APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

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THE FOLLOWING CASE SUMMARIES MAY NOT BE CITED AS AUTHORITY

Accidents; Member Of Bicycle Club Sustains Injuries When Rider In Front Falls In Path; Road Under Construction; Defendants' Summary Judgment Motions Denied; Primary Assumption Of Risk; What Activity Qualifies As Sporting Activity

Cotty v Town of Southampton (64 AD3d 251 [May 19, 2009; Skelos, Opinion; Dillon, Santucci, Balkin, Concurring])

The doctrine of primary assumption of risk is not a defense to a negligence cause of action asserted by a bicyclist against a municipality for failure to safely maintain a public roadway. Here, the plaintiff, a member of a bicycle club which engaged in long-distance rides, was riding with members of her club on a roadway that was under construction, and fell when the rider immediately in front of her unsuccessfully attempted to avoid a "lip" in the road and fell in her path. Seeking to avoid that rider, the plaintiff swerved and slid into the road, where she collided with an oncoming car, sustaining injuries.

In rejecting the application of the doctrine of primary assumption of the risk in the instant case, the Court explained that the doctrine is founded on the theory that one who voluntarily participates in a sporting activity generally consents, by such participation, to those injury-causing events, conditions, and risks which are inherent in the activity, and that a plaintiff's consent eliminates the duty of care that would otherwise exist since the plaintiff no longer has a reasonable expectation that the care owed to him or her by others would

encompass the risks to which he or she consents (*see Turcotte v Fell*, 68 NY2d 432, 437). In addressing the threshold issue of what type of activity qualifies as a sporting activity for the purposes of the application of the doctrine, the Court concluded that its application to claims of negligence in maintaining a thoroughfare that is regularly used by pedestrians and motor vehicles as well as cyclists would not promote the doctrine's recognized salutary purpose of facilitating free and vigorous participation in athletic activities.

Accidents; General Municipal Law § 205-a; Firefighter Injured When He Fell Down A Flight Of Stairs While Attending Certified First Responder Defibrillator Training; Inadequate Handrail; Violation Of Administrative Code §§ 27-127, 27-128 Sufficient Predicate For Liability Under GMA § 205-a

Cusumano v City of New York (63 AD3d 5 [Apr. 7, 2009; Dickerson, Opinion; Balkin, Belen, Concurring; Spolzino, Dissenting]).

In a 3-1 decision, the Court holds that General Municipal Law § 205-a imposes liability upon a landowner for injuries sustained by a firefighter during the course of his training, where the landowner violated Administrative Code of the City of New York (hereinafter the Administrative Code) § 27-127 [requiring all buildings and parts thereof to be maintained in a safe manner] and § 27-128 [making the owner of a building responsible at all times for the safe maintenance of the building and its facilities].

Specifically, the landowner had installed a makeshift handrail adjacent to a stairway by simply nailing pieces of wood to the abutting wall that could not be grasped by the plaintiff. The plaintiff's expert opined that "the handrail did not provide a proper clearance because it did not allow his hand to grasp the rail," and the plaintiff established that he fell down the staircase when he attempted to grasp the makeshift handrail.

Although the majority concluded that the defendant did not violate section 27-375 of the Administrative Code, referable to the design, construction, and maintenance of interior stairs, since the stairs at issue here did not qualify as "interior stairs" within the meaning of section 27-232 of the Administrative Code, the majority held that violations of sections 27-

127 and 27-128 of the Administrative Code constituted a "sufficient predicate for liability under (GML) § 205-a." The majority also concluded that an award of $1,200,000 for past pain and suffering was excessive and should be reduced to $775,000.

Accidents; Action to Recover Damages for Personal Injuries; Owner and Operator of Car That Struck Intoxicated Pedestrian May Seek Contribution From Seller of Alcohol

O'Gara v Alacci (67 AD3d 54 [Sept. 22, 2009; Covello, Opinion; Rivera, Angiolillo, Leventhal, Concurring])

Where an intoxicated plaintiff is injured by a tortfeasor, and the circumstances support a finding that the accident was caused, in part, by the provision of alcohol to the plaintiff in violation of General Obligations Law § 11-100 or § 11-101, the tortfeasor may properly seek contribution from the provider of the alcohol under that statute. In the instant dispute, a car struck an intoxicated pedestrian who was attempting to cross a parkway on foot in the early morning hours. Prior to the accident, the pedestrian had been at the defendant's bar, where she consumed copious amounts of alcohol.

Although the bar could not be considered to have violated a duty owed to the pedestrian, since a seller of alcohol owes no duty to the consumer to protect the consumer from the results of his or her voluntary intoxication, a party's liability for contribution can also flow from a breach of an independent duty owed to the party seeking contribution, provided that the breach of this duty played a part in causing or augmenting the injury for which contribution is sought.

Thus, the bar's alleged violation of the Dram Shop Act, which imposes a duty on sellers of alcohol to protect the public from the dangers posed by intoxicated people, constituted an alleged breach of a duty owed to the car's driver and owner, who were members of the public.

Although permitting a driver or vehicle owner to seek contribution from a bar in a case such as this could result in the bar ultimately being held indirectly answerable in damages to the alleged tortfeasor, as opposed to the intoxicated person, such a result promotes one of the Dram Shop Act's important goals, namely, motivating sellers of alcohol to exercise greater care in their sales.

Accidents; Automotive; Defendant Operator Of Vehicle #2 May Not Invoke Vehicle And Traffic Law 388(1) To Interpose A Counterclaim Against The Plaintiff Owner And Passenger In Vehicle #1 Thereby Imposing Vicarious Liability For Negligent Acts Of Operator Of Vehicle #1

Schuyler v Perry (69 AD3d 33 [Sept. 29, 2009; Dickerson, Opinion; Spolzino, Covello, Angiolillo, Concurring]).

The provisions of Vehicle and Traffic Law § 388(1), generally imposing vicarious liability upon an owner of a vehicle for the negligent acts of a driver operating the vehicle with the owner's consent, may not be invoked by an allegedly negligent defendant operator of one vehicle involved in a two-vehicle collision to interpose a counterclaim for contribution or setoff against an injured plaintiff who owned the other vehicle, where the plaintiff was merely a passenger in the other vehicle. Accordingly, the plaintiff's recovery from the defendant could not be reduced as a consequence of the negligent acts of the operator of the plaintiff's vehicle.

Here, the plaintiff was a passenger in a vehicle owned by her and driven by her then-boyfriend, when her vehicle collided with another vehicle. She commenced an action against her boyfriend and the driver of the other vehicle. Although the driver of the other vehicle properly cross-claimed against the plaintiff's boyfriend for contribution, he improperly sought to amend his answer to counterclaim against the plaintiff in order to impute comparative negligence to the plaintiff pursuant to Vehicle and Traffic Law § 388 for the alleged negligence of the plaintiff's boyfriend. Relying on *Kalechman v Drew Auto Rental*

(33 NY2d 397), this Court concluded that a passenger's right to recover may not be barred on the basis of some special relationship to the driver, and that, in the absence of proof that the passenger's personal negligence contributed to the injury, the general rule must be applied notwithstanding Vehicle and Traffic Law § 388 (*id*. at 405).

Since Vehicle and Traffic Law § 388 "is designed to give injured persons access to a financially responsible insured entity that might provide for a more realistic recovery of damages" (*Mowczan v Bacon*, 92 NY2d 281, 284), application of that statute to the facts of this case would contravene this statutory goal.

Accidents; Automotive; Rear End Collisions Caused By Abrupt Stop By Police Vehicle In Front Of Plaintiff; Evidence Legally Sufficient To Support Jury Verdict Finding The Police Vehicle Was Operated In Reckless Disregard For Safety Of Others

Tutrani v County of Suffolk (64 AD3d 53 [May 5, 2009; Dickerson, Opinion; Covello, Angiolillo, Carni, Concurring])

On a prior appeal, the Court of Appeals, in reversing this Court, ruled that an authorized operator of an emergency vehicle could be held liable for reckless operation of that vehicle pursuant to Vehicle and Traffic Law § 1104 even where the operator's vehicle did not come into contact with the plaintiff's vehicle (*see Tutrani v County of Suffolk*, 10 NY3d 906, *revg* 42 AD3d 496).

On remittitur from the Court of Appeals, this Court holds that the jury had a rational basis to conclude that a police officer operating a police emergency vehicle acted recklessly when he abruptly, and for no apparent reason, stopped his vehicle in front of the plaintiff's vehicle, causing a third vehicle to strike the plaintiff's vehicle in the rear. Moreover, this Court holds that the jury rationally concluded that the officer was 50% at fault in the happening of the accident.

The plaintiff's vehicle was rear-ended by a civilian's vehicle when the plaintiff stopped her vehicle to avoid rear-ending a police vehicle driven by a Suffolk County police officer that had come to an abrupt stop in front of her vehicle. The officer testified that he was traveling at 40 miles per hour when, without activating his vehicle's emergency lights, he abruptly reduced his speed to approximately two miles per hour within two seconds in order to assist a motorist with a disabled vehicle. The officer conceded that he could have passed the disabled vehicle and proceeded to the next exit, and that there were options available to him that would not have required him to cross from the middle lane to the shoulder within the space of 100 feet, but would still enable him to reach the disabled motorist.

In light of the evidence that the officer came to a virtual stop extremely abruptly in front of the plaintiff's vehicle, in rush-hour traffic that was proceeding at 40 miles per hour, without any warning and just seconds before the collision, it could not be said that there was no rational process by which the jury could have found that the officer operated his vehicle in reckless disregard for the safety of others.

This Court also found that the trial court properly charged the jury on the essential elements of the reckless disregard standard of care applicable to authorized emergency vehicles (*see* Vehicle and Traffic Law § 1104), and that the charge was consistent with the New York Pattern Jury Instructions governing vehicular accidents involving authorized emergency vehicles (*see* PJI 2:79A). Contrary to the appellants' contention, the trial court did not improperly blur the legal distinctions between the negligence standard of care and the reckless disregard standard applicable to the officer.

Commercial Litigation; Accounting Malpractice; Statute Of Limitations For Non-Medical Professional Malpractice Under CPLR § 2146(6) Did Not Bar Cause Of Action For Accounting Malpractice; Continuous Representation Exception

Symbol Tech., Inc. v Deloitte & Touche, LLP (69 AD3d 191 [Oct. 27, 2009; Austin, Opinion; Rivera, Florio, Belen, Concurring])

In this accounting malpractice and breach of contract action, although the Supreme Court properly acted within its discretion in treating an accountant's motion to dismiss the complaint on the basis of documentary evidence and for failure to state a cause of action (*see* CPLR 3211[a][1], [7]), as a motion to dismiss the complaint on the basis of the statute of limitations (*see* CPLR 3211[a][5])—inasmuch as no party was prejudiced and the plaintiff opposed the motion arguing continuous representation—it should not have granted that branch of the motion which was to dismiss the first cause of action alleging accounting malpractice.

Although the accountant satisfied its initial burden of showing that the action was commenced more than three years after the alleged malpractice occurred, the statute of limitations for nonmedical professional malpractice under CPLR 214(6) did not bar the cause of action alleging accounting malpractice. There were sufficient allegations in the complaint, and sufficient documentary evidence submitted with the accountant's moving papers, to establish the facial applicability of the continuous representation exception, which requires a "mutual understanding [by the parties] of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306).

Moreover, this Court determined that the complaint withstood dismissal pursuant to the doctrine of *in pari delicto*, which bars an action where the plaintiff is itself at fault, since the plaintiff alleged that the situation fell within the narrow "adverse interest" exception. Specifically, the complaint made sufficient allegations that the plaintiff's senior managers were acting in their own self-interest and outside the scope of their employment in the course of defrauding the plaintiff by enabling themselves to receive higher, undeserved

compensation. Accordingly, it was ultimately for the trier of fact to determine whether their conduct could be imputed to the plaintiff corporation.

Finally, this Court found that the remaining causes of action alleging breach of contract, fraud, and negligent misrepresentation, which arose from the same facts as the accounting malpractice cause of action, were properly dismissed by the Supreme Court.

Construction; Defendant Contractor Contracted With Plaintiff School District To Deliver Construction Management Services; Plaintiff Sues Defendants For Breach Of Contract Predicating Liability Of Owner Of Corporate Defendant On Doctrine Of Piercing Corporate Veil; Complaint Dismissed

East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc. (66 AD3d 122 [July 28, 2009; Fisher, Opinion; Spolzino, Miller, Concurring; Dillon, Eng, Dissenting])

In this breach of contract action, this Court, in reversing the Supreme Court, held that the plaintiff had not sufficiently alleged the elements required to pierce the corporate veil and proceed against the defendant's principal. Although the plaintiff alleged in its complaint that the principal had exercised complete dominion and control over the corporate defendant, and had used such dominion and control to direct the acts and omissions of the corporate defendant to commit a wrong against the plaintiff, this Court recognized that small corporations are often directed and controlled by a single person. Thus, this Court reasoned that if mere domination, standing alone, were sufficient to support the imposition of personal liability on the owner of a corporation, virtually every cause of action asserted against a corporation either wholly or principally owned by an individual who conducts corporate affairs could also be asserted against that owner personally, rendering the principle of limited liability largely illusory.

Instead, this Court held that a party seeking to pierce the corporate veil must also establish "that the owners, through their domination, abused the privilege of doing business in the corporate form" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142). The list of factors constituting abuse of the privilege include the owner's failure to respect the separate legal existence of the corporation, the treatment of corporate assets as personal assets, or the undercapitalization of the corporation or failure to respect corporate formalities. The mere use of the term "bad faith" in a complaint is insufficient to allege this second element of abuse of the privilege of doing business in the corporate form. Consequently, this Court held that the complaint should have been dismissed insofar as asserted against the principal in his individual capacity. Moreover, additional allegations contained in the affidavit submitted by the plaintiff did not require a different result, inasmuch as those allegations did not address the element requiring abuse of the privilege of conducting business in the corporate form.

Finally, this Court rejected the plaintiff's argument that dismissal at the pleading stage was inappropriate, as evidence might eventually be discovered that would justify piercing the corporate veil. This Court stated that the policy inherent in allowing individuals to conduct business in the corporate form so as to shield themselves from personal liability would be seriously threatened were this Court to allow an insufficient cause of action to survive, at least to the summary judgment stage, merely on the plaintiff's hope that something will turn up.

Construction; Excavation Agreement Provides That Defendant Contractor Required To Pay Certain Municipal Fees Which It Did Not Pay; Plaintiff Developer Paid Fees To Town And Sued Defendant; Plaintiff May Recover Payments As An Equitable Subrogation Claim Against Sub-Contractor's Bond; Plaintiff's Conversion Cause Of Action Against Defendant For Removing Excess Sand And Gravel Sustained

Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp. (64 AD3d 85 [Apr. 21, 2009; Spolzino, Opinion; Carni, Dickerson, Chambers, Concurring])

An excavation contractor (hereinafter the contractor) agreed with a developer to pay certain municipal environmental fund and excavation fees and costs in connection with a project, but failed to do so, leaving the developer to pay the fees and costs out of its own pocket. Accordingly, the developer, in its capacity as equitable subrogee under certain bonds posted by both the contractor and an excavation subcontractor, was entitled to recover under those bonds for the fees and costs it paid out of its own pocket. Moreover, both excavators may be liable in conversion to the developer for the value of excavated material removed from the site in excess of that provided for under the terms of the plans and specifications.

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law on its breach of contract cause of action asserted against the contractor. Since there was a valid and enforceable contract between the plaintiff and the contractor, however, this Court concluded that the causes of action sounding in quasi-contract must be dismissed insofar as asserted against the contractor.

Since the plaintiff did not have a contract with the subcontractor, which had orally agreed with the contractor to purchase material excavated and removed from the property, the plaintiff sought recovery from the subcontractor pursuant to three quasi-contract theories. This Court concluded that the plaintiff could not recover from the subcontractor under the theory that the subcontractor had entered into a joint venture with the contractor. While the execution of certain payment and performance bonds by the contractor and subcontractor demonstrated that they jointly assumed certain obligations incident to the excavation work, the existence of the bonds did not establish their relative contributions to a joint undertaking, and the bonds themselves did not contain any provision for the sharing of

profits and losses, as they must in order to establish a joint venture. This Court further concluded that the plaintiff failed to demonstrate that it had a relationship with the subcontractor sufficiently approximating privity such that the subcontractor should be held liable to the plaintiff for breach of contract. However, since the plaintiff paid municipal fees and costs for a required environmental fund, and engineering costs guaranteed by certain payment and performance bonds, the plaintiff, even though it was not a party to those bonds, was entitled, as equitable subrogee of the municipality, to recover from the subcontractor the sums paid to the municipality out of its own pocket. In the relevant bonds, the subcontractor agreed to pay the fees and costs directly to the municipality. The plaintiff, in personally paying the fees and costs, acted to protect its interest in the timely completion and approval of the project, an interest which was threatened when the municipality ordered a stop to all work due to alleged over-excavation. Particularly, only by paying the fees and costs did the plaintiff satisfy the conditions imposed by the municipality before the work could resume. Since these payments, in equity and good conscience, should have been made by the subcontractor, the plaintiff satisfied all of the elements required for an equitable subrogation claim, notwithstanding the fact that the plaintiff may have been initially responsible to the municipality for the fees and costs.

This Court further determined that the conversion causes of action were not duplicative of the breach of contract causes of action, since the plaintiff had an ownership interest in the materials excavated and removed from the site by the contractor and subcontractor in excess of the amount provided for in the excavation agreement, and that the soil and sand excavated and removed from the real property became personal property subject to a conversion claim.

CPLR §§ 306-b, 1024; Late Service On Jane Doe Defendant 233 Days After Filing Of Summons And Complaint; Late Service Allowable In The Interests Of Justice

Bumpus v New York City Tr. Auth. (66 AD3d 26 [July 7, 2009; Dillon, Opinion; Spolzino, Florio, Belen, Concurring])

CPLR 306-b provides that service of a summons and complaint or other initiatory papers in an action must be made upon a defendant within 120 days after the filing of those papers. It further provides that a court may extend the time for service "upon good cause shown" or "in the interest of justice." Here, the Court concludes that the more liberal "interest of justice" standard, rather than the stricter "good cause" standard, should have been applied to extend the time for service upon a previously unidentified female employee of the defendant New York City Transit Authority (hereinafter NYCTA) whose identity was allegedly determined by the plaintiff only after the 120-day period had lapsed.

Here, the plaintiff sought damages arising out of an incident that occurred at a subway fare booth. The complaint named, as defendants, both NYCTA and "Jane Doe," referring to a fare booth clerk employed by NYCTA. The summons and complaint were filed on January 30, 2007, and timely served on NYCTA. Service was not effected upon "Jane Doe" within the 120-day period set forth in CPLR 306-b, *i.e.*, by May 31, 2007, because the plaintiff claimed not to know the true identity of the employee.

As a consequence of the underlying incident, NYCTA scheduled, with notice to the plaintiff, an administrative disciplinary hearing against its employee, Lorna Smith, in March and April 2007. The plaintiff was subpoenaed to testify at the hearing, but failed to appear on each occasion, resulting in the dismissal of administrative charges against Smith on May 1, 2007. The plaintiff learned of Smith's identity through the disciplinary hearing subpoena, but claimed that the name Lorna Smith was so common that efforts to serve process upon her prior to the lapse of the 120-day period for service of process upon her would be fruitless.

On August 24, 2007, after the 120-day service period had ended, the plaintiff served a discovery demand upon NYCTA for the home address of Lorna Smith. NYCTA is not authorized to release such information but, in a discovery compromise, it identified the fare booth location at which Lorna Smith was then assigned. Smith was served at that fare booth promptly after the disclosure of this information, albeit 233 days after the filing of the summons and complaint.

Smith moved to dismiss the action insofar as asserted against her on the ground that service was effected beyond the deadline set forth in CPLR 306-b. Although the plaintiff never cross-moved for leave to extend the time to serve a late summons and complaint upon Smith, the Supreme Court denied Smith's motion on the ground that there was "good cause" for the delay in service. This Court affirmed, but held that the Supreme Court should have applied the "interest of justice" standard.

In addressing the interplay between CPLR 1024, which allows actions against unknown parties, and the 120-day service deadline of CPLR 306-b, the Court recognized that plaintiffs suing an unknown defendant are necessarily hard-pressed to meet the statutory service deadline. Frequently, the time that is expended in awaiting the receipt of a responsive pleading from a known defendant, serving discovery demands, and receiving responses that might identify the unknown party, exhausts, in most instances, the 120-day period available for service. Although, as a general matter, attorneys might avoid this difficult situation by utilizing pre-action disclosure for identifying the unknown defendant before the action is commenced (*see* CPLR 3102[c]), utilizing Freedom of Information Law requests when governmental entities are involved, which require prompt response times (*see* Public Officers Law §§ 87, 89), commencing actions against known defendants well in advance of the statute of limitations so that discovery will disclose the unknown party's identity and the complaint can then be amended to timely add the additional party, using

the relation-back doctrine when there is a unity of interest between the known and unknown parties, and moving pursuant to CPLR 306-b for an extension of time to accomplish service, here, the facts warranted denial of Smith's motion and the extension of time for service upon her in the interest of justice.

Since good cause requires due diligence, and the plaintiff knew of Smith's identity based on the disciplinary hearing subpoena, but failed to make use of that information in a manner that might have resulted in proper service, the extension of the service period should not have been based on good cause. However, under the more liberal "interest of justice" standard, late service was properly permitted since Smith failed to demonstrate that she would be prejudiced as a result of the delayed service, while her name was unknown for a good portion of the 120-day service period, her name was common, the complaint had facial merit, and the time delay was not particularly egregious.

CPLR 2104; Oral Settlement Reached During Trial; Court Refuses To Allow Parties to Place Settlement On The Record; Jury Verdict Ten Times Settlement Amount; Settlement Failed To Comply With CPLR 2104 As Not Being Made In "Open Court"

Diarassouba v Urban (71 AD3d 51 [Dec. 15, 2009; Belen, Opinion; Rivera, Angiolillo, Eng, Concurring])

Where an oral settlement in a medical malpractice action is purportedly made during a jury's deliberation, but is not memorialized in a transcript, stenographic record, or a later writing, it is not enforceable as a settlement made in "open court" pursuant to CPLR 2104, despite the fact that the settlement was purportedly made in a courtroom with a judge present. Here, while the jury was deliberating, the plaintiff's counsel advised the defendants' counsel that his clients had authorized him to accept a settlement offer in the sum of $150,000. When defense counsel asked if the parties had a settlement, the plaintiff's

counsel stated that he accepted. Defense counsel then left the courtroom for several minutes, while the plaintiff's counsel informed the court clerk that the parties had reached a settlement. The clerk replied that he would inform the trial judge, who was returning to the courtroom to respond to a jury note.

When defense counsel then returned to the courtroom, the judge advised him that the jury had reached a verdict, and defense counsel again left the courtroom. When defense counsel returned, the plaintiff's counsel attempted to place the settlement on the record, but the trial judge refused, explaining that it would take the verdict, after which "the parties are free to do what they agreed on. An agreement is an agreement, counsel." The plaintiff's counsel again protested and asked that the settlement be placed on the record, and the trial judge refused, while defense counsel remained silent during this exchange.

The jury rendered a verdict in favor of the plaintiff that was 10 times greater than the settlement amount, finding the defendants 35% at fault for the plaintiff's injuries, and awarding the plaintiff the sums of $800,000 for past pain and suffering and $650,000 for future pain and suffering over 30 years. The plaintiff's counsel, reversing field, asserted that the purported stipulation of settlement was invalid because it had not been placed on the record and since, during his attempts to place the settlement on the record, the defense had not indicated its consent to the settlement, but had instead remained silent. Thereafter, the defendants moved to enforce the purported stipulation of settlement. The trial court granted the motion, finding that the settlement had been made in open court, with the trial judge on the bench and the court clerk and court reporter in attendance. The plaintiff appealed and this Court reversed.

Pursuant to CPLR 2104, a settlement agreement is valid only if the parties stipulate to the settlement in a written agreement or it is made in open court and placed on the record. Generally, the term "open court," within the meaning of CPLR 2104, requires a

judicial proceeding with a judge or justice presiding, some formal entry memorializing the parties' agreement, and a definite and complete agreement.

This Court explained that the "open court" exception in CPLR 2104 was created to codify the previously existing practice of enforcing oral stipulations made in open court during judicial proceedings. Extension of the statute to include settlements not placed on the record and not formally recorded would not only create issues of fact and credibility among the parties and the judge or justice presiding, but be detrimental to judicial integrity. Moreover, extension of the statute as sought by the defendants would result in collateral litigation that would undermine the purpose of CPLR 2104, which was to reduce litigation by enforcing settlements.

Here, the purported stipulation of settlement was not made in "open court" within the meaning of CPLR 2104 since it was not reduced to writing or entered onto the stenographic record. Moreover, defense counsel's silence during the attempts of the plaintiff's counsel to place the settlement on the record was ambiguous since the duty to speak did not arise until the plaintiff's counsel actually placed the settlement on the record, which never happened here. Thus, his silence cannot be viewed as clear and unequivocal acceptance of the settlement.

CPLR 4511; Auto Accident; Judicial Notice Of Hospital Treatment Codes Employed By U.S. Department Of Health And Human Services

Kingsbrook Jewish Medical Center v Allstate Ins. Co. (61 AD3d 13 [Jan. 20, 2009; Dillon, Opinion; Florio, Ritter, Dickerson, Concurring])

Courts may properly take judicial notice of hospital treatment billing codes employed by the United States Department of Health and Human Services (hereinafter USDHHS). Here, a person injured in an automobile accident was treated at a hospital for injuries, and

assigned his right to first-party no-fault benefits to the hospital. The hospital made claim upon the no-fault insurer for the hospital charges, but the insurer denied the claim, asserting that the claim forms submitted by the hospital set forth treatment codes that were improper or not recognized. The insurer further argued that certain treatment provided to the patient, such as rapid heart-rate associated with infection, heart damage caused by alcoholism, potassium deficiency, blood poisoning, and brain damage occasioned by a lack of oxygen, were unrelated to his automobile accident and outside of the no-fault statute. In reply, the hospital argued that the court should take judicial notice of the meaning of the treatment code numbers, as they were derived from codes employed by the USDHHS. This Court explained that, under CPLR 4511, there are two categories of information that may be deemed admissible evidence on the basis of judicial notice—information that is commonly understood and uncontested, such as calendar dates and sunrise times, and information generated from a source that is reliable and widely accepted as unimpeachable, such as certain information compiled by government agencies. This Court held that the USDHHS treatment codes fell into the second category, and that a court could take judicial notice of the diagnoses of and treatments rendered to the patient by applying the USDHHS definition to those codes.

With respect to whether the treatments were related or unrelated to the automobile accident, this Court concluded that the insurer failed to establish its entitlement to judgment as a matter of law since it relied upon an affirmation of counsel which set forth no foundation for any medical opinion, rather than on an affirmation from any medical expert. This Court explained that certain medical conditions that on their face might not appear to be related to an automobile accident could conceivably be conditions exacerbated by the automobile accident, and that exacerbated conditions are within the scope of the No-Fault Law.

CPLR 2311 And 7804(f); Committee Of Suffolk County Legislature Voted To Deny A Legislative Point Of Order Challenging Discharge Of Resolution To Full County Legislature; Nonjusticiable

Matter of Montano v County Legislature of County of Suffolk (70 AD3d 203 [Nov. 17, 2009; Dickerson, Opinion; Mastro, Belen, Chambers, Concurring])

In 2008, a committee of the County Legislature of the County of Suffolk voted to deny a legislative point of order challenging the discharge of a resolution to a vote by the full County Legislature. William Lindsay, in his capacity as Presiding Officer of the County Legislature, participated in the committee's vote to discharge. Subsequently, Ricardo Montano, a member of the County Legislature, but not a member of the committee, commenced the instant hybrid proceeding pursuant to CPLR article 78 against the County Legislature and Lindsay, inter alia, to review the committee's discharge and to enjoin the County Legislature from voting on the resolution, and action for a judgment declaring that the discharge was unlawful and invalid. The County Legislature and Lindsay moved to dismiss the petition/complaint pursuant to CPLR §§ 3211(a) and 7804(f). The Supreme Court denied the motion and granted the petition to the extent of annulling the determination denying the legislative point of order and discharging the resolution to the full County Legislature, and directed the County Legislature to reconsider its interpretation of its own internal rules and procedures. This Court reversed on two grounds. First, the dispute constituted an internal matter for the County Legislature, not for the courts, and thus presented a nonjusticiable controversy. Second, Montano lacked standing to prosecute this proceeding.

Whether the matter presented an internal administrative matter within the County Legislature was a threshold question. As this Court previously held in *Matter of Fornario v Clerk to Rockland County Legislature* (307 AD2d 927) "an issue involving an internal matter of a county legislature, as opposed to the New York State Legislature, presents a

nonjusticiable controversy that is to be handled by the county legislature." Furthermore, this Court concluded that the mere fact that the legislative body at issue here was a county legislature rather than the New York State Legislature did not somehow render inapplicable the doctrines of separation of powers and justiciability. Additionally, this Court concluded that, contrary to Montano's contentions, the challenged action violated neither County Law § 153(8) nor General Construction Law § 41 and, thus, did not contravene an applicable statute, law, or ordinance.

Standing and capacity to sue also presented threshold matters here. Although Montano may have had capacity to sue as a member of the County Legislature, this Court concluded that he lacked standing to prosecute this proceeding/action, notwithstanding his assertion that he was prevented from exercising his right to vote. Montano did not serve on or have a vote in the relevant committee when the resolution was, according to him, improperly voted out of committee. Accordingly, Montano's vote was not nullified or deprived of all validity as a result of the manner in which the resolution was voted out of committee. Thus, the petitioner's claimed injury was no more than "a mere abstract dilution of institutional legislative power, insufficient to confer standing" (*Urban Justice Ctr. v Pataki*, 38 AD3d 20, 25, *lv denied* 8 NY3d 958 [internal quotation marks omitted]).

Criminal Law; CPL 250.10; Mitigation Of Homicide; Affirmative Defense Of Extreme Emotional Disturbance; Notice Of Intent To Proffer Psychiatric Evidence

People v Diaz, (62 AD3d 157 [Mar. 17, 2009; Skelos, Opinion; Fisher, Dickerson, Belen, Concurring])

In this case, this Court held, inter alia, that pursuant to CPL 250.10, a criminal defendant who intends to interpose the affirmative defense of extreme emotional disturbance (hereinafter EED) in mitigation of a charge of murder arising from a homicide

(*see* Penal Law 125.25[1][a]) is required to serve and file a notice of intent to proffer psychiatric evidence and to submit to an examination by a psychiatrist designated by the People, notwithstanding the defendant's declaration that he will offer only lay testimony in support of the EED defense.

The defendant here was charged with the strangulation death his former girlfriend following an argument in which she told the defendant that the younger of their two children had been fathered by another man. Prior to jury selection, the People made a *Molineux* application (*see People v Molineux*, 168 NY 264). The trial court informed defense counsel that in order for the court to conduct the balancing test required by *Molineux*, the defendant must advise the court of his defense. Counsel then revealed the defendant's EED defense, founded on the former girlfriend's revelation to the defendant. The People objected to any evidence of EED because the defendant had not served a notice, pursuant to CPL 250.10(2), of his intent to present psychiatric evidence. Defense counsel argued that he was not required to give such notice because the defendant intended to proffer only lay testimony in support of the defense. The trial court granted the defendant leave to serve a late notice of intent upon finding that his failure to serve and file the notice was not willful, and it eventually directed that the defendant be examined by a psychiatrist designated by the People. Following a trial at which both parties presented expert psychiatric testimony, the defendant was convicted of, inter alia, murder in the second degree. The defendant appealed and this Court affirmed.

Analogizing the facts of this case to those in *People v Berk* (88 NY2d 257, 261, *cert denied* 519 US 859), in which service of a CPL 250.10 notice was required despite the fact that the psychiatrist who was to testify on the defendant's behalf had not examined the defendant, but was only prepared to testify generally as to the "fight or flight" syndrome, this Court concluded that the notice was required regardless of whether the defendant

intended to adduce only lay testimony on the issue of EED. Since the *Berk* court explained that the notice requirement was imposed "to ensure the prosecution sufficient opportunity to obtain the psychiatric and other evidence necessary to refute the proffered defense of mental infirmity [and] to allow the prosecution an opportunity to acquire relevant information from *any source* -- not merely from an independent examination of the defendant -- to counter the defense" (*People v Berk*, 88 NY2d at 264 [internal quotation marks and citations omitted] [emphasis added]), this Court, after acknowledging that lay testimony may, alone, be sufficient to establish the EED defense, nonetheless held that the People must be given a fair opportunity to counter that defense with relevant information from *any source*. Only timely notice of the defendant's intent to present lay psychiatric testimony would satisfy this condition. To hold otherwise would allow a defendant to interpose the defense of EED on the eve of trial, as the defendant did here, without affording the People the opportunity to obtain evidence to counter the defense, thereby placing them at an unfair disadvantage.

Furthermore, this Court rejected the defendant's contention that the People's right to have the defendant submit to a psychiatric examination pursuant to CPL 250.10(3) was limited to those circumstances where the defendant intended to offer expert psychiatric testimony. The Court noted that "psychiatric evidence" is defined without qualification in CPL 250.10(1)(b) as "evidence of mental disease or defect" and, thus, necessarily encompasses both "testimony by a psychiatrist or psychologist" and "other proof" such as the testimony of lay persons. Accordingly, a court may require the defendant to submit to an examination by the People's psychiatrist, notwithstanding the defendant's intention to proffer only lay testimony in support of the EED defense. This Court found that a more restrictive reading would have rendered superfluous the Legislature's distinction between

"testimony by a psychiatrist or psychologist" from "other proof" in describing the sanction for the defendant's failure to cooperate with a court-ordered psychiatric examination.

Criminal Law; Plea Of Guilty Not Voluntary; A Threatened Change In Bail Status May Not Be Used By Prosecutor Or Court As A "Bargaining Chip" To Persuade A Defendant To Plead Guilty

People v Grant (61 AD3d 177 [Feb. 24, 2009; Fisher, Opinion; Covello, McCarthy, Leventhal, Concurring])

The defendant, who had been free on bail during the entire pendency of the case, pleaded guilty only after the County Court told him that, if he did not, he would be remanded to the custody of law enforcement officials until his next scheduled court appearance. Under these circumstances, the defendant's plea of guilty was not voluntary. The defendant's judgment of conviction was thus reversed, his plea was vacated, and the matter was remitted for further proceedings.

A felony complaint charged the defendant, a licensed dentist, with two counts of falsifying business records in the first degree. Bail was set at $1,000. Seven months later, a grand jury returned an indictment containing 40 counts, encompassing various crimes. At the defendant's arraignment on the indictment two months after that, the County Court continued bail in the amount of $1,000; the defendant was conditionally released under the supervision of a county probation department. Four months hence, the trial court recited that the case was "ripe for trial." The trial court also stated that it had reviewed the grand jury minutes and found the evidence of the defendant's guilt to be overwhelming. It informed the defendant that if he were convicted after trial, it would sentence him to incarceration, but if he pleaded guilty within the next two days, it would sentence him to

probation and restitution or, if it found incarceration to be warranted, would permit the defendant to withdraw his plea of guilty. The trial court implored the defendant to either "fish or cut bait"; the case was then adjourned several times until, two months later, the trial court stated that it had received a letter from the county probation department complaining that the defendant was not fully compliant with the conditions of release. The trial court insisted that the defendant make a decision on whether to plead guilty. When defense counsel stated that he had been under the impression that the defendant had been given until the following Monday to decide, the trial court told the defendant that he could either plead guilty immediately and be continued on bail, or wait until the following Monday but be remanded in the meantime. The defendant pleaded guilty that day. He was eventually sentenced to a period of probation and payment of restitution and a fine.

An immediate change in the defendant's bail status is not an appropriate consideration in plea negotiations and may not be used by the prosecution or the court as a "bargaining chip" to persuade a defendant to plead guilty. Accordingly, when a trial court threatens to increase bail or remand the defendant unless a guilty plea is entered, any resulting plea cannot be deemed voluntary because the defendant's decision to plead guilty would no longer represent a free choice among legitimate alternatives.

Criminal Law; Alibi Notice; What Constitutes An Alibi; Trial Court Improperly Precluded Testimony, The Primary Purpose Of Which Was To Attack Credibility Of A Witness, For A Failure To Alibi Notice

People v Green (70 AD3d 39 [Nov. 24, 2009; Fisher, Opinion; Dickerson, Eng, Hall, Concurring])

A criminal defendant is not obligated to provide the prosecution with notice of his or her intent to adduce alibi evidence, as otherwise required by CPL 250.20(1), where that evidence is offered primarily for another purpose, such as to attack the credibility of a prosecution witness.

Here, the defendant challenged the credibility of minivan driver who identified the defendant as a front-seat passenger who exited the van and discarded a gun when the van was stopped by the police. The defendant contended that he had gotten into a dispute with the driver only one week prior to the date on which the crime was committed, and that the driver thus had a motive to lie. Accordingly, the defendant attempted to call a witness who allegedly both observed the dispute, and could testify that defendant did not get into the van with the driver on the day of the crime. The trial court precluded the defendant from calling the witness for the defendant's failure to provide notice of alibi evidence.

This Court reversed the judgment of conviction, noting that, while in some instances evidence proffered for another purpose may also have some characteristics of alibi evidence, no alibi notice was required in this case, since the testimony was proffered to attack the credibility of the driver.

In any event, this Court held that the trial court erred in precluding the evidence since the police had been aware of the witness and had interviewed him, and the defense's failure to give alibi notice was not an attempt to gain a tactical advantage, but was instead based on a good faith belief that alibi notice was not required.

Criminal Law; Penal Law § Rebuttable Presumption That Serious Injury Is The Result Of Intoxication Is Not Unconstitutionally Vague; No Due Process Violation

People v Mojica (62 AD3d 100 [Feb. 24, 2009; McCarthy, Opinion; Fisher, Covello, Leventhal, Concurring]).

Penal Law § 120.03(1) provides that a person is guilty of vehicular assault in the second degree when he or she causes serious physical injury to another person, inter alia, while operating a motor vehicle while impaired or intoxicated, and causes that serious physical injury as a result of such intoxication. The statute also provides that proof of such operation and the causation of such serious physical injury raises a rebuttable presumption that the serious injury is the result of such intoxication. In this case, this Court held that, contrary to the defendants' contentions, the statute did not violate due process and was not void for vagueness.

The defendant contended that Penal Law § 120.03 violates the right to due process because of the rebuttable presumption that it is the intoxication of a person convicted of driving while intoxicated that caused the serious physical injuries. This Court rejected the contention since the presumption did not give rise to arbitrary and discriminatory enforcement of the law. Specifically, the Court rejected the notion that an individual who was driving while intoxicated without causing the subject accident could nevertheless fall within the parameters of the statute. Rather, this Court concluded that where a driver's operation of a vehicle could not be deemed a proximate cause of the subject accident, the rebuttable presumption would not arise. In any event, the defendant could not assert a due process challenge, as applied to him, to the hypothetical conduct of others.

This Court further concluded that the language of the statute conveys a sufficiently definite warning as to the proscribed conduct "when measured by common understanding and practices" (*People v Shack*, 86 NY2d 529, 538) and, thus, rejected the defendant's challenge based on the statute's alleged vagueness. Specifically, the phrase "as a result of such intoxication" in the statute would be understood to mean that serious physical injury occurs "by virtue of" or "flowing from" a driver's voluntary consumption of alcohol, to the

extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

Criminal Law; Dismissal Of Indictment On Speedy Trial Grounds; "Exceptional Circumstances" Exception In CPL § 30.30(4)(g) Not Applicable

People v Price (61 AD3d 127 [Feb. 10, 2009; Mastro, Opinion; Angiolillo, Carni, Eng, Concurring])

In this case, this Court held that the People may not avoid dismissal of an indictment on speedy trial grounds by invoking the "exceptional circumstances" exclusion set forth in CPL 30.30(4)(g) to exclude the period of time during which the People awaited a determination in an appeal pending in an unrelated prosecution involving similar legal issues, in anticipation of the establishment of case law more favorable to its position.

The defendant was arrested in Suffolk County on February 1, 2006, and was charged with attempted disseminating indecent material to a minor in the first degree. On July 25, 2006, this Court decided *People v Kozlow* (31 AD3d 788, *lv denied* 10 NY3d 865), which involved a prosecution of a different defendant for the same offense, and which bore strong factual similarities to this case. In *Kozlow*, this Court concluded that the evidence of attempted disseminating indecent material to a minor in the first degree was legally insufficient where the defendant's internet communications with an undercover police officer whom he believed to be a minor did not contain any visual sexual images. Similarly, in this case, the defendant's conduct did not include the communication of any visual sexual images. The People viewed this Court's decision in *Kozlow* as an impediment to the continued prosecution of the defendant here, and it took no further action in this case.

Significantly, the People did not seek to adjourn the matter, to withdraw the charge, or to dismiss the felony complaint in the wake of this Court's decision.

On October 17, 2006, the Court of Appeals granted leave to appeal in *Kozlow*. On April 26, 2007, the Court of Appeals reversed this Court, holding in part that a defendant charged with attempted disseminating indecent material to a minor in the first degree "may properly be convicted under that statute even though his communications contained no nude or sexual images" (*People v Kozlow*, 8 NY3d 554, 556, *lv denied* 10 NY3d 865).

Thereafter, the People obtained an indictment of the defendant for attempted disseminating indecent material to a minor in the first degree, and the defendant was arraigned on that indictment on June 14, 2007, more than 16 months after he initially was arraigned on a felony complaint. The defendant moved pursuant to CPL 210.20(1)(g) and CPL 30.30(1)(a) to dismiss the indictment on speedy trial grounds. The People opposed the motion, contending that the time between this Court's decision in *Kozlow* and the decision of the Court of Appeals reversing it should be excluded pursuant to the "exceptional circumstances" provision of CPL 30.30(4)(g).

This Court concluded that the period of time at issue in this case, and the shift in the law which it represented, did not constitute "exceptional circumstances" within the meaning of CPL 30.30(4)(g). While the examples of exceptional circumstances set forth in that section are not exclusive, the statute contemplates situations in which a district attorney encounters difficulty in obtaining evidence or in otherwise preparing for trial in the particular case before the court. Furthermore, although the Penal Law excludes reasonable periods of delay caused by appeals which involve the particular defendant who is being prosecuted, it does not provide for an exclusion of time during the pendency of an appeal in an unrelated matter which merely involves similar legal issues. To hold otherwise would permit the People to charge a defendant with a crime and then hold the matter open indefinitely on the

ground that a potentially relevant issue in another case before a different court might influence the matter, an approach antithetical to the purpose of the speedy trial rule.

Criminal Law; New Trial Ordered; Jury Verdict Was Inconsistent

People v Rodriguez (69 AD3d 143 [Oct. 13, 2009; Covello, Opinion; Mastro, Balkin, Austin, Concurring]).

Where a jury acquitted a defendant of depraved indifference murder under Penal Law § 125.25(4), but convicted her both of the lesser-included offense of criminally negligent homicide and manslaughter in the first degree under Penal Law § 125.20(4), the verdict was inconsistent, since a criminal defendant cannot act both recklessly and negligently with respect to a particular result of the same act or omission.

Specifically, the defendant allegedly caused the death of her baby soon after giving birth to him. A common element of the count of depraved indifference murder and the count of manslaughter in the first degree with which she was charged is that each crime requires that an adult defendant caused the death of a child less than 11 years old.

The trial court charged criminally negligent homicide as a lesser-included offense of depraved indifference murder under Penal Law § 125.25(4), instructing the jury to initially consider depraved indifference murder under Penal Law § 125.25(4), but if it acquitted the defendant of that crime, it had to consider criminally negligent homicide as a lesser-included offense. The trial court then erroneously instructed the jury that, regardless of the verdict on the first count, it had to consider the second count charging manslaughter in the first degree under Penal Law § 125.20(4).

In convicting the defendant of manslaughter in the first degree under Penal Law § 125.20(4), the jury necessarily found that she recklessly caused the death of her baby. Yet, in convicting her of criminally negligent homicide, the jury necessarily found that the defendant, with criminal negligence, caused the death of her baby. Thus, the jury impermissibly assigned different culpable mental states to the defendant with respect to a particular result of a particular act or omission, and the jury verdict was, accordingly, inconsistent.

Criminal Law; Appeal To Department Of Correctional Services [DOCS] Of Adverse Ruling Denying Petitioner's Request To Have A Particular Witness Called To Testify; DOCS Properly Ordered A Rehearing

Matter of Stallone v Fischer (67 AD3d 125 [Sept 15, 2009; Leventhal, Opinion; Mastro, Covello, Eng, Concurring])

In the context of a Tier III inmate disciplinary hearing, a hearing officer's denial of a request to call a witness without any stated good-faith reason is a constitutional violation that generally requires expungement. However, when an inmate requests only a rehearing, expungement is not required and a rehearing may be granted. Here, the Court concluded that because the petitioner sought reconsideration and *either* expungement or a rehearing, the New York State Department of Correctional Services (hereinafter DOCS) properly granted a rehearing.

However, with respect to the petitioner's claim that an ex parte conversation between the hearing officer and the witness violated his constitutional due process rights, this Court remitted the matter to the Supreme Court to direct DOCS to file a transcript of the rehearing and determine whether there was a constitutional violation.

Criminal Law; Sex Offender Registration Act [SORA]; Defendant Did Inflict "Physical Injury" As Defined In SORA; Defendant Properly Designated Level Two Sex Offender

People v Sullivan (64 AD3d 67 [May 12, 2009; Rivera, Opinion; Mastro, Covello, Leventhal, Concurring])

Where a criminal defendant raped his ex-girlfriend, again appeared at the victim's house in California, and, after a lengthy struggle, forcibly raped her again, causing her to sustain bruises to her arms, a scratch to the right cheek, a bruise and "small abrasion" to the right lip, a bruise to her right mid thigh, scratches to the back, and an "abrasion" in her vaginal area, the defendant inflicted "physical injury" within the meaning of the Sex Offender Registration Act (hereinafter SORA) Risk Assessment Guidelines and Commentary.

Here, the Board of Examiners of Sex Offenders assessed only 10 points under risk factor 1, "Use of Violence," and the People requested that the Supreme Court assess 15 points for inflicting physical injury. The Supreme Court found "clear and convincing evidence in the police reports that the victim suffered physical injury," and assessed 15 points under this risk factor, and the defendant was designated a level two sex offender.

In affirming, this Court noted that under both Penal Law § 10.00(9) and the SORA Risk Assessment Guidelines and Commentary, physical injury means "impairment of physical condition or substantial pain." The victim here suffered "substantial pain" despite the defendant's attempts to minimize the injuries she sustained, since the injuries inflicted were not mere "petty slaps," but were inflicted by the defendant during the course of a brutal rape, during which the victim desperately tried to fend him off.

Criminal Law; Drug Law Reform Act Of 2004 [DLRA 2004]; Resentencing Court Does Not Have The Power To Direct That A Sentence For A Felony Drug Offense Run Concurrently With A Sentence For A Non-Drug-Related Felony Where The Sentences Were Originally Ordered To Run Consecutively

People v Vaughan (62 AD3d 122 [Mar. 24, 2009; Prudenti, Opinion; Mastro, Dillon, Balkin, Concurring])

Although the Drug Law Reform Act of 2004 (hereinafter the 2004 DLRA) was intended to ameliorate the harsh sentences previously authorized for drug offenses, it did not vest a resentencing court with the power to direct that a sentence for a felony drug offense run concurrently with a sentence for a non-drug-related felony, where the sentences were originally ordered to run consecutively.

The defendant was originally sentenced to indeterminate terms of imprisonment of 15 years to life on a drug possession count, 9 years to life on a weapon possession count, and 6 years to life on an assault count, all terms to run consecutively to each other. The defendant moved for resentencing pursuant to the 2004 DLRA, and requested not only that the court change his sentence on the drug possession count to a determinate term of imprisonment of 15 years, but also that the Supreme Court direct this sentence to be served concurrently with the sentences imposed on the other counts.

Under CPL 430.10, a legally imposed sentence of imprisonment "may not be changed, suspended, or interrupted" once the defendant has begun serving the sentence, "[e]xcept as otherwise specifically authorized by law." Although changing a sentence is authorized by the 2004 DLRA, the scope of that authorization is limited. The purpose of the resentencing provision of the 2004 DLRA is simply to retroactively reduce the level of punishment for certain drug offenses. The statute is not designed to grant the resentencing court plenary power over the defendant's sentence, including the making of a new determination as to how the sentence should be served in relation to sentences imposed for other, non-drug-related felonies.

In affirming the Supreme Court's order denying the defendant's motion, this Court distinguished the Court of Appeals' holding in *Matter of Murray v Goord* (1 NY3d 29, 32) that "when there is a vacated judgment of conviction and subsequent resentencing of someone subject to an undischarged term of imprisonment," the discretion to determine whether sentences should run concurrently or consecutively "devolves upon the last judge in the sentencing chain." In *Murray,* the change from consecutive sentences to concurrent sentences occurred only after the defendant's judgment of conviction was vacated, and the defendant was returned to his pretrial status, whereupon he engaged in plea negotiations and entered a plea of guilty, beginning the sentencing process anew. Here, by contrast, the Supreme Court's authority under the 2004 DLRA was limited to substituting a determinate term of imprisonment authorized under that statute's new sentencing structure for the previously imposed indeterminate sentence.

Criminal Law: Writ Of Prohibition Granted Halting Prosecution Of Ten Philippine Nurses For Endangering Welfare Of A Child And Physically Disabled Person After Simultaneous Resignation; First And Thirteenth Amendments To U.S. Constitution

Matter of Vinlaun v Doyle (60 AD3d 237 [Jan. 13, 2009; Eng, Opinion; Santucci, Angiolillo, Chambers, Concurring])

In this case, 10 nurses from the Republic of the Philippines, and an attorney who had given them legal advice, petitioned for a writ of prohibition to halt the respondents from prosecuting them for certain misdemeanor offenses, including endangering the welfare of a child and endangering the welfare of a physically-disabled person, arising from their simultaneous resignations from positions at a Long Island nursing home due to alleged unfair employment practices. This Court, in granting the petition, concluded that the criminal prosecutions constituted an impermissible infringement upon the Thirteenth

Amendment rights of the nurses to be free from involuntary servitude, and the First Amendment rights of their attorney.

The nurses involved in this proceeding were all recruited to work in the United States by a Philippines-based company that hires nurses for several nursing care facilities in New York controlled and managed by Sentosa Care, LLC. According to the nurses, the recruitment agency promised that they would be hired directly by individual nursing homes within the Sentosa network. To this end, each of the nurses signed an employment contract with the specific nursing homes for which they had been recruited to work. However, when the nurses arrived in the United States, they learned that they would be working for an employment agency instead of the specific nursing homes with which they had signed contracts, allegedly a lower-paying and less-stable form of employment. The nurses were assigned by the employment agency to the Avalon Gardens Rehabilitation and Health Care Center in Smithtown. Among the patients at Avalon Gardens are chronically ill children who need the assistance of ventilators to breathe. All of the nurses were trained to care for children on ventilators, and five of the nurses worked almost exclusively with these children.

The nurses alleged that, almost immediately upon their arrival at Avalon Gardens, issues arose over the terms of their employment, and that the promises made to them in the Philippines were breached. Believing that their complaints were not being addressed, the nurses sought assistance from the Philippines Consulate, and were referred to attorney Felix Vinlaun. When the nurses met with Vinlaun, they told him that they wanted to resign because their working conditions were intolerable. Vinlaun allegedly counseled the nurses that, under the Education Law, they could not leave their positions during a shift when they were on duty. Although Vinlaun also told the nurses that they had the right to resign once their shifts had ended, he suggested that it might be in their best interest to remain at Avalon Gardens while he pursued other remedies on their behalf. However, on April 7,

2006, the nurses resigned from their employment either at the end of their shift, or in advance of their next shift. The amount of notice provided before the next scheduled shift for each nurse ranged from 8 to 72 hours.

Three days after the resignations, Avalon Gardens filed a complaint with the New York State Department of Education, charging that the nurses had abandoned their patients by simultaneously resigning without adequate notice. Following an investigation, the Education Department closed the nurses' cases, concluding that they had not committed professional misconduct because none of them resigned in mid-shift, and no patients were deprived of nursing care because the facility was able to obtain appropriate coverage.

Nonetheless, in March 2007, nearly one year after the resignations, a Suffolk County grand jury handed down a 13-count indictment against the nurses and Vinlaun, charging them, inter alia, with having acted in concert to endanger the welfare of children and physically-disabled patients at Avalon Gardens. The indictment also charged Vinlaun with criminal solicitation in the fifth degree for allegedly requesting the nurses to resign immediately from Avalon Gardens.

After unsuccessfully moving to dismiss the criminal indictment in the Supreme Court, Vinlaun and the nurses petitioned this Court for a writ of prohibition halting the prosecution. In granting the petition, this Court concluded that subjecting the nurses to criminal sanctions for their act of resigning contravened the Thirteenth Amendment proscription against involuntary servitude. In reaching its conclusion, this Court noted that the indictment explicitly made the nurses' conduct in resigning a component of each of the crimes charged and, thus, had the practical effect of exposing the nurses to criminal penalty for the exercise of their right to leave their employment at will. This Court reasoned that, while Thirteenth Amendment rights are not absolute, this was not an exceptional case justifying an infringement of those rights in light of the fact that the nurses were engaged in

private employment, and no facts suggesting an imminent threat to the pediatric patients at Avalon Gardens had been alleged.

This Court further concluded that the prosecution violated Vinlaun's First Amendment rights of expression and association. In this regard, the Court observed that an attorney has a constitutional right to provide legal advice to his clients within the bounds of the law and that, since the nurses' conduct in resigning could not, under the circumstances of this case, subject them to prosecution, it could not be said that Vinlaun had advised them to commit a crime. Furthermore, Vinlaun's legal advice to the nurses was objectively reasonable, and an attorney should not lose the protection of the First Amendment even if his or her advice is later determined to be incorrect.

Discovery; HIPPA-Compliant Authorizations Forms; Notice Must Be Given That Purpose Of Interview Is To Assist Defense Counsel During Litigation And Participation Is Voluntary

Porcelli v Northern Westchester Hosp. Ctr. (65 AD3d 176 [June 9, 2009; McCarthy Opinion; Mastro, Miller, Carni, Concurring]).

Consistent with the Court of Appeals' opinion in *Arons v Jutkowitz* (9 NY3d 393), a plaintiff may include, directly on the authorizations he or she provides to nonparty treating physicians in compliance with HIPAA, a statement to the effect that the purpose of an informal, ex parte interview sought by defense counsel is solely to assist defense counsel at trial and that participation is voluntary. While the information could also have been conveyed to the treating physicians by defense counsel, *Arons* does not require that defense counsel be the only messenger of such information.

In *Arons*, the Court of Appeals held that there was no general prohibition against defense counsel conducting an ex parte interview with a nonparty physician, even after a

note of issue had been filed, provided that defense counsel complied with the procedural prerequisites set forth in the HIPAA privacy rule (45 CFR parts 160, 164). That rule forbids an organization subject to its requirements from using or disclosing an individual's health information, except as mandated or permitted by its provisions.

Here, this Court rejected the contention of one of the defendants that *Arons* requires that the admonition may be made only by defense counsel, observing that, in *Arons,* the Court of Appeals did not disturb or criticize the trial court's requirement in a companion case that the admonition be placed directly on the authorizations themselves. The admonitions at issue in this case were unlikely to chill a nonparty physician's participation in an ex parte interview with defense counsel, as the admonitions were facially neutral, and the identity of the party who conveys the message explaining the purpose of the interview is of secondary importance.

Divorce; "Social Abandonment" Analogous To "Dead Marriage" And Does Not Provide Grounds For Divorce Under New York Law

Davis v Davis (71 AD3d 13 [Nov. 17, 2009; Dillon, Opinion; Miller, Leventhal, Chambers, Concurring])

This appeal raised an issue of first impression: whether, in an action decided before the effective date of chapter 384 of the Laws of 2010, which provides that an irretrievable breakdown of the marital relationship for at least six months is a ground for divorce, "social abandonment" by one spouse provides a ground for divorce under New York law. This Court answered this question in the negative.

The plaintiff alleged in her complaint that her husband refused to engage in any social interaction with her by refusing to celebrate with her, or acknowledge, Valentine's Day, Christmas, Thanksgiving, and birthdays; by refusing to eat meals with her; by refusing

to attend family functions with her; by refusing to accompany her to movies, shopping, restaurants, and church services; by leaving her once at a hospital emergency room; by removing her belongings from the marital bedroom; and by otherwise ignoring her. The parties maintained separate bedrooms and had been married for 41 years. The husband moved to dismiss the complaint pursuant to CPLR 3211 for failure to state a cause of action. The wife argued in opposition that, pursuant to three somewhat recent Supreme Court decisions in Nassau, Queens, and Westchester Counties, "social abandonment" of a spouse breaches the marriage contract to the same extent as an actual abandonment or a sexual abandonment. The Supreme Court dismissed the complaint

This Court affirmed, holding that, as of 2009, New York did not recognize social abandonment as a ground for divorce. This Court analyzed the development of case law which, from 1928 forward, expanded the statutory abandonment ground to include "constructive" sexual abandonment, while noting that no appellate court ever extended the scope of the abandonment statute (*see* Domestic Relations Law § 170[2]) beyond sex-based constructive abandonment. The plain language of that section does not support any such extension.

This Court noted that the law provides special protections to sex within marriage, including the adultery statute (*see* Penal Law § 255.27) and the marriage annulment statute if a spouse has an incurable physical incapacity for sexual relations unknown to the other spouse at the time of the marriage ceremony (*see* Domestic Relations Law § 140[d]). Similar legal protections are not afforded to spouses with respect to social interaction within the marriage. Social abandonment, this Court held, is more in the nature of a "dead marriage" or "irreconcilable differences," which, in accordance with the law as of 2009, have been consistently held to provide no grounds for divorce in New York. This Court noted its concern that were social abandonment to be recognized as a ground for divorce, it would

elude clear definition. Additionally, this Court observed that recognition of a new ground for divorce would amount to judicial usurpation of the legislative function. On August 13, 2010, the Governor signed chapter 384 of the Laws of 2010, applicable to divorce actions commenced on or after October 12, 2010, making irretrievable breakdown of the marital relationship for at least six months a newly recognized ground for divorce.

Divorce; Equitable Distribution; Domestic Relations Law § 236(B)(1)(d)(2); Property Status Of Fire Fighter's Disability Pension And September 11th Victim Compensation Fund Award

Howe v Howe (68 AD3d 38 [Sept. 29, 2009; Spolzino Opinion; Dillon, Florio, Angiolillo, concurring]).

In this divorce action, the husband claimed that a portion of his New York City Fire Department disability pension was his separate property, despite the lack of evidence by which the disability and nondisability portions of the pension could be distinguished. The wife, meanwhile, sought a determination that a portion of the plaintiff's September 11th Victim Compensation Fund award which was designated as compensation for economic loss did not constitute "compensation for personal injuries" within the meaning of Domestic Relations Law § 236(B)(1)(d)(2), and, therefore, is marital property. This Court concluded that, under the circumstances presented in this case, the disability portion of the husband's pension, and thus his separate property interest therein, could be determined by a pension administrator. This Court further concluded that even so much of the husband's September 11th Victim Compensation Fund award as was designated as compensation for economic loss constituted "compensation for personal injuries" within the meaning of Domestic Relations Law § 236(B)(1)(d)(2) and, therefore, was the plaintiff's separate property.

This Court observed that pension benefits, and vested rights therein, are marital property, except to the extent that they were earned before the marriage or following the commencement of a matrimonial proceeding. Thus, inasmuch as a disability pension constitutes deferred compensation, it is subject to equitable distribution. Conversely, so much of a disability pension as constitutes compensation for personal injuries is separate property not subject to equitable distribution. The presumption is that the entire pension is marital property until the recipient establishes facts to the contrary.

This Court concluded that, based on the facts before it in this case, it would be possible to identify the separate portions of the plaintiff's disability pension, despite the limited evidence in the record. While the record did not contain evidence necessary to perform the calculation of the disability and non-disability portions of the plaintiff's pension, based on the methodology set forth in *Palazzolo v Palazzolo* (242 AD2d 688), this Court concluded that the necessary facts were known by the plan administrator when the administrator calculated the plaintiff's disability pension.

With regard to the wife's claim concerning the husband's September 11th Victim Compensation Fund award, this Court observed that compensation for personal injuries constitutes separate property for equitable distribution purposes. This Court stated that such an award is the equivalent of a recovery in a personal injury action, the noneconomic portion of which clearly falls within this category of separate property. Thus, the only question was whether the economic component of the award fell within that category as well.

This Court found the phrase "compensation for personal injuries" in Domestic Relations Law § 236(B)(1)(d)(2) to be ambiguous. Nonetheless, the logic of the Equitable Distribution Law is that pain and suffering is personal and, therefore, the compensation for it is separate, but earnings are marital and, therefore, the compensation for lost earnings

during the marriage should be marital as well. Thus, although the economic portion of a personal injury award should be marital property, the legislative history actually compels the contrary result. Specifically, the commentary of one of the drafters of the law suggested that the statute's purpose was to exclude from marital property both the economic and the noneconomic portion of a personal injury award. Although it may be a rare case where legislative intent may be gleaned from a commentary critical of the Legislature's action, this is just such a case.

Eminent Domain; Condemnation Of Public Roadway By Village Contingent On De-Mapping Of Portions Of Two Streets; CPLR Article 78 Petition Challenging De-Mapping Granted; De-Mapping Only Allowed When Road Is Useless As A Right Of Way By Public; Village Failed To Take A "Hard Look"

Matter of Baker v Village of Elmsford (70 AD3d 181 [Dec. 8, 2009; Dillon, Opinion; Angiolillo, Leventhal, Chambers, Concurring])

Village Law § 6-612 authorizes villages to de-map streets, and case law has interpreted that authority as requiring that de-mapping may only occur when the road in question is "useless as a right-of-way to the general public." A road is not "useless" where, as here, it serves a salutary, although perhaps only sporadically beneficial, purpose of providing access to and from the petitioners' properties during times that surrounding areas were flooded.

Here, the Village of Elmsford de-mapped and, in effect, condemned a public roadway located near premises owned by the petitioners. The Village had purchased certain property from a nonparty for use as a service and storage area for its Department of Public Works. The purchase contract was conditioned upon a de-mapping of portions of Vreeland Avenue and River Street, so that the de-mapped areas would be deeded to the seller in exchange for a credit against the purchase price. Vreeland Avenue and River Streets had been

mapped by the Village for more than 80 years, as depicted in zoning maps filed in 1930, 1966, and 1980. The roads are near the Saw Mill River, in an area designated as a flood zone by the Federal Emergency Management Agency. The Village published notice of a hearing on the proposed de-mapping, and prepared short environmental assessment forms pursuant to SEQRA, concluding that the de-mapping would not negatively affect the area's air quality, surface or ground water, noise levels, traffic patterns, waste disposal, erosion, drainage, or flooding problems. At the hearing, various Village officials stated that the de-mapping would not affect property values, nor fire, water and law enforcement services. The petitioners opposed the de-mapping, arguing that the proposed de-mapped portions of the roadways provided the sole means of access to and from their properties during times of periodic Saw Mill River flooding. The Village Board nonetheless voted to de-map and, in effect, condemn the designated portions of roadways.

In reversing the Supreme Court and annulling the Village's determination, this Court determined that the Village had failed to take a "hard look" at potential environmental impacts of the project facilitated by the de-mapping, as required by SEQRA. It further concluded that an alternative access through a private driveway to another roadway was not a reasonable alternative, as there could be no guarantee that the private drive would be open to the petitioners during emergencies.

Eminent Domain; Valuation Of Trade Fixtures; Claim For Compensation Dismissed Because Trade Fixtures Inconsistent With Highest And Best Use Of Property

Matter of West Bushwick Urban Renewal Area Phase 2 (69 AD3d 176 [Oct. 20, 2009; Dickerson, Opinion; Mastro, Eng, Hall, Concurring]).

In this eminent domain proceeding, the claimants sought compensation for the taking of their real property by the condemnor, City of New York, and, in addition, for certain trade fixtures located on such property. The trial court dismissed the claims for compensation for the trade fixtures. In affirming that ruling, this Court held that where trade fixtures are inconsistent with the highest and best use of the property that is the subject of the taking, claimants are not entitled to compensation for both the value of the property in its highest and best use and the trade fixtures which are inconsistent therewith. Here, it was undisputed that the trade fixtures on the claimants' property would have to be removed in order to realize the property's highest and best use as mixed commercial and residential real estate. Thus, the claimants were not entitled to compensation for the trade fixtures.

Employer/Employee; Plaintiffs Sue Defendant Employer Alleging Unfair Employment Practices Including False Inducements To Accept Employment, Unreasonable Demands, And Defamatory Statements

Epifani v Johnson (65 AD3d 224 [June 23, 2009; Dickerson, Opinion; Mastro, Covello, Leventhal, Concurring])

The plaintiffs asserted numerous causes of action against the defendant to recover damages arising from their employment as members of the defendant's household staff. This Court held that the causes of action for fraudulent inducement and misrepresentation should have been dismissed for failure to state a cause of action. These claims were premised upon the allegation that the plaintiffs were induced to accept employment based upon job descriptions that bore little relation to the actual tasks assigned to them. However, since the plaintiffs were only offered at-will employment, which could be terminated at any time and for any reason, they could not establish reasonable reliance on

their prospective employer's representations about the job, an element necessary to the recovery of damages under theories of fraudulent and negligent misrepresentation.

The Court further held that the allegations regarding the defendant's abusive speech and oppressive work rules, although unquestionably objectionable, were not so outrageous in character, and so extreme in degree, as to sufficiently state a cause of action to recover damages for intentional infliction of emotional distress. This Court also held that one of the plaintiffs failed to state a cause of action for prima facie tort. This cause of action, premised on the allegation that the defendant unnecessarily forced this plaintiff to stand for the duration of her workday, despite the defendant's knowledge of the plaintiff's foot and ankle injuries, merely pleaded general damages for noneconomic loss, and not the required "special damages" for this cause of action. The plaintiff also failed to plead that the defendant's actions were motivated solely by disinterested malevolence, a necessary element of prima facie tort.

The Court also held that in order to state a claim of retaliatory discharge pursuant to Labor Law § 215, a plaintiff must allege that he or she complained to his or her employer about a specific violation of the Labor Law. The plaintiffs failed to make this allegation here.

This Court held, however, that one of the plaintiffs adequately stated a cause of action to recover damages for defamation based upon the defendant's alleged statement that she was terminated from her employment because she was stealing from the defendant. This alleged statement constituted a claim that this plaintiff committed a "serious crime," and thus, qualified as slander per se. Accordingly, the plaintiff was not required to plead special damages in relation to this cause of action.

Environmental Law; Illegal Dumping; Collateral Estoppel Effect Of A Guilty Plea; Criminal Court Restitution Does Not Preclude Claims For Civil Damages, But Serves As A "Set Off"

City of New York v College Point Sports Assoc., Inc. (61 AD3d 33 [Jan. 20, 2009; Dillon, Opinion; Miller, McCarthy, Chambers, Concurring])

In this case, the plaintiff City of New York alleged that the defendants illegally dumped debris on a site owned by the City. The City sought to recover $16.5 million to compensate it for the cost of remediating the polluted property, asserting causes of action for restitution and damages recoverable by a crime victim under CPLR 213-b. Prior to the filing of this civil lawsuit, two of the defendants, the Casalinos, pleaded guilty to certain acts of illegal dumping and, as part of their plea agreements, agreed to pay restitution in an aggregate amount between $250,000 and $1,000,000.

This Court held that the City, as a crime victim, was entitled to summary judgment on its cause of action pursuant to CPLR 213-b, to the extent that the Casalinos pleaded guilty to certain conduct in the criminal proceedings. The entry of the guilty pleas had a collateral estoppel effect in the subsequent civil action as the relevant issue was identical to the issue decided in the criminal action, was necessarily decisive in the civil action, and the Casalinos had a full and fair opportunity to contest the issue in the criminal proceeding.

This Court also held that the doctrine of accord and satisfaction did not bar the City from seeking civil damages beyond the negotiated criminal restitution. Penal Law § 60.27 allows crime victims to receive restitution, and this Court held that municipal entities qualify as crime victims entitled to restitution for out-of-pocket losses directly attributable to the crime. Penal Law § 60.27(6) further provides that criminal court restitution does not preclude claims for civil damages, although this Court did hold that the amount of criminal restitution operates as a "set-off" against civil damages that are later recovered, to prevent a double recovery by the crime victim. This Court determined that, insofar as accord and satisfaction was concerned, the District Attorney in the criminal proceeding and the City's Department of Investigation, which accumulated evidence for the criminal and civil

proceedings, were separate entities for these purposes, so that the negotiated criminal restitution did not bar the City's civil suit for damages.

Executive Law § 296(1); Single Employer Doctrine Adopted To Meet Definition Of "Employer" Under Executive Law § 292(5); Finding Of Sexual Discrimination Affirmed; $15,000 Awarded For Mental Anguish

Matter of Argyle Realty Assoc. v New York State Div. of Human Rights (65 AD3d 273 [June 30, 2009; Belen, Opinion; Covello, Angiolillo, Chambers, Concurring])

The petitioner, Argyle Realty Associates, sought to review a determination of the Commissioner of the New York State Division of Human Rights, finding that the petitioner discriminated against its employee on the basis of her pregnancy, and therefore her gender, and awarding her $15,000 for mental anguish. This Court held that the number of employees of the petitioner's interconnected businesses could be aggregated to meet the four-employee statutory minimum required for it to be deemed an "employer" under Executive Law § 292(5). This Court concluded that the employees of all related entities may be aggregated, adopting the "single employer doctrine" applied by federal courts in interpreting the analogous federal anti-discrimination statute (Title VII of the Civil Rights Act of 1964), which addresses similar forms of discrimination, employs the same standards of recovery, and affords victims similar forms of redress as the New York Human Rights Law.

As the New York Court of Appeals has done, this Court looked to federal precedent analyzing Title VII for guidance in interpreting the parallel numerosity requirement in the New York Human Rights Law. Following the four criteria set forth by the United States Supreme Court for determining whether companies are sufficiently interrelated to constitute a single entity for the purpose of Title VII (*see Radio & Television Technicians v Broadcast Service of Mobile, Inc.*, 380 US 255), this Court found significant evidence of common ownership, common management, common financial control, and centralized control of labor relations between the petitioner and the related companies in question. By

aggregating the number of employees of the petitioner's interrelated businesses, the four-employee statutory minimum under Executive Law § 292(5) was met.

On the merits, this Court applied a rational basis review and affirmed that the finding of sex discrimination was based on substantial evidence. Additionally, this Court rejected the petitioner's contention that the $15,000 award for mental anguish was punitive and excessive. Due to the state's strong interest in preventing discrimination, the employee did not have to produce the equivalent quantum of evidence as a claim unrelated to discrimination may have required. She needed only to demonstrate that the relief imposed was rationally related to the discriminatory conduct.

Family Law; Penal Law §§ 265.00(3), 400.05(6); 42 USC § 1983; Summary Judgment For Plaintiff Since Sheriff Was Without Authority To Destroy Rifles, Shotgun, And Shooting Accessories

Maio v Kralik (70 AD3d 1 [Nov. 10, 2009; Dickerson, Opinion; Dillon, Covello, Miller, Concurring]).

On January 3, 2002, the plaintiff surrendered to the Sheriff's Department three handguns, three rifles, one shotgun, and certain shooting accessories as required under an order of protection entered against the plaintiff. In August 2006, the plaintiff went to the Sheriff's Department to reclaim his weapons and learned that they been destroyed on May 12, 2006, pursuant to Penal Law § 400.05(6). The plaintiff commenced this action, asserting a violation of 42 USC § 1983 based on the unlawful disposal of his property without due process of law and adequate notice.

This Court determined that the plaintiff was entitled to partial summary judgment, holding that the Sheriff's Department had no authority to destroy or otherwise dispose of his rifles, shotgun, and shooting accessories. These particular items, in contrast to the plaintiff's handguns, were not "firearm[s]" within the meaning of Penal Law § 265.00(3), and thus the former version of Penal Law § 400.05(6), in effect when the weapons were

destroyed, was not applicable to them. This Court also found that the Sheriff's Department violated 42 USC § 1983, in that it was acting under the color of law when it deprived the plaintiff of a protectable property interest by destroying his rifles, shotgun and shooting accessories. As to the Sheriff, this Court held that he was entitled to qualified immunity since a reasonable official would not have known that Penal Law § 400.05(6) actually excluded the plaintiff's rifles and shotguns and that disposing of the weapons violated clearly established statutory or constitutional rights.

Family Law; Juvenile Delinquents; Petition Alleging Commission Of Escape In Second Degree Dismissed; Nonsecure Facility Not A "Detention Facility" Within Scope Of Penal Law § 205.10

Matter of Dylan C. (69 AD3d 127 [Oct. 13, 2009; Eng, Opinion; Prudenti, Miller, Belen, Concurring])

This case presented the issue of whether a nonsecure facility for the placement of adjudicated juvenile delinquents is a "detention facility" within the scope of Penal Law § 205.10, which sets forth the elements of the crime of escape in the second degree. This Court concluded that nonsecure detention facilities, which did not exist when the Penal Law provisions relating to the crime of escape in the second degree were enacted, do not fall within the intended ambit of Penal Law § 205.10. This Court reviewed the historical context of the relevant statutory provisions at the time of their enactment and determined that the Legislature contemplated only secure detention facilities when it statutorily defined "detention facility" as "any place used for the confinement" of any person "charged with being or adjudicated" a juvenile delinquent (Penal Law § 205.00[1]).

This Court further stated that, while the Penal Law § 205.00(1) definition of "detention facility" does not expressly distinguish between secure and nonsecure facilities, both the nature of a facility, and the purpose for which youths are placed, may be taken into account in determining whether absconding from such a facility constitutes the crime of

escape in the second degree. The Court noted that, in the instant case, the purpose of Dylan C.'s placement in a nonsecure facility, which is statutorily prohibited from containing physically restricting construction and hardware, was for rehabilitation and not for public safety and confinement. The prevention of escapes are not of paramount importance in such nonsecure facilities.

Family Law; New York As Home State Under Uniform Child Custody Jurisdiction And Enforcement Act; Father's Motion To Dismiss For Lack Of Subject Matter Jurisdiction Denied

Matter of Felty v Felty (66 AD3d 64 [July 14, 2009; Belen, Opinion; Mastro, Dickerson, Chambers, Concurring])

In this child custody proceeding, this Court held that New York had jurisdiction as the "home state" of the parties within the meaning of the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter UCCJEA), which defines "home state" as the state in which a "child lived with a parent . . . for at least six consecutive months immediately before commencement" of the proceeding (Domestic Relations Law § 75-a[7]). The statute allows for temporary absences from the home state during that time period which will not count against accrual of the requisite six-month period. In this case, the mother had moved with the parties' two children from Kentucky to New York six months prior to her commencement of this proceeding, but she allowed the children to visit the father in Kentucky for six weeks during that same period.

This Court stated that the record supported the mother's contention that she intended to remain permanently in New York with the children and that the six-week period the children stayed with their father in Kentucky qualified as a temporary absence from the jurisdiction. The mother had never changed her permanent address from New York to Kentucky, and her professional license and driver's license remained in New York. Other

signs of a permanent intent to reside in New York included the children receiving special education services, visiting a pediatrician, and residing at home with their mother in the state.

The Court noted that a primary purpose of the UCCJEA is to ensure that victims of domestic violence and children are protected in custody battles, particularly those who must flee across state lines to prevent abuse. This Court dismissed the fact that the mother had assured the father she would return to Kentucky with the children due to substantial evidence that she made this promise so she could flee to New York to escape the threat of domestic violence. For the same reason, the court rejected the father's contention that the mother was forum shopping.

Family Law; Order Of Protection; Criminal Contempt; Quantum Of Proof For The Imposition Of A Definite Period Of Incarceration Under Family Court Act § 846-a Is Beyond A Reasonable Doubt

Matter of Rubackin v Rubackin (62 AD3d 11 [Feb. 24, 2009; Angiolillo, Opinion; Skelos, Leventhal, Belen, Concurring])

The appeal in this family offense proceeding raised the question of what standard of proof is necessary to sustain a finding that a respondent willfully failed to obey a lawful order of the Family Court, when the remedy to be imposed is a period of incarceration pursuant to Family Court Act § 846-a. This Court held that the Family Court erred in applying the less stringent "clear and convincing evidence" standard, and instead, was required to find, beyond a reasonable doubt, that the respondent willfully violated a court order. Analogizing this case to other cases involving criminal contempt, where the standard of proof is beyond a reasonable doubt, this Court held that the respondent's violation here, including the jail term imposed upon him, were punitive, punishing him for past disobedience, and thus criminal in nature and requiring a higher standard of proof.

Insurance; No Fault; Interest Toll Pursuant To 11 NYCRR 65-3.9(c) Applies To Claims Filed By Policyholders And Provider/Assignees

East Acupuncture, P.C. v Allstate Ins. Co. (61 AD3d 202 [Feb. 17, 2009; Balkin, Opinion; Mastro, Miller, McCarthy, Concurring])

The Insurance Law provides that a claim for No-Fault automobile insurance benefits is overdue if not paid within thirty days after the claimant supplies proof of the amount of the loss sustained, and all overdue payments bear interest at the rate of two percent per month. 11 NYCRR 65-3.9(c) governs the accrual of interest on overdue no-fault payments, and provides a toll on the accrual of the statutory interest:

> "[i]f an *applicant* does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken" (emphasis added).

This Court held that the term "applicant" as used in 11 NYCRR 65-3.9(c), and as interpreted by the New York State Superintendent of Insurance (hereinafter the Superintendent), refers both to injured persons who directly submit claims to their insurers, as well as to medical providers, as assignees of such injured policyholders, which submit such claims to insurers. Thus, the toll on the accrual of statutory interest on overdue No-Fault claims pursuant to 11 NYCRR 65-3.9(c) applies to both claims submitted to insurers by provider/assignees and to claims submitted directly by policyholders themselves. This Court noted that because the No-Fault regulations do not provide a general definition of the term "applicant," the plain meaning of this term in 11 NYCRR 65-3.9(c) would seem to refer to any entity, whether an injured person or a provider/assignee, who submits a claim or applies to an insurance company for No-Fault benefits. In addition, the No-Fault regulations use the term "applicant" in some instances as a generic reference to both provider/assignees and injured persons, while in other instances uses the term to refer specifically to injured persons. This Court concluded that the Superintendent's

interpretation was rational, reasonable, and entitled to deference because the No-Fault regulations do not use this term consistently and exclusively as a reference to injured persons.

In addition, the Superintendent's interpretation was consistent with the primary aims of the No-Fault system, to ensure prompt payment of claims. The interest which accrues on overdue No-Fault benefits is a statutory penalty designed to encourage prompt adjustments of claims and inflict a punitive economic sanction on those insurers who do not comply. Interpreting 11 NYCRR 65-3.9(c) as applying the interest toll only to injured persons would allow a provider/assignee, who delays commencing legal action or requesting arbitration on denied claims, to continue to accrue interest pursuant to the Insurance Law throughout this period of delay. Rewarding such delay with what amounts to essentially a windfall of punitive interest payments would be at odds with the legislative goal of promptly resolving No-Fault claims. Finally, this Court observed that the Superintendent's interpretation conforms with the general principle that an assignee stands in the shoes of an assignor and thus acquires no greater rights than those of its assignor.

Landlord/Tenant; Landlord Previously Obtained Judgment For Unpaid Rent And Eviction; Instant Action Seeks To Recover Unpaid Judgment And Post Eviction Rent; Motion To Dismiss; Claims Stated For Breach Of Lease Based On Piercing The Corporate Veil And Assumption Of A Lease

Gateway I Group, Inc. v Park Ave. Physicians, P.C. (62 AD3d 141 [Mar. 17, 2009; Dickerson, Opinion; Skelos, Ritter, Carni, Concurring]).

This Court held that the plaintiff landlord, which had a lease with a corporate tenant, adequately pleaded causes of action to recover unpaid rent against the defendant entities, which were related to the corporate tenant and occupied the leased space, but did not have a direct lease with the plaintiff, nor a written assignment of the lease from the tenant. This Court held that the plaintiff sufficiently alleged that the defendant entities could be liable for

the tenant's failure to pay rent in breach of its lease, and for post-eviction rent, under the theory of piercing the tenant's corporate veil. This was based upon allegations of the defendant entities sharing a common address with the tenant, using the same equipment, paying the tenant's rent under the lease, having an overlap and interlocking of owners, officers and directors, and the allegation that, while insolvent and for no consideration, the tenant conveyed its assets and accounts receivable to the defendant entities so that it would be judgment proof.

This Court also held that the plaintiff pleaded a viable claim for unpaid rent based on allegations that the defendant entities assumed the assignment of the tenant's lease by, *inter alia*, paying the rent, placing their names on the directory, referring to the lease as their lease in letters to the plaintiff, maintaining liability insurance on the property, and listing the subject suites as their place of business with the New York State Department of State.

In addition, this Court held that the plaintiff pleaded a viable claim to recover damages in quantum meruit for the use and occupation of the subject premises. Although a party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract which governs the subject matter, in this case there was no direct contract in place between the plaintiff and the defendant entities governing the subject matter.

Finally, this Court held that, contrary to the defendants' contention, alleged statutory violations of Debtor and Creditor Law §§ 273, 273-a, 274 and 275 need not be pleaded with heightened particularity pursuant to CPLR 3016(b), and such statutory violations were sufficiently pleaded here.

Landlord/Tenant; Rent Stabilized Apartment; Action to Recover Rent Overcharge; Court May Consider Rent Reduction Order Issued More Than Four Years Prior to Filing of Complaint

Jenkins v Fieldbridge Assocs., LLC (65 AD3d 169 [Apr. 7, 2009; Covello, Opinion; Rivera, Dillon, Angiolillo, Concurring])

The plaintiff, a tenant living in a rent-stabilized apartment, commenced this action to recover rent overcharges, alleging that the owner improperly charged and collected rent greater than the legal regulated rent fixed by a rent reduction order which was in effect within the four-year period preceding the filing of the complaint, but issued prior to that period. Despite a statutory proscription against the examination of the "rental history" of a rent-stabilized apartment prior to the four-year period preceding the filing of a rent overcharge complaint, this Court held that a rent reduction order issued prior to the four-year period, but still in effect during that four-year period, may be considered when determining the existence and amount of a rent overcharge.

This Court observed that it was presented with apparently irreconcilable statutory commands, requiring the Court to enforce the rent reduction order on the one hand, but prohibiting the court from considering it as part of the apartment's "rental history" on the other hand. In reaching the holding noted above, this Court resorted to the rules of statutory construction in order to resolve the statutory conflict and understand the Legislature's intent. This Court observed that, among other things, reaching a contrary conclusion would lead to an absurd result, to wit, a court countenancing the owner's failure to obey the terms of the order, and thus, frustrating the weighty goals the Legislature sought to further in authorizing the issuance of rent reduction orders (namely, motivating owners of rent-stabilized apartments to provide required services, compensating tenants deprived of those services, and preserving and maintaining the housing stock in New York City).

Libel; Defendant Newspaper And Reporter Entitled To Absolute Immunity Under Civil Rights Law § 74

Cholowsky v Civelleti (69 AD3d 110 [Oct. 6, 2009; Chambers, Opinion; Dillon, Angiolillo, Leventhal, Concurring])

In this action to recover damages for libel based upon the publication of two newspaper articles by the defendant newspaper and its reporter, this Court held that the defendants were entitled to absolute immunity under Civil Rights Law § 74, which protects "the publication of a fair and true report of any judicial proceeding." The articles commented on a judicial proceeding in which the plaintiff pleaded guilty to conspiracy to make corrupt payments, and they were a "fair and true" report of the records maintained in federal district court. It did not matter that the reporter obtained her information about the criminal proceeding against the plaintiff from another newspaper and there was no requirement that the defendants report the plaintiff's side of the controversy.

Alternatively, even if the defendants were not entitled to the absolute privilege of Civil Rights Law § 74, they established through documentary evidence that the information published about the plaintiff, a limited-purpose public figure, was not made with actual malice, that is, with knowledge that it was false or with reckless disregard for whether it was false or not.

Licensing; CPLR Article 78; Petitioner, Not A Licensed Veterinarian Who Performed Routine Equine Dentistry Not Required To Be A Licensed Veterinarian Because His Services Did Not Include "Diagnosis Or Treatment"

Matter of Brown v New York State Racing & Wagering Bd. (60 AD3d 107 [Jan. 13, 2009; Dillon, Opinion; Rivera, Covello, Angiolillo, Concurring])

This Court held that individuals, such as the petitioner in this proceeding, who are not licensed veterinarians may provide certain routine dental services to horses. The

Education Law, which governs veterinary medicine and animal health, divides veterinary caregivers into three categories that represent a sliding scale of training and responsibility: (1) licensed veterinarians who can diagnose and treat conditions (*see* Education Law § 6702); (2) "veterinary technicians" who can assist veterinarians using certain specialized training (Education Law § 6702[2]; *see* § 6708[1]); and (3) "unlicensed person[s]" that assist veterinarians but who do not have to possess knowledge of veterinary science (Education Law § 6713[1]).

This Court held that the terms "diagnosis" and "treatment," which are not defined in the Education Law, connote efforts to correct illness, disease, ailments or conditions. Moreover, this Court noted that the Education Law's definition of "veterinarian" does not include any reference to dentistry, unlike the comparable statutes in New Jersey and Connecticut, suggesting that the Legislature intended to exclude equine dentistry from the scope of the veterinary definitions under the doctrine of *unius est exclusio alterius*. This Court concluded that the petitioner's equine dental services (including the filing of teeth and removal of baby caps) were akin to the unlicensed services provided by groomers, trainers and blacksmiths; that no veterinary diagnosis or treatment was involved; and that the petitioner therefore was not in violation of any law in performing his services.

Medical Malpractice; LASIK Eye Surgery; Defendants' Motion To Dismiss Based On Statute Of Limitations Denied; Continuous Treatment Doctrine May Apply

Gomez v Katz (61 AD3d 108 [Feb. 10, 2009; Dillon, Opinion; Spolzino, Ritter, Dickerson, Concurring])

The plaintiff commenced this medical malpractice action against the defendant ophthalmologist based on his performance of LASIK treatment for her eyes. This Court affirmed the denial of the defendant's motion for summary judgment, finding that triable issues of fact existed as to whether the action was time-barred under CPLR 214-a or timely

commenced due to the tolling of the statute of limitations under the continuous treatment doctrine. The Court rejected the defendant's argument that any continuous treatment was severed, as a matter of law, by the plaintiff's intervening treatment with another ophthalmologist. This Court determined that the purpose of the plaintiff's consultation with the other ophthalmologist was merely to obtain new prescription glasses, and that any discussion of her eye history was merely incidental to that purpose. The record did not establish, as a matter of law, that the plaintiff severed her continuing relationship of trust and confidence with the defendant, which underlies the continuous treatment doctrine.

A secondary issue in the case was a 25-month gap in the plaintiff's continuing treatment. This Court held that this reached the outer limit of treatment that New York State case law has recognized as continuous, but that it did not, in fact, exceed that limit.

Mortgages; Foreclosure Action; After Filing Of Complaint But Before Service On Defendants, Mortgagee Retroactively Assigned Mortgage; Plaintiff Assignee Had No Standing Because It Did Not Have Legal Or Equitable Interest In Mortgage Prior To Commencing Foreclosure Action

Wells Fargo Bank, N.A. v Marichione (69 AD3d 204 [Oct. 20, 2009; Leventhal, Opinion; Dillon, Dickerson, Belen, Concurring])

This Court held that an assignee of a note and mortgage has no standing to commence a foreclosure action prior to the date that the assignment is actually executed, even where, as here, the assignment provides for a retroactive effective date prior to the commencement of the action. Despite the assignment's retroactive effective date, this Court held that the plaintiff did not have a legal or equitable interest in the mortgage until it was executed, which occurred after commencement of the action. Relying on *LaSalle Bank Natl. Assn. v Ahearn* (59 AD3d 911), this Court stated that a written assignment's execution date "is generally controlling and a written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and

mortgage was, in fact, previously effectuated." This Court reasoned that "the fiction of retroactivity," established between the parties to the assignment, should not adversely affect the rights of third persons.

Public Officers Law § 18; School District Sues Current And Former Board Members Alleging Failure To Monitor Finances; Member Of Board Commences Article 78 Proceeding Challenging Denial Of Request For Provision Of Defense And Indemnification; No Duty Found For The Provision Of Either

Matter of Barkan v Roslyn Union Free School Dist. (67 AD3d 61 [Skelos, Opinion; Mastro, Dillon, Eng, Concurring])

This Court held that a board of education that has, in sum and substance, adopted Public Officers Law § 18 is not obligated to provide a defense to, or indemnify, one of its employees against whom the school district, on behalf of the board of education, has commenced a civil action. The petitioner here was a member of a board of education. He argued that he was entitled to a defense and indemnification in an underlying action brought against him by the school district, not the board, in accordance with the board's by-laws, which in sum and substance were derived from Public Officers Law § 18(1)(a)(ii).

This Court noted that in Public Officers Law § 18(1)(a)(ii), from which the by-law provision is derived, the term "public entity," as used in the "defense and indemnification" provision, is defined as, inter alia, "a school district . . . or any other governmental entity or combination of association of governmental entities operating a public school." Since Public Officers Law § 18(3)(a) proscribes the duty to defend in those circumstances where a civil action is brought by or at the behest of the "public entity employing such employee," the provision adopted by the board here referred to itself and such combination or association as the school district. This Court held that when the school district commenced the underlying action, it did so, in effect, on behalf of the board with whose interests it is aligned, and that the duty to defend would not arise when a civil action was commenced by

either the board or the school district, or both, against an employee of either. Accordingly, there was no duty to defend.

This Court also held that the petitioner was not entitled to indemnification in the underlying action. In considering the issue of indemnification, this Court noted that while the duties to provide a defense and indemnification are governed by different provisions in Public Officers Law § 18, the legislative history suggested that one could not be construed without reference to the other. Thus, where a request for a defense was properly denied, as here, it rationally followed that the duty to indemnify did not independently exist.

Real Property; Duties Of Seller To Disclose Water Intrusion Problems; Complaint Alleging Fraud, Breach Of Fiduciary Duty And Seeking An Accounting Dismissed; Doctrine Of Caveat Emptor; Buyer Failed To Perform Due Diligence

Daly v Kochanowitz (67 AD3d 78 [Aug. 18, 2009; Dickerson, Opinion; Santucci, Florio, Covello, Concurring]).

This Court affirmed the dismissal of a complaint pursuant to CPLR 3211(a) and CPLR 3016(b), which alleged that the defendant seller of a house fraudulently misrepresented to the plaintiff purchaser that there was no flooding problem in the house. This Court held that the sellers and their real estate brokers did not have an affirmative duty to disclose the water intrusion history of the subject property: "New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment" (*Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 520). An exception to this doctrine arises from statutory disclosure obligations should the seller fill out and make available to the buyer a Property Condition Disclosure Statement (*see* Real Property Law §§ 462, 465; *Simone v Homecheck Real Estate*

Servs., Inc., 42 AD3d at 520-521), but this exception did not apply since the seller did not fill out such a statement.

Moreover, notwithstanding the seller's refusal to answer any questions in the Property Condition Disclosure Statement or to agree to a rider which promised that, at closing, the basement would be free of seepage, the plaintiff was put on fair notice that the house was subject to water intrusion of a serious nature. The plaintiff's home inspector noted evidence of water intrusion, the plaintiff was informed that the sale of the property was subject to the "Spinelli survey," which showed that the Mamaroneck River was inside the northern boundary line of the property, and the plaintiff was advised that New York State maintains an easement through the property's back yard to access the river. The plaintiff was warned in several ways of a potentially serious water intrusion problem, yet she failed to perform even minimum due diligence in investigating the subject property's water intrusion history.

Real Property; CPLR Article 78 Proceeding Dismissed; Petitioner's Deception Properly Considered Under Self-Creation Factor Pursuant To Town Law § 267-b

Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh (68 AD3d 62 [Sept. 29, 2009; Dillon, Opinion; Spolzino, Florio, Angiolillo, Concurring])

This Court held that a petitioner's acts of deceiving a town zoning board or planning board may be properly considered by a zoning board in reviewing an application for a variance, if such deception is related directly to one of the enumerated statutory factors set forth in Town Law § 267-b. Although "deception" is not an enumerated statutory factor among those specified in Town Law § 267-b, and although the enactment of Town Law § 267-b was intended by the Legislature to be wholly preemptive, in this case the petitioner's deception was properly considered by the zoning board as within the scope of the statutory factor regarding the self-creation of the hardship.

The petitioner, the owner of a retail store, had been illegally using the cellar of the store for retail purposes, which resulted in town code violations. After receiving the violations, the petitioner applied for a variance to use the cellar as retail space. The store's original plans, submitted to the town to receive a certificate of occupancy, did not dedicate the cellar for such retail purposes. In reviewing the petitioner's variance application, the zoning board considered the factors set forth in Town Law § 267-b. The zoning board determined that the petitioner intentionally deceived the town (by, inter alia, submitting forged floor plans, backdated to the original plans, now showing use of the cellar for retail), and it denied the variance application based principally on the concern that to grant the variance under these circumstances would undermine the community's respect for its local planning, building and tax laws (all of which were violated by the petitioner).

This Court concluded that the zoning board adequately considered all statutory factors set forth in Town Law § 267-b, and that consideration of the petitioner's deception was proper within the scope of the factor regarding the self-creation of the hardship (that the petitioner's difficulties were self-created by virtue of using the cellar as a showroom without seeking the necessary approvals). This Court emphasized that the role of the courts is not to substitute the courts' judgment for that of local boards, but merely to assure that the required statutory factors are considered.

Eminent Domain; Atlantic Yards Redevelopment Project; EDPL 207 Proceeding Challenging Proposed Taking Of Properties; Project Site Found To Be Substandard Or Unsanitary Area Tending To Impair Growth And Development; Planned Development Approved

Matter of Goldstein v New York State Urban Dev. Corp. (64 AD3d 168 [May 12, 2009; Eng, Opinion; Spolzino, Florio, Miller, Concurring]).

In this eminent domain proceeding, the petitioners challenged the condemnation and redevelopment of a 22-acre area located south of Atlantic Avenue near downtown Brooklyn.

This redevelopment, known as the Atlantic Yards project, called for the construction of a sports arena to serve as the home for the New Jersey Nets basketball team, the construction of a new subway connection to accommodate visitors to the arena, the construction of a platform over and reconfiguration of the rail yard, and the construction of 16 buildings which will include residential units, office space, retail space, and community facilities offering health care and child care services. Based upon an extensive blight study commissioned by the Empire State Development Corporation (hereinafter ESDC), the ESDC adopted a resolution finding, inter alia, that the project sight was a substandard and unsanitary area which tended to impair growth and development, and that the planned development would serve a public use, benefit, or purpose.

After unsuccessfully seeking redress in federal court on the theory that the condemnation violated the Public Use clause of the Fifth Amendment to the United States Constitution, the petitioners commenced this EDPL 207 proceeding to challenge the condemnation under the New York State Constitution. The petitioners primarily alleged that the proposed taking of their properties was unlawful because it violated the Public Use clause of the New York Constitution, article I, § 7. They also claimed that the project contravened New York Constitution, article XVIII, § 6, because State funds are to be used to defray infrastructure costs associated with the construction of new housing units without restricting those housing units to use by low-income persons.

As a threshold procedural issue, this Court rejected the ESDC's contention that the petition was untimely because it had not been commenced "within 30 days after the condemnor's completion of its publication of the determination" as required by EDPL 207(A). The petitioners asserted a timely state-law cause of action under the EDPL in their federal lawsuit, which was not adjudicated on the merits because the United States District Court declined to exercise jurisdiction. Moreover, the petitioners were entitled to rely on the six-

month grace period which CPLR 205(a) affords for recommencement of dismissed actions because the 30-day time period in EDPL 207(A) is a statute of limitations rather than a condition precedent to judicial review.

On the merits, this Court rejected the petitioners' argument that the Public Use clause of the State Constitution should be literally interpreted to allow the power of eminent domain to be exercised only where the condemned property is to be held open for use by all members of the public. The court noted that this narrow construction of the Public Use Clause had been rejected by the Court of Appeals more than 70 years earlier, and was inconsistent with EDPL 207, which expressly authorizes the Appellate Division, in reviewing a condemnation determination, to consider whether "a public use, benefit or purpose will be served by the proposed acquisition" (EPDL 207[C][4]). Furthermore, there was an adequate foundation for the ESDC's finding that the project would serve a public benefit because the project site was underdeveloped and characterized by unsanitary and substandard conditions. The project also served additional public purposes, including building an arena, constructing affordable housing, and creating new job opportunities. Moreover, the petitioners offered no evidence that the public benefits which the project would allegedly achieve were illusory, or that equivalent or greater public benefits would accrue absent the condemnation.

In addition, the project did not contravene New York Constitution, article XVIII, § 6 because its core purpose was to rehabilitate substandard land through improvements. Thus, the Atlantic Yards was not a housing project within the ambit of § 6.

Family Law; PINS Proceeding; Probation Ordered; Two Violations Filed After 18th Birthday; Family Court May Initially [But Not Successively] Place A PINS In State Custody For Up To Twelve Months Even After Reached Majority

Matter Of Matthew L. (65 AD3d 315 [June 30, 2009; Leventhal, Opinion; Spolzino, Dillon, Carni, Concurring])

The Family Court adjudicated Matthew L. (hereinafter the juvenile) to be a person in need of supervision (hereinafter PINS) under article 7 of the Family Court Act (hereinafter article 7) just prior to his eighteenth birthday and ordered probation. This Court held that the text of article 7 does not restrict the imposition of probation on a PINS beyond the age of majority. Upon analogizing the language in article 7 to that in article 3 of the Family Court Act, this Court further held that article 7 empowered the Family Court to *initially* place a PINS in state custody for up to 12 months as a sanction for violating probation, even if such placement occurs after he or she reached the age of majority. Thereafter, the Family Court did not possess the statutory authority to order *successive* placements.

Relying on the New York Court of Appeals' statutory construction of article 3 in *Matter of Robert J.* (2 NY3d 339), this Court determined that the Legislature solely intended to place an age restriction upon the imposition of *successive* placements and not *initial* placements, such as the one at issue here. The Court reasoned that ruling in the juvenile's favor "would mean that although the [PINS] proceeding could continue beyond the eighteenth birthday the court would have no dispositional alternatives available" to enforce the youth's compliance with its orders. This result would ultimately thwart the PINS proceeding's rehabilitative goals.

Mental Hygiene Law § 9.60 [Kendra's Law] Assisted Outpatient Treatment Program; HIPPA Does Not Preempt Kendra's Law Regarding Treating Physician's Need To Gain Access To Medical Reports Without Patient's Consent

Matter of Miguel M. (66 AD3d 51 [July 28, 2009; Belen, Opinion; Mastro, Balkin, Dickerson, Concurring])

Mental Hygiene Law § 9.60 (hereinafter Kendra's Law) establishes an Assisted Outpatient Treatment program (hereinafter AOT) through which certain psychiatric patients can receive court-ordered mental health treatment in lieu of hospitalization. In this case, Miguel M. appealed an order authorizing him to receive AOT treatment for a six-month

period. The Supreme Court's ruling was based on the testimony of a physician, Dr. Daniel Garza, who evaluated Miguel M. and reviewed his medical records to see if he was eligible for the AOT program. The principal issue presented on this appeal was whether the Health Insurance Portability and Accountability Act (hereinafter HIPAA) authorized Dr. Garza to obtain Miguel M.'s medical records, without his consent and without a court order, pursuant to the AOT proceeding.

As an initial matter, this Court held that even though the six-month period of AOT in the order appealed from had expired, the appeal was not moot. This Court found that the issues will likely be repeated, either because Miguel's mental illness is chronic or because many other individuals are subject to AOT petitions, yet will evade review, since the AOT orders always expire after six months. As the issues presented were matters of first impression and raised important questions of individual privacy rights and public safety, this Court found they should qualify as an exception to the mootness doctrine.

Turning to the merits, this Court held that HIPAA allows the disclosure of clinical records in these circumstances without individual authorization or a court order. HIPAA permits a health care provider covered by the statute to disclose medical information to "(a) public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability . . . and the conduct of public health surveillance, public health investigations, and public health interventions" (45 CFR 164.512).

This Court found that Dr. Garza qualified as a "public health authority" and that the AOT process qualified as a "public health investigation" or "intervention." HIPAA defines a "public health authority" as "a person or entity acting under a grant of authority from . . . [a] public agency . . . that is responsible for public health matters as part of its official mandate" (45 CFR 164.501). Dr. Garza was charged with investigating and evaluating

patients for the AOT program at Elmhurst Hospital, the purpose of which was to protect the public from potentially dangerous mentally ill patients living in the community. Kendra's Law authorizes the director of a hospital's AOT program, such as Dr. Garza, to obtain clinical records of psychiatric patients as part of the AOT investigatory process (*see* Mental Hygiene Law §§ 9.60, 33.13[c][12]). Granted the statutory authority to protect the public health and safety by virtue of his professional position, Dr. Garza qualified as a "public health authority" under HIPAA.

Since HIPAA does not explicitly define "public health investigation or intervention," this Court looked to the plain meaning of HIPAA's language and the legislative intent of Kendra's Law in analyzing whether an AOT investigation falls within HIPAA's provisions. Kendra's Law was enacted with the dual intent of protecting the public from potentially dangerous mentally ill individuals and to maximize the individual patient's quality of life. Given that these were proper uses of the state's police and parens patria powers, this Court found that an AOT investigation qualified as a "public health investigation and intervention" under HIPAA. Therefore, Dr. Garza was authorized under HIPAA to obtain Miguel's medical records, and they were properly admitted into evidence during the AOT proceeding.

This Court noted that there was no merit to Miguel M.'s contention that HIPAA preempts the Mental Hygiene Law with respect to AOT investigations. HIPAA specifically excludes from its preemption provisions any section of state law providing for public health investigations and interventions. Additionally, this Court emphasized the fact that HIPAA and Kendra's Law provisions regarding AOTs do not in fact conflict, since both allow disclosure of clinical records, and therefore there was no issue of preemption.

Mental Hygiene Law § 9.60; Kendra's Law; Application For Imposition Of Involuntary Assisted Outside Program Granted Including Appointment Of Money Manager; Clear And Convincing Evidence Of Inability To Pay Rent And Medical Bills

Matter of William C. (64 AD3d 277 [May 26, 2009; Balkin, Opinion; Mastro, Florio, Eng, Concurring])

This Court held that Mental Hygiene Law § 9.60, commonly known as Kendra's Law, authorizes the appointment of a money manager to assist with the financial affairs of a mentally ill person who is the subject of the involuntary assisted outpatient treatment program (AOT) pursuant to Kendra's Law, but who has not been declared incompetent under Mental Hygiene Law article 81. In addition to medical services, Kendra's Law authorizes any other services that would assist a mentally ill person in living and functioning in the community, which would include money management services, in order to prevent a relapse or deterioration which would be likely to result in serious harm to the mentally ill person or others.

In this case, there was clear and convincing evidence that the mentally ill person, William C., was unwilling to pay his rent and medical bills, thereby jeopardizing his access to medications and his Medicaid eligibility. This Court observed that unless his medications were provided through either Medicare or Medicaid, William C. would most likely fail to medicate and consequently would rapidly decompensate. The AOT would help ensure his continuous treatment and his housing stability, two of the main correlators, as found by the Legislature, in the prevention of violent acts by mentally ill persons (*see* Mental Hygiene Law § 9.60, as added by L 1999, ch 408, § 2).

Additionally, money management services would fall within the broad scope of Mental Hygiene Law article 41, which is designed to encourage local governments "to improve and to expand existing community programs for the mentally ill" by developing "preventive, rehabilitative, and treatment services offering continuity of care" (Mental Hygiene Law § 41.01). Money management services would assist mentally ill patients in ensuring for them

a "continuity of care" and other benefits, including uninterrupted psychiatric services and medications, essential components to treat mental conditions and prevent relapse (*id*.).

Real Property; Disputed Land Claims Between Individual Owners And Town; Colonial Land Grant Patents Support Superior Title

O'Brien v Town of Huntington (66 AD3d 160 [Aug. 11, 2009; Santucci, Opinion; Mastro, River, Fisher, Concurring])

This case involved conflicting claims to an area of vacant real property within the defendant Town of Huntington which the Town claimed as parkland, but which was also alleged to be owned by the various plaintiffs in individual parcels within the subject area. This Court held that Supreme Court should have granted the Town's motion pursuant to CPLR 4401 for judgment as a matter of law. The Town established superior title to the land by submitting colonial land grants, which showed that it originally owned the land as the successor to title previously held by the Crown of England in the colonial era. The sovereign title asserted by the Town was superior to the plaintiffs' claims to title, which were premised upon deeds and chains of title that could not be traced back to the sovereign source or to the Town itself. There was no evidence that the plaintiffs' alleged predecessor in interest, Thomas Powell, had consent from the Town to acquire title to the land covered by the colonial land grants. The plaintiffs merely showed that Powell obtained possessory rights to the property, but not legally cognizable title, from Native Americans in the seventeenth century.

Additionally, the plaintiffs failed to show the boundaries of each of their parcels with common certainty as required by RPAPL 1515(2). The plaintiffs' experts could not link the plaintiffs' claims regarding the boundary lines of their parcels with the original Powell allotment lines. Certain plaintiffs also premised their claim to title on certain tax deeds. This Court observed that title acquired by tax deed is no better than the title of the person who

allegedly lost the title for nonpayment of taxes. Here, the plaintiffs failed to demonstrate that the person or persons who lost title for nonpayment of taxes had title superior to the Town's colonial patent title.

Real Property; Certificate Of Use For Third Floor Of Commercial Property As Artist's Studio Denied; Three Citations Issued Pursuant To Sweep Ordered By Mayor; Petition Dismissed Except Claims Based On Violation Of Equal Protection

Sonne v Bd. of Trustees of Vil. of Suffern (67 AD3d 192 [Sept. 29, 2009; Chambers, Opinion; Spolzino, Angiolillo, Lott, Concurring])

The plaintiff commenced this action against the defendants, the Village of Suffern, its Board of Trustees, its Deputy Building Inspector, and its Code Enforcement Officer, seeking, inter alia, damages under 42 USC § 1983 due to various alleged violations of the plaintiff's constitutional rights relating to her use and ownership of certain commercial property. The plaintiff alleged, among other things, that the defendants violated her due process and equal protection rights in denying her a certificate to use the third floor of her building as an artist's studio and selectively enforcing the Village code by issuing her three citations pursuant to a sweep directed by the Mayor, which occurred after the plaintiff lodged a complaint to the Mayor regarding the length of time of a variance granted to her.

This Court held that the cause of action under 42 USC § 1983, premised upon a violation of her due process rights, should have been dismissed pursuant to CPLR 3211(a)(7). This Court concluded that, in denying the plaintiff's application for a certificate of use, the defendants had misinterpreted the Fire Code, but that this did not rise to the level of egregious official conduct necessary to sustain such cause of action. As a corollary, this Court granted summary judgment dismissing the complaint insofar as asserted against the Village Deputy Inspector on the ground that he was entitled to a qualified immunity because

his misinterpretation of the Village Code did not constitute a violation of clearly established statutory or constitutional rights of which a reasonable person would have known.

This Court, however, refused to dismiss the causes of action alleging violation of equal protection, finding that the allegations that the sweep directed by the Mayor affected only the plaintiff's property were sufficient to state a cause of action. A cause of action alleging deprivation of the plaintiff's right of free speech was dismissed as duplicative of her causes of action alleging violation of equal protection. This Court also dismissed a cause of action alleging wrongful interference with prospective economic advantage because, unlike the constitutional causes of action, serving a notice of claim was a condition precedent to maintaining that cause of action, and the plaintiff had failed to allege that she had done so in her complaint.

Wrongful Death; Fraudulent Concealment Of Health Risks Of Smoking Cigarettes Prior To 1969; Punitive Damages Award Vacated And Remitted For New Trial On Punitive Damages

Frankson v Brown & Williamson Tobacco Corp. (67 AD3d 213 [Sept. 29, 2009; Eng, Opinion; Spolzino, Santucci, Angiolillo, Concurring])

In this case, the plaintiff widow sued, among others, a defendant tobacco company for fraudulently concealing the risks of smoking, which led to the death of her husband. The defendants appealed from a judgment which, among other things, awarded the plaintiff $5 million in punitive damages. Relying on *Philip Morris USA v Williams* (549 US 346), the defendants argued that the punitive damages award should be set aside because the jury was not properly instructed that it could not award such damages for the purpose of punishing the defendant for harm to other nonparty smokers.

As a threshold procedural issue, this Court held that the defendants were not barred from raising this issue by law of the case. Although the defendants addressed the propriety

of the trial court's punitive damages charge on prior appeals, their current contentions relied on *Philip Morris USA v Williams* (549 US 346), which was decided after the determination of the prior appeals and constituted a change in the law which made reconsideration of the punitive damages charge appropriate in this case.

In *Phillip Morris USA v Williams,* the Supreme Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation" (*id.* at 353). Although the Supreme Court concluded that punitive damages could not be used to punish a defendant directly for harm inflicted on nonparties, it also recognized that a showing of harm to others was relevant to the portion of the punitive damages constitutional equation which requires the jury to gauge the reprehensibility of the defendant's conduct. Since conduct that risks harm to many is likely to be more reprehensible than conduct that risks harm to only a few, the Supreme Court concluded that a jury may take this fact into account in determining reprehensibility. However, the Supreme Court emphasized that it was constitutionally important that juries be given proper legal guidance to provide assurance "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers" (*id.* at 355).

In this case, the plaintiff's attorney made repeated references during the liability and compensatory damages phase of the trial to the fact that thousands of people die each year from lung cancer, and alleged that tobacco companies had created this lung cancer epidemic. This Court found that the plaintiff's attorney's statement that the defendants' "reprehensibility has to be judged in the context of the world in which they committed the reprehensibility," did not clearly signal to the jury that it should consider the death of thousands of others only in assessing the reprehensibility of the defendants' conduct. Thus,

absent a proper limiting instruction, the jury could have mistakenly understood the plaintiff's argument that the defendants' conduct resulted in the death of thousands of people to justify taking those other deaths directly into account in calculating the amount of damages warranted to punish the defendants' reprehensible conduct. Moreover, the trial court denied the defendants' request to charge the jury that "you are not to impose or assess punitive damages for injuries to any person other than the plaintiff." Furthermore, this Court found that the instructions which the trial court issued did not provide adequate assurance that the punitive damages award was not intended to directly punish the defendants for harm caused to other smokers in New York. Accordingly, this Court vacated the punitive damages award and remitted the matter for a new trial on punitive damages.

Zoning; Article 78; ZBA Determines That Proposed Access Road For Senior Citizen Housing Development Not A Permitted Use Under Zoning Law; ZBA Determination Not Arbitrary Or Capricious

Matter of BBJ Assocs., LLC v ZBA of Town of Kent (65 AD3d 154 [June 23, 2009; Chambers, Opinion; Rivera, Miller, Eng, Concurring])

In reversing a judgment of the Supreme Court, this Court held that it was not arbitrary and capricious for the Zoning Board of Appeals of the Town of Kent (hereinafter ZBA) to determine that a proposed access road for the petitioner's multi-family senior citizen housing development, which was situated on land stretching from the Town of Carmel to the Town of Kent, was not a permitted use under the zoning law of the Town of Kent. The ZBA had agreed with the petitioner that the proposed access road was an infrastructure improvement. However, the access road solely supported a single principal use, that is, access only to the development, which was not a permitted use in that part of the Town of Kent, which had been zoned for commercial and single-family residential use.

The petitioner challenged the ZBA's determination in this CPLR article 78 proceeding, and the Supreme Court granted the petition, finding that the ZBA acted in bad faith by

raising objections at the eleventh hour after participating in environmental review of the project without objection for 2½ years. This Court, as an initial matter, rejected the Supreme Court's stated reason for granting the petition. This Court found that, for purposes of environmental review, the Town of Carmel Planning Board, and not the Town of Kent, was designated as lead agency. Moreover, the SEQRA findings noted that there were problems with providing access, and the Town of Kent Planning Board never granted site approval.

This Court then concluded that the proposed access road was not a driveway, highway, or mapped street, nor was it approved for construction by the Town of Kent, Putnam County, or New York State, which, if it had been, its use as an infrastructure improvement would have been protected under the zoning law in effect at the time of the application. The proposed access road was also not a public way. Therefore, the proposed access road was subject to the Town of Kent's zoning law, and the ZBA's determination that the proposed access road was not for a permitted use in that part of the Town of Kent was not arbitrary and capricious.

This Court noted that it need not consider a change to the zoning law, which the petitioner contended should be disregarded under the special facts exception, since the ZBA's determination was proper under the old law.