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Editor: **Bruce Freeman**

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COURT OF APPEALS

CRIMINAL LAW.

COUNTY COURT SHOULD NOT HAVE IMPANELED AN ANONYMOUS JURY.

The Court of Appeals affirmed the appellate division, holding that County Court should not have empaneled an anonymous jury: "The trial court committed reversible error by empaneling an anonymous jury. Assuming that trial courts may, under certain circumstances, anonymize jurors, here County Court acted without any factual predicate for the extraordinary procedure. Indeed, the trial court expressly based its decision to empanel an anonymous jury on anecdotal accounts from jurors in unrelated cases and, then, exacerbated the error by taking 'no steps to lessen the potential prejudice' to defendants ...". ***People v. Flores*, 2018 N.Y. Slip Op. 08540, CtApp 12-13-18**

CRIMINAL LAW, APPEALS.

WHETHER A JUVENILE'S STATEMENT TO THE POLICE WAS VOLUNTARILY GIVEN PRESENTED A MIXED QUESTION OF LAW AND FACT WHICH IS NOT REVIEWABLE BY THE COURT OF APPEALS, TWO DISSENTERS ARGUED JUVENILES SHOULD NOT BE INTERROGATED OUTSIDE THE PRESENCE OF THEIR ADULT LEGAL GUARDIANS.

The Court of Appeals, over a two-judge dissent, determined the finding that a juvenile's statement to police was voluntarily given presented a mixed question of law fact which is not reviewable by the Court of Appeals. The dissenters argued juveniles should not be interrogated outside the presence of their adult guardians. ***Matter of Luis P.*, 2018 N.Y. Slip Op. 08427, CtApp 12-11-18**

CRIMINAL LAW, CORRECTION LAW, SEX OFFENDER REGISTRATION ACT (SORA).

ALTHOUGH DEFENDANT WAS REQUIRED TO REGISTER AS A SEX OFFENDER IN VIRGINIA, THERE WAS NO SEX-RELATED ELEMENT IN THE VIRGINIA OFFENSE, DEFENDANT NEED NOT REGISTER AS A SEX OFFENDER IN NEW YORK.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a three-judge dissenting opinion, determined that defendant need not register as a sex offender in New York based upon a murder conviction in Virginia, even though Virginia law required such registration. There was no sex-related element in the offense. Defendant, in 1989, at age 19, murdered his half-sister because she was harassing him. At the time, he said he was "hearing voices telling him to kill people:" "Blind deference to another jurisdiction's registry without asking, fundamentally, whether that jurisdiction considers its own registrant a sex offender would contravene the plain and limiting language of section 168-a (2) (d) (ii) and could subject an entire class of defendants with no relation to SORA's purpose to its strict requirements. '* * * In concluding that SORA does not require defendant's registration because Virginia does not consider defendant a sex offender, we reserve weightier issues of a foreign registry's potential conflict with New York's due process guarantees or public policy for another day. ... Our holding today merely requires a court or the Board to determine—not based on 'intuition,' but rather on the offense of conviction and its relation to the foreign registry statute—whether the out-of-state defendant is considered a sex offender before requiring registration under SORA. ... Defendant's out-of-state felony conviction did not require him to 'register as a sex offender' in Virginia under Correction Law § 168-a (2) (d) (ii) and, thus, he should not be required to register as a sex offender in New York." ***People v. Diaz*, 2018 N.Y. Slip Op. 08424, CtApp 12-11-18**

CRIMINAL LAW, EVIDENCE.

THE MURDER COUNT, WHICH SHOULD HAVE BEEN DISMISSED BECAUSE THE PEOPLE DID NOT SEEK PERMISSION TO RESUBMIT IT AFTER THE GRAND JURY DEADLOCKED ON THE CHARGE, DID NOT TAINT THE CONVICTION ON THE MANSLAUGHTER COUNT UNDER A SPILL-OVER ANALYSIS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a concurring opinion, reversing the appellate division, determined the murder count in the second indictment should have been dismissed because the People did not seek court permission to re-present it after the grand jury which issued the first indictment deadlocked on that charge. But the court further held the murder count, on which defendant was acquitted, did not taint the manslaughter conviction under a spill-

over analysis. The manslaughter count was a valid count in the first indictment (both indictments were tried together): "The People's failure to obtain court permission to resubmit a murder count to a new grand jury after the first grand jury deadlocked on that charge violated Criminal Procedure Law § 190.75 (3), and Supreme Court erred in denying defendant's pretrial motion to dismiss the murder count in the second indictment on that ground. * * * Under the particular circumstances of this case, we conclude that defendant is not entitled to a new trial on the manslaughter count. The People assert that all of the evidence admitted to prove defendant's guilt of murder in the second degree was also admissible to prove his guilt of manslaughter in the first degree, and defendant does not contend otherwise. ... [T]he presence of the tainted murder count here did not result in the admission of any prejudicial evidence that the jury would have been unable to consider if the murder count had been dismissed ...". ***People v. Allen*, 2018 N.Y. Slip Op. 08537, CtApp 12-13-18**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

A SENTENCING COURT MAY REQUIRE A DEFENDANT, AS A CONDITION OF PROBATION, TO PAY FOR ELECTRONIC MONITORING, IF A DEFENDANT CLAIMS AN INABILITY TO PAY, A HEARING MUST BE HELD TO DETERMINE WHETHER ANOTHER ALTERNATIVE TO INCARCERATION IS APPROPRIATE AND, IF NOT, THE DEFENDANT MAY BE SENTENCED TO PRISON.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a dissenting opinion, determined that the sentencing court, as a condition of probation, may require a defendant to pay for a Secure Continuous Remote Alcohol Monitoring (SCRAM) bracelet. Defendant, who had pled guilty to felony driving while intoxicated, made several monthly payments for the bracelet but then stopped paying and the monitoring company removed the bracelet. County Court then sentenced defendant to prison. The Third Department held that the sentence was illegal because the court cannot require a defendant to pay the cost of electronic monitoring: "Were we to hold that any monetary component of a condition that must be borne by a defendant per se invalidated said condition, sentencing courts would be divested of their broad authority to impose a myriad of probationary requirements, and consequently, would, in many instances, no longer view release into the community as a viable alternative to incarceration. In light of this, the requirement that defendant wear and pay for a SCRAM bracelet was well within County Court's statutory authority under Penal Law § 65.10 (4). This is not to say that requiring a defendant to wear and pay for an electronic monitoring device will always be reasonable. Courts cannot impose a condition of probation that includes costs a particular defendant cannot feasibly meet. Nor can courts incarcerate a defendant who has initially agreed to meet a condition requiring a payment, but who subsequently becomes unable to do so. * * * ... [I]f, at the imposition of the sentence or during the course of probation, a defendant asserts that they are unable to meet the financial obligations attendant to a certain condition, the sentencing court must hold a hearing on the matter ... . The defendant must be given the opportunity to be heard in person, present witnesses, and offer documentary evidence establishing that they made sufficient bona fide efforts to pay ... . If, after such inquiry, the sentencing court determines that the defendant has adequately demonstrated an inability to pay the costs associated with a particular condition despite bona fide efforts to do so, the court must attempt to fashion a reasonable alternative to incarceration ... . Conversely, if the sentencing court determines, by a preponderance of the evidence ... , that 'a probationer has willfully refused to pay . . . when [that defendant] can pay, the [court] is justified in revoking probation and using imprisonment as an appropriate penalty for the offense' ...". ***People v. Hakes*, 2018 N.Y. Slip Op. 08538, CtApp 12-13-18**

FREEDOM OF INFORMATION LAW (FOIL).

RECORDS OF DISCIPLINARY PROCEEDINGS CONCERNING A POLICE OFFICER ARE EXEMPT FROM DISCLOSURE EVEN IF THE IDENTIFYING INFORMATION IS REDACTED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, affirming the appellate division, over a concurring opinion and two dissenting opinions, determined that the records of New York Police Department disciplinary proceedings concerning a police officer are exempt from disclosure, even if the identifying information in the records is redacted: "The FOIL exemption at issue, Public Officers Law § 87 (2) (a), provides that an agency may deny access to records that 'are specifically exempted from disclosure by state or federal statute.' The parties agree that the disciplinary decisions requested by the NYCLU are covered by a state statute: Civil Rights Law § 50-a. * * * 'There can be no question' that Civil Rights Law § 50-a permits court-ordered disclosure "only in the context of an ongoing litigation' ... . Absent officer consent, protected personnel records are shielded from disclosure 'except when a legitimate need for them has been demonstrated to obtain a court order' based on a 'showing that they are actually relevant to an issue in a pending proceeding' ... . Here, in the context of the NYCLU's FOIL request, the requested records are not 'relevant and material' to any pending litigation ... , and accordingly, they are not disclosable. * * * This case presents a straightforward application of Civil Rights Law § 50-a and Public Officers Law § 87 (2) (a), which mandate confidentiality and supply no authority to compel redacted disclosure. To the extent the dissent would prefer to revoke civil rights protections afforded to police officers (Civil Rights Law § 50-a), victims of sex crimes (Civil Rights Law § 50-b), medical patients (Public Health Law § 2803-c [3] [f]), or others, those arguments are properly directed to the Legislature." ***Matter of New York Civ. Liberties Union v. New York City Police Dept.*, 2018 N.Y. Slip Op. 08423, CtApp 12-13-18**

REAL PROPERTY TAX LAW (RPTL).

LARGE CELLULAR DATA TRANSMISSION EQUIPMENT OWNED BY T-MOBILE IS TAXABLE REAL PROPERTY SUBJECT TO REAL PROPERTY TAX LAW 102.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that certain large cellular data transmission equipment owned by T-Mobile is taxable real property subject to Real Property Tax Law (RPTL) 102(12)(i): "T-Mobile owns large cellular data transmission equipment that it has installed on the exterior of buildings in Mount Vernon. The installations — which are large enough to require the use of 'stealth walls' that shield them from view — consist of multiple pieces of interconnected equipment, including base transceiver stations (essentially cabinets housing wiring and providing battery power); antennas that transmit and receive the signals; and coaxial, T-1, and fiber optic cables running amongst the other components. T-Mobile enters multi-year leases with the owners of the buildings to enable it to occupy the exterior space on the buildings for installation of the equipment. * * * Under the RPTL, all 'real property within the state' is subject to real property taxation unless otherwise exempt by law (see RPTL 300). 'Real property' is defined under subdivision (12) of RPTL 102. Under RPTL 102(12)(i), that term includes: 'When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain . . . .' . ... The plain language of paragraph i encompasses each component of T-Mobile's data transmission equipment, which consists of base transceiver stations; antennas; and coaxial, T-1, and fiber optic cables. The base transceiver stations are essentially cabinets that house cables and other electrical components and provide battery power, so they qualify as 'inclosures for electrical conductors.' The large rectangular antennas are part of the base transceiver stations and, thus, also 'inclosures for electrical conductors.' The various cables in the installations are 'lines' and/or 'wires' under the plain text of the statute. Because the primary function of the equipment installations is to transmit cellular data, the components are 'used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain,' as required by the statute. Thus, although ambiguities in tax statutes are generally resolved in favor of the taxpayer ... , that doctrine is not implicated here because the plain text of RPTL 102(12)(i) unambiguously indicates that T-Mobile's equipment installations are taxable real property." ***Matter of T-Mobile Northeast, LLC v. DeBellis*, 2018 N.Y. Slip Op. 08539, CtApp 12-13-18**

WORKERS' COMPENSATION.

TIME LIMITS ON ADDITIONAL COMPENSATION FOR A PERMANENT PARTIAL DISABILITY INCLUDED IN WCL § 15(3)(w) APPLY TO THE CALCULATION OF THE AMOUNT OF THE BENEFITS IN WCL § 15(3)(v).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissenting opinion, determined the durational limits for compensation pursuant to Workers' Compensation Law (WCL) § 15(3)(w) (paragraph w) are incorporated into WCL § 15(3)(v) (paragraph v). Therefore the claimant was entitled to compensation for permanent partial disability (50 % loss of use of his left arm) only for the 275 weeks allowed by paragraph w: "... [N]othing in the language of paragraph v. regarding termination of additional compensation upon eligibility for age-based social security benefits contradicts paragraph w's durational restrictions or precludes their application to paragraph v. recipients. By incorporating the entirety of paragraph w's framework for calculating benefits, paragraph v. provides additional compensation lasting a maximum number of weeks as a supplement to the schedule award the worker already received. Paragraph v's requirement that such payment terminates if the worker becomes eligible for age-based social security payments (regardless of how many weeks have passed) merely places another limit, where applicable, on the additional compensation a claimant can receive. ... [N]either of the primary benefits that section 15(3) provides are open-ended. Both schedule loss of use awards and non-schedule benefits continue for a maximum number of weeks, depending on the nature or severity of the worker's disability. Interpreting paragraph v. to grant a subset of recipients open-ended benefits limited only by eligibility for age-based social security payments — an award that would potentially span their working lifetimes — would uniquely benefit that small group above all other permanent partial disability award recipients. There is no textual support for such an exceptional interpretation. Rather, under the plain language of paragraph v, additional compensation awards are calculated pursuant to the formula and durational provisions of paragraph w, terminating earlier if or when a claimant becomes eligible for age-based social security benefits." ***Matter of Mancini v. Office of Children & Family Servs.*, 2018 N.Y. Slip Op. 08425, CtApp 12-11-18**

FIRST DEPARTMENT

DEFAMATION, CIVIL RIGHTS LAW, PRIVILEGE.

REMARKS ALLEGED TO BE DEFAMATORY REFLECTED THE RESULTS OF A JUDICIAL PROCEEDING AND WERE THEREFORE PRIVILEGED PURSUANT TO CIVIL RIGHTS LAW § 74.

The First Department determination the complaint alleging defamation causes of action against attorneys who had been interviewed about litigation involving plaintiff and Elizabeth Etling, whom the defendant attorneys represented. The court held that the remarks alleged to be defamatory were either protected descriptions of judicial determinations in the case or

were otherwise not actionable. With respect to the Civil Rights Law privilege, the court wrote: "Defendants' comment about plaintiff's 'massive spoliation' or 'spoliation in droves' is protected under Civil Rights Law § 74 as a fair and true report, even if the Delaware Chancery Court did not use defendants' exact words in its decision... . The court concluded that plaintiff had intended and attempted to destroy 'a substantial amount of information,' and detailed plaintiff's responsibility for the deletion, in violation of court order, of approximately 41,000 files from his computer. Plaintiff argues that defendants overstated the matter, because his spoliation proved largely reversible. Indeed, of the 41,000 files deleted, 1,000 were permanently destroyed. However, plaintiff did not cause the recovery of the data; rather, it occurred in spite of him. Moreover, he lied under oath about his spoliating conduct. As the court observed, an unsuccessful spoliator is still a spoliator... . Defendants' comment that plaintiff was 'holding Elting hostage' is protected under Civil Rights Law § 74. During the interviews at issue, defendants cited the section of the post-trial decision in which the court used similar language in summarizing Elting's position ... . Defendants' statement that 'no rational person would ever want to partner with [plaintiff],' which is nearly a verbatim quotation from the court's decision, is protected under the statute." ***Shawe v. Kramer Levin Naftalis & Frankel LLP*, 2018 N.Y. Slip Op. 08550, First Dept 12-13-18**

FAMILY LAW, EVIDENCE, JUDGES.

CUSTODY SHOULD NOT HAVE BEEN TRANSFERRED TO FATHER AND ALL CONTACT BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN SUSPENDED WITHOUT A HEARING, JUDGE, SUA SPONTE, SHOULD NOT HAVE PROHIBITED FUTURE PETITIONS FOR CUSTODY OR VISITATION BY MOTHER.

The First Department, reversing Family Court, determined mother should not have transferred custody to father and suspended all contact between the child and mother for a year without conducting a hearing. The First Department further held that the judge should not have, sua sponte, prohibited mother from filing future petitions for custody or visitation without leave of court because no party requested that relief: "... [T]he court erred when, without holding an evidentiary hearing, it made a final order transferring physical and legal custody to the father and suspending all contact between the mother and the child for a year. Determination of the child's best interests requires examination of the totality of the circumstances ... . We have consistently held that 'an evidentiary hearing is necessary before a court modifies a prior order of custody or visitation,' even where the court is familiar with the parties and child, and particularly where there are facts in dispute ... . Furthermore, while we have stated that a hearing on modification of a custody arrangement in the child's best interests 'may be as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant. . . ,' it must include an opportunity for both sides, and the children's attorney when there is one, to present their respective cases, and the factual underpinnings of any temporary order [must be] made clear on the record' ... . Here, the court made a final determination without taking any testimony or entering any documents into evidence. The court's reliance on statements made by the ACS caseworker during a court conference was inappropriate, since the mother's attorney had requested, but was denied, a full hearing at which counsel could have cross-examined the caseworker." ***Matter of Michael G. v. Katherine C.*, 2018 N.Y. Slip Op. 08568, First Dept 12-13-18**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF HAS STANDING IN THIS FORECLOSURE ACTION AND WHETHER THE RPAPL 1304 NOTICE WAS SERVED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. There exist questions of fact on whether plaintiff has standing and whether the RPAPL 1304 notice was served: "The borrower raised a meritorious standing defense based on questions as to the sufficiency of the content of the conclusory lost note affidavit, which does not state that a thorough and diligent search was made based on a review of the business records or anything else, does not state that any search was made or by whom, and does nothing to indicate when approximately the note was lost ... . The borrower also raised a plausible notice defense regarding plaintiff's service of the requisite 90-day notice under RPAPL 1304 ...". ***AS Helios LLC v. Chauhan*, 2018 N.Y. Slip Op. 08565, First Dept 12-13-18**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PROOF THAT DEFENDANT WAS SERVED WITH THE RPAPL 1304 NOTICE IN THIS FORECLOSURE PROCEEDING WAS NOT SUFFICIENT, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that the bank's motion for summary judgment in this foreclosure action should not have been granted. The proof of service of the RPAPL 1304 notice was deemed insufficient: "Plaintiff failed to establish a presumption that it properly served defendant with RPAPL 1304 notice through proof either of actual mailing or of a standard office practice or procedure for proper addressing and mailing ... . Its business operations analyst testified at the hearing on this issue that she was familiar with plaintiff's record keeping practices and procedures. However, she did not testify either that she was familiar with plaintiff's mailing procedures or that she was personally aware that

RPAPL 1304 notices had been mailed to defendant... . Nor does the fact that some of the RPAPL 1304 notices admitted into evidence at the hearing bear a certified mail number suffice to raise the presumption of proper service ...". ***CitiMortgage, Inc. v. Moran*, 2018 N.Y. Slip Op. 08435, First Dept 12-11-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF'S SLIP AND FALL OCCURRED ON DEBRIS IN A WALKWAY WITHIN THE MEANING OF THE N.Y.C.R.R. IN THIS LABOR LAW § 241(6) ACTION, HOWEVER, BECAUSE THE FALL OCCURRED OUTSIDE THE ENTRANCE TO A SHANTY, THE N.Y.C.R.R. PROVISION WHICH PERTAINS TO PASSAGEWAYS WAS NOT APPLICABLE.

The First Department, in a full-fledged opinion by Justice Tom, modifying Supreme Court, determined there were questions of fact about the applicability of certain provisions of the New York Code Rules and Regulations (N.Y.C.R.R.) to plaintiff's accident in this Labor Law §§ 241(6), 200 and common law negligence action. Plaintiff slipped and fell on snow covered pipes near the entrance to the employer's work site shanty. The Labor Law § 241(6) cause of action predicated on a violation of 12 N.Y.C.R.R. § 23-1.7(d) should not have dismissed because there is a question of fact whether the slip and fall occurred in a "walkway." The Labor Law § 241(6) cause of action predicated on a violation of 12 N.Y.C.R.R. § 23-1.7(e)(1), which deals with "passageways" as opposed to "walkways," was properly dismissed: "The Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.7(d) should not have been dismissed because there was an issue of fact as to whether the accident occurred in a walkway. There were conflicting accounts of whether the pipes were located in a manner that impeded ingress and egress into the shanty. ... [I]n contrast to 12 NYCRR 23-1.7(d) which pertains to slipping hazards on a 'floor, passageway, walkway, scaffold, platform or other elevated working surface,' 12 NYCRR 23-1.7(e)(1) is limited to passageways. A 'passageway' is commonly defined and understood to be 'a typically long narrow way connecting parts of a building' and synonyms include the words corridor or hallway ... . In other words, it pertains to an interior or internal way of passage inside a building." ***Quigley v. Port Auth. of N.Y. & N.J.*, 2018 N.Y. Slip Op. 08577, First Dept 12-13-18**

SECOND DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE JUSTIFIED CONSIDERING EVIDENCE WHICH COULD HAVE BEEN PROVIDED IN SUPPORT OF THE ORIGINAL MOTION, MOTION TO RENEW PROPERLY GRANTED, HOWEVER DELAYS IN DISCOVERY WARRANTED SANCTIONS AGAINST PLAINTIFF.

The Second Department determined law office failure was an adequate excuse for failing to present evidence in support of plaintiff's original motion which was submitted in support of a motion to renew. However, in light of plaintiff's delays in discovery, sanctions were appropriate: "... Supreme Court providently exercised its discretion in considering the new evidence submitted by the plaintiff in support of those branches of her motion which were for leave to renew her prior motion and her opposition to the appellants' cross motion. Although the new facts may have been known to the plaintiff at the time of her prior motion, the plaintiff explained that the new evidence was not submitted in connection with her prior motion and opposition due to a misunderstanding by counsel that ultimately led to law office failure. * * * 'The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion' ... . 'Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits' ... . '[T]he court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where that claim is supported by a detailed and credible explanation of the default at issue' ... . [A]though the plaintiff set forth a reasonable explanation for her failure to fully comply with the conditional order of dismissal, the fact remains that she failed to fully comply with that order, and her conduct during discovery cannot be countenanced ... . Consequently, ... a monetary sanction in the total sum of $5,000 is warranted to compensate the appellants for the time expended and costs incurred in connection with the plaintiff's failure to fully and timely comply with the conditional order of dismissal ...". ***Burro v. Kang*, 2018 N.Y. Slip Op. 08457, Second Dept 12-12-18**

CIVIL PROCEDURE, CONTRACT LAW.

BY ENTERING A STIPULATION SETTLING A FORECLOSURE ACTION, DEFENDANT WAIVED ANY DEFECT IN SERVICE OF THE COMPLAINT, THE STIPULATION WAS VALID EVEN THOUGH IT DID NOT OCCUR IN COURT, EMAILS AND PAYMENT OF A SETTLEMENT AMOUNT MEMORIALIZED THE STIPULATION.

The Second Department, reversing Supreme Court, over a dissent, determined that defendant Campbell had waived any defect in service of process by entering into a stipulation of settlement in this foreclosure action. The court held that the stipulation settling the deficiency judgment, which did not occur in court, was memorialized by emails and the payment of an agreed settlement amount. The dissent argued there was insufficient evidence of a stipulation entered into by Campbell and

therefore Campbell's motion to vacate the default judgment on the ground she was never served with the complaint should have been granted: "... [I]n vacating the settlement of the deficiency judgment 'in the interests of justice,' the Supreme Court incorrectly determined that Campbell was not represented by counsel. In fact, Campbell was represented by counsel when she settled and made payment on the deficiency judgment. As part of the settlement, the plaintiff agreed not to proceed in other pending foreclosure actions against Campbell. Additionally, Campbell retained the same attorney with respect to other actions arising out of the settlement. By settling the deficiency judgment, Campbell clearly submitted to the court's jurisdiction and acknowledged the validity of the judgment... . Therefore, we disagree with the court's determination granting Campbell's motion to vacate the judgment of foreclosure and sale, the subsequent foreclosure sale, the order of reference, the referee's deed, and the settlement of the deficiency judgment, the terms of which had been fully performed. Contrary to the position of our dissenting colleague, a formal stipulation of settlement need not be contained in the record. Here, the terms of the settlement were contained in contemporaneous emails between the plaintiff's attorney and Campbell's attorney, and by a check in the amount on which they had agreed. Campbell does not deny that she paid the amount for which she agreed to settle the deficiency judgment. That fully performed settlement two years before Campbell moved to vacate her default effectively waived her defense that the court lacked personal jurisdiction over her ...". ***Eastern Sav. Bank, FSB v. Campbell*, 2018 N.Y. Slip Op. 08465, Second Dept 12-12-18**

CIVIL PROCEDURE, EVIDENCE.

INSUFFICIENT EVIDENCE THAT THE FAILURE TO TURN OVER REQUESTED INVOICES IN DISCOVERY WAS WILLFUL AND CONTUMACIOUS, BUT PRESENTATION OF EVIDENCE ABOUT THE INVOICES AT TRIAL SHOULD HAVE BEEN PRECLUDED.

The Second Department determined that requested invoices which were alleged not to exist could not be the subject of evidence at trial: "Durante's affidavit demonstrated that the requested invoices of Croton could not be located and that the invoices of Iron Age were not in the respondents' possession or control ... . Under the circumstances of this case, there was no clear showing that the respondents' failure to produce the invoices was willful and contumacious, since, inter alia, the respondents complied, albeit tardily, with the appellants' discovery demands and demonstrated that the invoices requested could not be located, or were not in their possession or control (see CPLR 3101[d][2] ...). Nevertheless, the respondents should have been precluded from later offering evidence regarding the requested invoices of Croton that were not produced ... . Accordingly, that branch of the appellants' motion which was to preclude the respondents from introducing at trial evidence of the requested invoices of Croton that were not provided should have been granted." ***Cap Rents Supply, LLC v. Durante*, 2018 N.Y. Slip Op. 08458, Second Dept 12-12-18**

CONTRACT LAW.

ORAL AGREEMENTS BETWEEN PERSONS COHABITING TOGETHER ARE NOT PER SE REQUIRED TO BE IN WRITING, SEVERAL CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE THE UNDERLYING AGREEMENTS WERE NOT SUBJECT TO THE STATUTE OF FRAUDS.

The Second Department, modifying Supreme Court, determined that certain causes of action based upon oral agreements between plaintiff and defendant, who lived together for thirteen years, should not have been dismissed pursuant to the statute of frauds: "We disagree with the Supreme Court as to the applicability of the statute of frauds to the plaintiff's allegations as to ... express oral agreements between the parties, namely those related to her provision of domestic and legal services in exchange for support and sharing of business profits. Agreements between persons cohabiting together are not per se required to be in writing ... . Moreover, the plaintiff's allegations as to the terms of the oral agreements do not otherwise fall within the statute of frauds (see General Obligations Law § 5-703 ...). ... We also disagree with the Supreme Court's determination granting that branch of the motion which was to dismiss the plaintiff's third cause of action pursuant to the statute of frauds. The third cause of action seeks the return of certain personal items that allegedly were owned by the plaintiff separately prior to her relationship with the defendant. Thus, the property that was the subject of that cause of action was not within the statute of frauds." ***Baron v. Suissa*, 2018 N.Y. Slip Op. 08453, Second Dept 12-12-18**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

THE DIGNITY FOR ALL STUDENTS ACT (DASA) DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR IN-SCHOOL BULLYING AND HARASSMENT.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Brahwaite Nelson, determined that the Dignity for All Students Act (DASA, Education Law section 10) does not create a private right of action for a student injured by a school's failure to enforce policies prohibiting discrimination and harassment. The plaintiffs alleged Joshua, a student, was bullied and the complaint, in addition to alleging a violation of DASA, alleged negligent supervision and negligent retention of employees. The negligence causes of action properly survived the motions to dismiss: "A private right of action 'may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme' ... . A review of DASA's legislative history shows that finding

a private right of action under the act would be inconsistent with the legislative scheme. As noted above, DASA requires school districts to create and implement certain policies, procedures, and guidelines aimed at creating an educational environment in which children can thrive free of discrimination and harassment (see Education Law §§ 10, 13). In a letter to the Governor, Senator Thomas Duane described DASA as focusing 'on the education and prevention of harassment and discrimination before it begins rather than punishment after the fact' ... The letter stated that under the existing regime, school districts were paying 'a high cost in civil damages for failure to prevent bullying,' thereby suggesting that implementing DASA would alleviate such costs (id. at 9). Similarly, the Assembly sponsor of the bill also advised the Governor that 'the Legislature intends [DASA] to be primarily a preventive, rather than punitive, measure; it should therefore be implemented accordingly, with the emphasis on proactive techniques such as training and early intervention to prevent discrimination and harassment' ...". ***Eskenazi-McGibney v. Connetquot Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 08467, Second Dept 12-12-18**

FAMILY LAW, CIVIL PROCEDURE, EVIDENCE.

AUDIOTAPES OF CONVERSATIONS BETWEEN THE PATERNAL GRANDMOTHER AND THE CHILD WERE PROPERLY SUPPRESSED BECAUSE THEY WERE THE PRODUCT OF ILLEGAL WIRETAPPING UNDER CPLR 4506.

The Second Department determined Family Court properly suppressed audiotapes of conversations between the paternal grandmother and the child in this custody dispute between the maternal and paternal grandmothers. The audiotapes constituted illegal wiretapping pursuant to CPLR 4506: "Contrary to the maternal grandmother's contention, the Family Court properly granted the paternal grandmother's motion to suppress audiotapes of conversations between the paternal grandmother and the child pursuant to CPLR 4506, which provides for the suppression of evidence obtained by illegal wiretapping. The maternal grandmother and her son (the child's uncle) were not parties to the conversation, were not present during the conversation, and the maternal grandmother does not assert that, under the circumstances, any vicarious consent was given... . Moreover, there is no merit to the maternal grandmother's contention that the motion was untimely because it was not made before the hearing, since the paternal grandmother only learned of the existence of the tapes during the hearing (see CPLR 4506[4])." ***Matter of Dennis v. Davis-Schloemer*, 2018 N.Y. Slip Op. 08480, Second Dept 12-12-18**

FAMILY LAW, CRIMINAL LAW.

ABSENCE OF A SEXUAL RELATIONSHIP IS NOT NECESSARILY DETERMINATIVE IN AN ASSESSMENT OF WHETHER A PARTY IS A MEMBER OF A HOUSEHOLD FOR PURPOSES OF JURISDICTION OVER A FAMILY OFFENSE PROCEEDING, FAMILY COURT SHOULD NOT HAVE MADE A FINDING RESPONDENT WAS NOT A MEMBER OF THE HOUSEHOLD WITHOUT HOLDING A HEARING.

The Second Department, reversing Family Court, determined that Family Court should not have found that respondent and petitioner did not have an intimate relationship without holding a hearing. Petitioner sought an order of protection against respondent. Under the Family Court Act the court has jurisdiction in a family offense proceeding only if the parties are deemed to have an intimate relationship. Family Court found that, because the relationship was not sexual, it did not constitute an intimate relationship. The Second Department noted that the existence of a sexual relationship is not necessarily determinative and sent the matter back for a hearing: "The Family Court is a court of limited subject matter jurisdiction and 'cannot exercise powers beyond those granted to it by statute'... . Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed acts that occur 'between spouses or former spouses, or between parent and child or between members of the same family or household' ... . Effective July 21, 2008 ... , the Legislature expanded the definition of "members of the same family or household" to include, among others, 'persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time' (Family Ct Act § 812[1][e] ...). The Legislature also expressly excluded from the definition of 'intimate relationship' a 'casual acquaintance' and 'ordinary fraternization between two individuals in business or social contexts'... . Beyond those delineated exclusions, the Legislature left it to the courts to determine on a case-by-case basis whether a particular relationship constitutes an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e). The Legislature provided that '[f]actors the court may consider in determining whether a relationship is an intimate relationship' include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship'... . The determination of whether persons are or have been in an 'intimate relationship' within the meaning of the statute may require a hearing ...". ***Matter of Raigosa v. Zafirakopoulos*, 2018 N.Y. Slip Op. 08485, Second Dept 12-12-18**

FAMILY LAW, EVIDENCE.

MOTHER'S PETITION TO RELOCATE WITH THE CHILD SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING, THE PETITION WAS GRANTED AFTER FATHER SCREAMED AT COURT PERSONNEL.

The Second Department determined Family Court should not have granted mother's petition to relocate in this custody modification proceeding without holding a hearing. Family Court granted the petitioner after father appeared and screamed at court personnel: "Where a custodial parent seeks to relocate over the objection of the non-custodial parent, the court must consider each relocation request 'on its own merits with due consideration of all the relevant facts and circum-

stances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child' ... . 'In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests' ... . Although '[a] parent seeking a change of custody is not automatically entitled to a hearing' ... , 'custody determinations should [g]enerally' be made only after a full and plenary hearing and inquiry' ... . 'This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child' ... . 'When the allegations of fact in a petition to change custody are controverted, the court must, as a general rule, hold a full hearing' ...". ***Matter of Williams v. Jenkins*, 2018 N.Y. Slip Op. 08491, Second Dept 12-12-18**

MEDICAL MALPRACTICE, PERSONAL INJURY.

A BLOCKED TRACHEOSTOMY TUBE IS A FORESEEABLE EVENT FOR WHICH DEFENDANT ANESTHESIOLOGIST WAS TRAINED AND PREPARED, THEREFORE THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE EMERGENCY DOCTRINE, DEFENSE VERDICT IN THIS MEDICAL MALPRACTICE ACTION REVERSED AND NEW TRIAL ORDERED.

The Second Department, reversing the defense verdict and ordering a new trial in this medical malpractice action, determined the jury should not have been charged on the emergency doctrine. Plaintiff's decedent died after her tracheostomy tube became blocked. Because a blocked tracheostomy tube is a foreseeable condition, the emergency doctrine did not apply: "In the days after ... surgery, Jones [plaintiff's decedent] was improving and was out of bed and talking. On March 30, 2007, a nurse and respiratory therapist were removing a Passy-Muir valve (a device designed to allow a patient to speak with a tracheostomy tube in place) and met resistance while attempting to place an inner cannula into the tube. Jones began to experience shortness of breath. Despite attempts to suction the tube and ventilate Jones manually with an Ambu bag, Jones's oxygen saturation levels continued to drop to the low 60s, and her level of consciousness rapidly decreased. Accordingly, Sher [defendant], an anesthesiologist, and Joann Noto, a physician assistant, were paged. * * * ... [W]e disagree with the Supreme Court's determination to instruct the jury on the emergency doctrine. The emergency doctrine 'has been reserved, in a medical context, to situations where a doctor is confronted by a sudden and unforeseen condition' and is forced to undertake care under less than optimal circumstances,' and is inapplicable where the defendant physician was trained and prepared for the specific emergency ... . Here, there is no dispute that it was foreseeable for secretions to block a tracheostomy tube and that Sher was qualified as an anesthesiologist to replace a blocked tracheostomy tube. Indeed, Sher admitted that, in his 30 years of experience, creating airways for patients is what anesthesiologists do. Further, Sher was advised by Noto that a mucus plug was blocking the tracheostomy tube which Sher was ultimately able to replace within seconds. Accordingly, there was no sudden and unforeseen condition for which Sher was not trained or prepared." ***Crayton v. Sher*, 2018 N.Y. Slip Op. 08461, Second Dept 12-12-18**

PERSONAL INJURY.

PLAINTIFF ASSUMED THE RISK OF INJURY STEMMING FROM A FIGHT DURING A HOCKEY GAME.

The Second Department, reversing Supreme Court, determined that plaintiff, an amateur hockey player, assumed the risk of injury stemming from a fight on the ice. Plaintiff alleged he was injured when a referee tried to pull him away from the fight. Plaintiff voluntarily engaged in physical contact with a player involved in the fight (plaintiff alleged he was trying to pull a player out of the fight when the referee grabbed the plaintiff): "Under the doctrine of primary assumption of risk, by engaging in a sport or recreational activity, a participant 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation' ... . '[B]y freely assuming a known risk, a plaintiff commensurately negates any duty on the part of the defendant to safeguard him or her from the risk' ... . If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty... . However, a plaintiff will not be deemed to have assumed the risks of reckless or intentional conduct, or concealed or unreasonably increased risks ... . Here, the defendants established, prima facie, that the risks inherent in the sport of ice hockey, and in particular, involving oneself in an ongoing fight, were fully comprehended by the plaintiff and perfectly obvious. Further, the defendants established that the referees were permitted to make physical contact with players involved in a fight and, accepting the plaintiff's version of the events as true, the plaintiff voluntarily engaged in physical contact with a player involved in the fight." ***Falcaro v. American Skating Ctrs., LLC*, 2018 N.Y. Slip Op. 08469, Second Dept 12-12-18**

PERSONAL INJURY, EVIDENCE.

EVEN PHYSICALLY SMALL DEFECTS, IN COMBINATION WITH OTHER FACTORS, CAN CONSTITUTE A DANGEROUS CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the expert opinion submitted by both sides raised questions of fact whether "beveled edge between the dance floor and the adjoining rug" created a dangerous condition in this slip and fall case. The court noted that even physically small defects can become dangerous in combination with other

factors, including lighting: "The Court of Appeals has recognized that even a physically small defect may be actionable, such as where there is a jagged edge, a rough, irregular surface, the presence of other defects in the vicinity, or poor lighting, or if the defect is located where people are naturally distracted from looking down at their feet ... . Attention to the specific circumstances is always required, and undue or exclusive focus on whether a defect is a trap or snare is not appropriate ... . The plaintiffs submitted the expert affidavit of a professional engineer who inspected the dance floor and carpet area. He measured the static coefficient of friction of the beveled edges of the dance floor, and found that they did not provide proper slip resistance for an individual stepping on it while dancing. Additionally, he found that inadequate lighting contributed to the accident by 'not providing visual clues to recognize that the dance floor had terminated with the subject metal edging.' ... . Given the conflicting expert affidavits, and the circumstances of the accident, there are triable issues of fact as to whether the beveled edges of the dance floor constituted a dangerous condition that caused the injured plaintiff to slip and fall ...". ***Poliziani v. Culinary Inst. of Am.*, 2018 N.Y. Slip Op. 08519, Second Dept 12-12-18**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE, INSURANCE LAW, VEHICLE AND TRAFFIC LAW.

THE PRESUMPTION OF OWNERSHIP OF A VEHICLE CREATED BY THE CERTIFICATE OF TITLE CAN BE REBUTTED BY PROOF OF DOMINION AND CONTROL OVER THE VEHICLE, PLAINTIFF'S MOTION TO DISCOVER THE INSURER'S FILE IN THIS TRAFFIC ACCIDENT CASE TO DETERMINE WHETHER DEFENDANT EXERCISED DOMINION AND CONTROL OVER THE VEHICLE SHOULD NOT HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined that evidence that defendant exercised dominion of control of the vehicle would rebut the presumption of ownership created by a certificate of title. Here the tile was in defendant's wife's name and she was driving at the time of the traffic accident. Plaintiff sought to discover the insurer's file pursuant to CPLR 3124. Supreme Court should have granted the motion: " 'A certificate of title is prima facie evidence of ownership' (... Vehicle and Traffic Law §§ 128, 2101[g]; 2108[c]...) . However, this presumption may be rebutted by evidence demonstrating that another individual owns the subject vehicle... . This may include evidence that a person other than the title holder exercised 'dominion and control' over the vehicle ... . Here, documents from the insurer concerning the vehicle and the accident are material and relevant to the issue of whether the defendant exercised dominion and control over the vehicle ... . Accordingly, the Supreme Court should have granted the plaintiff's motion to compel the defendant to provide an executed authorization for documents in the insurer's possession concerning the vehicle and the accident ...". ***Portillo v. Carlson*, 2018 N.Y. Slip Op. 08520, Second Dept 12-12-18**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

PETITION TO AMEND A NOTICE OF CLAIM WAS UNTIMELY WITH RESPECT TO THE PARENTS' DERIVATIVE ACTION IN THIS PEDESTRIAN-VEHICLE TRAFFIC ACCIDENT CASE, THE PETITIONERS DID NOT SHOW THAT THE TOWN HAD TIMELY KNOWLEDGE OF THE ALLEGED INVOLVEMENT OF TOWN PERSONNEL, PETITION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the petition for leave to amend the notice of claim against the town in this pedestrian-vehicle traffic accident case should not have been granted. The infant petitioner was struck by a car crossing a road. The proposed amendment would have alleged a town park ranger waved the family across just before the child was struck. Because the request to amend was made more than a year and 90 days after the accident, the request was untimely for the derivative action by the parents, but the statute of limitations was tolled for the infant petitioner. The Second Department went on to find that petitioners did not demonstrate the town had timely knowledge of the the allegation the family was waved across the street by a town employee, even though the allegation was memorialized in a Suffolk County police report: "... [T]he petitioners failed to establish that the Town acquired actual knowledge, within 90 days of the collision or a reasonable time thereafter, of the essential facts constituting the claim that the Town park ranger waved to the family to cross the highway. It is not alleged that the child was struck by a Town vehicle or a Town employee. In addition, Magwood's [mother's] testimony at her hearing held pursuant to General Municipal Law § 50-h did not indicate that a Town park ranger waved to the family to cross the highway. Although several witnesses to the collision gave a statement to the effect that the Town park ranger waved to the family to cross the highway, these statements were made to Suffolk County Police Department (hereinafter SCPD) personnel and memorialized in SCPD reports... . Further, while the Town park ranger prepared a Town Division of Enforcement and Security Public Safety report on the date of the collision, that report did not indicate that the Town park ranger waved to the family to cross the highway. '[F]or a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation' ... . The Town park ranger's report did not support a ready inference that the Town committed a potentially actionable wrong ... . Moreover, the petitioners failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim asserting the theory that the Town park ranger waved to the family to cross the highway and for the subsequent delay in filing this petition... . Although the petitioners satisfied their initial burden of showing a lack of substantial prejudice to the Town as a result of the late notice, and the Town failed to make a 'particularized showing' of substantial prejudice ... , the presence or absence of any one factor is not necessarily determinative in

deciding whether permission to serve a late notice of claim should be granted ...". ***Matter of Johnson v. County of Suffolk*, 2018 N.Y. Slip Op. 08482, Second Dept 12-12-18**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

PETITION TO DEEM A LATE NOTICE OF CLAIM TIMELY SERVED SHOULD NOT HAVE BEEN GRANTED, THE CITY'S KNOWLEDGE OF THE CROSSWALK DEFECT IN THIS SLIP AND FALL CASE IS NOT EQUIVALENT TO TIMELY KNOWLEDGE OF THE NATURE OF PLAINTIFF'S CLAIM.

The Second Department, reversing Supreme Court, determined that plaintiff's petition to deem the late notice of claim timely served should not have been granted in this slip and fall case. Plaintiff alleged she tripped and fell over a defect in a crosswalk. The notice of claim was serve eight months after the fall. Photos of the defect were alleged to have been taken "shortly after" the fall but were not authenticated. An Internet map service apparently depicted the defects in 2013 and 2014. The court held that the fact that the city may have known of the defect does not mean the city had timely notice of the nature of plaintiff's claim: "... [W]e disagree with the Supreme Court's determination that the City acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter. While the photographs submitted in support of the petition may have demonstrated that the City had prior knowledge of the crosswalk defect, actual knowledge of the defect is not tantamount to actual knowledge of the facts constituting the claim, since the City was not aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability... . Similarly, the service of the notice of claim approximately five months after the expiration of the 90-day statutory period for service did not provide the City with the requisite actual knowledge within a reasonable time ... . We also disagree with the Supreme Court's determination, based on the photographs submitted by the petitioner, that she sustained her burden of demonstrating that the City would not be substantially prejudiced by the late notice. The petitioner contended that the photographic evidence showed that the defective condition was substantially the same in appearance at the time of her accident as it was some eight months later when her petition was served. However, the photographs purportedly taken 'shortly after' the accident were never authenticated ... , nor did the petitioner identify the actual date the photographs were taken or the person who took them. Moreover, the more recent photographs were taken at different angles than the earlier photos, and neither set of images contained any measurements or dimensions to support the conclusion that a comparison of the two sets of photographs established that the defect did not change in the interim ...". ***Matter of Bermudez v. City of New York*, 2018 N.Y. Slip Op. 08477, Second Dept 12-12-18**

PRODUCTS LIABILITY, EVIDENCE.

THE OWNER OF THE DEFECTIVE LADDER WHICH CAUSED PLAINTIFF'S INJURY ALLEGED THE LADDER WAS PURCHASED AT A PARTICULAR HOME DEPOT STORE, IN THE FACE OF PROOF THE STORE DID NOT OPEN UNTIL YEARS AFTER THE ALLEGED PURCHASE, THE OWNER OF THE LADDER ALLEGED THE LADDER WAS EITHER PURCHASED AT A DIFFERENT TIME OR AT A DIFFERENT HOME DEPOT STORE, HOME DEPOT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined Home Depot's motion for summary judgment should have been granted in this defective ladder products liability case. Defendant Garberg, the owner of the ladder, alleged he purchased the ladder at a specific Home Depot store between 1994 and 1995. Home Depot demonstrate the store in question did not open until 2001. Garberg then submitted an affidavit alleging he either bought ladder after the store opened or he bought the ladder at another Home Depot store (which was identified): " '[L]iability may not be imposed for . . . strict products liability upon a party that is [*2]outside the manufacturing, selling, or distribution chain'... . Here, Home Depot established its prima facie entitlement to judgment as a matter of law by demonstrating that it was outside the manufacturing, selling, or distribution chain... . In opposition, the plaintiff failed to raise a triable issue of fact on this issue. Garberg's 2016 affidavit contained assertions made for the first time in opposition to the motion and merely raised feigned issues designed to avoid the consequences of Garberg's earlier affidavit. Garberg swore to the 2016 affidavit after he settled with the plaintiff, after the close of discovery, and after Home Depot submitted its conclusive proof establishing that he could not have purchased the defective ladder when and where he claimed he had. The 2016 affidavit speculated about a possible purchase at a different Home Depot location that, unlike the Cropsey Avenue location, the parties did not have the opportunity to explore during discovery. Garberg also contradicted his prior unambiguous assertion about the timing of his purchase. His 2016 opposition affidavit was, therefore, insufficient to defeat summary judgment ...". ***Rooney v. Garberg*, 2018 N.Y. Slip Op. 08521, Second Dept 11-12-18**

REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT WITH RESPECT TO THE ADVERSE POSSESSION ACTION AND THE LACHES DEFENSE, THE ACTION INVOLVED LAND THAT WAS ONCE UNDER WATER CREATED BY THE MOVEMENT OF SAND DURING STORMS DECADES AGO.

The Second Department, modifying Supreme Court, determined there were questions of fact in this adverse possession case concerning who owned the land and when the adverse possession began. The land in question was once under water and was created by the movement of sand decades ago: "CPLR 212(a) provides that '[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his [or her] predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action.' However, the 10-year limitations period does not begin to run against a record owner of property until the occupiers of the property begin to adversely possess it (see RPAPL 311...). We disagree with the Supreme Court's determination that the defendants are entitled to summary judgment dismissing the complaint ... on the ground that the action was barred by the statute of limitations. Calculation of the date from which the statute of limitations began to run on the plaintiffs' causes of action requires a threshold determination as to whether the plaintiffs are the record owners of the disputed land, and secondly, whether, and if so, when, the defendants began to adversely possess the land... . The defendants failed to conclusively establish that the plaintiffs are not the record owners of the disputed land for the purposes of determining a date upon which the statute of limitations began to run ... . The defendants also failed to establish ... that they are entitled to judgment as a matter of law on their laches defense. 'The essence of the equitable defense of laches is prejudicial delay in the assertion of rights' ... . 'In order for laches to apply to the failure of an owner of real property to assert his or her interest, it must be shown that [the] plaintiff inexcusably failed to act when [he or] she knew, or should have known, that there was a problem with [his or] her title to the property. In other words, for there to be laches, there must be present elements to create an equitable estoppel' ... . Here, although the defendants established that the plaintiffs did not commence the action until a lengthy period of time after the alleged avulsive acts had occurred, the defendants failed to eliminate issues of fact as to whether the plaintiffs' failure to act was excusable, whether the defendants were taking actions to adversely possess the disputed land, and whether and when the plaintiffs should reasonably have become aware of such alleged acts." ***Strough v. Incorporated Vil. of W. Hampton Dunes*, 2018 N.Y. Slip Op. 08525, Second Dept 12-12-18**

ZONING, LAND USE, ENVIRONMENTAL LAW, CIVIL PROCEDURE.

FOUR MONTH STATUTE OF LIMITATIONS APPLIED TO THE DECISION BY THE PLANNING BOARD THAT NO ENVIRONMENTAL IMPACT STATEMENT WAS NECESSARY, PETITION TO ANNUL THAT DECISION WAS UNTIMELY.

The Second Department determined the four-month statute of limitations applied to the planning board's decision that an environmental impact statement was not necessary and the petition to annul that decision was untimely: "To the extent that the petition alleges the Planning Board's noncompliance with SEQRA [State Environmental Quality Review Act], the four-month statute of limitations applies (see CPLR 217[1]...). An action taken by an agency pursuant to SEQRA may be challenged only when such action is final (see CPLR 7801[1]). An agency action is final when the decision-maker arrives at a 'definitive position on the issue that inflicts an actual, concrete injury' ... . The position taken by an agency is not definitive and the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party ... . Here, the statute of limitations began to run with the issuance of the negative declaration for the project on February 19, 2015, as this constituted the Planning Board's final act under SEQRA and, accordingly, any challenge to the negative declaration had to be commenced within four months of that date ...". ***Matter of Stengel v. Town of Poughkeepsie Planning Bd.*, 2018 N.Y. Slip Op. 08488, Second Dept 12-12-18**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

DEFENDANT CANNOT PLEAD GUILTY TO A VIOLATION OF A STATUTE WHICH HAD NOT BEEN ENACTED AT THE TIME OF THE OFFENSE, THE DEFECT IS JURISDICTIONAL AND SURVIVES A WAIVER OF APPEAL.

The Third Department held that sexual abuse first degree charge in the superior court information (SCI) was based on a statute which had not yet been enacted at the time of the offense. The defect was jurisdictional and survived the waiver of appeal: "Initially, defendant contends that the waiver of indictment and the SCI are jurisdictionally defective with respect to the crime of sexual abuse in the first degree under Penal Law § 130.65 (4) because this provision of the Penal Law was not in effect in 2009 when the alleged criminal conduct occurred. Preliminarily, we note that defendant is not precluded by her unchallenged waiver of the right to appeal from raising this jurisdictional challenge ... . The People concede that a jurisdictional defect exists inasmuch as the relevant Penal Law provision did not become effective until November 1, 2011 ... , and

a defendant may not be charged with a crime that does not exist at the time that the act was committed ... . Consequently, defendant's plea of guilty to sexual abuse in the first degree must be vacated and count 2 of the SCI charging her with this crime must be dismissed." ***People v. Gannon*, 2018 N.Y. Slip Op. 08582, Third Dept 12-13-18**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER MAY NOT HAVE BEEN AFFORDED HIS RIGHT TO BE PRESENT WHEN THE UNAUTHORIZED MEDICATION WAS FOUND IN HIS CELL, DETERMINATION ANNULLED.

The Third Department held that the determination petitioner was guilty of possessing unauthorized medication must be annulled because petitioner may not have been afforded his right to be present when the pill was discovered: "... [T]he part of the determination finding petitioner guilty of possessing unauthorized medication must be annulled as the record reflects that petitioner may not have been afforded his conditional right to observe that portion of the cell search that resulted in the pill being discovered. As such, the determination must be annulled to that extent and all references to the charge of possessing unauthorized medication must be expunged from his institutional record ...". ***Matter of Torres v. Annucci*, 2018 N.Y. Slip Op. 08595, Third Dept 12-13-18**

PERSONAL INJURY, EMPLOYMENT LAW.

QUESTIONS OF FACT WHETHER THE EMPLOYER OF THE DRIVER WHO KILLED A BICYCLIST WHEN ATTEMPTING TO LEAVE THE EMPLOYER'S PREMISES IS LIABLE, QUESTIONS OF FACT WERE RAISED ABOUT (1) THE EMPLOYER'S SPECIAL USE OF THE AREA WHERE THE ACCIDENT OCCURRED, (2) A SPECIAL RELATIONSHIP WITH THE EMPLOYEE (MASTER-SERVANT) GIVING RISE TO A DUTY TO CONTROL THE EMPLOYEE, AND (3) PROXIMATE CAUSE.

The Third Department, over a dissent, determined there were questions of fact whether the employer (BorgWarner) of the driver who killed a bicyclist (plaintiff's decedent) while exiting the employer's premises was liable. There was a question whether the employer exercised a special use of the area, whether the employer had a duty to control the conduct of the employee because of a special relationship (master-servant), and whether the employer's acts or omissions constituted a proximate cause of the accident: "A finding of a special use arises where there is a modification to the public sidewalk, such as the installation of a driveway, or a variance of the sidewalk to allow for ingress and egress... , that was 'constructed in a special manner for the benefit of the abutting owner or occupier' ... . The owner must derive a 'unique benefit unrelated to the public use' ... . Contrary to BorgWarner's claims that it uses Warren Road in the same manner as the general public, there was substantial evidence in the record, submitted by plaintiff, suggesting that the public roadway in question had been altered for the exclusive benefit of BorgWarner to facilitate its relocation. ... [A] duty may be created to control the conduct of a person when a special relationship exists, such as master-servant ... . Here, not only did BorgWarner control the flow of traffic from its private parking lot at the south exit via a control gate, but BorgWarner also placed a yield sign on BorgWarner South Drive for motorists entering the merge lane on Warren Road. Also, as an employer, BorgWarner had the opportunity to conduct training or communicate in some way to its employees to use due caution and follow traffic laws when using the south exit. In fact, BorgWarner did provide training programs, including obeying traffic signs, however, none were specific to the use of the south exit. This evidence raises a question of fact as to the extent of BorgWarner's control over its employees and whether this control is sufficient to establish a duty... .Further, although it is true that, at the time of the accident, [the employee] had completed her shift and was going home, activity arguably outside the scope of her employment, exiting the facility was also 'necessary or incidental to such employment,' and her actions were still controlled in part by the gate and signage installed by BorgWarner ...". ***Giannelis v. Borgwarner Morse Tec Inc.*, 2018 N.Y. Slip Op. 08593, Third Dept 12-13-18**

UNEMPLOYMENT INSURANCE.

DANCE INSTRUCTOR WAS AN EMPLOYEE OF THE FOUNDATION CHARTERED BY THE NYS BOARD OF REGENTS TO SET UP ARTISTIC PROGRAMS IN SCHOOLS.

The Third Department determined the claimant, a dance instructor, was an employee of the foundation which was chartered by the New York State Board of Regents to provide artistic programs in schools. Claimant was therefore entitled to unemployment insurance benefits: "The evidence adduced at the hearing established that the Foundation retained control over important aspects of claimant's and other teaching artists' services. To that end, the Foundation solicited and worked with schools to establish an appropriate artistic program to meet their needs and budget, screened the artists, matched their skills and experience to the schools' needs and set the artists' rate of pay, which was less than the Foundation received by contract from the Department, and helps artists work in the academic settings. The Foundation paid the artists directly, upon receipt of weekly invoices provided by the Foundation and completed by the artist documenting hours worked, provided guidelines for them to follow and monitored their progress and hours to stay within the schools' budgets and program plans. The Foundation fielded and attempted to resolve complaints from schools regarding artists' conduct or

performance and found replacements when needed, and its officers attended the final performances and held evaluation meetings at the end with school personnel and the artists." ***Matter of Pearson (Commissioner of Labor)*, 2018 N.Y. Slip Op. 08588, Third Dept 12-13-18**

UNEMPLOYMENT INSURANCE.

NEWSPAPER CARRIER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, who delivered newspapers to residential customers, was an employee of Gannett Satellite Information Network: "... [W]e find that the indicators of control contained in Gannett Satellite's contract with claimant are practically the same as the relevant factors previously identified to establish an employer-employee relationship; accordingly, we find that substantial evidence supports the Board's decisions (see Matter of Smith [Gannett Satellite Info. Network, Inc.-Commissioner of Labor], ___ AD3d ___, ___, 85 NYS3d 796, 797 [2018]; *Matter of Race [Gannett Satellite Info. Network, Inc.-Commissioner of Labor]*, 128 AD3d 1130, 1130 [2015]; *Matter of Gager [Gannett Satellite Info. Network, Inc.-Commissioner of Labor*, 127 AD3d 1348, 1348-1349 [2015]; *Matter of Hunter [Gannett Co., Inc.-Commissioner of Labor]*, 125 AD3d 1166, 1167-1168 [2015]; *Matter of Armison [Gannett Co., Inc.-Commissioner of Labor]*, 122 AD3d 1101, 1102-1103 [2014], lv dismissed 24 NY3d 1209 [2015])." ***Matter of Nicholas (Commissioner of Labor)*, 2018 N.Y. Slip Op. 08589, Third Dept 12-13-18**

UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO HAD BEEN INJURED, DID NOT DEMONSTRATE SHE WAS ABLE TO WORK DURING THE TIME SHE WAS CERTIFIED FOR BENEFITS, UNEMPLOYMENT INSURANCE APPEALS BOARD RULING SHE WAS ENTITLED TO BENEFITS REVERSED.

The Third Department, reversing the Unemployment Insurance Appeals Board, determined claimant was not entitled to unemployment insurance benefits because she had been injured and did not demonstrate she was able to work during the relevant period of time: "The substantial and unrefuted medical documentation in the record, together with claimant's receipt of workers' compensation benefits, establishes that claimant was unable to perform any job duties required of her during the time period in which she certified for benefits ... . In addition, inasmuch as the essential job functions required of her included the performance of various physical tasks, including the manual operation of a school bus door three times in a certain amount of time, we are unpersuaded by claimant's contention that, at the time she applied for benefits and during the time period in question, no accommodation was made for her injury... . Moreover, although claimant testified that she previously worked as a waitress and that she was capable of performing such work while she recovered from her injury, claimant's testimony does not reflect that she sought, or was available for, this type of employment at any point during the time period in which she certified for benefits ... . In view of the foregoing, we conclude that the record does not contain substantial evidence to support the Board's finding that claimant was ready, willing and able to work in her employment as a school bus driver or in any other type of employment for which she is reasonably fitted by training and experience during the time period in which she certified for benefits ...". ***Matter of Ormanian (Commissioner of Labor)*, 2018 N.Y. Slip Op. 08592, Third Dept 12-13-18**

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