

Supreme Court of the State of New York
Appellate Division
Second Judicial Department

Decisions of Interest

Printer friendly PDF version

January 1, 2008 - December 31, 2008

[Accidents](#)

[Class Actions](#)

[Consumer Law](#)

[Court Of Claims](#)

[CPLR](#)

[Criminal Law](#)

[Divorce](#)

[Inheritance Rights](#)

[Insurance](#)

[Labor](#)

[Landlord/Tenant](#)

[Libel](#)

[Martin Act](#)

[Medicaid](#)

[Medical Malpractice](#)

[Real Property](#)

[Schools](#)

[Tax Certiorari](#)

[Taxpayers](#)

[Zoning](#)

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The Following Case Summaries May Not Be Cited As Authority

Accidents; All-Terrain Vehicle; Suitability As Affirmative Element Of General Obligations Law 9-103;

Morales v Coram Materials Corp. (51 AD3d 86 [Dillon, opinion; Ritter, Santucci, Miller, concur]).

The plaintiff was injured while driving an all-terrain vehicle (hereinafter ATV) in a gravel pit owned and maintained by the defendant, Coram Materials Corp. As he

was descending a gravel mound, he drove the ATV into a gap in the mound from which a large chunk of gravel had been removed, causing the plaintiff to fall head over heels from his ATV.

General Obligations Law § 9-103 is the "recreational use" statute that immunizes property owners from actions by persons who are injured while engaging in recreational activities. The statute has two expressed elements: (1) the plaintiff's activity must fall within a defined recreational activity such as hunting, fishing, skiing, etc., an enumeration that encompasses the operation of an ATV and (2) the defendant must be the property owner. If the defendant establishes that he or she has satisfied these two elements, he or she owes no duty to recreational users of the subject property to maintain that property or warn of defects in that property. In addition to the expressed elements of the statute, courts have added a third element, namely, that 3) the property be "suitable" for recreational use.

Here, the defendant Coram Materials Corp. was awarded summary judgment on the ground that it owned property that was being used for recreational purposes by the plaintiff and that it was therefore immune from liability under General Obligations Law § 9-103. The defendant submitted prima facie proof of its ownership of the property and of the plaintiff's recreational use. The defendant's only proof as to the "suitability" of the property was an attorney's affirmatory statement in support of the motion that was conclusory, and certain unsworn information, offered for the first time in reply, that the gravel pit had been used by operators of ATVs on many prior occasions.

This Court reversed the trial court's order awarding summary judgment to the defendant, finding that the defendant failed to establish the element of suitability in the initial moving papers. The attorney's conclusory affirmatory statement was not sufficient evidence, nor was the material offered for the first time in reply.

This opinion is noteworthy as it clarifies that "suitability" is an affirmative element of General Obligations Law § 9-103 which a defendant must address and establish in the initial submissions to meet the prima facie burden of proof on a motion summary judgment. Suitability depends on a number of factors discussed in detail in the opinion and, in that regard, this Court was guided by cases from the Court of Appeals, as well as its own precedent. This Court expressly declined to follow a Fourth Department case addressing the element of suitability (see *Pulis v T.H. Kinsella, Inc.*, 204 AD2d 976).

Accidents; Motorcycle Collided With Truck; Leg Amputated; Jury Verdict; Motion Seeking Collateral Source Hearing

Firmes v Chase Manhattan Auto. Finance Corp. (50 AD3d 18 [Dillon, opinion; Crane, Ritter, Carni, concur])

The plaintiff was seriously injured in a motorcycle accident, and his leg was amputated as a result. The jury found that one of the defendants was 90% at fault and that the plaintiff was 10% at fault in the happening of the accident. Damages, after certain post-trial reductions imposed by the trial court, were fixed by the jury in the sum of \$400,000 for past medical expenses, \$65,000 for past lost earnings, \$2,200,000 for past pain and suffering, \$2,872,400 for future medical expenses, \$660,000 for future lost earnings over 33 years, and \$5,200,000 for future pain and suffering/loss of enjoyment of life over a projected 50.1 years of future life expectancy. On appeal, this Court reduced the award for past pain and suffering to \$1,500,000 and the award for future medical expenses to \$1,500,000, and otherwise left the verdict intact.

The Court determined, as a matter of first impression, that the burden of proof at a collateral source hearing is that of "reasonable certainty" as to the amount of collateral source payments made to a plaintiff that should reduce a jury's award, and the correspondence of those payments to items of damages awarded by a jury. In this instance, the trial court denied the defendants' post-trial motion for a collateral source set-off hearing, on the ground that the defendants' proof in the motion failed to satisfy the reasonable certainty standard.

On appeal, this Court held that the standard applicable to whether a defendant is entitled to a collateral source hearing should necessarily be lower than the ultimate evidentiary standard applied at the hearing itself. This Court defined the motion standard, for the first time in case law, as "some competent evidence from available sources that the defendant's economic loss may in the past have been, or may in the future be, replaced, or the plaintiff indemnified, from collateral sources." In the opinion, this Court discussed the discovery mechanisms that are available to defendants to aid them in meeting that motion burden and establish their entitlement to a post-trial collateral source hearing, such as the written demand for collateral source information, depositions, demands for record authorizations, notices to admit, subpoenaed trial records, and trial testimony elicited outside the presence of a jury.

In this case, the trial court denied the defendants' motion for a collateral source hearing on the ground that it had already signed the judgment and because the motion proof failed to rise to the level of "reasonable certainty". On appeal, this Court concluded that the trial court should have granted the defendant a collateral source hearing because 1) the parties had agreed at the conclusion of the trial that collateral source issues would be addressed in post-trial motions, 2) the court's judgment was premature, as it had not yet made its mandatory periodic payment determinations under CPLR article 50-B, and 3) the plaintiff had stonewalled collateral source discovery and had twice made efforts to enter premature judgments. Moreover, this Court stated that the "reasonable certainty" standard, while applicable at hearings, is not applicable to the motion merely seeking the hearing.

Class Actions; Gift Cards; Breach Of Contract; Breach Of Implied Covenant Of Good Faith And Fair Dealing; Violation Of General Business Law § 349

Lonner v Simon Prop. Group, Inc. (57 AD3d 100 [Dickerson, opinion; Spolzino, Skelos, Florio, concur]) The plaintiff commenced this consumer class action challenging, inter alia, a \$2.50 monthly dormancy fee imposed by the defendant in conjunction with its promotion and sale of a plastic gift card, as well as the allegedly improper manner in which such fees are disclosed. The card in question was a prepaid, stored value card, designated as a Visa card, which could be used everywhere Visa is accepted. The card was programmed to hold a balance that was stored on it at the time of purchase. Each time the card was used, the amount of the transaction was deducted from the available balance. The card resembled a standard credit-card-sized plastic card.

There was a magnetic strip on the back of the card, below which it stated, in relevant part, as follows: "An administrative fee of \$2.50 per month will be deducted from your balance beginning with the seventh month from the month of card purchase." Once the card was activated, it was to be placed in a cardboard sleeve, which was styled as a cardboard folding 'book' with the sleeve at the top, into which the card is inserted, along with five additional folding double-sided 'pages' which were attached to the sleeve. On the front five 'pages,' general information about the card and its

use was included, and the cardholder agreement and terms and conditions were printed on the back five 'pages.'

The plaintiff alleged that the five 'pages' on the back of the Card sleeve that contained the terms and conditions of the Card, including the dormancy fees, were in small print, in fonts materially less than that required pursuant to CPLR 4544, and that they were concealed and in violation of General Business Law § 349.

The original complaint set forth three causes of action sounding in breach of contract, encompassing claims based upon a breach of the implied covenant of good faith and fair dealing, a violation of General Business Law § 349, and unjust enrichment, and sought damages as well as injunctive and declaratory relief. The defendant moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint.

The Supreme Court granted that branch of the defendant's motion which was to dismiss the complaint on the ground that the plaintiff's claims were preempted by federal law. On appeal, this Court reversed the Supreme Court's determination that the plaintiff's claims were preempted by federal law, and remitted the matter to the Supreme Court for further proceedings in accordance with *Goldman v Simon Prop. Group, Inc.* (31 AD3d 382, 383).

On remittal, the plaintiff subsequently filed an amended class action complaint on behalf of a class of consumers who had purchased the defendant's card. The factual allegations in the amended complaint were substantially similar to those in the original complaint.

The defendant again moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the amended complaint. The Supreme Court denied those branches of the defendant's motion which were to dismiss the first (breach of contract) and second (violation of General Business Law § 349) causes of action of the amended complaint. This Court affirmed.

Class Actions; Gift Cards; Preemption By Federal Law; No Private Right Of Action Under General Business Law § 393-I; CPLR 4544 Applies To Business Gifts; Breach Of Contract; Violation Of General Business Law § 349; Unjust Enrichment; Money Had And Received; Injunctive Relief

Goldman v Simon Prop. Group, Inc. (58 AD3d 208 [Dickerson, opinion; Skelos, Riter, McCarthy, concur]).

The legality of plastic gift cards has been addressed by this Court previously in *Lonner v Simon Property Group, Inc.*, 57 AD3d 100 [discussed above] and in *Llanos v Shell Oil Co.*, 55 AD3d 796 [a class of consumers challenged the imposition of dormancy fees of \$1.75 per month, setting forth four causes of action seeking damages for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violation of General Business Law § 349. Within the context of the defendant's motion to dismiss the complaint as preempted by General Business Law § 396-i and pursuant to CPLR 3211(a)(7), this Court found that the claims of the *Llanos* plaintiff were not preempted by General Business Law § 396-i and remitted the matter for consideration of the merits of each cause of action].

The instant action which, like the *Lonner* action, challenged the imposition of a dormancy fee of \$2.50 per month and alleged, inter alia, that the defendant "began to automatically deduct \$2.50 per month as Dormancy Fees beginning the seventh month after the purchase of the Gift Card held by plaintiff without proper notice to plaintiff," that the card did not place the user on notice of the deduction of the dormancy fees, that the card "was deceptive in its failure to provide reasonable

notice of the deductions of Dormancy Fees,” and that the defendant’s “sale, distribution, and marketing of the Gift Cards without providing proper notice of the deductions of Dormancy Fees was deceptive and materially misleading.”

Initially, the defendant moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. On appeal, this Court reversed the Supreme Court’s determination that the plaintiff’s claims were preempted by federal law (*see Goldman v Simon Prop. Group, Inc.*, 31 AD3d 382, 383). Accordingly, this Court remitted the matter for a determination of the merits of each cause of action. The plaintiff filed an amended class action complaint, which identified the card as a gift certificate, alleged that the plaintiff received the card from her employer on or about April 2003, that the card was sold at malls and through the internet, and that the “wrongful acts” of the defendant were consumer oriented and affected thousands of its customers. The amended complaint set forth five causes of action, which sought to recover damages for breach of contract (encompassing a claim based upon a breach of the implied covenant of good faith and fair dealing), violation of General Business Law §§ 349 and 396-i, and unjust enrichment, and to recover money had and received. The amended complaint also sought declaratory and injunctive relief enjoining and restraining the defendant from “further applying and implementing the policies and acts complained of.”

The defendant moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the amended complaint. The Supreme Court granted those branches of the motion which were to dismiss the General Business Law § 349 cause of action for failing to articulate the necessary elements of that cause of action and the General Business Law § 396-i claim because the statute applied to gift cards that were issued after October 18, 2004, and, thus, did not apply to the plaintiff’s card which was issued in April 2003. The Supreme Court noted that the amended complaint did not indicate that the card was a “gift certificate” or “store credit” within the meaning of General Business Law § 396-i before the 2004 amendment. Further, the Supreme Court determined that the “cause of action seeking the declaratory and injunctive relief sought is not appropriate in this case.” However, the Supreme Court ruled that the causes of action to recover damages for breach of contract and unjust enrichment, and to recover money had and received, were viable.

This Court held that there was no private right of action under General Business Law § 396-i, and that CPLR 4544 applies to business gifts which involve a consumer transaction. This Court also restored claims for injunctive relief and declaratory judgment and allowed the plaintiffs to plead unjust enrichment and money had and received as alternative claims to the breach of contract cause of action.

Class Actions; Durable Medical Equipment Providers; Systematic And Unauthorized Reduction Of Reimbursement For Medical Equipment And Supplies; Class Certification Denied; Inadequate Class Representative

Globe Surgical Supply v GEICO Ins. Co. (59 AD3d 129 [Dickerson, opinion; Spolzino, Florio, Miller, concur]).

A class of durable medical equipment (hereinafter DME) providers alleged that GEICO “violated the regulations promulgated by the New York State Insurance Department . . . pursuant to the no-fault provisions of the Insurance Law, by systematically reducing its reimbursement for medical equipment and supplies . . . based on what it deemed to be ‘the prevailing rate in the geographic location of the provider’ or ‘the reasonable and customary rate for the item billed.’” In denying certification, the Supreme Court found that Globe failed to establish adequacy of

representation as class representative since, inter alia, GEICO had asserted a counterclaim and, as a result, Globe may have become “preoccupied with defenses unique to it.”

However, this Court found that all of the other prerequisites to class certification set forth in CPLR 901(a) and 902 had been met, including numerosity [“the proposed class herein, is, at a minimum, between 10 and 100 DME providers”], predominance of common questions of law or fact [“a prima facie case can be easily made out by the class members and that proof of documented costs is not a requirement ... This is true, given that GEICO did not seek verification of the documented costs for the invoices submitted”], typicality [“Typical claims are those that arise from the same facts and circumstances as the claims of the class members”], adequacy of class counsel [“There is no question that Globe’s counsel is highly competent in prosecuting class actions”], superiority [“However, the availability of an arbitration alternative does not mean such a proceeding is superior to a class action which, through the aggregation of many similar claims, provides an incentive to the legal profession to expend the resources necessary to fully litigate often complex cases such as the instant matter”], and manageability [“Moreover, as with the requirements of CPLR(a)(2), referable to the issues of liability and damages calculations, the prosecution of this proposed class action is fairly straightforward and quite manageable”](see Weinstein-Korn-Miller, NY Civ Prac ¶ 901.20-901.27, 902)

This Court thus denied Globe’s motion for class certification, but did so without prejudice to renewal upon obtaining an adequate class representative.

Consumer Law; Purchase Of Defective Point Of Sale Computer System; No Cause Of Action For Breach Of Contract Or Breach Of Implied Or Express Warranty; Digital License Agreement Disclaiming Liability Unenforceable

Jesmer v Retail Magic, Inc. (55 AD3d 171 [Dickerson, opinion; Mastro, Rivera, Balkin, concur]).

This Court held that, in the absence of privity, the end user of a computer system, who purchased the computer system not from the manufacturer but from an authorized dealer, has no cause of action against the manufacturer sounding in breach of contract or breach of implied warranty. Because the end user sought to recover for economic loss only, and because she was not in privity with the manufacturer, she could not recover for economic losses from the manufacturer on a theory of breach of implied warranty. This Court also determined that the end user did not have a cause of action based on breach of express warranties contained in a digital licensing agreement (hereinafter DLA), because she did not personally accept, agree to, or rely on the provisions of the DLA. The Court found that there was no evidence that the party which purportedly assented to the DLA was the end user’s agent for any purpose. The Court also found that, in the absence of any words or conduct from the manufacturer, communicated to the end user, which would give rise to the appearance and belief that the authorized dealer possessed the authority to enter into a transaction on the manufacturer’s behalf, no apparent agency relationship existed between the manufacturer and its authorized dealer.

However, this Court further held that the end user may maintain a cause of action against the manufacturer to recover damages for breach of express warranties contained in a product and service brochure, a written price quote, and the seller’s distribution agreement. This Court stated that the DLA’s limitations and disclaimers did not supersede any express warranties contained in the literature about the

computer system, as such express warranties are not barred by any general disclaimers of warranty that accompany the sale of the product. Additionally, this Court concluded that the manufacturer could not invoke the provisions contained in the DLA to limit or restrict any express warranties made in the brochure, the price quote, and the seller's distribution agreement, because the end user did not assent to the DLA, and it was thus not binding on her. While the fact that she did not read the DLA may not have been dispositive, she must have been afforded the opportunity to view and assent to the DLA to be bound thereby. Moreover, the Court noted that, in this case, the very nature of the computer system implied performance over an extended period of time.

Court Of Claims; Claim By Criminal Defendant Alleging Negligent Act Of Court Employee Caused Her To Be Adjudicated As A Second Felony Offender Based On A Nonexistent Conviction; Ministerial Act; Superseding Causation

Lapidus v State of New York (57 AD3d 83 [Eng, opinion; Spolzino, Covello, Dickerson, concur]).

At issue in this case was whether the State could be held liable for allegedly negligent acts committed by court employees in the course of performing ministerial duties. Specifically at issue were matters pertaining to proximate cause and superseding causation. The claimant alleged that negligent acts by court employees caused her to be wrongfully adjudicated as a second felony offender based on a nonexistent conviction. The claimant alleged that this wrongful adjudication resulted in her being sentenced as a second felony offender, and that her sentence was further improperly enhanced when the sentence for the nonexistent conviction was added consecutively to her sentence as a second felony offender.

Preliminarily, this Court determined that the state employees' acts at issue were ministerial in nature. Therefore, the State could not be shielded from liability for the negligent performance of these duties. Accordingly, this Court proceeded to consideration of the elements of a negligence claim.

This Court concluded that there was ample authority for imposing a duty of care, and hence liability, on the State for its employees' negligent performance of ministerial acts. In response to the claimant's assertion that her failure to contest the predicate felony statement filed against her did not constitute an intervening, superseding event which disrupted the causal link between the alleged negligence of the court employees and her injury, this Court acknowledged that "[t]he concept of proximate cause, or more appropriately legal cause, has proven to be an elusive one, incapable of being precisely defined to cover all situations" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 314). The Court further held that, while foreseeability is often pertinent to whether a duty exists, it also plays a role in the doctrine of superseding causation. An intervening act, by either the plaintiff or a third party, may, in some circumstances, sever the causal connection between the defendant's conduct and the plaintiff's injury, relieving the defendant of liability. "In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence . . . If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d at 315). Ordinarily, such questions are for the finder of fact.

This Court stated that, to constitute a superseding event severing the causal connection between the defendant's alleged negligence and the plaintiff's injury, the

intervening act “must be a new and independent force,” which was not “set in motion by the defendant's own wrongful acts” (*Campbell v Cluster Hous. Dev. Fund Co.*, 247 AD2d 353, 354). Further, for the plaintiff's conduct to constitute a superseding cause, the plaintiff's “negligence must be more than mere contributory negligence, which would be relevant in apportioning culpable conduct. Rather, such conduct, in addition to being unforeseeable, must rise to such a level of culpability as to replace the defendant's negligence as the legal cause of the accident” (*Mesick v State of New York*, 118 AD2d 214, 218).

Applying these principles, this Court determined that the claimant's failure to controvert her status as a second felony offender was not, as a matter of law, such an intervening, superseding act, and distinguished this case from situations in which the alleged intervening act, as a matter of law, was independent of and divorced from the original negligence. Rather, the conduct alleged to be an intervening act flowed from the original alleged negligence of the court employee, which was further tainted the alleged subsequent negligent preparation of a duplicate commitment order, leading to the adverse and improper recalculation of the claimant's sentence.

CPLR 327; Forum Non Conveniens; Judiciary Act of 1789 (28 USC 1333[1]); Cruise Ship Passenger Contract Forum Selection Clause Enforced; Contract May Not Divest Court Of Subject Matter Jurisdiction

Lischinskaya v Carnival Corp. (56 AD3d 116 [Spolzino, opinion; Santucci, Angiolillo, Carni, concur]).

This Court enforced a forum selection clause in a cruise ship contract of passage that limited an injured passenger to suit in federal court, where such jurisdiction was available, and allowed a state court action only where it was not. In so ruling, this Court held that the clause violated neither the Saving to Suitors Clause of the Judiciary Act of 1789 (28 USC § 1333[1]) nor 46 USC § 30509, which governs clauses in maritime contracts that purport to limit liability.

This Court observed that the validity of the terms of a contract for a cruise turn on federal principles of maritime law. In deciding such issues, New York courts must look to the decisions of the Federal courts to define the liabilities of ship owners for maritime torts, and must ignore conflicting decisions of New York courts and State statutes.

Applying federal maritime principles, forum selection clauses in cruise ship contracts are generally enforceable, provided that the terms have been reasonably communicated to the passenger and do not violate notions of “fundamental fairness,” either because the passenger's assent was the result of fraud or overreaching or the forum restriction is inconvenient. This Court determined that the situation here fell within the class of cases in which a forum selection clause is enforceable since, among other things, the plaintiff had ample opportunity to review the ticket, the front portion of the ticket explicitly directed passengers' attention to a page containing “important limitations,” those limitations included the forum selection clause, and the forum selected was not inconvenient.

The Saving to Suitors Clause preserves the jurisdiction of state courts to entertain in personam maritime causes of action, provided that they apply federal maritime law. It does not purport to limit the right of a party to agree that he or she will not litigate in a particular forum that has jurisdiction. Since a cruise ship passenger is otherwise competent to bargain away the choice of forum, and the forum selection clause at issue was not otherwise unenforceable, the Saving to Suitors Clause did not bar dismissal of the plaintiff's claim. The forum selection clause also did not violate 46

USC § 30509, since that statute “allows for judicial resolution of claims” and does not “purport to limit [Carnival's] liability for negligence” (*Carnival Cruise Lines, Inc. v Shute*, 499 US 585, 596-597).

Nonetheless, this Court held that the forum selection clause did not divest the Supreme Court of subject matter jurisdiction or foreclose, solely on that ground, that court's consideration of the plaintiff's request for equitable relief. This Court wrote that this argument has been properly rejected as “hardly more than a vestigial legal fiction” (*M/S Bremen v Zapata Off-Shore Co.*, 407 US 1, 12), and that a court may not be divested of subject matter jurisdiction by contract. As a court of original, unlimited, and unqualified jurisdiction, the Supreme Court could not be divested of its jurisdiction in this manner. This Court further stated that, since the Supreme Court was not divested of subject matter jurisdiction, it had the authority to consider the availability of equitable relief pursuant to CPLR 327, which sets forth the common-law doctrine of forum non conveniens.

Notwithstanding the Supreme Court's retention of such authority, dismissal based on enforcement of the forum selection clause was not discretionary, but was the required result of the enforcement of the terms of the contract. Therefore, discretionary considerations such as the impact of the dismissal on the plaintiff and whether fatality to the plaintiff's claims can be avoided, which are legitimate inquiries in the context CPLR 327, are irrelevant here. Rather, the dismissal is analogous to dismissal based on lack of personal jurisdiction, where such considerations play no role. Thus, even though the Supreme Court had jurisdiction, it could not, under the circumstances of this case, grant discretionary relief pursuant to CPLR 327.

CPLR 3025(b),(d); Statute Of Limitations Defense May Be Asserted For First Time In An Answer Served Pursuant To CPLR 3025(d) And Responsive To An Amended Complaint Served Pursuant To CPLR 3025(b)

Mendrzycki v Cricchio (58 AD3d 171 [McCarthy, opinion; Prudenti, Fisher, Dickerson, concur]).

A defendant may assert an affirmative defense based on the statute of limitations for the first time in an answer served pursuant to CPLR 3025(d), where that answer was responsive to an amended complaint served pursuant to CPLR 3025(b). Accordingly, that affirmative defense is not waived even though it was not pleaded in the original answer to the initial complaint. This result is required since the pleading in controversy constitutes an original answer to the amended complaint.

In the instant matter, the plaintiff's decedent commenced the instant action against several defendants December 22, 2003, to recover damages for medical malpractice based on failure to diagnose her colon cancer. In their separate answers, none of the defendants raised an affirmative defense based on the statute of limitations.

The plaintiff's decedent died in April 2004 from colon cancer, and the plaintiff, as administrator of the decedent's estate, was substituted for her. In November 2004, the Supreme Court granted the plaintiff's motion for leave to serve an amended complaint, and thereafter the plaintiff served an amended complaint which differed from the original complaint only in its caption and in the assertion of a new cause of action sounding in wrongful death. In response to the amended complaint, the defendants' answers, for the first time, each asserted an affirmative defense to the cause of action sounding in medical malpractice, based on the statute of limitations.

CPLR 3211(e) provides, in pertinent part, that “[a]ny objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a)

is waived unless raised either by [a pre-answer motion to dismiss] or in the responsive pleading." Here, because the doctors' statute of limitations affirmative defense was raised in responsive pleadings submitted pursuant to CPLR 3025(d), the affirmative defense was not waived. That statute provides, in pertinent part, that "there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented" (CPLR 3025[d]). Although CPLR 3025(d) is silent as to whether new affirmative defenses may be raised in an answer served under this subdivision, significantly, an amended complaint is deemed to supersede an original complaint and, thus, a defendant's original answer has no effect. As such, an answer to an amended complaint served pursuant to CPLR 3025(d) is in fact an original answer to the amended complaint, and thus, affirmative defenses raised in that answer are not limited to those asserted in the original answer.

This Court acknowledged that plaintiffs may claim undue prejudice and surprise from the application of this rule. However, the primary focus is the effect of the amended complaint served by the plaintiff rather than the effect of the subsequent answer. Since an amended complaint supplants the original complaint, it would unduly prejudice a defendant if it were bound by an original answer when the original complaint has no legal effect.

By way of contrast, this Court observed that a supplemental complaint (which was not at issue here), does not supersede the original complaint, but is in addition to it. In such circumstances, the original answer remains in effect, such that a defendant could not assert a new affirmative defense in its answer to the supplemental complaint unless it is responsive to the new matter alleged.

CPLR 3103(a); A Cat Taken From Home Of Plaintiff May Be The Same As A Cat Adopted From Warwick Animal Shelter; Plaintiff Seeks Identity Of Donor Or Adoptive Owner; Protective Order Granted; Policy To Protect Animal Adoptive System

Feger v Warwick Animal Shelter (59 AD3d 68 [Leventhal, opinion; Mastro, Balkin, concur; Spolzino concurs in part, dissents in part]).

The plaintiff alleged that her cat, "Kisses," had been taken from her home by an unidentified individual. Approximately 10 days later, she saw a photograph of a cat, "Lucy," on the website of the Warwick Animal Shelter. The plaintiff claimed that "Lucy" was, in fact, "Kisses." The plaintiff contacted the shelter, but learned that "Lucy" had been adopted. The shelter refused to disclose the identity of the donor or adoptive owner. After the plaintiff commenced this action, the Supreme Court granted the defendants' motion for a protective order to prevent disclosure of the identities of the donor and adoptive owner.

A majority of this Court observed that, while CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action," CPLR 3103(a) authorizes the court to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device," and affirmed the order of the Supreme Court granting the defendants' motion for a protective order. In making the determination that disclosure was not warranted in this matter, this Court employed the test of "usefulness and reason" (*Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70), balancing the importance to the plaintiff's claim of the information sought versus the consequences of disclosure, while recognizing its broad discretion to deny demands it deems unduly burdensome or that seek irrelevant or improper information.

The record failed to establish that the identity of the adoptive owner was material and necessary to the plaintiff's claim. The majority concluded that public policy considerations supported this determination, and agreed with the Supreme Court that disclosure of the adoptive owner's identity would undermine the animal adoption system and create a disincentive for would-be adopters, as it would establish the possibility that they may be subject to harassment or intimidation by prior putative owners. The majority also noted that, absent alternatives to adoption, animals would be euthanized. Thus, the Court concluded that the protection of the identities of adoptive owners would promote the adoption of animals and prevent the needless euthanizing of otherwise healthy animals.

The majority also considered the role of companion animals in society and the protections they are afforded under the laws of this State, opining that the recognition of companion animals as a special category of property is consistent with the laws of the State and the underlying policy inherent in these laws to protect the welfare of animals. The majority concluded that it would be contrary to these principles to cause the needless euthanasia of animals by discouraging animal adoptions, which would likely result if a protective order were to be denied in similar circumstances.

With regard to the identity of the donor, the majority determined that, since the plaintiff alleged the shelter was aware that the cat was wrongfully taken from her, a reasonable resolution would be to allow the plaintiff to ascertain if the donor was, as alleged, employed by or affiliated with the shelter, or employed by a specified law firm. If so, then the donor's identity should be disclosed. Otherwise, disclosure would not be warranted.

Justice Spolzino concurred that the protective order was properly issued with respect to the identity of the adoptive owner. However, he did not agree that the identity of the donor was immaterial or should be protected as a matter of public policy. He stated that this Court's role in this case was merely to employ the rules applicable to disclosure pursuant to CPLR article 31. Justice Spolzino emphasized that the circumstances by which the cat came to the shelter were relevant to resolution of the dispute. He further asserted that, even if the public policy upon which the majority predicated its determination—that an individual who finds a stray or abandoned animal will be less likely to surrender it to a shelter because his or her identity may be disclosed—were properly recognized, it would not apply here, where the plaintiff alleged that an individual unlawfully took her pet.

CPLR 3211(b); Defense Of Failure To State A Cause Of Action Pursuant To CPLR 3211(a)(7) Unnecessary And "Harmless Surplusage"; Motion To Strike Defense Should Be Denied

Butler v Catinella (58 AD3d 145 [Rivera, opinion; Lifson, Florio, Chambers, concur]).

In this case, this Court, upon reconsideration of its prior determinations that the defense of failure to state a cause of action pursuant to CPLR 3211(a)(7) may not properly be interposed in an answer, determined that it may properly be interposed. In several previous cases, this Court had stated that this defense may not be included in the answer, but must be raised by appropriate motion. Here, this Court held that those cases did not articulate the correct legal standard and no longer reflected the jurisprudence of the Second Judicial Department.

It appears that the rule prohibiting the defense from being interposed in an answer originated in the statutory language of the 1877 Code of Civil Procedure, a predecessor to the modern CPLR. The Code of Civil Procedure provided that a

defendant may demur to the complaint where, inter alia, the objection “[t]hat the complaint does not state facts sufficient to constitute a cause of action” appeared upon the face of the complaint. Consistent therewith, in a 1921 case, this Court held that this defense “cannot be taken by answer,” and that, if the complaint is deficient on its face, that defect “should be taken by demurrer.”

In 1920 the Civil Practice Act abolished demurrer. Civil Practice Act § 277 stated that an objection to a pleading based on a defect allegedly appearing on the face of the pleading “may be taken by motion or by the answering pleading.” In 1921 that section was amended, inter alia, by deleting the phrase “or by the answering pleading.” Thus, an objection to a pleading had to be asserted by motion, and could not be advanced in an answer.

The CPLR was enacted in 1962 and became effective on September 1, 1963, replacing the former Civil Practice Act and the Rules of Civil Practice. CPLR 3211(e) now provides, in relevant part, that “[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted.” Since the initial enactment of the CPLR, and continuing to the present version, CPLR 3211(e) provides that a “motion based upon a ground specified” in CPLR 3211(a)(7), namely, that “the pleading fails to state a cause of action,” may be made at any subsequent time “or [raised] in a later pleading, if one is permitted.” Accordingly, this Court’s prior pronouncement that “a defense that a complaint does not state a cause of action cannot be interposed in an answer but must be raised by appropriate motion pursuant to CPLR 3211(a)(7)” runs afoul of the clear language of CPLR 3211(e).

Additionally, this Court agreed with the holdings of the Appellate Division, First Department, and Appellate Division, Third Department, that pleading the defense of failure to state a cause of action is unnecessary, constitutes “harmless surplusage,” and that a motion by the plaintiff to strike the defense should be denied. This Court agreed with those tribunals that no motion by the plaintiff lies under CPLR 3211(b) to strike this defense, as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim. This Court found the positions taken by those Courts to be well-grounded and sound. Accordingly, this Court concurred with their rationale and adopted it as this Court’s rule of law. To the extent that this Court’s prior cases held differently, they are no longer to be followed.

CPLR 3211(e); Comparison to CPLR 3025(b).

Janssen v Incorporated Vil. of Rockville Ctr., 59 AD3d 15 [Rivera, opinion; Santucci, Dickerson, Belen, concur].

Despite the recent amendment to CPLR 3211(e), which deleted reference to a “motion to replead,” such a motion is nonetheless still cognizable and available to a plaintiff, even though such a motion is, in essence, nothing more than a “poor substitute” for and an “arcane alternative” to a motion for leave to amend a complaint pursuant to CPLR 3025(b).

The plaintiff commenced this action, inter alia, to recover damages for sexual discrimination. The defendants moved to dismiss the complaint for failure to state a cause of action. In an order dated September 7, 2006, the Supreme Court granted those branches of the defendants’ motion that were to dismiss the first and part of the second causes of action. By notice of motion dated March 1, 2007, the plaintiff moved for leave to amend the complaint. The Supreme Court treated the plaintiff’s motion as, in effect, one to replead under CPLR 3211(e), and granted the motion.

This Court stated that the Supreme Court apparently elected to treat the motion as one for leave to replead under the incorrect premise that a motion for leave to amend a complaint is not permitted with regard to previously dismissed causes of action. In any event, because the Supreme Court framed its analysis in the context of CPLR 3211(e), and the defendants' contentions addressed that section, this Court focused on that characterization of the motion.

This Court noted that the former version of CPLR 3211(e) imposed three requirements: First, the party seeking leave to replead "was directed to state that request in the opposition papers to the motion to dismiss. Second, the court was not authorized to grant such leave unless it was satisfied that the party had good ground to support the cause of action or defense. Finally, the court was authorized to require an evidentiary showing before granting leave to replead" (Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.32 [2d ed]). This version of the statute was in direct conflict with the Court of Appeals' holding in *Rovello v Orofino Realty Co.* (40 NY2d 633). To resolve this conflict, in 2005, the Chief Administrative Judge introduced a bill to amend CPLR 3211(e).

CPLR 3211(e) was amended, and the amendment eliminated the three requirements set forth above. However, the amendment left several unanswered questions. First, did the Legislature, in amending the statute, eliminate a motion for leave to replead? The language pertaining to such motions was removed from the body of CPLR 3211(e), and the only reference to such motions appears in the heading or title of that subsection. Absent any indication that the Legislature intended to do away with such motions, this Court refused to presume such intent.

Second, what standard should be applied on a motion for leave to replead? This Court held that the same standard as governs motions for leave to amend pursuant to CPLR 3025 should apply to motions to replead, namely, that motions for leave to amend pleadings should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient. Here, the Supreme Court properly granted the plaintiff's motion.

Third, should any time limitation be required upon which to move for leave to replead? The defendants asserted that the Legislature inadvertently removed restrictions limiting the time in which a party could move for leave to replead. They urged this Court to impose a 30-day limitation akin to that governing motions for leave to reargue. However, this Court observed that CPLR 3211(e), as amended, did not set forth any time limitation. This Court further observed that "[A] court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact" (*Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394). "[T]he judicial function is to interpret, declare, and enforce the law, not to make it, and it is not for the courts to correct supposed errors, omissions or defects in legislation" (McKinney's Cons Laws of NY, Book 1, Statutes § 73, at 147-148). Accordingly, this Court refused to insert any time limitation, since to do so would result in a judicially "crafted" statute.

This Court stated that issues raised by this appeal demanded remedial action since the motion to replead could be deemed obsolete in light of CPLR 3025(b). However, whether to impose a time limitation and other concerns raised in this appeal were matters for the Legislature. Thus, this Court urged the Legislature to act without delay in addressing the matters and concerns raised in this appeal.

CPLR 7511; New York City Transit Authority Charged Employee, A Subway Conductor, With Verbally Abusing And Assaulting A Customer; Review Of

Arbitration Decision Sustaining Assault Charge And Reducing Penalty From Dismissal To Reinstatement Without Back Pay; Arbitrator Exceeded Authority In Reducing Penalty

Matter of Transport Workers Union, Local 100 v New York City Tr. Auth. (57 AD3d 684 [Miller, opinion; Dillon, Angiolillo, concur; McCarthy, dissents, in which Spolizino joins])

This Court ruled that an arbitrator exceeded his authority in reducing the penalty of dismissal from public employment where a public employee committed an on-the-job felony assault, where the collective bargaining agreement (hereinafter CBA) between the employer and the employee's union specified dismissal as the appropriate penalty in such a case, subject to exceptions that this Court found were not applicable here.

In this matter, the New York City Transit Authority (hereinafter the NYCTA) charged an employee subway conductor with verbally abusing and assaulting a customer. The employee was suspended, and the NYCTA sought his dismissal. The employee, who had 21 years of service with the NYCTA, had a prior disciplinary history which included, inter alia, a five-day suspension in 1991 arising from an altercation with a customer.

Pursuant to the relevant provisions of the CBA between the NYCTA and the employee's union, disciplinary step hearings were held. The charges were sustained, and the penalty of dismissal was upheld. According to the CBA, the next step in the review process was to be arbitration. The relevant provision of the CBA read, in part,

"If there is presented to the [arbitrator] for decision any charge which, if proved in Court, would constitute a felony, or any charge involving assault . . . the question to be determined by the [arbitrator] shall be with respect to the fact of such conduct. Where such charge is sustained by the [arbitrator], the action by the Authority, based thereon, shall be affirmed and sustained by the [arbitrator] except if there is presented to the [arbitrator] credible evidence that the action by the Authority is clearly excessive in light of the employee's record and past precedent in similar cases. It is understood by the parties that this exception will be used rarely and only to prevent a clear injustice."

The arbitrator sustained the assault charge, but reduced the penalty to reinstatement without back pay. He found that the employee was a long-term employee with no disciplinary action in the last 11 years of his service, and concluded that this case was "worthy of the exception" allowed by the CBA. This Court vacated the so much of the arbitrator's determination as reduced the penalty.

Where parties have agreed to arbitrate a dispute, judicial review of the arbitration award is governed by CPLR 7511. An arbitration award may be vacated where, inter alia, the arbitrator exceeded his or her power. An excess of power within the meaning of CPLR 7511(b)(1)(iii) occurs "only where the arbitrator's award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336).

The majority observed that, where an arbitrator sustains an underlying charge of assault against a NYCTA employee, the CBA directs the arbitrator to uphold the NYCTA's imposition of discipline unless credible evidence demonstrates that it is

clearly excessive in light of the employee's record and past precedent in similar cases. Noting that this exception is to be used by an arbitrator "rarely and only to prevent a clear injustice," the majority concluded that the arbitrator focused largely on issues that were relevant only to the question of whether the underlying offenses occurred. However, having found that an assault did occur, that point of distinction should have been rendered irrelevant. Furthermore, nowhere in the "discussion and analysis" section of his opinion did the arbitrator use the words "clearly excessive" (except in quoting the CBA), or otherwise indicate why the dismissal was a "clear injustice." The majority concluded that the arbitrator exceeded his authority in reducing the penalty, and that the Supreme Court properly granted the petition to vacate that portion of the award.

The dissenters concluded that the arbitrator did not act in excess of his authority in reducing the penalty. They observed that, here, the arbitrator determined that the "credible evidence" demonstrated that dismissal was "clearly excessive" in light of the employee's service record and the past precedent, and thus the circumstances warranted invocation of the "rare[]" exception "to prevent a clear injustice."

Criminal Law; District Attorney May Not Delegate The Prosecution Of A Criminal Case To An Attorney Retained By The Complaining Witness

Matter of Sedore v Epstein (56 AD3d 60 [Spolzino, opinion; Florio, Angiolillo, Dickerson, concur]).

A District Attorney may not delegate the prosecution of a criminal action to an attorney retained by the complaining witness since such a delegation is improper, and the defendant in such a criminal action may properly seek relief in a proceeding pursuant to CPLR article 78 in the nature of prohibition against the judge before whom the criminal action is commenced.

In reaching this conclusion, this Court explained that the real issue before it was not the conduct of the Town Justice in proceeding to trial, but rather the action of the District Attorney in delegating the authority to prosecute to an attorney retained by the complainant. This Court observed that prohibition may be invoked where a prosecutor threatens to act beyond his or her authority, precisely the petitioner's contention here. Further, this Court observed that the District Attorney's motion to intervene had been granted. Accordingly, this Court stated that, if the petitioner could satisfy the third element of a prohibition claim by demonstrating that she had a clear legal right to the relief requested, and the discretionary factors weighed in her favor, prohibition would lie.

This Court observed that the practice of private prosecution has largely been eliminated or limited. In New York, the authority to prosecute a criminal offense generally rests with the District Attorney in each county. A District Attorney does have the authority to delegate prosecution to assistants and to certain public officials. Additionally, when a District Attorney is unable to appear or is disqualified, the District Attorney of another county or a private attorney may be appointed to undertake the duties of the prosecutor. When the Governor deems it appropriate, the Governor may designate the Attorney General to prosecute in place of the District Attorney. However, none of these circumstances were presented here. Rather, the delegee was an attorney retained by the complainant for the sole purpose of prosecuting the petitioner.

This Court observed that there was no statutory authority for such a delegation. This Court then considered the unique role of the public prosecutor. The prosecutor is not the representative of an ordinary party to a dispute, but of a sovereignty charged

with governing impartially; the duty of the District Attorney is not merely to obtain convictions, but to see that justice is done. This Court emphasized that the prosecutor's obligations flow to the public. Thus, the conflict in permitting the prosecutor to be paid by the complainant is apparent.

While the Code of Professional Responsibility permits an attorney, with the client's consent, to accept payment from a third party, this Court observed that this rule did not contemplate the unique role of the public prosecutor. This Court again emphasized the public prosecutor's role as representing the public interest, stated that a private attorney delegated to prosecute a criminal offense should be as disinterested as the public prosecutor, and concluded that "[t]he administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach" (*People v Savvides*, 1 NY2d 554, 556). Thus, this Court stated that, even assuming that the District Attorney could consent on behalf of the public to an arrangement whereby an attorney retained by the complainant prosecutes a criminal offense, the conflict is not resolved.

This Court determined that the prosecution of a criminal offense is a public function, not a private one, and that prosecution of a criminal complaint by an attorney retained by the complainant is simply inconsistent with the principles concerning the role of the public prosecutor. This Court further concluded that, weighing the equitable factors that must be considered, a remedy in the nature of prohibition was appropriate. However, this Court recognized that the authority to prosecute may properly be delegated by the District Attorney to certain other public officials, and, accordingly, this Court modified the Supreme Court's order to reflect that possibility.

Criminal Law; New Trial Ordered; Solicitation Of "Hit Men" To Kill Two Witnesses; Conspiracy In The Second Degree; Criminal Solicitation In The Second Degree; Trial Errors

People v Kass (59 AD3d 77 [Fisher, opinion; Prudenti, McCarthy, concur; Dillon dissents, in which Skelos joins])

While incarcerated awaiting trial on an embezzlement charge, the defendant allegedly asked a fellow inmate to introduce him to people who, for money, would be willing to kill two witnesses. The fellow inmate turned out to be an informant, and two individuals posing as "hit men" were actually undercover police officers. On appeal from the judgment of conviction of conspiracy in the second degree and criminal solicitation in the second degree, a majority of this Court found that the defendant was deprived of a fair trial by a combination of errors, and thus reversed the judgment of conviction and ordered a new trial.

To convict the defendant of conspiracy in the second degree and criminal solicitation in the second degree, the People were required to prove, inter alia, that the defendant intended that the targets be killed. The majority characterized communications between the defendant and the detectives posing as "hit men" as consistent with the defendant's claim that he was merely pretending to go along with the "hit men" out of fear of the informant, secure in the knowledge that, so long as he made no payments to the "killers," no action would be taken.

Although the evidence was not legally insufficient to support the conviction, and the verdict was not against the weight of the evidence, the majority nonetheless agreed with the defendant's claims that trial errors deprived him of a fair trial.

Specifically, the trial court erroneously permitted the People to elicit from a police detective the substance of his initial conversation with the informant. Although the

trial court acted within its discretion in admitting this evidence for the nonhearsay purpose of proving the detective's state of mind, since this was the only evidence of the defendant's expression of a desire to hire people to kill the witnesses, there was a danger that the jury would treat the testimony as proof of the underlying fact, i.e., that the defendant actually made the statement. Since the trial court failed to issue a limiting instruction, it committed error in this regard.

Additionally, the trial court erroneously sustained the prosecutor's hearsay objection to the testimony of the fellow inmate closest to the defendant, given in response to defense counsel's question as to whether there were "any word around Rikers Island" that the defendant "was looking to have somebody killed," that the defendant never told him that he wanted to have any witnesses killed. This testimony, which was adduced by the defendant, was intended to counter the premise that the defendant approached the informant and inquired about hiring a contract killer, despite the fact that the defendant and informant knew each other only through minimal contact as fellow inmates. The question only required the witness to testify as to whether he had heard such a statement uttered, and did not call for a hearsay response.

The trial court also improperly sustained the prosecutor's hearsay objection to the defendant's testimony that the informant characterized himself as a "very big drug dealer in Washington Heights." Whether the informant was "a very big drug dealer in Washington Heights" was irrelevant to any issue at trial but, given the defendant's testimony that he met and spoke with the "hit men" only out of fear of the informant, the defendant's impression and understanding of the informant was crucial to the defense. Thus, the trial court's erroneous ruling excluded evidence relevant to the defendant's state of mind, the central issue in the case.

The trial court also erred in refusing to give a missing witness charge with respect to the informant. The request was not untimely and the People failed to establish the informant's unavailability.

The dissent concluded that there was no interpretation of the evidence other than that the defendant engaged in conspiracy and solicitation to commit contract killings, and that he harbored the requisite intent. The dissent disagreed with the majority that the detective's testimony was the only evidence of the defendant's expression of such an intent. Moreover, the dissent concluded that, since the jury accepted the inculpatory testimony of another detective as corroborated by certain tape recordings, any error in failing to provide a limiting instruction was harmless. The dissent concluded that the query to the inmate witness required a hearsay response inasmuch as the averment made by that witness was offered for the truth of the facts asserted, namely, that there was no word around Rikers Island that the defendant was attempting to arrange a murder. The dissent also concluded that the defense was not entitled to a missing witness charge, as the request was untimely, and the People established that the informant was not available.

Criminal Law; Breathalyzer; Source Code Written Document Pursuant To CPL 240.20(1)(c) And Written Instrument Within Meaning Of Penal Law 170.00[1], 175.00[3].

People v Donald Robinson (53 AD3d 63 [Dickerson, opinion; Ritter, Florio, McCarthy, concur]).

Prior to trial, the defendant moved to compel discovery of the computer source code installed in the breathalyzer that was used to measure his blood alcohol content (hereinafter BAC), arguing that disclosure was necessary to challenge the machine's

accuracy. This Court held that the computer source code governing the operation of a breathalyzer machine is a document subject to disclosure, but that since the People were not in possession of the subject source code, they therefore could not be compelled to disclose it.

Pursuant to CPL 240.20(1)(c), upon a defendant's demand to produce, the prosecution shall disclose:

"Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial."

This Court concluded that, since a computer source code is a species of "text" that must be written onto a computer chip, and it "concerns" scientific tests of the particular machine to which it relates, it is a written document within the meaning of CPL 240.20(1)(c).

Moreover, in the prosecution of an offense proscribed by the Vehicle and Traffic Law, CPL 240.20(1)(k) provides for the disclosure of:

"any written report or document, or portion thereof, concerning a physical examination, a scientific test or experiment, including the most recent record of inspection, or calibration or repair of machines or instruments utilized to perform such scientific tests or experiments and the certification certificate, if any, held by the operator of the machine or instrument, which tests or examinations were made by or at the request or direction of a public servant engaged in law enforcement activity or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial."

This Court determined that, since the computer source code constituted a document "concerning" inspection, repair, and calibration of the relevant machinery, it was included in the definition of discoverable material under this statute.

Bolstering its conclusion, this Court observed that computer source code is a written instrument within the meaning of the Penal Law (see Penal Law §§ 170.00[1], 175.00[3]).

Nonetheless, this Court determined that the defendant was not deprived of his right to challenge the reliability of the breathalyzer. This Court observed that the reliability of breathalyzers was firmly established and that, as the model at issue was on the New York State Department of Health's list of approved breath-testing instruments, it was presumptively reliable. This Court stated that the defendant had not provided any evidence that the breathalyzer was unreliable, and he failed to advance "some factual predicate" which would make it reasonably likely that the breathalyzer's source code contained material, exculpatory evidence unavailable from other sources.

This court observed that the defendant was afforded the opportunity to challenge the accuracy of the breathalyzer's determination of his BAC since he was provided with all of the documentation associated with the breathalyzer and was able to cross-

examine the officer who administered the test regarding his qualifications and the manner in which he conducted the test.

Thus, this Court concluded that the People satisfied the disclosure and evidentiary requirements for proffering the breathalyzer's measurement of the defendant's BAC at trial.

Moreover, the defendant offered no evidence that the People actually had the ability to reduce the source code contained in the relevant "EPROM" chip to an intelligible written document. This Court also concluded that the People were not required to make the source code available because the People did not possess it, actually or constructively. Specifically, the People did not have control over the program simply because it was installed in the EPROM chip, the source code was not the property of the State, since it was owned and copyrighted by its manufacturer and was a trade secret thereof.

Criminal Law; Sex Offender Registration Act; Reliable Hearsay; Clear And Convincing Evidence

People v Mingo (49 AD3d 148 [Ritter, opinion; Lifson, Angiolillo concur; Spolzino dissents]).

The issue presented on this appeal was whether documents generated by the District Attorney's office in prosecuting the defendant on the underlying indictment constituted "reliable hearsay" within the meaning of the Sex Offender Registration Act (Correction Law article 6-C, hereinafter SORA), and provided clear and convincing evidence that the defendant was armed with a dangerous instrument during the commission of his sex offense. The majority found that they did, and affirmed the defendant's designation as a level two sex offender.

In 1990 the defendant pleaded guilty to the top count of rape in the first degree in satisfaction of all charges contained in the indictment. As a result of a redetermination hearing, the defendant was assessed a total of 85 points in the Risk Assessment Instrument, making him a presumptive risk level two sex offender. This total included the assessment of 30 points for being armed with a dangerous instrument during the commission of his sex offense. At the hearing, the People proffered various documents taken from the District Attorney's file, including an "Early Case Assessment Bureau Data Sheet," a "Grand Jury Synopsis Sheet," and a "Data Analysis Form." Defense counsel did not object to receipt of the documents, but argued that they were not sufficient to provide clear and convincing evidence that the defendant was armed with a dangerous instrument during the commission of his sex offense. Specifically, counsel asserted that the "Grand Jury Synopsis Sheet" and "Data Analysis Form," both of which described the defendant's use of a chrome/metal strip during the crime, did not constitute "reliable hearsay" within the meaning of SORA. Concerning the "Grand Jury Synopsis Sheet," counsel argued: "The document is unsigned, unsworn, uncorroborated; I don't know where it came from, unreliable hearsay. It is not supported by any other reliable documentation, other documents that would have been found to be reliable by the courts."

The majority observed that the People bear the burden of proving the facts supporting a SORA determination by "clear and convincing evidence." In a SORA hearing, the court may consider "reliable hearsay" evidence submitted by either party, provided that it is relevant to the determinations to be made (Correction Law § 168-n[3]). As the majority observed, "[p]oints should not be assessed for a factor— e.g., the use of a dangerous instrument—unless there is clear and

convincing evidence of the existence of that factor" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 5 [2006 ed]).

The majority found that the documents fell within the penumbra of the type of materials identified by the statute and SORA Guidelines as permissible sources of reliable hearsay, and provided clear and convincing evidence that the defendant was armed with a dangerous instrument during the commission of his sex offense. The majority disagreed with the dissent that any ambiguities and/or inconsistencies in and between the documents impeached their character as an accurate and reliable recitation of the relevant facts. Nor did the majority find such impeachment in the fact that the documents were unsigned, unsworn, and uncorroborated, as the documents, by their nature, were not ones that would be signed or sworn.

The dissent opined that the documents failed to satisfy even the relaxed evidentiary standard set forth in Correction Law § 168-n(3), observing that the sort of documents that had been found to be admissible at SORA hearings as "reliable hearsay" differed in several respects from the documents at issue here. The documents here were not prepared in satisfaction of any statutory obligation that prescribed their form and content, and they were unsworn, unsigned, and unattributed.

The dissent further opined that the documents at issue failed to qualify as "reliable hearsay," as that term has been used in a variety of contexts. The authors of the documents were not identified, there was no attempt to specify the source of the information set forth therein, the documents were internally inconsistent, and there was no extrinsic evidence to provide the necessary indicia of reliability.

Criminal Law; Local District Attorney Has Authority To Prosecute Alleged Violations Of Article 17 Environmental Conservation Law Without Authorization On Behalf Of New York State Department Of Environmental Conservation

People v Quadrozzi (55 AD3d 93 [McCarthy, opinion; Fisher, Ritter, Dillon, concur]).

The Court concluded that Environmental Conservation Law § 71-0403 vests a local District Attorney with authority to initiate a criminal prosecution for alleged violations of article 17 of the Environmental Conservation Law (hereinafter the ECL) without the prior authorization of the New York State Department of Environmental Conservation (hereinafter DEC) or the DEC's prior institution of the criminal prosecution.

The Court relied for its conclusion on ECL 71-0403, entitled "[d]elegation of criminal enforcement authority," which provides:

"Whenever the attorney general is authorized under this chapter to prosecute a criminal proceeding on behalf of the [DEC], such authority may in the discretion of the attorney general be delegated to the [DEC], to initiate or conduct any such prosecution. Provided, however, that in any event the district attorney of the county in which the violation occurs may initiate or conduct any such prosecution"

and ECL 71-1933, which provides, in part:

"9. All prosecutions under this section shall be instituted by the [DEC] or the commissioner and shall be conducted by the Attorney General in the name of the people of the state of New York.

"10. In the prosecution of any criminal proceeding under this section by the Attorney General and, in any proceeding before a grand jury in connection therewith, the Attorney General shall exercise all the powers and perform all the duties which the District Attorney would otherwise be authorized or required to exercise or perform, and in such a proceeding the District Attorney shall exercise such powers and perform such duties as are requested of him by the Attorney General."

The Court explained that ECL 71-0403 was enacted specifically to overrule *People v Long Is. Light. Co.* (41 NY2d 1049, *affd for reasons stated below* 88 Misc 2d 123), in which an air pollution prosecution was dismissed solely because the Attorney General's authority under ECL 71-2105 was held to displace a local District Attorney's authority to initiate a criminal prosecution for an alleged ECL violation.

Further, this Court observed that the second sentence of ECL 71-0403 specifically vests local District Attorneys with authority to initiate or conduct prosecutions of alleged ECL violations independently of the Attorney General and the DEC, an issue which ECL 71-1933 does not address. Accordingly, this Court found that, in this regard, ECL 71-0403 was the more specific of the two statutes.

Quoting the Court of Appeals, this Court observed that its conclusion was consistent with the differing scopes of the offices involved: "the District Attorneys have plenary prosecutorial power in the counties where they are elected, [and in contrast] the Attorney-General has no such general authority and is without any prosecutorial power except when specifically authorized by statute" (*People v Romero*, 91 NY2d 750, 754). This Court explained that the District Attorneys' authority to prosecute was limited neither by ECL 71-0403 and 71-1933, not by the Attorney General's broader authority to prosecute ECL violations, and to hold otherwise would be contrary to the structure of the criminal justice system in the State, in which the Attorney General's prosecutorial powers are a subset of those of the District Attorneys.

This Court further based its conclusion on the legislative history of ECL 71-0403. In support of the bill that ultimately became that statutory provision, the DEC explained that the purpose of the enactment was to authorize District Attorneys to initiate and prosecute ECL violations. The Attorney General also submitted a statement in support of the bill, in which he stated that the bill would end the impediment to effective law enforcement in prosecuting air pollution violations

Divorce; Stipulation Of Settlement; Payment Of Future College Expenses Not Part Of Basic Support Obligation And Not Subject To Child Support Standards Act

Cimons v Cimons (53 AD3d 125 [Angiolillo, opinion; Spolzino, Dillon, Dickerson, concur]).

This Court held that, under the circumstances presented, the obligation to provide for the future college expenses of the parties' children, as set forth in a stipulation settling a divorce action, was not part of the parties' basic child support obligation, and was thus not subject to requirement articulated in the Child Support Standards Act (hereinafter CSSA) that any deviation from statutorily-mandated child support obligations must be recited and explained in a stipulation of settlement. Moreover, even though the parties violated the CSSA by failing to recite and explain in their stipulation why they deviated from CSSA standards in providing basic child support, and the basic child support provisions were properly vacated as a consequence, the

provision concerning future college expenses survived the vacatur, and was enforceable.

This Court stated that, where the parties' agreement fails to comply with the requirements set forth in the relevant provisions of the CSSA (Domestic Relations Law § 240[1-b][h]), the basic child support provisions of the agreement are invalid and cannot be enforced. That portion of the agreement must be set aside, and the parties' basic child support obligation must be recalculated pursuant to the CSSA. However, the fact that a portion of such an agreement may be invalid does not necessarily preclude the enforcement of other provisions. The determination as to which provisions, if any, must be vacated along with the basic child support provision depends on the circumstances of the case and the nature of the obligations described in the other provisions. Some provisions may be so directly connected or intertwined with the basic child support obligation that they necessarily must be recalculated along with the basic support obligation.

This Court noted that a part of the difficulty in differentiating between different obligations resulted from the language of the statute. Specifically, this Court considered the definitions of "[b]asic child support obligation" (see Domestic Relations Law § 240[1-b][b][1]), and "[c]hild support" (see Domestic Relations Law § 240[1-b][b][2]). This Court quoted a portion of the practice commentaries to Domestic Relations Law § 240, which stated, "Thus, child support consists of two distinct elements: (a) a regular periodic payment, or basic support; and (b) contribution towards 'add-on' expenses, which are additional items not encompassed in the regular basic child support payment" (Scheinkman, New York Law of Domestic Relations § 240, at 250 [14 West's NY Prac series]).

Unlike child care expenses and unreimbursed health care expenses, education expenses are, as a general rule, not directly connected to the basic child support calculation. This Court concluded that this case was consistent with those cases where courts determined that the tuition expense aspect of a college education was distinct from basic child support, finding that, here, college tuition was an add-on educational expense to be considered separately from the initial calculation of child support for basic needs.

This Court found that there was nothing in the record to support a finding that the father agreed to pay a share of college expenses as a trade-off against any other expense. This Court also determined that the provisions of the stipulation regarding college expenses were distinguishable from those provisions based on the calculation of basic child support. This Court further observed that the father's agreement to contribute to the children's college education expenses beyond the age of 21 years inured primarily to their benefit. Accordingly, as it is the intent of the CSSA to protect the children, to the extent possible, from the economic consequences of their parents' divorce or separation, this Court stated that "it would seem particularly unjust to allow the father, whose adjusted income, in 2005, after deduction of all mandatory deductions including his maintenance obligation, was reported as \$130,000, to wield noncompliance with the CSSA as a sword to eviscerate his commitment to provide his children with support for their college education."

Divorce; Domestic Relations Law 237(a); Application By Non-Monied Spouse For Award Of Interim Counsel Fees; Policy Considerations

Prichep v Prichep (52 AD3d 61 [Prudenti, opinion; Lifson, Covello, Balkin, concur]).

This Court held that an application for interim counsel fees by the nonmonied spouse in a divorce action should not be denied, or deferred until after trial, which functions

as a denial, without good cause articulated by the motion court in a written decision. This Court emphasized the importance of such awards to the fundamental fairness of such proceedings.

In light of the important public policy underlying Domestic Relations Law § 237(a), this Court reiterated the general rule that an award of interim counsel fees to the nonmonied spouse would generally be warranted where there is a significant disparity in the parties' financial circumstances. Therefore, motion courts should not defer applications for interim counsel fees to the trial court but, rather, should normally exercise their discretion to grant such applications made by the nonmonied spouse in the absence of good cause for a denial, such as where the fees sought are unsubstantiated or are clearly disproportionate to the volume of legal work required by the case. This Court specified that, where the court denies an application for good cause, it should articulate in a written decision the basis for its denial.

This Court also noted that the factors relevant to a determination as to which party should ultimately be responsible for the nonmonied spouse's attorney's fees and in what amount are not relevant in reaching a determination as to whether the monied spouse should be ordered to pay interim counsel fees in the first instance.

Inheritance Rights; Non-Marital Child; EPTL 4-1.2(a)(2)(c); Posthumous Genetic Marker Testing; Open And Notorious Acknowledgment

Matter of Poldrugovaz (50 AD3d 117 [Skelos, opinion; Spolzino, Fisher, Dickerson, concur]).

In a proceeding commenced by a nonmarital child to establish inheritance rights pursuant to EPTL 4-1.2(a)(2)(c), this Court held that a motion court may grant a pretrial motion for posthumous genetic-marker testing when the applicant provides some evidence that the decedent openly and notoriously acknowledged the nonmarital child as his own, and establishes that genetic-marker testing is reasonable and practicable under the totality of the circumstances. To the extent that this Court's holding in *Matter of Davis* (27 AD3d 124) required a party seeking posthumous genetic-marker testing to prove such an acknowledgment by clear and convincing evidence, that decision should no longer be followed. The holding, however, should not be interpreted as altering the statutory standard of proof essential to the standing of a nonmarital child to assert inheritance rights under EPTL 4-1.2(a)(2)(c), to wit: clear and convincing evidence of paternity together with proof that the alleged father openly and notoriously acknowledged the child as his own.

Among the factors to be considered by the court on an ad hoc basis in determining whether genetic-marker testing is reasonable and practicable under the totality of the circumstances are the following: (1) whether evidence presented demonstrates a reasonable possibility that the genetic testing will establish a match; (2) the practicability of obtaining the tissue sample for the purpose of conducting the genetic testing, including whether the sample is readily available; (3) whether there is a need to exhume the decedent's body or obtain the sample from a nonparty; (4) whether appropriate safeguards were, or will be, taken to insure the reliability of the genetic material to be tested; and (5) the privacy and religious concerns of the decedent and or his family members.

Insurance; Uninsured Motorist Benefits; Death Benefits; Disclaimer Of Coverage; Intentional Criminal Conduct

State Farm Mut. Auto. Ins. Co. v Langan (55 AD3d 281 [Fisher, opinion; Ritter, McCarthy, concur; Mastro, concurs in Part, dissents in Part])

Where a person is killed as a result of a motorist's intentional criminal use of a vehicle as the instrumentality of an attack, the victim's automobile insurance carrier is not obligated to pay the victim's estate under the uninsured motorist (hereinafter UIM) endorsement of the victim's automobile insurance policy. Here, the victim was struck and fatally injured by a motor vehicle. The motorist later pleaded guilty to murder in the second degree. The administrator of the victim's estate made a claim upon the victim's insurer to recover UIM benefits and death benefits pursuant to an automobile liability policy, but the insurer disclaimed coverage on the ground that the victim's injuries and ultimate death were caused by the motorist's intentional criminal conduct and, thus, were not the result of an "accident," as required by the policy.

Since a UIM endorsement is designed to afford an injured person the same protections he or she would have if he or she had been injured in an accident caused by an automobile covered by a standard automobile liability insurance policy, the coverage afforded under a UIM endorsement is coextensive with, and no greater than, the standard coverage ordinarily available to the uninsured motorist had he or she been insured. In light of the fact that no standard automobile policy would provide liability coverage to the motorist for the injuries he intentionally inflicted on the victim, the insurer was not obligated to provide benefits under the UIM endorsement.

However, the administrator of the victim's estate was entitled to recover benefits under the mandatory personal injury protection endorsement and its death and dismemberment provisions. This conclusion is required because, where an insured is intentionally injured or killed by a motorist, and the injury or death is not the result of misconduct, provocation, or assault by the insured, but is unforeseen from the insured's point of view, the injury or death is an "accident" within the meaning of accident insurance policies, and the insurer is liable therefor in contexts other than those covered by a UIM endorsement.

The dissent agreed that this Court was required to uphold the denial of UIM benefits, but urged the Court of Appeals to reexamine the governing principles in this area. Additionally, according to the dissent, the majority's determination with regard to the mandatory personal injury protection endorsement and the death and dismemberment provisions was inconsistent with this Court's previous order in this case, and would result in a construction of the policy whereby the phrase "caused by an accident" would have different interpretations depending upon where it appeared in the policy.

Labor; Labor Law 200, 240, 241(6); Homeowner's Exception

Ortega v Puccia (57 AD3d 54 [Dillon, opinion; Fisher, Ritter, McCarthy, concur]).

There are two disjunctive standards for liability under Labor Law § 200 and the common law in construction and demolition accidents. Where a worker's injury results from a dangerous or defective premises condition, liability depends upon whether the property owner created the condition or had actual or constructive notice thereof. Where a worker's injury results from the means and method of the work, including defects in the equipment provided to the worker by the worker's own employer or other contractors, liability depends upon whether the property owner had authority to supervise or control the means and methods of the work.

Thus, where a worker is employed on a construction project at the owner's home, and is injured as a consequence of a height-related hazard arising from the inadequacy of or defect in ladders, scaffolds, and the like provided by someone other

than the homeowner, the accident, for purposes of analysis under Labor Law § 200 and the common law, involves the means and methods of the work being performed. Hence, the relevant inquiry with respect to the homeowner's liability under Labor Law § 200 and the common law is whether he or she had authority to supervise or direct the work. To impose liability, however, this authority must be more than the usual "general authority to oversee the progress of the work" and "inspect[] the work product" that inheres in all homeowners; rather, for liability to be imposed, the homeowner must "bear[] the responsibility for the manner in which the work is performed."

Here, the plaintiff fell from a scaffold provided by his employer while working within the scope of his employment. The accident occurred at the defendants' single-family home. Causes of action were asserted under Labor Law §§ 200, 240, 241(6) and common law negligence. This Court affirmed the trial court's order awarding summary judgment in favor of the defendant homeowner.

Summary judgment in favor of the defendants was warranted with respect to the Labor Law §§ 240 and 241(6) causes of action under the single and two-family "homeowner's exception" of those statutes.

Labor Law § 200, by contrast, contains no homeowner's exception, as it codifies the common law, but the homeowners here escaped liability since they established, prima facie, that they did not have the authority to supervise or direct the plaintiff's work and the plaintiff failed to raise a triable issue of fact in opposition to that showing.

Labor; Labor Law 200; Equipment Loaned By Homeowner To Worker; Premises Condition Or Means And Method Of The Work Itself

Chowdhury v Rodriguez (57 AD3d 121 [Dillon, opinion; Miller, Balkin, Chambers, concur]).

In a follow-up opinion to *Ortega v Puccia* (57 AD3d 54), this Court held that where a ladder, scaffold, or other equipment is provided by a defendant homeowner to a worker engaged in construction or demolition at the defendant's home, and the worker alleges that he or she was injured due to the defective or dangerous nature of the ladder, scaffold, or other equipment, the ladder, scaffold, or other equipment is deemed to be part of the overall condition of the premises—i.e., part of the "plant"—for purposes of ascertaining the homeowner's liability pursuant to Labor Law § 200 and the common law (*cf. McFadden v Lee*, 62 AD3d 966 [where a worker concedes that a ladder provided to him by the homeowner was neither defective nor inadequate, and that his or her injury occurred solely due to the manner in which the homeowner directed the ladder to be used, the ladder is no longer to be considered part of the overall condition of the premises, and the dispute is to be analyzed as a "means-and-methods" issue]). Thus, the relevant inquiry in this regard is whether the homeowner created a defect or dangerous condition in the equipment, or had actual or constructive notice thereof prior to providing the equipment to the worker.

This Court explained that if a defendant homeowner provides equipment to the worker, the homeowner is in a position to know whether he or she has created a defect in the device or to have actual or constructive notice of whether the device is broken, defective, or inadequate, and thus is in the best position to correct the dangerous condition in furtherance of the purposes of the Labor Law. Here, the homeowners provided the plaintiff worker with a ladder that was allegedly missing rubber feet that would have prevented slippage. There was thus a triable issue of fact as to whether the defendant homeowners should have known that the ladder

was defective without rubber feet or some other type of anti-slippage covering for the legs of the ladder.

As in *Ortega*, the homeowners here were entitled to summary judgment dismissing the causes of action pursuant to Labor Law §§ 240 and 241(6), based upon the homeowner's exception articulated in those statutes.

Labor; Immigration Reform And Control Act Of 1986; Undocumented Alien; Submission Of Fraudulent Social Security Card; Claim For Lost Wages

Coque v Wildflower Estates Devs., Inc. (58 AD3d 44 [Prudenti, opinion; Ritter, Florio, McCarthy, concur]).

A worker's submission of false citizenship or immigration documentation to an employer is not in and of itself a sufficient ground to bar recovery of lost wages arising from a workplace injury, unless the provision of the false documentation actually induces the employer to hire the worker in the first instance. Where, as here, the employer knew or should have known of the worker's undocumented status or failed to verify the worker's eligibility for employment as required by federal legislation, this bar to recovery is inapplicable, and the undocumented alien is entitled to recover lost wages from a nonemployer tortfeasor.

The plaintiff, an undocumented alien who submitted a fraudulent Social Security card when applying for a job, sought to recover, inter alia, damages for lost wages after he was injured in performing his job. Relying on *Balbuena v IDR Realty LLC* (6 NY3d 338), in which the Court of Appeals held that a lost wages award to an undocumented alien injured on the job is not preempted by federal immigration policy, this Court declined to dismiss the claim for lost wages. Even if *Balbuena* supported the defendants' argument that the submission of a fraudulent document upon being hired is a sufficient basis for denying lost wages, this rule is limited to situations in which an innocent employer is duped, by fraudulent documentation, into believing that the employee is a United States citizen or otherwise eligible for employment. Moreover, although an employee may be entitled to recover lost wages despite being hired illegally, there is no reason to believe that an undocumented alien would have an incentive to submit fraudulent documents to obtain employment solely with the "hope" of someday receiving a damages award for lost wages as a result of a workplace accident.

Here, the evidence established that the plaintiff presented a false Social Security card to his employer when hired. However, it also appeared that the employer violated IRCA because it failed to verify additional documentation as required.

Labor; Independent Sales Representatives; Private Right Of Action Under Labor Law 191-b; Breach Of Fiduciary Duty; Quantum Meruit; Unjust Enrichment

AHA Sales, Inc. v Creative Bath Products, Inc. (58 AD3d 6 [Dickerson, opinion; Spolzino, Covello, Eng, concur]).

In a case of first impression, this Court holds that a sales representative has an implied private right of action to enforce Labor Law § 191-b against a corporation to which it provides services.

Under the circumstances of this case, sales representative also adequately stated a cause of action under Labor Law § 191-c, and could prosecute its claims sounding in breach of fiduciary duty, quantum meruit, and unjust enrichment, but has no cause of action based upon promissory estoppel. Moreover, although the plaintiff has a

cause of action against the corporation for an accounting, it has no cause of action against the corporation's president and majority shareholder, in his personal capacity, for that or any other relief.

In reaching its conclusion as to the existence of a private implied right of action, the Court held that the relevant statute is intended to benefit sales representatives who are not employees by ensuring that they are provided with written contracts and are paid in accordance therewith. The recognition of an implied private right of action promotes the legislative purpose of the statute by holding principals accountable by allowing independent contractor sales representatives to commence civil actions to recover unpaid commissions. Moreover, recognition of a private right of action under Labor Law § 191-b would not be inconsistent with the legislative scheme of Labor Law article 6, which contains language indicating that wage claims asserted by individuals, as well as by the Commissioner of Labor, are permissible, particularly since individual employees may sue to recover on wage claims prosecuted under Labor Law § 191(1)(c) and (d). The Court explained that it would be inconsistent to recognize an implied private right of action for salespersons who are employees within the meaning of Labor Law § 191(1)(c), while not recognizing a private implied right of action for independent sales representatives under Labor Law § 191-b.

Landlord/Tenant; Action For Unpaid Rent; Residential Landlord Has No Duty To Mitigate Damages

Rios v Carrillo (53 AD3d 111 [Lifson, opinion; Prudenti, Mastro, Santucci, concur]).

A residential landlord has no legal duty to mitigate damages as a prerequisite to recovery in an action or proceeding to recover unpaid rent, and thus need not attempt to re-let the subject premises after a lease is cancelled or abrogated. In so holding, this Court rejects the reasoning of the Appellate Term, Second and Eleventh Judicial Districts, in *Paragon Indus. v Williams* (122 Misc 2d 628, 629), and cases relying thereon. Rather, this Court, relying on the Court of Appeals' decision in *Holy Props. v Cole Prods.* (87 NY2d 130), which involved a commercial lease, stated that well-settled law in this State imposes no duty on a residential landlord to mitigate damages, particularly where the relevant lease provides that the tenant shall be liable for rent after eviction or abandonment of the premises. Here, the lease provided that the tenant would remain liable for the rent upon the cancellation of the lease, except as provided by law. Thus, the parties agreed at the onset of the tenancy that the tenant would remain liable for rent due under the lease for its duration.

Landlord/Tenant; Tenants Reside In Commercial Building Without Residential Certificate Of Occupancy; ETPA Does Not Apply; Owner Not Entitled To Use And Occupancy

Caldwell v American Package Co., Inc. (57 AD3d 15 [Spolzino, opinion; Miller, Dillon, McCarthy, concur]).

Tenants in the City of New York who reside in commercial premises for which there is no residential certificate of occupancy are not protected by the Emergency Tenant Protection Act of 1974, the Rent Stabilization Law, or the Rent Stabilization Code, Part B [hereinafter collectively ETPA], but the landlord of such premises is not entitled to the value of the tenants' use and occupancy.

By virtue of the fact that the City declared a housing emergency, ETPA ordinarily applies to any housing accommodation that is not expressly excepted from coverage. However, in *Wolinsky v Kee Yip Realty Corp.* (2 NY3d 487), the Court of Appeals

held, after considering the interplay of the Loft Law (Multiple Dwelling Law § 7-C), which applies only to units occupied for residential purposes on April 1, 1980 (not the case here), and ETPA, that “illegal conversions do not fall under the ambit of the ETPA.”

This Court had previously addressed the issue of ETPA coverage on two occasions. In *Gloveman Realty Corp. v Jefferys* (18 AD3d 812), this Court held, on the authority of *Wolinsky*, that the defendants' tenancies in illegally converted lofts were not subject to ETPA. In *Matter of 315 Berry St. Corp. v Hanson Fine Arts* (39 AD3d 656), this Court held that ETPA protection was available where “it was undisputed that the [owner] . . . knew of and acquiesced in the unlawful conversion, [undertaken] at the expense of the occupants, of the unit from commercial to residential use, that the applicable zoning generally permits residential use, and that the [owner] sought legal authorization to convert the premises to such use during the pendency of [the] proceeding.” This Court concluded that the exception recognized in *315 Berry St.* was an extremely limited one not applicable here.

Nonetheless, Multiple Dwelling Law § 302 prohibits the owner of a multiple dwelling for which there is no valid certificate of occupancy allowing residential use from collecting rent or the value of the use and occupancy of the premises. Rejecting a contrary determination by the First Department, However, this Court that the tenant’s awareness of the absence of a certificate of occupancy, or even evidence of the tenant’s intention to take advantage of its absence, did not estop the tenant from relying on this statutory prohibition, and created no exception to it. This Court stated that, unless the tenant actually interferes with the owner’s attempt to legalize the premises, it would be inconsistent with the Legislature’s command to shift this burden by estopping the tenant from relying on the statute as a defense to an action or proceeding to recover use and occupancy.

Libel; Comments Made To United States Department Of Transportation In Opposition To Application To Operate An Air Carrier Service; Noerr Pennington Doctrine

Singh v Sukhram (56 AD3d 187 [Chambers, opinion; Skelos, Dillon, Leventhal, concur]).

A complaint alleging defamation arising from statements made to a federal agency may not be dismissed where there are sufficient allegations that the statements were made with actual malice, even though, under the circumstances, there was no basis for invoking a recognized exception to the “*Noerr Pennington*” doctrine (see *Eastern R.R. Presidents Conference v Noerr Motor Freight*, 365 US 127, 144), which otherwise bars defamation action arising from such statements.

In this action, the plaintiff sought to recover damages for libel arising from comments made by the defendants to the United States Department of Transportation in connection with their opposition to the plaintiff’s application to operate an air carrier service.

The “*Noerr Pennington*” doctrine—originally created to protect private individuals petitioning the government from liability under antitrust laws—now protects the First Amendment rights of persons petitioning the government in general. Nonetheless, a cause of action alleging libel or slander arising in the context of statements made to government agencies may survive application of the doctrine under certain circumstances. Here, however, the “sham” exception to the *Noerr-Pennington* doctrine is inapplicable, since the exception requires proof that the defendant’s statements are objectively baseless with no reasonable expectation that the

statements will lead to a successful resolution of the controversy before the agency, and the plaintiff conceded that the defendants statements were not objectively baseless. Thus, even if the plaintiff could prove that the defendant acted with the subjective intent to “interfere directly with the business relationships of a competitor” (*Professional Real Estate Invs. v Columbia Pictures Indus.*, 508 US 49, 61), the objective element was not satisfied, and the court was consequently precluded from examining the defendant’s subjective motivation.

Nonetheless, the defendants’ motions to dismiss were properly denied on the ground that, with respect to libel, the doctrine enunciated in *McDonald v Smith* (472 US 479) applies in lieu of the *Noerr-Pennington* doctrine. Under *McDonald*, even libelous statements contained in communications with a government agency enjoy a qualified privilege requiring proof of malice. Since the complaint contained sufficient allegations of malice to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the defendants’ motions to dismiss were properly denied.

Martin Act; General Business Law Article 23-A; Common Law Causes Of Action For Fraud And Breach Of Contract Resting Upon Same Facts As Would Support Martin Act Violation Not Preempted

Caboara v Babylon Cove Dev., LLC (54 AD3d 79 [Ritter, opinion; Rivera, Carni, Leventhal, concur]).

Causes of action to recover damages for common-law fraud and breach of contract are not preempted by the Martin Act, New York’s blue sky law (see General Business Law article 23-A), even if the allegations giving rise to the causes of action would support a finding of a Martin Act violation.

The enforcement of the Martin Act is vested exclusively in the Attorney General of the State of New York, and there is no express or implied private right of action under the Martin Act. Nonetheless, private causes of action sounding in common-law fraud and breach of contract may rest upon the same facts as would support a Martin Act violation, provided they are sufficient to satisfy traditional rules of pleading and proof. Nothing in the language of the Martin Act compels the conclusion that the Legislature intended to abrogate any common-law remedy arising from conduct which would be prohibited under the Act.

This Court determined that, contrary to the defendants’ contention, the plaintiffs were not attempting, through artful pleading, to press a claim based on the sort of wrong properly given over to the Attorney General under the Martin Act. The purpose of the prohibition against such artful pleading is to prevent an “end run” around the exclusivity of the Martin Act by precluding a private plaintiff from asserting a private cause of action that purports to be based on the common law, even though proof of an essential element of such a cause of action, such as intent, is lacking, and the plaintiff thus can actually prove only a violation of the statute. In this case, however, this Court determined that the complaint was sufficient to state causes of action to recover damages for common-law fraud and breach of contract and, therefore, the allegations did not constitute prohibited artful pleading.

Medicaid; Down’s Syndrome; Injury During Spinal Surgery; Medical Malpractice Action; DSS Lien Pursuant To Social Services Law 104-b For Recovery Against Award

Matter of Ruben N. (55 AD3d 257 [Angiolillo, opinion; Spolzino, Santucci, Florio, concur])

Upon the death of a Medicaid recipient, the New York City Department of Social Services (hereinafter DSS) is not entitled to recover, from the proceeds of a medical malpractice settlement paid to the Medicaid recipient, all of the medical assistance payments it made to the Medicaid recipient over his lifetime, but only to certain portions thereof.

Ruben N. was born with Down's Syndrome in 1964 and began receiving Medicaid assistance payments from the DSS on July 1, 1992. On July 14, 1997, he suffered an injury during spinal surgery, which resulted in his partial paralysis, and a medical malpractice action was commenced on his behalf. Ruben continued to receive medical assistance from the DSS during the pendency of the action, and DSS filed a lien pursuant to Social Services Law § 104-b to recover, from any award made in the medical malpractice action, the expenses for "medical assistance" for which the third-party tortfeasor was found liable. Pursuant to regulation, the lien was required to be satisfied or otherwise resolved in order for the remaining funds received by Ruben to be disregarded, for purposes of Medicaid eligibility, by placement in a supplemental needs trust. On January 15, 2003, such a trust was created. It contained a provision, required by Federal and State law, that, upon Ruben's death, the State would receive all amounts remaining in the trust up to the value of "all medical assistance" it provided to Ruben. The settlement of the medical malpractice action, however, directed that payment be made to DSS in the amount of \$102,423.56, in full satisfaction of the Medicaid lien. On September 22, 2003, Ruben died.

DSS asserted that it was entitled to recover the total of all medical assistance it provided to Ruben over his lifetime. Thus, DSS sought to recover the medical assistance it provided to Ruben, as a result of his Down's Syndrome, for the five years prior to the commission of the medical malpractice; that portion of the medical assistance provided to him during the five years preceding the settlement of the medical malpractice action that was not recovered pursuant to the settlement of the malpractice action; and the total medical assistance it provided after the August 23, 2002, settlement of the medical malpractice action. DSS based its claim on State and Federal regulations, which require that a qualifying trust contain a provision that the State will receive, upon the death of the beneficiary, all amounts remaining in the trust up to the total value of "all medical assistance" paid on behalf of the beneficiary.

This Court stated that the regulatory language could not be read in isolation from the rest of the medical assistance statutes. Paragraph (b) of 42 USC § 1396p addresses recovery of medical assistance correctly paid. That paragraph provides, in relevant part, with certain exceptions not applicable here, that "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made" (42 USC § 1396p[b][1]). The parallel State provisions, with parallel exceptions not applicable here, are contained in Social Services Law § 369(2)(b)(i), which recites that "[n]otwithstanding any inconsistent provision of this chapter or other law, no adjustment or recovery may be made against the property of any individual on account of any medical assistance correctly paid to or on behalf of an individual under this title." In addition to these exceptions, special provision is made for assistance provided to an individual for an injury resulting from a third party's negligence. However, as there is no specific authorization for recovery of medical assistance correctly paid prior to August 23, 2002, the date on which the medical malpractice action settled, this Court found that to allow recovery therefor would be in direct contravention of the federal and state statutes.

With regard to the DSS's lien on the settlement proceeds, this Court observed that the third-party tortfeasor was only responsible for the medical costs incurred as a result of his negligence. DSS's rights were therefore limited to the medical assistance it provided as a consequence of the third-party tortfeasor's negligence.

Finally, upon the settlement of the medical malpractice action, Ruben received assets that would have rendered him ineligible for continuing medical assistance payments from the DSS, but for the special treatment accorded assets placed in a supplemental needs trust. The quid pro quo for disregarding those assets is that the DSS be reimbursed from the corpus of the trust, if any, for the assistance provided while the assets were disregarded. DSS was therefore entitled to reimbursement for all the medical assistance it provided to Ruben on and after August 24, 2002.

Medicaid; Eligibility For Long-Term Medical Care; Calculation Of Community Spouse Monthly Income Allowance; Social Services Law 366-c[2][g]

Matter of Balzarini v Suffolk County Dept. of Social Servs. (55 AD3d 187 [Spolzino, opinion; Ritter, Miller, Dickerson, concur]).

For the purposes of Medicaid eligibility and payments, the reasonable, ordinary expenses that significantly exceed the income of a person whose spouse is an assisted-living facility or nursing home, such as reasonable housing costs, utilities, automobile expenses, Medicare premiums, and expenses for food, clothing, medical care, and home maintenance, can be a sufficient basis upon which additional income of the institutionalized spouse may be made available to that person without penalty or loss of Medicaid eligibility. This Court arrived at its determination based, inter alia, on the legislative intent with regard to the Medicare Catastrophic Coverage Act.

Medicaid eligibility is determined on the basis of financial need. A person in need of long-term medical care must use his or her income to pay for such care until the eligibility threshold is met. As a result, prior to the enactment of the Medicare Catastrophic Coverage Act in 1988, financially-dependent spouses of individuals receiving long-term Medicaid-subsidized medical care often "found themselves virtually impoverished because the greater part of the couple's income derived from a pension or other source that was solely in the name of the institutionalized spouse" (*Matter of Schachner v Perales*, 85 NY2d 316, 319).

Under the Medicaid program, the amount that ordinarily will be available to the non-institutionalized spouse, or "community spouse," is known as the "community spouse monthly income allowance" and is determined by comparing the income of the community spouse to the Medicaid "minimum monthly maintenance needs allowance." The latter refers the "amount deemed sufficient for the community spouse to live at a modest level after the institutionalized spouse becomes eligible for Medicaid, subject to a statutory floor and ceiling" (*Matter of Tomeck*, 8 NY3d 724, 728), and, insofar as it affects New York residents, is set by federal law. The community spouse monthly income allowance is the amount "by which the minimum monthly maintenance needs allowance for the community spouse exceeds the monthly income otherwise available to the community spouse" (Social Services Law § 366-c[2][g]).

The federal Medicare Catastrophic Coverage Act allows for some relief from this calculation by providing that where either spouse "establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial distress, there shall be substituted for the minimum monthly maintenance needs allowance . . . an amount adequate to provide such additional

income as is necessary" (42 USC § 1396r-5[e][2][B]). Similarly, Social Services Law § 366-c(8)(b) directs that the community spouse allowance must be increased "[i]f either spouse establishes that the community spouse needs income above the level established by the social services district as the minimum monthly maintenance needs allowance, based upon exceptional circumstances which result in significant financial distress (as defined by the commissioner in regulations)." The regulations define "significant financial distress" as:

"exceptional expenses which the community spouse cannot be expected to meet from the monthly maintenance needs allowance or from amounts held in resources. Such expenses may be of a recurring nature or may represent major one-time costs, and may include but are not limited to: recurring or extraordinary noncovered medical expenses; amounts to preserve, maintain or make major repairs on the homestead; and amounts necessary to preserve an income-producing asset." (18 NYCRR 360-4.10[a][10]).

As this Court observed, the Medicare Catastrophic Coverage Act was enacted for the express purpose of "end[ing the] pauperization . . . [of] the community spouse" (*Matter of Schachner v Perales*, 85 NY2d 316, 319-320, quoting HR Rep No. 100-105[II], 100th Cong, 2d Sess, reprinted in 1988 US Code Cong & Admin News, at 888). Its "narrow purpose . . . is to protect the community spouse from financial disaster when the primary income-providing spouse becomes institutionalized" (*Matter of Schachner v Perales*, 85 NY2d at 323) "by assuring that the community spouse has a sufficient -- but not excessive -- amount of income and resources available while the institutionalized spouse is in a nursing home at Medicaid expense" (HR Rep No. 100-105 [II], 100th Cong, 2d Sess, reprinted in 1988 US Code Cong & Admin News, at 888). The goal is that "the community spouse in these circumstances has income and resources sufficient to live with independence and dignity" (HR Rep No. 100-105 [II], 100th Cong, 2d Sess, reprinted in 1988 US Code Cong & Admin News, at 892).

This Court observed that the income of the community spouse can be depleted just as easily by ordinary expenses as it can by exceptional, or unforeseen, expenses, where those ordinary expenses are extraordinary in relation to the individual income of the community spouse. Therefore, this Court concluded that the calculation of the funds that will be available to the community spouse cannot ignore those expenses that may have been ordinary before, but have become extraordinary in terms of the income that is available to the community spouse without the contribution of the institutionalized spouse.

Medical Malpractice; Esophageal Perforation; Causation

Myers v Ferrara (56 AD3d 78 [Fisher, opinion; Prudenti, Miller, Balkin, concur])

General and conclusory allegations of medical malpractice in an expert's affidavit are insufficient to oppose a defendant physician's prima facie showing of entitlement to judgment as a matter of law, and the physician's motion was thus properly granted here.

The decedent, Roy Myers, was admitted to a hospital after food became lodged in his throat. A pulmonologist there ordered, inter alia, that an esophageal perforation should be ruled out, and that Myers should have a thoracic surgery consultation as soon as possible. In light of the possibility of an esophageal perforation, the pulmonologist ordered that Myers should not be given food or fluids by mouth, and that antibiotics should be administered. Myers was transferred to another hospital,

where a thoracic surgeon performed an esophagoscopy, during which he did not see any esophageal perforation. Thereafter, Myers was placed on a clear liquid diet which included ginger ale. Sometime later, he was discovered on the floor of his room in a cyanotic state. The thoracic surgeon operated on Myers' chest, and removed a significant volume of fluid consistent with ginger ale. Additionally, pus consistent with long-standing infection was discovered in his chest. The thoracic surgeon determined that Myers had sustained an esophageal perforation. In addition, Myers had unfortunately suffered significant brain damage, and died five days later.

To establish liability for medical malpractice, a plaintiff must prove that the physician deviated from good and accepted medical practice, and that the departure was a proximate cause of the plaintiff's injuries. On a motion for summary judgment, the defendant physician must proffer evidence in admissible form establishing, prima facie, either that he or she did not deviate from good and accepted medical practice, or that, if there was such a departure, it was not a proximate cause of the plaintiff's injuries.

The pulmonologist established his prima facie entitlement to judgment as a matter of law with proof that he considered the possibility of esophageal perforation, determined that it was necessary to rule it out, took proper precautions, gave proper orders, and arranged for Myers's transfer to another hospital for treatment by the proper specialist. Although the plaintiff's expert opined that the pulmonologist departed from accepted practice by failing immediately to administer a "contrast study" or, failing that, to order the study over the five-hour period during which Myers's was waiting to be transferred to the other hospital, this opinion was speculative, particularly in light of (a) the pulmonologist's testimony that a thoracic surgeon would have been the one to perform surgery had a perforation been found, and it was thus appropriate to have the study done where the thoracic surgeon was located, and (b) the absence of any evidence as to the time it would normally take to get a contrast study done under the circumstances or that the failure to order a contrast study at the first hospital was a proximate cause of Myers' death. Moreover, while the plaintiff's expert opined that the pulmonologist departed from good and accepted medical practice by not speaking directly to the thoracic surgeon to express concern about the possibility of an esophageal perforation, there was no evidence that this failure, even if a departure, proximately caused Myers's death. This conclusion is supported by the testimony of the thoracic surgeon that he would have done nothing differently had he been directly apprised of the pulmonologist's concerns.

Medical Malpractice; Unwanted Blood Transfusion

Salandy v Bryk (55 AD3d 147 [Fisher, opinion; Lifson, McCarthy, concur; Carni concurs in part, dissents in part])

There were triable issues of fact here sufficient to require a jury to determine whether a blood transfusion was administered to the plaintiff without her actual and informed consent. Before the plaintiff was to undergo knee replacement surgery, she signed a consent form, pursuant to which she consented to, among other procedures, blood transfusion. However, she also executed a separate, seemingly contrary form entitled "Refusal to Consent to Blood/Blood Component Transfusion," by which she refused to consent to blood transfusion procedures. The surgery was performed without complication, and, thereafter, the plaintiff received an autotransfusion, or a transfusion of her own blood lost and collected during surgery.

After she learned of the autotransfusion, she commenced this action against the hospital and the surgeon.

This Court observed that, in cases of alleged medical malpractice predicated on lack of informed consent, where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent. The mere recording or witnessing of a consent by a hospital employee is a ministerial task that does not subject the hospital to liability. However, the hospital may be liable where it knew or should have known that the private physician using its facilities was acting or would act without the patient's informed consent.

The Supreme Court granted the plaintiff's motion for summary judgment on the issue of liability against the hospital and denied the hospital's cross motion for summary judgment dismissing the complaint. This Court modified, and denied both the motion and cross motion.

According to the surgeon's expert, since a first-year resident obtained the plaintiff's signature on both a form consenting to the autotransfusion and a form expressly refusing to consent to the autotransfusion, and signed as a witness on the relevant forms, the resident thus had a duty to inform the surgeon, surgical resident, and/or nursing staff that the plaintiff had signed both a written consent and a written refusal of the transfusion of blood products. The expert opined that the resident's failure to do so, or to do anything other than place both forms into the preoperative packet, constituted a departure from good and accepted medical practice. In contrast, according to the hospital's expert, this did not constitute a departure from the applicable standard of care. Based on these conflicting opinions, this Court found that there existed a triable issue of fact as to whether the resident departed from good and accepted medical practice. Under these circumstances, this Court further concluded that if the resident did in fact depart from good and accepted medical practice, it could not be said as a matter of law that his conduct, as a hospital employee, did not impute, to the hospital, actual or constructive knowledge that the surgeon would act without the plaintiff's consent.

This Court also found, however, that there existed a triable issue of fact as to whether the resident was actually present when the plaintiff executed the consent form. If, as the surgeon stated, the plaintiff signed the consent form immediately prior to surgery and not in the presence of the resident, then the resident could not have known that the plaintiff had executed two documents with conflicting directions as to transfusions, and the hospital would not be liable.

The dissent concluded that there was no factual basis to support the assertion that the resident or any other hospital employee knew or should have known that the surgeon would breach his duty of care. The dissent also concluded that the plaintiff's cause of action was not one for medical malpractice or lack of informed consent, but for civil battery allegedly committed by the surgeon, an intentional tort for which, under the circumstances, the hospital could not be held liable. The dissent also concluded that the plaintiff's claim alleging emotional distress was not compensable under the facts of this case since there was no allegation that any act by the hospital endangered her physical safety or caused her to fear for her safety.

Real Property; No Survival After Closing Of Claim, In Contract Or Tort, To Recover Damages For Seller's Failure To Deliver The Premises Vacant And Clean As Required By The Contract

Novelty Crystal Corp. v PSA Institutional Partners, L.P. (49 AD3d 113 [Spolzino, opinion; Santucci, Florio, Angiolillo, concur])

Despite agreeing that the subject real property "will be delivered vacant and clean, free of all personalty," the defendant seller failed to remove storage bins and other personal property from the premises prior to closing. The plaintiff purchaser did not raise the issue at closing. Since the contract did not expressly provide that a potential claim to recover damages for the seller's failure to deliver the premises vacant and clean survived the closing of title, the plaintiff's claims, whether sounding in contract or tort, are not cognizable, even though the seller's obligation to deliver vacant and clean premises was required by the contract.

"Generally, the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title. However, this rule does not apply where there is a clear intent evidenced by the parties that a particular provision [of the contract of sale] shall survive the delivery of the deed, or where there exists a collateral undertaking" (*Davis v Weg*, 104 AD2d 617, 619 [citation omitted]). Neither of these circumstances were present here. "[C]ollateral undertaking" has been defined as a contractual commitment "that is not connected with the title, possession or quantity of land" (*Alexy v Salvador*, 217 AD2d 877). By contrast, a "contract provision cannot be a collateral undertaking if it is an integral part of the principal purpose of the contract, namely a conveyance of title to real property" (*id.* at 878).

The delivery of the premises vacant and clean was but one aspect of delivering possession of the premises, which can never be collateral to the transfer of title. The intrinsic relationship between title and possession has long been recognized. Ownership of property necessarily entails the right to "possess, use and dispose of" the property, and the right to possession upon closing necessarily includes the right to exclude the seller from continued occupancy. Since possession goes to the essence of the transaction, the obligation to deliver the premises vacant and clean cannot be collateral to the transfer of title. Accordingly, the plaintiff's claims could not survive the closing since the language of the contract was susceptible of no interpretation other than that such claims, whether in tort or contract, were barred. The obligation, as set forth in the contract, "to do such other and further acts and things . . . in furtherance of the purposes of this Contract" was not simply a "further assurances" clause within the meaning of Real Property Law § 253; rather, the obligation to deliver the premises vacant and clean was an explicit obligation of the seller to be performed at or prior to closing, and was thus neither an "other" nor "further" act upon which a claim surviving closing could be based. Finally, since the trespass claim was merely "a contract claim in tort clothing," dismissal of that claim was warranted.

Real Property; RPAPL 522[1], [2]; Adverse Possession Claim Against Municipality; Admissibility Of Aerial Photographs; Business Records Exception

Corsi v Town of Bedford (58 AD3d 225 [Spolzino, opinion; Mastro, Balkin, Leventhal, concur]).

Where a photograph is taken in the usual course of the business of a municipality, and for a particular governmental purpose, it is admissible as evidence even in the

absence of testimony by the photographer, under the business records exception to the hearsay rule. Where there is no proof that such a photograph was taken for any particular governmental purpose, or that its creation was pursuant to any program related to the routine administration of government, the photograph is inadmissible as hearsay. Since a 1995 aerial photograph, together with the testimony of the municipality's expert witness, provided a sufficient basis for the dismissal of the major portion of the plaintiffs' claims, dismissal was indeed warranted, but only if the 1995 photograph was properly admitted into evidence under the business records exception to the hearsay rule.

This appeal presented the unusual situation in which a municipality was required to defend against an adverse possession claim. Since the plaintiffs' adverse possession claim was not based on a written instrument, they were required to demonstrate that the property was either "usually cultivated or improved" or "protected by a substantial enclosure" (RPAPL former 522[1], [2]) for the 10-year statutory period, as required by the law in effect at the time the action was commenced. To this end, the plaintiffs testified that they had effected various improvements of the property. The municipality's defense centered on aerial photographs of the property, purportedly taken in 1995 and 1996, and the testimony of an expert that enlargements of the photographs showed none of the improvements alleged by the plaintiffs to have been made by that time.

A photograph, including an aerial photograph, is generally admissible as a depiction of a fact in issue upon proof of its accuracy by the photographer or upon testimony of one with personal knowledge that the photograph accurately represents that which it purports to depict. Here, the municipality apparently was unable to present a witness who had knowledge of the property in 1995 or 1996, and it therefore offered the aerial photographs under the business records exception to the hearsay rule.

This Court determined, in the first instance, that the photographs were hearsay, as they were offered for the truth of their content. They were also deemed to be out-of-court statements, although not in the traditional sense.

The municipality offered the 1995 aerial photograph based on the testimony of an associate planner with the Westchester County Department of Planning (hereinafter the Department). He testified that the Department causes aerial photographs of the County to be taken in the regular course of its business every five or six years, that the policy determination to take such photographs at such intervals served to fulfill a legitimate governmental purpose, and that the photograph here was taken in April 1995 as part of a series of such photographs. This was sufficient to establish that the photograph was made in the regular course of business, that it was the regular course of such business to make the photograph, that this proof established the "routineness" of the creation of such records that "tends to guarantee truthfulness because of the absence of motivation to falsify" (*Ed Guth Realty v Gingold*, 34 NY2d 440, 451), and that the recording was contemporaneous with the report. The testimony that the company performing the photography was under a contractual duty to produce photographs according to certain specifications was sufficient to establish that the record was produced by a person under a business duty to report, as required under *Matter of Leon RR* (48 NY2d 117, 122). Since these circumstances provided the indicia of reliability necessary to bring the 1995 aerial photograph within the business records exception, it was properly admitted.

The evidentiary foundation for the 1996 aerial photograph, however, was insufficient. There was no testimony as to the manner in which, or the purpose for which, it was

taken, other than that it was taken "speculatively hoping to be able to sell this over the years." While perhaps supporting the inference that the photograph was taken in the regular course of business, this was insufficient to establish that the provider of the photograph was under a business duty to do so.

However, despite the improper admission of the 1996 photograph, the 1995 photograph provided a sufficient basis to warrant dismissal of the major portion of the plaintiffs' claims.

Schools; Student Accidents; Cheerleader "Flyer" Thrown Into Air And Sustained Injuries When "basers" Failed To Catch Her Or Ensure The She Land Safely On The Ground

Matter of Felice v Eastport/South Manor Cent. School Dist. (50 AD3d 138 [Crane, opinion; Santucci, Florio, Dillon, Balkin, concur])

The most important factor, among the several required to be considered in connection with a petition or motion for leave to serve a late notice of claim upon a public corporation, is whether the public corporation obtained actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time thereafter. In order to establish that the public corporation obtained that knowledge, the petitioner or movant must prove that the public corporation had knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the proposed notice of claim; the public corporation need not, however, have specific notice of the theory or theories themselves. Thus, where the public corporation has actual knowledge only that an accident occurred at its premises or in the course of an event that it sponsored, and that the resulting injury was severe, that knowledge does not amount to knowledge the essential facts constituting the claim, at least where the incident and the injury do not necessarily occur only as the result of fault for which it may be liable.

In this dispute, a secondary-school student was injured during cheerleading practice while performing with a "stunt" team. Specifically, she was a "flyer," a cheerleader who is thrown into the air, and she allegedly sustained injuries when the "basers" failed to catch her or ensure that she land safely on the ground. Although she complained to her coach that she had been injured during practice, there was no proof that the coach witnesses the manner in which the injuries were sustained. Moreover, although incident reports were submitted to school officials shortly after the accident, those reports did not set forth the specific manner in which the injuries were sustained, or that the failure of basers to catch the student was the proximate cause of her injuries, only that the injuries were sustained in the course of the practice.

This Court further determined that the petitioners' excuses for the delay in serving the notice of claim were not reasonable. This Court found that a claimant's ignorance of the notice of claim requirement is not an acceptable excuse, that the student's and her mother's excuse that they were unaware of the severity of the student's injury was unavailing without supporting medical evidence, and that, if the injuries were "'sufficiently serious' to warrant the [school] District's thorough investigation, the petitioners [failed to] explain why they did not perceive them to be 'sufficiently serious' to cause them to serve a timely notice."

This Court further observed that there was no evidence that the student's infancy rendered diagnosis of the potential permanent nature of her injury more difficult, there was, at best, only a slight connection between student's infancy and the failure to serve a timely notice of claim, and the petitioners failed to meet their burden of

proving that the school district would not be prejudiced by the failure to serve a timely notice of claim.

Tax Certiorari; Small Claims Assessment Review (SCAR); RPTL 730(8) Requires Mailing Of Petition Within 10 Days To Clerk Of Assessing Unit Named In Petition; Mailing On 11th Day Does Not Necessarily Mandate Dismissal Of The Petition

Matter of Sivin v Board of Assessors (57 AD3d 115 [Lifson, opinion; Florio, Eng, Belen, concur]).

The denial of several Small Claim Assessment Review (hereinafter SCAR) petitions for failure to strictly comply with the mailing requirement of RPTL 730(8) was erroneous since the assessing unit received notice of the proceedings within the time contemplated by the Legislature. Thus, although RPTL 730(8) requires service upon the assessing unit to be made within 10 days of filing of the SCAR petition, and, here, service was made on the 11th day, the statute permits service by certified mail, return receipt requested. Had the petitions been served on the 10th day after they were filed by certified mail, return receipt requested, they would not have been received any earlier than the 11th day after filing. Therefore, the assessing unit received notice which was no less than that to which it was entitled under the statute. Moreover, the appellants did not claim that they suffered any prejudice as a result of the personal service of the petitions 11 days after filing.

A SCAR petition pursuant to RPTL 730(3) must be commenced within 30 days of the completion and filing of the relevant assessment roll, and failure to commence the proceeding within that period requires dismissal of the proceeding. Under RPTL 730(8), the petitioner is required to "mail a copy of the petition within ten days from the date of filing with the clerk of the [S]upreme [C]ourt to: [inter alia] (a) the clerk of the assessing unit named in the petition, or if there be no such clerk, then to the officer who performs the customary duties of that official . . . [s]ervice upon the clerk of the assessing unit or other appropriate official specified in paragraph (a) of this subdivision shall be made by personal delivery or by certified mail, return receipt requested." Unlike the filing provision, the mailing provision does not include any mandatory dismissal language, and is thus akin to a technical defect, such as failure to comply with a pleading requirement.

Here, the SCAR petitions were timely filed within 30 days of the filing of the final assessment roll. However, the petitions were personally served upon the clerk of the assessing unit 11 days after they had been filed, one day later than required under RPTL 730(8). This Court determined that a petitioner's failure to serve a SCAR petition upon the clerk of the assessing unit within 10 days of filing does not necessarily mandate dismissal of the petition, observing that the "Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality" (*People ex rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 9). Since the entity whose action was challenged received adequate notice of the commencement of the proceeding and no substantial right of that entity would be prejudiced by disregarding the technical defect in mailing, the Court held that it should be disregarded and the petition decided on the merits.

Thus, a hearing officer may only exercise his or her discretion to deny a SCAR petition as untimely served where an assessing unit can establish that a petitioner's failure to comply with RPTL 730(8) deprived it of adequate notice, causing prejudice to a substantial right. Here, however, since the hearing officer determined that

denial was mandatory due to the lack of strict compliance with RPTL 730(8), the hearing officer's determination must be annulled.

Taxpayers; Access To Town Park Open To All Residents Of Unincorporated Town And Incorporated Villages; Costs Of Park Only Imposed Upon Taxpayers Of Unincorporated Area

Matter of Bernstein v Feiner (50 AD3d 212 [Spolzino, opinion; Fisher, Miller, Dillon, concur]).

In this case, the petitioner was a resident of the unincorporated area of the Town of Greenburgh. The petition addressed alleged inequities in the allocation of the cost to taxpayers for a particular park.

The park at issue, the Taxter Ridge Park Preserve, was open to use by all Town residents, both those who resided in the unincorporated area of the Town and those who resided in its incorporated villages. However, the Town imposed the cost of the park only upon the taxpayers of the unincorporated area in accordance with its understanding that special legislation applicable only in the Town required that the cost of the park be so allocated. The petitioner asserted that, since the park was open to all Town residents, its cost must be borne by all of the Town's taxpayers. The Supreme Court agreed. This Court, *inter alia*, declared that the Town had correctly allocated the cost of the park to the residents of the unincorporated area of the Town.

Ordinarily, the cost of parkland that is for the benefit of all the residents of a town is borne by all of the town's taxpayers (see Town Law § 232). However, here, the special legislation at issue (L 1982, ch 891), known as the Finneran Law after its Assembly sponsor, established, contrary to the general rule, that, except where a federal grant is involved, "all costs" for parkland in the Town of Greenburgh were to be paid by the taxpayers of the unincorporated area and the use of the park would be limited accordingly, unless a village government chose to provide for participation by its residents and taxpayers. Because there was no federal participation, and no village chose that its residents shall use, and its taxpayers pay for, the park, the Finneran Law required that the Town allocate the park's cost as it did.

This Court observed that, despite the foregoing, the Supreme Court essentially treated the Finneran Law as optional, holding that, having effectively chosen to open the park to all Town residents by entering into contracts with the State of New York and County of Westchester requiring that the park be open to all residents of the state, including residents of the incorporated villages, the Town was required to impose the cost of the park on all of the Town's taxpayers, including those in the incorporated villages, in accordance with the general rule established in the Town Law. This Court concluded that the statutory language does not permit such a result. The language providing for the imposition of the cost on the residents of the unincorporated area is mandatory, not permissive.

This Court determined that the allocation of park costs effected by the Finneran Law was not unconstitutional on its face. The law satisfied the rational basis standard, as, under the terms of the Finneran Law, village taxpayers were obligated to pay for a Town park only when the village Board of Trustees enacted a resolution that village residents would use the park.

This Court also determined that any constitutional challenge to the Finneran Law as applied must fail because certain provisions of the Finneran Law had not yet been applied, at least insofar as it concerned access to the park by village residents.

Specifically, although the Finneran Law required the Town to deny access to the park to residents of the noncontributing villages, the Town had chosen not to do so. The reason for this decision was apparent: two thirds of the cost of acquiring the park came from county and state funds—funds which would not have been available if access to the park were restricted to residents of the unincorporated area of the Town in accordance with the Finneran Law. Thus, instead of burdening the taxpayers of the unincorporated area in the amount of \$10.9 million for a restricted park, the Town had chosen to require that they pay one third of that amount for an unrestricted park.

Since the petitioner did not challenge the Town's failure to restrict the use of the park under the Finneran Law, the source of the alleged inequality in the tax burden—the permissible use of the park by some but not others—was not before this Court.

Zoning; Town's Re-Use Plan Contemplating Mixed-Use Development Of 34 Single-Family Homes, 40 Senior Citizen Semi-Attached Dwellings And Community Recreational Center Could Not Be Imposed Through Creation Of Zoning Ordinance Upon Buyer Of Land Owned By The United States

BLF Assoc., LLC v Town of Hempstead (59 AD3d 51 [Lifson, opinion; Mastro, Skelos, Leventhal, concur]).

After rejecting an offer to purchase excess federal land, a town may not, through the enactment of a local ordinance, impose overly restrictive terms and conditions on the use and development of the land upon a private entity that ultimately purchases the land from the federal government, where the authority claimed by the town goes beyond its statutorily-defined zoning, subdivision, and site plan review authority.

This appeal involved the zoning of a 17-acre parcel of property (hereinafter the property) located in the Town of Hempstead, which had previously been owned by the United States and used as an Army Reserve facility. The property and the surrounding area was zoned as a "B Residence" district.

In 1996 the federal government closed the base, the property was declared excess, and was made available for transfer. The Town was afforded the first opportunity to acquire the property, and it formed a Local Redevelopment Agency (hereinafter the LRA) to develop a reuse plan. The LRA's reuse plan contemplated a mixed-use development of 34 single-family homes, 40 senior citizen semi-attached dwellings, and a community recreational facility. The Town intended that the plan be incorporated as a deed restriction in the land sale documents promulgated by the United States Department of the Army (hereinafter the Army).

Ultimately, the Town declined to purchase the property. In 2004 the petitioner BLF Associates, LLC (hereinafter BLF) entered into an agreement to purchase the property from the Army, but the agreement did not refer to the reuse plan.

Meanwhile, the Town, over BLF's objection, enacted Article XXXVIII of the Town Building Zone Ordinance to implement the reuse plan. Thereafter, BLF acquired title to the property. BLF commenced this action seeking, inter alia, a judgment declaring that the Town's enactment of Article XXXVIII was *ultra vires* and void. The Supreme Court granted BLF's motion for summary judgment, and this Court affirmed.

This Court observed that "[t]owns and other municipal authorities have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant and in the absence of legislative delegation of power their actions are *ultra vires* and void" (*Matter of Kamhi v Planning Bd. of Town of Yorktown*, 59 NY2d 385, 389). The applicable enabling statutes at issue were

Town Law §§ 261 through 263. Section 263 mandates that zoning regulations enacted in accordance with these statutes be "made in accordance with a comprehensive plan." A comprehensive plan is a compilation of land use policies that may be found in any number of ordinances, resolutions, and policy statements of the town. "Zoning legislation is tested not by whether it defines a well-considered plan, but by whether it accords with a well-considered plan for the community" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 685).

The statement of legislative purpose in Article XXXVIII acknowledged that it was enacted solely to implement the reuse plan, and the statement did not contemplate that the ordinance was to be enacted to facilitate the rezoning of the property so that the project desired by the Town could be developed as of right. In any event, while Town Law §§ 261 and 262 empower the Town to regulate and restrict lot sizes and permitted uses, they do not empower the Town to create a zoning ordinance that specifies the exact number and types of dwelling allowed. Zoning ordinances may go no further than determining what may or may not be built. Thus, Article XXXVIII was unnecessarily and excessively restrictive and not enacted for legitimate zoning purposes. Moreover, the provisions of Article XXXVIII that required the recreational facility to be owned by a homeowners' association and that the senior citizen dwellings be cooperative units were clearly ultra vires and void, since it is a "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it" (*Matter of Dexter v Town Bd. of Town of Gates*, 36 NY2d 102, 105).

Finally, this Court rejected the Town's contention that BLF cannot be heard to complain because it knew about the reuse plan and Article XXXVIII before it closed title, since the "[p]urchase of property with knowledge of [a] restriction does not bar the purchaser from testing the validity of the zoning ordinance [because] the zoning ordinance in the very nature of things has reference to land rather than to owner" (*Vernon Park Realty, Inc. v City of Mount Vernon*, 307 NY 493, 500).