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Long past are the days when Philippe Petit could earn the acclaim of millions by traversing the twin towers of the World Trade Center on a high wire. Today, even a carefully thought-out plan to jump off the Empire State Building may result in an indictment.

The Appellate Division, First Department this month considered whether an unsuccessful attempt to parachute off the Empire State Building's observation deck could support a charge of reckless endangerment in the second degree. Bolstering the already-compelling array of arguments against flinging one's self from a large edifice, the First Department found that a second-degree reckless endangerment charge would be appropriate, even if the jumper professed to look before he leaped.

That decision is summarized below, along with other novel and interesting legal rulings from the state's intermediate appellate courts during the past three months.

First Department

Lesser Included Offense. A carefully planned parachute jump from the top of the Empire State Building may not be reckless endangerment in the first degree (a felony) without the requisite mental state of depraved indifference, but it can support an indictment for the lesser included offense of reckless endangerment in the second degree (a misdemeanor), according to the First Department in *People v. Corliss*.[1] The unanimous opinion, authored by Justice David B. Saxe (See Profile), reversed the dismissal of an indictment on the misdemeanor count of daredevil Jebb Corliss, whose attempt to jump off the Empire State Building in 2006 was thwarted by building security. While second-degree reckless endangerment "does not entail the mental state of depraved indifference," Justice Saxe explained, it rests upon conduct that "creates a substantial risk of serious physical injury to another person." The First Department found the evidence before the grand jury amply sufficient to establish such a risk. Justice Saxe explained that "[n]ot only were 30- to 40-mile-per-hour winds gusting out of the north, making mishaps more likely, but even an accidental misstep, or a hand or object reaching through the security fence and accidentally pushing, rather than grabbing him, could have sent defendant into the air, where a faulty parachute would result in a likelihood of death not only for defendant but for people on the ground." The court also observed that Mr. Corliss' planned stunt created risks of serious physical injury to the building security staff, to bystanders in the vicinity, and to people in the

street if a stray object were to fall from the roof and "become a lethal projectile."

Commercial Advertising. Think twice before faxing that unsolicited update on your legal specialty. A lawyer's unsolicited faxes reporting on developments in legal malpractice violated the Telephone Consumer Protection Act of 1991 (TCPA),[2] a divided panel of the First Department held in *Stern v. Bluestone*.[3] The TCPA prohibits the unsolicited faxing of "any material advertising the commercial availability or quality" of services. In this case, each fax consisted of a one-page essay on legal malpractice and included contact information for the law offices of defendant Andrew Lavoott Bluestone, who concentrates his practice on that area. Upholding an award against Mr. Bluestone, the unsigned 3-2 memorandum decision found it "clear" that the faxes "indirectly proposed a commercial transaction." Disclaimers in Mr. Bluestone's reports, cautioning that they were "not an advertisement of the availability of services" and were "[p]resented as an [e]ducational document," did not remove the faxes from the realm of commercial advertising. "[M]erely stating on the faxes that they are not advertisements of the availability of services does not make it so, nor should it allow [Mr.] Bluestone to evade the prohibitions of the TCPA," the court wrote. The imposition of treble damages for a "willful or knowing" violation was justified, the court continued, because Mr. Bluestone had been served with a similar complaint in 2003, which resulted in the entry of summary judgment against him in 2004.

Work Product. Does the client's right to view attorney work product extend to absent class members? No, the First Department held in *Wyly v. Milberg Weiss Bershad & Schulman LLP*,[4] a unanimous decision authored by Justice Eugene Nardelli (See Profile). "[T]he relationship between appointed counsel and an absent class member in a class action differs fundamentally from that found in the traditional [attorney-client] relationship," Justice Nardelli explained. Specifically, absent class members have "no right to direct the course of litigation, testify at trial, participate in discovery, or dismiss class counsel." Thus, precedents decided in the context of a non-class attorney-client relationship should not apply to absent class members. The absent class member's status, "coupled with the potential for class counsel to be unduly burdened, even after the end of litigation, by a multitude of requests from absent class members for counsel's entire file," led the First Department to reject a "blanket extension" to absent class members of the client's right to obtain work product.

Second Department

Vicarious Liability. It must have raised a few eyebrows when a trial judge in Queens County struck down, as an unconstitutional enactment in excess of congressional power under the Commerce Clause, a 2005 federal statute that eliminated vicarious liability for professional lessors and renters of vehicles. Why, one might ask, can't the federal government promote automobile leasing by overriding the doctrine of vicarious liability, even when that doctrine is codified in state statutes like N.Y. Vehicle & Traffic Law §388? In *Graham v. Dunkley*,[5] a unanimous decision written by Justice Edward D. Carni (See Profile), the Second Department decided that the federal government had not exceeded its authority. The 2005 statute provided that persons in the business of renting or leasing automobiles "shall not be liable under the law of any State

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. . . by reason of being the owner of the vehicle."[6] The Second Department found this provision to be within Congress' powers under the Commerce Clause because it "aids in the regulation of the national market for leased and rented automobiles."

As Justice Carni wrote, "[t]here can be no real dispute that the rental and lease of vehicles, and the conditions under which such transactions occur, are economic activities which impact the national market." The fact that the federal statute regulates economic activity by preempting a rule of New York tort law "does not make it unconstitutional." As a result, the Second Department concluded, "actions against rental and leasing companies based solely on vicarious liability may no longer be maintained."

Amended Pleadings. Overruling a line of decisions stretching back 52 years, the Second Department held in *Lucido v. Mancuso*[7] that a motion to amend a negligence complaint to add a claim for wrongful death is subject to the familiar standard that leave to amend shall be "freely given."[8] In a decision authored by Justice Stephen G. Crane (See Profile), who retired from the bench shortly afterward, the unanimous panel rejected the requirement of cases dating back to 1955 that an amendment to a personal injury complaint adding a cause of action for wrongful death must be supported by "competent medical proof" of the causal connection between the alleged negligence and the original plaintiff's death.

Examining the development of the "competent medical proof" requirement, Justice Crane observed that no case has "supplied, or attempted to supply, a rationale for the rule, much less a contemporary one." The CPLR, in contrast, requires "[n]o evidentiary showing of merit." Instead, "[i]f the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment."

Third Department

Recusal. When a judge recuses himself from a criminal case to avoid the appearance of impropriety, the judge cannot later issue a search warrant directed against the same defendant, a unanimous panel of the Third Department ruled in *People v. Alteri*.[9] Both justices for the Town of Ticonderoga had recused themselves from hearing a case against an emergency dispatcher for the town, based on their "close working relationship" with the defendant and his unit. Although the case was transferred to another town, a month later, the Ticonderoga police chief sought and obtained, from one of the recused judges, a search warrant directed at the defendant, which yielded an additional charge. Noting the "fundamental constitutional requirement" that a valid search warrant be issued by a "neutral, detached magistrate," the unanimous decision by Justice Karen K. Peters concluded that the judge's earlier recusal invalidated the warrant and required suppression of the evidence obtained during the search.

Civil Unions. A decedent's same-sex partner in a Vermont civil union was not entitled to surviving spouse death benefits under New York Workers' Compensation Law §16(1-a), a divided panel of the Third Department ruled in *Langan v. State Farm Fire & Casualty*.[10] Writing for a 4-1 majority, Justice Anthony T. Kane noted that the court had previously defined the statute's term "legal spouse" to mean "a husband or wife of a lawful marriage" in holding that a surviving domestic partner was not entitled to death benefits. Here, Justice

Kane held, neither the doctrine of comity toward other states nor the U.S. Constitution's Equal Protection Clause required a different result. In the Third Department majority's view, the decision to extend workers' compensation death benefits to same-sex civil unions "is a decision to be made by the Legislature after appropriate inquiry into the societal obligation to provide such benefits and the financial impact of such a decision."

Fourth Department

Same-Sex Marriages. Same-sex partners who validly marry under the laws of another country are entitled to recognition of their marriage in New York for the purpose of obtaining spousal health care benefits, the Fourth Department held in *Martinez v. County of Monroe*.[11] For over a century, New York has recognized marriages solemnized elsewhere, so long as they are not prohibited by this state's "positive law" and are not contrary to "natural law" (i.e., do not involve incest or polygamy). In a unanimous opinion by Justice Erin M. Peradotto, the Fourth Department panel observed that the "positive law" exception did not apply because New York's Legislature has not prohibited the recognition of same-sex marriages validly contracted outside of New York. The panel then determined that the "natural law" exception did not apply because it "cannot be said" that same-sex marriages are "offensive to the public sense of morality to a degree regarded generally with abhorrence."

The panel also rejected the claim that same-sex marriages are contrary to New York public policy under the Court of Appeals' decision in *Hernandez v. Robles*.[12] *Hernandez* "holds merely that the New York State Constitution does not compel recognition of samesex marriages solemnized in New York," the court wrote. Because *Hernandez* noted that the Legislature could enact legislation validating same-sex marriages, Justice Peradotto reasoned, such marriages cannot be against New York's public policy, and thus are entitled to recognition unless and until the Legislature acts otherwise.

Search Warrants. For the results of a search to be upheld, it isn't enough for the police to obtain a warrant: the police must actually know what they are supposed to be searching for, which means the supervising officer must know the warrant's content before commencing the search. That's the conclusion reached by the Fourth Department in *People v. Ellison*,[13] a unanimous memorandum opinion. Following an undercover officer's purchase of cocaine in the suspect's apartment, police secured the apartment and sought a warrant to search it and to seize the cash and cocaine inside. When notified by phone that a warrant had been secured, the police began the search.

The Fourth Department held that the evidence found in the apartment should have been suppressed because the supervising sergeant was not aware of the actual content of the warrant after it was signed by the issuing judge. According to the panel, the fact that a "routine search warrant application" had been submitted, and the fact that the judge had signed the warrant as it was presented without adding any limitations, "[did] not provide the police with the requisite knowledge of its contents in order to begin a search before having the warrant in hand."

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Endnotes:

1. 2008 N.Y. Slip Op. 01869 (1st Dept. March 4, 2008).
2. 47 U.S.C. §227.
3. 2008 N.Y. Slip Op. 00611 (1st Dept. Jan. 31, 2008).
4. 2007 N.Y. Slip Op. 10506 (1st Dept. Dec. 27, 2007).
5. 2008 N.Y. Slip Op. 00958 (2d Dept. Feb. 1, 2008).
6. 49 U.S.C. §30106.
7. 2008 N.Y. Slip Op. 00952 (2d Dept. Feb. 1, 2008).
8. CPLR 3025(b).
9. 2008 N.Y. Slip Op. 00302 (3d Dept. Jan. 17, 2008).
10. 2007 N.Y. Slip Op. 10438 (3d Dept. Dec. 27, 2007).
11. 2008 N.Y. Slip Op. 00909 (4th Dept. Feb. 1, 2008).
12. 7 N.Y.3d 338 (2006).
13. 2007 N.Y. Slip Op. 10204 (4th Dept. Dec. 21, 2007).

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