# KNOWLEDGE IS POWER

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## Inside this issue


His Mother's Son.....1
Cleaning House
All Bound Up
No Good Deed ... .....2
The Results Are In
Tour De Smithtown?
No Mystery Here
The D.A.'s Got No Appeal....3
Like Fish?
What Do You See?
This Is Funky.....4
A Fractured Result
Legends Of The Fall
Deputy Negligent?
Doggone Suspicious .....5
Tired?
Dr. No, No, No
Dreading Treadmills .....6
Zambonied!
Feel The Heat?
A Poke In The Eye
Go Figure .....7
Cementhead?
Making Sense Of Nonsense
Fingered!.....8


## HIS MOTHER'S SON

Although Bertrand Girigorie claimed he had "succession rights" to his mother's apartment, the New York City Department of Housing Preservation and Development (HPD) didn't agree, because the guy couldn't establish he had lived with his mom for the requisite period prior to her demise.

When he filed suit with the New York County Supreme Court to have HPD's determination annulled, that court granted relief in Girigorie's favor and gave him another opportunity to prove that he lived in the unit during the relevant timeframe.

On appeal, the Appellate Division, First Department, thought HPD's denial of succession rights had a rational basis, since Girigorie couldn't demonstrate that his mother's apartment was his primary residence for the two-year period immediately preceding her death. In the AD1's view, giving Girigorie extra time to produce evidence wasn't productive, particularly since he wasn't able to show that he had filed a NYC income tax return (or that he hadn't been obligated to do so).

They sure cut that cord.

## CLEANING HOUSE

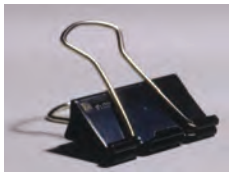
Sherman Rivers allegedly tried to sell a piece of real estate that he didn't really own and, in order to deliver the building vacant, supposedly paid some thugs to burn the place down.

Even though the Kings County Supreme Court allowed the prosecutor to ask some improper questions during the course of the criminal trial, the Appellate Division, Second Department, still affirmed Rivers's conviction on three counts of arson in the first degree.

Because the evidence against Rivers was so "overwhelming" that he would have been convicted in any event, the AD2 found the trial judge's error to be "harmless." (But because of a sentence-related discrepancy, the AD2 did direct that the guy be resentenced.)

The hungry judges soon the sentence sign....

## ALL BOUND UP

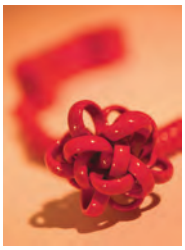


When Adam Benham sued his former landlord, Richard George, for the return of a security deposit, everyone agreed to binding arbitration and waived the right to file an appeal.

After the arbitrator awarded Benham $965, George sought to have the outcome vacated, and appealed when the Queens County Civil Court denied that request.

Since an arbitrator's decision can only be overturned in limited instances, such as when the arbitrator isn't impartial or exceeds his power, and because George wasn't able to show a basis for reversing the award, the Appellate Term, Second Department, upheld the lower court's determination.

Bye George!



## NO GOOD DEED ...

While on vacation, Octavio Ramos's lawyer got a phone call from the other side's counsel asking to delay the start of a trial. Because he assumed the postponement request would be granted by the judge, Ramos's lawyer didn't appear in court on the scheduled date.

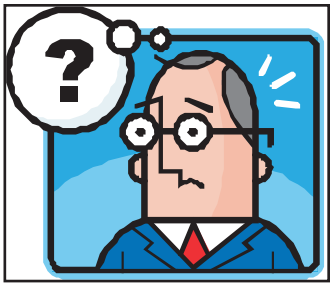
As luck would have it, the judge refused to delay the case, went ahead with the hearing, and found Octavio Ramos in default. After the New York County Civil Court denied a request to have that default vacated, Ramos appealed to the Appellate Term, First Department.

Although his lawyer's excuse was "hardly overwhelming," the AT1 deferred to a long-standing policy preference that cases be heard "on their merits."

While the attorney should have confirmed any postponement, and should have been ready to proceed with the trial, the appellate court still thought his conduct was "excusable law office failure," and reinstated the suit.

Isn't failure a fertilizer?

## THE RESULTS ARE IN




After a jury found Deland Eng liable for Zuo De Hu's injuries, the judge denied Eng's request to poll the jury.

When the judge refused to vacate the verdict based on that denial, Eng appealed. And since he had an "absolute" right to speak to the jury at the end of a case, the Appellate Term, Second Department, sent the case back for a do-over.

Poll that!

## TOUR DE SMITHTOWN?

Angela Pagano and her mom filed a personal-injury case against the Town of Smithtown, after the kid hit a sidewalk defect and was injured when she fell off her bike.

When the Suffolk County Supreme Court denied a request to have the case thrown out, the Town appealed.

Because Pagano didn't properly oppose the motion--by raising an "issue of fact" or rebutting a Town Clerk's affidavit that no prior notice of the problem had been given--the Appellate Division, Second Department, reversed and dismissed.

A letter as to the sidewalk's poor condition (received some three years before the accident) wasn't enough notice of the defect which later led to the kid's injuries.

Hope they didn't lose faith.

## NO MYSTERY HERE

George Drew bought a thirteen year-old car from Paul Orlick and, after he discovered that the signal switch didn't work, sued the seller to recover the repair costs. When the Nassau County District Court dismissed the case, Drew appealed.

Because the malfunction could have been discovered during a test drive, or by an inspection of the vehicle, and since no misrepresentations were made by the seller, the Appellate Term, Second Department, signaled its agreement with the dismissal.

Is that the end of the case, Drew?



**Knowledge Is Power Initiative Ltd (KIP)** is a not-for-profit entity formed for educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

KIP's goal is to cultivate, develop and advance citizens' awareness of their rights and obligations under the law. This hard-copy newsletter, which is distributed free of charge, is just one way KIP realizes its mission.

Ultimately, by utilizing legal information as an empowerment tool, we hope our readers will develop a greater appreciation for the legal system's role and function.

## THE D.A.'S GOT NO APPEAL

In response to a notice it received from the Queens County District Attorney's Office, 37-01 31st Avenue Realty Corporation filed a holdover proceeding against one of its tenants, alleging that the occupant had engaged in an "illegal business."

When that case got dismissed by the Queens County Civil Court, the D.A. appealed to the Appellate Term, Second Department.

While prosecutors had the authority to direct the landlord to initiate the litigation, since the D.A. didn't bring the case, and lacked standing to appeal or to force the landlord to do so, the AT2 was constrained to leave the dismissal undisturbed.

(Obviously, had the D.A. brought the holdover, it would have been able to challenge the Civil Court's determination.)

You can't always get what you want.

## LIKE FISH?

After William Maher's lease expired, his landlord sued to recover "fair-market rent" (or "use and occupancy") while Maher's "guest" continued to occupy the apartment.

Although the New York County Civil Court held the tenant responsible for his occupant's holding-over, it refused to award relief for the time it took the landlord to effect the eviction.

On appeal, the Appellate Term, First Department, agreed that the failure to return an empty apartment to the landlord exposed the tenant to liability. It also refused to hold the tenant responsible for any post-judgment delay, which was found to be due, in part, to the landlord's "inaction." (In the AT1's view, to hold otherwise would leave a tenant "perpetually liable.")

Think that stunk?

## WHAT DO YOU SEE?

Alfred Rosenthal's contract provided that he would receive a 10% commission on the sale of Quadriga Art's products.

While both sides had the right to end the deal on 30 days' notice, two obligations supposedly survived termination: Rosenthal couldn't engage in business with any of the company's customers for a three-year period, and Quadriga would continue to pay a commission on those products purchased by Rosenthal's customers during that same timeframe.

When Alfred died, his wife, Gloria, sued for payment of the commissions, and ended up filing an appeal after the New York County Supreme Court threw her case out.

Because the payments were in exchange for Alfred refraining from competing against the company, and the agreement didn't provide for any money to go to Alfred's survivors, the Appellate Division, First Department, also painted a pretty bleak picture for Gloria.

They brushed her off.

## THIS IS FUNKY

During the course of a charity event, Patrick Funk was injured while unloading items from a UPS refrigerated trailer.

When he later filed suit, Funk claimed UPS was liable because there wasn't any lighting in the back of the truck and he hadn't been warned about a hazardous condition--a three-inch trough--in the vicinity of the vehicle's rear door.

After the Suffolk County Supreme Court refused to throw the case out, the Appellate Division, Second Department, reversed and dismissed the litigation because Funk admitted he saw the trough (without the aid of artificial lighting) and UPS's "failure to warn" wasn't seen as the cause of his injuries.

That was some delivery.

## A FRACTURED RESULT

Claiming that her son suffered a fractured femur bone because of their negligence, Jeannine Worrel sued North Shore University Hospital and Dr. Boris Petrikovsky.

Even though he never treated or supervised anyone involved in the dispute, and the only reason his name was listed as the baby's physician was so that the kid could be admitted, the Queens County Civil Court denied a request to let Petrikovsky out of the case.

Because Petrikovsky hadn't treated her son, reviewed the medical records, acted in a supervisory role, or even had any contact with Worrel, the Appellate Term, Second Department, let the good doctor loose.

(While he was listed as the admitting physician that, "standing alone," wasn't enough to establish liability.)

Was there no recasting that?


## LEGENDS OF THE FALL

Diane Babich sued R.G.T. Restaurant Corp., and its landlord, after she fell down a flight of stairs leading to the establishment's restrooms.

When the New York County Supreme Court dismissed her case, Diane appealed.

Since an out-of-possession landlord isn't responsible for conditions under a tenant's control, particularly when there's no landlord obligation to make repairs, the Appellate Division, First Department, thought that the owner had been properly let out of the case.

But because there were unresolved questions as to whether the stairs complied with the New York City Building Code, the case against the restaurant tenant was allowed to continue.

Better to own than to rent?

## DEPUTY NEGLIGENT?


John DiDomenico, a Monroe County Deputy Sheriff, was responding to an emergency call when he rear-ended Yasmin Kabir.

After Kabir sued, the Monroe County Supreme Court granted the County's dismissal request based on Vehicle and Traffic Law § 1104(e), which provides that drivers of emergency vehicles aren't liable for injuries unless it can be shown they recklessly disregarded the safety of others.

On appeal, the Appellate Division, Fourth Department, thought that statutory immunity only applied when the emergency driver was (1) stopping, standing or parking, (2) proceeding past stop signs and red lights (after slowing down to ensure others could safely cross), (3) exceeding the posted speed limit, or (4) disregarding traffic flow and turning regulations.

Since none of those exceptions had been triggered, the AD4 was of the view that an ordinary negligence standard governed and that Kabir was entitled to recover damages.

That was some rear-end whupping.

## DOGGONE SUSPICIOUS

On July 27, 2007, Saddiq Abdur-Rashid was pulled over for driving without a front license plate. While being questioned, a passenger supposedly told officers a "convoluted tale" about why the guys were on the road, and Abdur-Rashid appeared "nervous and fidgety."

On August 1, 2007, Troy Washington was stopped for driving while talking on his cell phone. Unable to produce a driver's license or vehicle registration, Washington told officers that the vehicle belonged to a cousin (whom he wasn't able to name).

In both instances, dogs were used to sniff the exterior of the cars, and the animals alerted cops to the location of cocaine and crack cocaine. And each defendant claimed to have been the victim of an illegal search and wanted to prevent the introduction of the recovered evidence at their respective trials. While there were inconsistent outcomes at the trial-court level, the Appellate Division, Third Department, upheld the legality of the officers' conduct. And when the cases reached our state's highest court, the Court of Appeals agreed with the AD3.

Since people usually have an expectation of privacy when in a vehicle, the sniffing qualified as a "search." But because only a "minimal suspicion" is required when it comes to examining a person's car, the Court of Appeals thought that officers had a sufficient basis to use the animals and to retrieve the contraband.

Basically, those guys were thrown to the dogs.

## TIRED?

After he was wrongfully accused of stealing four tires from a Wal-Mart service station, Henry Britt brought a case against the company and its manager for false arrest and malicious prosecution. When Britt was awarded $106,000 in damages, Wal-Mart appealed.

Since there was no direct evidence linking Britt to the theft, the Appellate Division, Fourth Department, didn't think there was an appropriate basis for the guy's arrest. It also rejected the defendants' claim that there needed to be "spite" or "hatred" on the part of the accusers to support a malicious prosecution claim. (A "wrong or improper motive" was all that was required.)

Look who's licking tire now.

## DR. NO, NO, NO

When inmate Robert Wooley completed a 48-week regimen of pegylated interferon and ribavirin to treat his hepatitis C, his doctors recommended that he continue with a "low-dose maintenance pegylated interferon."

The Department of Corrections's Chief Medical Officer, Dr. Lester Wright, rejected those recommendations, because the use of pegylated interferon was still "experimental" and hadn't been FDA-approved. In response, Wooley filed a grievance claiming that the decision to deny him the medication lacked a rational basis and was "cruel and unusual punishment," violative of the U.S. Constitution.

When that argument got slammed, Wooley filed for review by the Albany County Supreme Court. And after that court, and the Appellate Division, Third Department, thought his case couldn't survive, Wooley went to the Court of Appeals.

Because there was a rational basis to deny him the treatment--since it hadn't been governmentally approved nor proven effective by way of long-term studies--our state's highest court thought Wooley's case had to die right there.

Was there no getting another shot?

## DREADING TREADMILLS

While jogging on a treadmill at a gym owned and operated by Gran, Inc., Albert Digiulio suffered a heart attack.

Although the assistant manager had been trained to operate the gym's automated external defibrillator (AED), he failed to use the device because he couldn't find the keys to the unit's box --which happened to be unlocked the entire time.

Paramedics were able to revive Digiulio, but the guy suffered brain damage and died a few months later. Prior to his death, Digiulio and his wife sued Gran for negligence and loss of companionship.

When the New York County Supreme Court granted the gym's dismissal request, an appeal followed.

Because Digiulio assumed the risk of heart attack that intense exercise can cause, the Appellate Division, First Department, didn't think a negligence case could be maintained. It also thought that the gym wasn't responsible for its employees' conduct because they acted as "Good Samaritans"--which relieved them of any liability. (The failure to check whether or not the cabinet was locked, wasn't "gross negligence" as far as the AD1 was concerned.)

The AD1 also rejected the argument that state law required the gym to keep an AED-trained employee on site at all times, since the statute didn't require that person to use the machine on a stricken patron.

*Clear!*

## ZAMBONIED!

Patricia Abato, a spectator at a charity hockey match, sued Nassau County--owner and operator of the Nassau Veterans Memorial Coliseum--after she was knocked to the floor by other spectators who were trying to retrieve a free T-shirt that had been tossed into the stands.

When the Nassau County Supreme Court denied the County's dismissal request, an appeal ensued.

Since it thought the injury was predictable and a "natural response" to launching free garb into a spectator area, the Appellate Division, Second Department, also concluded that the case shouldn't be dismissed. (It rejected a "lack of notice" defense because the County triggered the events which led to Abato's injuries.)

The AD2 also didn't buy the argument that free-flying T-shirts, and the commotion that follows, are "known, apparent or reasonably foreseeable consequences" of attending a hockey game.

Puck!

## FEEL THE HEAT?

David Small allegedly broke into a woman's home, forced her into the bedroom, attempted to kiss her, unbuttoned her shirt and, told her she was "hot."

After the Orange County County Court convicted him of attempted rape in the first degree, and of burglary and unlawful imprisonment, both in the second degree, Small appealed.

While it was clear Small wanted to have some "nonconsensual sexual contact," the Appellate Division, Second Department, didn't think the evidence established that he wanted to rape the woman. (Small never removed his clothes, and the victim never claimed that intercourse was attempted.)

But the AD2 found the burglary and unlawful-imprisonment convictions to be consistent with the evidence presented at trial.

That was certainly no Small matter.

## A POKE IN THE EYE

Convicted of robbery, attempted robbery, and coercion, all in the first degree, Toyin Alonge challenged the outcome of the case, claiming his lineup identification had been "unduly suggestive."

Even though there were gaps in the lineup participants' ages, the Appellate Division, Second Department, didn't think that made a difference--particularly since all the guys wore the same bandannas and only their eyes and foreheads had been exposed.

Do not the eyes hold the soul?

## GO FIGURE

Dhabah Almontaser was hired as the principal of a new public school that focused on Arabic language and culture.

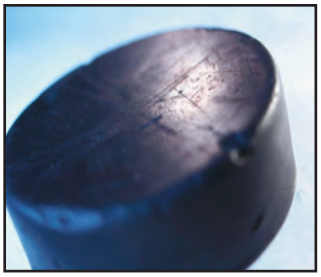
After Sara Springer (and others) publicly protested the school's opening and Almontaser's appointment, the principal resigned and accused Springer (and her cohorts) of "perpetrating a ferocious smear campaign, stalking her, and verbally assaulting her."

When Springer filed a defamation case, the Kings County Supreme Court dismissed her suit.

Because Almontaser's remarks weren't statements of fact, but rather, "figurative" expressions of how she felt, the Appellate Division, Second Department, still thought the case needed to be dismissed.

Was there no skating around that?

## CEMENTHEAD?



During a roller-hockey game, Robert Kormoski knocked down another player, Michael Filippazzo, and repeatedly punched him.

When Filippazzo sued him, Kormoski claimed he wasn't liable for the injuries because, as a voluntary participant in the sport, Filippazzo had assumed the risk of harm.

When the Suffolk County Supreme Court refused to dismiss the case, Kormoski appealed.

Because Kormoski's behavior might have been reckless, and unreasonably increased the likelihood that Filippazzo would be injured, the Appellate Division, Second Department, concurred in the outcome --particularly since the testimony established that Kormoski's conduct violated the roller-hockey league's rules and his behavior lacked "any competitive purpose."

Kormoski must have Filipped.

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## FINGERED!

After they received a call of a "dispute with a knife," officers arrived at the specified location and found two men pointing at Carlos Reyes.

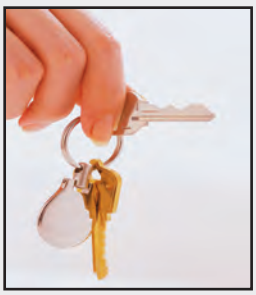
Without asking for any information, the cops pursued Reyes and eventually captured him. He happened to be carrying a gravity knife and a gun replica, and was arrested.

At his trial, Reyes wanted to prevent the introduction of the recovered items and the statements he made while in custody, claiming there hadn't been an appropriate legal basis--or "probable cause"--to arrest him. After the New York County Supreme Court denied that request, and he was convicted of attempted robbery in the third degree, Reyes appealed.

In the absence of the perpetrator's description, and because officers failed to interview witnesses at the scene (or ask why people were pointing at Reyes), the Appellate Division, First Department, thought the apprehension lacked a "reasonable" basis.

(Because flight alone wasn't enough to justify the pursuit, the weapons and statements weren't admissible.)

Looks like those cops needed a few pointers.



## COME UNLOCK OUR VAULT!

KIP'S new website--www.kipny.com--features a series of videos on an array of topics.

Watch our panel of experienced lawyers and local politicians discuss such issues as homelessness, gay rights, and the "Stuy Town" decision.

Special guests include: Assemblyman Micah Z. Kellner, Assemblyman David I. Weprin, and New York City Council Member James Sanders, Jr.