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FIRST DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, NEGLIGENCE.

EXPERT DISCLOSURE NOTICE NEED NOT DISCLOSE FACTS AND OPINIONS ABOUT WHICH EXPERT WILL TESTIFY, LATE EXPERT DISCLOSURE NOTICE FOR A REBUTTAL WITNESS SHOULD HAVE BEEN ACCEPTED.

The First Department, in remanding for a new trial, determined (1) the expert disclosure notice provided by the defense was sufficient, and (2) plaintiff should have been allowed, during the trial, to submit an expert disclosure notice for a rebuttal witness. Plaintiff alleged his foot was run over by a bus: "After the defense rested, plaintiff's attorney sought permission to call two rebuttal witnesses. He submitted a CPLR 3101(d)(1) notice for an expert in biomechanical medicine, arguing that the disclosure notice for Dr. Kurtz had provided no indication that the doctor's opinion was based on the lack of tread marks or injury to the metatarsals and ankle. He argued that the notice's insufficiency had not allowed him to prepare an expert witness to address these issues directly. His proposed expert would demonstrate, by use of an anatomical model of a foot, that plaintiff's foot could have been positioned after he fell in such a manner that when the bus wheel rolled over his foot, his ankle and upper foot would not have been injured as Dr. Kurtz claimed. The court denied his request based on the timing of the notice and its reasoning that no rebuttal was needed. ... We find that Dr. Kurtz's CPLR 3101(d)(1) disclosure notice was legally sufficient; it provided plaintiff with notice that the doctor would question whether a bus would have caused the injuries sustained by plaintiff. It is improper for a party to request the facts and opinions upon which another party's expert is expected to testify ... . * * * ... [N]otwithstanding the delay by plaintiff in providing a CPLR 3101(d)(1) disclosure for his medical expert, the trial court, in the interest of justice, should have permitted the medical expert to testify in rebuttal." ***Tate-Mitros v. MTA N.Y. City Tr.*, 2016 N.Y. Slip Op. 07394, 1st Dept 11-10-16**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REQUEST TO REPRESENT HIMSELF, MADE DURING JURY SELECTION, WAS TIMELY, SUMMARY REJECTION OF THE REQUEST WITHOUT ANY INQUIRY REQUIRED REVERSAL.

The First Department reversed defendant's conviction because the trial judge did not make an inquiry into his request to represent himself. Defendant's request was made during jury selection and was summarily rejected as untimely: "The right to self-representation ... is subject to several restrictions ... . Thus, '[a] defendant in a criminal case may invoke the right to defend pro se provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues' ... . When a defendant timely invokes the right to self-representation, 'the trial court should conduct a thorough inquiry to determine whether the waiver was made intelligently and voluntarily' ... . Judged by these principles, we conclude that defendant's right to self-representation was violated. Contrary to the trial court's finding, defendant's requests to proceed pro se, made during jury selection, were timely asserted ...". ***People v. Crespo*, 2016 N.Y. Slip Op. 07396, 1st Dept 11-10-16**

CRIMINAL LAW, PAROLE.

DENIAL OF PAROLE PROPERLY ANNULLED, NEW HEARING BEFORE DIFFERENT COMMISSIONERS ORDERED.

The First Department, in a full-fledged opinion by Justice Gesmer, affirmed Supreme Court's annulment of parole denial and ordered a new hearing before different commissioners. Petitioner shot and killed her husband. Evidence presented at trial indicated she had been abused by her husband for many years and her husband was threatening severe abuse at the time of the shooting. Petitioner earned two college degrees while in prison, participated in every available rehabilitation program, taught other inmates, served on a grievance committee, successfully worked for the Department of Motor Vehicles and testing indicated it was highly unlikely she would re-offend. Yet she was denied parole three times: "Based on the record before us, we conclude that the motion court correctly determined that the Board acted with an irrationality bordering on impropriety in denying petitioner parole. The Board focused exclusively on the seriousness of petitioner's conviction and the decedent's family's victim impact statements (which it incorrectly described as 'community opposition to her release') without giving genuine consideration to petitioner's remorse, institutional achievements, release plan, and

her lack of any prior violent criminal history." ***Matter of Rossakis v. New York State Bd. of Parole*, 2016 N.Y. Slip Op. 07415, 1st Dept 10-10-16**

EMPLOYMENT LAW, NYC HUMAN RIGHTS LAW, CIVIL PROCEDURE.

PLAINTIFF STATED A CAUSE OF ACTION FOR SEXUAL ORIENTATION-BASED DISCRIMINATION, DEFENDANT'S ARGUMENT THERE WAS A NON-DISCRIMINATORY REASON FOR ADVERSE ACTION SHOULD NOT BE CONSIDERED IN A CPLR 3211 (a)(7) MOTION TO DISMISS.

The First Department, reversing (modifying) Supreme Court, determined plaintiff had stated a cause of action under the New York City Human Rights Law for sexual orientation-based discrimination: "Plaintiff's allegations that he is an openly gay man and was qualified for the positions of correction officer and captain meet the first two elements of his discrimination claim. Plaintiff's allegations that he was written up, twice suspended, and ultimately demoted meet the third element of disadvantageous treatment ... . Defendant's argument that plaintiff has not alleged that he was treated worse than similarly situated captains — as opposed to correction officers — is unavailing. Suspension and demotion are, on their faces, adverse employment actions. Defendant's argument is, effectively, that those actions were warranted by plaintiff's conduct while a captain, but this argument goes more properly to the second leg of the ... burden-shifting framework ... , namely rebuttal of a prima facie claim of employment discrimination by showing a legitimate, nondiscriminatory reason for the adverse action, and is misplaced at this early procedural juncture." ***James v. City of New York*, 2016 N.Y. Slip Op. 07400, 1st Dept 11-10-16**

SECOND DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

GRIEVANCE FILED AGAINST SCHOOL DISTRICT REGARDING THE DISTRICT'S STARTING A PLENARY ACTION AGAINST A TEACHER UNDER A FAITHLESS SERVANT THEORY WAS ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT.

The Second Department determined a grievance involving a teacher was arbitrable under the collective bargaining agreement (CBA). The grievance was filed by the teachers' association against the school district regarding the district's starting a plenary action against a teacher under a faithless servant theory: "Here, the respondent, Locust Valley Teachers' Association (hereinafter the LVTA), filed a grievance against the petitioner, Locust Valley Central School District (hereinafter the School District), regarding the commencement by the School District of a plenary action against a teacher formerly employed by the School District. The former teacher was a member of the LVTA. The applicable collective bargaining agreement (hereinafter CBA) between the parties provided that either party had the right to submit a grievance to arbitration, where that grievance was not resolved by the School District. The CBA defined a 'grievance' as 'a claimed violation, misinterpretation or inequitable application [of a] provision of th[e] Agreement.' In the plenary action, the School District sought, under a "faithless servant" theory, the forfeiture of all compensation earned by the subject teacher pursuant to the CBA during a period of time in which the teacher allegedly engaged in certain criminal conduct. That conduct ultimately resulted in the teacher's plea of guilty to several criminal charges. The School District has not identified any statutory, constitutional, or public policy prohibition against arbitrating the grievance. Further, in light of the fact that the grievance concerns the right of the School District to bring a plenary action seeking the equitable forfeiture of compensation paid to the teacher under the CBA, there exists a reasonable relationship between the grievance and the CBA. Therefore, the Supreme Court did not err in finding the grievance to be arbitrable pursuant to the CBA ...". ***Locust Val. Cent. Sch. Dist. v. Benstock*, 2016 N.Y. Slip Op. 07299, 2nd Dept 11-9-16**

CIVIL PROCEDURE.

CHINESE NATIONAL NOT DOMICILED IN NEW YORK, NO RELATIONSHIP BETWEEN THE ALLEGATIONS IN THE COMPLAINT AND DEFENDANT'S TRANSACTION OF BUSINESS IN NEW YORK, COMPLAINT PROPERLY DISMISSED FOR LACK OF JURISDICTION.

The Second Department determined the complaint against a Chinese national was properly dismissed for lack of jurisdiction. The court explained the law re: (1) the burdens of proof for the motion to dismiss, (2) the procedure when discovery is required to determine jurisdiction, (3) the definition of "domicile" and (4) the nature of business transactions which will provide New York with jurisdiction: "... [T]he plaintiffs failed to make a prima facie showing that the defendant was domiciled in New York at the time the action was commenced in July 2013. Evidence of the defendant's ownership of a cooperative apartment in Queens is, on its own, insufficient to confer personal jurisdiction over him absent evidence of his intent to make the apartment his 'fixed and permanent home' ... . * * * The transaction of business is established where it is shown that a 'defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted'... . 'Purposeful activities are those with which a defendant, through volitional acts, avails [himself or herself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws'

... . A single transaction in New York may suffice to invoke jurisdiction even if the defendant never enters the state, provided that the activity was purposeful and 'there is a substantial relationship between the transaction and the claim asserted' "... . Indeed, absent 'some articulable nexus' between a defendant's purposeful business activities in the state and the plaintiff's claims, personal jurisdiction pursuant to CPLR 302(a)(1) may not be exercised ...". ***Chen v. Guo Liang Lu*, 2016 N.Y. Slip Op. 07290, 2nd Dept 10-9-16**

CONTRACT LAW.

AMBIGUOUS TERMS IN CONTRACT NOT CLARIFIED BY PAROL EVIDENCE, TRIABLE ISSUES OF FACT PRECLUDED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined the applicable provisions of a construction contract were ambiguous and defendant's motion for summary judgment should have been denied. The plaintiff installed a sidewalk shed around a school building to facilitate its roof work. A dispute arose whether the construction of the sidewalk shed was included in the contract, or whether it was extra work for which extra compensation was due: "A contractor may properly recover payment for extra work that is not contemplated by the terms of the original agreement, and which is performed at the direction of the defendant ... . However, a contractor may not recover for any alleged extra work that was actually covered by the terms of the original contract ... . * * * ... [T]he contract provision requiring the plaintiff to install sidewalk shedding 'to provide proper protection to the school population, workers and pedestrians' is ambiguous with respect to whether it obligated the plaintiff to install a sidewalk shed around the existing building. Moreover, contrary to the Supreme Court's conclusion, the provision in the contract providing that the plaintiff must install 'sidewalk sheds and/or fences . . . in the most conservative manner' is also ambiguous as to whether the plaintiff was required to install a sidewalk shed around the existing building and is subject to different interpretations. The parol evidence submitted by the plaintiff does not conclusively resolve this ambiguity. Thus, in light of these ambiguities as to whether the contract required the plaintiff to perform the work in question, there are triable issues of fact which preclude a grant of summary judgment to either party...". ***Arnell Constr. Corp. v. New York City Sch. Constr. Auth.*, 2016 N.Y. Slip Op. 07282, 2nd Dept 11-9-16**

COOPERATIVES.

COOPERATIVE BOARD'S PARKING RESTRICTION WAS A PROPER EXERCISE OF THE BUSINESS JUDGMENT RULE.

The Second Department determined the cooperative board's parking restriction was a proper exercise of the business judgment rule (and did not constitute a breach of fiduciary duty): " 'In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination [s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith'... . '[D]ecision making tainted by discriminatory considerations is not protected by the business judgment rule' ... . Here, the defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the complaint by establishing that the decision to enforce parking rules and prohibit parking in the grass area behind one of the cooperative buildings was protected by the business judgment rule ... . In particular, the defendants demonstrated that they were acting in the best interests of the cooperative after making a number of capital improvements that added to the aesthetics and value of the property." ***Beach Point Partners v. Beachcomber, Ltd.*, 2016 N.Y. Slip Op. 07284, 2nd Dept 11-9-16**

CORPORATION LAW, APPEALS.

COMPLAINT SUFFICIENTLY ALLEGED A CAUSE OF ACTION UNDER THE DOCTRINE OF PIERCING THE CORPORATE VEIL, ISSUE NOT RAISED BELOW PROPERLY CONSIDERED ON APPEAL.

The Second Department determined plaintiff had stated a cause of action under the "pierce the corporate veil" theory. Weaver was the developer of a construction project and Andrea was the general contractor. Defendant Weinberg was a member of Weaver and a shareholder of Andrea. Plaintiff had obtained a unpaid judgment against Andrea. Plaintiff alleged Weinberg abused the privilege of doing business in corporate form and sought to pierce the corporate veil and hold Weinberg liable for Andrea's debts. The court noted that, although the contention that New York does not recognize a cause of action for piercing the corporate veil was not raised below, the question could be considered on appeal because it involves a question of law which appears on the record and which could not have been avoided if raised at the proper time: "Here, the plaintiff adequately pleaded allegations that Weinberg dominated Andrea, and that he engaged in acts amounting to an abuse of the corporate form to perpetrate a wrong or injustice against the plaintiff. In this regard, the plaintiff alleged that Andrea was inadequately capitalized, that Weinberg commingled the assets of Andrea with the assets of Weaver, that Weinberg failed to adhere to corporate formalities with respect to Andrea, that Weinberg kept assets out of Andrea to avoid paying its debts and the judgment to the plaintiff, and that Weinberg used the account of Weaver to partially pay the debts of Andrea to the plaintiff. The plaintiff also sufficiently pleaded allegations that Weaver was the alter ego of Andrea." ***Olivieri Constr. Corp. v. WN Weaver St., LLC*, 2016 N.Y. Slip Op. 07302, 2nd Dept 11-9-16**

CRIMINAL LAW, APPEALS.

DEFENDANT HAD STANDING TO CONTEST THE SEARCH, MATTER REMITTED FOR A SUPPRESSION HEARING BECAUSE AN APPELLATE COURT CANNOT CONSIDER A MATTER NOT RULED UPON BELOW.

The Second Department determined Supreme Court erred in finding defendant did not have standing to contest the search of a van. The court explained that it could not consider the merits of the suppression motion because the merits were not ruled upon by the court below. The options for handling this scenario were explained in some detail. The court opted to hold the appeal in abeyance and remit the matter for a suppression hearing: "This Court has deemed it appropriate to reverse or modify the judgment of conviction, rather than holding the appeal in abeyance, where no purpose would be served by holding the appeal and directing that a new determination be made. This is the case, for example, where a determination of the alternative issue would not change the ultimate determination of the suppression motion ... , or where the trial court has already determined the alternative issue in the defendant's favor, in which case the issue would, in all likelihood, be decided in the defendant's favor again, and thus would remain unreviewable after remittal ... . However, where, as here, the alternative issue raised by the People on appeal has not been determined by the trial court, and the resolution of that issue could affect the determination of the suppression motion, we deem it appropriate to hold the defendant's appeal in abeyance and remit the matter for consideration of the alternative issue." ***People v. Chazbani*, 2016 N.Y. Slip Op. 07337, 2nd Dept 11-9-16**

FAMILY LAW.

DEFENDANT MOTHER, WHO SUCCESSFULLY OBTAINED AN ORDER REQUIRING PLAINTIFF TO PAY CHILD SUPPORT, WAS JUDICIALLY ESTOPPED FROM ARGUING PLAINTIFF WAS NOT A PARENT FOR THE PURPOSE OF VISITATION.

The Second Department, reversing Family Court, determined defendant mother was judicially estopped from arguing plaintiff was not a parent for the purpose of visitation. Defendant had previously successfully obtain an order requiring plaintiff to pay child support: "The defendant was judicially estopped from arguing that the plaintiff was not a parent for the purpose of visitation. First, by asserting in her child support petition that the plaintiff was chargeable with support for the subject child, the plaintiff assumed the position before the Family Court that the plaintiff was the subject child's parent, as it is parents who are chargeable with the support of their children (see Family Ct Act § 413[1][a]). Next, based on her assertion that the plaintiff was chargeable with the subject child's support, the defendant successfully obtained an order compelling the plaintiff to pay child support for the subject child ... . Under this order, the plaintiff was required to pay child support for his children, including the subject child. Furthermore, the record does not support the court's finding that the defendant unequivocally waived the right to child support. Therefore, the defendant is judicially estopped from arguing that the plaintiff is not a parent for the purpose of visitation ...". ***Paese v. Paese*, 2016 N.Y. Slip Op. 07304, 2nd Dept 11-9-16**

FAMILY LAW.

WHEN PARENTS HAVE EQUAL PARENTING TIME, THE PARENT WITH THE HIGHER INCOME SHOULD BE DEEMED THE NONCUSTODIAL PARENT FOR CHILD SUPPORT PURPOSES.

The Second Department, reversing Family Court, determined that mother, who had a substantially higher income than father, should be deemed the noncustodial parent because mother and father had equal parenting time. Therefore, father was entitled to child support from mother: "The 'custodial parent' within the meaning of the Child Support Standards Act is the parent who has physical custody of the child for the majority of the time ... . Where neither parent has the child for a majority of the time, the parent with the higher income, who bears the greater share of the child support obligation, should be deemed the noncustodial parent for the purposes of child support ...". ***Matter of Conway v. Gartmond*, 2016 N.Y. Slip Op. 07319, 2nd Dept 11-9-16**

INSURANCE LAW, CORPORATION LAW.

COMPLAINT STATED A CAUSE OF ACTION AGAINST BROKER INDIVIDUALLY FOR NEGLIGENT MISREPRESENTATION AND FOR BREACH OF A FIDUCIARY DUTY AGAINST THE BROKER'S CORPORATION.

The Second Department, reversing (modifying), Supreme Court determined the complaint stated a cause of against for negligent misrepresentation against an insurance broker individually (Weiss) and for breach of fiduciary duty against the broker's corporation (JSW). It was alleged that the defendants failed to add plaintiff's landlord as an additional insured and the broker signed a certificate which falsely indicated the landlord had been added to the policy: "Here, the Supreme Court erred in determining, upon reargument, that the complaint failed to state a cause of action sounding in negligent misrepresentation against Weiss individually. ... [W]e note that the complaint, as amplified by the evidentiary materials submitted by the plaintiffs, alleged that Weiss personally signed a certificate of insurance falsely stating that the plaintiffs' landlord had been added as an additional insured on a certain commercial general liability insurance policy, and forwarded this certificate to the plaintiffs, knowing that it was required by the plaintiffs' landlord. This is sufficient, for purposes of CPLR

3211(a)(7), to state a cause of action against Weiss, based on his personal participation in the commission of a tort ... . * * * The common-law rule is that 'an insurance broker acting as an agent of its customer has a duty of reasonable care to the customer to obtain [specifically] requested coverage within a reasonable time after the request, or to inform the customer of the agent's inability to do so, [but] the agent owes no continuing duty to advise, guide or direct the customer insured to obtain additional coverage' ... . However '[w]here a special relationship develops between the broker and client, . . . [the] broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage' ... . * * * Here … the complaint sufficiently alleged that there was a course of dealing between JDW and the plaintiffs over an extended period of time, which may have given rise to a special relationship between them ...". ***JT Queens Carwash, Inc. v. JDW & Assoc., Inc.*, 2016 N.Y. Slip Op. 07295, 2nd Dept 11-9-16**

LANDLORD-TENANT.

FAILURE TO RETURN KEYS DID NOT CONSTITUTE A FAILURE TO SURRENDER THE APARTMENT, TENANT ENTITLED TO RETURN OF SECURITY DEPOSIT.

The Second Department, reversing Supreme Court, determined the tenant was entitled to the return of the security deposit. The fact that the tenant did not return the keys did not show a failure to surrender the apartment: "The tenant established his prima facie entitlement to judgment as a matter of law on the cause of action alleging breach of the lease for failing to return the security deposit (see General Obligations Law § 7-103). The evidence established that the tenant paid the landlord a security deposit and vacated the apartment a few days before the lease terminated. In opposition, the landlord failed to raise a triable issue of fact. Contrary to the landlord's contention, the tenant's failure to return the keys prior to the expiration of the lease did not show a failure to surrender ... . Furthermore, there was no provision in the lease requiring the tenant to notify the landlord that he was vacating the apartment. In fact, the 'Tenant Cooperation Rider' stated that such notice was not required. Moreover, the landlord failed to submit evidentiary proof that the tenant damaged the apartment." ***Pezzo v. 26 Seventh Ave. S., LLC*, 2016 N.Y. Slip Op. 07310, 2nd Dept 11-9-16**

MORTGAGES.

STANDING REQUIREMENTS TO BRING AN ACTION CONTESTING A SATISFACTION OF MORTGAGE ARE THE SAME AS FOR BRINGING A FORECLOSURE ACTION.

The Second Department determined there was a question of fact whether plaintiff had standing to bring an action contesting a satisfaction of mortgage. The court determined the standing requirements for a foreclosure action applied and explained the burdens of proof for summary judgment: " 'The plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing either a written assignment of the underlying note or the physical delivery of the note' ... . 'As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note. However, the transfer of the mortgage without the debt is a nullity, and no interest is acquired by it . . . because a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation' ... . On a defendant's motion to dismiss a complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law ... . 'To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing' ...". ***U.S. Bank, N.A. v. Noble*, 2016 N.Y. Slip Op. 07315, 2nd Dept 11-9-16**

MUNICIPAL LAW, IMMUNITY, PROPERTY DAMAGE.

COUNTY NOT LIABLE FOR FLOODING, NO SPECIAL RELATIONSHIP WITH PLAINTIFF.

The Second Department determined the county could not be held liable for flooding by a brook which overflowed its banks. There was not special relationship between the county and the plaintiff: " '[A] municipal corporation is not liable for failure to restrain waters between banks of a stream or to keep a channel free from obstructions it did not cause. Absent any special duty owed to the private landowners, a municipal corporation cannot be held liable for failing to provide adequate flood protection' ... . Here, the County demonstrated that it did not owe a special duty to the plaintiff, and that the overflow was caused by natural phenomena, rather than its conduct. In opposition, the plaintiff failed to raise a triable issue of fact." ***Kimball Brooklands Corp. v. County of Westchester*, 2016 N.Y. Slip Op. 07297, 2nd Dept 11-9-16**

PERSONAL INJURY.

PLAINTIFF UNABLE TO IDENTIFY THE CAUSE OF HIS FALL, DEFENDANT SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted in this slip and fall case. The plaintiff could not identify the cause of his fall as he attempted to board a bus: " '[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation' ... . Although '[p]roximate

cause may be established without direct evidence of causation, by inference from the circumstances of the accident[,] . . . mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action' ... . 'Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation ...". ***Hahn v. Go Go Bus Tours, Inc.*, 2016 N.Y. Slip Op. 07294, 2nd Dept 11-9-16**

PERSONAL INJURY.

ROPE WHICH CAUSED PLAINTIFF TO FALL WAS AN OPEN AND OBVIOUS CONDITION KNOWN TO THE PLAINTIFF, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the rope (connected to a tree and a metal stanchion in a building atrium) which caused plaintiff to trip and fall was a non-actionable open and obvious condition: "[Defendant] moved for summary judgment dismissing the complaint insofar as asserted against it, arguing that the subject metal stanchions and connecting rope were open and obvious, and not inherently dangerous. The Supreme Court denied [defendant's] motion. [Defendant] met its prima facie burden by showing that the subject rope and stanchions, which were known to the plaintiff, were open and obvious, and not inherently dangerous ... . In opposition, the plaintiff failed to raise a triable issue of fact...". ***LeComples v. More Specialized Transp., Inc.*, 2016 N.Y. Slip Op. 07298, 2nd Dept 11-9-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

REPLACING A SPEAKER IN CONJUNCTION WITH INSTALLING PANELING CONSTITUTED ALTERING, ALLEGATION THE LADDER SWAYED SUFFICIENT TO DEMONSTRATE THE FAILURE TO SECURE THE LADDER CAUSED THE FALL.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240(10) cause of action should have been granted. Plaintiff had been hired to install wood paneling. Speakers were removed from wall to install the paneling. Plaintiff was standing on an A-frame ladder, replacing one of the speakers when the ladder swayed and he fell. The Second Department held that plaintiff was engaged in "altering," a covered activity, and the allegation that the ladder swayed was sufficient to link the fall to a failure of a safety device (failure to secure the ladder): "Although the defendant contends that the act of rehanging a speaker does not constitute the 'altering' of a building or structure, '[t]he intent of [Labor Law § 240(1)] was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts' ... . * * * Further, the plaintiff established, prima facie, the existence of a violation of Labor Law § 240(1) that was a substantial factor in causing his injuries ... . 'A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries'... . Here, the plaintiff's proof established that the ladder from which he fell was inadequately secured to provide him with proper protection, and that the failure to secure the ladder was a proximate cause of his injuries ...". ***Goodwin v. Dix Hills Jewish Ctr.*, 2016 N.Y. Slip Op. 07293, 2nd Dept 11-9-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

REPAIR OF AN AIR CONDITIONER WAS NOT A PROTECTED ACTIVITY UNDER LABOR LAW 240(1) OR 246(1), LADDER WAS NOT DEFECTIVE AND DEFENDANT DID NOT CONTROL PLAINTIFF'S WORK, THEREFORE NO LIABILITY UNDER LABOR LAW 200(1) AS WELL.

The Second Department determined defendant (Nickel) was entitled to summary judgment dismissing the Labor Law 200(1), 246(1) and 240(1) causes of action. Plaintiff was injured when he fell of a ladder while attempting to fix an air conditioner which had stopped running. Plaintiff was not engaged in a protected activity under Labor Law 240(1) or 246(1). The Labor Law 200(1) cause of action was properly dismissed because defendant did not control the manner of plaintiff's work: "Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff was not engaged in an enumerated activity protected under Labor Law § 240(1) at the time of his accident. Furthermore, Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff's accident did not involve construction, demolition, or excavation and, accordingly, that Labor Law § 241(6) does not apply. In opposition, the plaintiff failed to raise a triable issue of fact. Supreme Court properly granted that branch of Nickel's motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it, albeit for a different reason. Nickel established, prima facie, that the ladder was not defective, and the plaintiff conceded that fact. Thus, the potential liability of Nickel, contrary to the Supreme Court's finding, was not based on its actual or constructive notice of any dangerous or defective condition of the ladder ... . Instead, the plaintiff allegedly was injured as a result of the manner in which he performed his work. Accordingly, recovery against Nickel under Labor Law § 200 or under the common law may only be found if Nickel had the authority to supervise or control the performance of the work ... . Nickel established, prima facie, that it did not have authority to exercise supervision or control over the means and methods of the plaintiff's work. In opposition, the plaintiff failed to raise a triable issue of fact ...". ***Mammone v. T.G. Nickel & Assoc., LLC*, 2016 N.Y. Slip Op. 07300, 2nd Dept 11-9-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

FALL WHEN DESCENDING A 28-FOOT LADDER ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, APPARENTLY A 40-FOOT LADDER WOULD HAVE BEEN SAFER BUT NONE WAS AVAILABLE, THEREFORE USE OF THE SHORTER LADDER COULD NOT BE THE SOLE PROXIMATE CAUSE OF THE INJURY.

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell when he attempted to descend a 28-foot ladder. Apparently a 40-foot ladder would have been safer, but there was no showing a 40-foot ladder was available. Therefore plaintiff's use of a 28-foot ladder could not be the sole proximate cause of his injury: "... [T]he plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when he fell while descending an unsecured, 28-foot ladder, and that he was not provided with a safety device to prevent him from falling ... . Contrary to Halsted's (defendant's) contention, it failed to raise a triable issue of fact as to whether the plaintiff's decision to use a 28-foot ladder, rather than a 40-foot ladder, was the sole proximate cause of his injuries. The record reveals that there were no 40-foot ladders readily available to the plaintiff on the date of his accident, and that a Halsted employee nevertheless instructed the plaintiff that he was required to complete his job, or be fired. Under these circumstances, the plaintiff's use of the 28-foot ladder cannot be said to be the sole proximate cause of his injuries ...". ***Pacheco v. Halsted Communications*, Ltd., 2016 N.Y. Slip Op. 07303, 2nd Dept 11-9-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

A TWO-FOOT DEEP TRENCH WAS NOT AN ELEVATION HAZARD OR A HAZARDOUS OPENING.

The Second Department determined defendant was entitled to summary judgment dismissing the Labor Law 240(1) and 241(6) causes of action. Plaintiff alleged he was pulled into a two-foot deep trench while holding a cable. The court held the hazard was not "elevation-related" and the two-foot deep trench was not a "hazardous opening:" "The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff's alleged injuries were not caused by the elevation or gravity-related hazards encompassed by Labor Law § 240(1) ... . [T]he defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6) by demonstrating, inter alia, that 12 NYCRR 23-1.7(b)(1), which is the only Industrial Code provision upon which the plaintiff presently relies, is inapplicable to the facts of this case. That provision provides, in pertinent part, that '[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing' (12 NYCRR 23-1.7[b][1][i]). Although this provision is sufficiently specific to support a cause of action under Labor Law § 241(6) ... , the trench in this particular case, which was only two feet deep, is not a hazardous opening within the meaning of 12 NYCRR 23-1.7(b)(1) ...". ***Palumbo v. Transit Tech.*, LLC, 2016 N.Y. Slip Op. 07305, 2nd Dept 11-9-16**

ZONING.

ADJACENT PROPERTY OWNERS DID NOT HAVE STANDING TO CHALLENGE VARIANCE, THE CHALLENGE WAS NOT WITHIN THE ZONE OF INTEREST OF THE RELEVANT STATUTE.

The Second Department determined petitioners, who own property adjacent to the property for which the contested variance was granted, did not have standing to challenge the variance. The challenge was deemed not to be within the "zone of interest" encompassed by the relevant statute. Any increase in parking related to the variance affected only the subject property, and not parking on the street: "... [A] petitioner whose property is adjacent to the property that is the subject of the administrative action may rely on a presumption of direct injury for purposes of standing ... . Nevertheless, even a petitioner whose property is adjacent to the subject property must demonstrate that its alleged injury is within the 'zone of interest' of the statute ... . 'Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted' ... . Here, we agree with the Supreme Court that the petitioners/plaintiffs did not allege any legally cognizable injury with respect to parking or traffic. Simply put, the only effect that the petitioners/plaintiffs allege the area variances will have with respect to parking is limited to parking actually on the subject property. There is no allegation of impact as to on-street parking ...". ***Matter of Panevan Corp. v. Town of Greenburgh*, 2016 N.Y. Slip Op. 07327, 2nd Dept 11-9-16**

ZONING.

ZONING BOARD PROPERLY REJECTED APPLICATION TO EXTEND THE ONE-YEAR DEADLINE FOR A REBUILD OF A FIRE-DAMAGED, NON-CONFORMING HOME.

The Second Department, reversing Supreme Court, over an extensive dissent, determined the zoning board (ZBA) properly rejected petitioner's application to rebuild a fire-damaged, non-conforming home after the statutory one-year period for a rebuild had passed. The unambiguous language of the town code provision supported the board's action (therefore the action was not arbitrary and/or capricious): "The ZBA's affirmance of the ... denial of the complete application for a building permit was based on its interpretation of Town Code § 77-48(A) as then in effect. Since the interpretation of the terms of that section involves a pure legal interpretation of statutory terms, we do not defer to the ZBA's interpretation, but instead make

an independent review of the law ... . We conclude that the ZBA correctly interpreted the then-current version of Town Code § 77-48(A). Indeed, the provision 'could not be clearer' ... ; it enunciated a strict one-year limit for completion of the rebuilding of a destroyed nonconforming residence. Thus, the ZBA's affirmance of the denial of the ... permit application was a correct interpretation of the law. The ZBA correctly concluded that it was not authorized to disregard that clear language." ***Matter of Warner v. Town of Kent Zoning Bd. of Appeals*, 2016 N.Y. Slip Op. 07332, 2nd Dept 11-9-16**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER DID NOT MAKE AN ADEQUATE INQUIRY INTO THE NATURE AND RELIABILITY OF CONFIDENTIAL INFORMATION, DETERMINATION ANNULLED.

The Third Department concluded the nature of the confidential information provided to the hearing officer and the hearing officer's failure to adequately inquire into the reliability of the information required annulment of the determination: "Here, the confidential information considered by the Hearing Officer consisted of, among other things, memoranda prepared by correction officials that briefly summarized their interviews with three confidential sources who stated, in conclusory fashion, that petitioner was the individual who broke the window. In addition, a memorandum and photo array identification were provided by one of the confidential sources, but were similarly lacking in detail. The Hearing Officer also considered the confidential testimony of the two correction officials who spoke directly with the confidential sources. The officials related that the sources identified petitioner as the individual who broke the window, but did not reveal any specific information regarding the basis of their knowledge. Significantly, there is no indication that the sources actually witnessed petitioner break the window nor any explanation as to how they acquired this information. In addition, the correction officials who interviewed them did not provide any endorsement of their reliability other than to state that they freely provided the information and were not coerced. Under these circumstances, we conclude that the Hearing Officer failed to undertake the requisite independent assessment of the confidential information to establish its reliability ...". ***Matter of Belliard v. New York State Dept. of Corr.*, 2016 N.Y. Slip Op. 07382, 3rd Dept 11-10-16**

UNEMPLOYMENT INSURANCE.

CLAIMANT'S CONNECTION TO A CORPORATION WAS NOT SUFFICIENT TO WARRANT FINDING HE WAS NOT TOTALLY UNEMPLOYED.

The Third Department determined claimant, who was listed as a principal of a corporation (Reel One), did not have a sufficient connection to the corporation to warrant the board's decision claimant was not totally unemployed: "It is well settled that '[a] claimant who is a principal of an ongoing corporation will not be considered totally unemployed if he or she stands to benefit financially from its continued operation, no matter how minimal the activities performed on its behalf' ... . Here, there is no evidence that claimant performed any activities, however trivial, on behalf of Reel One in 2010 during the time period at issue. In addition, there is no evidence that claimant's name appeared on any bank accounts or corporate documents. Claimant testified that his wife created Reel One as a nonprofit corporation in the 1990s before they were married and that she was the sole shareholder. Although claimant and his wife, who both had extensive journalism experience, were listed as principals of Reel One on its website, claimant testified that his wife provided this information for marketing purposes only and that the website functioned as a type of advertisement. There is no evidence that the website was actively used to transact business." ***Matter of Petrick (Commissioner of Labor)*, 2016 N.Y. Slip Op. 07363, 3rd Dept. 11-10-16**

UNEMPLOYMENT INSURANCE.

DISSATISFACTION WITH JOB ASSIGNMENTS NOT GOOD CAUSE FOR RESIGNING.

The Third Department upheld the board's finding claimant did not demonstrate good cause to leave her job and therefore was ineligible for unemployment insurance benefits: "... [D]issatisfaction with job assignments or responsibilities has been held to not constitute good cause for resigning ... . The Board credited the testimony of claimant's supervisor regarding the reorganization and its effect upon claimant. Claimant's title, grade, salary, work schedule and location were not being changed and, while there were changes in her job duties, her precise duties had not been finally determined due to the ongoing and preliminary nature of the reorganization. Significantly, claimant did not attempt to speak with any of her supervisors before resigning to raise concerns or clarify the new job duties. The Board was free to reject claimant's disputed testimony that she resigned as a result of ongoing retaliation ...". ***Matter of Flint-Jones (Federal Reserve Bank of N.Y.--Commissioner of Labor)*, 2016 N.Y. Slip Op. 07368, 3rd Dept 11-10-16**

UNEMPLOYMENT INSURANCE.

EXCESSIVE ABSENTEEISM JUSTIFIED DENIAL OF BENEFITS.

The Third Department determined claimant's excessive absenteeism justified the denial of unemployment insurance benefits. The fact claimant didn't realize the last warning was a final warning did not excuse the behavior: "Excessive absen-

teeism, which continues despite repeated warnings, has been held to constitute misconduct disqualifying a claimant from receiving unemployment insurance benefits ... . Here, it is undisputed that claimant was continually absent from work even after she was warned that further absences would result in disciplinary action, including discharge. Although claimant maintains that she did not realize that the last warning was her final one, this does not excuse her behavior under the circumstances presented." ***Matter of Mead (Commissioner of Labor)*, 2016 N.Y. Slip Op. 07374, 3rd Dept 11-10-16**

ZONING, CIVIL PROCEDURE, ENVIRONMENTAL LAW.

ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED.

The Third Department determined all "rezoned" property-owners, deemed "necessary parties" by Supreme Court in this action to annul a local law rezoning property for industrial use, were, in fact, not "necessary parties." The petition, which had been dismissed for failure to timely serve the newly-added "necessary parties," was reinstated. The local law, which would allow a recycling center in a previously residential-agricultural zone, was challenged based upon an alleged failure to comply with the State Environment Quality Review Act: "The newly-added respondents were not necessary parties merely because the ordinance at issue affected their property rights. "'[T]he absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion' … . Given a court's power to raise the issue, it is notable that the Court of Appeals and this state's appellate courts, including this Court, have long entertained challenges to municipalities' legislative actions in regard to zoning ordinances without requiring the joinder of every property owner whose rights are affected by the ordinance at issue ... .]). This has been true even when the ordinance at issue is one that, on its face, is likely to dramatically affect the property rights held by real property owners … . Although this Court has, in limited cases, found property owners to be necessary parties in regard to legal challenges to municipal ordinances that affect the property owners' rights, it has only done so in cases where the owners had obtained an actual approval pursuant to the challenged zoning ordinance that would be adversely impacted by a judgment annulling that ordinance ...". ***Matter of Hudson Riv. Sloop Clearwater, Inc. v. Town Bd. of The Town of Coeymans*, 2016 N.Y. Slip Op. 07358, 3rd Dept 11-10-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

RECORD SILENT ON WHETHER DEFENSE COUNSEL WAS APPRISED OF A JURY NOTE, MURDER CONVICTION REVERSED.

The Fourth Department determined a mode of proceedings error required reversal of a murder conviction. The record was silent about whether defense counsel was apprised of the contents of a jury note requesting further instruction: "... [A] mode of proceedings error occurred and reversal is required because the record fails to show that defense counsel was advised of the contents of a jury note requesting, inter alia, further instruction on reasonable doubt, murder in the second degree and manslaughter in the first degree ... . Moreover, because the record does not establish that the court advised defense counsel of the contents of the note, we cannot assume that the court complied with its core responsibilities pursuant to CPL 310.30 and *People v. O'Rama* (78 NY2d 270) ...". ***People v. Owens*, 2016 N.Y. Slip Op. 07431, 4th Dept 11-10-16**

CRIMINAL LAW.

DEFENDANT'S GUILTY PLEA COERCED BY JUDGE'S REMARKS ABOUT A POTENTIAL SENTENCE AFTER TRIAL.

The Fourth Department vacated defendant's guilty plea, finding the trial judge's comments about the possible sentence after trial amounted to coercion: "Pursuant to the terms of the plea agreement, defendant entered his guilty plea in satisfaction of the indictment by which he was charged with, inter alia, murder in the second degree (§ 125.25 [1]), and County Court imposed a determinate term of incarceration of 25 years. During discussions over the plea offer, the court addressed the possibility of a jury convicting defendant of the lesser included offense of manslaughter in the first degree by stating: '[Y]ou wouldn't get any better than 25 [years] if you get a manslaughter. That's a big if.' Defendant contends that the court erred in denying his motion to withdraw his guilty plea on the ground that it was coerced. We agree. '[T]he court's statements do not amount to a description of the range of potential sentences but, rather, they constitute impermissible coercion, rendering the plea involuntary and requiring its vacatur' ...". ***People v. Williams*, 2016 N.Y. Slip Op. 07450, 4th Dept 11-10-16**

CRIMINAL LAW.

SANDOVAL HEARING HELD IN DEFENDANT'S ABSENCE REQUIRED DISMISSAL OF THE INDICTMENT, PLACING THE RESULTS OF THE HEARING ON THE RECORD IN DEFENDANT'S PRESENCE DID NOT RECTIFY THE DEFECT.

The Fourth Department determined holding the Sandoval hearing in the defendant's absence required dismissal of the indictment (without prejudice to file another charge): "We agree with defendant that Supreme Court erred in conducting the Sandoval hearing in his absence ... . The court's Sandoval ruling in this case was not wholly favorable to defendant, and thus

'it cannot be said that defendant's presence at the hearing would have been superfluous' ... . Contrary to the People's contention, although the court placed its Sandoval ruling on the record in defendant's presence the morning after the hearing, '[a] mere repetition or recitation in the defendant's presence of what has already been determined in [the defendant's] absence is insufficient compliance with the Sandoval rule' ...". ***People v. Gardner*, 2016 N.Y. Slip Op. 07469, 4th Dept 11-10-16**

CRIMINAL LAW.

ADVANCES IN MEDICINE AND SCIENCE CALL INTO QUESTION PREVIOUS OPINIONS ABOUT SHAKEN BABY SYNDROME, MOTION TO VACATE DEFENDANT'S CONVICTION GRANTED AND NEW TRIAL ORDERED.

The Fourth Department affirmed the grant of defendant's motion to vacate her conviction based on newly discovered evidence. Defendant, a daycare provider, was convicted in the death of a toddler. Medical testimony at trial attributed the death to shaken baby syndrome. In the motion to vacate her conviction, defendant argued that advances in medicine and science have called into question the prior opinions about shaken baby syndrome, and indicate a short-distance fall can mimic the shaken-baby symptoms: "In general, advancements in science and/or medicine may constitute newly discovered evidence ... , and we conclude that defendant established, by a preponderance of the evidence (see CPL 440.30 [6]), that 'a significant and legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone, . . . and whether other causes [such as short-distance falls] may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome' ... . We further conclude that defendant established, by a preponderance of the evidence (see CPL 440.30 [6]), that the newly discovered evidence would probably change the result if a new trial were held today. 'A motion to vacate a judgment of conviction upon the ground of newly discovered evidence rests within the discretion of the hearing court . . . The court must make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial' ... . Here, the cumulative effect of the research and findings on retinal hemorrhages, subdural hematomas or hemorrhages and cerebral edemas as presented in SBS/SBIS cases and short-distance fall cases supports the court's ultimate decision that, had this evidence been presented at trial, the verdict would probably have been different ...". ***People v. Bailey*, 2016 N.Y. Slip Op. 07490, 4th Dept 11-101-6**

CRIMINAL LAW, EVIDENCE.

STATEMENT WHICH WAS NOT IN THE 710.30 NOTICE, AND WHICH PROVIDED EVIDENCE OF DEFENDANT'S DOMINION AND CONTROL OF THE RESIDENCE WHERE DRUGS WERE FOUND, SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE.

The Fourth Department, over a two-justice dissent, determined a statement alleged to have been made during a search, but which was not part of the 710.30 notice, should not have been admitted at trial. The defendant was charged and convicted of constructive possession of drugs found in the searched residence. The statement indicated where defendant's "own room was." There was little or no other evidence defendant lived at the searched residence. The court rejected the argument that the statement was "pedigree information" and further rejected the argument that the search consent form, signed by the defendant, was an admission of his dominion and control of the residence: "The People served on defendant a CPL 710.30 notice of their intent to offer defendant's admissions as evidence at trial and attached a police report to the notice. The police report referenced defendant's statement to the deputies, during the search, that one of the bedrooms belonged to another person. At trial, however, the court permitted an investigator to testify that defendant 'explained where his [own] room was,' referring to another of the bedrooms. Inasmuch as the CPL 710.30 notice did not cover that statement, the court's ruling on that point was error (see CPL 710.30 [1]...). That error permitted the court to conclude that defendant was an occupant of the residence and, consequently, to find that defendant had constructive possession of the drugs found therein ...". ***People v. Buza*, 2016 N.Y. Slip Op. 07423, 4th Dept 11-10-16**

CRIMINAL LAW, EVIDENCE.

RECORDED STATEMENTS MADE TO THE MOTHER OF DEFENDANT'S CHILDREN, WHO WAS ACTING AS A POLICE AGENT AT THE TIME THE STATEMENTS WERE MADE, REQUIRED THE REOPENING OF THE HUNTLEY HEARING, CASE REMITTED.

The Fourth Department sent the case back for a reopened *Huntley* hearing concerning recorded statements made by the defendant to the mother of defendant's children, who was acting as a police agent at the time the statements were made. The statements were under a protective order until two weeks before the trial. The defendant was convicted of the murder of a man he mistakenly believed was having a relationship with the mother of his children: "... [T]he court erred in failing to reopen the Huntley hearing at defense counsel's request with respect to recorded statements that he made to an agent of the police (see CPL 60.45 [2] [b] [i], [ii]), i.e., the mother of his children, which were the subject of a protective order until approximately two weeks before trial. Because the admission of those statements at trial cannot be deemed harmless error ... , we hold the case, reserve decision and remit the matter to Supreme Court to reopen the Huntley hearing with respect to those recorded statements ...". ***People v. Mitchell*, 2016 N.Y. Slip Op. 07543, 4th Dept 11-10-16**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

SCHOOL MAY HAVE HAD CONSTRUCTIVE KNOWLEDGE OF THE STUDENT'S CLAIM, BUT DID NOT HAVE ACTUAL KNOWLEDGE; LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department determined claimant high school wrestler should not have been granted leave to serve a late notice of claim against one of the two named schools, Akron. The claimant alleged he contracted herpes from an Akron wrestler during a tournament at Akron. Although Akron was deemed to have constructive knowledge of the claim, the court found it did not have timely actual knowledge of the essential facts of the claim: "We agree with Akron ... that it did not have actual knowledge of the essential facts constituting the claim. Akron established that it was not aware until it received claimant's application for leave to serve a late notice of claim that he was allegedly infected with herpes by wrestling Akron's student at the tournament. ...[C]laimant here established that, at most, Akron had constructive knowledge of the claim, which is insufficient ... . It is well settled that actual knowledge of the claim is the factor that is accorded 'great weight' in determining whether to grant leave to serve a late notice of claim ... . Even if we agree with claimant that Akron suffered no prejudice from the delay, we nevertheless conclude that the court abused its discretion in granting claimant's application for leave to serve a late notice of claim against Akron ...". ***Matter of Ficek v. Akron Cent. Sch. Dist.*, 2016 N.Y. Slip Op. 07545, 4th Dept 11-10-16**

FAMILY LAW.

FAMILY COURT RETAINS JURISDICTION TO CONDUCT A PERMANANCY HEARING (RE: PLACEMENT IN FOSTER CARE) AFTER THE UNDERLYING NEGLECT PETITION (WHICH LED TO TEMPORARY PLACEMENT) HAS BEEN DISMISSED.

The Fourth Department, in a full-fledged opinion by Justice Scudder, over a two-justice dissent, determined Family Court had jurisdiction to conduct a permanency hearing (re: placement in foster care) even though the underlying neglect petition which led to temporary placement of the child was dismissed: "We … conclude, based upon the plain language of the provisions of Family Court Act article 10-A, that the court obtains jurisdiction as a result of a placement with petitioner pursuant to section 1022 (see § 1088), and that the court is required to make a determination whether to return the child to the parent based upon the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if the child were to return to the parent (see § 1089 [d] [1], [2] [i]). Thus, we conclude that the court retained jurisdiction to conduct the permanency hearing despite the dismissal of the neglect petition. Moreover, our interpretation of the statutory provisions of article 10-A comports with the longstanding principle that 'an overarching consideration always obtains for children to be returned to biological parents, if at all possible and responsible . . . When that cannot be done, the emphasis shifts to securing permanent, stable solutions and settings'...". ***Matter of Jamie J. (Michelle E.C.)*, 2016 N.Y. Slip Op. 07424, 4th Dept 11-10-16**

FAMILY LAW, CIVIL PROCEDURE.

FATHER DID NOT ABUSE THE JUDICIAL PROCESS, FAMILY COURT SHOULD NOT HAVE PROHIBITED FUTURE PETITIONS.

The Fourth Department determined father, who was incarcerated in Michigan, was afforded due process in the proceedings in which his petition for visitation was denied. However, the court noted that Family Court did not have the power, under the circumstances, to prohibit any further petitions by father: "... [W]e agree with the father that the court erred in sua sponte imposing conditions restricting him from filing new petitions. It is well settled that '[p]ublic policy mandates free access to the courts' ... , but ' a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will' ... . Here, however, there is no basis in the record from which to conclude that the father had engaged in meritless, frivolous, or vexatious litigation, or that he had otherwise abused the judicial process ...". ***Matter of Otrosinka v. Hageman*, 2016 N.Y. Slip Op. 07553, 4th Dept 11-10-16**

INSURANCE LAW.

COURT ERRED IN REFUSING TO APPLY THE "MADE WHOLE" RULE IN THIS SUBROGATION ACTION.

The Fourth Department determined Supreme Court erred when it refused to apply the "made whole" rule in this subrogation action. After settling for the full amount of the policy, respondent insurer sought the full amount paid to plaintiff by another insurer. The matter was sent back because it was unclear whether the settlement made plaintiff whole: "Plaintiff contends that, under the 'made whole' rule, respondent has no right of subrogation because plaintiff's damages exceed the amount of the settlement. By way of background, the 'made whole' rule provides that, if 'the sources of recovery ultimately available are inadequate to fully compensate the insured for its losses, then the insurer—who has been paid by the insured to assume the risk of loss—has no right to share in the proceeds of the insured's recovery from the tortfeasor' ... . 'In other words, the insurer may seek subrogation against only those funds and assets that remain after the insured has been compensated. This designation of priority interests . . . assures that the injured party's claim against the tortfeasor takes precedence over the subrogation rights of the insurer' ... . Although we agree with plaintiff that the court erred in refusing

to apply that rule, on this record, it is unclear whether the settlement made plaintiff whole." ***Grinage v. Durawa*, 2016 N.Y. Slip Op. 07429, 4th Dept 11-10-16**

PERSONAL INJURY.

STORM IN PROGRESS RULE REQUIRED SUMMARY JUDGMENT TO DEFENDANT IN THIS SLIP AND FALL CASE, FAILURE TO REMOVE ALL SNOW FROM A PARKING LOT DOES NOT CREATE A HAZARD.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should have been granted. Defendants established they had no duty to remove snow at the time of plaintiff's fall under the storm in progress doctrine. The court noted that the duty to render a parking lot safe does not entail the removal of all the snow: "It is undisputed that defendants met their initial burden on the motion 'by establishing that a storm was in progress at the time of the accident and, thus, that they had no duty to remove the snow and ice until a reasonable time ha[d] elapsed after cessation of the storm' ... . In opposition, plaintiff failed to raise a triable issue of fact ' whether the accident was caused by a slippery condition at the location where [she] fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant[s] had actual or constructive notice of the preexisting condition' ... . … The record is devoid of competent evidence that any … snow piles existed or, more specifically, that a pile of snow was located near the area of the parking lot where plaintiff fell that had melted and had then refrozen prior to the storm, resulting in the icy condition that caused plaintiff's accident ... . Finally, to the extent that plaintiff contends that defendants' snow removal efforts created the hazardous condition because they did not properly care for the area where she fell even though they had treated other areas of the parking lot during the storm, we note that it is well settled that '[t]he mere failure to remove all snow and ice from a . . . parking lot does not constitute negligence' and does not constitute creation of a hazard' ...". ***Hanifan v. Cor Dev. Co., LLC*, 2016 N.Y. Slip Op. 07498, 4th Dept 11-10-16**

PERSONAL INJURY, CONTRACT LAW.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT CONTRACTOR CREATED AN UNREASONABLE RISK OF HARM WHEN INSTALLING A FLOOR AND THEREFORE OWED A DUTY TO PLAINTFF, HOWEVER THE DEFECT WAS TRIVIAL AS A MATTER OF LAW.

The Fourth Department, reversing Supreme Court, determined plaintiff had raised an issue of fact whether defendant contractor owed a duty to plaintiff because its flooring work created an unreasonable risk of harm to others. However Supreme Court erred in not finding the defect trivial as a matter of law: "Here, the record establishes that the bullnose tile was slightly less than one-half of an inch in height and was not the same color as the tile floor. * * * ... '[T]he test established by the case law in New York is not whether a defect is capable of catching a pedestrian's shoe. ... [T]he relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances' ... . Upon our review of the photos of the alleged defect and in view of the less than ½-inch height of the bullnose tile and the circumstances surrounding decedent's accident ... , we conclude that, although an accident occurred that is "traceable to the defect, there is no liability" because the alleged defect 'is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence' under the circumstances present here ...". ***Stein v. Sarkisian Bros., Inc.*, 2016 N.Y. Slip Op. 07501, 4th Dept 11-10-16**

PERSONAL INJURY, EMPLOYMENT LAW.

DEFENDANT EMPLOYEE WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE REAR-END COLLISION OCCURRED; DEFENDANT WAS DRIVING HIS OWN CAR TO WORK.

Defendant, Frasier, was driving to work in his own car when he was involved in a rear-end collision with plaintiff. Plaintiff sued defendant's employer under the doctrine of respondeat superior. The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted. The defendant was not acting within the scope of his employment when the accident occurred: " 'As a general rule, an employee driving to and from work is not acting in the scope of his [or her] employment . . . Although such activity is work motivated, the element of control is lacking' ... . 'Although the issue whether an employee is acting within the scope of his or her employment generally is one of fact, it may be decided as a matter of law in a case such as this, in which the relevant facts are undisputed ... . Contrary to plaintiffs' contention, the mere fact that Frasier carried his own tools in his vehicle was insufficient to 'transform the use of the automobile into a special errand [for defendant] or an extension of the employment' ... . Moreover, the fact that Frasier drove a coworker to work that morning is of no significance because he was not directed to do so, and the carpool was based on the employees' 'personal arrangement' ... . Finally, the fact that defendant paid for lodging for Frasier while he was at a remote work site also does not require a different finding inasmuch as defendant did not require its employees to stay at the procured hotel, and the employees did not have 'to inform defendant of their whereabouts [outside of working hours]' ...". ***Figura v. Frasier*, 2016 N.Y. Slip Op. 07525, 4th Dept 11-10-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S MOTION PAPERS RAISED A QUESTION OF FACT WHETHER HIS FAILURE TO USE A LADDER WAS THE SOLE PROXIMATE CAUSE OF HIS FALL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS.

The Fourth Department, over a two-justice dissent, reversing Supreme Court, determined plaintiff's motion papers in the Labor Law 240(1) action raised a triable issue of fact whether his failure to use an available ladder was the sole proximate cause of his fall from a wall. Plaintiff's motion must therefore be denied without any need to consider the opposing papers: " 'Liability under section 240 (1) does not attach when the safety devices that [the] plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and [the] plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident' ... . Under those circumstances, the 'plaintiff's own negligence is the sole proximate cause of his [or her] injury' ... . Where the plaintiff's submissions in support of the motion raise a triable issue of fact whether his or her own actions were the sole proximate cause of the injury, the plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of liability because 'if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation' ... . In this case, plaintiff's submissions raised triable issues of fact whether plaintiff knew that he was expected to use a readily available ladder at the work site to perform his task, but for no good reason chose not to do so, and whether he would not have been injured had he not made that choice ...". ***Scruton v. Acro-Fab Ltd.*, 2016 N.Y. Slip Op. 07428, 4th Dept 11-10-16**

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