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Editor: **Bruce Freeman**

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COURT OF APPEALS

FAMILY LAW.

PARTNER IN AN UNMARRIED COUPLE WITH NO BIOLOGICAL OR ADOPTIVE RELATIONSHIP WITH A CHILD HAS STANDING AS A PARENT TO SEEK CUSTODY/VISITATION.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, overruling a 25-year-old precedent, determined a partner in an unmarried couple who has no biological or adoptive relationship with a child can be the child's parent entitled to custody or visitation: "Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We hold that these allegations, if proven by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody." ***Matter of Brooke S.B. v. Elizabeth A.C.C.*, 2016 N.Y. Slip Op. 05903, CtApp 8-30-16**

FIRST DEPARTMENT

CIVIL RIGHTS LAW.

ALLEGED DEPICTIONS OF PLAINTIFFS IN A VIDEO GAME NOT PROHIBITED BY THE CIVIL RIGHTS LAW.

The Second Department determined the Civil Rights Law did not apply to a video game which was alleged to have been based upon depictions of the plaintiffs Karen Gravano and Lindsay Lohan. The statute prohibits the unauthorized of one's name, portrait or picture in advertising or trade: "Both Gravano's and Lohan's respective causes of action under Civil Rights Law § 51 "must fail because defendants did not use [plaintiffs'] name, portrait, or picture'" ... . Despite 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 ... . As to Lohan's claim that an avatar in the video game is she and that her image is used in various images, defendants also never referred to Lohan by name or used her actual name in the video game, never used Lohan herself as an actor for the video game, and never used a photograph of Lohan ... . Even if we accept plaintiffs' contentions that the video game depictions are close enough to be considered representations of the respective plaintiffs, plaintiffs' claims should be dismissed because this video game does not fall under the statutory definitions of 'advertising' or 'trade' ...". ***Gravano v. Take-Two Interactive Software, Inc.*, 2016 N.Y. Slip Op. 05942, 1st Dept 9-1-16**

CRIMINAL LAW, EVIDENCE.

NO PROOF DEFENDANT WAS THE PERSON WITH THE SAME NAME.

The Second Department reversed defendant's drug conspiracy conviction. Although there was proof a person with defendant's name was part of the conspiracy, there was no proof defendant was that person: "We find that defendant Mohammed's conviction was not supported by legally sufficient evidence. In determining whether the jury's verdict is supported by legally sufficient evidence, the reviewing court must decide 'whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial, and as a matter of law satisfy the proof and burden requirements for every element of the crime charged' ... , including the identity of the defendant who committed the crime charged ... . While there was sufficient evidence to show that a person by the name of Habiyb Mohammed took part in the conspiracy, the record is devoid of any identification of defendant Mohammed to be that same Habiyb Mohammed." ***People v. Brown*, 2016 N.Y. Slip Op. 05940, 1st Dept 9-1-16**

FRAUD, CORPORATION LAW, SECURITIES.

SOPHISTICATED INVESTOR DID NOT STATE A CAUSE OF ACTION FOR FRAUD.

The First Department, in a full-fledged opinion by Justice Gische, recalling and vacating a prior decision and order dated May 31, 2016, determined plaintiff did not state a cause of action for fraud. Plaintiff, a sophisticated investor, procured a majority interest in DuCool, a manufacturer of heating and cooling equipment. The plaintiff, in a share purchase agreement, acknowledged the speculative nature of the investment. And plaintiff was given full access to DuCool's records prior to the purchase: 'Where a cause of action is based in fraud, 'the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury' ... . Furthermore, where the plaintiff is a sophisticated party, 'if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations' ... . Circumstances constituting fraud must be set forth in a complaint in detail (CPLR 3016[b])." ***MP Cool Invs. Ltd. v. Forkosh*, 2016 N.Y. Slip Op. 05944, 1st Dept 9-1-16**

INSURANCE LAW, ENVIRONMENTAL LAW.

INSURER NOT LIABLE FOR POLLUTION DAMAGE DURING PERIODS WHEN POLLUTION INSURANCE WAS PROHIBITED BY LAW.

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court, determined the insurer (Century) of plaintiff gas company (Keyspan) was not liable for pollution damage for periods of time which preceded the 16 years the policy was in place and during which pollution insurance was prohibited by law: "New York appellate courts ... have not expressly ruled on the question presented here, which is: When the reason for the period of no insurance is that the insured could not have obtained insurance even if it had wanted to, is the risk attendant to the unavailability of insurance in the marketplace allocable to the existing, triggered insurance policies or to the insured? * * * ... [T]he order of the Supreme Court ... which ... denied defendant Century Indemnity Company's motion for partial summary judgment declaring that Century is not responsible for any part of the costs of cleanup for periods of time when insurance was unavailable before 1953 and after 1986, should be unanimously reversed, on the law, without costs, and the motion granted, and it should be so declared." ***Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.*, 2016 N.Y. Slip Op. 05945, 1st Dept 9-1-16**

PERSONAL INJURY, EVIDENCE.

IN ORDER TO BE ENTITLED TO SUMMARY JUDGMENT FINDING DEFENDANT LIABLE IN AN ACCIDENT CASE, PLAINTIFF MUST DEMONSTRATE FREEDOM FROM COMPARATIVE NEGLIGENCE.

The First Department, over an extensive two-justice dissent, determined that, where a question of fact has been raised in an accident case about whether plaintiff was comparatively negligent, summary judgment finding defendant liable cannot be granted. Here, the plaintiff was alleged to have been injured while walking behind a sanitation truck which was backing up: "In this case, we are revisiting a vexing issue regarding comparative fault: whether a plaintiff seeking summary judgment on the issue of liability must establish, as a matter of law, that he or she is free from comparative fault. This issue has spawned conflicting decisions between the judicial departments, as well as inconsistent decisions by different panels within this Department. The precedents cited by the dissent have, in fact, acknowledged as much. After a review of the relevant precedents, we believe that the original approach adopted by this Department, as well as that followed in the Second Department, which requires a plaintiff to make a prima facie showing of freedom from comparative fault in order to obtain summary judgment on the issue of liability, is the correct one. ...The issue that arises in the context of a summary judgment motion brought by a plaintiff on the issue of liability is whether, as the dissent posits, the motion should be granted and the issue of contributory negligence considered during the damages portion of the case or where the defendant raises an issue of fact with respect to the plaintiff's negligence and the plaintiff fails to show the absence of negligence on his or her part, the motion must be denied and that issue considered during the liability phase of the trial. … [T]he latter is the fairer, and therefore the proper way to proceed." ***Rodriguez v. City of New York*, 2016 N.Y. Slip Op. 05943, 1st Dept 9-1-16**

PROPERTY DAMAGE (NEGLIGENCE), CONTRACT LAW.

QUESTION OF FACT WHETHER PROPERTY MANAGER LAUNCHED AN INSTRUMENT OF HARM WHEN A MINOR LEAK WAS REPAIRED.

The First Department, over an extensive dissent, determined the motion for summary judgment dismissing the negligence cause of action against defendant property manager was properly denied. Defendant contracted with the board of a cooperative to manage the property. Plaintiff alleged defendant's attempt to fix a minor leak caused water to damage his unit: "Regardless of which party had the burden of proof on the *Espinal* exception, the evidence submitted on the motion established that defendant attempted to fix the leak or leaks on several occasions and that the problem persisted and culminated in a flood of water " 'cascading' into plaintiff's apartment. Plaintiff testified that the leak began on March 8, 2010, and lasted a few days. The leak started again in May 2010, and reoccurred in August 2010 and December 2010, and finally, the 'big

finale' of water cascading into plaintiff's unit occurred in August 2011. Defendant attempted to fix the leaks on several occasions. Invoices dated March 10, April 13, September 28, and December 30, 2010 indicate that plumbing work was done in response to plaintiff's complaints about water leaks. The notations in these invoices do not definitively establish whether or not defendant's plumbers 'launched a force or instrument of harm.' Thus, contrary to the dissent's contention, the evidence raises an issue of fact as to whether defendant's attempts to fix the water leak exacerbated the condition that led to the more serious leak that occurred in August 2011." ***Karydas v. Ferrara-Ruurds*, 2016 N.Y. Slip Op. 05941, 1st Dept 9-1-16**

REAL PROPERTY.

THEORIES OF LIABILITY FOR DAMAGE TO A PARTY WALL EXPLAINED.

The Second Department, affirming the denial of a motion to dismiss counterclaims, in an action stemming from alleged damage to a party wall, explained the law of party walls: "While one who hires an independent contractor generally will not be liable for the contractor's negligence, an exception exists where the employer has a nondelegable duty to ensure the work is safely performed ... . With regard to two owners whose properties abut the same party wall, each owns so much of the wall as stands upon his or her own lot, both 'having an easement in the other strip for purposes of the support of his own building' ... . 'Although the land covered by a party wall remains the several property of the owner of each half, . . . the title of each owner is qualified by the easement to which the other is entitled' ... . '[N]either owner may subject a party wall to a use for the benefit of its own property that renders the wall unavailable for similar use for the benefit of the other property' ... . Liability may also be imposed on a property owner where, during renovation, the party wall is altered to the detriment of the adjoining property … . … '[E]ven if the defendant proceeded with all skill and diligence it is still liable to the plaintiffs for any injuries sustained in consequence of the intended alterations to the wall and to the support which the building on defendant's premises gave to the plaintiffs' property"… ". ***Ehrenberg v Regier*, 2016 N.Y. Slip Op. 05938, 1st Dept 9-1-16**

SECOND DEPARTMENT

CONTRACT LAW, CIVIL PROCEDURE.

ACTION SEEKING REFORMATION OF NOTE AND MORTGAGE PROPERLY DISMISSED UNDER DOCTRINE OF LACHES.

The Second Department determined plaintiffs' action seeking reformation of a note and mortgage was properly dismissed under the doctrine of laches: "...[W]hile the plaintiffs may have, at one point, had a cause of action for reformation of the note and mortgage on the basis of mutual mistake ... , the Supreme Court properly determined that such a cause of action is barred by the plaintiffs' laches in asserting a right to reformation. 'The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party' ... . Prejudice may be demonstrated 'by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay' ... . The plaintiffs unreasonably delayed in asserting a right to reformation of the note and mortgage for almost six years, during which time they made payments in accordance with the terms of the note and mortgage. Further, the defendant would be prejudiced in defending the action at this time by the loss of evidence resulting from her husband's death in 2012, approximately 4½ years after the note and mortgage were executed ...". ***Diecidue v. Russo*, 2016 N.Y. Slip Op. 05907, 2nd Dept 8-31-16**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

UNDER STATE CONSTITUTIONAL STANDARDS, THE WARRANTLESS SEARCH OF A MESSENGER BAG AT THE TIME OF DEFENDANT'S ARREST WAS NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES, CONVICTIONS REVERSED.

The Second Department, reversing defendant's conviction, determined, under state constitutional standards, the warrantless search of a messenger bag on defendant's person at the time of his arrest was not justified by exigent circumstances. The court also noted that the prosecutor's characterizing the defense as "beyond absurd" and comments upon defendant's pre-arrest silence were improper: "Here, the Supreme Court concluded that the defendant's messenger bag was lawfully searched incident to his arrest for burglary. However, the proof adduced at the suppression hearing failed to establish the presence of exigent circumstances justifying the warrantless search. Initially, there was insufficient evidence to support a finding of exigent circumstances relating to the safety of the public and the arresting officer ... . Although the police officer who testified at the suppression hearing stated that he had responded to the scene after receiving a report of an individual climbing into a building through a rear window, there was no indication that the individual was armed ... . Nor did the officer testify as to any circumstances indicating the presence of a weapon ... . Furthermore, the police officer did not express any concerns about his own safety, or the safety of the public, and the circumstances of the defendant's arrest did not serve to establish an objectively reasonable inference of police apprehension." ***People v. Anderson*, 2016 N.Y. Slip Op. 05927, 2nd Dept 8-31-16**

FAMILY LAW, INSURANCE LAW, TRUSTS AND ESTATES.

CONSTRUCTIVE TRUST PROPERLY IMPOSED UPON THE PROCEEDS OF LIFE INSURANCE TO COVER CHILD SUPPORT AND EDUCATION COSTS.

The Second Department determined, where father was ordered to procure life insurance to cover the children's support and education costs, and where father died without complying with the order, a constructive trust on the proceeds of other life insurance policies was properly imposed in an amount sufficient to cover father's support and education-expense obligations: "... [T]he Legislature has provided that a court may require a payor spouse to maintain life insurance to prevent that financial injury: 'The court may also order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage, or in the case of accident insurance, the insured spouse as irrevocable beneficiaries during a period of time fixed by the court. The obligation to provide such insurance shall cease upon the termination of the spouse's duty to provide maintenance, child support or a distributive award' (Domestic Relations Law § 236[B][8][a]). The purpose of this provision is not to provide an alternative award of maintenance or child support, but solely to ensure that the spouse or children will receive the economic support for payments that would have been due had the payor spouse survived ... . Accordingly, where life insurance is appropriate, it should be set in an amount sufficient to achieve that purpose ... . It should not be in an amount that would provide a windfall ...". ***Mayer v. Mayer*, 2016 N.Y. Slip Op. 05911, 2nd Dept 8-31-16**

FORECLOSURE, EVIDENCE.

BANK'S PROOF OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The Second Department determined the bank's motion for summary judgment was properly denied because the bank did not submit sufficient proof of possession of the note and mortgage at the time the foreclosure action was commenced. The proof did not meet the requirements of the business records exception to the hearsay rule. That affiant did not attest she was personally familiar with the plaintiff-bank's record-keeping practices and procedures: "Here, the plaintiff attempted to establish its standing by submitting the affidavit of Angela Frye, Vice President of Loan Documentation for Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the servicer of the defendant's loan on behalf of the plaintiff. Frye averred, in relevant part, that she 'reviewed the books and records regularly maintained by Wells Fargo in the ordinary course of its business as servicer of Defendant's loan for and on behalf of the Trust,' and that 'Wells Fargo's regularly maintained records reflect that both the original Note ... and the Mortgage were physically delivered to the Trust prior to the commencement of this action.' The plaintiff failed to demonstrate that the records relied upon by Frye were admissible under the business records exception to the hearsay rule (see CPLR 4518[a]) because Frye, an employee of Wells Fargo, did not attest that she was personally familiar with the plaintiff's record-keeping practices and procedures ...". ***Deutsche Bank Natl. Trust Co. v. Brewton*, 2016 N.Y. Slip Op. 05906, 2nd Dept 8-31-16**

MUNICIPAL LAW.

USE OF ROADWAY BY PEDESTRIANS AND BICYCLISTS MAY SUFFICE TO SHOW A ROADWAY, NOT USED BY VEHICLES, HAS NOT BEEN ABANDONED WITHIN THE MEANING OF THE HIGHWAY LAW.

The Second Department, reversing Supreme Court, determined there was a question of whether a roadway had been abandoned under Highway Law 205. The court noted that the lack of use by vehicles does not necessarily render a roadway abandoned. Use by pedestrians and bicyclists may suffice. The plaintiff demonstrated such recreational use. The town raised a question of fact whether the roadway had been abandoned with proof portions of the roadway were impassable: "Once a highway exists, it is presumed to continue until the contrary is demonstrated ... . 'It will be deemed abandoned, however, if it is not traveled or used as a public highway for six years' ... . To show use as a highway, there must be evidence that travel proceeds, in forms reasonably normal, along the lines of an existing street ... . Automobile use is not determinative in assessing whether a road has been abandoned ... . Indeed, evidence of frequent recreational activity may be sufficient to preclude a finding of abandonment ...". ***Dandomar Co., LLC v. Town of Pleasant Val. Town Bd.*, 2016 N.Y. Slip Op. 05905, 2nd Dept 8-31-16**

PERSONAL INJURY.

FACT THAT PLAINTIFF SLIPPED AND FELL ON A MARBLE FLOOR DID NOT ESTABLISH THE CAUSE OF THE FALL, COMPLAINT SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the slip and fall case should have been dismissed. Although plaintiff alleged she slipped on a marble floor, she did not know the cause of her fall: "The defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence, including a transcript of the plaintiff's deposition testimony, which demonstrated that the plaintiff was unable to identify the cause of her fall ...". ***Scimone v. LT Propco, LLC*, 2016 N.Y. Slip Op. 05915, 2nd Dept 8-31-16**

PERSONAL INJURY, LANDLORD-TENANT.

LANDLORD'S RIGHT TO ENTER TO MAKE REPAIRS DOES NOT CREATE A DUTY TO MAKE REPAIRS.

In finding the out-of-possession landlord was entitled to summary judgment in this slip and fall case, the Second Department noted that the landlord's reservation of a right to enter the property to inspect and make repairs does not impose a duty to make repairs. The plaintiff alleged she slipped on ice in the workplace parking lot: "Here, the plaintiff alleged that the defendant breached a common-law duty to keep the premises in a reasonably safe condition. The defendant established its prima facie entitlement to judgment as a matter of law by submitting proof that it was an out-of-possession landlord and, thus, had no duty to perform repairs or remove snow and ice from the premises ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendant had a duty to remove snow or ice under statute or regulation, the terms of the lease, or a course of conduct ... . A landlord's reservation of the right to enter property to inspect and make repairs does not in itself give rise to a duty to make repairs ...". ***Keum Ok Han v. Kemp, Pin & Ski, LLC*, 2016 N.Y. Slip Op. 05908, 2nd Dept 8-31-16**

REAL PROPERTY.

JUSTIFIABLE RELIANCE ON PLAINTIFF'S INACTION RE A FORGED DEED NOT DEMONSTRATED, CRITERIA FOR EQUITABLE ESTOPPEL THEREFORE NOT MET.

The Second Department determined defendant was not entitled to summary judgment in a quiet title action under the doctrine of equitable estoppel. Plaintiff alleged a deed which purported to transfer her title to the property was forged. Defendant, citing the delay in plaintiff's taking action, sought dismissal of the complaint on equitable estoppel grounds. The Second Department determined the "justifiable reliance" element of equitable estoppel had not been demonstrated: "Although [defendant] made a prima facie showing that the plaintiff knew of the allegedly forged deed transferring title from her to Edward Wallace, unjustifiably delayed almost two years in commencing this action from the time she was advised to do so by the Kings County District Attorney's Office, and intended her delay to be acted upon, and that [defendant] lacked knowledge of the allegedly forged deed and prejudicially changed its position ... , [defendant] failed to establish, prima facie, that its reliance upon the plaintiff's conduct was justified ...". ***Wallace v. BSD-M Realty, LLC*, 2016 N.Y. Slip Op. 05917, 2nd Dept 8-31-16**

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