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FIRST DEPARTMENT

CRIMINAL LAW; EVIDENCE.

DESTRUCTION OF BLOOD EVIDENCE IN FLOODING CAUSED BY HURRICANE SANDY DID NOT WARRANT AN ADVERSE INFERENCE JURY INSTRUCTION.

The First Department, over an extensive dissent, determined that the destruction of blood evidence by Hurricane Sandy did not warrant an adverse inference jury instruction, despite the People's failure to timely respond to the defense request for the evidence. The court determined that the adverse inference jury instruction is not triggered by a loss of evidence for which the People are blameless: "... [T]he *Handy* [20 NY3d 663] adverse inference charge is a penalty for destruction of evidence, not for mere tardiness in producing it. ... While we do not condone the People's slowness in fulfilling their disclosure obligations in this case, the evidence in question was not lost as a foreseeable result of the passage of time, but as a consequence of a natural catastrophe that happened to occur just before this case went to trial. Moreover, the delay in production of the evidence here appears to be as much the fault of the defense as of the People. Even though the defense always knew that the case would rely on DNA evidence, defense counsel, after making a pro forma request to which the physical blood evidence would have been responsive, never took any steps before the hurricane, over a period of approximately two years, to enforce defendant's right to production of that evidence. As previously noted, the physical evidence did not become a focus of the discussion among the court and counsel until after the hurricane had passed. ...". **People v Austin, 2015 NY Slip Op 09372, 1st Dept 12-22-15**

CRIMINAL LAW; EVIDENCE.

EVIDENCE OF HOW THE MURDER VICTIM FELT ABOUT DEFENDANT AND EVIDENCE OF STRIFE IN THE COUPLE'S RELATIONSHIP ADMISSIBLE TO SHOW MOTIVE AND IDENTITY.

The First Department determined evidence of how the murder victim felt toward the defendant and evidence of the couple's "strife and unhappiness" was properly admitted to show the defendant's motive and was inextricably interwoven with the issue of the identity of the killer: "The court properly admitted testimony from friends of the victim reflecting the victim's unfavorable perception of defendant's character, in order to show the victim's beliefs as part of a showing that the couple had been arguing and that the victim had been attempting to break up with defendant. Proof of the murder victim's espoused intention to terminate her relationship with, and stay away from, defendant was admissible to show the victim's state of mind" and was "relevant to the issue of the motive of defendant, who was aware of the victim's attitude, to kill the victim ... . Hence, the background information about the couple's strife and unhappiness was admissible as highly probative of the defendant's motive and [was] either directly related to or inextricably interwoven with the issue of his identity as the killer ... . The friends' testimony about disputes between defendant and the victim was similarly admissible ...". [internal quotation marks omitted] **People v Brooks, 2015 NY Slip Op 09379, 1st Dept 12-22-15**

INSURANCE LAW; CONTRACT LAW.

MASSIVE 750-FOOT TOWER CRANE DESTROYED BY HURRICANE SANDY NOT COVERED UNDER "TEMPORARY WORKS" CLAUSE IN INSURANCE POLICY.

The First Department, in a full-fledged opinion by Justice Andrias, over a two-justice dissent (opinion by Justice Mazzarelli), determined that a massive 750-foot tower crane destroyed during Hurricane Sandy was not included in the policy-definition of "Temporary Works" and was included in a policy-exclusion for "contractor's tools, machinery, plant and equipment." Damage to the crane, therefore, was not covered: "The policy defines a temporary structure as something that is 'incidental to the project.' Although the term incidental is not defined, 'it is common practice for the courts of this State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract' ... . Black's Law Dictionary defines the term 'incidental' as'[s]ubordinate to something of greater importance; having a minor role' (10th ed 2014])…. … [T]he 750-foot tower crane is not a structure that is 'incidental' to the project. … [T]he '[b]uilding was specifically designed to incorporate the Tower Crane during construction' and the crane's design and erection involved an 'in-depth process' that had to be approved by a structural engineer. Moreover, once it was integrated into the structure of the building, the custom designed tower crane, rather than serving a minor or subordinate role, was used to lift items such as concrete slabs, structur-

al steel and equipment, was integral and indispensable, not incidental, to the construction of the 74-story high-rise, which could not have been built without it. Accordingly, the tower crane does not fall within the policy's definition of Temporary Works." **Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co., 2015 NY Slip Op 09389, 1st Dept 12-22-15**

SECOND DEPARTMENT

CIVIL PROCEDURE.

QUESTION OF FACT WHETHER DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDED STATUTE OF LIMITATIONS DEFENSE, CRITERIA EXPLAINED.

The Second Department determined plaintiff raised a question of fact whether the doctrine of equitable estoppel precluded defendants' statute of limitations defense. The court explained the criteria: "The doctrine of equitable estoppel will preclude a defendant from asserting the statute of limitations as a defense where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding ... . A plaintiff seeking to invoke the doctrine of equitable estoppel must establish that subsequent and specific actions by defendants somehow kept [the plaintiff] from timely bringing suit ... . Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant ... . Where the defendant has a fiduciary duty to the plaintiff, the doctrine of equitable estoppel may be invoked based on the defendant's failure to disclose facts underlying the claim ...". [internal quotation marks omitted] **North Coast Outfitters, Ltd. v Darling, 2015 NY Slip Op 09409, 2nd Dept 12-23-15**

CIVIL PROCEDURE; ASSOCIATIONS.

NAMING THE PRESIDENT OF AN UNINCORPORATED ASSOCIATION AS A DEFENDANT PROPERLY JOINED THE ASSOCIATION.

The Second Department determined an association was properly sued by naming the president as a defendant. An unincorporated association cannot sue or be sued solely in the association name: "An unincorporated association such as the Condominium has 'no legal existence separate and apart from its individual members' (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1025:2 at 341). 'Unlike a partnership, an unincorporated association may not sue or be sued solely in the association name' ... . General Associations Law § 13 provides: 'An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally.' Thus, by commencing the action against Fogarty, as president of the Condominium, the plaintiffs joined the Condominium ...". **Pascual v Rustic Woods Homeowners Assn., Inc., 2015 NY Slip Op 09415, 2nd Dept 12-23-15**

CIVIL PROCEDURE; JUDGES.

JUDGE'S IMPROPER COMMENTS CONCERNING PLAINTIFF'S EXPERT WARRANTED A NEW TRIAL ON DAMAGES.

In finding a motion to set aside the verdict in a personal injury case should have been granted, the Second Department determined the plaintiff was entitled to a new trial on damages (in part) because of the improper comments made by the judge. The judge cast doubt on the plaintiff's expert's testimony: "A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice may be granted where improper comments by the trial court deprive a party of a fair trial ... . '[L]itigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court' ... . A trial court 'has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary' ... . Nevertheless, '[a] trial judge should at all times maintain an impartial attitude and exercise a high degree of patience and forebearance. A trial judge may not so far inject himself [or herself] into the proceedings that the jury could not review the case in the calm and untrammeled spirit necessary to effect justice' ...". **Ioffe v Seruya, 2015 NY Slip Op 09407, 2nd Dept 12-23-15**

CIVIL PROCEDURE; LIMITED LIABILITY COMPANY LAW.

PRINCIPAL OFFICE OF A FOREIGN LIMITED LIABILITY COMPANY, AS LISTED ON THE DEPARTMENT OF STATE APPLICATION FOR AUTHORITY TO CONDUCT BUSINESS, IS THE CONTROLLING LOCATION FOR VENUE PURPOSES.

The Second Department, reversing Supreme Court, determined that appellant's motion for a change of venue should have been granted. Appellants demonstrated that the foreign limited liability company's application for authority to conduct business in New York listed a principal office in New York County. Plaintiff brought the action in Queens County, alleging appellant's principal place of business is in Queens County. The principal office in New York County, pursuant to Limited

Liability Company Law 102[s], was the controlling location for venue purposes: "Pursuant to CPLR 503(a), the venue of an action is properly placed in the county in which any of the parties resided at the time of commencement ... . In support of their motion, the appellants established that QPS was a resident of New York County at the time of commencement by producing a certified copy of QPS's application for authority to conduct business filed with the New York State Department of State, which listed New York as the county in which its principal office was located ... . The plaintiff did not dispute the fact that the application for authority designated New York County as the location of QPS's principal office, but claimed that QPS is a resident of Queens County because that is the location of its principal place of business. However, the sole residence of a foreign corporation or a foreign limited liability company for venue purposes is the county where its principal office is located as designated in its application for authority to conduct business filed with the New York State Department of State, regardless of where it transacts business or maintains its actual principal office or facility (see CPLR 503[c]...). Such office need not be a place where business activities are conducted by the limited liability company ...". **Carlton Group, Ltd. v Property Mkts. Group, Inc., 2015 NY Slip Op 09423, 2nd Dept 12-23-15**

CIVIL PROCEDURE; REAL ESTATE.

ANALYTICAL CRITERIA FOR MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION, WHERE DEFENDANT SUBMITS EVIDENCE, CLEARLY EXPLAINED; PLAINTIFF IS NOT PENALIZED FOR NOT SUBMITTING EVIDENCE IN OPPOSITION; BURDEN NEVER SHIFTS TO PLAINTIFF.

The Second Department determined the complaint stated a cause of action for specific performance of a real estate contract. The court offered a clear explanation of the analytical criteria to be used when defendant submits evidence in support of a motion to dismiss for failure to state a cause of action. Here, the fact that plaintiff submitted no evidence in opposition was of no consequence. The evidence submitted by defendant was not sufficient to demonstrate, as a matter of law, the complaint did not state a cause of action: "A court is . . . permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)... . However, on a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party ..., and a plaintiff will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint ... . When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate ... . Contrary to the defendant's contention, the complaint adequately alleged a cause of action for specific performance of a contract for the sale of real property." [internal quotation marks omitted] **E & D Group, LLC v Vialet, 2015 NY Slip Op 09400, 2nd Dept 12-23-15**

CRIMINAL LAW; EVIDENCE.

SEARCH OF JACKET POCKET NOT PRECEDED BY PAT DOWN SEARCH; SEIZURE OF WEAPON FROM JACKET POCKET NOT SUPPORTED BY PROBABLE CAUSE.

The Second Department, reversing Supreme Court, determined defendant's motion to suppress evidence taken during a search of his jacket should have been granted. The searching officer had the right to pat the defendant down for weapons but did not do so. The search of the pockets, which turned up a weapon, was not, therefore, supported by probable cause: "The search of the defendant's right jacket pocket, from which the police recovered a gun, cannot be upheld as justifiably premised on probable cause, since the defendant had not been placed under arrest prior to the search ... . '[A]n officer who reasonably suspects that a detainee is armed may conduct a frisk or take other protective measures even in the absence of probable cause to arrest' ... . However, "'a] police officer acting on reasonable suspicion that criminal activity is afoot and on an articulable basis to fear for his own safety may intrude upon the person or personal effects of the suspect only to the extent that is actually necessary to protect himself from harm while he conducts the inquiry' ... . 'The key question in all cases remains whether the protective measures taken by the officer were reasonable under the circumstances"'... . Here, the police officer searched the defendant's jacket pocket without any prior visual observations of a weapon and without first conducting a pat down of the outside of the pocket. Thus, even assuming that the officer acted on reasonable suspicion that criminal activity was afoot and an articulable basis to fear for his safety, he failed to confine the scope of his search to an intrusion reasonably necessary to protect himself from harm. Accordingly, the weapon recovered as a result of the unlawful search should have been suppressed. In addition, the drugs and other items thereafter recovered must also be suppressed as fruits of the initial, unlawful search ...". **People v Graham, 2015 NY Slip Op 09442, 2nd Dept 12-23-15**

PERSONAL INJURY.

ALTHOUGH THERE WAS A STORM IN PROGRESS WHEN PLAINTIFF FELL, PLAINTIFFS RAISED A QUESTION OF FACT WHETHER PREEXISTING SNOW AND ICE WAS THE CAUSE OF THE FALL.

The Second Department determined the defendant met his burden of demonstrating a storm was in progress when plaintiff slipped and fell, but plaintiffs then raised a question of fact whether snow and ice which was there prior to the storm was

the cause of the fall: "The evidence submitted by the defendant in support of its motion for summary judgment, including certified climatological data, a report from the plaintiffs' own expert meteorologist, and the transcripts of the deposition testimony of the parties, demonstrated, prima facie, that a storm was in progress at the time of the subject accident ... . The plaintiffs do not contend otherwise. Accordingly, the burden shifted to the plaintiffs to raise a triable issue of fact as to whether the injured plaintiff's fall was caused by something other than precipitation from the storm in progress ... . In order to do so, the plaintiffs were 'required to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the [injured] plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition' ... . The plaintiffs raised a triable issue of fact in this regard. The evidence relied upon by the plaintiffs in opposition to the defendant's motion, which included the report of their expert meteorologist, certified climatological data, and the affidavits of the injured plaintiff and two nonparty witnesses, raised a triable issue of fact as to whether the injured plaintiff slipped and fell on old snow and ice that was the product of a prior storm, as opposed to precipitation from the storm in progress, and as to whether the defendant had constructive notice of the preexisting condition...". **Burniston v Ranric Enters. Corp., 2015 NY Slip Op 09395, 2nd Dept 12-23-15**

PERSONAL INJURY; EDUCATION-SCHOOL LAW.

STUDENT ASSUMED THE RISK OF INJURY DURING LACROSSE PRACTICE.

The Second Department, reversing Supreme Court, determined plaintiff, a high school varsity lacrosse player, assumed the risk of injury during lacrosse practice. Plaintiff alleged the goal was not properly covered by the net and his foot hit the base of the goal, causing him to twist his ankle and fall: "The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' ... . 'An educational institution organizing a team sporting activity must exercise ordinary reasonable care to protect student athletes voluntarily participating in organized athletics from unassumed, concealed, or enhanced risks' ... . 'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty' ... . This includes the construction of the playing surface and any open and obvious condition on it ... . * * * ... Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint. The defendant established, prima facie, that the plaintiff assumed the risk by voluntarily participating in lacrosse practice where the condition of the goal was not concealed and clearly visible ...". **Safon v Bellmore-Merrick Cent. High Sch. Dist., 2015 NY Slip Op 09418, 2nd Dept 12-23-15**

THIRD DEPARTMENT.

UNEMPLOYMENT INSURANCE.

PHARMACEUTICALS COURIERS WERE EMPLOYEES.

The Third Department determined couriers for a pharmaceuticals warehouse (SDS) were employees entitled to unemployment insurance benefits: "Here, SDS advertised for couriers and screened interested parties. Couriers are assigned routes by SDS, set up geographically by SDS's clients, worked an agreed upon set weekly schedule at a pay rate negotiated between the couriers and SDS and were required to either pick the pharmaceuticals up at an SDS warehouse or at the SDS client's location. SDS would have an on-site coordinator present when pickups were made at the client's location. Couriers were provided a daily manifest bearing SDS's name that identifies the stops for their routes. Couriers were required to obtain proof of delivery signatures on the manifests and return a copy of them to SDS. Couriers also provided invoices to SDS in order to get paid and SDS would bill its clients, and couriers were paid whether or not SDS was paid by its clients ... . Couriers were required to wear SDS uniforms and were provided badges identifying themselves as being contracted through SDS. SDS also provided scanners to couriers to be used in order to electronically track their pickups and deliveries." **Matter of Gill (Strategic Delivery Solutions LLC--Commissioner of Labor), 2015 NY Slip Op 09576, 3rd Dept 12-24-15**

FOURTH DEPARTMENT

CRIMINAL LAW.

53-MONTH PRE-INDICTMENT DELAY DID NOT DENY DEFENDANT DUE PROCESS.

The Fourth Department determined a 53-month delay between the incident and indictment did not constitute a denial of due process. Defendant was charged with burglary, robbery and criminal possession of a weapon. He was convicted of criminal possession of a weapon. The court explained the analytical criteria re: speedy trial/due process and went through the facts in support of each of the criteria:"A defendant's right to a speedy trial is guaranteed by both the Constitution ... and by statute ... . A defendant may also challenge, on due process grounds, preindictment delay ..., and the factors utilized to determine if a defendant's rights have been abridged are the same whether the right asserted is a speedy trial right or

the due process right to prompt prosecution ... . The inquiry involves weighing the factors enunciated in Taranovich: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay (Taranovich, 37 NY2d at 445...). Generally when there has been a protracted delay, certainly over a period of years, the burden is on the prosecution to establish good cause ...". [internal quotation marks omitted] **People v Johnson, 2015 NY Slip Op 09449, 4th Dept 12-23-15**

CRIMINAL LAW.

FAILURE TO APPRISE COUNSEL OF THE CONTENTS OF A NOTE FROM THE JURY REQUIRED REVERSAL.

The Fourth Department determined the trial judge's failure to apprise counsel of the specific, substantive contents of a jury note requesting a readback of testimony required reversal (in the absence of preservation): "As the court brought the jury into the courtroom to respond to the first two notes, the jury gave a third note to the court. The court told the jury that it would respond to the first two notes at that time, and would then discuss the issue raised in the third note with counsel after sending the jury back to the jury room. The court stated that the 'third note [had] not yet [been] shown to counsel nor have we had an opportunity to discuss it.' The record further reflects that the jury resumed its deliberations after the court provided requested testimony and instruction in response to the first two notes, and then rendered a verdict of guilty. The third note, which is included in the record, indicates that the jury was seeking the testimony of a particular witness on a specific topic, but there is nothing in the record indicating that the note was shown to counsel, or that it was read into the record before the jury rendered its verdict. Where, as here, 'the record fails to show that defense counsel was apprised of the specific, substantive contents of the note . . . [,] preservation is not required' ... , and we conclude that the '[c]ourt committed reversible error by violating the core requirements of CPL 310.30 in failing to advise counsel on the record of the contents of a substantive jury note before accepting a verdict' ...". **People v Brink, 2015 NY Slip Op 09450, 4th Dept 12-23-15**

CRIMINAL LAW; EVIDENCE.

EMERGENCY EXCEPTION TO WARRANT REQUIREMENT IMPROPERLY APPLIED; JUDGE FAILED TO ELICIT UNEQUIVOCAL ASSURANCES OF IMPARTIALITY FROM FIVE PROSPECTIVE JURORS; NOTHING CAN BE INFERRED FROM THE PROSPECTIVE JURORS' COLLECTIVE SILENCE IN RESPONSE TO THE JUDGE'S QUESTION WHETHER THEY COULD BE FAIR.

The Fourth Department ordered a new trial after finding that defendant's motion to suppress statements and evidence should have been granted. The police entered defendant's apartment without permission. The People argued that the entry was proper under the so-called emergency exception to the warrant requirement. However, the facts indicated the police entered the apartment solely because of defendant's refusal to open the door. The Fourth Department further noted that five prospective jurors should have been excused for cause because they all indicated not hearing from the defendant would be problematic for them. The judge explained that the defendant had no responsibility to put on any proof, but failed to elicit an unequivocal assurance from each of the jurors that they could render an impartial verdict. The judge simply asked all the jurors collectively whether they had a problem sitting as fair and impartial jurors and the jurors remained silent. **People v Casillas, 2015 NY Slip Op 09454, 4th Dept 12-23-15**

CRIMINAL LAW; EVIDENCE.

SEARCH OF DEFENDANT'S JACKET, WHICH WAS NOT ON HIS PERSON, AFTER DEFENDANT WAS HANDCUFFED AND IN CUSTODY VIOLATED THE STATE CONSTITUTION.

The Fourth Department determined the search of the pockets of defendant's jacket (which was not on his person) after defendant was handcuffed and in custody was illegal under the State Constitution and the drugs found in the pockets should have been suppressed. The court further found that the illegally-seized drugs presented as evidence at trial may have influenced the jury to find an "intent to sell" with respect to the remaining drug count. A new trial was ordered on the remaining count: " 'Under the State Constitution, to justify a warrantless search incident to an arrest, the People must satisfy two separate requirements. The first imposes spatial and temporal limitations to ensure that the search is not significantly divorced in time or place from the arrest . . . The second, and equally important, predicate requires the People to demonstrate the presence of exigent circumstances' ... . We conclude that, here, neither requirement is satisfied. At the time the jacket was searched, defendant was handcuffed in an interview room at the Public Safety Building. 'T]he jacket had been reduced to the exclusive control of the police[,] and there was no reasonable possibility that defendant could have reached it' ... . Nor was there any exigency that would justify the warrantless search of the jacket in these circumstances ...". **People v Wilcox, 2015 NY Slip Op 09457, 4th Dept 12-23-15**

CRIMINAL LAW; EVIDENCE.

SEARCH INSIDE DEFENDANT'S UNDERWEAR WAS AN ILLEGAL STRIP SEARCH.

The Fourth Department, reversing County Court, determined what amounted to a strip search at a traffic stop was illegal. The officer searched defendant's underwear and seized drugs which were inside defendant's underwear: "... [B]ecause the officer intended to transport defendant to the police station to charge him with the traffic infractions, he was justified in conducting a pat search for weapons before placing defendant in the patrol vehicle ... . We note that a person's underwear, 'unlike a waistband or even a jacket pocket, is not a common sanctuary for weapons' ... and, in any event, the officer did not pat the outside of defendant's clothing to determine whether defendant had secreted a weapon in his underwear after defendant leaned forward. Instead, he conducted a strip search by engaging in a visual inspection of the private area of defendant's body ... . We conclude that a visual inspection of the private area of defendant's body on a city street was not based upon reasonable suspicion that defendant was concealing a weapon or evidence underneath his clothing...". **People v Smith, 2015 NY Slip Op 09517, 4th Dept 12-23-15**

FAMILY LAW; EVIDENCE.

IN THIS VISITATION-MODIFICATION PROCEEDING, DAUGHTER'S OUT-OF-COURT STATEMENTS WERE NOT SUFFICIENTLY CORROBORATED.

The Fourth Department determined Family Court, in a visitation-modification proceeding, properly found that the daughter's out-of-court statements about alleged sex abuse were not reliably corroborated: "It is well settled that there is an exception to the hearsay rule in custody [and visitation] cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Ct Act § 1046 (a) (vi) . . . , where . . . the statements are corroborated ... . Although the degree of corroboration [required] is low, a threshold of reliability must be met ... . The repetition of an accusation does not corroborate a child's prior statement . . . , although the reliability threshold may be satisfied by the testimony of an expert ... . Family Court has considerable discretion in deciding whether a child's out-of-court statements alleging incidents of abuse have been reliably corroborated . . . , and its findings must be accorded deference on appeal where . . . the . . . [c]ourt is primarily confronted with issues of credibility ... . Here, there is no direct or physical evidence of abuse, and thus the case turns almost entirely on issues of credibility ... . Although the mother correctly notes that some corroboration may be provided through the consistency of a child's statements and that a child's out-of-court statements may be corroborated by testimony regarding the child's increased sexualized behavior ... , the court determined here that the mother's witnesses—who provided the corroborative testimony regarding the daughter's purportedly consistent statements and sexualized behavior—were not credible." [internal quotation marks omitted] **Matter of East v Giles, 2015 NY Slip Op 09466, 4th Dept 12-23-15**

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