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COURT OF APPEALS

ADMINISTRATIVE LAW.

NYS OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION DID NOT EXCEED ITS AUTHORITY WHEN IT PROHIBITED SMOKING IN SOME SMALL PARKS WITHIN NEW YORK CITY AND ON A SMALL PERCENTAGE OF THE 330,000-ACRE PARK SYSTEM.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined the NYS Office of Parks, Recreation and Historic Preservation (OPRHP) did not exceed its authority when it prohibited smoking in seven small parks in New York City and in less than 5 percent of the 330,000-acre state park system. The court went through the factors outlined in *Boreali v. Axelrod*, 71 N.Y.2d 1, which were described as follows: "[Under *Boreali*] the circumstances to be considered are 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[]' ... . Our statement of the relevant principles of law does not end with the articulation of the *Boreali* factors. Those considerations, we have observed, are not to be applied rigidly ... . In fact, they 'are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power' ...". ***Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 2016 N.Y. Slip Op. 02479, CtApp 3-31-16**

CRIMINAL LAW, APPEALS, ATTORNEYS.

PROCEDURE USED TO EXCUSE PROSPECTIVE JURORS ON HARDSHIP GROUNDS WAS NOT A MODE OF PROCEEDINGS ERROR; FAILURE TO OBJECT TO PROSECUTOR'S APPEAL TO GENDER BIAS DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over an extensive dissenting opinion by Judge Rivera, determined the procedure used by the trial judge to excuse prospective jurors on hardship grounds was not a mode of proceedings error warranting reversal in the absence of preservation. At the outset of jury selection, the judge told the prospective jurors the trial might take five days. Anyone who felt they could not sit for five days was then allowed to leave the courtroom with the clerk who would evaluate the extent of the hardship. The Court of Appeals held the hardship questioning occurred prior to formal voir dire and did not concern a prospective juror's fitness to serve, thereby distinguishing cases where the judge was absent during formal voir dire. The Court of Appeals further determined defense counsel's failure to object to the prosecutor's remarks in summation which appealed to gender bias did not constitute ineffective assistance of counsel. The defendant in this assault /burglary case was a woman, as was the victim. The victim's boyfriend was the father of defendant's children. To counter the defendant's argument that the attacker was a male, the prosecutor told the jury the case was about "jealousy" and "obsession" and "only a woman" would inflict "this kind of injury." With respect to the juror-hardship issue, the court explained: "Preservation is particularly important in a case like this because the defense, faced with the prospect that certain prospective jurors were claiming that they were unable to serve due to hardship, may very well have made a strategic decision not to challenge the procedure because he did not want to risk having those prospective jurors end up on the jury when it became apparent that they did not wish to serve. If defense counsel had an objection to the procedure employed by the trial court, he should have voiced it so that the court could have corrected any alleged error." ***People v. King*, 2016 N.Y. Slip Op. 02278, CtApp 3-29-16**

CRIMINAL LAW, EVIDENCE.

REDACTED STATEMENT OF CO-DEFENDANT IMPLICATED DEFENDANT IN VIOLATION OF *BRUTON* RULE, CONVICTION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissenting opinion, determined the redacted statement of a co-defendant (Villanueva), in its written form, left no doubt that the statement implicated defendant

in this gang-assault murder case. The error was not harmless and defendant's conviction was therefore reversed: "[T]he written statement was not 'effectively redacted so that the jury would not interpret its admissions as incriminating the nonconfessing defendant[s]' ... . Rather, the statement, with large, 'blank [spaces] prominent on its face, . . . "facially incriminat[ed]"' a codefendant because it 'involve[d] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial' ... . Any juror 'wonder[ing] to whom the blank might refer need[ed] only lift his [or her] eyes to [Villanueva's codefendants], sitting at counsel table, to find what [would] seem the obvious answer' ... . In our view, the replacement of the identifying descriptors of defendant with blank spaces did not leave 'the slightest doubt as to whose name[] had been blacked out, but even if there had been, that blacking out itself would have not only laid the doubt but underscored the answer' . . . , particularly after the court instructed the jury that it was not to speculate about the redactions in any way. The redacted statement both 'indicat[ed] to the jury that the original statement contained actual names' or clearly identifying descriptors and, 'even if the very first item introduced at trial[,] [it] would immediately inculpate [a codefendant] in the charged crime' ... . Therefore, we conclude that its admission violated the *Bruton* rule." ***People v. Cedeno*, 2016 N.Y. Slip Op. 02281, CtApp 3-29-16**

Similar issue and result in a full-fledged opinion by Judge Rivera, over a three-judge dissenting opinion in ***People v. Johnson*, 2016 N.Y. Slip Op. 02282, CtApp 3-29-16**

CRIMINAL LAW, EVIDENCE.

PEOPLE DID NOT DELIBERATELY CALL WITNESS FOR THE SOLE PURPOSE OF ELICITING THE ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION; PEOPLE'S OWN WITNESS PROPERLY IMPEACHED WITH PRIOR STATEMENT; EXPERT TESTIMONY ON EFFECT OF EVENT STRESS ON IDENTIFICATION PROPERLY PRECLUDED.
The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined (1) the People did not improperly call an eyewitness to the shooting to invoke his privilege against self-incrimination in front of the jury; (2) the People were properly allowed to impeach the eyewitness with his statement made to police at the time of the incident; and (3) expert testimony offered by the defense on the effect of "event stress" on the identification of the defendant was properly precluded. A *Frye* hearing was not required before preclusion. The expert witness was allowed to testify about "weapon focus" and "witness confidence." With respect to a witness' invocation of the privilege against self-incrimination in front of the jury, the court explained the analytical criteria: "The Fifth Amendment of the United States Constitution directs that no person 'shall be compelled in any criminal case to be a witness against himself' (US Const Amend V). When a witness invokes the Fifth Amendment privilege in front of the jury, 'the effect of the powerful but improper inference of what the witness might have said absent the claim of privilege can neither be quantified nor tested by cross-examination, imperiling the defendant's right to a fair trial' ... . It is therefore reversible error for the trial court to permit the prosecutor to deliberately call a witness for the sole purpose of eliciting a claim of privilege ... . The critical inquiry is whether the prosecution exploited the witness's invocation of the privilege, either by attempting 'to build its case on inferences drawn from the witness's assertion of the privilege' or utilizing those inferences to 'unfairly prejudice [the] defendant by adding "critical weight" to the prosecution's case in a form not subject to cross-examination' ...". ***People v. Berry*, 2016 N.Y. Slip Op. 02283, CtApp 3-29-16**

CRIMINAL LAW, EVIDENCE, APPEALS.

IT WAS AN ABUSE OF DISCRETION, AS A MATTER OF LAW, TO EXCLUDE EVIDENCE OF THIRD-PARTY CULPABILITY IN THE FORM OF STATEMENTS AGAINST PENAL INTEREST.
The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissenting opinion by Judge Fahey, determined the defendant should have been allowed to submit evidence of third-party culpability and ordered a new trial in this felony murder/rape case. The majority acknowledged the evidence against defendant was overwhelming. However, the third-party culpability evidence — hearsay admissions about the crime allegedly made to the declarant's cellmate in prison — qualified as statements against penal interest. Applying a balancing test, the Court of Appeals concluded the probative value of the hearsay was such that it was an abuse of discretion, as a matter of law, to exclude it: "Where, as here, the defendant makes an offer of proof to the court explaining the basis for a third-party culpability defense and connecting the third-party to the crime, and the probative value of the evidence 'plainly outweighs the dangers of delay, prejudice and confusion,' then it is 'error as a matter of law' to preclude the defendant from presenting such proof to the jury ...". ***People v. DiPippo*, 2016 N.Y. Slip Op. 02279, CtApp 3-29-16**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

FAILURE TO MOVE TO SUPPRESS WEAPON CONSTITUTED INEFFECTIVE ASSISTANCE.
The Court of Appeals determined defendant, who was charged with criminal possession of a weapon, was not afforded effective assistance of counsel in that defense counsel did not move to suppress the weapon. The matter was remitted for a suppression hearing. The underlying facts were not addressed in the decision. ***People v. Bilal*, 2016 N.Y. Slip Op. 02475, CtApp 3-31-16**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL'S DECISION TO FOREGO A REQUEST TO REOPEN THE SUPPRESSION HEARING BASED UPON TRIAL TESTIMONY WAS SUPPORTED BY A SOUND STRATEGIC REASON, COUNSEL WAS THEREFORE NOT INEFFECTIVE.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over an extensive two-judge dissenting opinion, determined defense counsel's failure to request the reopening of the suppression hearing based upon trial testimony did not constitute ineffective assistance. The Appellate Division had previously reversed the trial court's suppression of defendant's statements. At trial the detective who took the statements from the defendant gave an account which differed from the detective's hearing testimony. The inconsistent testimony related to the second of the two statements made by the defendant during interrogation. In response to defendant's motion to vacate the judgment of conviction on ineffective-assistance grounds, the People provided an affidavit from defense counsel which explained the strategy underlying the decision to forego a request to reopen the suppression hearing: "Counsel averred that he had believed that defendant's second statement would almost certainly be admitted into evidence at trial and that therefore he had focused on using the exculpatory preface of the first statement to cast doubt on the probative worth of defendant's more incriminating subsequent comments." The court found the explanation of the defense strategy to be sound: "Defense counsel did not deprive defendant of the effective assistance of counsel when he decided not to move to reopen the suppression hearing ... . Because the Appellate Division had rejected counsel's original arguments for suppression of the [second] statement prior to trial and cited a number of factors that remained extant throughout the proceedings in this case, counsel reasonably thought that the statement would be admitted into evidence regardless of any new developments, and instead of making what he sensibly thought was a longshot motion to reopen the hearing, he decided to use the exculpatory portion of defendant's first statement to undermine the credibility of the second statement and place it in context." ***People v. Gray*, 2016 N.Y. Slip Op. 02476,**

ENVIRONMENTAL LAW, LAND USE, ADMINISTRATIVE LAW.

TOWN'S ISSUANCE OF A POSITIVE DECLARATION WITH THE REQUIREMENT THAT THE LANDOWNER SUBMIT A DRAFT ENVIRONMENTAL IMPACT STATEMENT DID NOT RAISE A JUSTICIABLE CONTROVERSY WHICH COULD BE REVIEWED BY A COURT.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the town board's issuing a positive declaration under the State Environmental Quality Review Act (SEQRA) and imposing a DEIS (draft environmental impact statement) requirement on a landowner seeking a nonconforming use did not raise a justiciable controversy. Although the creation of a DEIS imposes a financial cost on the landowner, it is only the initial step in the SEQRA review process and is not, therefore, ripe for review. The landowner relied on *Matter of Gordon v. Rush*, 100 N.Y.2d 236, to argue review was appropriate. The court explained why *Gordon* did not apply: "This Court [in *Gordon*] concluded that the Board's administrative action was ripe for judicial review because the Board's SEQRA declaration imposed an obligation on the petitioners to prepare and submit a DEIS, after they 'had already been through the coordinated review process and a negative declaration had been issued by the DEC as lead agency,' and where no apparent further proceedings would remedy the injury caused by the unnecessary and unauthorized expenditures associated with conducting a DEIS ... . Thus, *Gordon*'s analysis and its import must be considered in light of the Court's recognition that the administrative action in that case was potentially unauthorized because 'the Board may not have had jurisdiction to conduct its own SEQRA review,' given the existence of a prior negative declaration by a facially appropriate lead agency ...". ***Matter of Ranco Sand & Stone Corp. v. Vecchio*, 2016 N.Y. Slip Op. 02477, CtApp 3-31-16**

FRAUD, ATTORNEYS, TRUSTS AND ESTATES.

FIDUCIARY EXCEPTION TO THE USUAL BURDEN OF PROOF IN A CONSTRUCTIVE FRAUD ACTION DID NOT APPLY; FIDUCIARIES WERE NOT PARTIES TO THE RELEVANT DOCUMENTS AND DID NOT STAND TO BENEFIT FROM THE PROVISIONS OF THE DOCUMENTS.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissenting opinion, determined an affirmative defense alleging constructive fraud on the part of attorneys who drafted irrevocable releases of powers of appointment of trust assets was properly dismissed by the Appellate Division. The Benihana Protective Trust (BPT) was formed by Rocky, the founder of the Benihana restaurant chain. The irrevocable releases of powers of appointment allowed disposition of the trust assets only to Rocky's descendants. However, irrespective of the releases, Rocky's will attempted to pass trust assets to his wife. Rocky indicated in a deposition that he would not have signed the releases had he known they would prohibit the disposition of trust assets to his wife. Upon Rocky's death, Rocky's wife sought to have the releases declared invalid under a fiduciary constructive-fraud theory. Rocky's wife argued that the fiduciary exception to the usual constructive fraud proof requirements shifted the burden to the trust beneficiaries to prove the releases were not procured by fraud. Rejecting the applicability of the fiduciary exception, the court affirmed the Appellate Division's grant of summary judgment in favor of the trust beneficiaries: "It is a well-settled rule that 'fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to [be] relieve[d] . . . from an obligation on that ground'

... . However, an exception to that general rule provides that where a fiduciary relationship exists between the parties, the law of constructive fraud will operate to shift the burden to the party seeking to uphold the transaction to demonstrate the absence of fraud ... . * * * Here, the only individuals who stood to benefit from Rocky's execution of the Releases were his descendants. [The attorneys] were [not] parties to the Releases [and did not] to directly benefit from their execution ... . If anything, the execution of the Releases all but ensured that [the attorneys] would have no interest in, nor would receive any benefit from, the trust assets." ***Matter of Aoki v. Aoki*, 2016 N.Y. Slip Op. 02474, CtApp 3-31-16**

INSURANCE LAW.

OFFICE-BASED SURGERY CENTERS, UNLIKE HOSPITALS AND AMBULATORY SURGERY CENTERS, ARE NOT ENTITLED TO REIMBURSEMENT FOR FACILITY FEES UNDER THE NO-FAULT LAW.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined an office-based surgery (OBS) center, unlike hospitals and ambulatory surgery centers (ASC), is not entitled to reimbursement for "facility fees" under the no-fault insurance law and the related regulations. The fees at issue in this case amounted to $1.3 million: "As the statutory language illustrates, the legislature capped total payments for basic economic loss, and delegated the determination of fee rates to the Chair and the Superintendent. Neither administrator has chosen to include OBS facility fees in the regulatory schedules. It is not for this Court to decide, contrary to [the OBS's] contention, whether this is a 'good idea' or if it would be better for patients covered by no-fault insurance, and for the efficient management of our health care system, to require reimbursement of OBS facility fees as a means to ensure that OBS facilities continue to be viable options for patients. 'These policy determinations are beyond our authority and instead best left for the legislature' ...". ***Government Empls. Ins. Co. v. Avanguard Med. Group, PLLC*, 2016 N.Y. Slip Op. 02473, CtApp 3-31-16**

PHYSICIAN-PATIENT CONFIDENTIALITY, BREACH OF; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

BREACH OF PHYSICIAN-PATIENT CONFIDENTIALITY CAUSE OF ACTION ALLOWED TO PROCEED AGAINST HOSPITAL AND TREATING PHYSICIAN, PLAINTIFFS' DECEDENT'S TREATMENT AND DEATH IN THE EMERGENCY ROOM WERE FILMED WITHOUT CONSENT; ALLEGATIONS OF OUTRAGEOUS CONDUCT NOT SUFFICIENT TO SUPPORT INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined plaintiffs had stated a cause of action against the hospital and treating physician for breach of physician-patient confidentiality. At the time plaintiffs' decedent was admitted to the emergency room, a television crew was filming. Without decedent's consent, his treatment and death were recorded and subsequently aired. Although the breach of confidentiality cause of action was allowed to go forward, the intentional infliction of emotional distress cause of action was not. The allegations were deemed not to meet the requirements of the "extreme and outrageous conduct" element of the tort. With respect to the breach of confidentiality, the court explained: "The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages ...". ***Chanko v. American Broadcasting Cos. Inc.*, 2016 N.Y. Slip Op. 02478, CtApp 3-31-16**

FIRST DEPARTMENT

CIVIL PROCEDURE.

FAILURE TO COMPLY WITH NOTICE PROVISION OF NYC ADMINISTRATIVE CODE DID NOT TOLL STATUTE OF LIMITATIONS RE: AN ACTION SEEKING TO RECOVER THE COST OF BUILDING MODIFICATIONS REQUIRED BY THE CODE AFTER DEFENDANTS' CONSTRUCTION OF A TALLER NEIGHBORING BUILDING.

The First Department, in a full-fledged opinion by Justice Tom, determined defendants' failure to give notice to plaintiff of their intent to increase the height of a neighboring building did not toll the statute of limitations. The suit concerned two provisions of the Administrative Code of the City of New York. One provision required notice to neighboring property owners of construction to increase the height of a building. The other required the owner of the newly constructed building to increase the height of the chimneys of surrounding buildings to bring them back into conformance with the Administrative Code. Plaintiff was seeking to recover the cost of modifying its chimney which was rendered noncompliant by defendants' now taller neighboring building. The new construction was completed in 2007. The court held defendants' failure to notify plaintiff of the new construction did not excuse plaintiff's failure to bring an action within three years of the completion of the new construction. ***West Chelsea Bldg. LLC v. Guttman*, 2016 N.Y. Slip Op. 02548, 1st Dept 3-31-16**

CORPORATION LAW.

DERIVATIVE SUIT AGAINST JP MORGAN CHASE STEMMING FROM SUBPRIME MORTGAGE-BACKED SECURITIES DISMISSED.

The First Department determined a derivative suit against the board of directors of JP Morgan Chase stemming from subprime mortgage-backed securities was properly dismissed for failure to demonstrate the futility of a presuit demand upon the board. The decision includes particularly clear explanations of what must be alleged to sufficiently demonstrate futility under Delaware law pursuant to the "*Aronson*" and "*Rales*" tests. With regard to one of the two "*Aronson*" tests, the court wrote: "Plaintiffs contend that the board's action, including the adoption of the January 2007 resolution delegating authority to a management committee, was not a valid exercise of business judgment. However, this factual assertion examines the board's course of action in hindsight and hinges on certain warning signs that plaintiff alleges the board failed to heed, including some losses that reverted back to JPMorgan's balance sheet by September 2008. Delaware law presumes that in making a business decision the board of directors acts in good faith and in the honest belief that the action is taken in the best interests of the company ... . In order to satisfy the second prong of the *Aronson* test, plaintiffs are required to plead particularized facts sufficient to raise a reason to doubt that [1] the action was taken honestly and in good faith or [2] the board was adequately informed in making the decision ... . These facts do not rebut the presumption of regularity of the board's decision making process ... . Although risky, the conduct plaintiff challenges, the board's authorization of the securitization and sale of investments, involves 'legal business decisions that were firmly within management's judgment to pursue' ... . The fact that investors later sued or made repurchase demands does not raise a reasonable doubt that the decision to engage in such transactions was not a valid exercise of business judgment ...". ***Asbestos Workers Phila. Pension Fund v. Bell*, 2016 N.Y. Slip Op. 02510, 1st Department 3-31-16**

FRAUD, CIVIL PROCEDURE.

FRAUD CAUSES OF ACTION AGAINST DEUTSCHE BANK STEMMING FROM THE COLLAPSE OF MORTGAGE-BACKED SECURITIES DISMISSED AS UNTIMELY, ACCUSATIONS AGAINST DEUTSCHE BANK WERE WELL-KNOWN MORE THAN TWO YEARS BEFORE THE SUIT WAS BROUGHT.

In another lawsuit stemming from the collapse of mortgage-backed securities, the First Department determined fraud causes of action by Aozora Bank against Deutsche Bank were properly dismissed as untimely. Investigations, including a Congressional investigation, into the relevant actions of Deutsche Bank were well-known more than two years before the suit was brought: "The parties do not dispute that plaintiff's fraud causes of action were not timely under New York's six-year limitations period and, to be timely, must have been commenced within two years from the time plaintiff discovered the fraud, or with reasonable diligence could have discovered it (CPLR 213[8]). * * * ... [O]ne of the most significant sources of public information putting plaintiff on notice of its fraud claims is the Senate Report and its associated emails, which actually form the centerpiece of plaintiff's complaint. In fact, the Senate Report contains a 45-page section on Deutsche Bank entitled 'Running the CDO Machine: Case Study of Deutsche Bank.' Taken with all the other information available in the public domain, the Senate Report is more than sufficient to have placed Aozora on inquiry notice of possible fraud by April 2011 at the latest ...". ***Aozora Bank, Ltd. v. Deutsche Bank Sec. Inc.*, 2016 N.Y. Slip Op. 02511, 1st Dept 3-31-16**

PERSONAL INJURY, LABOR LAW.

12- TO 18-INCH FALL SUPPORTED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF UNDER LABOR LAW § 240(1).

The First Department determined a fall of 12 to 18 inches sufficed to award plaintiff summary judgment in a Labor Law § 240(1) action: "Plaintiff was injured when, while carrying wood planks, he fell through an opening in a latticework rebar deck to a plywood form that was 12 to 18 inches below. 'There is no bright-line minimum height differential that determines whether an elevation hazard exists' . . . , and here, the record establishes that plaintiff's fall was the result of exposure to an elevation related hazard ...". ***Brown v. 44 St. Dev., LLC*, 2016 N.Y. Slip Op. 02527, 1st Dept 3-31-16**

SECOND DEPARTMENT

CIVIL PROCEDURE, TRUSTS AND ESTATES, APPEALS.

DEFENDANT'S DEATH PRIOR TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DIVESTED THE COURT OF JURISDICTION; COURT SHOULD NOT HAVE DECIDED MOTION AND ORDER APPEALED FROM WAS A NULLITY.

In this foreclosure action, the Second Department determined plaintiff bank's motion for summary judgment should not have been entertained because defendant had died before the motion was brought. The order appealed from was therefore a nullity: "Here, the deceased defendant died before the plaintiff's motion was made and before the order appealed from was issued. The attorney who had represented the deceased defendant prior to his death purportedly took this appeal on behalf of, among others, the deceased defendant. However, since a substitution of parties had not been effected prior to the filing of the notice of appeal, counsel lacked the authority to act for the deceased defendant, and the purported appeal taken

on behalf of the deceased defendant must be dismissed ... . Furthermore, since no substitution was made prior to the entry of the order appealed from, the order appealed from is a nullity to the extent that it pertains to the deceased defendant, and we vacate so much of the order as granted that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against the deceased defendant ... . Similarly, in this case, since a proper substitution had not been made, the Supreme Court should not have determined the merits of the plaintiff's motion, even to the extent that the plaintiff sought relief against the other defendants ...". ***Aurora Bank FSB v. Albright*, 2016 N.Y. Slip Op. 02307, 2nd Dept 3-30-16**

CRIMINAL LAW.

JUROR SHOULD HAVE BEEN EXCUSED FOR CAUSE, CONVICTION REVERSED.

The Second Department determined defendant's conviction must be reversed because the trial court should have granted defense counsel's request to excuse a prospective juror for cause. The juror said she "didn't know" whether the sexual assault of her aunt would affect her ability to judge the sexual-offense case for which the jury was being selected: "Here, during voir dire, one prospective juror indicated that because her aunt had been the victim of a violent sexual assault, it would 'be a little bit hard' for her to keep an open mind when listening to the facts of this case. When asked whether she could 'give the defendant in this case a fair trial,' she responded, 'I can manage. Yes.' When asked if it was possible that her judgment in this case might be affected by her aunt's case, she responded, 'Might.' The Supreme Court also asked the prospective juror if the fact that this case did not involve a sex crime would 'change things' for her, and she responded, "'Part of it. Yeah.' The prospective juror confirmed that she would refrain from blaming the defendant for what happened to her aunt or favoring the prosecution for successfully prosecuting her aunt's assailant, but when asked again by defense counsel whether her aunt's experience 'might affect [her] ability to judge this case,' the juror paused and finally said, 'I don't know.' The court denied the defendant's challenge for cause to this prospective juror. The defense then exercised a peremptory challenge to remove her and exhausted all of its peremptory challenges prior to the end of jury selection. At no point did the prospective juror unequivocally state that her prior state of mind would not influence her verdict, and that she would render an impartial verdict based solely on the evidence. Under the circumstances, the Supreme Court should have granted the defense's challenge for cause to this prospective juror ...". ***People v. Malloy*, 2016 N.Y. Slip Op. 02380, 2nd Dept 3-30-16**

INSURANCE LAW, CONTRACT LAW.

SUPPLEMENTAL UNINSURED/UNDERINSURED MOTORIST PROVISIONS WERE UNAMBIGUOUS, RECOVERY LIMITED TO THE DIFFERENCE BETWEEN THE AMOUNT RECOVERED UNDER THE TORTFEASOR'S POLICY AND $50,000, HERE THE DIFFERENCE WAS ZERO.

The Second Department determined the relevant supplemental uninsured/underinsured motorist (SUM) provisions of appellant's policy were unambiguous and limited recovery for the death of appellant's daughter to a total of $50,000. Appellant argued the policy allowed recovery of the $50,000 limit, despite recovery of $50,000 under the tortfeasor's policy: "Based upon the . . . provisions of the policy, the Supreme Court properly found that the $50,000 recovered by the appellant from the tortfeasor was equivalent to the maximum SUM limit provided for in the policy. Therefore, the appellant had no possibility of an additional recovery, which rendered her SUM claim academic ... . The language of the SUM endorsement was not ambiguous and must be enforced ...". ***Matter of Ameriprise Auto & Home Ins. Co. v. Savio*, 2016 N.Y. Slip Op. 02358, 2nd Dept 3-30-16**

PERSONAL INJURY.

FAILURE TO DEMONSTRATE WHEN AREA WAS LAST CLEANED OR INSPECTED REQUIRED DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.

The Second Department determined defendant's motion for summary judgment in a slip and fall case was properly denied. The defendant failed to demonstrate when the area was last cleaned and inspected. Evidence of routine maintenance is not enough: "Here, although the defendant's evening maintenance employee testified at his deposition about his regular cleaning routine for the building, he had no independent recollection of having cleaned the floor in question on the date of the plaintiff's accident. Furthermore, no deposition testimony was provided describing the condition of the floor in question on the date of the accident, including whether the maintenance employee had observed a water condition upon it. Since the defendant did not submit evidence regarding any specific inspection or cleaning of the area on the date of the accident, the defendant failed to establish that it did not have constructive notice of the alleged dangerous condition ... . The defendant's submissions also failed to eliminate all triable issues of fact as to whether it created the alleged dangerous condition ...". ***Ansari v. MB Hamptons, LLC*, 2016 N.Y. Slip Op. 02305, 2nd Dept 3-30-16**

THIRD DEPARTMENT

CONTRACT LAW, JOINT VENTURES.

LIABILITY UNDER CONTRACT CAN ARISE IN THE ABSENCE OF PRIVITY WHERE A PARTY IS A JOINT VENTURER OR PARTNER WITH A SIGNATORY TO THE CONTRACT.

The Third Department, reversing Supreme Court, determined there was a question of fact whether defendant Rock Solid was in a joint venture with defendant Catamount at the time Catamount entered a contract with plaintiffs. Plaintiffs sought specific performance of the contract. Supreme Court had dismissed the action against Rock Solid finding that Rock Solid was not in privity of contract with plaintiffs. However, because plaintiffs alleged Rock Solid and Catamount were joint venturers, and because Rock Solid did not address that issue in its motion for summary judgment, the motion should not have been granted: "Liability under a contract can arise in the absence of privity where it is established that the defendant is in a joint venture or partnership with a signatory to the contract (*see* Partnership Law § 28 ...). 'A joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge' ... . 'The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise; and a provision for the sharing of profits and losses' ... . Here, Supreme Court concluded that Rock Solid established its prima facie entitlement to summary judgment as a matter of law by demonstrating that it was not a party to the 2005 agreement … . … [T]he court failed to address whether Rock Solid satisfied its additional burden to refute plaintiffs' assertions in the complaint that Rock Solid was Catamount's joint venturer or partner." ***Alper Rest., Inc. v. Catamount Dev. Corp.*, 2016 N.Y. Slip Op. 02509, 3rd Dept 3-31-16**

CRIMINAL LAW, JUDGES.

TRIAL JUDGE GAVE TOO MUCH ADVICE TO THE PROSECUTOR ON THE ADMISSION AND USE OF EVIDENCE, NEW TRIAL ORDERED.

The Third Department reversed defendant's conviction because the trial judge gave excessive procedural advice to the prosecutor (ADA). During several sidebars, the judge explained to the ADA how to lay a proper foundation for the admission of evidence and how to use evidence to refresh a witness's recollection. The judge's well-intentioned assistance was deemed to have created the perception the prosecution received a tactical advantage: "During the course of the trial, the ADA in question demonstrated difficulty in laying the proper foundation for the admission into evidence of certain photographs and bank records and in utilizing a particular document to refresh a witness's recollection. In response, County Court conducted various sidebars, during the course of which the court, among other things, explained the nature of defense counsel's objections, outlined the questions that the ADA needed to ask of the testifying witnesses, referred the ADA to a certain evidentiary treatise and afforded him a recess in order to consult and review the appropriate section thereof. Without further belaboring the point, suffice it to say that our review of the record confirms what County Court itself acknowledged — namely, that in attempting to 'explain[] some of the law' and in an effort to avoid portraying defense counsel as 'obstructionist,' it 'explained one thing too many, in all fairness.' As County Court's assistance in this regard — although well-intentioned — arguably created the perception that the People were receiving an unfair tactical advantage, we are persuaded that this matter should be remitted for a new trial ...". ***People v. Kocsis*, 2016 N.Y. Slip Op. 02480, 3rd Dept 3-31-16**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

ALLEGATIONS BY THREE FORMER EMPLOYEES DID NOT MAKE OUT A PRIMA FACIE CASE OF A HOSTILE WORK ENVIRONMENT DUE TO SEXUAL HARASSMENT.

The Third Department, reversing Supreme Court, determined the lawsuit against the employer, Ross, by three former employees should have been dismissed. The allegations made by the three employees were not sufficient to make out a prima facie case of a hostile work environment due to sexual harassment: "While Ross' alleged conduct was certainly offensive and grossly unprofessional, those aspects of it that were sexually harassing were not severe or pervasive enough to render any plaintiff's work environment objectively hostile and abusive as these terms are construed under the Human Rights Law. In order to establish the existence of a sexually hostile work environment, an individual plaintiff must show that his or her workplace was 'permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [his or her] employment and create an abusive working environment' ... . All of the circumstances must be considered, including 'the frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with [the plaintiff's] work performance' ... . Moreover, the workplace must be both subjectively and objectively hostile. That is, a plaintiff must not only perceive that the conditions of his or her employment were altered because of discriminatory conduct, but the conduct also must have created an environment that a reasonable person would find to be hostile or abusive ...". **Pawson v. *Ross*, 2016 N.Y. Slip Op. 02502, 3rd Dept 3-31-16**

MUNICIPAL LAW, PROPERTY DAMAGE, GOVERNMENTAL IMMUNITY, CONTRACT LAW.

QUESTION OF FACT WHETHER GOVERNMENTAL OR PROPRIETARY ACTS WERE INVOLVED IN CONNECTION WITH A BURST WATER MAIN; QUESTION OF FACT WHETHER ROAD-WORK CONTRACTOR LIABLE IN TORT FOR LAUNCHING AN INSTRUMENT OF HARM.

The Third Department, in a full-fledged opinion by Justice Garry, determined questions of fact had been raised about governmental immunity and tort liability arising from contract in a property-damage case arising from road renovation work. Village officials and the contractor hired to do the road work (Merritt) decided to allow what was thought to be a small water leak to remain unaddressed temporarily. The leak was apparently created when a fire hydrant was removed to accommodate the road work. At some point the water main burst, causing flooding and a mudslide which damaged plaintiffs' property. The questions before the court were whether the village should be allowed to amend its answer with a governmental-immunity affirmative defense, and whether an indemnification cross-claim against the contractor (Merritt) by the village should have been allowed. The Third Department answered both questions in the affirmative. Although maintenance of a water system for fire protection is a governmental function to which immunity applies, maintenance of the water system generally is a proprietary function to which immunity would not apply. With respect to Merritt, although tort liability does not usually arise from a contract, here there was a question of fact whether Merritt "launched an instrument of harm" which would trigger liability in tort. ***Billera v. Merritt Constr., Inc.*, 2016 N.Y. Slip Op. 02503, 3rd Dept 3-31-16**

PERSONAL INJURY, CONTRACT LAW.

QUESTION OF FACT WHETHER SNOW-REMOVAL CONTRACTOR CREATED THE ICE CONDITION WHERE PLAINTIFF FELL.

The Third Department, in this slip and fall case, determined Inland, the owner of the shopping mall where plaintiff fell on ice, raised a question of fact whether the snow removal contractor, Hayes Paving, created the dangerous condition (i.e., launched an instrument of harm) by piling ice near a building which subsequently melted and refroze: "[W]e conclude that a question of fact exists as to whether Hayes Paving negligently created a dangerous condition by piling chunks of ice against the Staples store building which, thereafter, melted and refroze into the patch of ice upon which plaintiff allegedly slipped ... . Thus, Hayes Paving was not entitled to dismissal of Inland's third-party claim for contribution." ***Hannigan v. Staples, Inc.*, 2016 N.Y. Slip Op. 02506, 3rd Dept 3-31-16**

REAL PROPERTY, DEEDS.

1899 DEED COVENANT TO PROVIDE FREE ELECTRIC POWER TO DEFENDANT'S PREMISES RAN WITH THE LAND; HOWEVER THE IMPLIED DURATIONAL LIMITS ON THE COVENANT HAVE BEEN SURPASSED RENDERING IT UNENFORCEABLE.

The Third Department, reversing Supreme Court, determined that a covenant in an 1899 deed to provide free power to the property now occupied by defendant Allied Healthcare Product (AHP) was no longer enforceable. The covenant was precipitated by the building of a hydroelectric dam which cut off the water supply upon which the mills on the property now owned by AHP relied. The Third Department determined the covenant met all the requirements for running with the land. But the court went on to find that implied durational limits on the covenant have been surpassed: "While the general requisites of an affirmative covenant running with the land have been met, that does not end the matter. 'The affirmative covenant is disfavored in the law because of the fear that this type of obligation imposes an 'undue restriction on alienation or an onerous burden in perpetuity' ... . The power covenant has no express limitation on its duration, and 'it may 'fall[] prey to the criticism that it creates a burden in perpetuity, and purports to bind all future owners, regardless of the use to which the land is put' ... . AHP rightly points out that the power covenant may be implicitly 'conditioned upon the continued existence of' a hydroelectric facility capable of supplying the required power to ongoing manufacturing at the mills ... . Suffice it to say, those conditions have only been intermittently met as historical matter and are not met now." ***Niagara Mohawk Power Corp. v. Allied Healthcare Prods., Inc.*, 2016 N.Y. Slip Op. 02504, 3rd Dept 3-31-16**

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