COURT OF APPEALS CIVIL UPDATE
AUGUST 2019

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Table Of Contents

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I. Civil Procedure

A. Personal Jurisdiction

Whether New York Courts Could Constitutionally Exercise Personal Jurisdiction Over An Ohio Weapons Seller Who Sold Guns, In Ohio, Which He Purportedly Knew Were Destined For Resale In New York — *Williams v Beemiller, Inc.*, 2019 NY Slip Op 03656 [May 9, 2019].

Where the defendant, an Ohio "firearm merchant," repeatedly sold guns to an Ohio gun trafficker who planned to open a store (selling firearms) in Buffalo, and where the plaintiff sustained injury in New York as a result of the defendant's allegedly negligent sale of one such gun, was the defendant subject to New York's long-arm jurisdiction pursuant to CPLR 302(a)(3)(i) (jurisdiction over "any non-domiciliary … who in person or through an agent … commits a tortious act without the state causing injury to person or property within the state …")?

By 4 to 3 vote, the Court of Appeals answered in the negative.

Majority: Per majority opinion penned by Chief Judge DiFiore, a court may not *constitutionally* exercise personal jurisdiction over a non-domiciliary tortfeasor, even if the case falls within statutory long-arm jurisdiction, unless the non-domiciliary "'purposefully avails itself of the privilege of conducting activities within the forum State.'" Further, "'the mere likelihood that a product will find its way into the forum' cannot establish the requisite connection between defendant and the forum 'such that [defendant] should reasonably anticipate being hauled into court there.'"

Here, even "viewing the facts in the light most favorable to plaintiffs," the proof established only that defendant sold the gun in Ohio to another Ohioan who might in future open a shop in New York. The defendant himself "did not maintain a website, had no retail store or business telephone listing, and did no advertising of any kind, except by posting a sign at his booth when participating in a gun show." Further, while the Ohio buyer might have been a gun trafficker, the defendant "was not a member of the criminal gun trafficking conspiracy" and "had no distribution agreement" with the buyer. Beyond this, the record was "devoid of evidence supporting plaintiffs' theory that, merely by selling handguns to Bostic, Brown intended to serve the New York market."

Dissent: The dissent, penned by Judge Fahey, did not dispute that minimum contacts with the State were required for constitutional exercise of New York's long-arm statute. However, the dissenters believed that such contacts existed based on, amongst other facts:

> defendant sold the guns to the same gun trafficker on multiple occasions, and always in cash,
>
> the gun in issue was one of 182 such weapons, all of which were used in New York, and,
>
> the defendant's sales to this particular trafficker constituted a significant percentage of his total sales.

The dissenters further noted that approximately 100 percent of the guns brought into the state by the Ohioan purchaser had been used in New York for criminal purposes.

In the dissenters' view, "the law of the United States Supreme Court and this Court *strongly supports* the application of long-arm jurisdiction where, as here, Brown [the defendant seller] at least indirectly served the marketplace in this state… and purposefully and voluntarily derived a benefit from interstate activity … aimed at this state."

B. Statute Of Limitations Issues

Whether Agreement That The Contract Will Be "Enforced" In Accordance With New York Law Evinces An Intent That New York's Statutes Of Limitations Will Control Even Where CPLR 202, The Borrowing Statute, Dictates Otherwise — *2138747 Ontario, Inc. v Samsung C & T Corp.*, 31 NY3d 372 [2018].

CPLR 202, New York's so-called borrowing statute, applies when the cause of action accrued without the state and is brought by an out-of-state resident. In such an instance, the shorter of the two statutes of limitations, whether New York's or that of the other jurisdiction, governs. CPLR 202 is designed to prevent forum shopping, *e.g.*, an Iowa resident who brings his or her Iowa cause of action in New York because it is time-barred in Iowa.

But what if, in an action premised upon breach of contract and unjust enrichment, the contract provided that it would be "governed, construed and enforced" in accordance with New York law and that any lawsuit or other proceeding arising from the contract would be commenced in New York.[1] Does that language trump the borrowing statute?

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[1] The provision here in issue stated:

> "This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of New York. You hereby irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts of the State of New York and of the United States District Courts located in the County of New York for any lawsuits, actions or other proceedings arising out of or relating to this Agreement and agree not to commence any such lawsuit, actions or other proceeding except in such courts … You hereby irrevocably and unconditionally waive any objection to the laying of venue of any lawsuit, action or other proceeding arising out of or relating to this Agreement in the courts of the State of New York or the United States District Courts located in the County of New York, and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such lawsuit, action or other proceeding brought in any such court has been brought in an inconvenient forum."

Here, plaintiff was an Ontario corporation and the claims accrued on October 26, 2009 in Ontario. They were timely under New York's six-year statute for breach of contract claim (CPLR 213[2]) but not under Ontario's two-year statute. Plaintiff urged that the agreement that the contract would be "governed by, construed and enforced" in accordance with New York law meant that parties intended that New York's substantive and procedural laws would apply *except for* its choice-of-law provisions, the logic being that the choice-of-law provisions would defeat the parties' intent to the extent they dictated application of foreign law (31 NY3d at 378).

In so arguing, plaintiff relied upon the Court of Appeals' rulings in *Ministers & Missionaries Benefit Bd. v. Snow*, 26 NY3d 466 [2015] and *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 NY3d 310 [2012], *cert. den*., 133 SCt 2396 [2013]. In *IRB-Brasil Resseguros*, the Court of Appeals held that GOL § 5-1401, which provides that the parties' decision to be bound by New York law in a transaction of $250,000 or more should be honored irrespective of whether the contract has minimal New York contacts, precludes the traditional, common law, choice-of-law analysis. In other words, the legislature could, and did, decide that New York policy favors application of New York law to persons who want to be bound by New York law.

In *Ministers & Missionaries*, the Court held that the same result follows under common law where the transaction or contract involved $250,000 or less and thus did not implicate GOL § 5-1401. In other words, the Court of Appeals could, and did, decide that it was good policy to apply New York law to litigants who had agreed to be bound by New York law.

Plaintiff here urged that CPLR 202 was a "choice-of-law" of provision and that the rulings in *IRB-Brasil Resseguros* and *Ministers & Missionaries* dictated that the parties' agreement trump the choice-of-law provision.

Held: The Court unanimously rejected plaintiff's arguments. It instead held, per a decision by Judge Fahey, that CPLR 202 applied and defeated plaintiff's claims notwithstanding the parties' above-quoted agreement that the contract would be "enforced" in accordance with New York law.

Ultimately, the issue came down to the parties' intent: did the contract evince an intent that CPLR 202 not apply?

The Court explained that "choice of law provisions typically apply to only substantive issues … and statutes of limitations are considered 'procedural' because they are deemed 'as pertaining to the remedy rather than the right' [internal quotation marks omitted]" (31 NY3d at 378). Where, as here, the parties go further and specify that the contract should be "enforced" in accordance to New York law, that is taken to mean that the parties also intended New York's procedural law.

However, contrary to plaintiff's argument, "CPLR 202 is part of that procedural law, and the statute therefore applies here" (31 NY3d at 378). Further, *IRB-Brasil* and *Ministers* did not help plaintiff's cause since they held only that the parties' intent should control. Here, the question in issue was the parties' intent.

Nor, contrary to plaintiff's claims, was it "irrational to conclude that the contracting parties may have intended for CPLR 202 to apply" (31 NY3d at 388). Since "the borrowing statute is a stable fixture of New York's procedural law, of which these sophisticated commercial entities were presumably aware when they chose New York's procedural law to govern their arrangement" (31 NY3d at 380), "the parties may have intended for CPLR 202 to apply, perhaps for strategic reasons, or because they did not think at the time that it was possible to contract around the application of statutes they believed to be statutory choice-of-law directives, or otherwise" (*id*.).

Emphasis added.

Notably, the Court did not in any way dispute that the parties *could*, if they wished, agree that CPLR 202 should not apply. Rather, the point was merely that there was here no "language that expressed a clear intent to preclude application of CPLR 202" (31 NY3d at 381). "Here, the contracting parties chose New York's procedural law" and "CPLR 202 [was] part of that procedural law" (*id*.).

Comment: Of course, here, like in every other case in which the issue is how one construes a sophisticated contract in the absence of any provision that specifically addresses the matter in issue, the assumption is that the sophisticated parties and their sophisticated attorneys will henceforth specifically provide for some other result if they do not want the default result (here, that CPLR 202 governs). So, by that logic, that the default is X rather than not-X is less important than the fact that there is a clear default that will apply in the absence of agreement to the contrary.

Still, I find myself thinking back to Virgil Sollozzo's immortal words in Louie's Restaurant, "You think too much of me, kid. I am not that clever."

Does anyone really think that the sophisticated parties really thought about CPLR 202 and drafted the provision in question, a provision seeking application of New York law, with the intent that CPLR 202 *displace* New York's statute of limitations?

More importantly, does anything think that attorneys choosing New York law will invariably know and understand that they need to *disavow* a New York statute, CPLR 202, if they actually want the case to be governed by New York's procedural laws inclusive of its statutes of limitation?

Whether The Contracting Parties Can, By Agreement Between Them, Set The Accrual Date Of Any Cause Of Action For Breach Of Contract — *Deutsche Bank Natl. Tr. Co. Tr. for Harborview Mtge. Loan Tr. v Flagstar Capital Markets Corp.*, 32 NY3d 139 [2018].

Generally, a cause of action for breach of contract accrues at the time of breach. So here, where defendant Quicken Loans sold a number of loans that did not conform with its representations and warranties concerning the quality of the product, the breach occurred at the time of sale and the claim became time-barred six years later.

Moreover, such is the rule even where, as in *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 NY3d 581 [2015], the contract provides that the buyer's sole remedy for a breach is to demand that the seller cure or repurchase the non-conforming loans. In such an instance, the fact that the buyer's loss may in some sense arise years after the sale from the seller's failure to cure does not alter that the cause of action arises from the breach, that the breach occurred at time of sale, and that the statute of limitations begins to run at that point.

But what if the contract specifically provides that the cause of action does not accrue at time of sale and instead accrues at some later date? Can the parties effectively alter the accrual date of the statute of limitations by agreement?

Held: By 4 to 2 vote, the Court of Appeals held that the parties cannot by agreement alter the accrual date of the statute of limitations.

Writing for the majority, Judge Fahey acknowledged that "freedom to contract is an important public policy in New York" (32 NY3d at 154). However, the majority reasoned that the Court's ruling in *John J. Kassner & Co. v. City of New York*, 46 NY2d 544 [1979] and the provisions of General Obligations Law § 17-103 dictated that "[i]f the agreement to waive or extend the Statute of Limitations is made at the inception of liability it is unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative" (*Kassner*, 46 NY2d at 551).

As for the plaintiff's argument that parties *should* be free to contract as they wish, the Court answered that "plaintiff's remedy lies with the legislature" in light of the provisions of GOL § 17-103.

Dissent: Judge Rivera, joined by Judge Wilson, would have ruled there was no "hard and fast rule" that the date of accrual "cannot be replaced by agreement of the parties" (32 NY3d at 158). Further, there was in the dissenters' estimation no true public policy that was served by the majority's ruling "and no reason to allow defendant to escape the consequences of its arms-length bargain" (*id*. at 161).

Judge Wilson separately added that the Court had created "bad law" both here and in *ACE*: "bad because it neither hews to the intent of the contracting parties nor of the investors in securities issued thereby; bad because it serves no public policy; bad because it disserves a very important public policy—the preservation of New York's role as the commercial center of the nation" (32 NY3d at 165).

Important Caveat: The majority distinguished the situation in which the contract itself specified that the performance itself, and therefore any breach of performance, would occur at some later date.

By way of example, suppose the parties contract on May 1, 2006 that Jones will pay Smith $200,000 on May 1, 2016. Obviously, if Jones breaches that agreement, the breach occurs on May 1, 2016 and the cause of action accrues at that time, not at the date of the contract itself.

But that is different, the majority reasoned, from a case in which the payment was due on May 1, 2006 but the parties agreed that the cause of action would first accrue on May 1, 2016.

Whether Expiration Of The Time To Bring Suit For Return Of The Principal Also Bars Any Claim For Related Interest Payments — *Ajdler v Province of Mendoza*, 33 NY3d 120 [2019].

Where,

a) defendant issued bonds pursuant to an indenture which provided that repayment of the principal was due when the bonds matured ten years after issuance,

b) the indenture required defendant to pay interest in biannual installments accruing on the principal sum at a 10% annual rate,

c) the indenture further provided that "[a]ll claims against [defendant] for payment of principal of or interest … on or in respect to the bonds shall be prescribed unless made within four years from the date on which such payment first became due"; and,

d) any claim for repayment of the principal was time-barred under the above-quoted four-year contractual proscription period,

could plaintiff nonetheless bring suit for recovery of the interest payments that were purportedly due over the four-year period immediately prior to the commencement of suit?

The question, on certification from the Second Circuit, obviously turned on whether the interest payments were separable and due even after any claim for the principal was time-barred.

Plaintiff's argument went like this:

1) under the terms of the indenture, interest payments ran until the principal was repaid,

2) because the principal was never repaid, the biannual interest payments never stopped running,

3) per general statute of limitations principles, the limitation period for suit relating to the interest payments was separate for each payment that was due, and started to run only when that particular payment became due, and,

4) although the statute of limitations had run with respect to the principal, such was merely a procedural and not a substantive bar to recovery (and, indeed, constituted an affirmative defense), meaning that it provided no substantive basis for denial of the interest payments as to which the statute had not yet run.

The defendant's rejoinder was that interest could not run on the principal when any claim to the principal was time-barred.

Held: The Court unanimously held, per opinion by Judge Feinman, that while it is true that New York applies a separate accrual date for each interest installment, "where an indenture provides that interest is due until the principal is paid, once an action to recover outstanding principal is time-barred, there can be no freestanding claim to enforce the obligation to make post-maturity interest payments."

In other words, "once a claim on the principal is time-barred, a claim to recover unpaid post-maturity interest payments is not legally cognizable."

Statute Of Limitations For No-Fault Claims Asserted Against Self-Insurers — *Contact Chiropractic, P.C. v New York City Tr. Auth.*, 31 NY3d 187 [2018], *rev'g* 135 AD3d 804 [2d Dept 2016].

Is an action to recover no-fault benefits from a self-insurer governed by the three-year statute of limitations of CPLR 214(2) (relating to disputes regarding penalties created by statute) or by the same six-year statute of limitations set forth in CPLR 213(2) (relating to actions for indemnification) as would *ostensibly* apply to recover no-fault benefits from an insurer?

The Court of Appeals ruled by four to three vote that the shorter statute of limitations applied.

Majority: Writing for the majority, Judge Fahey observed that the Court had previously characterized the no-fault scheme as "as a Rube Goldberg-like maze" and that the matter here in issue was "another illustration of the intricacy of that law" (31 NY3d at 195).

Judge Fahey acknowledged (albeit without express approval) that "[i]n matters involving questions with respect to no-fault claims against insurance companies liable for no-fault benefits due to the issuance of an insurance policy, the Appellate Division has applied a six-year statute of limitations" (31 NY3d at 195).

The point, however, is that those disputes arose from a contract with the insurer. In contrast, no-fault claims against self-insurers are purely a function of statute. Since the "the source of [the] claim is wholly statutory … the three-year period of limitations in CPLR 214(2) should control this case" (31 NY3d at 196-197).

Judge Stein issued a one-paragraph concurring opinion wherein she noted that the Court did not here "resolve the question of whether insurance companies who issue contractual insurance policies covering no-fault claims are subject to a three- or six-year statute of limitations, as that question is not before us" (31 NY3d at 197).

Dissent: Writing for the dissenters, Judge Garcia said that "the lower courts have, for decades, held that a no-fault claim against an insurance company is subject to the six-year limitation" and that it made no sense for the statute of limitations to be different against self-insurers (31 NY3d at 197).[2]

The dissenters would have ruled that a party who chooses to self-insure has thereby elected to stand "in the same position as any other insurer under the No–Fault Law" (*id*. at 198). In the dissenters' opinion, the majority's ruling was "an unfortunate result and one not required by our precedent" (*id*.).

But that was the dissent.

Relation Back: Via Two Different Routes — *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.,* 33 NY3d 72 [2019] and U.*S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 33 NY3d 84 [2019].

When an action is dismissed without prejudice by reason of the plaintiff's failure to comply with a contractual prerequisite for commencement of suit, and where the statute of limitations has expired by the time the plaintiff files the second action, is the second action nonetheless timely pursuant to CPLR 205[a] if it was commenced within six months of dismissal of the first action?

When an action is dismissed without prejudice by reason of the plaintiff's failure to comply with a contractual prerequisite for commencement of suit, and where the statute of limitations has expired by the time the plaintiff files the second action, can the filing of the second action relate back pursuant to CPLR 203[f] to the time that a different party filed an essentially identical (and timely) action against the same defendant?

The Court of Appeals resolved those two issues in two different opinions. Both were penned by Judge Rivera and both were unanimous. The answers were "Yes" to the CPLR 205[a] extension and "No" to the CPLR 203[f] relation back.

Facts: Defendant DLJ purchased a group of residential mortgage loans and later sold the loans to a non-party. Plaintiff U.S. Bank, and others, ultimately entered into a "pooling and servicing agreement" with the non-party purchaser.

Plaintiff, which claimed there were multiple misrepresentations regarding the quality of the loans, timely commenced Action #1 against DLJ. However, "[a]s is typical of these agreements, the MLPA, RA, and PSA contain[ed] a now familiar sole remedy provision, which require[d] any party that discovers a breach to promptly notify the other relevant party, and upon notice, allow[ed] Ameriquest time to remedy the defect." U.S. Bank had not complied with that prerequisite, requiring the dismissal of Action #1. By the time plaintiff commenced Action #2 against the same defendant, the statute of limitations had expired.

Held [CPLR 205(a) Issue]: Back in *ACE Secs. Corp. v. DB Structured Prods., Inc.*, 25 NY3d 581 [2015], the Court addressed a contractual prerequisite similar to that involved here and the Court there

[2] Actually, many of those self-insurers, including the self-insurer in the case at bar (the New York City Transit Authority), are quite accustomed to receiving more favored treatment than less privilege litigants on a whole array of so-called procedural matters, including special (shorter) limitations periods, even more restrictive notice of claim prerequisites, and special (lower) interest rates. But I digress.

ruled that the provisions were a procedural prerequisite to suit and not a substantive condition precedent to the seller's performance. DLJ here argued that such ruling somehow rendered CPLR 205[a] inapplicable.

The point, however, was that *ACE* dealt only with the question of when the claims for breach of representations and warranties accrued, and whether the action therein was untimely. Here, the first action was clearly timely and the second action was clearly untimely absent application of CPLR 205[a].[3] The issue was whether CPLR 205[a] could save the otherwise untimely action, and that issue was not addressed in *ACE*.

By its terms, CPLR 205[a] allows recommencement within six months if the first action was timely, and notwithstanding that the second action would otherwise be time-barred, in all but four instances: where the first dismissal was "a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits." Further, the Court's prior precedents establish, a) the provision "implements the Legislature's 'policy preference for the determination of actions on the merits'" [citation omitted], and, b) the statute should be broadly construed to effect that policy preference.

Here, the dismissal of the first action was plainly premised upon a procedural defect, not upon the merits. The dismissal was not premised upon a substantive condition precedent, that is, upon a provision that "'describe[s] acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract.'" The "notice" and "sole remedy" provisions which dictated dismissal of the first action were "not substantive elements of the cause of action, but instead limitations on the remedy for a breach of the mortgage loan representations and warranties."

Thus, none of the four statutory exceptions applied, and plaintiff was accordingly entitled to the six-month grace period of CPLR 205[a].

Held [CPLR 203(f) Issue]: Plaintiff's "backup" argument, which it fortunately did not need, was that its commencement of the second action related back, pursuant to CPLR 203[f], to another party's timely commencement of a different action against the same defendant.

CPLR 203[f] provides: "A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

Plaintiff relied upon the fact that a certificate holder had timely commenced a suit premised on essentially identical claims within the statute of limitations. Plaintiff's problem was, a) that "CPLR 203(f) applies only in those cases where a valid pre-existing action has been filed," and, b) the certificate holder's action was dismissed by virtue of its lack of standing to sue, with the consequence that there was "no valid pre-existing action to which a claim in a subsequent amended pleading may relate back."

C. Disclosure/Discovery Issues

Whether There Are FOIL Exceptions For Redacted Documents And/Or Documents Previously Received In Evidence During A Public Hearing — *New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556 [2018].

[3] Although defendant argued that the first action was also untimely, the Court ruled that such was plainly not the case.

As the first sentence of the majority's opinion noted: "Civil Rights Law § 50-a requires that police officer personnel records be kept confidential, and sets out a procedure to obtain a court order of disclosure."

But what if the party seeking disclosure does not mind if all of the officer's identifying information is redacted? Does that mean that material that would otherwise be exempt from disclosure is now discoverable inasmuch as there can no longer be any valid concern about the officer's privacy interests?

Relatedly, what if some or all of the officer's personnel records were received in evidence during a disciplinary hearing that was itself open to the public? Do those portions of the personnel file that were admitted at a hearing open to the public thus become discoverable notwithstanding the provisions of CPLR § 50-a?

Held: By 5 to 2 vote, the Court's answers to the above questions were No and No. The majority's opinion was penned by Judge Garcia.

Regarding the argument that the statutory concerns can be satisfied by redaction rather than by withholding the document, the Court ruled, as follows, that such was an alternative that the legislature had considered and rejected:

> These policy arguments are not new. To the contrary, in enacting and amending Civil Rights Law § 50–a, the Legislature was well aware of them. In fact, "opposition to the bill was expressed on the ground that the needs to prevent oppressive use of police personnel records 'do not offset the benefits of assuring the availability to the public of the performance evaluation of its servants' " (*Daily Gazette,* 93 N.Y.2d at 155, 688 N.Y.S.2d 472, 710 N.E.2d 1072, quoting Mem of Special Duty Atty–Gen Joseph P. Hoey, Special Prosecutor Suffolk County, Bill Jacket, L 1976, ch 413).
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> * * *
>
> Notwithstanding this resistance, the Legislature made the "policy choice" to "shield the personnel records of these officers from disclosure" by extending broad statutory protection while providing only limited exceptions for their release (*id.* at 154–155, 688 N.Y.S.2d 472, 710 N.E.2d 1072).
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> * * *
>
> The alternative "redacted disclosure" regime proposed by the parties would eviscerate the Legislature's mandate. Civil Rights Law § 50–a sets up a "legal process whereby the confidentiality of the records may be lifted by a court, but only after an in camera inspection and affording affected parties notice and an opportunity to be heard" (*Daily Gazette,* 93 N.Y.2d at 154, 688 N.Y.S.2d 472, 710 N.E.2d 1072). The parties' proposal would, instead, enable an agency to circumvent the host of statutory protections belonging to covered officers by simply applying redactions that the agency, in its sole discretion, deems adequate. That scheme would transform Civil Rights Law § 50–a into an optional mechanism applicable only when (and if) the agency chooses to invoke it.

Regarding the argument concerning materials that were placed in evidence at a hearing that was itself open to the public, the majority said, in a footnote, that "Section 50-a's mandatory confidentiality provision" was "unaffected by the 'crucial fact' that NYPD disciplinary hearings are open to the public," adding that such a rule "would perversely discourage municipalities from allowing public hearings, and encourage officers to seek confidential treatment of their hearings, in order to avoid any implication that they have somehow 'consented' to broader public disclosure."

Dissents: Judge Rivera charged that the majority's rejection of compliance by redaction was "at odds with the statutory text and intent," inconsistent with the Court's prior rulings, and "bad decisionmaking" inasmuch as it "undermines our state's public policy of open government."

Judge Wilson agreed with Judge Rivera's redaction analysis and further opined, as follows, that protection should not be extended to materials that were already in the public domain:

> By opening the Trial Room proceedings to the public, the City has chosen to disclose information relevant to that proceeding. In doing so, the City has determined that the confidentiality of an officer's identity, the nature of the charged offense, or the evidence supporting that charge—otherwise protected by section 50–a—is of insubstantial weight compared to the countervailing interest in public disclosure. Neither party here suggests that the City has acted beyond its authority in doing so, or that such disclosure violates section 50–a in the first place. Subsequent disclosure of the same information under FOIL cannot, therefore, undermine those same concerns. Having decided to make the Trial Room hearing public, the NYPD cannot reasonably claim that those portions of the final decision that reveal only what was publicly revealed in the hearing are exempt under section 50–a. None of our prior decisions relied on by the majority remotely suggests that information disclosed by a governmental entity to the public, pursuant to rules promulgated by that entity, cannot be obtained by the public through a FOIL request.

The "Maybe We Do And Maybe We Don't" FOIL Response — *Abdur-Rashid v New York City Police Dept.,* 31 NY3d 217 [2018], *aff'g* 140 AD3d 419 [1st Dept 2016].

Can an agency served with a Freedom of Information Law request (Public Officers Law § 84 *et seq.* [FOIL]) *decline to say* whether it has responsive documents on the ground that providing that information would of itself reveal information protected from disclosure under a FOIA exemption? A divided Court answered in the affirmative.

Facts: According to the Chief Judge's majority opinion, the two petitioners served FOIL requests that sought "any records possessed by the New York City Police Department … related to any 'surveillance' and 'investigation' of them as individuals and of certain specified entities with which they were associated (including a mosque and a university student association, respectively) for the six-year period immediately preceding the request" (31 NY3d at 223). The NYPD responded that such information "if possessed by the NYPD," would be protected from disclosure (*id*.).

Majority: Chief Judge DiFiore's majority opinion noted that "[t]he federal courts have long permitted federal agencies responding to Freedom of Information Act (5 USC § 552 [FOIA]) requests to neither confirm nor deny the existence of responsive documents" where the alternative would of itself provide protected information (31 NY3d at 222).

Although New York's statute had not previously been construed in that manner, the majority looked favorably upon the NYPD's argument "that this Court should follow the commonsense doctrine employed by the federal courts, which have recognized that it is permissible under the federal statutory scheme of FOIA for a federal agency to decline to acknowledge possession of responsive records when the fact that responsive records exist would itself reveal information protected under a FOIA exemption" (31 NY3d at 228).

"Taken to its logical extreme," the petitioners' opposing view would create "a Catch–22 paradigm where the NYPD would have to acknowledge the existence of an investigation involving a particular person notwithstanding that the contents of any responsive records would be exempt and revelation of their existence would result in the same harm justifying exemption of the contents …" (*id*.).

Looking ahead, the majority said that it would be "a rare case where, due to the surrounding circumstances and the manner in which a FOIL request is structured, acknowledging that any responsive records exist would, itself, reveal information tethered to a narrow exemption under FOIL" (31 NY3d at 233). This, however, was such "a rare case."

Petitioners effectively sought to discover whether they or various others were the subject of police investigations. Such requests "implicate[d] the core concerns underlying the law enforcement and public safety exemptions" (31 NY3d at 235) and could undermine the detecting, deterring, and thwarting of terrorist activity.

Dissent: Judge Stein, joined by Judge Rivera, dissented on the principal ground that the Court was here tasked with construing a statute and the NYPD's view that it could choose to neither confirm nor deny that it possessed the documents in issue "cannot be found in, or reconciled with, the language of FOIL, and the majority's determination to the contrary sanctions a blanket exemption from disclosure for a vast amount of information and records" (31 NY3d at 258).

Partial Dissent: Dissenting alone, Judge Wilson felt that "neither FOIL nor our decisional law interpreting it requires an agency to confirm or deny the existence of protected documents if such confirmation or denial would itself be protected by an exemption" (31 NY3d at 240). However, he also felt that the agency should have to show more than was here shown by the NYPD in order to issue the kind of "Maybe we do and maybe we don't" response the majority here deemed permissible.

Whether Electronic Copies Of Paper Ballots Were Themselves "Voted Ballots" For Disclosure Purposes — *Kosmider v. Whitney*, 2019 NY Slip Op 04757 [June 13, 2019], *rev'g* 160 AD3d 1151 [3d Dept 2018].

The Freedom of Information Act (FOIL), Public Officers Law § 84, renders governmental records discoverable with four stated exceptions, none of which was claimed to apply here.

However, the case involved a FOIL demand for election data and thus implicated the Election Law. Election Law § 3-222(s) provided in pertinent part:

> "[v]oted ballots shall be preserved for two years after [an] election and the packages thereof may be opened and the contents examined only upon order of a court or judge of competent jurisdiction or by direction of [a] committee of the senate and assembly if the ballots relate to [an] election under investigation."

Emphasis added.

Under the above-quoted statute, one needs a court order (or the direction of a legislative committee) to obtain disclosure of "voted ballots" within the first two years following an election.

But what, exactly, are "voted ballots"? More specifically, while everyone here agreed that the paper ballots themselves were "voted ballots" within the meaning of the provision, what about any electronic images of the paper ballots? Were they "voted ballots" and therefore non-discoverable "absent a court order or legislative committee direction in the first two years following an election"?

The Court of Appeals split 4 to 3.

Majority: The majority ruled per opinion by Chief Judge DiFiore that "electronic copies of ballots are no less protected from disclosure under section 3-222 during the relevant time frame."

As the majority saw it, the prohibition was not aimed merely at safeguarding of the ballots from those who might alter or destroy them, but also at restricting access. This being so, there was no meaningful distinction between the paper ballot and an electronic copy thereof. The majority added: "The 2011 amendments also show that the Legislature knew how to distinguish between paper and electronic materials when that was its intent."

Dissent #1: Judge Stein, joined by Judge Rivera, dissented on the grounds that, a) electronic copies of the ballots were, literally, not the "voted ballots," and, b) the legislative history "demonstrate[d] that this statutory provision was primarily intended to safeguard paper ballots against tampering—a concern absent vis-à-vis electronic images of ballots."

Beyond that, while Judge Stein construed the majority's ruling as suggesting "that FOIL disclosure of electronic ballot images would undermine the integrity of elections," she felt that "just the opposite is true—such disclosure furthers the legislative purpose of Election Law § 3-222(s) by providing a check against fraud perpetrated by governmental actors and promoting accuracy in our electoral process."

Dissent #2: Judge Wilson went in a different direction, largely premised on the statute's two-year end date.

Everyone here agreed that the statute shielded the records for only two years after the election, at which point even the paper ballots were discoverable. Here, it was now more than three years after the subject election.

This, in Judge Wilson's opinion, dictated two further conclusions. First, even if the Board of Elections believed that the electronic records were ballots within the meaning of the statute, its response should have been that it would provide petitioner with the records when the two-year end date arrived, not that it would not provide them at all. Second, inasmuch as the records were now discoverable, the respondent should have been directed to provide them. "Setting up meaningless procedural hurdles that have the potential to deprive the public of information about the operation of their government" — such as requiring the person seeking disclosure to re-file the request at some later point in time — would serve no valid purpose.

D. Allegedly Binding Agreements To Individually Arbitrate Employment Disputes

The New Norm: Employees Can Now Be Effectively Compelled To Relinquish Any And All Rights To Litigate Collectively — *Gold v New York Life Ins. Co*., 32 NY3d 1009 [2018], *rev'g* 153 AD3d 216 [1st Dept 2017].

The key issue was summarized in the very first sentence of Justice Karla Moskowitz's opinion for the Appellate Division majority:

> … whether employees can be obliged to arbitrate collective disputes such as class actions regarding wage disputes with their employers.

153 AD3d at 216.

The answer is Yes, and it is a product of a recent U.S. Supreme Court ruling.

Facts: Plaintiffs were former insurance agents for defendant New York Life. They were all hired pursuant to standard contracts that provided that the agent was not an employee of N.Y. Life. Their remuneration was based on commissions from the sale of insurance policies.

Plaintiffs filed a class action in which they alleged, *inter alia*, that NY Life effected "unlawful wage deductions for commission reversals in violation of Labor Law § 193," that it failed "to pay overtime in violation of 12 NYCRR 142-2.2," and that it failed "to pay the minimum wage in violation of Labor Law § 652" (153 AD3d at 220).

NY Life moved to dismiss on the ground that the plaintiffs had agreed to arbitrate any dispute arising from the "employment" contracts. Plaintiffs countered that the arbitration provisions prohibited class, collective, or representative claims, thus violated the National Labor Relations Act (NLRA), and therefore could not be enforced.

Appellate Division: The Appellate Division split 3 to 2 on the arbitration issue. Writing for the majority, Justice Moskowitz noted that New York courts had "not squarely addressed the question of whether this type of arbitration provision is enforceable" and that the Federal circuit courts had split on the issue (153 AD3d at 221).

The majority found the Seventh Circuit's ruling in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 [7th Cir 2016], to the effect that the arbitration clause was unenforceable, to be persuasive. The majority observed: "we can divine no reason that the FAA policy favoring arbitration should trump the NLRA policy prohibiting employers from preventing collective action by employees" (153 AD3d at 224).

The *Epic* Ruling: The Appellate Division ruling, relying in large part in *Lewis*, was rendered on July 18, 2017. The United States Supreme Court reversed *Lewis* the following year, in *Epic System Corp. v. Lewis*, 138 S.Ct. 1612 [2018]. The reversal was by 5 to 4 vote.

Writing for the majority, Justice Gorsuch (joined by Chief Justice Roberts and Justices Kennedy, Alito and Thomas) framed the issue as follows:

> Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

Epic, 138 S.Ct. at 1619.

The assumption was, in other words, that the employees had *actually wanted* the arbitration clause, or, if they hadn't, such did not matter. The majority further stated:

> that "[t]he NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum" (*Epic*, 138 S.Ct. at 1619);
>
> that until relatively recently "courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms" (*id*. at 1620); and,
>
> that, in the FAA, Congress specifically directed courts "to respect and enforce the parties' chosen arbitration procedures" (*id*. at 1621).

The majority ruled that the FAA's saving clause — which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" — was inapplicable because the clause applies only to defenses (such as fraud or duress) which could invalidate *any* contract, whereas the defense here in issue specifically targeted agreements to arbitrate (*id*. at 1622).

As for the employees' claim that every single right that was seemingly guaranteed by the NLRA would become a dead letter if the employees could not group together and assert their violation in a class action that would make litigation affordable for them, the majority rejoined, 1) while the policy "may be debatable," "the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written" (*id*. at 1632), and, 2) that class actions also had their negative side, in that it is "well known that they can unfairly 'place[] pressure on the defendant to settle even unmeritorious claims [citation omitted].'"

Justice Ginsberg, joined by Justices Breyer, Sotomayor and Kagan, observed that the plaintiffs-employees here "complain[ed] that their employers … underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938" and their claims were individually so small as to be "scarcely of a size warranting the expense of seeking redress alone" (Dissent, 138 S.Ct. at 1633).

In the dissenters view, the majority "today subordinates employee-protective labor legislation to the Arbitration Act," a result that dissenters deemed "egregiously wrong" (*id*. at 1633). In the cases before the Court, the employers had "required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one" (*id*. at 1635-1636). The employees objected not to arbitration per se, but instead that the agreement barred them from litigating collectively in *any* forum and thus effectively allowed employers to violate with impunity state and federal wage guarantees, secure in the knowledge that none of the illegally treated employees could individually afford to litigate the violations. The dissenters vigorously agreed with that analysis, writing:

> The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers
>
> * * *

> The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread … One study estimated that in Chicago, Los Angeles, and New York City alone, low-wage workers lose nearly $3 billion in legally owed wages each year.
>
> * * *
>
> If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries.
>
> * * *
>
> The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.

Dissent, 138 S.Ct. at 1646-1648.

As for the majority's rationale that the FAA clearly required enforcement of the "agreement" to arbitrate even if the policy ramifications were debatable, the dissenters felt,

> 1) "Congress did not intend the statute to apply to arbitration provisions in employment contracts" (*id*. at 1643);
>
> 2) the employees' defense did not single out arbitration and therefore fell within the FAA's savings clause inasmuch as, at bottom, the employees relied on the general contract rule that "illegal promises will not be enforced" (*id*. at 1646); and,
>
> 3) even if the provision in issue was violative of the FAA, any conflict between the FAA and the NLRA should be resolved in favor of the NLRA, the later enactment.

Held: In the Court of Appeals, plaintiffs conceded that the Supreme Court's subsequent ruling in *Epic* required reversal of the Appellate Division order.

The Court of Appeals reversed in a single paragraph on section 500.11 review, explaining:

> The parties now agree that the arbitration clauses in Kartal's agreements are enforceable (*see Epic Sys. Corp. v. Lewis*, ___ U.S. ___, 138 S.Ct. 1612, 200 L.Ed.2d 889 [2018]), and ask that we reverse.

Gold, 32 NY3d at 1010.

E. Other Procedural Issues

Whether Requirement Of Posting Security That Applied Only To Nonresidents Was Violative Of The Privileges And Immunities Clause — *Clement v Durban*, 32 NY3d 337 [2018].

Background: CPLR § 8501, subd. [a], states: "Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made."

CPLR § 8503 provides that "[s]ecurity for costs shall be given by an undertaking in an amount of five hundred dollars in counties within the city of New York, and two hundred fifty dollars in all other counties, or such greater amount as shall be fixed by the court …"

Facts: Plaintiff commenced the subject personal injury action while a New York resident. She emigrated some time later to Georgia. After she relocated, defendants moved, pursuant to the above-quoted statutes, for an order compelling plaintiff "to post a minimum of $500 security for costs in the event she lost the case." *Clement*, 32 NY3d at 340.[4]

Plaintiff opposed the motion on the ground that, by requiring nonresident plaintiffs to file security for costs, the State was treating resident and nonresident litigants differently, in violation of the Privileges and Immunities Clause set forth in article IV, section 2 of the United States Constitution.[5]

Held: The Court of Appeals unanimously ruled, per opinion by Judge Feinman, that the constitutional challenge lacked merit.

The gist was that the Privileges and Immunities Clause applies only to "certain 'fundamental' privileges protected under the Privileges and Immunities Clause, which include '[nonresidents'] pursuit of common callings within the State; in the ownership and disposition of privately held property within the State; and in access to the courts of the State [citation omitted].'" *Clement*, 32 NY3d at 341. "Neither the Supreme Court nor this Court have insisted on equal treatment for nonresidents 'to a drily logical extreme.'" *Id*. at 342, *quoting Smith v. Longman*, 245 NY 486, 493 [1927].

Regarding CPLR 8501[a], the Court found that "[s]tatutes or court rules mandating that nonresident plaintiffs post security for anticipated costs for which they may be responsible if they lose their cases are a fixture in states across the country, including New York." *Clement*, 32 NY3d at 344. That residents and nonresidents were treated differently did not constitute a violation of the Privileges and Immunities Clause unless the difference was of such nature and degree as to deprive nonresidents of "reasonable and adequate access to the New York courts." *Id*. at 346.

Here, the "marginal" cost, imposed "on only those nonresident plaintiffs who do not qualify for poor person's status pursuant to CPLR 1101, or fit any other statutory exemption," clearly did not deprive the plaintiff of "reasonable and adequate access to the New York courts." *Id*. at 346.

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[4] Would the $500, which I guess was meaningful when the statute was last amended in 1972, even pay for the cost of making the motion? I doubt it.

[5] That clause states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Whether The Plaintiff's Attorney's Failure To Maintain A "Physical Office" In The State Rendered The Action A Nullity — *Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P.*, 32 NY3d 645 [2019], *rev'g* 154 AD3d 523 [3d Dept 2017].

Section 470 of the Judiciary Law allows nonresident attorneys to practice law in the State, but only if the attorney maintains an office in the State. The Court of Appeals ruled in *Schoenefeld v. State*, 25 NY3d 22 [2015] that the in-state office provision mandates "a physical law office," this as opposed to mere appointment of an in-state agent to receive service.

The question was whether the action itself is a nullity when the attorney who filed it on the plaintiff's behalf did not have a New York office.

Facts: Plaintiff Arrowhead and defendant Cheyne together "entered into a financing agreement with a group of borrowers." Cheyne, "as senior lender, held a secured term loan note and Arrowhead held a subordinated note, with both notes secured by certain collateral." After the borrower defaulted and Arrowhead obtained a $2.5 million judgment against it, Arrowhead commenced the present suit against Cheyne and its senior partner. Plaintiff's theory was that the defendant "failed to protect the collateral securing Arrowhead's subordinated note, thus depriving Arrowhead of its security for repayment."

The point, however, was that while the plaintiff's attorney had business addresses in both Pennsylvania and Manhattan, he did not actually have a "physical office" in New York.

After initially moving to dismiss on various merits grounds, the defendants made a second motion to dismiss (while the first was still pending) by reason of the defendant's attorney's violation of Judiciary Law § 470. Supreme Court granted the latter motion and the Appellate Division affirmed, holding, a) the statutory violation rendered the action a nullity, and, b) the violation was not cured by the client's retention of an in-state attorney as co-counsel.

Held: Noting that the "nullity issue" had divided the departments of the Appellate Division, the Court of Appeals unanimously ruled per an opinion by Judge Garcia that given the Court's prior ruling that an attorney's disbarment does not render the action a nullity, "it would be incongruous to conclude that, unlike the acts of a disbarred attorney, actions taken by an attorney duly admitted to the New York bar who has not satisfied Judiciary Law § 470's office requirement are a nullity."

Rather, where such a violation exists, the party in violation "may cure the section 470 violation with the appearance of compliant counsel or an application for admission pro hac vice by appropriate counsel."

The Court added: "Where further relief is warranted, the trial court has discretion to consider any resulting prejudice and fashion an appropriate remedy … and the individual attorney may face disciplinary action for failure to comply with the statute."

The Court concluded:

> This approach ensures that violations are appropriately addressed without disproportionately punishing an unwitting client for an attorney's failure to comply with section 470.

Whether Direct Contact With The Property Owner Is Essential For A Contractor To Assert A Mechanic's Lien Against The Subject Property — *Ferrara v Peaches Café LLC*, 32 NY3d 348 [2018].

Section 3 of the Lien Law provides that a contractor "who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof … shall have a lien for the principal and interest, of the value, or the agreed price, of such labor ... from the time of filing a notice of such lien."

Thus, where, as here, a lessee hires the contractor to improve the property, and where the lessor consents to the work, the contractor can file the lien against the subject property even though it was a lessee, not the owner, who hired the contractor to make the improvement.

But what, exactly, does "consent" entail in the present context? Must the owner "directly" and "expressly" consent to trigger the statutory lien? Or is something less sufficient?

Facts: Defendant Peaches Café LLC ("Peaches") entered into a ten-year lease with defendant COR Ridge Road Company LLC ("COR") whereby the latter leased the former space in a retail shopping plaza. The lease specifically provided that Peaches would build and operate a full-service restaurant, that Peaches would substantially complete construction within 90 days, and that any improvements effected by Peaches would become part of the realty at the end of the lease.

Peaches later went under, still owing its contractor, Ferrara, $50,000.

Was COR responsible under above-quoted section 3 of the Lien Law? COR argued it was not responsible since it did not "expressly" and "directly" consent to Ferrara's selection or work.

Held: The Court unanimously ruled, per opinion by Judge Wilson, that the Appellate Division correctly ruled in the contractor's favor inasmuch as "our precedents establish that the Lien Law does not require any direct relationship between the property owner and the contractor for the contractor to be able to enforce a lien against the property owner. Lien Law § 3" (32 NY3d at 353).

In so ruling, the Court distinguished the situation where the owner is at very most aware that the tenant planned to make improvements (as in *Rice v. Culver*, 172 NY 60 1902]) from the situation (as at bar) in which the owner required that the improvements be made and also benefitted from the improvements. Here, "[t]he language of the lease agreement not only expressly authorized Peaches to undertake the electrical work, but also required it to do so to effectuate the purpose of the lease" (32 NY3d at 355). In such an instance, the statutory consent exists irrespective of whether there was any direct contact between the owner and the contractor.

In this regard, while the Appellate Division had on occasion construed certain language in *Delany & Co. v. Duvoli*, 278 NY 328 [1938] as holding that direct contact was a prerequisite to statutory consent, such, the Court of Appeals here said, was a misreading of its ruling in *Delany*. The Court explained:

> … *Delany* does not stand for the proposition that consent under Lien Law § 3 requires a direct relationship between the property owner and the lienor. Instead, Delany stands for the proposition that some "affirmative act" by the landowner is required to find consent for the purposes of Lien Law § 3. Our decisions make clear that that "affirmative act" can include lease terms requiring specific improvements to the property (*see Burkitt,* 79 N.Y. 273; *Otis,* 90 N.Y. 336; *Jones,* 168 N.Y. 61, 60 N.E. 1053). When a lease does not require improvements, the owner's overall course of conduct and the nature of the relationship between the owner and the lienor may demonstrate consent for purposes of Lien Law § 3 (*see National Wall–Paper Company v Sire,* 163 N.Y. 122, 57 N.E. 293 [1900]). The decision in *Paul Mock,* when read properly, is consistent with our precedents, as are most of the Appellate Division cases relied on by COR. To the extent that certain Appellate Division decisions relying on *Paul Mock* suggest that Lien Law § 3 requires a direct relationship between

> the landlord and the contractor to establish consent, they are contrary to our precedents and should not be followed.

32 NY3d at 356-357.

II. Substantive Tort Law In Personal Injury And Wrongful Death Actions

A. Construction Accident Litigation (Labor Law §§ 240[1] and 241[6])

Labor Law § 240, As Applied To A Prime Mover That "Flipped Forward" And Thus "Catapult[ed]" The Plaintiff-Operator — *Somereve v Plaza Constr. Corp.*, 31 NY3d 936 [2018], *rev'g* 136 AD3d 537 [1st Dept 2016].

Plaintiff moved for summary judgment under Labor Law § 240[1]. The motion, which split the Appellate Division 3 to 2, touched on several significant legal issues.

Facts: Plaintiff was using a prime mover (essentially, a small forklift) to hoist a load of bricks onto a scaffold 5½ to 6 feet high. Two co-workers were up on the scaffold in order to tell plaintiff when the forks were clear of the scaffold. "However, when the load was approximately five feet off the ground, the prime mover flipped forward and plaintiff was ejected off the back of the machine and onto the concrete floor" (136 AD3d at 538).

Plaintiff moved for summary judgment before completion of discovery. Two witnesses, at least one of whom was claimed to have seen the accident, had been subpoenaed but not yet deposed.

In moving for summary judgment, plaintiff urged that the lifting of the bricks posed an elevation risk within the scope of Labor Law § 240. Plaintiff further contended that the hoist was a device within the statute's scope, and that the hoist failed to provide adequate protection and safety as established by the fact it flipped over.

The Appellate Division majority ruled that Supreme Court was correct in granting plaintiff summary judgment. The dissenters disagreed on multiple grounds, including, (a) the case purportedly did not involve an elevation-risk within the scope of the statute, (b) the evidence purportedly "raise[d] a factual issue as to whether plaintiff's injuries were caused solely by his own negligent operation of the machine" (136 AD3d at 540), (c) there was insufficient proof of a statutory violation, and, (d) the motion was purportedly premature.

Elevation-Relatedness: The Appellate Division dissenters characterized plaintiff's accident as being a "fall from the platform of the prime mover situated eight inches off the floor" and said that such "hardly represents 'a risk arising from a physically significant elevation differential'" (136 AD3d at 544). The Appellate Division majority took issue with both the premise and the conclusion, as follows:

> Plaintiff did not simply "f[a]ll from the platform of the prime mover situated eight inches off the floor," as the dissent states. Similarly, plaintiff was not simply "alighting" from the prime mover. The testimony in the record shows instead that the prime mover tipped forward, with a resulting "catapult-type effect" on plaintiff. The prime mover then ejected plaintiff upward, causing him to hit the ductwork or the ceiling before he was "slammed" onto the concrete floor of the site. Certainly, it is appropriate to characterize this sequence of

> events as a gravity-related accident (*see Potter,* 71 A.D.3d at 1566, 900 N.Y.S.2d 207).

136 AD3d at 539.

Violation Of Statute: The Appellate Division dissenters stressed that there was "no proof offered by plaintiff that the device, the prime mover … was defective or that it proximately caused plaintiff's injuries" (136 AD3d at 542). They also concluded there was "no evidence" that "'the prime mover or scaffold could not support the weight of the brick load'" (*id*. at 543).

In contrast, the Appellate Division majority deemed the very fact that the prime mover pitched forward as dispositive proof that it did not provide adequate protection.

Sole Proximate Cause: The Appellate Division dissent repeatedly charged that "the evidence raises a factual issue as to whether this incident was caused solely by plaintiff's negligent operation of the mover" inasmuch as it was plaintiff who "personally ascertained that the load was properly positioned and secured before proceeding to the scaffold" (136 AD3d at 543-544).

The Appellate Division majority charged that the dissenters were confusing mere "comparative negligence" with "sole proximate cause":

> … despite our dissenting colleague's suggestion otherwise, there is no viable argument that plaintiff was the sole proximate cause of this accident. The record presents no evidence that plaintiff failed or refused to use an available safety device or that he disregarded a supervisor's instructions regarding use of the prime mover, nor does the dissent point to any.
>
> * * *
>
> What is more, "the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence" (*Kielar v. Metropolitan Museum of Art,* 55 A.D.3d 456, 458, 866 N.Y.S.2d 629 [1st Dept.2008] [internal quotation marks omitted]).

136 AD3d at 539-540.

Allegedly Premature Motion: The Appellate Division dissenters said "plaintiff could not give an explanation as to how the incident occurred," "there are at least two identified witnesses to the occurrence who were subpoenaed but have not yet been deposed and are in a position to shed light on how it occurred," and "summary judgment was prematurely awarded."

The Appellate Division majority responded, *inter alia*, that the witnesses' testimony could not change the outcome. Even if their testimony established that "that the prime mover, which plaintiff himself loaded, may have been carrying too much weight" and/or "that the bricks on the prime mover may have come into contact with the scaffold as plaintiff was raising the load, thus causing the prime mover to tip forward," such would at most constitute mere comparative negligence, which would not change the outcome (136 AD3d at 538-539).

Held: The Court of Appeals reversed in a terse memorandum opinion on the sole ground that the motion was "prematurely granted." The ruling was, in its entirety:

> The order of the Appellate Division should be reversed, with costs, plaintiffs' motion for partial summary judgment of liability on the Labor Law § 240(1) claim denied, and the certified question answered in the negative.
>
> Here, where there is insufficient evidence concerning how the accident occurred, the requested discovery could aid in establishing what happened, and the note of issue was not due to be filed for another six months, summary judgment was prematurely granted (*see Groves v. Land's End Hous. Co.,* 80 N.Y.2d 978, 980, 592 N.Y.S.2d 643, 607 N.E.2d 790 [1992]).
>
> Order reversed, with costs, plaintiffs' motion for partial summary judgment of liability on the Labor Law § 240(1) claim denied, and certified question answered in the negative, in a memorandum.

31 NY3d at 937.

Comment: I note two points of interest.

First, in ruling that the motion was "prematurely granted," the Court did not say how or why the missing witnesses' testimony might have changed the ruling.

Second, since there was no claim that the missing testimony was in any way relevant to the threshold question of whether there was an elevation risk within the scope of the statute, I suppose one could view the opinion as providing tacit support for, or at least not overturning, the Appellate Division's holding that the case involved an elevation risk within the scope of the statute.

B. Premises Liability

Plaintiff's Allegedly "Improper" Reliance On A Non-Governmental ANSI Provision, And The Defendants' Alleged Lack Of Actual Or Constructive Notice Of The Alleged Hazard — *Bradley v HWA 1290 III LLC*, 32 NY3d 1010 [2018], *aff'g* 157 AD3d 627 [1st Dept 2018].

The not atypical result: after the Appellate Division split 3 to 2 and rendered two lengthy opinions, the Court of Appeals affirmed on 500.11 review in a single paragraph.

Because the Court of Appeals ruling says virtually nothing about the facts of the case or the specifics of the parties' respective contentions, those must be gleaned from the Appellate Division's opinions.

Facts: Decedent, characterized by the Appellate Division majority as "an experienced elevator maintenance mechanic," was "electrocuted as a result of coming into contact with a transformer while servicing a malfunction in one of the building's elevators" (157 AD3d at 628).

The accident was unwitnessed, and decedent's body was first found hours after he died (*id*.). Plaintiff's thesis was that decedent must have contacted an uncovered transformer in the allegedly dark elevator motor room. Plaintiff claimed that the transformer should have been equipped with a safety cover, and also that the elevator room was too dark and therefore unsafe. In making those claims, plaintiff relied upon an industry standard, the ANSI Safety Code for Elevators, which required that "[b]arriers shall be installed to prevent contact with live parts if inadvertent contact with bare live parts during normal service and adjustment operation is considered probable."

Appellate Division: The Appellate Division majority ruled that plaintiff's proof regarding the lighting — essentially, that one of defendant's employees testified that "the fluorescent lighting in the ninth floor motor room 'wasn't that good at all'" —was "merely conclusory" and failed "to raise a factual issue as to whether the lighting in the motor room was up to code" (157 AD3d at 630).

With respect to the alleged violation of the above-mentioned provision regarding barriers, the Appellate Division majority ruled:

1) plaintiff's "reliance on ANSI" was not proper inasmuch as,

a) "the Environmental Testing Labs, an independent tester/certifier of products in the elevator industry, certified the elevator control cabinet as complying with the ANSI requirements," and,

b) the ANSI provision in issue had not "been adopted by or incorporated into New York City's elevator code" and plaintiffs had "failed to establish that defendants were required by law to comply with the above ANSI standard" (157 AD3d at 633), and,

2) even assuming that the condition in issue (no cover) could be deemed dangerous, the defendant-landowners had neither designed nor installed the cabinet in issue and defendants had established that they lacked actual or constructive notice of an alleged defect that existed within the closed cabinet in issue (157 AD3d at 631, 633).

Held: The Court of Appeals affirmed but agreed only with the latter prong of the Appellate Division's ruling regarding the absence of a safety cover: that defendants lacked actual or constructive notice of the alleged defect. In affirming on that ground, the Court of Appeals expressly rejected the first prong of the Appellate Division's decision: that plaintiff's reliance on the ANSI standard was "improper."

The Court of Appeals' ruling, rendered on section 550.11 review, consisted of a single paragraph. The Court there said:

> To the extent that a violation of standards of the American National Standards Institute (ANSI) constitutes evidence of negligence (*see Sawyer v. Dreis & Krump Mfg. Co.*, 67 N.Y.2d 328, 502 N.Y.S.2d 696, 493 N.E.2d 920 [1986]; *Trimarco v. Klein,* 56 N.Y.2d 98, 451 N.Y.S.2d 52, 436 N.E.2d 502 [1982]), plaintiffs' reliance on those standards was proper. However, plaintiffs nevertheless failed to raise a triable question of fact as to whether defendants had either actual or constructive notice of the alleged dangerous condition.

Bradley, 32 NY3d at 1011.

Mowing The Law: Not "Inherently Dangerous" — *Mery v Eginger*, 31 NY3d 1068 [2018], *aff'g* "for the reasons stated in the memorandum at the Appellate Division," 149 AD3d 827 [2d Dept 2017].

Plaintiff was driving by defendant's church when his left eye was apparently struck by a piece of wire that was ejected from contractor Frank Eginger's lawn mower. Plaintiff "did not dispute that Eginger was an independent contractor" whom defendant had hired to mow its lawn (149 AD3d at 827-828). Plaintiff alleged that defendant was vicariously liable for Eginger's alleged negligence "because Eginger had been engaged in an inherently dangerous activity, and because the activity pertained to a nondelegable statutory duty on the part of the Church."

In rejecting plaintiff's argument and affirming the grant of summary judgment to defendant, the Appellate Division acknowledged that the general rule of non-liability for independent contractors was "'subject to various exceptions, and it has been observed that the general rule is now primarily important as a preamble to the catalog of its exceptions'" (149 AD3d at 828). The Appellate Division nonetheless affirmed on the ground that neither of the claimed exceptions applied at bar. The Court explained:

> 1) "the Church established, prima facie, that the inherently dangerous activity exception does not apply in this case because Eginger's mowing of the Church's lawn did not involve a risk of harm inherent in the nature of the work itself, nor should the Church have recognized that risk in advance of the contract" (*id*.); and,
>
> 2) "the evidence submitted by the Church established that it did not have a nondelegable duty to mow the lawn such as would subject it to vicarious liability for the actions of an independent contractor."

Held: The Court of Appeals affirmed "for the reasons stated in the memorandum at the Appellate Division."

Whether Municipality's Issuance Of A Certificate Of Occupancy Establishes Prima Facie That The Subject Building Then Conformed With All Applicable Statutory And Regulatory Standards — *Viselli v Riverbay Corp.,* 32 NY3d 980 [2018], *mod'g* 155 AD3d 439 [1st Dept 2017].[6]

Does the defendant-landowner's proffer of a certificate of occupancy prima facie establish that the property complied with all applicable statutes and regulations as of that time? The Court of Appeals answered in the negative … again.

Facts: The plaintiff-firefighter was injured while responding to a fire when he "allegedly slipped, fell and was injured on an unknown 'wet' substance upon the painted concrete stairs of an internal, common stairwell" (155 AD3d at 440). Plaintiff brought suit both under common law and General Municipal Law § 205-a. That statute, sometimes called the firefighters' statute, provides firefighters with a statutory cause of action when injured in the course of duty by reason of the defendant's violation of a qualifying rule, regulation or statute.

Plaintiff "alleged the subject staircase was unsafe and violated, inter alia, Multiple Dwelling Law (MDL) § 52(1), MDL § 78 and Administrative Code of the City of N.Y. § 28-301.1 because it had only one

[6] Disclosure: My office represented the plaintiffs-appellants.

handrail …" (155 AD3d at 439). Although the building code requirements that were in effect when the building was built did not require a second handrail, that requirement was later added.

In moving for summary judgment, defendant did not prove that there had not been such building alterations as to trigger applicability of the two-railing requirements. But nor did plaintiff prove there had been such alterations. Plaintiff urged that the burden of proof lay with the defendant on the defendant's motion for summary judgment. Defendant urged that it met that burden by proving that it had been issued a certificate of occupancy. According to defendant, the municipality would not have issued a certificate of occupancy if the stairway in issue required but lacked a second handrail.

The Issue: The issue basically turned on whether the case was governed by the Court of Appeals' ruling in *Hyman v. Queens County Bancorp., Inc.*, 3 NY3d 743 [2004], *aff'g* 307 AD2d 984 [2d Dept 2003] or by its more recent ruling in *Powers v. 31 E 31 LLC*, 24 NY3d 84 [2014].

In *Hyman*, wherein the plaintiff also claimed that the absence of a second railing was violative of the applicable building codes, the Appellate Division granted summary judgment to defendant on the stated grounds that there was no evidence that the post-amendment "renovations were so substantial in nature that the defendant would have been required to bring the entire building into compliance with City and State building code regulations which existed at that time" and that "the certificate of occupancy issued by the New York City Department of Buildings in 1978 certified that the premises 'conforms substantially to the approved plans and specifications and to the requirements of all applicable laws, rules and regulations of the uses and occupancies specified herein'" (307 AD2d at 671). The Court of Appeals thereafter affirmed in *Hyman*, stating that while "plaintiffs argued that the absence of a second handrail violated city and state laws, not all buildings were subject to the cited codes and plaintiffs offered no evidence of what would have brought the subject building within the purview of those laws" and that plaintiffs had thus "failed to raise a triable issue of fact regarding the defective or dangerous condition of the premises, particularly in light of the certificate of occupancy issued to defendant in 1978" (3 NY3d at 744-745).

In *Powers*, where the subject roof was not statutorily required to have a railing when it was built and there was a dispute as to whether the later alterations of the building were of such magnitude as to trigger application of the post-construction railing requirements, the defendant urged that the City's issuance of a certificate of occupancy in 1979 established that the post-construction railing requirements did not apply to the 1909 building (or else the certificate would not have been issued). In rejecting that argument, the *Powers* Court distinguished *Hyman* as follows:

> Nor does the 1979 certificate of occupancy satisfy defendants' burden to present a prima facie showing of entitlement to judgment as a matter of law, and our decision in *Hyman v. Queens County Bancorp., Inc.*, 3 N.Y.3d 743, 797 N.Y.S.2d 215, 820 N.E.2d 859 (2004) does not hold otherwise. In Hyman, the plaintiffs bore the burden of establishing that the proffered building code provisions were in effect at the relevant time and that updated compliance was required because the plaintiffs had raised the building codes in opposition to the defendant's summary judgment proof, which had shown there was no defective or dangerous condition on the premises (*see id*. at 744-745, 787 N.Y.S.2d 215, 820 N.E.2d 859). In light of the certificate of occupancy presented by the defendant, paired with the absence of any indication that the stairway was defective, or any evidence that the proffered codes applied, the plaintiffs in *Hyman* failed to raise a legitimate issue of fact to defeat summary judgment (*see id*.).

Powers, 24 NY3d at 93.

So, which governed in the case at bar: *Hyman* or *Powers*?

Defendant argued that *Hyman* controlled since, (a) "the *Powers* case did not involve handrails – the issue addressed in *Hyman*, and the very thing at issue in the case *sub judice*," and, (b) the certificate of occupancy in *Powers* "was not issued at the time the building was built (as it was in the case *sub judice*), but rather was issued more than half a century later consequent to a conversion." Letter Brief, 2018 WL 4365047 at 11-12.

Plaintiffs argued the *Powers* Court had itself distinguished *Hyman* on the ground that some newer buildings were required to have double handrails and others were not and that "plaintiffs offered no evidence of what would have brought the subject building within the purview of those laws." *Viselli*, Reply Brief for Plaintiffs-Appellants, 2017 WL 10239510 at 24, quoting *Powers*.

By contrast, there was, plaintiffs urged, no doubt that Multiple Dwelling Law § 52(1) would here require double handrails if the alteration threshold triggered its application. *Id*.

Appellate Division: Without distinguishing or even citing *Powers*, the Appellate Division ruled that "defendant's submission of a certificate of occupancy which indicated that the building was in compliance with all applicable statutes, codes and ordinances shifted the burden on the motion to plaintiffs to offer evidence as might raise triable issues on the claims asserted" and that plaintiff had failed to meet that burden.

The Court cited *Hyman*, amongst other decisions, as authority for the ruling.

Court of Appeals: The Court of Appeals, citing *Powers* but not *Hyman*, unanimously modified on 500.11 (abbreviated) review, stating:

> With respect to the General Municipal Law § 205-a cause of action, defendant's submissions of a certificate of occupancy and an expert affidavit that did not sufficiently respond to plaintiffs' General Municipal Law § 205-a claim were insufficient, without more, to meet its prima facie burden as the party moving for summary judgment.

However, the Court of Appeals did not overturn the dismissal of the plaintiffs' common law negligence claim.

C. Municipal Liability

Whether Plaintiff Was Required To Prove That The Governmental Defendant Would Have Timely Effected Improvements But For Its Negligent Failure To Complete The Subject Highway Study — *Brown v State*, 31 NY3d 514 [2018], *aff'g* 79 AD3d 1579 [4th Dept 2010] and 144 AD3d 1535 [4th Dept 2016].

The State's novel causation defense led to a couple of extremely interesting Appellate Division opinions back in 2010, opinions that were finally reviewed by the Court of Appeals in June of 2018.

Facts: Wayne and Linda Brown were proceeding north, riding a motorcycle, on State Route 350. Henry Friend was heading east on Paddy Lane. Those two streets intersected at a right-angle in the Town of Ontario. Friend had a stop sign. The Browns did not have any traffic control.

The vehicles collided in the intersection. Not surprisingly, it turned out worse for the Browns. Mr. Brown died and Mrs. Brown, who sued for the estate and on her own behalf, was injured. Friend claimed that he had stopped at the stop sign and had looked both ways, but never saw the motorcycle.

It was far from the first collision at the subject intersection. "Between 1995 and 1999, there had been 14 right-angle collisions at the intersection of Route 350 and Paddy Lane" (31 NY3d at 518). DOT began studying the intersection, at the Town's request, in 1999 (*id*.). However, DOT never completed the study and never took any action. The subject accident occurred in April of 2003.

When the case went to trial in the Court of Claims the State argued it was entitled to governmental immunity, and, even if it was not, claimant had the burden of proving that its "'failure to complete [the] intersection safety study was a proximate cause of the accident'" (79 AD3d at 1581), this as opposed to merely proving that the unreasonably dangerous nature of the intersection was a proximate cause of the accident.

Further, in order to prove that the failure to complete the study proximately caused the accident, claimant was allegedly obligated to prove that "a four-way stop sign would have been installed before the accident and would have prevented it" if the State had finished its study (31 NY3d at 519).

Of course, the remarkable part of the latter argument is that it posited that the State's own negligence could itself constitute a defense. If, for example, the State routinely delayed three to five years for no particular reason before doing anything even when it concluded that changes were needed, that of itself would prevent the claimant from proving that failure to complete the study was a cause of the accident. Nonetheless, the trial court and two of the Appellate Division panelists "bought" the proffered defense.

Appellate Division Ruling, Immunity Issue: All the judges who reviewed the case agreed that the State was not entitled to governmental immunity. Under the standards set forth in such cases as *Weiss v. Fote*, 7 NY2d 579 [196], *Friedman v. State*, 67 NY2d 271 [1986], and *Turturro v. City of New York*, 28 NY3d 469 [2016], the municipal defendant is at very most entitled to "qualified immunity" for its allegedly negligent maintenance or design of the public roadways, and it is entitled to "qualified immunity" only when the allegedly negligent determination in issue was premised upon a qualifying study. Since that was not the case here, the State was not entitled to qualified immunity, much less outright immunity.

But the so-called causation issue split the Appellate Division panel that considered the matter back in 2010.

Appellate Division Ruling, Causation Issue: The two 2010 dissenters agreed with the trial court that "claimant was required to show more than that the potentially dangerous condition of the intersection was a proximate cause of her injuries and decedent's death. Rather, she was required to show what corrective action should have been taken by defendant and that such corrective action would have been completed before and would have prevented the accident" (79 AD3d at 1586, Dissent).

Further, based upon the State's proof that it would have installed 4-way stop signs only as a last resort and only after testing whether lesser, "incremental" changes reduced the carnage, the dissenters felt that the trial court (sitting at trier of fact) could have fairly concluded "that it was pure speculation to conclude that a four-way stop—the corrective action suggested by claimant's expert—would have been in place before claimant's accident even if defendant had undertaken a timely and adequate study" (*id*. at 1587, Dissent).[7]

[7] Is it just me? Let us suppose that a driver who was very, very drunk speeds into an intersection without first looking left. Let's suppose the driver there collides with

The Appellate Division majority ruled that the trial court erred and effectively "reintroduce[d] elements of the *Weiss v. Fote* doctrine into the analysis when it concluded that claimant's burden of proof still required claimant to establish that the "failure to complete [the] intersection safety study was a proximate cause of the accident" (79 AD3d at 1582). In its view, "[t]he appropriate inquiry was whether defendant was made aware of a dangerous condition and failed to take action to remedy it and whether the dangerous condition was the proximate cause of the accident" (*id*.).

Appellate Division Ruling, Driver Negligence Issue: In the wake of the first Appellate Division ruling, the case was remitted to the Court of Claims. The trial court ultimately concluded that Friend (the truck driver) was not negligent even though he was convicted under Vehicle and Traffic Law § 1142[a] of failure to yield the right-of-way.

The State challenged that ruling on appeal but the Appellate Division unanimously affirmed. The Appellate Division reasoned that "only 'an unexcused violation of the Vehicle and Traffic Law, if proven, constitutes negligence per se'" (144 AD3d at 1538) and there was "evidence from which the court could fairly conclude that Friend would not have been able to observe the motorcycle in time to avoid the collision … including evidence concerning the history of right-angle accidents 'caused by the same or similar contributing factors as the accident in which claimant was involved'" (*id*. at 1539).

Held: Per an opinion by Judge Wilson, the Court of Appeals unanimously affirmed both Appellate Division rulings.

The Court ruled, first, that the Appellate Division "properly characterized the inquiry" as whether the allegedly dangerous condition of the intersection was a proximate cause of the collision. The Court added:

> We have never required accident victims to identify a specific remedy and prove it would have been timely implemented and prevented the accident. In *Turturro,* for example, a 12–year–old plaintiff was struck by a speeding car while he attempted to ride his bicycle across a four-lane road as to which the City had received numerous complaints of excessive speed (28 N.Y.3d at 485, 45 N.Y.S.3d 874, 68 N.E.3d 693). There, the plaintiff was not required to show that traffic calming measures—much less any specific traffic calming measure adopted at a specific time—would have avoided the accident. The relevant inquiry was whether the "City's failure to conduct a traffic calming study and to implement traffic calming measures was a substantial factor in causing the accident" (*id.*).

31 NY3d at 520, emphasis added.

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another car. Does the plaintiff lose unless he or she can prove that defendant would have stopped if defendant had looked left? Does the defendant win by proving that he or she was too drunk to stop anyway, and that the failure to look left was therefore inconsequential?

Or closer to the facts at bar. Let us suppose that the defendant is a small village and the village has an iron-clad practice of never making any roadway improvements. Does that mean that its failure to study or complete a study is never consequential and that it is thereby immune?

Regarding the driver negligence issue, the Appellate Division's affirmed findings of fact, including "that the vertical curve created visibility problems; that Mr. Friend stopped and looked both ways; that Mr. Friend was unable to see the motorcycle approaching; that no one was speeding," were of course beyond the scope of the Court's review.

The Court rejected the State's argument that Friend's conviction *required* that he be assigned fault. The Court explained that there was evidence supporting the trial court's finding that Friend "carefully entered the intersection after looking both ways, but simply was unable to see the motorcycle" (*id*. at 521). Further, "a Vehicle and Traffic Law violation does not itself establish negligence, when, as the court found here, the driver has exercised reasonable care in an effort to comply with the statute" (*id*.).

Whether The Stairway Was A "Sidewalk" For Purposes Of The Prior Written Notice Laws — *Hinton v Vil. of Pulaski*, 33 NY3d 931 [2019], *aff'g* 160 AD3d 1446 [4th Dept 2018].

Facts: Plaintiff fell while descending an exterior stairway that connected a public road to a municipal parking lot. The defendant-Village moved for summary judgment on the theory that the stairway was a "sidewalk" within the meaning of the Village's prior written notice law. For that reason, the Village's alleged lack of prior written notice concerning the subject defect purportedly entitled it to summary judgment.

Held: The Court ruled, by 5 to 2 vote in a memorandum opinion, that the Court's prior ruling in *Woodson v. City of New York*, 93 NY2d 936 [1999] controlled and that the absence of prior written notice entitled defendant to summary judgment.

In *Woodson*, the Court held that a stairway may be classified as a "sidewalk" for purposes of a prior written notice statute if it "functionally fulfills the same purpose that a standard sidewalk would serve." *Woodson*, 93 NY2d at 937-938. The majority here ruled:

> The courts below correctly applied *Woodson* in holding that the stairway at issue "functionally fulfills the same purpose" as a standard sidewalk, and therefore plaintiff was required to show that the Village received prior written notice of the allegedly defective condition (*Woodson,* 93 N.Y.2d at 938, 693 N.Y.S.2d 69, 715 N.E.2d 96). In its motion for summary judgment, the Village established that plaintiff failed to plead or prove prior written notice.

Emphasis added.

Dissent: Writing for himself and Judge Fahey, Judge Wilson observed that the legislature had "specifically declined to include stairways in the list of municipal passageways to which prior written notice protection applies" and that the majority was "rewrit[ing]" the statute to reach the result defendant favored.

As for *Woodson*, Judge Wilson acknowledged that the decision therein had "spawned a jurisprudence applying what we have come to call the 'functional equivalence test,' where if a court thinks something not on the Village Law § 6–628 list is sufficiently like something on that list, it rewrites the statute to include it." However, the Court of Appeals had there said only, "the stairway *in this case* functionally fulfills the same purpose that a standard sidewalk would serve on flat topography, except

that it is vertical instead of horizontal …" There, however, the subject stairway was "integrated with, or a part of, a connected standard sidewalk." Since that was not the case here in *Hinton*, *Woodson* should not control.

That aside, review of the Record in *Woodson* showed that the stairway in that case "was relatively short, shallow, and perfunctory, comprising shallow concrete steps up a short, gentle incline connecting two concrete sidewalks," and "[c]rucially, the steps could have been replaced with a simple pavement ramp with the same result." Justice Wilson added:

> The *stare decisis* reach of *Woodson* covers stairs integrated with a connected sidewalk, possessing the same injury potential as a sidewalk, but not other stairs. Expanding *Woodson,* without any articulated justification or analysis, is not "the application of settled precedent" (majority op. at ___) but the creation of a new doctrine that all stairs are sidewalks, or perhaps that some are, with no rule as to how to sort them beyond a mantra ("functional equivalent") that raises more questions in its bare form than it answers. That the Legislature has not "disapprov[ed]" *Woodson* is of no moment. Ignoring a holding that a few steps connecting two sidewalks are a "sidewalk" implies nothing about the legislature's view of whether, as the majority seems to affirm today, all stairways are always sidewalks.

Emphasis added.

D. Motor Vehicle Liability

"Purely Conclusory" Expert Opinion, Or Not? — *Rosa v Delacruz*, 32 NY3d 1060 [2018], *aff'g* 158 AD3d 571 [1st Dept 2018].

Determinations concerning whether the plaintiff sustained a "serious injury" within the meaning of the No-Fault Law seem to have their own evidentiary rules, particularly concerning whether an expert's conclusions — almost always the plaintiff's expert's conclusions — are "conclusory" and therefore insufficient to raise a triable issue of fact.

Facts: Plaintiff claimed a "serious injury" to his left shoulder. Defendants moved for summary judgment.

Per the Appellate Division ruling: "Defendants established that plaintiff's alleged left shoulder injuries were not causally related to the subject accident by submitting the MRI report of plaintiff's radiologist, who found multiple degenerative cysts, and no torn tendons, in the MRI of plaintiff's left shoulder performed shortly after the accident … Defendants also submitted the affirmed reports of two orthopedists who found normal range of motion in the left shoulder, both shortly after the accident and two years later, after plaintiff underwent left shoulder arthroscopic surgery" (158 AD3d at 571).

Plaintiff countered with "reports of an orthopedist who examined him" and who asserted "that such tear [was] causally related to the accident, and … permanently limited plaintiff's use of his left shoulder" (32 NY3d at 1061-1062, Dissent).

Issue: Was the plaintiff's proof sufficient to raise an issue of fact? The Appellate Division had unanimously ruled in the negative.

Held: By 4 to 3 vote, the Court of Appeals ruled on section 500.11 review that plaintiff's proof was "conclusory" and therefore insufficient because,

1) Defendants' doctors concluded that plaintiff's left shoulder injury was pre-existing based upon findings that "plaintiff had a normal range of motion six months following the accident, with no permanent effects" and upon a shoulder MRI "performed six weeks after the accident by plaintiff's radiologist, who reported that plaintiff's rotator cuff tendons were intact and there was no MRI evidence of a tear" (32 NY3d at 1061); and,

2) Plaintiff's expert orthopedist "failed to acknowledge, much less explain or contradict, the radiologist's finding" and instead asserted the "purely conclusory" opinion "there was a causal relationship between the accident and anterior labrum/rotator cuff tears that he observed (and repaired) during surgery nearly two years after the accident" (*id*.).

Dissent: Judge Fahey, joined by Judges Rivera and Wilson, noted that "the examining orthopedist diagnosed plaintiff with a rotator cuff tear shortly after the subject accident." The dissenters believed that the reports "sufficiently rebut defendants' theory that plaintiff's shoulder injuries were preexisting" inasmuch as "[t]he opinion of plaintiff's orthopedist with respect to the etiology of plaintiff's injuries is based on, among other things, that physician's review of plaintiff's medical history and personal observations that physician made during the arthroscopic procedure in which he repaired plaintiff's left shoulder" (*id*. at 1061-1062).

Note: The majority referred to the plaintiff's examining orthopedist as "plaintiff's" or "his" orthopedist and to the doctors who examined on the defendants' behalf as "independent physician[s]."

E. Medical Malpractice

Whether Liability Can Arise From The Defendant-Doctor's Allegedly Negligent Failure To Order Diagnostic Tests That Could Have Led To Earlier Diagnosis Of An Underlying Condition That He Admittedly Had No Reason To Suspect — *Brooks v April*, 31 NY3d 1102 [2018], *rev'g* 154 AD3d 564 [1st Dept 2017].

Although one would never know this simply from the Court of Appeals' one paragraph reversal on 500.11 review, the medical malpractice defendants' motion for summary judgment combined several very interesting legal issues.

For one, what if all agree that the defendant-doctor had no reason to suspect the condition that he or she failed to diagnose? Can a doctor be held liable on the theory that the diagnostic tests that he or she should have purportedly ordered for *other* reasons could have led to timely diagnosis of the condition that was not suspected? And, if so, is the correct causation standard whether the tests *would have* led to a timely diagnosis or whether they *could have* led to a timely diagnosis?

The case also presented the issue, which seemingly recurs in virtually every action in which summary judgment is sought or opposed on the basis of an expert's opinion, whether the plaintiff's expert's opinions were too "conclusory" to raise triable issues of fact.

Facts: Plaintiff fell and struck her head. Some ten days later, and still suffering from headaches, she visited defendant Dr. Robert S. April, a neurologist at Mount Sinai Hospital. Dr. April conducted a CT

scan, but the results were unremarkable. Dr. April diagnosed post-concussion headache syndrome and conducted follow-up examinations within the next few weeks.

On November 30, 2010, which was some 28 days after she first saw Dr. April, plaintiff experienced what was later diagnosed as a cerebral hemorrhage. She called Dr. April, complaining that her head pain had increased. Dr. April advised her to rest and see him the next morning, which she did. Dr. April that day performed an electroencephalogram (EEG) and several other diagnostic tests, all of which were unremarkable.

On December 2, 2010, plaintiff visited Dr. Cesar, another neurologist, for a second opinion. Dr. Cesar ordered an MRI of plaintiff's brain and the MRI showed a large amount of blood products in the left parietal lobe of plaintiff's brain.

To make the proverbial long story short, plaintiff continued over the next months to see a succession of doctors who collectively ordered a multitude of tests. However, it was not until May of 2011 that anyone ordered an angiogram to check for a possible micro-arteriovenous malformation (micro–AVM). The micro-AVM was first diagnosed in June 2011 and a craniotomy was performed in July 2011. Plaintiff thereafter began to suffer seizures. She still suffered from them, "as well as headaches, balance problems, confusion, fatigue and impaired vision" (154 AD3d at 564).

Plaintiff essentially alleged that "Dr. April was negligent in failing to order diagnostic testing that would have revealed the presence of a micro–AVM during the course of his treatment of her from November 2 through December 1, 2010" (*id*.). Defendant April moved for summary judgment on the basis of motion papers, inclusive of a neurologist's affirmation, which, per the characterizations of the Appellate Division majority, demonstrated, (1) "that the alleged deviations from the accepted standard of medical care did not proximately cause plaintiff's damages, as her AVM, a rare congenital condition found in one percent of the population, and mostly in male patients, was not visible on noninvasive diagnostic testing," (2) that the plaintiffs' claim "that a cerebral angiography should have been performed prior to plaintiff's hemorrhage was inconsistent with the accepted standard of medical care," and, (3) "any subsequent testing would not have changed plaintiff's course" (154 AD3d at 566).

The Appellate Division panel unanimously agreed that defendants' papers prima facie established an entitlement to summary judgment. The question that split the Court was whether plaintiffs' opposition raised triable issues of fact.

The Two Opposing Views Concerning The Sufficiency Of Plaintiffs' Opposing Papers

Plaintiff opposed the motion with expert proof that either was or was not "conclusory." In the opinion of the Appellate Division dissenters, the "plaintiff's neurological expert specifically identified numerous deviations from the standard of care and noted that plaintiff showed multiple AVM symptoms before her rupture, including headaches, two or three falls, severe head pain, weakness, and visual disturbance, all of which increased after the initial visit" (154 AD3d at 569).

Inasmuch as there was apparently no dispute "that an angiogram would have revealed the congenital malformation in plaintiff's brain" (154 AD3d at 570), the issue, as the dissenters saw it, was whether "the angiogram was actually indicated" (*id*.). In the dissenters' view, there was "nothing conclusory" regarding the plaintiffs' expert's opinion "that given plaintiff's history and the clinical course of her neurological deterioration, defendants should have performed a differential diagnosis of her symptoms to rule out various possible conditions, including seizure disorder or intracranial infection" (*id*.).

Further, while the majority criticized the plaintiff's expert for stating in the disjunctive that the standard of care required Dr. April to order a "cerebral MRI and MRA or CTA [computed tomography

angiography] or conventional cerebral angiography" (154 AD3d at 566), the dissenters felt that the disjunctive phrasing did not render the opinion conclusory inasmuch as "the very point of plaintiffs' expert's opinion is that the failure to order any sort of test other than an EEG was part of defendants' failure to perform a differential diagnosis" (*id*. at 571).

Nor did the dissenters deem it fatal that plaintiffs' expert did not say that defendant should have specifically suspected and tested for an AVM. Although the claim was merely that the defendant failed to undertake the correct diagnostic procedures and that timely performance of those procedures *could have led* to timely diagnosis of the AVM when considered in conjunction with plaintiff's symptoms, that, the dissenters felt, was sufficient to raise a triable issue of fact.

Interestingly, in reaching that conclusion, the dissenters distinguished the facts at bar from those in *David v. Hutchinson*, 114 AD3d 412 [1st Dept 2014]. There, where failure to properly treat decedent's complaints "of abdominal pain during an emergency room visit following gallbladder removal" would have arguably led to "incidental discovery" of decedent's liver abscesses, the Court ruled that the failure to investigate a condition that would have led to an incidental discovery of an unindicated condition did not constitute malpractice. The case at bar was different from *David* in, amongst other respects, that plaintiff's symptoms "might well have pointed to an AVM" (154 AD3d at 571), purportedly meaning that discovery of the AVM would not have been wholly incidental.

The majority took issue with the dissenters' conclusions on multiple grounds. Perhaps most notably, the majority deemed the dissenters' efforts to distinguish *David* "unavailing" and ruled that, as in *David*, "failure to conduct testing that would have led to the discovery of an unindicated condition does not constitute malpractice" (154 AD3d at 568-569). It also deemed plaintiffs' expert's opinions "conclusory" in that "plaintiffs' expert failed to identify a basis for the apparent conclusion that, as an alternative to noninvasive testing, cerebral angiography was indicated prior to plaintiff's November 30, 2010 hemorrhage" (*id*. at 567).

The Appellate Division majority also deemed it insufficient that the purportedly correct protocol "might well have pointed to an AVM" inasmuch as there was "no guarantee" that such course would have led to detection of the AVM and the plaintiffs' case thus rested on — you guessed it — "speculation" (154 AD3d at 567-569).

Held: The Court of Appeals unanimously reversed. The opinion was in its entirety as follows:

> On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order reversed, with costs, and order of Supreme Court, New York County, reinstated. Plaintiffs' submissions rebutted defendants' prima facie showing of entitlement to summary judgment and raised triable issues of fact (*see Burns v. Goyal,* 30 N.Y.3d 956, 86 N.E.3d 551 [2017]). On this record, triable issues of fact preclude summary judgment in favor of defendants.

Brooks, 31 NY3d at 1103.

F. Toxic Substance Liability

Whether The Decedent Mechanic's 25 Years Of Exposure To Defendant Ford's Asbestos-Laden Products Was Sufficient To Establish Causation Under The *Parker* Standard — *Matter of New York City Asbestos Litig.*, 32 NY3d 1116 [2018], *aff'g* 148 AD3d 233 [1st Dept 2017].

Plaintiff claimed that decedent, her husband, died of mesothelioma. She further claimed that the disease was caused by decedent's exposure to asbestos-containing products while he worked as an auto mechanic. More specifically, she claimed that decedent was exposed to and died from "exposure to asbestos over the years he worked on the brakes, clutches, and manifold gaskets of Ford vehicles, during which work, plaintiff says, asbestos dust was released" (148 AD3d at 235).

In the aftermath of a trial which ended in a jury verdict in the plaintiff's favor, the trial court granted defendant Ford Motor Company's motion to set aside the verdict on the ground that plaintiff had failed to adequately prove causation under the toxic causation standard of *Parker v. Mobil Oil Co.*, 7 NY3d 434 [2006].

In *Parker*, and thereafter in *Cornell v. 360 W. 51st Str. Realty*, 22 NY3d 762 [2014] and *Sean R. v. BMW of N. Am., LLC*, 26 NY3d 801 [2016], the Court of Appeals ruled that a so-called toxic tort plaintiff must prove both "general causation" and "specific causation." The Court put it this way in *Sean R.*:

> In toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation) (*see Parker v. Mobil Oil Corp.,* 7 N.Y.3d 434, 448, 824 N.Y.S.2d 584, 857 N.E.2d 1114 [2006]). Although it is 'not always necessary for a plaintiff to quantify exposure levels precisely' (*id.*), we have never '"dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect' (*Cornell v. 360 W. 51st St. Realty, LLC,* 22 N.Y.3d 762, 784, 986 N.Y.S.2d 389, 9 N.E.3d 884 [2014]). 'At a minimum, ... there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered' (*id.,* quoting *Wright v. Willamette Indus., Inc.,* 91 F.3d 1105, 1107 [8th Cir.1996]).

Sean R., 26 NY3d at 808-809, emphasis added.

Here, the First Department ruled by 4 to 1 vote that the trial court was correct in concluding that plaintiff's proof was deficient under the *Parker* standard. That is, while plaintiff indeed proved that Ford's products contained toxic asbestos, plaintiff failed to prove that decedent's exposure to Ford-related asbestos was of such quantity as to cause the injury. The Appellate Division majority explained the ruling as follows:

> … the fact that asbestos, or chrysotile, has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant; a causation expert must still establish that the plaintiff was exposed to sufficient

> levels of the toxin from the defendant's products to have caused his disease (*see Sean R.,* 26 N.Y.2d at 809, 28 N.Y.S.3d 656, 48 N.E.3d 937). Even if it is not possible to quantify a plaintiff's exposure, causation from exposure to toxins in a defendant's product must be established through some scientific method, such as mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies (*Parker* at 449, 824 N.Y.S.2d 584, 857 N.E.2d 1114).
>
> The evidence presented by plaintiff here was insufficient because it failed to establish that the decedent's mesothelioma was a result of his exposure to a sufficient quantity of asbestos in friction products sold or distributed by defendant Ford Motor Company. Plaintiff's experts effectively testified only in terms of an increased risk and association between asbestos and mesothelioma (*see Cornell,* 22 N.Y.3d at 783–784, 986 N.Y.S.2d 389, 9 N.E.3d 884), but failed to either quantify the decedent's exposure levels or otherwise provide any scientific expression of his exposure level with respect to Ford's products (*see Sean R.,* 26 N.Y.3d at 809, 28 N.Y.S.3d 656, 48 N.E.3d 937; *Parker,* 7 N.Y.3d at 449, 824 N.Y.S.2d 584, 857 N.E.2d 1114).

Justice Kahn concurred and sided with the majority on the logic that, a) the case was not really distinguishable from *Parker* and *Cornell*, and, b) any change or limitation of *Parker* should come from the Court of Appeals.

Justice Feinman, writing in dissent, would have distinguished the case at bar from the rulings in *Parker* and *Cornell* on the grounds that, 1) asbestos is a known and accepted cause of the subject disease (mesothelioma), and, 2) application of the *Parker* standard to asbestos-caused injury would erect "an insurmountable hurdle requiring plaintiffs to recreate the work environment, to establish precise exposure levels, dust and fiber counts, air quality levels throughout the day, and so on, or to test the asbestos-containing materials or items so as to demonstrate how much asbestos was present and subject to release into the air through the work process, becoming respirable" (Dissent, 148 AD3d at 255). In his view, the verdict "finding Ford 49% responsible for causing decedent's mesothelioma after 25 years of exposure to asbestos-containing products sold or distributed by Ford was based on a fair interpretation of the totality of the evidence and an assessment of the credibility of the experts, and was not 'utterly irrational'" (*id*. at 255-256).

Held: The Court of Appeals affirmed by 4 to 1 vote with two judges taking no part (one of whom was Judge Feinman, who by this point had been elevated to the Court of Appeals). However, the four-judge majority could not agree on *why* the plaintiff's proof was inadequate as a matter of law.

The Court's memorandum opinion stated, virtually in its entirety:

> Viewing the evidence in the light most favorable to plaintiffs, the evidence was insufficient as a matter of law to establish that respondent Ford Motor Company's conduct was a proximate cause of the decedent's injuries pursuant to the standards set forth in *Parker v. Mobil Oil Corp.,* 7 N.Y.3d 434, 824 N.Y.S.2d 584, 857 N.E.2d 1114 (2006) and *Cornell v. 360 W. 51st St. Realty, LLC,* 22 N.Y.3d 762, 986 N.Y.S.2d 389, 9 N.E.3d 884 (2014). Accordingly, on this particular record, defendant was entitled to judgment as a matter of law under CPLR 4404(a).

32 NY3d at 1118, emphasis added.

Concurring Opinions: Judge Fahey, who was part of the four-judge majority, wrote separately to say that the problem was not that plaintiff's proof was inadequate to establish that her husband's mesothelioma was caused by asbestos inhalation, but instead that the plaintiff's proof was legally insufficient to establish "a connection between defendant Ford Motor Company's products and decedent's exposure to asbestos" (32 NY3d at 1118).

Judge Wilson, who was also part of the four-judge majority, wrote separately to say that in his view the plaintiff's proof was deficient as to general causation, not as to specific causation. He particularly stressed:

> Plaintiffs did not produce an expert to rebut the argument that the physical properties of the asbestos in Ford's friction products had been so radically altered as to render conventional asbestos toxicology irrelevant. Instead, one of plaintiffs' causation experts testified extensively that chrysotile asbestos in its raw state caused mesothelioma. But when asked about chrysotile asbestos subjected to the extreme temperatures involved in the manufacture and use of friction products, he testified that he had not studied the release of chrysotile asbestos from friction products because he was "not an engineer or industrial hygienist."
>
> * * *
>
> Plaintiffs' other causation expert, when asked specifically about the high temperature transformation of asbestos to Forsterite, testified that "no one knows" whether the friction product dust to which Mr. Juni was exposed when replacing the used products was toxic.
>
> * * *
>
> Thus, a necessary link in the proof of proximate cause was missing. I do not suggest that Ford is correct as a scientific matter; that question remains for the trier of fact in each case. Here, in my view, there was simply a gap in proof as to the toxicity of the products at issue.

32 NY3d at 1119-1120.

Dissent: Judge Rivera dissented "[f]or the reasons stated in then-Justice Feinman's well-reasoned and thorough dissent" (32 NY3d at 1121).

Noting that "[o]n a daily basis, he [decedent] was exposed to asbestos-laden dust from new and used brakes, clutches, and manifold and engine gaskets," and further noting that such exposure extended over a 25-year span, Judge Rivera would have ruled that "[i]n light of the compelling evidence of Mr. Juni's exposure to asbestos while working on Ford vehicles and products," there was "no basis to conclude that the verdict was utterly irrational" (32 NY3d at 1121-1122).

Note: Judge Rivera stated in a footnote of her dissent that plaintiff "had requested a jury charge in Supreme Court instructing the jury that defendant Ford could be liable for asbestos-containing replacement parts used in its vehicles even if Ford did not manufacture those products," that Supreme Court rejected the request, and that Supreme Court's ruling was in conflict with *Dummitt v. A.W. Chesterton*, 27 NY3d 765 [2016]. That was the case in which the Court ruled that "'the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended'" (32 NY3d at 1120, Dissent).

The majority countered, also in a footnote, "Inasmuch as the parties make no arguments about *Matter of New York City Asbestos Litig.,* 27 N,Y,3d 765, 37 N.Y.S.3d 723, 59 N.E.3d 458 (2016) (*Dummitt*), we have no occasion to address whether, as the dissent concludes, the jury charge given in this case conflicts with our decision therein" (32 NY3d at 1118).

G. Products Liability

Whether The *Scarangella* Exception Applied (Or Could Apply) To A Leased Product — *Fasolas v Bobcat of New York, Inc*., 33 NY3d 421 [2019].

The general rule with respect to the doctrine of strict products liability is that liability is imposed for resultant harm if the product is not reasonably safe as of the time it leaves the manufacturer's hands. Under that rule, the manufacturer is not responsible for subsequent modifications that render the product dangerous but is also not entitled to expect that someone else will make its unsafe product safe. Rather, it is the product's condition at the time of sale that controls.

The Court of Appeals crafted an exception to that general rule back in *Scarangella v. Thomas Built Buses*, 93 NY2d 655 [1999]. The Court was there confronted with the issue of whether a product manufacturer stood liable under the doctrine of strict products liability where a safety feature that was purportedly necessary for safe operation of the product was not included and was instead an option which the purchaser had to add at an additional cost. The Court there ruled that "[t]he product is not defective where the evidence and reasonable inferences therefrom show that: (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product" (93 NY2d at 661). The theory was that "[i]n such a case, the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability" (*id*.).

In *Scarangella*, the product was a school bus and the optional feature not included unless specially purchased was a back-up alarm. The ruling was that the absence of the back-up alarm did not render the bus defective inasmuch as the purchaser, a bus company, was a knowledgeable user and the only individuals at risk were the purchaser's own employees inasmuch as the bus would be driven in reverse only within the confines of the purchaser's facility.

But what if the ultimate user never purchased the product? What if the product, here a loader, was purchased by a company in the business of renting such equipment and that company then leased

the equipment to the ultimate user? Could the manufacturer still defend on the basis that it was someone else's responsibility, whether that of the lessor or the lessee, to add the optional safety device?

The Court ruled by 4 to 3 vote that the *Scarangella* exception is not "categorically unavailable when the allegedly defective product came into the injured end user's hands through the rental market, rather than by a purchase transaction."

Facts: The product in issue was a loader that the lessor purchased for approximately $22,000. The device was "a ride-on machine," consisting of "a motorized base with wheels and hydraulic arms that can be raised and lowered," that could be "used for multiple light construction functions."

The safety device that was not included but could have been added as optional equipment was a "door kit" that served to "enclose the cab and thus restrict airborne material from entering that area." The machine's operator was killed "when a small tree entered the open operator cab, crushing him."

The manufacturer urged that there were up to 150 different attachments that could be added to the loader and that it was up to the purchaser to determine which were needed for his or her intended use of the machine. Plaintiff countered that the *Scarangella* defense did not make sense and could not be logically applied when the purchaser was not the machine's user.

Appellate Division: The Appellate Division ruled that *Scarangella* was categorically unavailable where, as here, the purchaser did not retain control of the product and, in consequence, could not have been in a superior position (as compared to the manufacturer) to weigh whether the safety device was warranted.

Held: Writing for the majority, Chief Judge DiFiore rejected the Appellate Division's thesis that the *Scarangella* exception was inapplicable as a matter of law to leased products. But it would appear that the defense is legally cognizable only where there is proof that the purchaser-lesssor actually had control over, or at least the means to monitor, the lessee's intended use of the product:

> Bobcat's theory was that the loader was not unreasonably dangerous without the optional door kit when used for its intended purpose of moving soil and that Taylor knew its own clientele and was in control of who would have access to the loader (i.e., its rental customers) and for what purpose. Thus, it argued that Taylor was in a superior position, given the wide range of uses of the product, to balance the benefits and risks of not purchasing the door kit in the specifically-contemplated circumstances of its clients' intended uses. Taylor's status as a retail rental company does not establish, as a matter of law, that it was not in a position to engage in the balancing analysis contemplated by the third prong of Scarangella. Without question, whether the buyer exercises control over the product's use in its capacity as an employer or otherwise is a consideration that is relevant to a determination of the buyer's relative "position" to engage in the proper balancing inquiry — but it is not dispositive. A lessor may be able to appropriately mitigate risk by carefully controlling to whom it rents its products and for what use. In this case, testimony was presented that Taylor rented its products to businesses, contractors, schools and other community institutions, such as the fire department — entities that may have possessed training and expertise in the use of loaders and other construction equipment.

* * *

> Having deemed Scarangella to be wholly inapplicable, neither the trial court nor the Appellate Division examined whether Bobcat raised a triable question of fact warranting a Scarangella charge. Because Bobcat is entitled, in any event, to a new trial on the design defect claim due to the error in the strict products liability instruction, we have no occasion to do so either. For purposes of resolution of this appeal, it is sufficient to observe as a matter of law, based on the evidence presented at this trial, that Bobcat was not entitled to a directed verdict in its favor on the Scarangella exception. Whether a Scarangella instruction will be appropriate on retrial is a matter for the trial court to determine based on the evidence presented at that time. Bobcat's evidentiary argument is academic.

Yet, it is unclear, at least to me, whether the defense turns on, a) whether the purchaser-lessor was *capable of* monitoring and/or controlling the lessee's use of the product, or, b) whether the purchaser-lessor *actually did so*.

Dissent: The dissent, by Judge Rivera, charged that "[t]he majority's expansion of *Scarangella* to absolve a manufacturer of liability, if the renting company has information about the product and the optional safety equipment that has not been provided to the renter, runs counter to our products liability public policy goals and the instrumentalist rationale of *Scarangella*."

In the dissent's view, "[t]he majority's analysis mischaracterize[d] the relevant question as 'whether the exception is categorically unavailable when the allegedly defective product came into the injured end user's hands through the rental market, rather than by a purchase transaction.'" As the dissenters saw it, "[t]he question is not whether the end user rented or purchased the product, but whether the end user has the type of knowledge necessary to make the risk-benefit analysis that traditionally falls to the manufacturer." As such, the "real issue" was "whether the manufacturer may escape strict liability by choosing to distribute its product through a third-party rental company."

The dissent also charged that the ruling constituted bad policy that "undermines an intended goal of products liability: to reduce injury and all the economic harms that flow from them by incentivizing manufacturers to design and produce products reasonably safe for their intended use."

H. The Rest

Whether The Personal Injury Plaintiff Must Disprove Comparative Negligence In Order To Obtain Partial Summary Judgment — *Rodriguez v City of New York*, 31 NY3d 312 [2018].

Obviously, in order to obtain summary judgment in the garden variety personal injury action, the plaintiff must make a prima facie showing that the defendant was negligent and such negligence was a proximate cause of the subject accident.

But must the plaintiff also make a prima facie showing that he or she was *not* comparatively negligent, or, alternatively, that his or her comparative negligence was *not* a proximate cause of the accident? That question spurred a vigorous debate that has now apparently ended, albeit with a sharply contested four to three ruling.

The argument for the proposition that the plaintiff should not bear any such burden is fairly straightforward. Since comparative negligence is an affirmative defense on which the defendant bears the burden of proof per CPLR § 1412, plaintiff should not have to disprove comparative negligence, or so the argument goes.

On the other hand, a defendant seeking summary judgment in such an action must make a prima facie showing that he or she was *not* negligent (or, alternatively, that his or her negligence was *not* a proximate cause of the subject accident) even though the plaintiff would bear the burden of proof on those issues at a trial. Also, many lawyers (and courts) had read the decision in *Thoma v. Ronai*, 82 NY2d 736 [1993] as holding that the summary judgment plaintiff must disprove comparative negligence in actions in which that is a recognized defense.

Thoma was rendered on a fast-track review in which the appeal is resolved without briefing or oral argument. (The Court of Appeals instead decides the case on the basis of the Appellate Division briefs and the parties' letter submissions.) Typically, such appeals are resolved by memorandum decisions that are often no more than a paragraph long. (In *Thoma*, the decision was three paragraphs long, a veritable tome.)

Thoma arose from a "pedestrian knockdown" accident in which the plaintiff moved for summary judgment on the ground that it was undisputed that she was crossing in the crosswalk and with the right-of-way. In affirming the Appellate Division's denial of summary judgment, the *Thoma* Court said:

> The submissions to the nisi prius court on plaintiff's motion for summary judgment, consisting of her affidavit and the police accident report, demonstrate that she may have been negligent in failing to look to her left while crossing the intersection. Plaintiff's concession that she did not observe the vehicle that struck her raises a factual question of her reasonable care. Accordingly, plaintiff did not satisfy her burden of demonstrating the absence of any material issue of fact and the lower courts correctly denied summary judgment.

Thoma, 82 NY2d at 737.

Largely based upon *Thoma* (and upon decisions of their own that had cited *Thoma*), the Second and Fourth Departments had repeatedly ruled that a personal injury plaintiff who moves for summary judgment must disprove comparative negligence in those actions in which comparative negligence is a legally viable defense. *E.g.*, *Palmer v. Ecco III Enterprises, Inc.*, 153 AD3d 1267, 1267-1268 [2d Dept 2017]; *Piscitello v. Fortress Trucking, Inc.*, 118 AD3d 1441, 1442 [4th Dept. 2014].[8]

The First Department went back and forth on the issue. After some initial decisions seemed to suggest that a plaintiff moving for summary judgment must disprove comparative negligence (*e.g.*, *Cator v. Filipe*, 47 AD3d 664, 664-665 [1st Dept 2008]), the Court then ruled in *Tselebis v. Ryder Truck Rental*, 72 AD3d 196, 199 [1st Dept 2010] that such "opinions cannot be reconciled with CPLR 1411 if the statute is to be given effect." However, the First Department afterwards ruled (over a dissent) that

[8] Although the *Rodriguez* dissent construed the Third Department's ruling in *Rigney v. Ichabod Crane Cent. Sch. Dist.*, 59 AD3d 842 [3d Dept 2009] as also holding that a personal injury plaintiff seeking summary judgment must disprove comparative fault, the *Rigney* Court said only that there were "[t]riable issues" regarding the plaintiff's comparative fault, which is not quite the same thing.

Tselebis was wrongly decided. *Maniscalco v. New York City Transit Authority*, 95 AD3d 510 [1st Dept 2012]. Although some members of that Court (including now Presiding Justice Acosta, in *Capuano v. Tishman Construction Corporation*, 98 AD3d 848 [1st Dept 2012]) resisted that view, including in *Rodriguez* itself, it remained the majority rule in that Department. Until now.

Held: Per a majority opinion by Judge Feinman, the Court ruled that a personal injury plaintiff who seeks partial summary judgment limited to the issue of the defendant's liability need not prove that he or she was not comparatively negligence. The Court reasoned:

> Placing the burden on the plaintiff to show an absence of comparative fault is inconsistent with the plain language of CPLR 1412. In 1975, New York adopted a system of pure comparative negligence, and, in so doing, directed courts to consider a plaintiff's comparative fault only when considering the amount of damages a defendant owes to plaintiff. The approach urged by defendant is therefore at odds with the plain language of CPLR 1412, because it flips the burden, requiring the plaintiff, instead of the defendant, to prove an absence of comparative fault in order to make out a prima facie case no the issue of defendant's liability.[9]

The majority added that "[d]efendant's approach also defies the plain language of CPLR 1411, and, if adopted, would permit a possible windfall to defendants" and, additionally, "[t]he approach we adopt is also supported by the legislative history of article 14-A."

As for the ruling in *Thoma*, the majority wrote that "*Thoma* never addressed the precise question we now confront" and "a review of the briefs publicly filed in that case reveal that the plaintiff proceeded on the assumption that if a question of fact existed as to her negligence, summary judgment on the issue of liability would be denied."[10]

As for the argument that partial grant of summary judgment would serve no purpose since the comparative negligence issue would still be left to be tried, the majority answered that "[a] principal rationale of partial summary judgment is to narrow the number of issues presented to the jury."

Dissent: The dissent, by Judge Garcia, stressed that *Thoma* had been perceived as holding that the plaintiff-movant must disprove comparative negligence and that the legislature had failed to adopt several proposed bills that would have overturned *Thoma*.[11] As the dissent saw it, "[t]he majority's approach goes well beyond these proposals, enabling a plaintiff to obtain summary judgment even where, as happened here, a defendant has demonstrated that plaintiff's comparative fault may be significant."

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[9] CPLR § 1412 states that "[c]ulpable conduct claimed in diminution of damages ... shall be an affirmative defense to be pleaded and proved by the party asserting the defense."

[10] The majority added that "it appears this Court has never cited *Thoma* for any proposition whatsoever."

[11] Much has been written about the wisdom, or lack thereof, of inferring legislative intent from legislative inaction.

Beyond that, the dissent felt that adherence to "the *Thoma* rule" was "the fairer outcome" inasmuch as "the issues of defendant's liability and plaintiff's comparative fault are intertwined," such that "[a] jury cannot fairly and properly assess plaintiff's comparative fault without considering defendant's actions."

Note: As is obvious from the above discussion, the grant of *partial* summary judgment on the liability to the plaintiff would not preclude the defendant from proving at trial that the plaintiff was culpable and thus responsible for some share of the total fault. Further, the plaintiff would still have to (and would still want to) prove defendant's fault in order to permit the jury to apportion fault in the event it finds plaintiff culpable. However, the jury would be instructed that it must find defendant culpable and must assign defendant at least some share of the fault.

My own guess is the principal impact of *Rodriguez* will be in "streamlining the issues." One would think that grant of partial summary judgment to the plaintiff could also incentivize the defendant to settle.

Whether Release Given By The Decedent Seaman To The Defendant's Predecessor Applied To And Thus Barred The Subject Action — *Matter of New York City Asbestos Litig.*, 33 NY3d 20 [2019], *aff'g* 153 AD3d 461 [1st Dept 2017].

The issue was whether defendant Chevron was entitled to summary judgment, by reason of the release decedent executed with respect to a prior action against Texaco, Chevron's predecessor.

Facts: Decedent worked shipboard as a merchant marine from 1945 to 1982, when he retired. He, "along with hundreds of other plaintiffs, filed individual lawsuits against Texaco and 115 other defendants … in the United States District Court for the Northern District of Ohio." In that prior action, decedent alleged that he and others were "exposed to asbestos friable fibers causing him to breathe into his system carcinogenic asbestos dust." That suit was settled three weeks after the action's commencement and decedent received a grand total of $1,750 in settlement.

Although decedent therein alleged that he sustained pulmonary injury from inhalation of asbestos fibers, the release executed with the settlement did not allege or mention mesothelioma or cancer. Nor had decedent at that point been diagnosed with mesothelioma or cancer. Decedent was later diagnosed with mesothelioma, which he died of in 2015.

The Issue: Did the 1997 release which decedent gave to Chevron's predecessor in return for the $1,750 settlement bar plaintiffs' current action against Chevron?

More particularly, where the maritime law applicable to seamans' claims placed the burden on the defendant to show that the subject release "was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights" (*Asbestos*, *quoting Garrett v. Moore-McCormack Co.*, 317 US 239, 248 [1942]), did Chevron affirmatively establish as a matter of law that the 1997 release covered decedent's mesothelioma notwithstanding, a) that the release did not mention mesothelioma, and, b) that decedent had not yet been diagnosed with mesothelioma?

Held: The Court ruled by 4 to 3 vote that Chevron had not met its burden of proof for summary judgment.

Writing for the majority, Judge Wilson noted that the 1997 release provided that decedent was "giving up the right to bring an action against the Released Parties, or any of them, in the future for any new or different diagnosis that may be made about Claimant's condition as a result of exposure to any product[.]." But the release did not mention mesothelioma, with the consequence that the release "does not unambiguously extinguish a future claim for mesothelioma."

Furthermore, while both parties to the release were then aware "that asbestos exposure could cause mesothelioma," they "agreed to a release that omitted it." In these circumstances, "the absence of mesothelioma (and the other cancers) from the release could readily support the conclusion that the omissions of mesothelioma (and the other cancers) from the language of the release was deliberate."

There was also, the majority ruled, insufficient evidence to establish adequacy under the applicable admiralty law. While decedent received $1,750 from Chevron's predecessor, the record did not indicate "how many cases Texaco settled; how much Texaco paid to settle as a lump sum; how that lump sum was distributed; what the considerations were that led to the allocation of a specific amount of compensation to [decedent]; what, if anything, [decedent] received from the 115 other defendants he sued; or what he or his counsel viewed as the revalue of those remaining claims (which he expressly carved out of the release) at the time he settled with Texaco."

For these reasons, while it was possible "that additional evidence could be developed that would validate the release and extinguish plaintiffs' claims," the record was "presently insufficient to demonstrate the effectiveness of the 1997 release as a matter of law."

Dissent: Writing for himself and the two other dissenters, Judge Garcia charged that this was a case in which a plaintiff who was then represented by counsel "executed a comprehensive release, agreeing to forfeit 'any and all' claims for known or potential injuries suffered as a result of his alleged exposure" and in which "the same seaman, with the same counsel" was now "suing the same ship owner for injuries sustained from that same asbestos exposure."

The dissenters charged that "[b]y denying summary judgment, the majority seemingly renders all releases executed by seamen – no matter how comprehensive – unenforceable in New York courts," a result that "harms both defendants seeking certainty in settlement and plaintiffs hoping to avoid the risk and expense of litigation."

Caveat: The majority made very clear that it was specifically addressing releases, governed by admiralty law, executed by seamen.

Duties Vessel Owner Owed To Harbor Worker, Or Did Not Owe To Harbor Worker, Under Maritime Law — *Schnapp v Miller's Launch, Inc.*, 31 NY3d 1001 [2018], *aff'g* 150 AD3d 32 [1st Dept 2017].

Plaintiff, a harbor worker under the Longshore and Harbor Workers' Compensation Act (LHWCA), sustained injury while boarding defendant's vessel. Basically, plaintiff, who was given no other means of boarding the vessel, jumped down from the bulkhead to the deck. "That day the distance between the bulkhead and the boat deck was a little more than it was at other times, about four feet … when he landed, he fractured his tibia and fibula" (150 AD3d at 35).

As a harbor worker, plaintiff's rights against the vessel owner were circumscribed per the standards set forth in *Scindia Steam Nav. Co. v. De Los Santos*, 451 US 156 [1981]. As detailed in Presiding Justice Acosta's majority opinion in the Appellate Division, a vessel owner's duties are limited under *Scindia* "to turning over the vessel in a reasonably safe condition (turnover duty), conducting operations still under its control reasonably safely (active control duty), and intervening if it had knowledge of an unsafe condition under the stevedore's control (duty to intervene)" (150 AD3d at 38).

The issue which split the Appellate Division was whether there were triable issues of fact concerning those duties or whether defendant was instead entitled to summary judgment.

Appellate Division – Turnover Duty: Even though the vessel owner's turnover duty includes providing a safe means of accessing the vessel (150 AD3d 32), defendant argued and the Appellate Division dissenter found that "'a shipowner can, ordinarily, reasonably rely on the stevedore (and its longshore employees) to notice obvious hazards and to take steps consistent with its expertise to avoid those hazards where practical to do so'" (150 AD3d at 44, Dissent, quoting *Kirsch v. Plovidba*, 971 F2d 1026, 1030 [3d Cir 1992]). Here, said the Appellate Division dissenters, "defendant did not violate its *Scindia* turnover duty" inasmuch as the height differential was "open and obvious" (150 AD3d at 46).

The majority ruled otherwise, stating that "'the turnover duty, at a minimum, requires a vessel to provide a safe means of access" (150 AD3d at 40, quoting *Scheuring v. Traylor Bros*., 476 F3d 781, 790 [9th Cir 2007]) and that "'the obviousness of the defect does not absolve the vessel owner of its duty to turn over the ship in a condition under which expert and experience[d] stevedores can operate safely'" (*id*. at 41, quoting *Martinez v. Korea Shipping Corp.*, 903 F2d 606, 610 [9th Cir 1990]).

Appellate Division – Duty to Intervene: The majority noted that "[t]he duty to intervene requires the vessel owner to intervene in areas under the principal control of the stevedore if the owner has actual knowledge that a condition of the vessel or its equipment poses a risk of harm and the stevedore or other contractor is not exercising reasonable care to protect its employees from that risk" (150 AD3d at 42) and that the vessel's captain "was aware of the dangerous distance between the pier and the deck of the vessel at the time of the accident, and he knew that plaintiff would have to disembark and eventually reboard" (*id*.).

The dissent answered,

> a) the duty to intervene applies if the vessel owner acquires "actual knowledge that (1) a condition of the vessel or its equipment poses an unreasonable risk of harm and (2) the stevedore is not exercising reasonable car[e] to protect its employees from that risk" (150 AD3d at 48), and,
>
> b) "the captain did not see plaintiff embark" (*id*.) and there was no "evidence that he had actual knowledge of what plaintiff intended to do" (*id*.).

Held: The Court of Appeals unanimously affirmed on 500.11 review, stating only:

> On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order affirmed, with costs, and certified question answered in the affirmative. Triable issues of fact exist as to whether defendant Miller's Launch, Inc. breached a duty of care it owed to plaintiff Wayne Schnapp pursuant to the Longshore and Harbor Workers' Compensation Act (33 USC § 905[b]).

31 NY3d at 1002.

III. Business, Consumer, And Other Non-Personal Injury Torts

A. Theft Of Trade Secrets, Unfair Competition, And Unjust Enrichment

Whether The Damages In An Unfair Competition, Unjust Enrichment Or Stolen Trade Secrets Case May Be Measured By The Costs The Defendant Avoided (Rather Than By The Profits Defendant Realized Or The Harm The Plaintiff Suffered) — *E.J. Brooks Company v Cambridge Sec. Seals*, 31 NY3d 441 [2018].

The question via certification from the Second Circuit was "[w]hether, under New York law, a plaintiff asserting claims of misappropriation of a trade secret, unfair competition, and unjust enrichment can recover damages that are measured by the costs the defendant avoided due to its unlawful activity." The Court answered in the negative by 4 to 3 vote.

Facts: Defendant Cambridge Security Seals stole plaintiff TydenBrooks fully-automated process for manufacturing plastic indicative security seals. A jury found defendant Cambridge Security Seals liable for three distinct torts: it stole trade secrets from plaintiff TydenBrooks, engaged in unfair competition with TydenBrooks, and unjustly enriched itself at TydenBrooks' expense.

But how were the damages to be measured in this case in which the entire impact of defendant's theft was that it allowed defendant to produce its product more cheaply than it could have otherwise done?

At trial, plaintiff did not present any proof as to the number of customers or the amount of profits it purportedly lost as a result of defendant's wrongs. Nor did plaintiff present any proof as to the amount of the defendant's ill-gotten gains. Of course, had plaintiff chosen either of those paths, defendant would have no doubt responded that such figures amounted to mere "speculation."

Plaintiff instead presented proof to the effect that defendant "would have had to incur an additional $6.1 million to $12.2 million, at a minimum, to develop the manufacturing process for its first-generation machines without making use of its knowledge of TydenBrooks' information" (31 NY3d at 445). The issue was whether that added cost, assuming the figure to be accurate, could serve as the measure of damages.

Majority: Per an opinion by Judge Feinman, the Court ruled,

> (1) the amount of the defendant-avoided costs was not "awardable as compensatory damages in an action based on a theory of unfair competition" inasmuch as the damages therein "must correspond to 'the amount which the plaintiff would have made except for the defendant's wrong *** not the profits or revenues actually received or earned' by the defendant" and the plaintiff in such a case can instead recover the amount of the defendant's "unjust gains" only where, a) "a plaintiff's actual losses cannot 'be traced with even approximate precision,'" and, b) there is some "approximate relation of correspondence" between the defendant's gain and the plaintiff's loss (31 NY3d at 448-450);
>
> (2) the amount of the defendant-avoided costs could not serve as the measure of damages for theft of a trade secret because, citing Appellate Division rulings, "trade secret damages may not be measured by a defendant's increased profits, except to the extent that those profits are evidence of the plaintiff's own losses" (31 NY3d at 453); and,

(3) the amount of the defendant-awarded costs could not serve as the measure of damages for defendant's unjust enrichment since such is a "narrow" doctrine wherein equity intervenes only where "'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (31 NY3d at 455).

Dissent: Judge Wilson, writing also for Judges Rivera and Fahey, lamented that in relying upon "several inapposite Appellate Division cases" to resolve a novel question that deserved both a better answer and a better analysis, the Court "forsakes New York's historic role at the vanguard. Where we should lead, we now refuse even to follow" (31 NY3d at 458).

As the dissenters saw it, as the ultimate determinant of New York law, the Court of Appeals should have determined whether plaintiff's request that the loss be measured by the defendant's avoided costs made sense and constituted good policy. The dissenters believed it did.

First off, while there are no doubt cases where the opposite is true, here and in many instances "the calculation of avoided-cost damages is … much simpler than, and less subject to challenge than, lost-profit damages, which makes them an attractive alternative for plaintiffs who are willing to forgo a potentially larger recovery in favor of a smaller, more certain one" (31 NY3d at 456).

Second, while the avoided-cost calculation may understate the defendant's gain, it is not likely to overstate the gain inasmuch as "no rational economic actor would spend $X to recover profits of merely $X" (*id*.).

Third, while the issue was novel in New York, the use of avoided costs as a measure of damages is "widespread" "under the Restatement (Third) of Unfair Competition and the laws of other states" (31 NY3d at 460).

The dissent concluded with this eloquent elergy:

> The approach provided by nearly all other jurisdictions and the Restatement (Third) of Unfair Competition explicitly allows plaintiffs in trade secret cases to recover the plaintiff's cost of development or the defendant's avoided costs. That is of no moment to the majority. The suggestion that our Court—the Court that, in Judge Cardozo's time and thereafter, led the nation in advancing the laws that govern civil wrongs in contract, tort and equity—should turn a blind eye and disregard our duty "to bring the law into accordance with present day standards of wisdom and justice" (Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691 [1951], quoting Funk v. United States, 290 U.S. 371, 382, 54 S.Ct. 212, 78 L.Ed. 369 [1933]), is most perplexing.
>
> * * *
>
> The majority also abandons our role in crafting the common law to fulfill the policy goals of this State. The Supreme Court of the United States has identified the general policies behind trade secret law as the "maintenance of standards of commercial ethics and the encouragement of invention" (Kewanee, 416 U.S. at 481, 94 S.Ct. 1879). The legal protections against theft of advancements in the sciences, arts and industry—not to punish, but to spur innovation—is embodied in the United States Constitution (U.S. Const, art I, § 8, cl 8). "Trade

secret law will encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention" (Kewanee, 416 U.S. at 485, 94 S.Ct. 1879; see also Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 180 [7th Cir 1991] ["trade secret protection is an important part of intellectual property, a form of property that is of growing importance to the competitiveness of American industry.... The future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property"]).

New York, as the nation's commercial center and a hub of innovation, embodies those goals by fostering inventors and innovation; those are unmistakable goals of our legislative and executive branches (see e.g.Press Release, Governor Cuomo Announces Highlights of the FY 2019 Budget [March 30, 2018] [announcing budget includes "$600 million to support construction of a world-class, state-of-the-art life sciences public health laboratory in the Capital District that will promote collaborative public/private research and development partnerships"]; Governor Andrew Cuomo, State of the State Address to 2015 New York Legislature [announcing "new innovation hotspots ... (to) provide one-stop funding and services—legal services, accounting services, all the services (inventors) need to grow their business"]).

What commercial ethics or invention is encouraged by the majority's decision? What does that decision bode for our role in molding the common law to changing times? By rejecting the predominant rule accepted by most states and the Restatement, the majority undermines the policy goals of this State and casts off our mantle. Under the majority's rule, I am encouraged to steal your trade secrets. If I can make better use of them than you, because I am a better salesperson, better funded or a cheaper purchaser of inputs, even if I lose when you sue me, I can make a net profit, repaying you only what you can prove you lost in sales. If I am not better suited to exploit your trade secrets, I may nevertheless profit if you are unable to prove your lost sales, which, because of the messiness of the real world, is often difficult or impossible to do. At worst, I may be subjected to an injunction, but at that point, the secret has begun to leak out, and you will be hard-pressed to prove that some third, fourth or fifth party derived its identical process from your secret. The incentive for others to innovate will be replaced by the incentive to steal. Punitive damages, of course, remain as a deterrent, but because many trade secrets are allegedly stolen by employees moving from one company to another (which, quite correctly, the law does not restrain per se), the theft is difficult enough to prove, and punitive damages in those situations are uncommon, as this case itself demonstrates. Likewise, although you may have purposefully refrained from licensing your secret to anyone, you may be forced to accept a "reasonable royalty" from the defendant as damages, based on a conjectural price at which you might have licensed your secret—a sort of eminent domain power for thieves.

Cases such as this, "where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law ... are the cases where the creative element in the

> judicial process finds its opportunity and power" (Cardozo, The Nature of the Judicial Process [Yale U Press, 1921, p. 165]). Judge Cardozo set that course for us a century ago; I am saddened we shirk from it; doubly so when the Second Circuit has steered us to it.

31 NY3d at 474-475, 475-477, Dissent, emphasis added.

B. Alleged Civil Rights Violation

Alleged Misappropriation Of Likeness Under Civil Rights Law § 31 — *Gravano v Take-Two Interactive Software, Inc.*, 31 NY3d 988 [2018], *aff'g* 142 AD3d 776 [1st Dept 2016].

Plaintiff Karen Gravano, who was apparently a celebrity, charged that defendants incorporated her likeness into the video game "Grand Theft Auto V."

Although the name of the character in the game was Andrea Bottino, Gravano argued that "the character uses the same phrases she uses; that the character's father mirrors Gravano's own father; that the character's story about moving out west to safe houses mirrors Gravano's fear of being ripped out of her former life and being sent to Nebraska; that the character's story about dealing with the character's father cooperating with the state government is the same as Gravano dealing with the repercussions of her father's cooperation; and that the character's father not letting the character do a reality show is the same as Gravano's father publicly decrying her doing a reality show" (142 AD3d at 776-777).

The First Department ruled that Gravano's claim was correctly dismissed since "[d]espite Gravano's contention that the video game depicts her, defendants never referred to Gravano by name or used her actual name in the video game, never used Gravano herself as an actor for the video game, and never used a photograph of her [emphasis added]" (142 AD3d at 777).

Even if the video game depiction was close enough to be a representation of Gravano, the claim would still fail "because this video game does not fall under the statutory definitions of 'advertising' or 'trade'" (142 AD3d at 777). "This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire" (*id*.).

Held: The Court of Appeals unanimously affirmed, but without reaching the Appellate Division's second ground for dismissal. The brief memorandum said:

> The order of the Appellate Division, insofar as appealed from, should be affirmed, with costs. A computer-generated image may constitute a "portrait" within the meaning of Civil Rights Law §§ 50 and 51 (*see Lohan v. Take–Two Interactive Software*, 31 N.Y.3d 111, 121–122, 73 N.Y.S.3d 780, 97 N.E.3d 389 [2018] [decided herewith]). Plaintiff, however, is not recognizable from the images at issue here, namely, the "Andrea Bottino" avatar in the video game in question (*see Cohen v. Herbal Concepts*, 63 N.Y.2d 379, 384, 482 N.Y.S.2d 457, 472 N.E.2d 307 [1984]).

31 NY3d at 990.

C. Defamation

Whether Purportedly Defamatory Statements Made To FDA Investigator Were Absolutely Privileged — *Stega v New York Downtown Hosp.*, 31 NY3d 661 [2018], *rev'g* 148 AD3d 21 [1st Dept 2017].

Conflicts arose between Dr. Jeanetta Stega and Dr. Leonard A. Farber concerning the Luminant study, a study that involved testing of a drug that was intended to treat metastatic cancer. Dr. Stega, "a medical scientist who has specialized in gynecological and oncological research," was an employee of defendant New York Downtown Hospital and the hospital's Vice President of Research. Dr. Farber, an oncologist in private practice who had medical staff privileges at Downtown Hospital, was the prime mover behind the Luminant study.

Amongst other claims, Farber eventually accused plaintiff, falsely it appears, "of taking funds that belonged to the hospital." By reason of that and other charges, plaintiff's employment was terminated and she was removed from the hospital board.

Plaintiff ultimately sued the hospital, Farber and some others for defamation. Amongst other charges, plaintiff alleged that defendants made defamatory statements to a U.S. Food and Drug Administration (FDA) investigator in the course of an investigation.

The issue, which split both the Appellate Division and the Court of Appeals, was whether the statements in issue were absolutely privileged and thereby non-actionable, whether they were imbued with a qualified privilege, or whether they were not privileged.

By 4 to 1 vote, the Appellate Division ruled that the statements were absolutely privileged.

Held: The Court of Appeals reversed by 4 to 2 vote (Chief Judge DiFiore taking no part). Writing for the majority, Judge Fahey noted that "[a]bsolute privilege, which entirely immunizes an individual from liability in a defamation action, regardless of the declarant's motives, is generally reserved for communications made by 'individuals participating in a public function, such as judicial, legislative, or executive proceedings'" and that such protection "is designed to ensure that their own personal interests—especially fear of a civil action, whether successful or otherwise—do not have an adverse impact upon the discharge of their public function." Such protection applies, *inter alia*, to "statements uttered in the course of a judicial proceeding."

By contrast, where a statement is "'made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned,'" such statement are generally protected by a "qualified privilege" which essentially means they are "protected if they were not made with 'spite or ill will' or 'reckless disregard of whether [they were] false or not.'"

However, as the majority saw it, in order "for absolute immunity to apply in a quasi-judicial context" there must be some "mechanism" "for the party alleging defamation to challenge the allegedly false and defamatory statements." "[T]he privilege extends only if procedural safeguards enable the defamed party to contest what is said against her." As Judge Fahey forcefully put it:

> The absolute privilege against defamation applied to communications in certain administrative proceedings is not a license to destroy a person's character by means of false, defamatory statements.

Regarding the defendants' argument that it should be enough "that the proceeding … contain the possibility of an adversarial hearing, even if not necessarily a hearing at which the party alleging defamation could challenge the statements in question," such theory "flies in the face of the policy rationale for insisting on an adversarial procedure, namely to prevent the absolute privilege from shielding statements published in a setting in which the defamed party may never know of the statements and, even if he or she did, would have no way to rebut them."

Regarding the defendants' argument "that a qualified privilege would not be sufficient to foster the level of candor needed in the context in which the FDA is investigating IRBs, because of the fear of potential litigation, in which a speaker, as defendants see it, would be obliged to prove lack of malice," it would actually be "the defamation plaintiff who 'would have the burden of showing that a statement is actionable because it was motivated by malice.'"

Dissent: The dissenters would have rejected the majority's view that, as the dissenters characterized it, "whether an absolute privilege applies to a communication made in the course of a quasi-judicial proceeding depends on the status of the subject of the communication, rather than the forum or circumstances in which the challenged communication is made."

In the dissenters' view, such distinction had no support in the law, would "lead to uneven application—affording protection to some individuals but not others, and cloaking communications depending on the target of the speech and not its content—and inject uncertainty about the availability of absolute immunity for those participating in these types of proceedings," and would thus "undermine[]what the Court has identified as the animating public policy for adopting an absolute privilege in quasi-judicial proceedings."

Note: My cursory review of the facts significantly understates, (a) the degree to which many of the defamatory statements were simply false, and, (b) the adverse impact they had on the plaintiff's reputation. I think that Judge Fahey's majority opinion, and Justice Kapnick's dissenting opinion in the Appellate Division, were responsive to those facts and, more generally, to the circumstance that one could easily have one's professional life sullied if not ruined by charges that were known to be untrue but were also believed to be made without risk or any potential for reckoning.

IV. Attorney-Client Issues, Legal Ethics, And Legal Practice

Legal Malpractice Claim Not Pleaded With Sufficient Particularity — *Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, PLLC*, 31 NY3d 1090 [2018], *aff'g* 155 AD3d 1218 [3d Dept 2017].

This was another appeal that the Court of Appeals resolved in a single paragraph on abbreviated 500.11 review. One must again go to the Appellate Division's opinions to discern what the appeal was all about.

The case concerned one particular class of defendants that have of late had a great deal of success in obtaining pre-answer dismissals of the claims against them: attorneys sued for legal malpractice. Here, the dismissal was premised upon the plaintiff's failure to plead its claim in sufficient detail.

Facts: Plaintiff retained the defendant-attorneys "to provide legal services in connection with the collection of debts and foreclosure matters in which plaintiff was the mortgagee" (155 AD3d at 1219). The Appellate Division dissenters characterized plaintiff's legal malpractice as being that

defendants purportedly failed to represent plaintiff in a "timely, competent and professional" manner and that plaintiff would have recovered more money and incurred less expense had defendants provided proper legal representation (155 AD3d at 1224). The dissenters felt that it could be "readily inferred" from the "spare allegations" in the complaint "that defendants' delay or incompetence in handling what otherwise would have been successful claims caused the claims to be dismissed or become time-barred, or otherwise prevented plaintiff from recovering all or part of the value of the underlying debts" (155 AD2d at 1224).

All five of the Appellate Division panelists agreed, (a) plaintiff's complaint did not provide a wealth of factual detail, and, (b) plaintiff's fraud cause of action had to be dismissed since it certainly did not plead its fraud claim with the high level of specificity and detail required by CPLR 3016(b). The question which split the panel was whether plaintiff pleaded its legal malpractice claim in sufficient detail to survive the defendants' pre-answer motion to dismiss. The majority ruled it did not.

Appellate Division: As the Appellate Division majority saw it,

> (a) "[a] legal malpractice claim requires that the plaintiff show that 'the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence'" (155 AD3d at 1219-1220); and,
>
> (b) plaintiff's complaint was defective because other than the "vague" and "conclusory" allegation that it "would not have incurred a loss in time and value in the debt on the collection and foreclosure cases assigned to defendant[s]" but for the defendants' unidentified malpractice, "plaintiff failed to plead any specific facts, which, if accepted as true, would establish a legal malpractice claim" (*id*. at 1220).

The complaint did not, the majority noted, identify "any mention of an instance of deficient representation or any example of erroneous advice by defendants" (*id*.). Further, even after "[h]aving been apprised of defendants' challenge and being presented with an opportunity to particularize its allegations, plaintiff, in response, submitted an amended complaint that merely added two paragraphs consisting of bare legal conclusions" (*id*. at 1221).

The Appellate Division dissenters countered that the majority was wrongly requiring "a higher standard of detail and specificity for legal malpractice claims than those imposed upon other causes of action by the familiar and fundamental standards of notice pleading" (155 AD3d at 1223). Nor, the dissenters said, was such justified by the cases the majority cited as authority for the dismissal. Those were cases, the dissenters said, in which the defendant obtained pre-answer dismissals by demonstrating that it would be impossible for the plaintiff to prove "but for" causation, *i.e.*, that the plaintiff-client would have obtained a better result but for the alleged legal malpractice. Here, by contrast, there was "nothing 'inherently incredible' about plaintiff's claims, nor have defendants proffered any form of documentary evidence that refutes or contradicts the allegations" (155 AD3d at 1224). The dissenters added:

> Plaintiff was not required to prove its case at this early stage of the litigation, nor was it obliged to show that defendants' malpractice actually caused it to sustain damages.

* * *

> The majority objects to the lack of specific details as to the particular foreclosure and debt collection actions that defendants allegedly handled inadequately. However, that analysis focuses incorrectly on whether plaintiff has properly stated a claim, rather than on whether it has one (*see Rovello v. Orofino Realty Co.,* 40 N.Y.2d at 636, 389 N.Y.S.2d 314, 357 N.E.2d 970).

* * *

> The majority holding introduces unpredictability and confusion into what was previously settled law, opens the door to the excessive litigation that the CPLR was expressly designed to avoid, and contravenes decades of careful and well-founded application of the principles of notice pleading. It further deprives plaintiff of any opportunity to prove its case at the earliest juncture of the litigation, solely because its pleading—although sufficient to give rise to the reasonable inference that plaintiff suffered losses due to defendants' legal malpractice—lacks detail that could readily have been obtained by less drastic means.

155 AD3d at 1224-1225.

Held: The Court of Appeals unanimously affirmed. The ruling was, in its entirety, as follows:

> On review of submissions pursuant to section 500.11 of the Rules, order insofar as appealed from affirmed, with costs. The Appellate Division properly concluded that plaintiff Mid–Hudson Valley Federal Credit Union did not state a claim for legal malpractice against defendants Paul Quartararo and Quartararo & Lois, PLLC insofar as the amended complaint failed to allege facts "sufficiently particular to give the court and [defendants] notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved" (CPLR 3013).

31 NY3d at 1091.

V. Insurance Law

Whether The Admittedly "Inapplicable" Underlying Insurance Coverage Was Nonetheless "Valid" Coverage Within The Meaning Of The Umbrella Policy — *Erie Ins. Exch. v J.M. Pereira & Sons, Inc.*, 31 NY3d 938 [2018], *aff'g* 151 AD3d 1879 [4th Dept 2017].

The Fourth Department panel split, 4 to 1, on the question of whether the plaintiff-insurer established the inapplicability of an exception to the policy's exclusion of coverage. The dispute

ultimately turned on the majority's distinction between "applicable underlying insurance" and "valid underlying insurance."

Plaintiff issued defendant J.M. Pereira & Sons a so-called Business Catastrophe Liability Policy which provided commercial liability umbrella coverage. Defendant, a Pennsylvania corporation, was sued as a third-party in the aftermath of an accident in which several of its employees were injured or killed while working in New York.

Plaintiff disclaimed coverage "based on a policy exclusion that excluded coverage for bodily injury to JMP's employees if such injury arose out of their employment or during the course of performing their duties related to JMP's business." There were, however, three exceptions to the exclusion of coverage. In particular, the insurance policy indicated that the subject exclusion,

> "does not apply to the extent that valid 'underlying insurance' for the employer's liability risks ... exists or would have existed but for the exhaustion of the underlying limits for 'bodily injury'. Coverage provided will follow the provisions, exclusions and limitations of the 'underlying insurance' *unless otherwise directed by [the BCL] insurance*."

151 AD3d at 1882, emphasis added.

The Appellate Division majority explained that the above-noted exception to the exclusion constituted "a standard 'follow the form' provision" whereby the umbrella policy "incorporates the provisions of a valid underlying policy, and 'is designed to match the coverage provided by the underlying policy'" (151 AD3d at 1882).

So, here comes the twist. Defendant did have underlying insurance coverage, but the underlying coverage was limited to injuries that occurred in Pennsylvania. Did that mean that there was "valid underlying insurance" or did it mean there wasn't "valid underlying insurance"?

Appellate Division Dissent: As the dissenter saw it, "[t]he only reasonable interpretation of the plain and unambiguous language is that the BCL policy would provide JMP with employer's liability coverage (*i.e.*, the exclusion would not apply) only to the extent that such coverage existed under the SWIF [*i.e.*, underlying] policy." Since the underlying policy did not provide employer's liability coverage for JMP's work outside of Pennsylvania, that meant "no 'valid underlying insurance for [JMP's] liability risks' exists" within the meaning of the provision (151 AD3d at 1885).

Appellate Division Majority: The majority essentially ruled that the dissent was erroneously equating "valid underlying insurance" with "applicable underlying insurance."

Yes, it was true that the underlying policy was geographically limited to Pennsylvania accidents and was therefore *inapplicable*. However, the exception applied to the extent there was "*valid* underlying insurance." Here, there was valid underlying coverage notwithstanding that the coverage was inapplicable. For this reason, the plaintiff-insurer had failed to establish that the exception did not apply.

The majority explained:

> The dissent adopts plaintiff's position that the geographic limitation of the underlying SWIF policy, i.e., limiting coverage to work in Pennsylvania, precludes coverage for the accident that occurred in New York. According to the dissent, the underlying SWIF policy was not "*valid* 'underlying insurance' " because it limited coverage to work in Pennsylvania (emphasis added). We respectfully disagree with that position. The dissent is interpreting the word "valid" to mean

> "applicable." In our view, the geographic limits of that policy do not affect the policy's *validity* but, rather, affects its *applicability.* Otherwise there would never be a situation where the "unless otherwise directed" language would have meaning. That phrase has meaning only if the underlying insurance has exclusions not found in the BCL policy. Inasmuch as we must "construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect," we cannot adopt the position of the dissent (*Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,* 98 N.Y.2d 208, 221–222, 746 N.Y.S.2d 622, 774 N.E.2d 687 [internal quotation marks omitted]). In any event, the fact that we and our dissenting colleague interpret the policy differently establishes, at the very least, that the policy is ambiguous and that plaintiff failed to satisfy its burden of establishing as a matter of law that there is "no other reasonable interpretation" of the exception to the exclusion (*Dean v. Tower Ins. Co. of N.Y.,* 19 N.Y.3d 704, 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143 [internal quotation marks omitted]).

151 AD3d at 1883.

Held: The Court of Appeals unanimously affirmed on 500.11 review without stating whether it agreed or disagreed with the Appellate Division majority's reasoning. The ruling was in its entirety as follows:

> On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order affirmed, with costs, and certified question answered in the affirmative. Plaintiff failed to establish, as a matter of law, that the "loss was unambiguously excluded from the coverage of [the] policy" (Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co., 12 N.Y.3d 302, 307, 880 N.Y.S.2d 885, 908 N.E.2d 875 [2009]).

31 NY3d at 939.

A Cluster of Issues, Including Whether Plaintiff Was Obligated To Prove That It Justifiably Relied Upon Defendant's Misrepresentations — *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 31 NY3d 569 [2018], *aff'g* 151 AD3d 83 [1st Dept 2017].

The case arose from the massive fraud regarding residential mortgage-based securities (RMBS) that came to light in the economic meltdown of the last decade.

Plaintiff Ambac "agreed to insure payments of principal and interest owed to the holders of residential mortgage-backed securities sponsored by defendant Countrywide." In convincing Ambac to offer the coverages, Countrywide made thousands of false representations that, in essence served to understate and thus misrepresent the risk of default. Ambac eventually brought the subject action for breach of contract and fraudulent inducement. The case presented several issues that arose from the terms of the parties' agreement.

Reliance Issue: At common law, a plaintiff who asserts a claim for fraudulent inducement must prove not only that defendant made an intentional and significant misrepresentation but also that the misrepresentation *caused* the harm for which the plaintiff seeks recovery. In order to prove causation, the plaintiff must show that he or she *justifiably relied*, to his or her detriment, upon the misrepresentation(s) in issue.

Ambac argued that Insurance Law § 3105 effectively displaced that element. The Court of Appeals unanimously ruled otherwise.[12] Writing for the Court, Judge Garcia explained:

> Supreme Court relied on Insurance Law § 3105 in addressing Ambac's claim that it need not show justifiable reliance or loss causation.
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> * * *
>
> Insurance Law § 3105 plays no role here.
>
> * * *
>
> Section 3105 (b) (1) provides that "[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material," and "no misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." Section 3105 does not provide an affirmative, freestanding, fraud-based cause of action through which an insurer may seek to recover money damages. Nor does it "inform" a court's assessment of the longstanding common law elements of fraudulent inducement. By its terms, section 3105 is only relevant when an insurer seeks rescission of an insurance contract or is defending against claims for payment under an insurance contract, relief that Ambac cannot, and does not, seek.

Remedies Provision: Section 2.01(1) of the Insurance Agreement provided that "the remedy" with respect to any defective Mortgage Loan or any Mortgage Loan as to which there has been a breach of representation or warranty" under the Securitization Documents "shall be limited to the remedies specified" in the applicable Securitization Documents." The referenced provision stated that the remedy was that Countrywide would "either repurchase, cure, or substitute noncomforming loans." Ambac argued that the "sole remedy" provision applied only to misrepresentations concerning individual loans, and not to what it termed "'transaction-level' representations about Countrywide's operations and financial condition."

Citing its recent ruling in *Nomura Home Equity Loan, Inc. Services 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 NY3d 572, 585-586 [2017], the Court ruled over Judge Rivera's dissent that it was "well settled that 'courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities'" and that such equally applied here.

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[12] Although Judge Rivera dissented in part, she agreed with the majority concerning the reliance issue.

Alleged Entitlement To Full Reimbursement: Ambac urged that it was entitled to reimbursement for all payments it made "regardless of whether they [arose] from a breach of misrepresentation." The Court ruled otherwise.

In effect, Ambac was seeking rescission or rescissory damages inasmuch as "[p]ayment of that measure of damages would place Ambac in the same position it would be in if it had not insured any of the securities—the equivalent of rescissory damages."

"Instead, any compensatory damages should be measured only by reference to claims payments made based on nonconforming loans."

Attorneys' Fees: Ambac sought reimbursement for the attorney's expenses.

The Court noted that "[i]n New York, 'the prevailing litigant ordinarily cannot collect … attorneys' fees from its unsuccessful opponents … Attorneys' fees are treated as incidents of litigation, rather than damages … The exception is when an award is authorized by agreement between the parties or by statute or court rule.'" Further, a court "'should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.'"

Here, there was no "unmistakenly clear" language overriding the common law rule.

VI. Commercial Law

Corporate Looting, Standing To Sue, And Piercing Of The Corporate Veil — *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30 [2018] *aff'g* 142 AD3d 822 [1st Dept 2016].

In 2005, the Private Equity Defendants (consisting of private equity funds and their individual partners) created a group of shell companies which they used to acquire TIM Hellas ("Hellas"). At the time, Hellas "was the third largest cellular telephone company in Greece, profitable and nearly debt-free." Yet, by the end of that year the Hellas shell companies carried 1.6 billion in debt and only 38 million in equity. Hellas then embarked on a so-called recapitalization in which it issued PIK (payment-in-kind) notes in order to borrow even more.

Needless to say, the Hellas companies ultimately defaulted on the notes they had issued as part of the "recapitalization."

According to the plaintiff, the assets that Hellas owned at the time defendants acquired it did not just vanish. They were pocketed by the Private Equity Defendants. Indeed, at least according to plaintiff, the transformation and ultimate demise of Hellas was part of a deliberate scheme to loot the company to the detriment of, amongst others, the creditors who purchased the PIK notes that the defendants purportedly never intended to repay.

But the two questions raised in the context of the defendants' motion to dismiss were, (a) whether the plaintiff had standing to sue, and, (b) whether the factual assertions in the complaint, if taken as true, provided legal basis for piercing the corporate veil in this case in which the notes' corporate issuers were, per the defendants' alleged plan, debt-encumbered shells that existed only to enrich the defendants.

The Court unanimously answered both questions in the affirmative. The Court's decision, penned by Judge Rivera, provided some much needed clarification and guidance concerning the prerequisites for and meaning of piercing the corporate veil. Amongst other points, the Court explained

that piercing of the corporate veil is not a cause of action but is instead a "dependent legal theory" that may *supplement* a cause of action.

The "Standing" Issue

The standing issue turned on the particular contractual language of the indenture in issue and, for this reason, may be of lesser interest than the issues concerning piercing of the corporate veil. So, I will endeavor to "cut to the chase."

When the defendants issued the PIK notes as part of their so-called recapitalization, they did so pursuant to an indenture which spelled out the rights and obligations of the parties thereto. As the Court herein noted, "'[a]n indenture is essentially a written agreement that bestows legal title of the securities in a single Trustee to protect the interests of individual investors who may be numerous or unknown to each other.'" Significantly, an "indenture trustee" differs from an "ordinary trustee." Whereas an ordinary trustee "'has historic common-law duties imposed beyond those in the trust agreement'" "'an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement.'"

Thus, the indenture trustee's powers are defined by the indenture itself, which is construed per the usual rules that govern construction of any contract.

Here, the plaintiff's complaint, filed by the indenture trustee for the benefit of the allegedly defrauded PIK noteholders, asserted causes of action for breach of contract, fraudulent conveyances, unlawful corporate distribution, and unjust enrichment. The question was whether the indenture agreement empowered the indenture trustee to assert such claims. The answer turned in large part on the Court's interpretation of section 6.03 of the indenture, which stated:

> If an Event of Default occurs and is continuing, the Trustee may pursue any available remedy to collect the payment of principal, premium, if any, and interest on the Notes or to enforce the performance of any provision of the Notes or this Indenture.

Defendants urged that the words "on the Notes" should be narrowly construed to mean a claim for payment due "under the terms and conditions of the Notes." In other words, if a payment of a million euros was past due, the Trustee could sue only for the million euros that were past due and could sue only the note issuers — who of course would be judgment-proof since they had been looted.

Not to keep the reader in suspense, the Court ruled that such construction of the provision ran contrary to its plain language, was inconsistent with other parts of the indenture, and was also inconsistent with the way other jurisdictions had construed such provisions. The Court therefore concluded:

> If the parties to the indenture intended to limit the trustee to actions against the issuer and guarantor only – as defendants maintain – the signatories to the indenture could have easily said so. They did not. Therefore, WTC is empowered under section 6.03 to pursue causes of action to recover pro rata payment for all noteholders against those who WTC alleges bled dry the issuer and guarantor for defendants' profit, to the detriment of the noteholders.

Piercing The Corporate Veil

Defendants asserted a couple of different arguments for dismissal of the "alter ego" or "piercing of the corporate veil" theory by which the plaintiff sought to impose personal liability on the masters of Hellas entities. One argument was that the complaint purportedly failed to allege adequate facts to establish "alter ego" liability. Defendants particularly emphasized that the complaint repeatedly referred to the "Private Equity Defendants" collectively without specifically detailing each defendants' role in the overall scheme. Defendants additionally argued that the so-called cause of action for piercing the corporate veil was duplicative of the fraudulent conveyance causes of action.

The Court's emphatic rejection of both of those arguments is instructive.

As to the defendants' first argument, the complaint specifically described, (a) the "borrowing scheme" that defendants had allegedly utilized to enable the Hellas shell companies "to acquire long-term debt which dwarfed shareholder equity, all the while distributing the PIK loan proceeds and Certificate redemptions to the Private Equity Defendants," and, (b) the titles and management positions of the individual defendants. It was, the Court said, "unreasonable to require greater detail from WTC as to each individual's daily conduct and involvement in the fraud at this pre-answer, pre-discovery stage." Rather, that was precisely the kind of information that would be in the defendants' exclusive possession at this point in time.

As to the defendants' argument that the alter ego "cause of action" was duplicative of the fraudulent conveyance causes of action, the point was that "[a]n argument to pierce the corporate veil is not a cause of action in itself, but rather dependent on the action against the corporation." Since it was not a cause of action but merely a theory that could supplement a valid cause of action —rendering the puppet masters liable for the causes of action asserted against the puppets — it could not be "duplicative" of any cause of action.

Wrongful Dissolution Of A Partnership, And Assessment of The Damages — *Congel v Malfitano*, 31 NY3d 272 [2018], *mod'g* 141 AD3d 64 [2d Dept 2016].

The case presented several issues of interest arising from the defendant's attempts to unilaterally dissolve the subject partnership. One issue, discussed immediately below, concerned the very core of the Partnership Law.

Facts: The facts were very straightforward for present purposes. Defendant and seven others were members of a partnership that operated a shopping mall. Defendant became unhappy with the arrangement and wanted to dissolve the partnership. For our purposes, it really doesn't matter why.

The Partnership Agreement provided,

a) it would continue "until it is terminated as hereinafter provided,"

b) the Partnership would dissolve upon "[t]he election by the Partners to dissolve the Partnership" or "[t]he happening of any event which makes it unlawful for the business of the Partnership to be carried on or for the Partners to carry it on in Partnership," and,

c) all decisions would require "[t]he affirmative vote of no less than fifty-one percent (51%)" of the partners.

However, Partnership Law § 62(1)(b) states that a partner may unilaterally dissolve a partnership, without violating the partnership agreement, if "no definite term or particular undertaking is specified" in the agreement and the partnership is therefore "at will."

Defendant took the position that the partnership was at will and that he therefore could unilaterally dissolve it even though he owned only 3.08% of the entity. He wrote his partners and therein purported to dissolve the Partnership. Plaintiffs urged that defendant had no power to do so and continued the business. Judge Fahey penned the opinion of the mostly unanimous Court.[13]

Allegedly Wrongful Dissolution: Interestingly, Supreme Court, the Appellate Division, and the Court of Appeals all ruled that defendant was wrong in asserting that this was an "at will" partnership which defendant could therefore dissolve unilaterally under Partnership Law § 62(1)(b). But the courts reached that conclusion on three different grounds.

Supreme Court ruled for plaintiffs on the ground that the Partnership Agreement specified a "particular undertaking" and that it was therefore not an at-will partnership. The Appellate Division affirmed on the different ground that the Agreement specified a "definite term" or temporal limit under Partnership Law § 62(1)(b).

The Court of Appeals affirmed on a much different ground, a ground that rendered the statute all but irrelevant.

The key was that the "'[t]he Partnership Law's provisions are, for the most part, default requirements that come into play in the absence of an agreement'" (31 NY3d at 287), quoting *Ederer v. Gursky*, 9 NY3d 514, 526 [2007]. With few exceptions, the Legislature intended that the partners could agree on whatever terms they wished to agree.

This equally applies to termination. The Legislature intended that the parties be able to chart their own course as to the circumstances in which the partnership would dissolve. By its terms, Partnership Law § 61(1)(a) dictates that the Agreement controls and that "dissolution does not violate a partnership agreement if it occurs [b]y the termination of the definite term or particular undertaking specified in the agreement." One need go beyond the Agreement only where the Agreement does not specifically address the circumstances in which dissolution may occur. In the latter case, "Partnership Law § 61(1)(b) codifies [the] common-law doctrine that 'a contract of partnership containing no stipulation as to the time during which it shall continue in force … may be dissolved by either partner at his own will, at any time'" (31 NY3d at 289).

Here, the Agreement provided that the partnership would continue until it was dissolved by majority vote or the business became unlawful. Period. There was no ambiguity, no missing gap to be filled. So, Partnership Law § 62(1)(b) had no application and defendant's purported dissolution of the Partnership was violative of the Agreement.

Attorney's Fees: Partnership Law § 69(2)(a)(II) states: "[w]hen dissolution is caused in contravention of the partnership agreement ... [e]ach partner who has not caused dissolution wrongfully shall have ... [t]he right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement."

Plaintiffs contended that they therefore could recover for the attorney's fees they incurred in consequence of the defendant's wrongful, attempted dissolution of the Partnership.

The Court of Appeals rejected that claim. Under the so-called American Rule, each party pays his or her own attorney's fees, irrespective of the merits of the litigation, unless a statute or the parties' agreement clearly dictates otherwise. Here, they did not clearly dictate otherwise.

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[13] Judge Feinman dissented on one issue, explained below.

Further, while plaintiffs urged that several cases they cited supported their argument, "the cited cases clearly rely on a distinction between, on the one hand, legal fees incurred in prosecuting or defending a successful civil lawsuit and, on the other hand, legal fees, in the nature of damages, incurred in carrying out separate acts necessitated by the breach."

Valuation of Partnership's "Good Will": Where a partner dissolves a partnership in contravention of the partnership agreement, the partner has a right "to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertain and paid to him in cash" but "any goodwill component in the value of the partner's interest must be deducted."

Defendant here argued that "goodwill does not exist in a real estate holding," that "the Partnership [therefore] lacked goodwill as a matter of law," and that there could therefore be no goodwill deduction.

The Court concluded that defendant misread the case law. The cases on which defendant relied did not hold that real estate holdings can never have goodwill value as a matter of law. They held only that there was no "goodwill component as a matter of law" (31 NY3d at 293).

Whether A Minority Discount Could/Should Be Applied: This was the issue on which Judge Feinman dissented.

A "minority discount is a standard tool in valuation of a financial interest, designed to reflect the fact that the price an investor is willing to pay for a minority ownership interest in a business, whether a corporation or a partnership, is less because the owner of a minority interest lacks control of the business" (31 NY3d at 294-295).

Defendant argued that such a discount should not be applied where, as here, the business continued as an on-going concern. The dissenter noted that such was the rule adopted in the Revised Uniform Partnership Act after a great deal of study of the issue. Also, "[i]n the context of corporate appraisals and judicial dissolutions, minority discounts have been soundly rejected in New York and in the vast majority of jurisdictions across the country" (31 NY3d at 303, Dissent).

However, the majority deemed that logically inconsistent with Partnership Law § 69(2)(c)(ii). The majority also deemed it notable that "New York, like Massachusetts, has not adopted the 1997 Uniform Partnership Act commonly known as RUPA" (31 NY3d at 296).

Statute Concerning Credit Card "Surcharges" — *Expressions Hair Design v Schneiderman*, 32 NY3d 382 [2018].

The appeal, which arrived via certification from the Second Circuit, involved construction of General Business Law (GBL) § 518. That statute states:

> "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means."

All agreed that the statute does not mean what it appears to say, *i.e.*, that merchants cannot charge a higher price for customers who pay by credit card. On the contrary, "[a] merchant may distribute the cost [charged by the credit card companies] to all customers, regardless of the means by

which they pay, or a merchant may charge those using credit cards more than those who pay by cash, check, or the like."

The question on which the Court split four ways concerned what, if anything, a merchant who uses "differential pricing" and thus charges credit card customers a higher price must and/or can *tell* its customers about the differential.

Specifically, must the merchant "do the math" for the customer and say, for example, "credit card customers pay an extra $2" if that is the differential? Or is it enough to say "credit card customers pay 3% more"? Can the merchant post a sign advising its customers that the added $2 is a "surcharge" to compensate the merchant for the credit card fees it must pay, thus conveying that the "bad guys" are the credit card companies?

Held: The majority ruled, per opinion by Judge Fahey:

> 1) because one of the legislature's concerns was that customers might be lured by use of a low price available only for cash purchases, merchants who employ "differential pricing" must post "the total dollars-and-cents price charged to credit card users" — in other words, it is not enough to say that credit card customers pay 3%, and the merchant must instead do the math and inform the customer what the total price will be;
>
> 2) Once, however, the merchant has done so, "merchants are free to call the price differential anything they wish without fear of prosecution under the statute" and may, for example, call the differential a "surcharge," an "additional fee," or "an added cost."

Concurrence (Rivera): Judge Rivera construed the Second Circuit's question a bit differently than the majority, and answered only that a merchant who chooses to post "the total dollars-and-cents price charged to credit-card users … without any other indication as to how the merchant decided on the credit card price" thus avoids criminal prosecution.

However, the one caveat was that the merchant could not "describe the difference between the credit card price and the cash price as a 'surcharge,' 'additional fee,' or 'extra cost'" because "[t]o do so would permit a merchant to characterize the credit card price—and as a consequence demand payment—in the only way expressly prohibited by the legislature." Judge Rivera here parted company with the majority.

Concurrence (Wilson): Judge Wilson concurred on very different grounds than Judge Rivera, writing:

> As I see it, all conduct complies with the law, because the law is unconstitutionally vague, and therefore cannot reasonably be said to prohibit anything. I part ways with the majority when it attempts to describe what GBL § 518 does prohibit, which we have not been asked, and, truthfully, to which we can provide no reasonable answer.

In so reasoning, Judge Wilson observed that the statute's only plain meaning, to the extent it had any, was the very meaning that all apparently agreed was not its true meaning:

No ambiguity is present on the face of the statute; it prohibits the imposition of a surcharge – it says nothing about posting prices or words that may or may not be used.

All agree, though, that the legislature did not mean to prohibit different cash and credit pricing. What the New York legislature did mean by adopting section 518 has confounded everyone who has considered it, including a long list of great legal minds. I am not one of those, but I can see enough pervasive uncertainty in the attempts to interpret this criminal statute to lead me to conclude a legislative do-over is necessary.

Dissent: Dissenting at great length, Judge Garcia agreed with Judge Rivera's conclusion that the statute precluded the merchant from characterizing the price differential as a "surcharge," but disagreed that the statute required any disclosure.

As Judge Garcia saw it, GBL § 518 was "not a disclosure statute." Rather, close analysis of the statute's history including that of the federal law that preceded it revealed that the statute was intended to balance various competing concerns, including the credit card industry's concern that "surcharge labelling would elicit negative reactions from consumers."

Yet, "[r]ather than honoring the Legislature's omission, the majority reverses it: The majority reads the excluded provisions into the New York statute, dismissing the omission as some sort of legislative misstep."

VII. Family & Estates Law

Whether A Single Incident In Which The Five-Year-Old Child Was Used "As A Pawn In A Shoplifting Scheme" Provided "Rational Basis" For A Finding That The Child Was At "Imminent Risk" Of Harm — *Natasha W. v New York State Off. of Children and Family Services*, 32 NY3d 982 [2018], *rev'g* 145 AD3d 401 [1st Dept 2016].

Did the Administrative Law Judge (ALJ) have rational basis to conclude "that the child was placed in imminent risk of impairment, constituting maltreatment," by virtue of the parent's conduct in "using the child as a pawn in a shoplifting scheme"?

The Court of Appeals ruled in the affirmative, in a brief memorandum opinion, over Judge Wilson's dissent. It thus reversed the 3 to 2 ruling in the Appellate Division.

Majority: The two Appellate Division dissenters, whose conclusion the Court of Appeals here adopted, said they would find "petitioner's utilization of her five-year-old son to steal two coats and a pair of boots from Bloomingdale's constituted maltreatment and was sufficiently egregious so as to create an imminent risk of physical, mental and emotional harm to the child" (145 AD3d 411).

In their view, "the ALJ rationally concluded that petitioner's actions in exploiting her five-year-old son to steal caused the child's mental and emotional condition to be in imminent danger of impairment" in that there could be "no doubt that exploiting a child to steal and teaching a child that such behavior is acceptable has long-lasting consequences for that child's emotional and mental development at an age when the child primarily learns from observation of the parent's actions" (145 AD3d at 417). At the least, there was "simply nothing irrational about reaching such a conclusion" (*id*.).

Dissent: Judge Wilson's dissent noted that the mother "had earned an Associate's degree, and was continuing at a well-regarded four-year college to earn a Bachelor's degree in Early Childhood Education" when "[o]ne day, inexplicably, she took her son to Bloomingdale's" and engaged in the theft in issue. He stressed that the mother "had no prior involvement with the criminal justice system or child welfare services" and that store security personnel "reported that the child was 'not at all distraught' and was 'interacting normally.'"

The Appellate Division majority similarly observed "there was no evidence before the ALJ that the child suffered any injury or required any treatment as a result of petitioner's conduct, and no evidence that petitioner had ever engaged in the behavior at issue at any other time" (145 AD3d at 407).

Note: The Appellate Division dissenters made one further observation that perhaps influenced the ultimate result. They noted "the sole consequence of an 'indicated' report is that petitioner's name was included in the registry maintained by OCFS for the purposes of informing providers and licensing agencies concerning petitioner's future application for childcare related employment, and foster care and adoption," adding that "an agency may still choose to hire or approve persons with indicated reports provided they 'maintain a written record as part of the application file or employment record, of the specific reasons why such person was determined to be appropriate to receive a foster care or adoption placement or to provide day care services' (Social Services Law § 424-a[2][a])" (145 AD3d at 413, Dissent).

Alleged Abandonment By Incarcerated Father — *Matter of Mason H.*, 31 NY3d 1109 [2018], *rev'g* 154 AD3d 1129 [3d Dept 2017].

What must be shown in order to establish that an incarcerated father "abandoned" his child and thus lost his parental rights?

The petitioner agency contended that the child's father, who was incarcerated at all pertinent times, "abandoned" his child in excess of the six-month period specified by Social Services Law § 384-b and thus lost his parental rights. The father, who did not offer any testimony or other evidence, appealed the loss of his parental rights.

The Appellate Division affirmed, ruling that the petitioner-agency was required to and did establish "by clear and convincing evidence that, for the six months immediately preceding the commencement of the proceeding, respondent failed to visit the child or communicate with the child or the petitioning agency" (154 AD3d at 1130).

Held: The Court of Appeals unanimously reversed in a memorandum opinion.

Although it was undisputed that the father was incarcerated and did not see his child during the six months in issue, "Parents are presumed able to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still presumed able to communicate with their children absent proof to the contrary" (31 NY3d at 1110).

Here, while "petitioner's caseworker testified that respondent … did not visit with the child or communicate with the caseworker or other agency personnel in the six months preceding the filing of the abandonment petition," the record was "bereft of evidence establishing that respondent failed to communicate with the child, directly or through the child's foster parent, during the relevant time period" (31 NY3d at 1110). Petitioner therefore "did not meet its burden of demonstrating, by clear and convincing evidence, that respondent abandoned the child" (*id*.).

Supreme Court's Authority To Modify A Settlement Agreement That Could Have Otherwise Contracted Away The Duty Of Child Support (Sort Of) — *Keller-Goldman v Goldman*, 31 NY3d 1123 [2018], *aff'g* 149 AD3d 422 [1st Dept 2017].

The parties entered into a highly negotiated Stipulation of Settlement and Agreement. Amongst other terms, the mother retained custody of three of the four children and the father retained custody of the fourth. The father paid monthly child support of $2,500, which was less than the $5,000 that would have been due under the Child Support Standards Act. The mother paid no child support with respect to the fourth child.

The whole case, which obviously went to the Court of Appeals, concerned whether the father was entitled to a monthly credit of $1,200 towards the monthly child support of $2,500 during the period he was paying $12,000 for the fourth child's 10-month seminary program in Israel.

Simply in terms of the written agreement, the father plainly was entitled to the credit. The agreement provided:

> During the period in which a Child is attending a college and residing away from the residences of the parties and [the father] is contributing towards the room and board expenses of that Child, [the father] shall be entitled to a credit against his child support obligations in an amount equal to the amount [the father] is paying for that Child's room and board. The credit shall be allocated in equal monthly installments against [the father's] child support payments.

149 AD3d at 422-423.

Supreme Court ruled that, stipulation be damned, "as a matter of public policy, the agreement could not be enforced as written" since the mathematics made it possible that "one or two of the children could be deprived of any child support because the father was paying room and board for their sibling or siblings in an amount that exceeded the amount owed the mother" (149 AD3d at 423). Per the mother's request, the Court therefore capped the credit in such manner as to assure child support. But could Supreme Court do that with respect to a stipulation of settlement that clearly provided otherwise?

The issue split the Appellate Division 3 to 2. The majority ruled Supreme Court did not overstep its bounds.

Appellate Division Majority: As the Appellate Division majority saw it, settlement agreements involving child support are a special kind of contract. While "there is a presumption that the agreement reflects what the parties believed to be a fair and equitable division of the financial burden to be assumed in rearing the child" (149 AD3d at 424), "'the parties cannot contract away the duty of child support'" (*id*., quoting *Matter of Thomas B. v. Lydia D.*, 69 AD3d 24, 30 [1st Dept 2009]).

Here, the agreement violated that principle and Supreme Court acted correctly in eschewing a "plain language" construction that would have produced an "absurd" result that the parties could not have intended (*id*. at 426).

Appellate Division Dissent: The Appellate Division dissenters noted that the case involved a 55-page Stipulation of Settlement and Agreement that had been negotiated "by highly regarded and experienced counsel" and "so ordered" by the court.

Here, the mother had "knowingly agreed to a compromise which was less than what she was entitled to under the child support guidelines" (*id*. at 434). In return, the father "assumed responsibility for 100% of tuition and room and board expenses and other statutory add-ons, as well as the full support obligation for the youngest child, who would remain in his custody and would be the last to be emancipated" (*id*.). No public policy was affronted and, as the dissenters saw it, the majority's ruling "undermine[d] the long-standing public policy in favor of settlements in divorce actions by creating uncertainty as to their enforceability" (*id*.).

Held: The Court of Appeals affirmed on 500.11 review by 5 to 2 vote. The two dissenters essentially agreed with the much lengthier dissent in the Appellate Division. The majority's ruling was in its entirety as follows:

> On review of submissions pursuant to section 500.11 of the Rules, order affirmed, with costs. Like the Appellate Division, and in light of the significant downward departure from the support contemplated under the Child Support Standards Act, we cannot say that Supreme Court erred when, prior to incorporating the parties' agreement into the judgment, it interpreted the disputed provision, in the context of the larger agreement and the parties' respective financial circumstances, in a manner that ensured adequate support to each unemancipated child, as the parties clearly intended (*see* Domestic Relations Law § 240[1–b][h]).

Emphasis added.

Whether Lower Courts Properly Ruled That ACS Had Made "Reasonable Accommodation" for Mother's Intellectual Disability — *Lacee L. v Stephanie L.*, 32 NY3d 219 [2018].

In this proceeding under Article 10-A of the Family Court Act to determine whether the New York City Administration for Children's Services (ACS) made "reasonable efforts" to return the child to her parent, the key issues were,

1) whether, in a case in which the child's parent is disabled, ACS must comply with the mandate in the Americans with Disabilities Act (ADA) which requires that governmental agencies make "reasonable accommodations" to ensure disabled persons have access to their services, and,

2) if so, whether ACS here did so.

The Court of Appeals answered both questions "Yes." The first "Yes" was unanimous and the second was by 6 to 1 vote.

First Issue: The child's mother, Stephanie L., was intellectually disabled. She had "cognitive limitations that make it difficult for her to understand instructions and follow through on tasks. When she does understand her obligations, she has difficulty thinking through options to overcome obstacles that emerge" (32 NY3d at 227).

The Court ruled, per opinion of Judge Wilson, that ACS was therefore obligated under the ADA to provide Stephanie L. with "reasonable accommodations" re: the permanency proceedings, adding, however, that at least in the case at bar there was no material difference between the ADA "reasonable accommodation" standard and the requirement under Family Court Act § 1089[d] to make "reasonable efforts" to "effectuate the child's permanency plan" (32 NY3d at 230-231). The Court added:

> Although ACS undoubtedly must comply with the ADA, ACS's failure to offer or provide certain services at the time a six-month permanency reporting period ends does not necessarily mean that ACS has failed to make "reasonable efforts." Family Court is not required to determine compliance with the ADA in the course of a permanency proceeding. The ADA's "reasonable accommodations" test is often a time- and fact-intensive process with multiple

> layers of inquiry (Duvall v. County of Kitsap, 260 F.3d 1124, 1136 [9th Cir. 2001] [court adjudicating ADA claim charged with the "duty to gather sufficient information from the disabled individual and qualified experts"] [internal quotation marks omitted]). That adjudication is best left to separate administrative or judicial proceedings, if required (see 28 CFR §§ 35.107[b], 35.170; 42 USC § 12133). Family Court is charged with assessing whether reasonable efforts were made to achieve the permanency goal "in accordance with the best interest and safety of the child" (Family Court Act § 1089 [d]).

32 NY3d at 232.

Second Issue: With respect to the question of whether ACS here made "reasonable accommodations" for the parent's disability, while the majority was less than impressed with ACS's performance, it ruled that there was sufficient evidence to support the lower court's rulings that the parent ultimately received reasonable accommodations by virtue of Family Court's interventions:

> In this case, the record contains support for the Appellate Division's affirmance of Family Court's determination that ACS – albeit sometimes as a result of court orders – made reasonable efforts to provide Stephanie L. with services to facilitate the permanency goal of "Return to Parent." Stephanie L. requested five accommodations under the ADA; at oral argument, her counsel affirmed that Stephanie would have requested those exact same accommodations under New York law if the ADA did not exist. The record reflects that each of those accommodations was eventually provided to her. Some were not provided immediately upon request, sometimes because of miscommunications, sometimes because of lack of follow-through by Stephanie L. or ACS personnel, and sometimes simply because processing eligibility through outside governmental agencies (such as OPWDD) does not happen overnight. Others were provided with substantial effort by the court and Stephanie's attorneys. But each requested item has been provided, and, according to the parties' briefs, the permanency goal presently remains "Return to Parent."

32 NY3d at 233.

Dissent: Writing in dissent, Judge Rivera felt, a) ACS here failed to provide the child's mother with "reasonable accommodations" for her disability, and, b) the majority erred in, in effect, crediting ACS with the efforts made by the parent's counsel to assist the parent (32 NY3d at 234-235). She wrote:

> The fundamental problem is that during the period covered by Family Court's order, ACS did not take the steps necessary to adequately assess and provide the services appellant required. As Family Court stated, "it took considerable prodding from the other attorneys in this case to make clear to the agency that a more carefully crafted approach was needed in this case." Yet, as Family Court emphasized, it was the legal duty of ACS not others to make these efforts. It is axiomatic that if ACS does not understand a parent's disability it cannot provide services "tailored to the particular circumstances and individuals in a given

> case" (Matter of Cloey S., 99 A.D.3d at 1081, 952 N.Y.S.2d 657). In other words, the agency does not undertake statutorily required meaningful efforts when it does not know what it must do to address the challenges a disabled parent faces in attempting to access services. Indeed, it is difficult to read this record without drawing the conclusion that ACS did little to accommodate appellant's needs. The actions taken appear to be not much different from those that ACS would have followed if appellant was not disabled. Worse yet, to the extent her cognitive challenges affected her ability to comply with document and other requests from ACS (which ACS claimed slowed down its process), providing grounds for Family Court and the majority here to excuse ACS's delays and conclude that the agency met its affirmative obligations, appellant is in a worse position than a nondisabled parent who is able to act without the challenges posed by a disability.

32 NY3d at 244.

Whether Respondent's Proof Of Dementia And Inappropriate Behavior Sufficed To Raise An Issue Of Fact As To Decedent's Testamentary Capacity — *Matter of Estate of Giaquinto*, 32 NY3d 1180 [2019], *aff'g* 164 AD3d 1527 [3d Dept 2018].

What, exactly, is required to raise the proverbial "issue of fact" regarding the decedent's testamentary capacity?

Here, all agreed, a) the petitioner bore the initial burden of demonstrating prima facie that "decedent 'understood the consequences of executing the will, knew the nature and extent of the property being disposed of and knew the persons who were the natural objects of his bounty[] and his relationship to them'" (164 AD3d at 1528), and, b) petitioner here satisfied that burden by producing affidavits from several non-family members, one of whom had been decedent's primary care physician for 25 years, to the effect that decedent was operating on all cylinders before his sudden demise.

The issue was whether respondent, who had been left out of decedent's 2013 will (and also from decedent's prior, 2003 will), raised an issue of fact by adducing, *inter alia*, "a neuropsychological evaluation conducted in July 2012, a year prior to the 2013 will execution, by Mark Rogerson, who diagnosed decedent with 'moderate dementia' and highlighted decedent's broad and progressive nature of ... cognitive difficulties, as well as his notable deficits in memory, orientation, semantic retrieval[ ] and conceptual reasoning[, which] are strongly suggestive of Alzheimer's disease'" (164 AD3d at 1528).

The Appellate Division split 3 to 2.

The two dissenters acknowledged that "a diagnosis of dementia, standing alone, is insufficient to create a triable issue of fact regarding mental capacity" (164 AD3d at 1532) but would have nonetheless ruled that an issue is presented "where, as here, there is proof of a progressively worsening mental condition" and where, as here, there is proof that decedent also acted "inappropriately" around the time he executed the will (164 AD3d at 1532-1533).

The majority reached the opposite conclusion, emphasizing that none of respondent's proof directly related to decedent's capacity "at the time of the execution of the 2013 will" (164 AD3d at 1530).

Held: The Court of Appeals unanimously affirmed on section 500.11 review. The ruling was two sentences long:

> On review of submissions pursuant to section 500.11 of the Rules, order, insofar as appealed from, affirmed, with costs. In response to petitioner's prima facie showing of entitlement to summary judgment on the issue of testamentary capacity, respondent failed to raise a triable issue of fact.

Query: As has been noted, the party challenging the will had also been left out of the decedent's prior will, which had been executed ten years earlier. One wonders if the two Appellate Division dissenters would have garnered at least one other vote had that not been the case.

Husband's Former Wife vs. Husband's Judgment Creditor, A Question of Priority — *Pangea Capital Management, LLC v. Lakian*, 2019 NY Slip Op 05059 [June 25, 2019].

This appeal that arrived via certification from the Second Circuit pitted a wife's right to property by virtue of a divorce settlement against the rights of her husband's judgment creditor.

Husband's former employer had a $14 million judgment against Husband by reason of the fact that he and a co-worker had diverted millions of dollars from the company to themselves.

Meanwhile, Husband and Former Wife purchased a Shelter Island house back in 2002. Although the title was originally held in Husband's name, the title was transferred soon after the purchase to a trust of which Husband was the sole beneficiary and each spouse was a 50% beneficiary as tenant in common. When the parties divorced in 2015, the judgment incorporated an agreement that provided that Wife would receive 62.5% of the proceeds plus another $75,000.

The house was eventually sold for more than $5 million. There was no question as to the ultimate destination of the approximately 37.5% of the proceeds that belonged to Husband under the divorce settlement. That would go to the employer. But what of Wife's approximately 62.5% of the proceeds under the divorce settlement? Who had priority to that part of the proceeds?

Employer argued that both it and Wife were judgment creditors within the meaning of CPLR § 5203 and that priority went to whichever judgment creditor first docketed her/its judgment in Suffolk County (where the property was located). I'll leave it for you to guess who was first to docket.

Wife contended, a) the divorce judgment did not make her a "judgment creditor" within the meaning of CPLR § 5203, and, b) her equitably distributed share of the trust corpus was fixed and vested upon entry of the divorce judgment.

Held: The Court unanimously ruled in Wife's favor per an opinion by Judge Wilson.

The key point was that the wife was not a judgment creditor within the meaning of CPLR § 5203, and, in contrast to judgment creditors within the meaning of the statute, Wife was not obligated to docket it in the subject county in order to enforce it. Under New York law, "an entered judgment of divorce that distributes marital property is not like a money judgment of a judgment creditor." This being so, Wife "was not subject to the docketing requirements of CPLR 5203."

Although Employer argued that the Second Circuit's decision in *Musso v. Ostashko*, 468 F3d 99 [2d Cir 2006] was *contra*, *Musso* was distinguishable inasmuch as Wife therein had not yet obtained an entered judgment of divorce at the time that Husband's creditors filed the involuntary bankruptcy petition against Husband.

Note: The creditors here argued that a settlor who "creates a trust solely for the purpose of holding title to property for the benefit of himself and another beneficiary" and who "retains the unfettered right to revoke the trust" thereby remains the absolute owner of the property. The Court of Appeals found it unnecessary to reach that issue. Irrespective of whether Husband remained the "absolute owner" of the property up until the divorce was finalized, he certainly was not the "absolute owner" once the divorce judgment awarded Wife approximately 62% of the sales proceeds, which here occurred before the creditor obtained its judgment.

VIII. Government, The Judiciary, And Constitutional Issues

The Bridge Nobody Wanted— *Town of Aurora v Vil. of E. Aurora*, 32 NY3d 366 [2018].

The issue was which entity, the Town of Aurora or the Village of East Aurora, was responsible for the maintenance of the Brooklea Drive Bridge.

Section 6-604 of the Village Law provides first, that "[i]f the board of trustees of a village has the supervision and control of a bridge therein, it shall continue to exercise such control …," and, second, that "[i]n any other case, every public bridge within a village shall be under the control of the ... town in which the bridge is wholly or partly situated, ... and the expense of constructing and repairing such bridge and the approaches thereto is a town charge, unless the village assumes the whole or part of such expense."

Section 6-606 specifies *how* "[a] village may assume control" of a bridge, stating that "[a] village may assume the control, care and maintenance of a bridge or bridges wholly within its boundaries, upon the adoption of a resolution of the board of trustees therefor; such action, however, shall be subject to a permissive referendum as provided in this chapter or the board of trustees may enter into an agreement with the town, in which any part of such village is situated, to construct or repair a bridge in any part of the village included in such town, at the joint expense of the village and town …"

Here, according to Judge Fahey's partial dissent, "[t]he Village of East Aurora unilaterally built" the subject bridge "over 40 years ago" and "never relinquished control or authority over that bridge" (32 NY3d at 377). The Village nonetheless maintained that, per the language of Village Law §§ 6-604 and 6-606, the Town was responsible for maintenance of all bridges within the Village unless the Village had formally assumed control of the bridge per vote of the trustees, which had never occurred. In contrast, the Town urged that a village can assume control "in ways other than those enumerated in the above-quoted statutes."

The reason that the issue was suddenly important to both governmental entities was that State DOT determined that the bridge now needed major — and expensive — repairs.

Held: The Court ruled in the Village's favor by 4 to 3 vote.

The majority, per decision by Judge Stein, reasoned that "'where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded'" (32 NY3d at 372-373).

Here, the legislature "limited the methods by which a village may assume control of a bridge by establishing specific procedures to be followed" (*id*. at 373), providing that a formal vote by the Village's board of trustees was prerequisite. "Had the legislature intended for a village to have the ability to unilaterally construct, and thereby control, a bridge—without regard to the passage of resolutions, agreements with the town, or permissive referendums—the legislature could easily have so stated, and

its failure to do so compels the conclusion that such other methods of assuming control are ineffective" (*id*. at 373).

The Court added that Village Law § 6-604 reflected "the long-established general rule that '[a]ll bridges within a village ... are expressly made the responsibility of the town, unless the village has voluntarily assumed responsibility therefor.'" 32 NY3d at 371, *quoting Matter of Village of Chestnut Ridge v. Howard*, 92 NY2d 718, 724 [1999].

As for the Town's argument that the permissive language of VL § 6-606 (*i.e.*, "[a] village *may* assume …") connoted that such was merely one way the village could assume control of a bridge, the majority answered that "the legislature's use of the word 'may' in Village Law § 6–606 reflects only that a village has discretion in choosing *whether* to assume control of a bridge—since the default rule under section 6–604 is that towns are responsible for bridges within their boundaries—not that a village has discretion regarding *how* to assume such responsibility [emphasis by the Court]" (*id*.).

Dissent (Partial): The dissent, by Judge Fahey, noted that the Village built the bridge and retained sole control over it until DOT told the Village that repairs were needed, at which point "the Village responded by claiming the Town was really the responsible party" (32 NY3d at 377).

The dissenters felt that this was "simply a bridge too far" (32 NY3d at 377).

Whether Plaintiffs Could Use A Writ Of Mandamus To Compel Municipal Defendants To Enforce Animal Cruelty Laws — *All. to End Chickens as Kaporos v New York City Police Dept.,* 32 NY3d 1091 [2018], *aff'g* 152 AD3d 113 [1st Dept 2017].

The religious practice of Kaporos, which is performed by some "ultra Orthodox" Jews in the days immediately preceding Yom Kippurm "entails grasping a live chicken and swinging the bird three times overhead while saying a prayer that symbolically asks God to transfer the practitioners' sins to the birds" (152 AD3d at 115). The chicken's throat is then slit and "[i]ts meat is then required to be donated to the poor and others in the community" (*id*.). This fate apparently befalls "thousands of chickens" each year (*id*.).

The plaintiffs contended that, apart from the pain inflicted during the minutes preceding the chicken's death, the birds are crammed into cages, "not given food or water, are not protected from the elements or from feces and urine falling from the crates above, and sometimes fall out of the crates onto the public streets" (152 AD3d at 122, Dissent). They further claimed that the birds' throats "are frequently cut incorrectly, to the extent that the carotid artery is not completely severed and the birds die an unnecessarily slow and painful death" and also that "[t]he slaughter takes place on public streets in makeshift open-air slaughterhouses, and dead and nearly dead birds, blood, excrement, used tarps and gloves, and other by-products of the slaughter are left on the street for days afterwards" (*id*.). Plaintiffs additionally contended that "other Orthodox Jewish communities use coins in place of live chickens" (*id*. at 121).

Finally, plaintiffs contended that the killings and the mistreatment that preceded the killings was violative of animal cruelty laws, that they had repeatedly asked the municipal defendants to intervene and enforce those laws, and that their entreaties had been ignored.

The question, which split the Appellate Division, was whether plaintiffs could, via a writ of mandamus, seek to compel the municipal defendants to intervene and enforce the animal cruelty laws.

Appellate Division Majority: The Appellate Division majority ruled that a writ of mandamus is available "to compel … an officer or body to perform a specified ministerial act that is required by law to be performed," that it "does not lie to enforce a duty that is discretionary," and that "[m]andamus is

generally not available to compel government officials to enforce laws and rules or regulatory schemes that plaintiffs claim are not being adequately pursued" (152 AD3d at 117-118).

Such, the majority said, was the case here. None of the provisions on which plaintiffs relied specifically forbid the conduct of which plaintiffs complained. Rather, the killings in issue were illegal only if they were "unjustified," which necessarily implicated some exercise of discretion (152 AD3d at 119-120). Because the laws that were here in issue "implicate the discretion of law enforcement and do not mandate an outcome in their application," mandamus would not lie to force the municipal defendants to act.

Appellate Division Dissent: Without offering any opinion as to whether the plaintiffs' could ultimately prevail, the dissenters believed that plaintiffs "stated a claim for mandamus relief sufficient to survive a motion to dismiss" (152 AD3d at 121, Dissent).

In the dissenters' view, at least a couple of the animal cruelty laws on which plaintiffs relied, including Agriculture and Markets Law § 371, set forth mandatory rather than discretionary standards. The dissenters stressed that that statute, which made certain acts ("including torture, unjustifiable injury, maiming, mutilating or killing of any animal, as well as depriving an animal of 'necessary sustenance, food or drink,' or causing such treatment") a class A misdemeanor, provided that a "police officer must … issue an appearance ticket pursuant to section 150.20 of the criminal procedure law, summon or arrest, and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of article twenty-six of the agriculture and markets law" (152 AD3d at 125, Dissent).

So, as the dissenters saw it, "while the City defendants may exercise discretion in the process of determining whether a violation has occurred and, if so, how to respond to it, they have, at a minimum, an obligation to determine whether or not a reported violation has occurred" (152 AD3d at 125-126, Dissent).

Held: The Court of Appeals unanimously affirmed in a memorandum opinion, stating:

> A writ of mandamus "is an 'extraordinary remedy' that is 'available only in limited circumstances'" (*Matter of County of Chemung v. Shah,* 28 N.Y.3d 244, 266, 44 N.Y.S.3d 326, 66 N.E.3d 1044 [2016], quoting *Klostermann v. Cuomo,* 61 N.Y.2d 525, 537, 475 N.Y.S.2d 247, 463 N.E.2d 588 [1984]).
>
> * * *
>
> While mandamus to compel "'is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which [a public] officer may exercise judgment or discretion'" (*Klostermann,* 61 N.Y.2d at 539, 475 N.Y.S.2d 247, 463 N.E.2d 588, quoting *Matter of Gimprich v. Board of Educ. of City of N.Y.,* 306 N.Y. 401, 406, 118 N.E.2d 578 [1954]).
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> * * *
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> Enforcement of the laws cited by plaintiffs would involve some exercise of discretion (*see Town of Castle Rock v. Gonzales,* 545 U.S. 748, 760–761, 125 S.Ct. 2796, 162 L.Ed.2d 658 [2005]). Moreover, plaintiffs do not seek to compel the performance of ministerial duties but, rather, seek to compel a particular

> outcome. Accordingly, mandamus is not the appropriate vehicle for the relief sought (*see Walsh v. La Guardia,* 269 N.Y. 437, 440–441, 199 N.E. 652 [1936]).

32 NY3d at 1093.

City Board Of Health's Alleged Overstep In Mandating Influenza Vaccinations — *Garcia v New York City Dept. of Health and Mental Hygiene*, 31 NY3d 601 [2018], *rev'g* 144 AD3d 59 [1st Dept 2016].

The New York City Board of Health ("the Board") amended the New York City Health Code so as to require that children between the ages of 6 months and 59 months who attend city-regulated child care or school-based programs receive annual influenza vaccinations. The Appellate Division ruled that the amendments, while not preempted by State law, were nonetheless invalid because the Board exceeded the scope of its regulatory authority.

On further appeal, the Court of Appeals unanimously ruled per a decision by Judge Stein that the Appellate Division erred and the Board "promulgation of the flu vaccine rules falls squarely within the powers specifically delegated to the Department in New York City Administrative Code § 17–109, and the Board's actions did not violate the separation of powers doctrine" (at *1).

The Court reasoned,

> (1) While Public Health Law § 2164 required every child between the age of 2 months and 18 years to receive certain vaccines against certain enumerated diseases, "New York City and New York State share regulatory authority over child care facilities and programs located in the City" and "nothing in Public Health Law § 2164 suggests that the list of vaccinations set forth therein is an exclusive one that may not be expanded by local municipalities to which the authority to regulate vaccinations has been delegated" (at *9).
>
> Quite the contrary, although the State has enacted a relatively comprehensive statutory scheme for school vaccinations, the relevant statutes reflect the state legislature's recognition that municipalities play a significant role in vaccination programs and "it is not unusual for the State to set the floor for public health regulations while permitting localities to adopt stricter measures."
>
> (2) While the Appellate Division held that the flu vaccine rules were invalid as enacted, under the analysis set forth in *Boreali v. Axelrod*, 71 NY2d 1 [1987] and its progeny, "because … 'the particular scheme' adopted by the Board 'involved improper policy decisions, and thus did not constitute appropriate rulemaking,'" correct analysis of the *Boreali* factors indicated that the Board did not overstep its bounds.
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> The so-called *Boreali* factors are, "whether (1) the regulatory agency " 'balanc[ed] costs and benefits according to preexisting guidelines,' or instead made 'value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems'" … (2) the agency "merely filled in details of a broad policy or if it 'wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance'" … (3) the legislature had unsuccessfully attempted to enact laws

pertaining to the issue … and (4) the agency used special technical expertise in the applicable field (see id. at 13–14, 523 N.Y.S.2d 464, 517 N.E.2d 1350)."

Here, concerning the first *Boreali* factor, it was the Legislature, not the Board, which "chose between the competing public policies of advancing public health and avoiding economic disruption of specific industries" and "[i]n adopting the flu vaccine rules, the Board determined, in accordance with the legislature's mandates, which vaccines should be required for children attending certain daycare programs, as a matter of public health."

Regarding the second *Boreali* factor, "Administrative Code § 17–109 specifically delegates to the Board the power to regulate vaccinations and adopt vaccination measures to reduce the spread of infectious disease." And, "[i]n light of the state legislature's aforementioned delegations to the Board of the power to regulate vaccines, together with the Board's long history of mandating immunizations for children attending city-regulated child care programs beyond those required by the legislature, there can be no serious claim that, in enacting the flu vaccine rules, the Board 'wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.'"

Regarding the third *Boreali* factor, "the question of legislative inaction, the parties do not identify any attempt by the New York City Council to legislate whether the influenza vaccine should be mandatory for children attending child care programs regulated by the Department," and, also because "'[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences,'" "the third factor does not weigh against the Board."

Regarding the fourth *Boreali* factor, "the Board compiled data and research regarding the prevalence and severity of influenza in the infant population, the effectiveness and safety of the vaccine, and the benefits to the greater population of mandating the vaccination of young children."

The Court concluded:

> …we hold that the Board permissibly adopted the flu vaccine rules pursuant to its legislatively-delegated and long-exercised authority to regulate vaccinations. We also hold that neither field, nor conflict, preemption abrogates the rules. Therefore, the order of the Appellate Division should be reversed, with costs, the petition insofar as it sought to enjoin enforcement of the amendments to the New York City Code denied, and judgment granted declaring in respondents' favor in accordance with this opinion.

Whether Finding Of The NYC Commission On Human Rights That Installation Of A Wheelchair-Accessible Entrance To An Apartment Would Not Pose "Undue Hardship" Was Supported By "Substantiated Evidence" — *Mar. Holdings, LLC v New York City Commn. on Human Rights*, 31 NY3d 1045 [2018], *rev'g* 137 AD3d 1284[2d Dept 2016].

Petitioners, who owned and managed an apartment complex in which the complainant lived, refused to install a handicapped accessible entrance to her apartment on the ground that it would

allegedly be "structurally infeasible" to do so. Petitioners' claim to that effect was supported by a structural engineer who said that the requested accommodation—converting a window to a door and installing a ramp— would raise "a 'slew of structural issues' and that the building might need to be evacuated" (31 NY3d at 1048, Dissent).

After a hearing, the ALJ issued a report and recommendation finding that petitioners "did not discriminate against [the tenant] by their failure to provide the [proposed accommodation], because it would create an undue hardship to do so" (31 NY3d at 1049, Dissent). The Court of Appeals' dissenters would later describe the ALJ's report as thorough, and based in part on the structural engineer's report and testimony on petitioners' behalf. The ALJ noted that the Commission "did not present the testimony of a structural engineer" and that its inspection of the premises was cursory.

Nonetheless, the Commission, now wearing its decision-making hat, "issued a decision and order rejecting the ALJ's report and recommendation and finding that petitioners did not prove undue hardship"(31 NY3d at 1049).

In the Appellate Division, that Court noted that a Commission's finding "shall be conclusive if supported by substantial evidence on the record considered as a whole" (137 AD3d at 1285). But the court ruled in petitioners' favor because "the record did not contain any substantial evidence rebutting the petitioners' showing that it would be structurally infeasible to install a handicapped accessible entrance to the complainant's apartment" (*id*. at 1286).

Held: By 4 to 2 vote (Judge Rivera taking no part), the Court of Appeals reversed in a memorandum decision. The majority, which saw the case and the proof quite differently than the dissenters, explained:

> The Commission considered evidence presented at the hearing that petitioners had carried out a window-to-door conversion elsewhere in petitioners' residential complex, similar to that proposed as a feasible reasonable accommodation by an architect retained by petitioners and by an architect who testified for respondents. No evidence was presented that this prior window-to-door conversion had imposed any hardship on petitioners, and substantial evidence supports the determination that petitioners did not prove that the proposed conversion would require alterations significantly different from the previous one. The Commission could rationally conclude that petitioners failed to carry their burden of proving that the proposed accommodation would cause undue hardship in the conduct of their business.

31 NY3d at 1047.

Whether Replacement of One Fire Protective District (FPD) With Two Smaller FPDs Constituted A Legally Required "Dissolution" Of The FPD — *Waite v Town of Champion*, 31 NY3d 586 [2018].

In 2009, the Legislature enacted the "New N.Y. Government Reorganization and Citizen Empowerment Act" (Act), codified as General Municipal Law article 17-a. Amongst other provisions, the Act set forth a mechanism by which a local government entity other than a town may be dissolved upon successfully negotiating a statement procedural course. Here, the electors of the Town of Champion

Fire Protection District went through the prescribed procedural course and ultimately voted in favor of dissolution.

The question which here split the Court of Appeals was whether the Town had in fact "dissolved" the subject fire protection district (FDP).

Dissent: The dissent by Judge Fahey charged that the Town merely divided the FPD into two parts "and therefore did not comply with its statutory obligation to dissolve and terminate the FDP." This, Judge Fahey concluded, frustrated rather than followed the voters' will.

Held: The Court ruled by 6 to 1 vote, per an opinion by Judge Rivera, that petitioners' challenge was "based on a misunderstanding of the statutory framework, the purpose of the Act, and the Town Board's authority to choose the manner by which to provide fire protection services to the Town's residents."

The key was that the vote specified only that the FPD would be dissolved. It did not specify what would thereafter fill the void.

Moreover, there were "material differences between the CFPD, and FPD 1 and FPD 2. FPD 1 and 2 each cover their own respective geographic area." Amongst other differences, "[t]he cost in each FPD may be different, then, as assessment sin that FPD will exclusively reflect the cost of providing fire services to those residents alone."

The Court added that "[p]etitioners have a remedy if they are dissatisfied with the Town Board's choice: they can seek to dissolve the FPDs through an electro-initiated referendum, as they did with the CFPD, or they can petition for the establishment of an FD."

Whether DOH Regulations Limiting The Compensation Paid To Executives Of Certain Health Care Providers Were Violative Of The Separation Of Powers Doctrine — *LeadingAge New York, Inc. v Shah*, 32 NY3d 249 [2018].

Background: For whatever reason, some people, including Governor Cuomo, felt that executives who worked for nonprofit healthcare organizations funded in part by Medicaid should not be getting rich at the public's expense. Governor Cuomo accordingly issued an executive order directing certain executive agency heads including respondent Commissioner of Health to promulgate regulations restricting the compensation paid to such executives.

The case at bar involved a challenge to the Department of Health (DOH) regulations promulgated in response to the executive order. The regulations involved a so-called "hard cap" and a so-called "soft cap." The hard cap provided,

> (a) that "[n]o less than 75 percent [increasing to 85 percent by 2015] of the covered operating expenses of a covered provider paid for with State funds or State-authorized payments shall be program services expenses rather than administrative expenses," and,
>
> (b) absent a waiver, a covered provider may "not use State funds … for executive compensation … in an amount greater than $199,000."

The soft cap was that, with certain exceptions, a covered provider was subject to penalties if executive compensation exceeds $199,000 per year from any source of funding.

Although the soft cap was in one sense less limiting than the hard cap (inasmuch as providers could exceed the cap so long as they paid the penalty), it was in another sense far more limiting than the hard cap. Whereas the hard cap applied only to the manner in which the provider allocated state funds, the soft cap applied irrespective of the source of the income.

Petitioners charged that the regulations exceeded the authority granted to DOH by the legislature and were thus violation of the separation of powers doctrine.

Held: By 4 to 3 vote, the Court, per an opinion by Chief Judge DiFiore ruled that the "hard cap" fell within DOH's regulatory authority but that the "soft cap" did not.

In reaching those conclusions, the Court described the doctrine of separation of powers as follows:

> "The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions" (*Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.,* 27 N.Y.3d 174, 178, 32 N.Y.S.3d 1, 51 N.E.3d 512 [2016] [internal quotation marks and citation omitted]). The principle "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v. Cuomo,* 85 N.Y.2d 781, 784, 628 N.Y.S.2d 618, 652 N.E.2d 171 [1995] [citation omitted]; *see* N.Y. Const, art III, § 1; art IV, § 1).
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> * * *
>
> If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers.
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> * * *
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> The separation of powers doctrine commands that the legislature make the primary policy decisions but does not require that the agency be given rigid marching orders (*see Greater N.Y. Taxi Assn.,* 25 N.Y.3d at 609, 15 N.Y.S.3d 725, 36 N.E.3d 632). Administrative entities possess technical expertise and may be vested with considerable discretion to flesh out a policy broadly outlined by legislators. Thus, in promulgating regulations, an agency may rely on a general but comprehensive grant of regulatory authority. To be sure, a broad grant of authority is not a license to resolve – under the guise of regulation – matters of social or public policy reserved to legislative bodies (*Boreali v. Axelrod,* 71 N.Y.2d 1, 9, 523 N.Y.S.2d 464, 517 N.E.2d 1350 [1987]). But among the powers possessed by necessary implication, administrative agencies have flexibility in determining the best methods for pursuing objectives articulated by the legislature (*Bourquin,* 85 N.Y.2d at 790–91, 628 N.Y.S.2d 618, 652 N.E.2d 171). And because it is not always possible to draw a clear line between the functions of the legislative and executive branches, common sense must prevail when

> determining whether an agency acted within its grant of authority (*Greater N.Y. Taxi Assn.,* 25 N.Y.3d at 609, 15 N.Y.S.3d 725, 36 N.E.3d 632).

32 NY3d at 259-260.

Quoting from its above-cited ruling in *Borreali*, the Court noted four "coalescing circumstances" that "may inform the inquiry":

> whether (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation[]

32 NY3d at 261.

Here, with respect to the hard cap regulations, DOH did not exceed its authority inasmuch as, amongst other factors, "promulgation of the hard caps reflects a 'balanc[ing] [of] costs and benefits according to preexisting guidelines' set by the Legislature – not a new 'value judgment' directed at resolution of a 'social problem'" (32 NY3d at 263, *quoting Borreali*).

By contrast, while it may be that DOH's intentions in promulgating the soft cap regulations "were to advance the same interests underlying the hard cap regulations," the soft cap regulations "pursue[d] a policy consideration – limited executive compensation – that is not clearly connected to the objectives outlined by the Legislature but represents a distinct 'value judgment'" (32 NY3d at 268).

Partial Dissent (Garcia): Judge Garcia would have held that DOH "exceeded its constitutional authority and acted arbitrarily in promulgating *both* the soft and hard caps on executive compensation" (32 NY3d at 271). In his view, "[a] policy choice about reasonable executive compensation aimed at influencing corporate behavior is law-making beyond DOH's regulatory authority" (32 NY3d at 276), and, in addition, the $199,000 hard cap was "arbitrary and capricious" and "was not the result of any compensation study of the healthcare industry, but instead was lifted from EO38, which for unknown reasons identified the highest salary paid to federal employees at Level I of the Executive Schedule as the benchmark for 'outsized' executive compensation for all 'providers of service'" (*id*. at 277).

Partial Dissent (Wilson): Judge Wilson agreed with the majority's conclusion that the hard cap regulations passed muster but would have reached the same conclusion with respect to the soft cap and disagreed with the "strange regulatory surgery" that "renders one part of a regulation valid but another, virtually identical, part of the same regulation invalid" (32 NY3d at 279).

Beyond that, Judge Wilson felt that the *Borreali* standard employed by the majority was involved "when the Court applies limiting constructions to statutes that, read literally, would give the executive branch unconstitutionally excessive power" and was by its very terms inapplicable to the issues at bar (*id*. at 280). As he saw it, absent the situation in which the executive branch attempt to "execute the laws in a manner, or with a result, objectively inconsistent with the policy goals articulated, expressly or implicitly, in the legislation that purportedly authorizes that action" (32 NY3d at 289), one

need only analyze whether the executive branch was empowered to do as it did. Here, the regulatory standards arose from the executive branch's expenditure of state funds and "[t]he power to spend money appropriated by the Legislature is at the very core of the power to execute the laws, and at the heart of the power to spend money is the power to contract" (32 NY3d at 291).

Partial Dissent (Rivera): Judge Riviera did not join that portion of Judge Wilson's dissent which rejected the *Borreali* standard but joined in the other parts of Judge Wilson's dissent including its conclusion.

Whether State Department's Ban On Employees' Holding Elective Political Office Was Unconstitutional — *Spence v New York State Dept. of Agric. and Markets*, 32 NY3d 991 [2018], *aff'g* 154 AD3d 1234 [3d Dept 2017].

Petitioners Gregory Kulzer and Ronald Brown were employed as Dairy Product Specialists by New York State's Department of Agriculture and Markets. Their job involved inspecting and rating milk plants and farms in accordance with state and federal law. Petitioners submitted separate requests for approval of outside activities to the Department, seeking approval to campaign for the elected position of Lewis County Legislator. The long and the short of it was that the Department disapproved the requests and the disapprovals were upheld by the Commissioner of Agriculture and Markets on the ground, amongst others, that petitioners' outside activities would create the appearance of a conflict of interest.

Petitioners charged that the rulings were arbitrary and capricious and also that they were violative of their right to free speech. Their arguments were rejected first by Supreme Court and then by the Appellate Division for the Third Department. The latter ruled that Supreme Court properly determined that, under the balancing test of *Pickering v. Board of Educ. of Township High School Dist*., 205 Will County, Ill., 391 US 563, 568 [1968], the balance tipped in the State's favor inasmuch as there was a stated concern that "[petitioners'] official duties as Dairy Product Specialists would be 'too intertwined' with their duties as county legislators so as to create the appearance of a conflict of interest" (154 AD3d at 332).

Held: The Court of Appeals affirmed on section 500.11 review by 5 to 2 vote. The majority opinion was two sentences long, as follows:

> On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order, insofar as appealed from, affirmed, without costs. The challenged policy has not been shown to be unconstitutional (*see United States Civ. Serv. Commn. v. National Assn. of Letter Carriers*, 413 U.S. 548, 564, 93 S.Ct. 2880, 37 L.Ed.2d 796 [1973]; *see also United States v. National Treasury Employees Union*, 513 U.S. 454, 467, 115 S.Ct. 1003, 130 L.Ed.2d 964 [1995]).

Spence, 32 NY3d at 992.

Dissents: Judges Rivera and Wilson filed separate dissenting opinions.

Judge Wilson would have ruled that the Department's ban on running for elective official was violative of petitioners' right to free speech since amongst other reasons:

> 1) "The First Amendment protects campaigning for elected office" and "the United States Supreme Court has recognized the importance of the Constitution's protections for political participation" (32 NY3d at 994),
>
> 2) there was little or no risk that anyone would actually attribute petitioners' Departmental work to their partison views as legislators since, let's face it, there isn't much politics that goes into inspection of dairy products (but Judge Wilson said it better), and,

3) "the Department's outside activities policy is categorical and prophylactic, not individual and *post hoc*" (*id*. at 995).

Judge Rivera, who termed Judge Wilson's dissent thoughtful, would have remanded on the ground that the Appellate Division had apparently applied the wrong legal standard. While the Appellate Division had here used the *Pickering* standard, the United States Supreme Court had later "clarified" that standard, in *United States v. National Treasury Employees Union*, 513 US 454 [1995], as being "less deferential to government" (32 NY3d at 993).

IX. Real Estate, Landlord-Tenant, Zoning & Tax Issues

Whether The Defendant-Builder's "Completion Guaranty" Was "A Bond Or Other Form Of Undertaking" Within The Meaning Of Lien Law § 5, And Whether That Statute Even Applied — *Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 31 NY3d 1002 [2018], *aff'g* 146 AD3d 1 [1st Dept 2016].

Lien Law § 5 provides that a private developer on public land must post a bond or other undertaking guaranteeing prompt payment to the contractors. In the Appellate Division, the entire panel agreed that the statute applied and that its breach could here give rise to a breach of contract claim. But the question which split the panel was whether the statute was here satisfied by a so-called Completion Guaranty or whether nothing short of a bond would suffice. The Court of Appeals later affirmed, but on the very different ground that the statute was inapplicable.

Facts: The case concerned the Atlantic Yards Project, "a sprawling $4.9 billion mixed-use mega-development encompassing 22 acres of underdeveloped public land" in Brooklyn, N.Y. The project was terminated prior to completion after a seemingly endless series of setbacks and recriminations.

The dispute concerning Lien Law § 5 was a small part of the whole, but it was the issue that went up to the Court of Appeals. Lien Law § 5 states:

> "Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement" (emphasis added).

Here, defendants, who agreed to construct a proposed 34–story residential building containing 350 units, signed a "Completion Guaranty." The Guaranty stated that defendants' affiliate would "cause Substantial Completion of the Improvements and perform the Development Work," including "to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work, including, but not limited to, the costs of constructing, equipping and furnishing the Guaranteed Work."

Obviously, the "Completion Guaranty" was not a bond. But was it "a bond or other form of undertaking guaranteeing prompt payment of moneys" within the meaning of the statute?

Appellate Division: By 4 to 1 vote, the Appellate Division ruled, as follows, that the statute plainly connoted that the undertaking need not be a bond and the Guaranty here in issue sufficed:

> The crux of plaintiff's position is that the guarantee provided in this case does not comply with the law because it is not equivalent to a bond or "other form of undertaking" under the statute.
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> A statute, however, is to be construed so as to give meaning to each word (*see* McKinney's Statutes § 231). Black's Law Dictionary defines an "undertaking" first as "[a] promise, pledge, or engagement," and second as "[a] bail bond" (Black's Law Dictionary 1665 [9th ed 2009]).
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> That the legislature intended the term "undertaking" in Lien Law § 5 to mean a "guarantee" is strongly supported by the statute's legislative history, which indicates that the Governor vetoed an earlier version of the 2004 amendment that added the above quoted language because the earlier version would have required the posting of a bond in every instance, disallowing "other forms of security designed to guarantee payment" (Letter from Assembly sponsor, July 8, 2004, Bill Jacket, L 2004, ch 155 at 5).
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> * * *
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> This guarantee follows the letter of the statute, namely "guaranteeing prompt payment" to contractors. That there are better guarantees available, such as a letter of credit, as the dissent notes, is beside the point. ESDC, as the public owner, was satisfied with the guarantee issued by Forest City Enterprises, Inc. Certainly, if the legislature had wanted the guarantee to be on par with a letter of credit it could have said that or identified the various types of guarantees that would satisfy the statute.

146 AD3d at 9-10.

Justice Gische, dissenting only on that issue, agreed that Lien Law § 5 does not invariably require a bond, but she felt that the statute required something more than the so-called Guaranty here in issue:

> Defendants argue that even if Lien Law § 5 applies to this project, ESDC can accept some form of security other than a bond.
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> * * *
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> B2 Owner is correct that Lien Law § 5 does not exclusively require the filing of a bond as security in these circumstances, because the express statutory language permits another form of undertaking. Not just any form of alternative security, however, will suffice. In order to achieve the objective of the Lien Law, and

> consistent with the legislative history of the amendment, any alternative undertaking must provide substantially equivalent protection to that provided by a bond. The alternative undertaking should be a financial arrangement that would afford an unpaid contractor, subcontractor, laborer, or provider of materials, a fund of money, or an asset, available for predictable and prompt payment. An identifiable fund of money, or a bond, or a lien against real property, are Lien Law remedies available in other contexts where services and materials are provided but not paid for, each having characteristics of ready availability.
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> The Completion Guaranty is not the functional equivalent of a bond or other form of undertaking, because it is no more than FCRC's contractual promise to complete the project and pay its account, which, if not honored, requires a lawsuit to secure a judgment and a collection process to obtain satisfaction.

146 AD3d at 19-21, Dissent.

Held: The Court of Appeals unanimously affirmed, but on very different grounds. The Court held that the mere fact that the agreement was governed by New York law did not mean that the builders had any contractual duty to comply with the terms of Lien Law § 5.

The Court said:

> … the CM Agreement contains no express provision requiring compliance with the Lien Law. Plaintiff nevertheless maintains that section 5 of the Lien Law should be "read into" the CM Agreement because the contract is governed by New York law. Specifically, plaintiff points to section 17.3 of the CM Agreement, which provides that "[t]he construction, validity and performance of [the CM Agreement] shall be exclusively governed by the laws of the State of New York, excluding any provisions or principles thereof which would require the application of the laws of a different jurisdiction." However, this is a typical choice-of-law provision that we do not read as imposing a contractual obligation here. The mere fact that an agreement, and disputes arising thereunder, are governed by the law of a particular jurisdiction does not transform all statutory requirements that may otherwise be imposed under that body of law into contractual obligations, and we decline to interpret the CM Agreement as "impliedly stating something which [plaintiff and B2 Owner] have neglected to specifically include" (Vermont Teddy Bear, 1 N.Y.3d at 475, 775 N.Y.S.2d 765, 807 N.E.2d 876, quoting Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 72, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978]; see also Goncalves v. Regent Intl. Hotels, 58 N.Y.2d 206, 220, 460 N.Y.S.2d 750, 447 N.E.2d 693 [1983]).

31 NY3d at 1006-1007.

It was therefore unnecessary to reach the issue which split the Appellate Division:

> Accordingly, plaintiff's claim that B2 Owner breached the CM Agreement by failing to comply with section 5 of the Lien Law was properly dismissed. We, therefore, have no occasion to pass on, and the Appellate Division did not need to reach, the merits of the parties' arguments concerning either the interpretation of that statute or whether the Guaranty satisfied its mandate. Plaintiff's remaining arguments lack merit.

Id. at 1007.

Whether Tenants' Waiver Of The Right To Bring A Declaratory Judgment Action Contravened Public Policy — *159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353 [2019].

Roughly a week after the ruling here in *159 MP Corp.*, a columnist for the New York Law Journal lamented that the 4-3 ruling in the case may "totally eviscerate[]" the Yellowstone injunction that had served "[f]or over half a century" "as the commercial tenant's most powerful sword when faced with eviction." Massimo F. D'Angelo, Bye-Bye 'Yellowstone'?, NYLJ, 5/16/19.

He may not be wrong.

Facts: Plaintiffs entered into two 20-year leases that enabled them to occupy 13,000 square feet as a Foodtown supermarket. The agreements were negotiated by the parties' respective counsel, at arm's length. One of the provisions in a rider to each lease included a waiver, by the tenants, of its right to bring a declaratory judgment action. That provision said:

> Tenant waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease ... [I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.

Nonetheless, after "defendant sent notices to plaintiffs alleging various defaults and stating that plaintiffs had fifteen days to cure the violations in order to avoid termination of the leases," plaintiffs commenced a declaratory judgment action with the object of determining whether they were in fact in default.

The landlord argued that the tenant was bound by the waiver provision and that the declaratory judgment action had to be dismissed. The tenants urged that the provision was violative of public policy and should therefore not be enforced.

The Court of Appeals agreed with the landlord, albeit by 4 to 3 vote.

Majority: The majority ruled, in an opinion by Chief Judge DiFiore, that while a contractual provision may be deemed unenforceable where violative of public policy,

> a) the public policy favoring freedom of contract "is itself a strong public policy interest in New York," and,

b) a provision should be deemed violative of public policy only where it "'clearly … contravene public right or the public welfare,'" and then only when "the interests favoring invalidation are stronger [than the public policy favoring freedom of contract]."

The majority added that, historically, "[o]nly a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom of contract." These include instances in which "the Legislature has identified the benefits or obligations recognized in constitutional, statutory or decisional law that are so weighty and critical to the public interest that they are nonwaivable" and "agreements that involve illegal activity."

Here, the contractual waiver was "clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract."

Dissent: The dissent, by Judge Wilson, acknowledged that "agreements at arm's length by sophisticated, counseled parties are generally enforced according to their plain language," but reasoned that we here had the conceptually perverse situation in which enforcement of the contractual provision *undermined* freedom of contract. The dissent put it this way:

> A contractual provision that forecloses a party from timely knowing its contractual obligations – instead forcing parties to gamble on the contract's meaning – undermines the contract and with it, society's benefit from the freedom of contract.

That aside, enforcement of the waiver provision would "alter the landscape of landlord-tenant law, and of neighborhoods, throughout the state for decades to come, absent legislative action." As the dissenters saw it, "commercial building owners and landlords will [henceforth] include a waiver of declaratory and *Yellowstone* relief in their leases as a matter of course." Having done so, they would then be able "to terminate the leases based on a tenant's technical or dubious violation whenever rent values in the neighborhood have increased sufficiently to entice landlords to shirk their contractual obligations." And, stripped of any opportunity to obtain a ruling as to whether the landlord's action was legally permissible, the tenant would then have the Hobson's choice of risking an adverse and potentially crushing loss or raising the white flag of surrender.

Interestingly, while the majority primarily viewed freedom of contract as an individual right of the parties to the contract, the dissent felt that it was also appropriate to view freedom of contract as "grounded in the benefit to society at large." "The freedom of contract is of fundamental importance in society because it creates legally enforceable rights, on which the contracting parties can act now based on assurances about the future: contracts are a way that economic actors can obtain some measure of security about an otherwise uncertain future" When viewed through that prism, "waiver of the right to declaratory judgment … creates instability by undermining the purposes and benefits of the freedom of contract, and the enforcement of such a waiver violates that very public policy."

Comment: I think it is implicit in the majority's opinion that the result could be different where the provision was not a product of arms-length negotiation by sophisticated parties. But it remains to be seen where those boundaries, in terms of negotiating power and sophistication, will henceforth be drawn.

NYCHA's Allegedly "Arbitrary" And "Capricious" Denial Of Son's Application To Permanently Reside With Tenant-Mother Who Suffered From Dementia — *Aponte v Olatoye*, 30 NY3d 693 [2018] *rev'g* 138 AD3d 440 [1st Dept 2016].

Petitioner brought the subject proceeding to challenge the New York City Housing Authority's ["the Authority's"] determination denying him "remaining family member" (RFM) status with regard to his late mother's apartment.

Facts: Petitioner moved into the apartment in 2009 to care for his mother, then suffering from dementia. He continued to reside in the apartment and care for his mother until she died in 2012.

During the years he lived in the apartment, petitioner twice applied to *permanently* live in the apartment as a resident on the stated ground that his mother could not care for herself. The requests were denied on the ground that two adults living in the one-bedroom apartment would render it "overcrowded." Petitioner never applied for permission to *temporarily* reside in the apartment.

After his mother died, petitioner asked that he be allowed to lease her apartment as a RFM. The request was denied on the ground that he had never permanently resided therein.

Petitioner argued that the Authority's denial was "arbitrary" and "capricious."

Appellate Division: Over a dissent, the Appellate Division ruled for petitioner.

As the majority saw it, "[t]he ground proffered for the denial, i.e., that adding petitioner to the household would result in overcrowding," created "an unacceptable Catch-22" inasmuch as "an additional family member will almost always result in overcrowding unless NYCHA fails simultaneously to consider transferring the applicant to a larger apartment" (138 AD3d at 443).

Held: The Court of Appeals unanimously reversed, with Judge Rivera concurring in result only.

Writing for the majority, Judge Wilson reasoned, (a) "NYCHA's rules contemplate that a tenant may require a live-in home-care attendant, either for the duration of a transient illness or the last stages of life, and its rules expressly allow for a live-in home-care attendant as a temporary resident, even if the grant of permission would result in 'overcrowding,'" and, (b) the petitioner was "in effect, accorded temporary residency status." The majority further reasoned that the Authority did not act in an "arbitrary and capricious" manner by not allowing petitioner "to bypass the 250,000-household waiting line as a reward for enduring an 'overcrowded' living situation while caring for his mother."

Concurrence: Judge Rivera separately wrote to discuss what she considered "a striking and inexcusable breakdown in NYCHA's procedures for providing reasonable accommodations to people with disabilities."

Even though NYCHA was repeatedly made aware of the tenant's advanced dementia and her need for a full-time caretaker, "NYCHA failed to refer Ms. Aponte's case to NYCHA's Reasonable Accommodations Coordinator, failed to provide Ms. Aponte or her son with an explanation of the accommodation services available to Ms. Aponte, failed to engage Ms. Aponte or her son in an interactive process to determine the scope of Ms. Aponte's disability or what accommodations would allow her to enjoy equal use of her apartment, and failed even to expressly provide her son with Temporary Residency status, which NYCHA concedes he was entitled to as his mother's caretaker."

As for NYCHA's argument, credited by the majority, that it "in effect" allowed petitioner to remain as a temporary resident, that "post-hoc, ad-hoc rationalization merely obfuscates NYCHA's actual behavior."

The above notwithstanding, petitioner's claim that NYCHA failed to reasonably accommodate his mother was not before the Court since it was "not raised as part of the administrative hearing underlying this appeal." Also, while "petitioner … set forth a colorable claim for associational discrimination in his own right," he "failed to establish how he was discriminated against based on his

association with his disabled mother' since he was "in fact, allowed to live with his mother and care for her until the time of her death."

Whether DHCR Abused Its Discretion In Allowing Tenant To Exclude Absent Husband's Income From Rent Control Income Calculation — *Brookford, LLC v New York State Div. of Hous. and Community Renewal*, 31 NY3d 679 [2018] *aff'g* 142 AD3d 433 [1st Dept 2016].

Respondent lived in a rent-controlled apartment, subject to the New York City Rent Control Law ("RCL"). The petitioner owner served her and her husband with a an Income Certification Form ("ICF") in order to ascertain "whether the total annual income of the occupants of the subject apartment exceeded the deregulation income threshold for the two years preceding the filing of the ICF."

The husband, Si Friedman, "first occupied the subject rent controlled apartment—Apartment 9S—in 1955. He moved to an assisted living facility in March 2005 and died there on November 3, 2006. His wife, respondent Margaret Friedman, succeeded to the apartment upon his death. In 2004 and 2005, the Friedmans filed joint federal and state tax returns indicating adjusted gross incomes of $200,831 in 2004 and $228,823 in 2005" (142 AD3d at 433-434).

When Mrs. Friedman finally answered the ICF, she asserted that "her husband permanently moved out of the residence and into a nursing home in March 2005, over a year before the ICF was served" (at *1). She apportioned the income based upon that circumstance and, "based on that apportionment, listed her total annual income as below the relevant income threshold for both years. DHCR denied owner's petition for deregulation and subsequent petition for administrative review" (at *1).

The question in this CPLR Article 78 proceeding brought by the landlord was whether the Division of Housing and Community Renewal ("DHCR") abused its discretion in so ruling.

The Court of Appeals ruled, in an opinion by Judge Feinman and over the dissent of Judge Garcia, that "DHCR's interpretation was rational and [did] not run counter to the language of the statute" (at *1).

Dissent: I begin with the dissent because such will help explain the nature of the legal dispute.

Judge Garcia noted that the Legislature found in 1993 that "'the current system of rent regulation was not equitable to either tenants or owners because the system in place disproportionately benefitted 'high income tenants' whose rent should not be subsidized.'" The 1993 amendments provided "two procedures for luxury deregulation": one where "the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more," and, the second, applicable here, where "the monthly rent exceeds $2,000 and the total annual income of the occupants of the housing accommodation exceeds $175,000 in each of the two years immediately preceding the year in which the landlord files a petition seeking deregulation."

Here, the couple's total income far exceeded $175,000 each year, but the income dropped below that threshold when apportioned in the manner described above.

As Judge Garcia saw it, the courts' role was "to determine whether respondent's apportionment [was] consistent with the plain language and legislative intent of the Rent Control Law." In his view, it wasn't. The Rental Control Law defined "annual income" as "the federal adjusted gross income *as reported* on the New York state income tax return." Period. End of story. And here that figure exceeded $175,000 for each year.

Further, while the majority appeared to be "straining to reach what it considers a 'fair' result," "[p]recisely because wealthy couples can afford multiple residences or 'households,' they can now apportion their income between these households to keep their luxury apartment in the City rent-stabilized."

Majority: Writing for the majority, Judge Feinman emphasized that the issue was whether DHCR's decision to deny petitioner's application for deregulation was arbitrary or capricious. Here, the RCL specifically said that "[t]otal annual income means the sum of the annual incomes of *all persons who occupy* the housing accommodation as their *primary residence* other than on a temporary basis," which provided reasonable for DHCR to exclude the income of a person who was not a resident.

Further, while the dissent raised the spectre of "manipulative" and gaming of the system, such had nothing to do with this case in which "tenant's husband vacated due to illness and died thereafter." And the RCL had safeguards against fraud. It would, the majority felt, be "neither fair nor equitable to misconstrue the statute to prevent a narrow set of circumstances that has adequate deterrents."

Whether The Tax Benefits Provided Under The LMRP To Owners Who Convert Commercial Buildings To Residential Use Constitutes An Implied Exception To RPTL 421-g, A Statute That Generally Invalidates Any Law That Would Otherwise Exempt From Rent Regulation Those Apartments For Which The Owners Received RPTL 421-g Tax Benefits — *Kuzmich v. 50 Murray Street Acquisition LLC*, 2019 N.Y.Slip Op. 05057 [June 25, 2019], *rev'g* 157 AD3d 556 [1st Dept 2018].

The case turned on the manner in which two statutes that were the proverbial ships passing in the night operated in tandem. At issue was whether the subject properties were subject to rent stabilization.

Background: Real Property Tax Law § 421-g ostensibly provided that, with exceptions not applicable here, any provisions of the Rent Stabilization Law (RSL) that would otherwise operate to exempt apartments from rent regulation did not apply to buildings receiving section 421-g tax benefits. But the provisions did not expressly single out the RSL luxury deregulation enacted in 1995 as part of the Lower Manhattan Revitalization Plan (LMRP) and did not specifically say that they superseded the LMRP.

The latter provisions were enacted in part to encourage the conversion of vacant commercial buildings to residential use. They did so by, amongst other means, granting a 12-year property tax exemption and 14-year property tax abatement for commercial buildings converted to at least 74% residential use.

So, did the benefits provided to owners by the LMRP constitute an implied exception to the provisions of RPTL § 421-g? Alternatively, did the provisions of RPTL § 421-g supersede those of the LMRP?

The Court of Appeals split 6 to 1.

Held: The Court's ruling, penned by Judge Stein, was premised upon the "clear and inescapable" language of RPTL 421-g. The statute specifically said that "[d]uring 'the entire period for which the eligible multiple dwelling is receiving' RPTL: 421-g benefits, it 'shall be fully subject to control' under the RSL, 'notwithstanding the provisions of' that regime or any other 'local law' that would remove those dwelling units from such control, 'unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit.'" The Court said that that of itself dictated the answer.

There was, accordingly, no reason to sift through and evaluate the legislative history. But even if one did so, the intent to revitalize lower Manhattan by means of the RSL incentives was "not inconsistent with the stabilization of rents, which was plainly contemplated under the subdivision that we are called upon to interpret in these appeals."

Also, "defendants' reading of the statute [failed] to give effect to the language in RPTL 421-g(6) that provides a mechanism for a landlord to 'decontrol' units that 'would not have been subject to such control but for [that] subdivision,' after section 421-g benefits have terminated" inasmuch as "[t]hat language clearly contemplates the suspension of decontrol provisions during the benefit period, further reaffirming what is unmistakably conveyed in the notwithstanding clause."

Dissent: The Chief Judge's dissent stressed the historical context in which the LMRP was adopted back in the early 1990's. Many then feared that New York City was deteriorating economically and that the downturn would spiral out of control absent dramatic changes. Property owners that thereafter purchased commercial buildings and converted them to residential use did so "in reliance" of the promised benefits and under the assumption that the new apartments would not be rent-stabilized. In the dissent's view, the majority's ruling "retroactively" deprived those owners of the benefits they had been promised.

Obviously, that was not how the tenants saw it. As the tenants saw it, 1) the landlords were never promised an RPTL § 421-g exemption in the first place, and, 2) the real choice was not whether the owners would obtain the benefits they had been promised but instead whether they would also obtain additional benefits they had never been promised.

Whether The General Presumption In The Taxpayer's Favor Is Inapplicable To Alleged Statutory Exclusions (As Opposed To Statutory Exemptions) — *Wegmans Food Markets, Inc. v. Tax Appeals Tribunal of the State of New York*, 2019 NY Slip Op at 05184 [June 27, 2019], *rev'g* 155 AD3d 1352 [3d Dept 2017].

Wegmans, the petitioner supermarket chain, hired a contractor to routinely conduct competitive price audits (CPAs) of Wegmans' competitors' products.

Although Tax Law § 1105[c][1] imposed a sales tax on certain informational services, it excluded "the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons." Wegmans argued that its payments for the CPAs fell within that statutory exclusion. The respondent Tribunal rejected the argument. In doing so, it reasoned that the fact that the contractor obtained the pricing information by going into the competitors' stores and pricing the items Wegmans asked it to price meant that the information in issue was publicly available and therefore not "personal or individual in nature."

The issue which divided the Court of Appeals was whether the Tribunal's determination should stand. That question turned on the much broader issue of whether an alleged exclusion from a tax, as at bar, is treated differently than an alleged exemption from a tax.

Held: The Court of Appeals majority ruled, in an opinion by Judge Feinman, that the Tribunal's determination was rational and should therefore be upheld. But the key issue going forward is whether, as charged in Judge Stein's concurrence, the Court effectively overruled *Matter of Grace*, 37 NY2d 193, 196 [1975].

In *Grace*, the Court of Appeals ruled that "[a] statute which levies a tax is to be construed most strongly against the government and in favor of the citizen" and that "a well-founded doubt" as to the meaning of the statute "defeats the tax." If, however, it is clear that the taxpayer is subject to the statute and the question is instead whether the taxpayer is entitled to the benefit of a statutory exemption, the presumption is reversed and the onus falls on the taxpayer.

But is an exemption from the tax the same as an exclusion from the tax for purposes of the *Grace* rule?

The majority ruled that there was no distinction, and "we have not differentiated between exemptions, exclusions, and deductions" for purposes of the *Grace* rule. So, even though the case involved an alleged exclusion rather than an alleged exemption, the taxpayer still bore the burden of proof and a "well-founded doubt" as to the provision's meaning or reach would not invalidate the tax. Rather, it was instead the taxpayer's burden to demonstrate that the Tribunal's determination was not rational.

The majority further ruled that the Tribunal's determination was rational inasmuch as the Tribunal could rationally find that pricing information "derived from a non-confidential and widely-accessible source, the supermarket shelves of Wegmans's competitors" was not "personal or confidential in nature."

Concurrence: Judge Stein agreed that the Tribunal could rationally rule as it did and therefore agreed with the majority's result. However, she strongly disagreed with the majority's reasoning, and more particularly with its refusal to distinguish tax exemptions from tax exclusions.

As Judge Stein saw it, the governing case law had long distinguished exemptions from exclusions, with the consequence that the presumption in favor of the taxpayer was not displaced where, as here, the issue turned on application of a statutory exclusion rather than a statutory

exemption. In the judge's opinion, the Court "[e]ffectively overrul[ed]" *Grace* in favor of "new rule: in New York, the taxpayer always loses."[14]

Dissenting Opinions: Judges Fahey and Wilson dissented, but for different reasons.

Judge Fahey essentially agreed with Judge Stein's distinction between tax exclusions and tax exemptions, and that the presumption in the taxpayer's favor is lost only as to exemptions. However, he also agreed with the Appellate Division's conclusion that such here required that the dispute be resolved in the taxpayer's favor.

Judge Wilson charged that "the lower courts and the Tax Appeals Tribunal reached their decisions principally by relying upon their own prior cases, cherry-picked to avoid others that are inconsistent" and that they should have but failed to analyze what the legislature had here intended the statute to mean.

In Judge Wilson's view, the legislative history made clear that the qualifier "personal or individual" was "meant to distinguish generic information services from customized ones." "[T]he legislature was not concerned with the public nature of the information gathered by an information service provider or whether that information was transformed in some manner, but rather whether the report delivered was custom—personal or individual for the client—or generic—sold or potentially sold to others."

Since the reports in issue plainly were "personal or individual for the client," Judge Wilson believed that the expenses in issue should have been deemed to fall within the tax exclusion.

Whether The Law Requiring Retailer To Pre-Pay Tax Conflicted With The Indian Law And Was Thus Unconstitutional — *White v Schneiderman*, 31 NY3d 543 [2018], *aff'g* 140 AD3d 1636 [4th Dept 2016].

Tax Law § 471 imposes a tax "on all cigarettes possessed in the state by any person for sale," including "all cigarettes sold on an Indian reservation to non-members of the Indian Nation or Tribe." There is an exception for cigarette "sales to qualified Indians for their own use and consumption on their nation's qualified reservation." While the statute requires tribal retailers to prepay the tax to wholesalers when purchasing inventory, they later recoup the tax by adding it to the retail price for cigarettes sold to non-members of the Nation.

Plaintiffs alleged that the tax conflicted with the Buffalo Creek Treaty of 1842 and Indian Law § 6 and was thus unconstitutional.

Held: The Court unanimously ruled, in an opinion by Judge Garcia, that, as the Second Circuit noted in *Oneida Nation of New York v. Cuomo*, 645 F3d 154, 168 [2d Cir 2011], "'it is the legal burden of a tax—as opposed to its practical economic burden—that a state is categorically barred by federal law from imposing on tribes or tribal members.'"

Here, "the pre-collection mechanism at issue here is not a tax on the retailer and is borne instead by the non-Indian consumer." As such, "Tax Law § 471 does not constitute a tax on an Indian retailer, and therefore it does not run afoul of the plain language of the Treaty or Indian Law § 6."

[14] The majority insisted that it did not overrule *Grace* and was not saying "the taxpayer always loses" notwithstanding "the concurrence's hyperbolic claims to the contrary."

Whether A Unit Owner Could Effectively Issue A "Standing Authorization" For The Board To Challenge Tax Assessment On His Or Her Behalf, Or Whether A New And Separate Authorization Was Required For Each Tax Year — *Eastbrooke Condominium v Ainsworth*, 33 NY3d 139 [2019], *rev'g* 147 AD3d 1510 [4th Dept 2017].

The appeal turned on the question of whether Real Property Law § 339-y(4) required a condominium's board of managers to obtain separate authorizations from each unit owner with respect to each year in which the board challenged a tax assessment on that owner's behalf.

Facts: The board of managers of the Eastbrooke Condominiums, a condominium comprised of 402 individually-owned units, challenged the Town of Brighton's tax assessments for the years 2008, 2009, 2010 and 2011. The board prevailed when, at the end of a non-jury trial, the trial court determined that the condominium units had been over-assessed by a total of $4,485,300 for each tax year between 2008 and 2011.

The question then became which unit owners could benefit from that determination. That, in turn, depended on whether the board had been properly authorized to act on the owners' behalf, and, if so, to which tax years the authorization(s) extended.

Petitioner (the condo board) argued that it could choose to represent any and every unit owner so long as the unit owner did not object to the representation after being provided notice thereof. If, however, the Court found that an affirmative authorization by the unit owner was required, petitioner contended that it was enough that the unit owner provided the board with a "standing authorization" that would apply unless and until the unit owner cancelled or rescinded it.

The Town argued that the board lacked authority to act on the owner's behalf unless the owner provided the board with a *separate* authorization for the particular tax year in issue.

Real Property Law § 339-y(4) provided:

> The board of managers may act as an agent of each unit owner who has given ... written authorization to seek administrative and judicial review of an assessment made in accordance with [Real Property Law § 339–y (1)], pursuant to[, among other things, Real Property Tax Law article 7]. Their board of managers may retain legal counsel on behalf of all unit owners for which it is acting as agent and to charge all such unit owners a pro rata share of expenses, disbursements and legal fees for which charges the board of managers shall have a lien pursuant to [Real Property Law 339–z].

Held: All seven judges rejected the petitioner's argument that authorization could be premised upon a unit owner's mere failure to object to representation. Rather, the statute required "that the unit owner must, in writing, authorize the board of managers to dispute that tax assessment on the owner's behalf."

However, by 5 to 2 vote, the court ruled per opinion by Judge Fahey that the board did not need to obtain a separate authorization for each tax year. It was sufficient that it obtain a standing authorization covering all tax years.

First, "[a]t worst (from the perspective of petitioner and those situated similarly thereto)," the statute was "ambiguous with respect to the question whether an owner may confer upon a board

continuing authority to challenge a tax assessment on the owner's behalf." Second, settled law required that any ambiguity be resolved in the tax payer's favor.

Dissent: Chief Judge DiFiore and Judge Feinman dissented in an opinion by the former. The dissent stressed that the statute permitted a unit owner to authorize a condominium board of managers to challenge "an assessment" on his or her behalf. This signified that "the legislative clearly intended to treat condominium unit owners just like other real property owners who must decide each year whether or not to file (or authorize an agent to file [see RPTL 524(3)] an article 5 grievance or article 7 proceeding challenging the assessment for that tax year."

The majority was not moved by that analysis. As they saw it, "the point remains that nothing in that statute explicitly requires a 'fresh' authorization for each tax year" and the use of the singular was "of no moment."

Whether The Lessee Which Paid The Allegedly Excessive Property Taxes Has Standing To Challenge Those Assessments — *Larchmont Pancake House v Bd. of Assessors & C.*, 2019 NY Slip Op 02441 [Apr. 2, 2019].

The subject property housed an International House of Pancakes that was operated by a corporation owned by the Carfora family. However, that corporation, which we will call Petitioner, did not own the land. The land was owned by a revocable trust that had been established when Susan Carfora died.

The issue was this: where the lessee corporation had in fact paid the property taxes for the 2010 through 2013 tax years, where the petitioner-lessee had filed administrative grievances with respect to the sums it had paid in property taxes during those years, and where those challenges had failed, was petitioner an aggrieved party within the meaning of RPTL article 7 with standing to challenge the administrative rulings?

Held: The Court ruled by 5 to 2, in an opinion by Judge Garcia, that the mere fact that the lessee had paid the subject taxes did not make the lessee an aggrieved party within the meaning of RPTL article 7. Rather, it is only when the lessee is contractually obligated and thus "legally responsible" for the taxes that it is aggrieved for purposes of RPTL article 7.

Apart from stating that such conclusion was dictated by the Court's prior rulings, the Court urged, as follows, that such was also the better rule from a policy perspective:

> A direct legal obligation also promotes the goals of clarity, efficiency, and judicial economy embodied in the RPTL. As we have noted before, article 7's standing requirement serves a number of salutory purposes: avoiding a fracturing of challenges against an assessment; preventing duplicative petitioners; and protecting the taxing authority from multiple litigations as to the same parcel by parties of unknown relation to the taxed premises (*Waldbaum*, 74 N.Y.2d at 134, 544 N.Y.S.2d 561, 542 N.E.2d 1078). To those ends, article 7's aggrievement provision consolidates the authority to seek judicial review of a challenged assessment, generally requiring non-owners to assume a direct obligation to pay the owner's taxes, or to obtain a contractual authorization to pursue a tax certiorari proceeding. By narrowing the field of appropriate challengers, this bright lien rule avoids needless confusion and thereby minimizes the risk of fractured and duplicative assessment challenges.

> Here, petitioner lacks any legal obligation to assume the undivided tax liability or authorization to pursue this proceeding and, as such, lacks standing under article 7.

Dissent: Judge Wilson, joined by Judge Rivera, felt that the majority's ruling elevated form over substance, in the process stripping a "hardworking" family of their right to challenge possible excessive tax assessments:

> Real Property Tax Law § 704(1) provides, in relevant part, that "any person claiming to be aggrieved by any assessment of real property upon any assessment roll" may seek judicial review of that assessment. The majority holds that a person who, pursuant to a longstanding arrangement, pays 100% of the property taxes on a piece of land, cannot "claim[] to be aggrieved" even by the improper inflation of the property taxes they pay.
>
> That conclusion is as wrong as it sounds. Worse still, the mistake relied on to divest these aggrieved taxpayers of their right to judicial review is purely clerical: hardworking pancake proprietors, following their mother's death, listed the name of their business instead of the name of the trust that temporarily held legal (but not equitable) title to the land on which their business sat. The trust filed an affidavit saying it would have approved of the tax proceedings when they were filed, and executed authorizations of the proceedings once the problem was brought to its attention. To top it off, the Town knew all along who owned the property and did not see fit to mention it until four years had passed. All agree the claimed error was harmless, yet the Court dismisses the proceedings anyway.
>
> For almost a century, we have followed the rule that courts should disregard errors like this, so that taxpayers can vindicate their rights to an accurate and equitable property tax assessment (N.Y. Const, art XVI, § 2; NY Const, art I § 11).
>
> * * *
>
> The majority's aggrievement rule does not merely ignore our prior cases; it ignores reality. Suppose a couple of my colleagues and I order coffees. I gratuitously pay for all, and later realize the barista has overcharged me. Surely I am aggrieved by the overcharge, even though I had no legal obligation to pay for my colleagues' coffee. The same rule should apply here: a person who pays the entirety of someone else's property tax is as, if not more, aggrieved as the lucky beneficiary of that payment, even if at the time the taxes were paid the payor had no "legal obligation" to do so.

Construction Of Statutory Law Governing Taxation Of Certain Telecommunications Equipment —*T-Mobile Northeast, LLC v Debellis*, 32 NY3d 594 [2018].

Although the Court's opinion provides an interesting historical review as to the manner that telecommunications equipment was taxed, I'm not sure that any of that discussion was actually necessary to resolve the rather narrow issue before the Court. That issue was whether T-Mobile's cellular data transmission equipment — equipment that T-Mobile owned and which was installed on the exterior of various buildings in Mount Vernon — was taxable real property within the meaning of RPTL 102[12][i]. That statute provided:

> When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain …

Emphasis added.

T-Mobile argued, in the main, that the words "for electric conductors" (underscored in the passaged quoted above) modified and limited the preceding words "all lines, wires, poles, supports and inclosures." So, that the equipment in issue (which included base transceiver stations; antennas; and coaxial, T-1, and fiber optic cables) was purportedly not "for electrical conduction" purportedly rendered the provision inapplicable.

However, the Court unanimously ruled, per an opinion by Chief Judge DiFiore, that the Appellate Division correctly applied "the last antecedent rule of statutory construction" (32 NY3d at 608). "Under that rule, '[r]elative and qualifying words or clauses in a statute are not be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote" (*id.*, *quoting Dunlea v. Anderson*, 66 NY2d 265, 269 [1985]). So, here, the phrase "for electrical conductors" modified only the term "inclosures" (*id*.).

X. Employment, Workers' Compensation, And Employee Benefits Disputes

Whether The Subject Collective Bargaining Agreement Authorized The Impacted Employee, As Opposed To His Or Her Union, To Demand Arbitration — *Widrik v Carpinelli*, 32 NY3d 975 [2018], *aff'g* 155 AD3d 1564 [4th Dept 2017].

Did the collective bargaining agreement (CBA) authorize the employee to demand arbitration with respect to his allegedly wrongful firing?

By 4 to 3 vote on section 500.11 review, the Court held that the CBA required that the union demand the arbitration, which it had here failed to do.

Majority: The majority ruling stated in its entirety:

> On review of submissions pursuant to section 500.11 of the Rules, order affirmed, with costs. "Our reading of the collective bargaining agreement as a whole establishes the parties' plain and unambiguous intent to limit the right to demand ... arbitration to [petitioner's union]" (*County of Westchester v. Mahoney,* 56 N.Y.2d 756, 758, 452 N.Y.S.2d 21, 437 N.E.2d 280 [1982]).

Dissent: Judge Wilson, writing for the dissenters, rendered a much longer opinion.

Article XXIII, relating to "Discharge & Discipline," provided that "if the employee is covered under Section 75 of the Civil Service Law '[a diciplinary action] may be processed either by the grievance or arbitration procedure, or by a hearing as provided by said Section of the Civil Service law *as the employee may elect*' (emphasis added)."

Similarly, Article IV, section 1 of the CBA provided "that the employee presenting the grievance has the 'right to be represented at any and all stages *if the employee so chooses*' (emphasis added)."

In the dissent's opinion, such provisions "clearly grant[ed] the employee the right to elect arbitration." But even if the agreement were "ambiguous in that regard, it must be construed in favor of the employee's right to demand arbitration."

But, as has been noted, this was the dissent.

Whether The Department of Labor's Construction Of A DOL "Wage Order," A Construction That Permitted Employers To Pay Live-In Health Care Aides For Only 13 Hours Of Each 24 Hours On The Premises, Was "Irrational" Or Violative Of The Governing Regulation — *Andryeyeva v New York Health Care, Inc*., 33 NY3d 152 [2019].

Labor Law § 652 requires that each employee be paid a minimum hourly wage for each hour worked. But how, exactly, should that be applied to a home health care aide who typically spends some part of each day on the premises and on-call while sleeping?

The Department of Labor here issued a Work Order that essentially provided that the hourly wage would not have to be paid, (1) "during [the employee's] normal sleeping hours solely because [the employee] is required to be on call during such hours," or, (2) "at any other time when [the employee] is free to leave the place of employment."

The DOL thereafter issued an "opinion letter" that distinguished "live-in employee" home health care aides from other home health care aides. More specifically, where the aide was a live-in attendant who was "afforded at least eight hours for sleep and actually receive[d] five hours of uninterrupted sleep," and where the aide was also provided three hours for meals, the employer could exclude those 11 hours and pay the employee only for the other 13 hours.

Here, a number of aides sought class certification to challenge the DOL's construction of both the statute and the Work Order, and more specifically with the DOL pronouncement that live-in home health care aides need be paid for only 13 hours of each 24-hour span. In doing so, they urged that they routinely failed to get "five hours of uninterrupted sleep because their patients required assistance multiple times each night." They also urged that they "were never allowed to take meal breaks" inasmuch as the patients could not be left alone.

Held: By 5 to 2 vote, the Court ruled per a decision by Judge Rivera that judicial deference was warranted "to an agency's interpretation of its rules and regulations" and that such deference had to be even more pronounced where, as here, the agency had adhered to the construction in issue for "a long period of time."

Here, "DOL's interpretation [was] not inconsistent with the plain text of the Wage Order, which requires that an employee be paid the minimum wage for the time when they are 'required to be available for work at a place prescribed by the employer.'" In essence, "DOL has given meaning to the complete phrase by interpreting 'available for work,' in the context of a 24-hour shift to exclude the hours when the employee is not working because the employee is on a scheduled sleep and meal

break." That plaintiff had an "alternative reading" of the Wage Order was "beside the point," even if DOL's reading was "'not the most natural reading.'" Further, this was "not a case where DOL has vacillated in its position, rendering its interpretation capricious or unmoored from the realities of workplace life." Also, "[i]nterpreting the Wage Order to exclude sleep and earing breaks in a 24-hour shift, on the presumption that the employer will in fact structure the work assignment to provide such time for a home health care aide, harmonizes with the federal approach."

While noting that the plaintiffs could and would prevail if they were exploited and were required to work during their unpaid meal and sleep hours, it remained that "DOL's interpretation of the Wage Order" was "rational" and therefore had to be upheld.

Dissent: Judge Garcia's dissent (with which Judge Fahey concurred) concluded that the result effected by the majority was "not only unfair, it is completely at odds with the plain text of the wage order."

Amongst other points, it was neither fair nor plausible for the employer to be permitted to deduct three hours for meal breaks when the employers' own manual said, "Patients are never to be left alone!"

Nor was it fair or consistent to provide that "sleep hours *do not* constitute time the employee is 'available for work'" where the worker was a "residential employee" and to provide the opposite for all other employees.

In the dissent's view, the Court erred in approving a DOL construction that ran "contrary to the regulations' text" and such ruling would have "profound and far-reaching ramifications for a vulnerable and often mistreated workforce." The dissent also felt that the majority accorded undue weight to the fact that DOL's policy was longstanding, stating:

> Even if a longstanding, uniform construction could supersede plain text, DOL has not exhibited the consistency or clarity that the majority describes. Rather, DOL has been consistent on one and only one position: nonresidential home health care aides may be paid for fewer hours than their shift requires. The interpretations that DOL has adopted to achieve that result have "vacillated" dramatically.[15]

The majority responded that there was "nothing unreasonable or irrational about recognizing the similarities and dissimilarities between residential and nonresidential employees to reach the conclusion that a home health care aide assigned to a 24-hour shift should have significant amounts of regularly scheduled work-free periods."

Construction Of Prevailing Wage Rate Statute — *Intl. Union of Painters & Allied Trades v New York State Dept. of Labor*, 32 NY3d 198 [2018].

New York's prevailing wage law requires that workers engaged in public work not "be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state" where

[15] In a footnote, the majority took issue with the dissent's claim that the DOL's interpretation had "vacillated dramatically."

the public work is to be located. N.Y. Const., art I, section 17. Labor Law § 220(e-3) additionally provides:

> [a]pprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the [DOL]. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the [DOL] for the classification of work [the employee] actually performed.

The Department of Labor ("DOL") construed the above-quoted statute "to mean that apprentices employed on public work projects may be paid apprentice rates only if they are performing tasks within the trade classification (e.g., 'glazier,' 'ironworker') that is the subject of the apprenticeship program in which they are enrolled" (32 NY3d at 204). The plaintiff-employers urged that "that the DOL's interpretation of Labor Law § 220(3–e) violates the plain meaning of the law, and that the statute permits contractors on public works to pay apprentices the posted apprentice rates, provided that they are registered in any DOL-certified apprenticeship program" (*id*.).

Under the DOL's construction of the statute, an apprentice who was enrolled in a program to become a journeyman glazier could be paid the lower rate for an apprentice when doing a glazier's work, but would have to be paid the higher rate of a journeyman when performing some other kind of work (*e.g.*, ironwork). Under the employers' construction of the statute, the apprentice could be paid the lower rate irrespective of whether the work fell within the scope of the training program — provided that the apprentice was in fact enrolled in a DOL-approved program.

Held: By 6 to 1 vote, the Court upheld, per an opinion by Judge Fahey, DOL's construction of the statute.

The majority reasoned that the statute was itself ambiguous on the point in issue in that "the words 'to work as such' might be taken to mean working as an apprentice, no matter the trade, or to denote working as an apprentice in the apprentices' chosen trade, with the latter interpretation validating the DOL's position" (32 NY3d at 209). It further reasoned that DOL's interpretation of the statute was "entitled to deference unless it [was] inconsistent with unambiguous language in the statute or irrational," which was not the case here (*id*.).

In assessing whether DOL's construction was rational, the Court observed that DOL's interpretation "ensures that apprentices are learning tasks within their trades and that they are not used as cheap labor" and that the alternative construction "would give contractors a financial incentive, particularly if ironworker apprentices were scarce, to divert glazier apprentices from their limited opportunities to learn glazier skills and require them to perform ironworker tasks" (*id*. at 210).

Dissent: Judge Garcia dissented on the ground that DOL's limitation to *the kind of work* covered by the training program was a limitation that could not be found in the statute. He added, a) that the majority's ruling would actually hurt rather than help apprentices-in-training inasmuch as "a contractor would have little incentive to pay a glazier-in-training full journeyworker wages" (32 NY3d at 212), and, b) the statute itself dealt with potential employer abuse by requiring "certain ratios of journeyworkers to apprentices for each trade classification" (*id*.).

Whether The County Could Decline To Indemnify Its Police Officer Because The Officer Was Not Then Involved In "*Proper* Discharge" Of His Employment Duties — *Lemma v Nassau County Police Officer Indem. Bd.,* 31 NY3d 523 [2018], *aff'g* 147 AD3d 760 [2d Dept 2017].

Petitioner, a Nassau County police officer, arrested Raheem Crews in connection with a robbery. Even though petitioner subsequently discovered that Crews was incarcerated when the crime occurred, he told no one and "Crews remained in pretrial detention for four months for a crime petitioner knew he did not commit."

Crews commenced an action in federal court pursuant to 42 USC § 1983 against petitioner, among others. Initially, the County offered to represent and indemnify petitioner pursuant to General Municipal Law § 50-l. However, the County thereafter learned of petitioner's conduct in failing to disclose the accused's iron-clad alibi. At a hearing to determine whether the County would continue to provide a defense, petitioner "claimed that the information concerning Crews' incarceration had simply slipped his mind due to a heavy caseload and personal problems he was experiencing at the time." Nonetheless, the Board decided to revoke defense and indemnification.

The issue in this Article 78 case was whether the Board's decision was "irrational." The Court, in an opinion by Chief Judge DiFiore for a unanimous bench, ruled for the Board.

The issue turned on the language of General Municipal Law § 50-l. That statute required indemnification of Nassau County police officers for civil "damages, including punitive or exemplary damages, arising out of a negligent act or other tort of such police officer committed while in the proper discharge of [the officer's] duties and within the scope of [the officer's] employment [emphasis added]." But what, in context, did the word "proper" mean?

Petitioner urged "that the phrases 'proper discharge of … duties' and 'scope of … employment' [were] interchangeable in this statute, requiring only that the officer be engaged in police work to be entitled to indemnification" (31 NY3d at 529). However, that construction effectively read the word "proper" out of the statute.

The Court instead held that "the statute permits the Board to consider the propriety of the officer's actions in determining whether defense and indemnification is appropriate, as it did here when it revisited its determination after learning petitioner concealed information that extended the pretrial detention of an innocent person" (*id*.).

Whether The WCB Could Conclude That The Employee's Disability Was Merely Partial — *Wohlfeil v Sharel Ventures, LLC*, 32 NY3d 981 [2018], *rev'g* 155 AD3d 1264 [3d Dept 2017].

In another ruling rendered on 500.11 review (no Court of Appeals briefs or oral argument), the Court unanimously reversed the Appellate Division ruling. Although one must go to the Appellate Division opinions to get the significant facts of the case, the key lesson here is that judicial review of WCB rulings is limited.

Fact: Claimant "fell at work in October 2007" and thereafter "underwent multiple back surgeries, including a L3–4 and L4–5 spinal fusion in December 2010 and fusions at L4–5 and L5–S1 in August 2012" (155 AD3d at 1264). Her treating doctor "classified her condition as permanent and assigned a class five severity F rating to her lumbar back injury under the New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity" (*id*. at 1265). He also "rated

her functional capacity at 'less than sedentary work,' a category defined as 'unable to meet the requirement of sedentary work'" (*id*.). The doctor "who conducted an independent medical examination on behalf of the workers' compensation carrier, assigned a class four severity G rating to claimant's back condition" and said it was "'unlikely [claimant] would ever be able to return to meaningful employment'" (*id*. at 752-753).

Despite those facts, the WCL judge found that claimant had "sustained a permanent partial disability and a 75% loss of wage-earning capacity," this as opposed to finding permanent total disability. The Workers' Compensation Board (WCB) affirmed and claimant appealed to the Appellate Division.

The issue split the Appellate Division 3 to 2. The majority ruled "the Board's findings as to claimant's ability to perform some type of sedentary work are contrary to the consistent medical proof presented" and "the record actually warrants a finding of a permanent total disability" (155 AD3d at 1265-1266).

The Appellate Division dissenters noted that claimant's treating doctor conceded that claimant "could occasionally sit, stand, walk and lift objects weighing up to 10 pounds" (155 AD3d at 1266). Such proof entitled the Board to find that claimant's disability was only partial (*id*.). Since the judicial review was "limited to whether the Workers' Compensation Board's determination [was] supported by substantial evidence," and since such was here the case, that ended the inquiry (*id*. at 1266-1267).

In so concluding, the Appellate Division dissenters stressed that the Board could have rationally doubted the credibility of both medical witnesses. The treating doctor's testimony that claimant was totally disabled was contradicted by his "findings and opinion of a permanent partial disability in his written report" (*id*. at 1267). The Board could have also concluded that the opinion of the doctor who examined for the carrier was "conclusory" and based upon the claimant's "subjective pain level" (*id*.).

Held: The Court of Appeals reversed, stating only:

> On review of submissions pursuant to section 500.11 of the Rules, order reversed, with costs, and decision of the Workers' Compensation Board reinstated. On this record, substantial evidence supports the Board's determination that claimant has a permanent partial disability with a 75% loss of wage-earning capacity (*see generally Matter of Zamora v New York Neurologic Assoc.,* 19 N.Y.3d 186, 192–193, 947 N.Y.S.2d 788, 970 N.E.2d 823 [2012]; *see also Matter of Burgos v. Citywide Cent. Ins. Program,* 30 N.Y.3d 990, 990–991, 66 N.Y.S.3d 216, 88 N.E.3d 375 [2017]).

Scope Of Employment, Appellate Review Of WCB Rulings — *Grover v State Ins. Fund*, 33 NY3d 971 [2019], *aff'g* 165 AD3d 1329 [3d Dept 2018].

According to the Appellate Division majority,[16] "[c]laimant applied for workers' compensation benefits, claiming that she injured her left shoulder on her way to work when she reached out of her car window to scan her parking pass in order to enter a parking garage located at her employer's building" (165 AD3d at 1329). The issue was whether the accident occurred within the scope of claimant's employment.

[16] The Court of Appeals' affirmance was three sentences long and devoid of facts.

After the WCLJ ruled that the claim was established, the Workers' Compensation Board reversed, finding that claimant's injury did not arise out of and in the course of her employment.

The Appellate Division for the Third Department then affirmed by 3 to 2 vote.

Appellate Division Majority: While acknowledging that the facts would also "support a contrary result" (165 AD3d at 1330), the Appellate Division majority affirmed on the grounds that,

> a) the issue was whether "substantial evidence support[ed] the Board's decision" (*id*.), not whether the Court would rule the same way, and,
>
> b) the Board could rule as it did inasmuch as, 1) "the Board found that the parking garage was utilized by members of the public, as well as other businesses located within the same building as the employer" (*id*.), and, 2) "the employer did not own or maintain the garage."

Appellate Division Dissent: The dissenters felt that the "substantial evidence" standard of review should not apply in this case in which the facts were undisputed and the issue turned solely on a question of law.

The dissenters also felt that the governing case law required reversal inasmuch as,

> a) "the employer assigned claimant to a parking space in the garage and provided a parking pass to her at no charge, thus affirmatively encouraging claimant to park there" (*id*. at 1331),
>
> b) while some "portions of the garage were open to the public, claimant used a section available exclusively to employees located in the building by use of a parking pass" (*id*.), and,
>
> c) the case law instructed "that '[a]n employer, by making arrangements for employee parking, may be found to have extended its premises to the area of the approved parking facility so that an accident that occurs therein may be found to have arisen within the precincts of the claimant's employment, rendering it compensable'" (*id*.).

Court of Appeals: The Court of Appeals unanimously affirmed, stating only:

> On this record, substantial evidence supports the Workers' Compensation Board's determination that claimant's injury is not compensable.

The Durational Limits Of WCL "Additional Compensation" — *Mancini v Off. of Children and Family Services*, 32 NY3d 521 [2018].

The case turned on construction of Workers' Compensation Law § 15(3)(v) and (w) and involved assessment of the "additional compensation" due certain workers who are permanently partially disabled.

By way of background, a worker who sustains "permanent partial disability as a result of loss (or loss of use) of one of the listed body parts or senses is entitled to an award amounting to a weekly payment of 2/3 of the average weekly wages prior to the injury for the number of weeks attributed to their type of injury in the schedule" (32 NY3d at 526). When those benefits run out, the worker can apply for the "additional benefits" of WCL § 15(3)(v) … but only if the worker sustained "one of the four most severe scheduled losses (greater than 50% loss of use of a leg, arm, hand or foot)" (*id*. at 531, Dissent). That provision states:

> *Additional compensation* for impairment of wage earning capacity in certain permanent partial disabilities. *Notwithstanding any other provision of this subdivision,* additional compensation shall be payable for impairment of wage earning capacity *for any period* after the termination of an award under paragraphs a, b, c, or d, of this subdivision for the loss or loss of use of fifty per centum or more of a member, provided such impairment of earning capacity shall be due solely thereto. *Such additional compensation shall be determined in accordance with paragraph w of this subdivision, and shall cease on the date the disabled employee receives or is entitled to receive old-age insurance benefits under the Social Security Act* …

Here, claimant was found to have suffered a 50% use of his left arm and, per the statutory schedule, received a 156-week "schedule loss of use" award. After the 156 weeks passed, he sought "additional benefits." There was no doubt claimant was qualified for such benefits, and no doubt what claimant should receive per week. The matter in issue was the duration of such benefits.

The employer urged that in stating that the additional compensation "shall be determined in accordance with paragraph w," the above-quoted paragraph (v) required application not only of paragraph (w)'s weekly benefit formula (*i.e.*, "the compensation shall be sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages and his or her wage-earning capacity thereafter in the same employment or otherwise") but also its durational limits (which ranged from 225 to 525 weeks, depending on the percentage of loss). Claimant urged that the duration limits of paragraph (w) specifically applied only to "*compensation payable under this paragraph*," and, additionally, that paragraph (v) had its own payment span (beginning when the other benefits run out and ending when the employee is entitled to receive social security benefits).

Held: In an opinion by Chief Judge DiFiore, the Court ruled by 6 to 1 vote that the durational limits of paragraph (w) applied to and thus restricted the "additional compensation" provided by paragraph (v). The gist was as follows:

> Claimant asserts, despite the cross-reference to paragraph w, that only a part of that paragraph – the formula for determining the weekly benefit – is applicable to additional compensation awards under paragraph v. He therefore maintains that he is entitled to additional compensation until he is eligible for age-based

social security benefits. But the plain text of paragraph v adopts, without qualification, paragraph w's process for determining the size and scope of a disability award.

* * *

Contrary to claimant's position, nothing in the language of paragraph v regarding termination of additional compensation upon eligibility for age-based social security benefits contradicts paragraph w's durational restrictions or precludes their application to paragraph v recipients.

* * *

Indeed, neither of the primary benefits that section 15(3) provides are open-ended. Both schedule loss of use awards and non-schedule benefits continue for a maximum number of weeks, depending on the nature or severity of the worker's disability. Interpreting paragraph v to grant a subset of recipients open-ended benefits limited only by eligibility for age-based social security payments – an award that would potentially span their working lifetimes – would uniquely benefit that small group above all other permanent partial disability award recipients. There is no textual support for such an exceptional interpretation. Rather, under the plain language of paragraph v, additional compensation awards are calculated pursuant to the formula and durational provisions of paragraph w, terminating earlier if or when a claimant becomes eligible for age-based social security benefits.

Dissent: Judge Wilson dissented, stating:

The majority takes the durational limitations at the end of paragraph (w) and engrafts them onto paragraph (v); in doing so, it misconstrues paragraph (v)'s "determined in accordance with" clause and ignores the clear contrary statements in both paragraphs (v) and (w). That reading is wholly unsupportable. When paragraph (v) was adopted, paragraph (w) had no durational limit. Consequently, paragraph (v)'s statement that the "additional compensation" provided thereunder be "determined in accordance with paragraph w" could have referred, at the time, only to the method of calculating the amount of the payment. The majority's claim that the durational requirement later added to paragraph (w) should be engrafted into paragraph (v) runs contrary to numerous clear provisions contained in those paragraphs.

He added:

The majority voices concern that, unless the time limits from paragraph (w) are imposed onto paragraph (v) benefits, the additional compensation will "uniquely benefit" partially permanently disabled workers with a schedule (a)-(d) award over all others receiving permanent partial disability benefits (maj op

at 8). But the Workers' Compensation Law is a hierarchy of benefits unique to each type of workplace injury: total disability is greater than partial; loss of a hand is worse than loss of an eye is worse than loss of a thumb is worse than loss of a ring finger. Paragraph (v) is the Legislature's expression of yet another benefit unique to a defined class: injured workers who suffer one of the four most severe permanent partial disabilities ([a]-[d]) will be treated less well than those who suffer a permanent total disability (and receive lifetime benefits), but better than those whose schedule disability is less severe ([e]-[s]), and potentially better than those whose partial disability is non-schedule. By enacting paragraph (v), the Legislature chose to afford workers suffering the most severe schedule injuries "additional compensation": less than what they would have received had the disability been total, but more than what less severely injured workers might receive. That "unique benefit" is what the Legislature enacted, which the majority now spurns.

XI. Administrative Law And Everything Else

Whether Dangerous Sex Offender's Assigned Counsel Was An "Authorized Representative" Or A "Significant Individual" Who Was Thereby Entitled, Under Article 10 Of The Mental Hygiene Law, To Attend The Offender's Treatment Planning Interview — *Mental Hygiene Legal Serv. v Sullivan*, 32 NY3d 652 [2019].

The Mental Health Law requires the Commissioner of Mental Health "to develop and implement a treatment plan in accordance with the provisions of section 29.13 of [the Mental Hygiene Law] for persons" committed as dangerous sex offenders. That "treatment plan" extends beyond treatment per se. Because confinement is open-ended and extends until the offender "no longer requires confinement," the treatment plan impacts that as well.

Section 29.13(b) of the Mental Hygiene Law specifically authorizes two types of individuals to "actively participate" in the offender's planning interview: 1) "an authorized representative of the patient, to actively participate in such preparation or revision," and, 2) "upon the request of the patient [16] years of age or older, a significant individual to the patient including any relative, close friend or individual otherwise concerned with the welfare of the patient, other than an employee of the facility."

The question before the Court of Appeals was whether the offender's attorney fell into either of those categories.

Held: By 6 to 1 vote, the Court held in an opinion by Judge Stein that "MHLS counsel is not entitled to be given an interview and an opportunity to participate in treatment planning simply by virtue of an attorney-client relationship with an article 10 respondent."

As the majority saw it, the statutes themselves did not "definitively" answer the question. However, that the legislature specifically referenced Mental Hygiene Legal Service (MHLS) counsel "by name when it intend[ed] the agency to play a role in a particular activity." Accordingly, that the statutes did not do so here was "strong indication that the Legislature did not intend MHLS counsel to be automatically entitled to a role in the clinical activity of treatment planning." Beyond that, it was important to remember that the subject interview was, after all, a clinical treatment event.

The Court added that it held only that the attorney-client relationship did not of itself entitle the attorney to participate as a matter of law. It was, however, undisputed that "a facility has the discretion to permit MHLS counsel to participate in treatment planning." Also, "in a particular case, it is possible that counsel could develop and demonstrate a sufficient personal relationship with a patient such that counsel would qualify as a 'significant individual … otherwise concerned with the welfare of the patient.'"

Dissent: In dissent, Judge Wilson agreed that "MHLS counsel does not, simply by virtue of an attorney-client relationship with an article 10 respondent, qualify as an individual required to be given an interview and an opportunity to participate in treatment planning." However, the point, as he saw it, was that the offender had a right to designate his or her "significant individual" and there was no legally viable reason why that individual could not be the offender's MHLS attorney.

Whether Landmarks Preservation Commission Exceeded Its Authority In Enabling A Private Development To Make A Landmarked-Protected Historical Clock Into A Condominium Buyer's Personal And Private Perk — *Save Am.'s Clocks, Inc v. City of New York*, 33 NY3d 1054 [2019], *rev'g* 157 AD3d 133 [1st Dept 2017].

New York City's Landmark Preservation Commission (LPC) was created to, uh, designate, preserve and protect, uh, landmarks. The subject building, a 13-story building in Tribeca, was "part of the first wave of skyscrapers that heralded the dawn of the twentieth century." Amongst other features, the building contained a clock tower that contained a very special clock. The clock operated by means of "a particularly rare double three-legged gravity escapement that is manually wound once a week." There was apparently only one other remaining clock tower with such a mechanism: Big Ben, in London.

The City had acquired the building in 1968 and the LPC designated it as a landmark the following year. The LPC'c interior designation noted, *inter alia*, that the "clock and clocktower interior, which have not been altered, are a rarity in New York City" and that "[t]he clock is one of the few remaining in New York which has not been electrified."

The City ultimately sold the building to a developer who bought it subject to the landmark designation, that is, with the understanding that essentially any significant alteration would require LPC approval.

The issue was this. The developer sought approval to, a) electrify the clock, and, b) make it part of a triplex penthouse, which would essentially remove it from the public domain. And the LPC *approved* that plan, to the petitioners' chagrin. Did the LPC, an entity that was created and empowered to preserve landmarks, exceed its authority in instead permitting the developer to, essentially, privatize and market the landmark clock?

Held: By 4 to 2 vote, the Court ruled, per opinion by Judge Garcia:

1) Judicial review was "limited to whether 'the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' [citation omitted]."

2) The LPC's ruling did not run afoul of that standard since, amongst other reasons, the LPC had been specifically authorized to approve "demol[ition] of any improvement."

Dissent: Judge Rivera wrote a strident dissent which Judge Wilson joined. The gist was as follows:

> New York City is an architectural wonder; home to hundreds of landmarked structures and areas with unique cultural and historical value to the public. Some structures illustrate the grandeur and majesty of the City—Grand Central Terminal, the Empire State Building, the Chrysler Building, and the Brooklyn Bridge. Others depict the City's vibrant social and cultural life—the Coney Island Cyclone, the Rainbow Room in Rockefeller Center, the Apollo Theatre in Harlem, and the Paradise Theatre in the Bronx. Some are visible to the public from the street and fully appreciated in contrast to their surroundings, like the Sidewalk Clock at 161-11 Jamaica Avenue; others, like the Sailors' Snug Harbor on Staten Island, provide a more intimate view of life and invite us to enjoy the internal settings of the past. Varying in size, fame, and use, these structures and spaces root the City in its complex and diverse history and embody its indelible soul.
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> * * *
>
> Notwithstanding the historical significance of the clock to the City, the LPC approved the building owner's request to convert this interior landmark into a luxury apartment. The former is a rare horological masterpiece; the latter is a typical, now-commonplace, development for the wealthy by the wealthy. Although the LPC has great latitude to decide whether to approve an alteration to an interior landmark, it cannot approve an alteration that, by its very nature, amounts to a de facto rescission of a landmark designation.
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> * * *
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> Contrary to the majority's view (majority op. at ___), an interior landmark cannot retain its designation if the complete denial of public access is part of the approved alteration.
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> * * *
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> Soon after the demolition of Pennsylvania Station had commenced, acclaimed architecture critic Ada Louis Huxtable described the work as an indictment of the City's values. "We want and deserve tin-can architecture in a tin-horn culture. And we will probably be judged not by the monuments we build but by those we have destroyed" (Ada Louis Huxtable, *Farewell Penn Station*, N.Y. Times Oct. 30, 1963). Fundamentally, the Landmarks Preservation Law, which grew from this fervor, recognized that the structures and sites that embody the spirit of the City should be preserved even when commercial interests seek their destruction. While it might be more profitable to disavow the clatter of the Cyclone, the sight of the Navy Yard dry dock, or the pace of the retractile Carroll Street Bridge, New York City appreciates these elements and the quality they add to public life. The LPC designation here recognized that it was not just the

elegant faces of the clock that warranted protection, but also the less visible mechanism that gave it meaning and historical significance. By approving Developer's proposal to irrevocably alter the mechanics that define the unique horological features of the clock and indefinitely deny public access to this interior landmark in violation of the Landmarks Preservation Law, the LPC's decision was erroneous as a matter of law and cannot stand. I would affirm the Appellate Division.

Whether Gaming Commission Determination Based On Hearsay Was Supported By "Substantial Evidence" — *Pena v New York State Gaming Commn.*, 32 NY3d 1122 [2018], *rev'g and dismissing for reasons stated in the dissenting opinion of Justice Presiding William E. McCarthy*, 144 AD3d 1244 [3d Dept 2016].

Petitioner, a licensed trainer of harness racehorses, was "prohibited from allowing any horse in his 'custody, care or control to be started' in a race if certain substances [were] administered to the horse within a specified period prior to the race" (144 AD3d at 1245, quoting 9 NYCRR 4120.4[a]).

Respondent, the New York State Racing and Wagering Board, adopted the Hearing Officer's finding that petitioner had committed more than 1,700 violations of that rule during an approximately two-year period. Respondent also adopted the Hearing Officer's recommendations that petitioner be fined $200 per violation, that his license be revoked, and that he not be allowed to reapply for three years. Petitioner challenged those rulings in this article 78 proceeding.

The Issue: The issue that split the Appellate Division was fairly narrow.

The Hearing Officer's factual findings were premised on uncertified "veterinary records insinuating that petitioner ran afoul of the rule with regard to multiple substances in the lead-up to hundreds of harness races run between January 2010 and April 2012." *Pena*, 144 AD3d at 1245.

The Third Department panel agreed that the determination in issue "may be based upon hearsay evidence such as information contained in the veterinary records" and that there was "no question that the records were admissible in the administrative context even though they were not certified." *Pena*, 144 AD3d at 1246. The point of dispute was whether the particular records in issue actually showed what they purported to show.

The Appellate Division majority noted that the veterinary records themselves contained no more than a list of dates and that the only indication as to what the records actually meant was a cover letter "which advised that the dates listed in the records could reflect 'the day that a treatment was prescribed, [the] horse was treated or [the] medication dispensed'" (144 AD3d at 1246-1247). In this context, the majority noted that respondent's determination should be upheld if supported by "substantial evidence," but ruled that the ambiguity of the proof dictated the conclusion that it did not "constitute substantial evidence for the essential finding that horses in petitioner's care were administered substances within the prohibited time frames" (*id*. at 1247).

Justice McCarthy dissented on the basis of his conclusion that the proof adduced at the hearing — particularly including expert proof regarding the "customary practice of veterinarians — rendered it "reasonable and plausible" for respondent to conclude that the records represented what they were claimed to represent (144 AD3d at 1248). The dissenter wrote:

> The proof relevant to the interpretation of the veterinary records consisted of expert proof regarding the customary practice of veterinarians, the records themselves and the proof regarding petitioner's admissions regarding veterinary treatment.
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> * * *
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> Thus, when respondent considered veterinary records and found that dates listed next to descriptions of veterinary care represented dates upon which such care was administered, it relied on expert evidence establishing that such an

> interpretation was consistent with customary practice within the veterinary industry.
>
> Turning to the veterinary records themselves, the records are prefaced by a cover letter that explains that the dates contained within the records represent "the day that a treatment was prescribed, horse was treated or medication dispensed for the horse." Contrary to the majority's description of the records, however, this is not the only context for the individual record entries. Each dated entry for a horse's "chronological history" is accompanied by a description/comments section containing further information.
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> * * *
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> More generally, an examination of the records provides a reasonable basis to conclude that the veterinarian's default record-keeping practice was in accordance with custom: dates associated with care represented the administration of care unless otherwise specified.

Pena, 144 AD3d at 1248-1250, Dissent.

Held: The Court of Appeals unanimously reversed for the reasons stated by the Appellate Division dissenter.

Whether Public Service Commission Had Legal Authority To Cap Electrical Rates Charged By Energy Service Companies — *Natl. Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 33 NY3d 336 [2019].

The issue and holding were summarized in the first paragraph of Judge Stein's opinion on behalf of the unanimous Court:

> On this appeal, we are asked to determine whether the Public Service Law authorizes the Public Service Commission (PSC) to issue an order that conditions access to public utility infrastructure by energy service companies (ESCOs) upon ESCOs capping their prices such that, on an annual basis, they charge no more for electricity than is charged by public utilities unless 30% of the energy is derived from renewable sources. We conclude that the Public Service Law, in authorizing the PSC to set the conditions under which public utilities will transport consumer-owned electricity and gas, has such authority.

Although the Court rejected the PSC's argument "that ESCOs fall within the definitions of 'gas corporations' and 'electric corporations' set forth in Public Service Law § 2" and were thus "subject to the PSC's direct rate-making authority under Public Service Law article 4," that did not end the inquiry. The PSC could nonetheless "condition access to utility infrastructure upon ESCOs' compliance with a price cap on gas or electricity" "under its authority to regulate *utilities*' transportation of ESCOs' gas and electricity" pursuant to Public Service Law § 5(1)(b).

"In other words, contrary to petitioners' arguments, the PSC is not charged solely with monitoring abuses of monopoly power by 'electric corporations and 'gas corporations,' i.e., utilities. Rather, in the context of its power to supervise the 'conveying, transportation, sale or distribution of gas ... and electricity' (Public Service Law § 5[1][b]), the PSC has always had the additional duty of preventing 'extortionate competition' and 'oppressive or discriminating charges' [citation omitted]."

The Local School Board's Attempt To Legislate Minimal Standards Governing The Pre-K Programs Of Charter Schools Which Receive State Funding — *Matter of DeVera*, 32 NY3d 423 [2018].

The dispute herein concerned the degree of authority that local school districts — here, the City of New York's Department of Education — could exercise over the pre-K programs of those charter schools that receive funds under the Statewide Universal Full-Day Pre-Kindergarten Program. Because the dispute turned on construction of the exceedingly dense statutes, I will provide no more than a gross overview of the issue and its resolution.

Notwithstanding that part of the justification for providing public funding of charter schools is that such may encourage the kind of creativity that will ultimately boost educational standards everywhere, the City of New York's Department of Education ("DOE") here made the pre-K funding for petitioner Success Academy contingent upon the latter's agreement to the terms of a 241-page contract that contained detailed provisions governing, *inter alia*, "field trips (capping the number at no more than three per year); playtime (setting a 'floor' at 2 hours and 7 minutes); and screen time (capping the amount at 30 minutes per week)."

Simply in terms of policy, there were arguments pro and con for DOE's action. Pro: DOE's standards assured that charter schools would meet at least some minimum standards in return for the provision of public monies. Con: DOE was trying to exercise such degree of control over charter schools as to effectively compromise the independence and creativity that the legislature expressly sought to preserve.

The majority chose the latter path per a decision by Judge Garcia. Judge Rivera, joined by Judge Wilson, took the opposing view. However, both opinions reached their respective conclusions not on the basis of policy per se, but instead on the ground that the governing statutes dictated that course and that such result also furthered the legislature's intent.

Note: The majority's ruling rested in part on the premise that "'[w]here the question is one of pure statutory interpretation' we 'need not accord any deference to an agency's determination and can undertake its function of statutory interpretation,'" *quoting Matter of Albano v. Board of Trustees of N.Y. City Fire Dept., Art. II Pension Fund*, 98 NY2d 548, 553 [2002].

Whether Department Of Corrections Owed Inmate With Statutory Housing Restriction A "Heightened" Duty To Find Compliant Housing — *Gonzalez v Annucci*, 32 NY3d 461 [2018].

Correction Law § 201(5) requires the Department of Corrections and Community Supervision (DOCCS) to provide inmates who are eligible for community supervision with substantial assistance in identifying appropriate housing. Here, the inmate in question was a level-one sex offender (second degree rape) who, as a result, needed housing at least 1,000 feet away from any school. This was apparently difficult to find, at least within petitioner's economic means within his community, the City of New York.

The issues, as framed by the majority, were, first, whether those circumstances created "a heightened duty of substantial assistance on DOCCS," and, second, whether DOCCS here complied with whatever duty it owed.

In terms of the facts, petitioner's inability to find compliant and affordable housing caused him to spend more than three extra years in incarceration, effectively resulting in the loss of his good time credit. During that time, DOCCS proposed two housing options. One was beyond his means and the other was a homeless shelter on Riker's Island. It denied him permission to live with his parents, which was his first choice and theirs, on the ground that it was too close to a school.

Held: The Court ruled by 5 to 1 vote per a decision written by Chief Judge DiFiore:[17]

> 1) Although "Correction Law § 201(5) requires DOCCS to assist inmates prior to release and under supervision to secure housing" (32 NY3d at 474), it does not have a "heighted burden" where, as here, the conditions placed on the inmate's housing render it difficult for the inmate to find compliant, affordable housing (*id*. at 472), and,
>
> 2) DOCCS satisfied its obligation in which DOCCS investigated (and rejected) all 58 residences proposed by the petitioner and "affirmatively identified at least two housing options for petitioner in New York City" (*id*. at 474-475).

Dissent: Characterizing DOCCS's treatment of the inmate as Kafkaesque, Judge Wilson opened his lengthy dissent with the following:

> Suppose you were moving to New York City and were looking for a place to live. As tens of thousands do each year, you turn to a real estate agent for assistance. You tell your agent the maximum rent you can afford and that you need an apartment within a certain proximity of a school, the subway and a park. The agent, however, does not give you a map of possible locations, or a set of listings, or even suggestions as to neighborhoods. Instead, the agent insists you play a game of real-estate Battleship: you guess an address, and the agent will tell you "hit" or "miss," depending on whether, based on the agent's inscrutable interpretation of your criteria, the address has a suitable apartment. After 58 misses and no hits, the agent finally proposes an apartment to you—one far outside of your price range. One more thing: until you win the game, *you cannot leave.* Have you been "assisted"?

[17] The seventh judge, Judge Rivera, concurred in part and dissented in part.

* * *

> … although Mr. Gonzalez's impeccable conduct while imprisoned earned him a substantial amount of good-time credit, he was stripped of that credit because he lost DOCCS's unwinnable game of real-estate Battleship. I am certain the Legislature intended neither the process nor the result here, and therefore dissent.

32 NY3d at 475-476.

Whether "Substantial Evidence" Supported School Board's Finding Of "Sexual Misconduct" — *Huag v State Univ. of New York at Potsdam*, 32 NY3d 1044 [2018], *rev'g* 149 AD3d 1200 [3d Dept 2017].

"Me Too" meets the "Substantial Evidence" barrier, and ultimately prevails.

This was an article 78 proceeding that arose from a public university's expulsion of a student on the grounds of sexual misconduct. The chief points of interest were,

> 1) the expulsion was based solely on hearsay inasmuch as the complainant declined to appear as a witness, and,
>
> 2) there was no claim, even in terms of the hearsay proof, that the complainant in any way said or signaled that she did not consent. Rather, the expulsion was based on the complainant's alleged failure to unambiguously convey that she did consent.

Facts: The facts are taken for the most part from the lengthier opinions in the Appellate Division.

It was undisputed that complainant and petitioner were students at SUNY Potsdam, that they had been friends for several years, that they "ran into" each other on the night in issue, and that complainant invited petitioner to her dorm room. It was also undisputed that they did have sexual intercourse, that complainant removed her own shirt, and that complainant shortly afterwards complained to a school official that she had been assaulted.

Petitioner's version of the operative facts was adduced at the subject hearing via his own testimony. The complainant's version of the events was related by the school official who had interviewed complainant and was based in large part on the official's notes of that interview. The two stories materially differed in several respects.

The complainant's version, based on the school official's testimony and notes, was that petitioner "tried in some manner to touch her once they got to the room" (149 AD3d at 1201), that petitioner thereafter "locked the door and led her to bed" (*id*.) and that the two began "making out" (*id*.). Complainant conceded that she had removed her own shirt and that she had never said or signaled "stop," but, on the other hand, that she never actually consented and that "she 'froze up' and did 'not respond' to petitioner's advances" (*id*. at 1202).

The complainant's claim of sexual misconduct was based upon the fact that the school's code of conduct provided that it was violative to engage in sexual relations unless there was "spoken words or

behavior that indicates, without doubt to either party, a mutual agreement to" proceed. So, accepting as true that complainant neither consented nor refused, petitioner's conduct would have constituted sexual misconduct.

Petitioner's version of the events differed on the critical issue of consent. He claimed, *inter alia*, that complainant "took off both of their shirts," that he then "removed the rest of their clothing and asked the complainant if she had any condoms," and that "she replied that she did not but that it was 'fine' and no reason to worry" (149 AD3d at 1202). However, bearing upon his own credibility, petitioner also said "that he had consumed a 'ridiculous' amount of alcohol on the night in question" (*id*. at 1206), which obviously could lead one to question his ability to accurately recall the events of the evening.

The Hearing Board "found petitioner guilty of sexual misconduct and recommended that he be … suspended for the remainder of the semester and directed to complete an alcohol evaluation and treatment program and a reflective paper on appropriate sexual conduct and consent" (149 AD3d at 1201-1202). When petitioner thereafter appealed to SUNY's Appellate Board, the penalty was increased to expulsion. Petitioner thereafter commenced the subject article 78 proceeding.

Appellate Division: The Appellate Division ruled by 3 to 2 vote that the Hearing Board's finding was not supported by "substantial evidence."

The majority ruling was, in the proverbial nutshell:

> It is not clear to us that a reasonable person could find from these hearsay accounts an absence of "behavior that indicate[d], without doubt to either party, a mutual agreement to participate in sexual intercourse," as to do so would require overlooking the complainant's admission that she removed her shirt when sex was suggested. Indeed, the only path to finding a lack of consent under these circumstances would be to make inferences that do not reasonably follow from the hearsay accounts of what the complainant said.

149 AD3d at 1202.

As such, the majority's problem was not per se that the finding of misconduct was based entirely on hearsay. Nor did it have a problem with the school standard providing that the absence of very clear consent was tantamount to refusal. However, it felt that even wholesale acceptance of the school official's testimony as to the complainant's statements did not, in its view, negate that there had been affirmative consent. The majority added that "[w]hile nothing in the student code of conduct expressly prohibits the Appellate Board from recommending, and SUNY's president from ultimately imposing, a more severe sanction upon a disciplined student's appeal," it was "troubled by the absence of any such clear articulation that an enhanced penalty may result from a student's choice to appeal the underlying determination and believe that, in this context, fairness warrants a clear and conspicuous advisement to that effect" (*id*. at 1203).

The two dissenters stressed that the "substantial evidence" standard was a very minimal standard which, in their view, was here met. As for the fact that petitioner had not had any opportunity to confront his accuser, they observed: "even when afforded an opportunity to challenge the hearsay evidence against him, petitioner declined to question the individuals who interviewed the complainant after the incident" (149 AD3d at 1204).

Held: The Court of Appeals reversed by 6 to 1 vote in a memorandum opinion.

In so doing, the Court said,

1) "'[t]he substantial evidence standard is a minimal standard'" and "'demands only that a given inference is reasonable and plausible, not necessarily the most probable'" (32 NY3d at 1045-1046),

2) "[w]here substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently" (*id*. at 1046),

3) "hearsay is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds" (*id*.), and,

4) "[c]ontrary to petitioner's argument, the hearsay evidence proffered at the administrative hearing, along with petitioner's testimony, provides substantial evidence in support of the finding that he violated respondents' code of conduct" (*id*.).

Judge Fahey dissented "for reasons stated in the majority opinion of the Appellate Division" (32 NY3d at 1047).

Judicial Review Of SDHR Determination That Petitioners Engaged In Discriminatory Practices Against A Complainant Who Allegedly Required A Dog Due To Her Disability — *Delkap Mgt., Inc. v New York State Div. of Human Rights*, 33 NY3d 925 [2019], *rev'g* 144 AD3d 1148 [2d Dept 2016].

Although the facts cannot be gleaned from the Court's one-paragraph ruling, the complainant, who was a resident in a cooperative housing project, alleged that the coop's Board of Directors discriminated against her by virtue of her disability (*i.e.*, that she had been diagnosed with "rheumatoid arthritis … which [made] walking difficult, as well as with supraventricular tachycardia and cardiac arrhythmia in 2008, which cause palpitations, lightheadedness, and sleeplessness" [144 AD3d at 1149]).

Complainant filed "an administrative complaint with the New York State Division of Human Rights (hereinafter SDHR), charging, inter alia, that the petitioners had engaged in unlawful discriminatory practices relating to housing in violation of Executive Law article 15" (*id*.), that is, the Human Rights Law.

Basically, complainant had acquired a dog in violation of the Coop's "no dogs" policy. Although complainant contended that she needed a dog due to her disability and had presented the Board with medical proof to that effect, petitioners "refused to consider the complainant's request for a reasonable accommodation, directed her to remove the dog, and fined her $740, which consisted of $300 for a dog fine and $440 for the petitioners' legal fees" (144 AD3d at 1149). When complainant then filed a formal complaint with the SDHR, petitioners responded by, *inter alia*, revoking her parking privileges.

The ALJ ruled in complainant's favor, finding "that the Coop had discriminated against the complainant in the terms, conditions, and privileges of her housing on the basis of of her disability, and that she should have been allowed to keep the dog in her apartment as a reasonable accommodation for her disability" (*id*. at 1150). "The ALJ also determined that the respondents retaliated against the complainant for opposing the discrimination and filing a complaint with the SDHR" (*id*.). Those findings were thereafter adopted by the Acting Commissioner of the SDHR, who "directed the petitioners to pay

$5,000 to the complainant in compensatory damages for mental anguish and $10,000 in punitive damages, assessed a $5,000 penalty upon each petitioner payable to the State, and directed the petitioners to create and implement standard policies and procedures to evaluate shareholders' requests for reasonable accommodations and to develop and implement training to prevent unlawful discrimination" (*id*.).

On further appeal, the Appellate Division for the Second Department ruled:

> 1) the DSHR's finding that "the dog was actually necessary in order for [complainant] to enjoy the apartment" was not supposed by "substantial evidence," particularly in light of the fact that "complainant had resided in the apartment for more than 20 years without the dog" (144 AD2d at 1151), and it logically followed that "the SDHR's determination of discrimination based on her disability was not supported by substantial evidence" (*id*.); and,
>
> 2) "the SDHR's determination that the petitioners retaliated against the complainant for engaging in protected behavior was supported by substantial evidence" (*id*.) inasmuch as petitioners failed to "to present legitimate, independent, and nondiscriminatory reasons to support their actions" in, *inter alia*, " taking away the complainant's designated parking space for a nine-day period, refusing to accept her maintenance checks, filing eviction proceedings against her, falsely informing her that the SDHR had ruled in the petitioners' favor, and directing her to immediately remove her dog from her apartment" (*id*. at 1152-1153).

The Appellate Division further ruled that the amounts awarded by the SDHR "were excessive, as this Court has determined that the complainant did not establish by substantial evidence that the petitioners discriminated against her due to her disability" (*id*. at 1152).

Held: The Court of Appeals ruled in a memorandum opinion by 5 to 2 vote that the Appellate Division erred in setting aside "a portion of the agency's determination" and that the petition should have been dismissed in its entirety.

The two dissenters would have affirmed for the reasons stated by the Appellate Division.

Administrative Determination Requiring Public Authority and Its Subsidiary To File Separate Financial Reports — *Madison County Indus. Dev. Agency v Authorities Budget Off.*, 33 NY3d 131 [2019], *aff'g* 151 AD3d 1532 [3d Dept 2017].

The lower courts perceived the issue as to whether the Madison County Industrial Development Agency (MCIDA), an "industrial development agency" created under Public Authorities Law article 18-A, had statutory authority to create a subsidiary of itself, the Madison Grant Facilitation Corporation (MGFC). They answered in the negative.

The Court of Appeals construed the issue as instead being whether the New York State Authorities Budget Office (ABO) abused its discretion in requiring the parent and the subsidiary to file separate budget/audit reports inasmuch as that was the determination that here gave rise to everything else. (Per the Court's unanimous ruling: "Under the Public Authorities Accountability act (PAAA), every 'local authority,' as that term is defined in Public Authorities Law § 2(2), is obligated to file certain annual, budget and independent audit reports …").

Held: In a unanimous ruling penned by Chief Judge DiFiore, the Court held that the ABO's determination to require separate filings was not contrary to law inasmuch as "[t]he Public Authorities Law plainly provides that a local development corporation such as MGFC, which is 'affiliated' with a local IDA, is also a local authority subject to the PAAA and, as such, has reporting obligations (Public Authorities Law § 2[2][d])."

Nor was the ABO's determination "irrational," "arbitrary" or "capricious." The rule in issue was intended to promote greater transparency, which was also one of the key objects of the statutes that empowered the ABO to do as it did. Public Authorities Law §§ 2800-2806.

Finally, while the ABO's website said that some subsidiaries of public authorities could file consolidated reports with the parent authority, such did not render the ABO's insistence upon separate reports an abuse of discretion, particularly "as the ABO asserts without contradiction, the agency has never permitted a purported subsidiary of a local IDA to file consolidated reports and, thus, no claim of inconsistent or discriminatory enforcement is advanced here."

Whether MHLS Had Standing To Commence An Article 78 Proceeding Which Sought A Writ Of Mandamus Compelling The Medical Provider To Provide A Complete Copy Of Each Patient's Hospital Record In Advance Of Any Hearing Concerning A Challenge To The Patient's Involuntary Confinement — *Mental Hygiene Legal Service v Daniels*, 32 NY3d 652 [2019], *rev'g* 158 AD3d 82 [1st Dept 2017].

As was noted in Chief Judge DiFiore's majority opinion, a patient who challenges his or her involuntary admission to a mental health facility is entitled to, a) request a hearing before a judge, and, b) demand "a record of the patient" in advance of the hearing.

Up until relatively recently, the Bronx Psychiatric Center (BPC) would bring the patient's entire clinical chart, usually consisting "of one or two binders totaling hundreds of documents," to the hearing itself and this satisfied the Mental Hygiene Legal Service (MHLS). However, starting in 2016, MHLS purportedly became aware that documents were being added to and removed from the binders just before the binders arrived at the hearing. MHLS accordingly "filed this CPLR article 78 petition in the nature of mandamus, in its own name – and separate from any specific client or proceeding – seeking an order compelling BPC to provide copies of a patient's entire clinical chart when it provides notice of a request for an admission or retention hearing."

This gave rise to two issues. First, did MHLS have standing to commence the proceeding. Second, and assuming that MHLS had standing to do so, was it entitled to the patient's entire chart. As to the latter issue, "BPC argued that Mental Hygiene Law § 9.31 does not clearly require it to provide copies of a patient's clinical chart as the phrase 'record of the patient' is defined in section 9.01 to encompass the application and accompanying physician certificates relevant to initiation of the legal proceeding – not a patient's medical records."

The Appellate Division split 3 to 2. The majority ruled in favor of MHLS on both issues. The dissenters would have ruled for BPC on both issues. As to the latter issue, the dissenters would have ruled that MHLS was "entitled to copy for itself any part of a patient chart it needs to represent the patient at a retention hearing," but that it had "no right to demand that BPC (or any similar facility) bear the expense of providing MHLS with a copy of the entire chart" (158 AD3d at 100, Dissent).

Held: The Court ruled by 4 to 3 vote that MHLS lacked standing to commence the mandamus proceeding.

The Chief Judge's majority opinion reasoned,

1) "a party challenging governmental action must meet the threshold burden of establishing that it has suffered an 'injury in fact' and that the injury it asserts 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted,'" and,

2) MHLS here "failed to allege – much less establish – that it has suffered an injury in fact within the protected zone of interests as a result of the asserted violation of Mental Hygiene Law § 9.31."

The majority did not reach the merits.

Dissent: Judge Rivera penned a dissent with which Judges Fahey and Wilson concurred.

The dissent charged that the majority "misconstrue[d] the jurisprudential underpinnings of our party-standing doctrine, which are designed to ensure that the plaintiff is a proper party to seek judicial review and that resources are conserved for those cases where the party asserts an injury."

In this regard, while the dissent agreed that the "flexible party-standing jurisprudence" required that the plaintiff "allege an injury in fact that falls within the zone of interests sought to be promoted or protected by the statute," "plaintiff's standing is always judged in light of the prudential concern that animates the rule" and such dictates that "a plaintiff's burden to establish standing is substantially diminished where a statute identifies them as a beneficiary of the government's duty or obligation giving rise to the plaintiff's claim."

Here, inasmuch as "BPC's practice of not providing a copy of the complete record before the hearing violates BPC's statutory obligation and places MHLS in the position of representing a patient without benefit of an advance copy of the patient's full medical records," MHLS "easily" established standing. The majority's contrary finding was, the dissent charged, premised "in part based on the erroneous premise that MHLS must establish economic harm."

In the dissenters' view, it was "wholly anomalous for the majority to conclude that an unnamed party (an Article 9 patient) has standing to sue, but the party chosen by Legislature for special treatment under the statute (MHLS) cannot pursue a claim for alleged violation of the government's duties and obligations to that named party."

On the merits, the dissenters would have ruled that BPC's construction of Mental Hygiene Law § 9.31 was erroneous and even "nonsensical" and that BPC was obligated to produce the patient's entire chart. As has already been noted, the majority did not reach the issue.

Whether The New York State Justice Center For The Protection Of People With Special Needs Can Investigate Abuse Arising From Systemic Deficiencies As Opposed to Employee Wrongdoing — *Anonymous v Molik*, 32 NY3d 30 [2018], *rev'g* 141 AD3d 162 [3d Dept 2016].

By 6 to 1 vote, the Court held that the Justice Center for the Protection of People with Special Needs acted within its authority when it required petitioner to undertake certain remedial measures after the same resident committed three sexual assaults within a six-month period at petitioner's residential health care facility.

Held: Judge Garcia's majority opinion noted that "[i]n 2012, the Protection of People with Special Needs Act was enacted to create a set of uniform safeguards to bolster the protection of people

with special needs in New York." The Act created the New York State Justice Center for the Protection of People with Special Needs. "Among other things, the Justice Center maintains a statewide central register—the Vulnerable Persons' Central Register—which operates a 24–hour hotline created to field allegations of reportable incidents." The procedure as to the Justice Center's consequent investigations are detailed in Social Services Law § 493.

Petitioner here argued "that Social Services Law § 493(3)(a)(i) provides the exclusive grounds for a 'substantiated' finding of abuse or neglect" and that, per the statutory language, the Justice Center is not authorized to substantiate a report of abuse or neglect against a facility where the incident results solely from systemic deficiencies, rather than any employee wrongdoing. The Court deemed such construction at odds with the statute's purposes:

> Under petitioner's construction of the statute, the Justice Center's determination that a "systemic problem" caused or contributed to an incident of abuse or neglect would not, by itself, trigger any consequences. Petitioner maintains that the *only* "substantiated" findings of neglect are those provided in section 493(3)(a)(i), and that *only* those "substantiated" findings are categorized and remediated under subdivisions (4) and (5); a "concurrent finding," then, would *not* trigger categorization under subdivision (4) and, as such, would *not* trigger corrective action under subdivision (5). The statute's remedial provisions would be entirely inapplicable unless, under (3)(a)(i), a particular employee is also deemed responsible, or no perpetrator can be identified (Social Services Law § 493[3][a][i]). The Justice Center would therefore be unable to take corrective action where, as here, an employee is identified as the "subject" of a report but is ultimately found not responsible because the incident was caused by deficient facility conditions rather than any employee wrongdoing (*see* Social Services Law § 493[3][a][ii]). It would similarly be unable to forward information to the Medicaid inspector general that may be relevant to an investigation of unacceptable practices, including facility practices amounting to fraud or abuse (*see* Social Services Law § 493[2]).
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> * * *
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> Petitioner's narrow construction of the statute would paradoxically leave the Justice Center powerless to address many systemic issues, defeating the purpose of the Act and preventing the Justice Center from protecting vulnerable persons where it is most critical to do so.
>
> * * *
>
> Consistent with the goals of the Act, the Justice Center's interpretation of the statute would allow for a finding of neglect against a facility wherever "a systemic problem caused or contributed" to an incident—regardless of whether the allegations against an individual employee are substantiated—thereby enabling the Justice Center to direct the facility to formulate a plan to fix the systemic problem.

* * *

> This construction also furthers the Justice Center's intended role as the central agency responsible for managing and overseeing the incident reporting system, and for imposing or delegating corrective action (*see* Social Services Law § 492[3][c]; Executive Law § 553). As the Act and its legislative history make clear, pre-existing State systems, which dispersed oversight responsibility among at least six state offices, suffered from "numerous gaps and inconsistencies" as well as substantial "variations across state agencies" (Sponsor's Mem., Bill Jacket, L 2012, ch 501 at 12, 14).

* * *

> The Justice Center's construction of Social Services Law § 493 gives meaning to each provision of the statute, enabling it to address systemic issues at a facility or provider agency regardless of whether or not allegations against a particular employee are also substantiated. Consistent with the legislative history and underlying purpose of the statute, this interpretation assigns to one state agency—the Justice Center—the primary and comprehensive responsibility for protecting a particularly vulnerable population. Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to the Appellate Division for consideration of issues raised but not determined on appeal to that court.

Dissent: Judge Rivera rejoined that the majority's construction ignored part of the statute's language:

> To read the statute as the majority does here, so that the concurrent finding may stand on its own as the finding of abuse or neglect in order to bring the petitioner within paragraphs (4)(d) and (5)(c), the Court has to ignore the language of section 493(b). We are not at liberty to do so because "[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation" (Stat Law § 76 [McKinney]). If the legislature intended that a concurrent finding would serve independently as a finding of abuse or neglect, bringing the facility or provider under sections 493(4)(d) and (5)(c), it would have said so in paragraph (3)(b), or included a "finding of a systemic problem" in the list of possible findings set forth in paragraph (3)(a).

Failure To "List" Sex On The Designating Petition — *Mintz v Board of Elections In the City of New York*, 32 NY3d 1054 [2018], *aff'g* 164 AD3d 442 [1st Dept 2018].

Section 2-102[4] of the Election Law expressly permits the state committee of the political parties to provide for equal representation of the sexes. The statute states:

> The state committee may provide by rule for equal representation of the sexes on said committee. When any such rule provides for equal representation of the sexes, the designating petitions and primary ballots shall list candidates for such positions separately by sex.

Here, two positions on the State Committee for the Democratic Party were open: one designated for a female Member and one for a male Member. Petitioner Penny Mintz at all times self-identified as female but failed to specify on her designating petition that she sought the female vacancy. After the respondent Board of Elections initially published a Record of designating petitioners which listed petitioner as a candidate for female State Committee it subsequently "determined that petitioner had a 'Prima Facie defect' because she failed to state that she was seeking to be the female State Committee Member" (164 AD3d at 442, Dissent). Ms. Mintz here challenged that determination.

Supreme Court ruled against petitioner, writing that it was "constrained" to follow the decision in *Bosco v. Smith*, 104 AD3d 462, 462 [2d Dept 1984], *aff'd* "*for reasons stated in the memorandum at the Appellate Division*," 63 NY2d 698 [1984].

Appellate Division: The Appellate Division affirmed "for the reasons stated by Edmead, J." by 3 to 2 vote.

The two dissenters would have distinguished *Bosco* on the ground that "[t]hat decision focused on potential confusion caused by the candidates' failure to 'designate their respective sexes anywhere on the designating petitions' in a race in which both the male and female slots were open, one candidate used an initial in place of a full first name, and there was no other indication of that candidate's gender on the designating petition" (164 AD3d at 443). Here, in contrast, petitioner had "a recognizably female name" and there was no indication that anyone was confused or mislead (*id*.). They added: "the 1,900 signatories who wanted petitioner's name to be on the ballot should not have their selection invalidated where there was no likelihood that any of them thought petitioner was a man or was running for the male slot" (*id*.).

Held: The Court of Appeals affirmed in a memorandum opinion by 6 to 1 vote. Inasmuch as the governing statute specifically said "the designating petitions ... shall list candidates for such party positions separately by sexes," "the courts below did not err in denying the petition to validate the designating petition due to the failure to specify whether the office sought was that of male or female member of the state committee" (32 NY3d at 1055).

Dissent: Judge Wilson dissented on a variety of different grounds, including that the statute required that the designating petitions and primary ballots "list" rather than "identify" the constituents by sex.[18] However, I suspect the main reason was likely the last one, to wit:

> The Election Law evinces a clear directive that absent a serious concern with fraud, persons wishing to run for office should not be shut out of elections by court-sanctioned strict adherence to technical requirements. No such concerns exist here.

32 NY3d at 1060, Dissent.

[18] The judge explained the difference by means of an example that involved a grocery list.