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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

APPEALS, CIVIL PROCEDURE, FREEDOM OF INFORMATION LAW (FOIL).

THE INTERIM DECISION ISSUED BY SUPREME COURT WAS NOT THE EQUIVALENT OF AN ORDER; THE FIRST DEPARTMENT, THEREFORE, DISMISSED THE APPEAL FOR LACK OF JURISDICTION.

The First Department, dismissing the appeal in this Freedom of Information Law (FOIL) case, determined the "interim decision" was not an appealable paper, depriving the First Department of jurisdiction: "This proceeding stems from Spectrum News NY1's (Spectrum) attempts to gain access to video files from the voluntary body camera experiment. Specifically, Spectrum filed a FOIL request for unredacted videos from the NYPD's voluntary body camera program begun in 2014. NYPD denied the request, claiming that unredacted files were exempt from disclosure under FOIL. Spectrum then commenced this article 78 proceeding seeking a judgment compelling respondent NYPD to comply with its request. ... [T]he parties stipulated that out of a disputed 328 videos, only 30 would be the subject of the hearing. Supreme Court then issued 'an interim decision,' which was not the product of a motion for relief. Instead, the 'interim decision,' among other things, permitted respondents to redact the faces of persons other than officers from any video footage recorded by the body cameras and to redact certain communications between officers ... .Supreme Court granted petitioner leave to appeal from the 'interim decision.' This appeal is thus taken from an 'interim decision,' which is not an appealable paper. The lack of an appealable paper here deprives the Court of jurisdiction and requires dismissal of Spectrum's appeal, albeit without prejudice. Where, as here, a party brings an appeal from a nonappealable paper, this Court regularly dismisses the appeal for lack of jurisdiction ... . While there are instances where this Court has deemed a paper denominated as a 'decision' to nonetheless be appealable because it contained all the hallmarks of an order ... , that is not the situation here." ***Matter of Spectrum News NY1 v. New York City Police Dept.*, 2020 N.Y. Slip Op. 00521, First Dept 1-28-20**

CIVIL PROCEDURE, CONTRACT LAW, JUDGES.

TRIAL COURT'S DECLARING A MISTRIAL VIOLATED THE PARTIES' STIPULATION PURSUANT TO THE SUMMARY JURY TRIAL RULES.

The First Department, reversing Supreme Court, determined the trial should not have, sua sponte, declared a mistrial in this summary jury trial (SJT) in an attempt to correct an evidentiary error. The mistrial violated the parties' STJ stipulation which constitutes a binding contract: "The SJT rules to which the parties stipulated provide, among other things, that '[p]arties agree to waive any motions for directed verdicts as well as any motions to set aside the verdict or any judgment rendered by said jury' and that the 'Court shall not set [a]side any verdict or any judgment entered thereon, nor shall it direct that judgment be entered in favor [of] a party entitled to judgment as a matter of law, nor shall it order a new trial as to any issues where the verdict is alleged to be contrary to the weight of the evidence' ... . The court erred in sua sponte declaring a mistrial and setting aside the verdict. While this was an attempt to correct an admittedly erroneous evidentiary ruling, the parties' stipulation to a summary jury trial, subject to the applicable rules and procedures for Bronx County, was a legally binding contract ... . Since the summary jury trial rules for Bronx County do not provide for any means to correct errors of law committed during trial, the court exceeded the boundaries of the parties' agreement by setting aside the verdict, regardless of whether it in fact did so on its own initiative in the interest of justice ... . [T]his holding does not proscribe post-trial motions of any kind in connection with summary jury trials; rather, it abides by the parties' own proscriptions made at the time that they stipulated to proceed with a summary jury trial. There was nothing barring the parties from stipulating to reserve their right to appeal or move to set aside the verdict on the ground of an error of law." ***Vargas v. LaMacchia*, 2020 N.Y. Slip Op. 00556, First Dept 1-28-20**

CRIMINAL LAW, CIVIL PROCEDURE, JUDGES, CONSTITUTIONAL LAW.

TRIAL JUDGE SHOULD NOT HAVE, SUA SPONTE, DECLARED A MISTRIAL TO ACCOMMODATE A JUROR'S WEEKEND PLANS; WRIT OF PROHIBITION GRANTED; RETRIAL BARRED; INDICTMENT DISMISSED.

The First Department, granting petitioner's application for a writ of prohibition and dismissing the indictment, determined the trial court should not have, sua sponte, declared a mistrial to accommodate a juror's weekend travel plans. Retrial was barred: "The trial court was not compelled by manifest necessity to declare a mistrial and terminate the proceedings ..., and

accordingly, retrial is barred under the Double Jeopardy Clauses of the Federal and New York State Constitutions ... . It was an abuse of discretion to declare a mistrial in order to accommodate a juror's weekend travel plans, including a Friday, which she belatedly informed the court about during deliberations, where the court, as requested by defendant, reasonably could have directed the juror to report for deliberations the following day, and the court also failed to confirm that the jury was hopelessly deadlocked at the time ...". ***Matter of Bannister v. Wiley*, 2020 N.Y. Slip Op. 00522, First Dept 1-28-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER INSTALLING CONDENSERS WAS 'ALTERATION' WITHIN THE MEANING OF LABOR LAW § 241(6); DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff was engaged in construction (alteration) at the time of his injury. His Labor Law § 241(6) cause of action, therefore, should not have been dismissed: "Plaintiff alleges that he was injured while installing a refrigeration condenser unit at premises owned by Boss and leased by Antillana. We find that the motion court improperly granted defendants' motions for summary judgment dismissing the Labor Law § 241(6) claim. Plaintiff was engaged in an activity within the purview of Labor Law § 241(6). Plaintiff worked at the subject premises during the build-out installing three refrigeration system condensers, which weighed about 3000 pounds and had to be moved with a forklift. Three weeks after the store was opened, plaintiff was asked to install an additional condenser which weighed about 200 pounds. The president of Antillana acknowledged that there had been a renovation project underway at the premises before plaintiff's accident. We find that there is an issue of fact whether the subsequent installation of the condenser constituted an 'alteration' of the premises, which falls within the ambit of 'construction' work under Labor Law § 241(6) ...". ***Rodriguez v. Antillana & Metro Supermarket Corp.*, 2020 N.Y. Slip Op. 00669, First Dept 1-30-20**

PERSONAL INJURY, LANDLORD-TENANT.

QUESTIONS OF FACT WHETHER THE ASSAILANT WAS AN INTRUDER AND WHETHER THE LANDLORD HAD NOTICE OF THE DEFECTIVE DOOR LOCK IN THIS THIRD-PARTY ASSAULT CASE; LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant NYC Housing Authority's (NYCHA's) motion for summary judgment in this third-party assault case should not have been granted. Plaintiff raised questions of fact whether the assailant was an intruder and whether the NYCHA had notice of the defective entrance door to the apartment building: "NYCHA failed to eliminate an issue of fact as to whether it was 'more likely or more reasonable than not' that the man who shot plaintiff in the leg in front of his apartment door was an intruder 'who gained access to the premises through a negligently maintained entrance' ... . Plaintiff testified that a man spoke to him on the sidewalk just outside the building, asking where he could find drugs, and that, after plaintiff entered through the unlocked front entrance and walked up the stairs to his floor and along the hall 10 feet to his apartment, he saw the man again when he heard the door to the stairwell open, and the man held him up at gunpoint. From plaintiff's familiarity with building residents, the history of ongoing criminal activity, and the assailant's failure to conceal his or her identity a jury could reasonably infer 'that the assailant was more likely than not an intruder' ... . Plaintiff informed the police that he could identify the assailant if shown a photograph ... . NYCHA's evidence also showed that there was a robbery inside the building about 18 months before plaintiff's incident, requiring repairs to the front door lock, and various shootings on the grounds ... . Contrary to NYCHA's contention, there is enough evidence as to how the assailant gained entry to the building to require consideration of whether NYCHA had actual or constructive notice of the nonfunctioning door lock ... . A jury could infer from plaintiff's testimony that the assailant entered the building himself and did not need to wait for anyone in the lobby to open the door for him. Nor does its evidence demonstrate that NYCHA did not have constructive notice of the nonfunctioning door lock, since plaintiff testified that the lock was not functioning the day before and the day of the incident, but the last daily maintenance checklist produced by NYCHA, which included the front door lock, was dated two days before the incident ...". ***Clotter v. New York City Hous. Auth.*, 2020 N.Y. Slip Op. 00554, First Dept 1-28-20**

PERSONAL INJURY, LANDLORD-TENANT, MUNICIPAL LAW.

BUILDING OWNER NOT LIABLE FOR ALLEGED FAILURE TO ENSURE A SMOKE DETECTOR WAS FUNCTIONAL, DESPITE THE ALLEGATION THE OWNER REGULARLY INSPECTED THE SMOKE DETECTORS.

The First Department determined the defendant landlord could not be held liable for the failure to ensure a smoke detector was functional: "In this action where plaintiff alleges that he was injured as a result of a fire in his apartment due to defendant building owner's negligent failure to provide an operable smoke detector, defendant demonstrated prima facie that he satisfied his statutory duty to provide a functional smoke detector in the apartment, and accordingly, the obligation to maintain the smoke detector was assumed by plaintiff (see Administrative Code of City of NY § 27-2045[a][1], [b][1], [2]). Plaintiff's argument that defendant voluntarily assumed a duty to ensure his smoke detector was in good working condition by regularly inspecting tenants' smoke detectors, is unavailing. 'Liability under this theory may be imposed only if defendant's conduct placed plaintiff in a more vulnerable position than he would have been in had defendant done nothing' ... . Here, however, plaintiff provided no evidence that he relied on defendant's inspection of his smoke detector to ensure

its functionality, and instead testified that he never saw the building superintendent inspect his smoke detector." ***Figueroa v. Parkash*, 2020 N.Y. Slip Op. 00525, First Dept 1-28-20**

SECOND DEPARTMENT

CRIMINAL LAW.

SUPREME COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PROTECTIVE ORDER ALLOWING THE PEOPLE TO DELAY DISCLOSURE OF EVIDENCE IN THIS MURDER CASE UNTIL ONE WEEK BEFORE TRIAL; CRITERIA EXPLAINED.

The Second Department, in an expedited review of Supreme Court's granting a protective order in a murder case, determined Supreme Court did not abuse its discretion, in part because defense counsel was notified of the ex parte proceeding: "On January 15, 2020, the Supreme Court convened in an open session in the presence of the prosecutor, defense counsel, and the defendant. After ascertaining that defense counsel would not waive a hearing on the protective order, the court ordered the courtroom sealed. The defendant was removed from the courtroom, and defense counsel stepped out of the courtroom. Defense counsel did not voice an objection to the court's conduct of an ex parte proceeding. Nor did defense counsel seek to offer any arguments concerning any of the factors relevant to the determination as to whether, and to what extent, a protective order should be issued. The court then proceeded to conduct an ex parte proceeding regarding the People's application. Thereafter, the court resumed with a continued open session attended by both defense counsel and the defendant. After the court informed defense counsel that it had granted the People's application, the parties and the court proceeded to discuss other matters related to the case. During these proceedings, defense counsel inquired as to whether there was description of the shooting by a witness. The court responded by stating that defense counsel had been provided with a videotape that 'pretty much shows you how the shooting occurred.' ... The defendant now seeks expedited review of the court's ruling pursuant to CPL 245.70(6). ... [T]he record reflects that the court considered the possibility of allowing defense counsel access to the information on the condition that it not be shared with the defendant personally; the court raised this possibility sua sponte. It would have been better in my view to allow defense counsel to see the portions of the People's written application that contained legal argument or other matter that would not reveal the information sought to be covered by the protective order, pending the court's determination as to whether the sensitive portions of the People's application should be sealed. Further, it would have been better in my view, even assuming that portions of the People's written and oral presentations should be sealed, to permit defense counsel to participate in portions of the protective order proceeding where the substance of the sealed information is not discussed. In my view, defense counsel should be excluded from participation in the protective order review process only to the extent necessary to preserve the confidentiality of sensitive information pending the court's determination as to the issuance, and scope, of the protective order." ***People v. Nash*, 2020 N.Y. Slip Op. 00520, First Dept 1-27-20**

CRIMINAL LAW.

PROTECTIVE ORDER VACATED UPON EXPEDITED REVIEW.

The Second Department, vacating the protective order issued by Supreme Court, determined defense counsel should have been heard in opposition to the application for the protective order: "... [T]he matter is remitted to the Supreme Court, Nassau County, to afford the defendant an opportunity to make arguments to that court with respect to the People's application for a protective order. Under the circumstances of this case, the Supreme Court should have granted defense counsel's request for an opportunity to be heard with respect to the People's application for a protective order pursuant to CPL 245.70 ... . [T]he People advised this Court that they no longer oppose the application." ***People v. Belfon*, 2020 N.Y. Slip Op. 00519, Second Dept 1-27-20**

CIVIL PROCEDURE, FORECLOSURE.

MOTION TO RENEW SHOULD NOT HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court in this foreclosure action, determined the motion to renew should not have been granted, explaining the criteria: "In general, a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion ... . It is well settled that a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation ... . Indeed, the Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion ... . Successive motions for summary judgment should not be entertained in the absence of good cause, such as a showing of newly discovered evidence. However, evidence is not newly discovered simply because it was not submitted on the prior motion; rather, the evidence must not have been available to the party at the time it made its initial motion and could not have been established through alternate evidentiary means ...". ***Deutsche Bank Natl. Trust Co. v. Elshiekh*, 2020 N.Y. Slip Op. 00570, Second Dept 1-29-20**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFFS CAN NOT RAISE A NEW THEORY OF LIABILITY IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the defendant hospital's motion for summary judgment in this medical malpractice action should have been granted. The plaintiffs attempted to raise an evidentiary issue and theory of liability for the first time in opposition to the motion: "... [T]he plaintiffs improperly alleged, for the first time, a new theory claiming that other employees of the hospital were negligent in failing to properly administer Decadron and Heparin in accordance with the prescription of the plaintiff's attending physician. 'A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars' " ... . ***Bacalan v. St. Vincents Catholic Med. Ctrs. of N.Y.*, 2020 N.Y. Slip Op. 00561, Second Dept 1-29-20**

CONTRACT LAW.

CONTRACTUAL PROVISION LIMITING DAMAGES IS ENFORCEABLE, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the contractual provision limiting damages was enforceable. Plaintiff, Astoria, owned a power station and hired defendant, Rileu, to overhaul a steam boiler, which exploded. The contract limited Riley's damages to one and a half times the contract price: "A clear contractual provision limiting damages is enforceable, unless there is a special relationship between the parties, there is a statutory prohibition against it, or it is against public policy because the conduct of the party seeking to enforce it was grossly negligent ... . Here, Riley established, prima facie, that the clear limitation of liability provision contained in the addendum to the contract was part of an arm's length transaction between the parties, two sophisticated commercial entities, and is thus valid and enforceable ... . Riley further established, prima facie, that there was no special relationship between it and Astoria, that there was no statutory prohibition against the limitation of liability provision, and that the provision was not against public policy ...". ***Astoria Generating Co., LP v. Riley Power, Inc.*, 2020 N.Y. Slip Op. 00560, Second Dept 1-29-20**

CORPORATION LAW.

THERE WAS A DE FACTO MERGER SUCH THAT THE SUCCESSOR CORPORATION WAS LIABLE FOR THE TORTS OF ITS PREDECESSOR; THE CORPORATE VEIL WAS PROPERLY PIERCED TO FIND THE OWNER OF THE CORPORATION LIABLE.

The Second Department determined Supreme Court properly found there was a de factor merger such that the successor corporation is liable for the torts of its predecessor, and further found that Supreme Court properly found the owner of the corporation was personally liable for damages awarded against the corporation. The facts are too complex to fairly summarize here: " 'Generally, a corporation which acquires the assets of another is not liable for the torts of its predecessor' ... . 'However, such liability may arise if the successor corporation expressly or impliedly assumed the predecessor's tort liability, there was a consolidation or merger of seller and purchaser, the purchaser corporation was a mere continuation of the seller corporation, or the transaction was entered into fraudulently to escape such obligations' ... . Accordingly, '[a] transaction structured as a purchase of assets may be deemed to fall within this exception as a de facto merger' … . 'The hallmarks of a de facto merger are the continuity of ownership; cessation of ordinary business and dissolution of the [predecessor] as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets, and general business operation' ... . Where the acquired corporation is 'shorn of its assets' and becomes a 'shell,' legal dissolution is not required to support a finding of de facto merger ... . '[I]n non-tort actions, continuity of ownership is the essence of a merger' ... . * * * [Re: piercing the corporate veil:] It is the plaintiff's burden to demonstrate ' that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences' ... . Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use' ...". ***Bonanni v. Horizons Invs. Corp.*, 2020 N.Y. Slip Op. 00563, Second Dept 1-29-20**

CRIMINAL LAW.

PROTECTIVE ORDER ISSUED PURSUANT TO THE NEW DISCOVERY/DISCLOSURE STATUTES VACATED; MATTER REMITTED TO ALLOW THE DEFENSE TO BE HEARD ON THE PEOPLE'S APPLICATION FOR A PROTECTIVE ORDER.

The Second Department, after an expedited review pursuant to the new Criminal Procedure Law § 245.70, vacated the protective order and remitted the matter to allow the defense to oppose the application for a protective order: "I conclude that the Supreme Court should have afforded defense counsel an opportunity to be heard on the People's application for a protective order (see *People v. Bonifacio* ___ AD3d ___, 2020 N.Y. Slip Op. 00517 [2d Dept 2020]). Accordingly, the application

by the defendant Carlson Small is granted, the Supreme Court's ruling and protective order are vacated, and the matter is remitted to the Supreme Court, Kings County, to afford the defendants an opportunity to make arguments to that court with respect to the People's application for a protective order, and for a new determination of that application thereafter." ***People v. Reyes*, 2020 N.Y. Slip Op. 00620, Second Dept 1-29-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S ROBBERY CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE IDENTIFICATION TESTIMONY WAS TOO WEAK TO MEET THE BEYOND A REASONABLE DOUBT STANDARD.

The Second Department, reversing defendant's conviction determined the identification evidence was too weak to support the conviction in this robbery case. The conviction was deemed to be against the weight of the evidence: "Upon the exercise of our independent factual review power (see CPL 470.15[5]), we conclude that the verdict of guilt was against the weight of the evidence. '[W]eight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the [factfinder] was justified in finding the defendant guilty beyond a reasonable doubt' ... . At the second trial, in this one-witness identification case, the complainant consistently had difficulty remembering details of the crime. She could not remember how she described the defendant, and when asked how she recognized him, she stated, '[b]y his shirt.' The description she provided of the perpetrator shortly after the incident did not match, in several ways, the defendant's actual physical characteristics and appearance. Moreover, at the time of his arrest, several minutes after the incident, the defendant possessed neither the money nor the personal items which had allegedly been taken from the complainant." ***People v. James*, 2020 N.Y. Slip Op. 00615, Second Dept 1-29-20**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

PLAINTIFF ALLEGEDLY INJURED HIS HAND WHEN HE SAW HIS DAUGHTER START TO SLIP OUT OF A SWING ON A SCHOOL PLAYGROUND AND STOPPED THE SWING; THE ALLEGEDLY DEFECTIVE SWING WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY; THE COURT NOTED THAT THE ASSUMPTION OF THE RISK DOCTRINE DID NOT APPLY TO THIS SCENARIO.

The Second Department determined plaintiff failed to demonstrate the allegedly defective swing was the proximate cause of his injury. Plaintiff alleged the swing was crooked causing his daughter to begin to slip off the seat and he fractured his hand trying to stop the swing. The Second Department noted that the assumption of the risk doctrine did not apply to this scenario: "The concept of assumption of the risk has been 'generally restricted . . . to particular athletic and recreative activities in recognition that such pursuits have enormous social value' even while they may involve significantly heightened risks' ... . 'As a general rule application of assumption of the risk should be limited to cases . . . such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues' ... . Here, the plaintiff was pushing his young daughter in a plastic molded bucket seat swing at a playground on the School District defendants' property when, while attempting to stop the swing, he 'jammed' his hand on the back of it and fractured his hand. Pushing a swing is not the type of activity to which the doctrine of assumption of the risk is applicable ... . Moreover, jamming one's hand in the back of a swing 'is not a risk inherent in the activity and flowing from it' ... . * * * …[T]he plaintiff's deposition testimony describing the accident leads to the conclusion, as a matter of law, that under the circumstances of this case the risk of the plaintiff's injury was not forseeable ... . It is not reasonably foreseeable that the allegedly negligent installation of the swing, which caused it to swing crookedly, would have resulted in the plaintiff 'jamm[ing]' his hand on the back of the swing and fracturing his hand. The alleged negligent installation of the swing merely furnished the occasion for the unrelated act of the plaintiff reaching out to grab the swing and jamming his hand ...". ***Raldiris v. Enlarged City Sch. Dist. of Middletown*, 2020 N.Y. Slip Op. 00630, Second Dept 1-29-20**

FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT THE TERMINATION OF MOTHER'S PARENTAL RIGHTS; PETITIONER MADE NO EFFORT TO HELP MOTHER MAKE THE TRIAL DISCHARGE WORK.

The Second Department, reversing Family Court, determined the evidence did not support the termination of mother's parental rights. During the trial discharge of the child to mother, the petitioner made no effort to place in a school closer to mother and mother allowed the child to stay at the foster home on weeknights to attend school: "The evidence at the fact-finding hearing established that in May 2016, the mother had adequate housing for the child, that in June 2016, she had completed her service plan and was having unsupervised parental access with the child, and that in July 2016, she was having overnight and weekend parental access. In November 2016, the Family Court directed that the petitioner implement a trial discharge to the mother, and a trial discharge commenced on December 23, 2016. Although at that time the mother resided in Manhattan and the child was attending school in Brooklyn, the petitioner did not provide any assistance with regard to transferring the child to a school closer to the mother in Manhattan, did not provide any assistance with the child's

transportation to and from his school in Brooklyn, and did not provide other appropriate services to the family. The trial discharge failed in April 2017. According to the petitioner's witness, the trial discharge failed after the petitioner became aware that the mother had not taken the child into her full-time custody. According to the mother, the child spent weeknights with the foster mother in Brooklyn, because of the long commute between the mother's apartment in Manhattan and the child's school in Brooklyn. After the trial discharge failed in April 2017, the mother consistently attended her scheduled supervised parental access two hours per week until the petition was filed on August 7, 2017. Under the circumstances presented, the petitioner failed to establish by clear and convincing evidence that, during the relevant period of time, the mother failed to maintain contact with or plan for the future of the child, and further, that it made diligent efforts to encourage and strengthen the parental relationship (see Social Services Law § 384-b[7] ...)." ***Matter of Tai-Gi K. (Nadine B.),* 2020 N.Y. Slip Op. 00586, Second Dept 1-29-20**

FORECLOSURE, EVIDENCE.

THE BANK DID NOT PROVE IT HAD STANDING IN THIS FORECLOSURE ACTION, PRESENTING ONLY HEARSAY; SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the plaintiff bank in this foreclosure proceeding did not prove it had standing, that the defendant was in default, or that the notice provisions of Real Property Actions and Proceedings La (RPAPL) 1304 were complied with. With respect to standing, the Second Department wrote: "... [T]he plaintiff submitted the note, which contains an undated endorsement in blank, as well as affidavits from two vice presidents of loan documents for its loan servicer, Wells Fargo Bank, N.A. (hereinafter Wells Fargo). In both affidavits ... each vice president stated that review Wells Fargo's business records relating to the subject mortgage loan had confirmed that the plaintiff was in possession of the note prior to November 7, 2012. Neither one identified the documents reviewed or any basis for the conclusion that the plaintiff was in possession of the note more than two years prior to the subject review of Wells Fargo's files. The only document relevant to this issue attached to either affidavit was a copy of the note with the undated endorsement in blank. Under these circumstances, the affidavits constituted inadmissible hearsay and lacked any probative value ...". ***HSBC Bank USA, N.A. v. Campbell-Antoine*, 2020 N.Y. Slip Op. 00578, Second Dept 1-29-20**

FORECLOSURE, JUDGES.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, REVOKED THE ACCELERATION OF THE DEBT IN THIS FORECLOSURE CASE BECAUSE PLAINTIFF DID NOT SEEK THAT RELIEF.

The Second Department noted that Supreme Court in this foreclosure action should not have, sua sponte, revoked the previous acceleration of the debt because plaintiff did not request that relief: "... [T]he Supreme Court should not have revoked the previous acceleration of the mortgage debt and directed that the mortgage remain an installment contract, inasmuch as the plaintiff did not seek such relief in its motion or cross-move for it in response to the defendant's cross motion ...". ***Citi-Mortgage, Inc. v. Salko*, 2020 N.Y. Slip Op. 00566, Second Dept 1-29-20**

PERSONAL INJURY.

DEFENDANT DRIVER HAD THE BURDEN TO PROVE FREEDOM FROM COMPARATIVE NEGLIGENCE IN THIS TRAFFIC ACCIDENT CASE; DEFENDANT FAILED TO ELIMINATE QUESTIONS OF FACT ABOUT WHETHER HE WAS TRAVELLING TOO FAST AND WHETHER HE KEPT A PROPER LOOKOUT FOR PLAINTIFF BICYCLIST; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant driver, Perrone, did not eliminate questions of fact concerning whether he was negligent in travelling too fast for conditions or in keeping a proper lookout. Plaintiff bicyclist was struck while trying to see around a construction wall separating the bicyclist from the traffic: "Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment has the burden of establishing freedom from comparative negligence as a matter of law ... . 'In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident' ... . The issue of comparative fault is generally a question for the trier of fact ... . Here, the defendants failed to establish, prima facie, that Perrone was free from comparative fault in the happening of the accident. In particular, the defendants failed to eliminate triable issues of fact as to whether Perrone kept a proper lookout or was traveling at a reasonable and prudent speed as he approached the intersection in light of the conditions then present ...". ***Ballentine v. Perrone*, 2020 N.Y. Slip Op. 00562, Second Dept 1-29-20**

PERSONAL INJURY.

NO ONE AT THE DEFENDANT HEALTH CLUB WHEN PLAINTIFF'S DECEDENT SUFFERED A HEART ATTACK WAS CERTIFIED TO PROVIDE EMERGENCY AID AND THE EMPLOYEE DELAYED CALLING 911; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment against defendant health club for failing to aid plaintiff's decedent when she had a heart attack at the club. The only club employee on duty, Higgins, was not certified to provide emergency aid and delayed calling 911: "The Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the common-law negligence cause of action to the extent of granting partial summary judgment on the issue of the defendants' breach of their limited duty of care to render aid to patrons struck down by heart attack or cardiac arrest. In ***Miglino v. Bally Total Fitness of Greater N.Y., Inc.* (20 NY3d 342)**, the Court of Appeals recognized that 'New York courts have viewed health clubs as owing a limited duty of care to patrons struck down by a heart attack or cardiac arrest while engaged in athletic activities on premises' (id. at 350). The Court of Appeals has referred to this limited duty as the health club's 'common-law duty to render aid' (id. at 351 ...). A health club fulfills this duty by, for example, calling 911 immediately, responding to the patron and performing CPR or other measures, or responding to the patron and then deferring to someone else with superior medical training ...". ***Hamlin v. PFNY, LLC*, 2020 N.Y. Slip Op. 00574. Second Dept 1-29-20**

PERSONAL INJURY, MUNICIPAL LAW, CONTRACT LAW.

ALTHOUGH THE CITY GAVE A PERMIT TO A BUS COMPANY TO USE A PARKING LOT, THE CITY DID NOT DEMONSTRATE IT RELINQUISHED ALL CONTROL OVER THE MAINTENANCE OF THE PARKING LOT SUCH THAT IT COULD NOT BE HELD LIABLE IN THIS SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined that the City did not demonstrate it relinquished maintenance responsibilities for a parking lot licensed to a bus company in this slip and fall case: "... [T]he City failed to meet its prima facie burden of demonstrating that it relinquished control of the premises such that it had no duty to the plaintiff to remedy the allegedly defective condition. In support of its motion, the City submitted a copy of the permit agreement, as well as the deposition testimony of several City employees. The permit agreement provided that the bus company had some responsibility for maintenance of the premises, but that the permit also was revocable at will by the City, and the City reserved 'the right at all times to free and interrupted access' to any portion of the premises. Moreover, the deposition testimony submitted by the City established, prima facie, that City employees made regular visual inspections of the premises. Viewing the evidence in the light most favorable to the plaintiff ... , it cannot be said as a matter of law that the City relinquished control of the premises to the bus company such that it owed no duty to the plaintiff to remedy the allegedly defective condition...". ***D'Angelo v. City of New York*, 2020 N.Y. Slip Op. 00569, Second Dept 1-29-20**

ZONING, LAND USE, LANDLORD-TENANT.

USE OF A SINGLE FAMILY HOME FOR MOSTLY WEEKEND SHORT-RENTALS IS NOT A LEGAL NONCONFORMING USE OF THE PROPERTY.

The Second Department determined the zoning board properly held that petitioner's. Cradit's, use of her property for short-term guests was not a legal nonconforming use: "... [W]e agree with the Board's determination that Cradit's use of her property was not a legal nonconforming use. Contrary to Cradit's argument, in renting out the residence on the property on a short-term basis, she was not using the residence as a one-family dwelling. A one-family dwelling is a building that contains a single dwelling unit (see Southold Town Code § 280-4[B]). Where property is used as 'a boarding- or rooming house, . . . hotel, motel, inn, lodging or nursing or similar home or other similar structure[, it] shall not be deemed to constitute a dwelling unit' (id.). The Board correctly determined that Cradit's use of the residence for short-term rentals was 'similar to a hotel/motel use,' which had never been a permissible use in her zoning district. Moreover, prior to the enactment of Southold Town Code §§ 280-4 and 280-111(J), Southold Town Code § 280-8(E) specifically provided that 'any use not permitted by this chapter shall be deemed prohibited.' Accordingly, because Cradit was using the property in violation of a prior zoning ordinance, she could not establish that her current use is a legal nonconforming use ...". ***Matter of Cradit v. Southold Town Zoning Bd. of Appeals*, 2020 N.Y. Slip Op. 00588, Second Dept 1-29-20**

THIRD DEPARTMENT

CRIMINAL LAW.

THE RECORD DOES NOT DEMONSTRATE DEFENDANT WAS WARNED THE USE OF DRUGS WHILE ON FURLOUGH WOULD RESULT IN AN ENHANCED SENTENCE; MATTER REMITTED FOR RESENTENCING OR WITHDRAWAL OF THE PLEA.

The Third Department determined the sentencing court should not have imposed an enhanced sentence because the record did not demonstrate defendant was warned the use of drugs while on furlough would result in a stiffer sentence: "... '[A] court may not impose an enhanced sentence unless, as is relevant here, it has informed the defendant of specific conditions that the defendant must abide by or risk such enhancement' ... . A review of the transcript of all of the proceedings, including those at which defendant entered his guilty pleas, reflects that, although he received warnings that certain conduct could result in an enhanced sentence of up to nine years on the first indictment, he was never advised that a positive drug test could result in an enhanced sentence. Given that the furlough was granted off-the-record, the record before us does not disclose what, if any, warnings were provided to defendant prior to his release on furlough ... . Moreover, when defendant objected to the enhanced sentence, the court did not advise him of the right to a hearing to contest the alleged violation ... , and the record does not contain the positive drug test results, the testing date or any evidence as to when defendant consumed these drugs so as to establish that it occurred during the six-hour furlough ... . Accordingly, the sentences imposed upon the first indictment must be vacated and the matter remitted to County Court to either impose the original agreed-upon sentences or to give defendant an opportunity to withdraw his guilty plea to that indictment ...". ***People v. Blanford*, 2020 N.Y. Slip Op. 00646, Third Dept 1-30-20**

EMPLOYMENT LAW, WORKERS' COMPENSATION.

CORRECTION OFFICER NOT ENTITLED TO TWO-YEAR LEAVE OF ABSENCE; THERE WAS SUPPORT IN THE RECORD FOR THE FINDING PETITIONER'S PHYSICAL CONFRONTATION WITH AN INMATE WAS NOT AN ASSAULT WITHIN THE MEANING OF THE CIVIL SERVICE LAW.

The Third Department, over a two-justice dissent, determined petitioner correction officer was not entitled to a two-year workers' compensation leave of absence because there was support in the record for the finding petitioner was not assaulted. Petitioner was injured trying to prevent an inmate from swallowing contraband: "... [R]espondent advised petitioner that, pursuant to Civil Service Law § 71, his employment would be terminated ... because his absence from employment ... exceeded one cumulative year. Petitioner asserted through counsel that he was entitled to a two-year leave of absence under Civil Service Law § 71 because his injuries resulted from an assault sustained during the performance of his duties. * * * Pursuant to Civil Service Law § 71, an employee who 'has been separated from [his or her] service by reason of a disability resulting from occupational injury' is 'entitled to a leave of absence for at least one year.' If, however, 'an employee has been separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years' ... . * * * Although the record demonstrates that the parolee was combative and refused orders to stop resisting and to surrender the contraband, there is no indication that the parolee directed any intentional physical act of violence toward petitioner before, during or after petitioner's application of the body hold. Given the absence of such record evidence, respondent's determination that petitioner's injuries were not the result of an assault sustained during the course of employment had a sound basis in reason and, thus, was rational ...". ***Matter of Froehlich v. New York State Dept. of Corr. & Community Supervision*, 2020 N.Y. Slip Op. 00652, Third Dept 1-30-20**

FOURTH DEPARTMENT

APPEALS, FAMILY LAW.

THE MAJORITY NOTED THAT A DECISION IS NOT AN APPEALABLE PAPER BUT HELD THE DECISION HERE IN THIS DIVORCE CASE MET THE ESSENTIAL REQUIREMENTS OF AN ORDER AND WAS THEREFORE APPEALABLE; THE DISSENT DISAGREED.

The Fourth Department, over a dissent, determined that, although a decision is not an appealable paper, the decision in this divorce action was close enough to an order to support an appeal. The dissent disagreed: "As a preliminary matter, although not raised by the parties and although '[n]o appeal lies from a mere decision' (... see generally CPLR 5501 [c]; 5512 [a]), we conclude that the paper appealed from meets the essential requirements of an order, and we therefore treat it as such ... . **From the dissent:** In 1987, this Court held that '[n]o appeal lies from a mere decision' (*Kuhn v. Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]). In reaching that conclusion, we relied on, inter alia, CPLR 5512 (a), titled 'appealable paper,' which provides that '[a]n initial appeal shall be taken from the judgment or order of the court of original instance.' Until today, we have routinely followed that settled principle ... . * * * Here, the record includes a decision that is denominated only as a decision and has no ordering paragraphs and, in his notice of appeal, plaintiff explicitly appeals 'from the Decision' … . My

colleagues in the majority believe that the decision is an appealable paper because it meets 'the essential requirements of an order.' To support that proposition, the majority relies on ***Matter of Louka v. Shehatou* (67 AD3d 1476 [4th Dept 2009])**, wherein this Court determined that a letter would be treated as an order inasmuch as 'the Referee filed the letter with the Family Court Clerk and . . . the letter resolved the motion and advised the father that he had a right to appeal' (id. at 1476). Although the decision here was filed and resolved the motion, there was no directive in the decision that plaintiff had the right to appeal from it. Furthermore, I submit that almost all written decisions at least attempt to resolve the issues presented by the parties and many of those decisions are also filed." ***Nicol v. Nicol*, 2020 N.Y. Slip Op. 00740, Fourth Dept 1-31-20**

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

THE PORTION OF THE ARBITRATOR'S AWARD WHICH CONFLICTED WITH THE COLLECTIVE BARGAINING AGREEMENT AND THE PORTION OF THE AWARD WHICH WAS NONFINAL SHOULD NOT HAVE BEEN CONFIRMED BY SUPREME COURT.

The Fourth Department determined certain findings made by the arbitrator shouldn't have been confirmed by Supreme Court. The matter concerned the elimination of teaching positions to accommodate the hiring of teachers' aides. In one instance the arbitrator's ruling conflicted with the terms of the collective bargaining agreement (CBA). And in the other instance the arbitrator's ruling was nonfinal: "An award may be vacated where an arbitrator, 'in effect, made a new contract for the parties in contravention of [an] explicit provision of [the] arbitration agreement which denied [the] arbitrator power to alter, add to or detract from' the collective bargaining agreement (CBA) ... . An award is nonfinal and indefinite if, inter alia, 'it leaves the parties unable to determine their rights and obligations' ...". ***Matter of Arbitration Between Buffalo Teachers Fedn., Inc. (Board of Educ. of the Buffalo Pub. Schs.)*, 2020 N.Y. Slip Op. 00794, Fourth Dept 1-31-20**

COURT OF CLAIMS, LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

APPLICATION TO FILE A LATE CLAIM IN THIS LABOR § LAW 240(1) ACTION SHOULD HAVE BEEN GRANTED; CRITERIA FOR ACCEPTING A LATE CLAIM UNDER THE COURT OF CLAIMS ACT DESCRIBED.

The Fourth Department, reversing the Court of Claims, determined claimant's application to file a late claim in this Labor Law § 240(1) action should have been granted. The criteria for allowing a late claim under the Court of Claims Act were described in some detail: "Upon our consideration of the six factors outlined in Court of Claims Act § 10 (6), we conclude that the court abused its discretion in denying claimant's application insofar as claimant sought to assert a cause of action under Labor Law § 240 (1). Several factors militate against granting claimant's application. For instance, his excuse for failing to file a timely notice of intent was law office failure, which, as the court determined, is not an acceptable excuse ... . Also, as the court noted, claimant has at least 'a partial alternate remedy through workers' compensation' ... . With respect to three of the remaining four statutory factors, we agree with the court's determination that defendant had notice of the essential facts constituting the claim, had an opportunity to investigate the claim and was not prejudiced by the delay ... . The most significant factor, however, is 'whether the claim appears to be meritorious' (Court of Claims Act § 10 [6]) inasmuch as 'it would be futile to permit the filing of a legally deficient claim which would be subject to immediate dismissal, even if the other factors tend to favor the granting of the request' ... . [D]ocumentation submitted by claimant indicates that, as he struggled to remove the window and lower it to the ground, the window allegedly 'fell' on him, causing him to sustain injuries to his back. Claimant's submissions raise issues of fact whether he was injured by the application of the force of gravity to the window as he was moving it between 'a physically significant elevation differential' ...". ***Phillips v. State of New York*, 2020 N.Y. Slip Op. 00753, Fourth Dept 1-31-20**

CRIMINAL LAW.

DEFENDANT'S SENTENCE DEEMED TOO HARSH BASED UPON DEFENDANT'S CRIMINAL HISTORY, THE PLEA DEAL DEFENDANT WAS OFFERED BEFORE TRIAL, AND THE ABSENCE OF ANY NEW EVIDENCE REVEALED BY THE TRIAL.

The Fourth Department determined defendant's sentence was unduly harsh based upon his criminal history and the plea deal defendant was offered before trial: "... [T]he 10-year determinate sentence is unduly harsh and severe considering that defendant has no violent crimes on his record and was offered the opportunity to plead guilty to the charges in the indictment in exchange for a prison sentence of five years. It does not appear that any facts were revealed at trial that were unknown to the People or the court at the time the sentence promise was made. Under the circumstances, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence on each count to a determinate term of imprisonment of seven years plus three years of postrelease supervision ...". ***People v. Green*, 2020 N.Y. Slip Op. 00765, Fourth Dept 1-31-20**

CRIMINAL LAW, CONSTITUTIONAL LAW.

STATUTE CRIMINALIZING THE POSSESSION OF AN UNLICENSED FIREARM DOES NOT VIOLATE THE SECOND AMENDMENT.

The Fourth Department, in a full-fledged opinion by Justice Peradotto, determined that the statute prohibiting possession of an unlicensed firearm in the home does not violate the Second Amendment: "... [D]efendant contends that New York may not constitutionally impose any criminal sanction whatsoever on the unlicensed possession of a handgun in the home. * * * ... [I]t is beyond dispute that 'New York has substantial, indeed compelling, governmental interests in public safety and crime prevention' ... . Those concerns include the state's 'substantial and legitimate interest and[,] indeed, . . . grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown' that they should not be entrusted with a dangerous instrument ... . .. [T]the criminal prohibition on the unlicensed possession of a handgun, including in the home, bears a substantial relationship to the state's interests. 'In the context of firearm regulation, the legislature is far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying [and possessing] firearms and the manner to combat those risks' ...". ***People v. Tucker*, 2020 N.Y. Slip Op. 00739, Fourth Dept 1-31-20**

CRIMINAL LAW, EVIDENCE.

THE WARRANTLESS SEIZURE AND SEARCH OF A BAG IN DEFENDANT'S CAR WAS NOT JUSTIFIED UNDER THE INEVITABLE DISCOVERY DOCTRINE; ERROR HARMLESS HOWEVER.

The Fourth Department determined the inevitable discovery doctrine did not apply to a "diabetes bag" seized by the police. The bag should have been suppressed, but error was deemed harmless: "On the day of his arrest, a police officer pulled defendant's vehicle over for failing to signal. Defendant had a passenger with him. After approaching the vehicle, the officer observed that defendant appeared to be under the influence of drugs and placed him under arrest. The passenger was also arrested. At a suppression hearing, the officer testified that, after she arrested defendant and seated him in her patrol vehicle, defendant indicated that he had diabetes medication in his vehicle. Defendant did not give the officer permission to retrieve the bag of medication from his vehicle or say that he needed it at that time, nor did he give her permission to open the bag. The officer testified that she retrieved the bag for defendant because defendant would be allowed access to certain medication in lockup; she did not intend to give the bag to defendant while he was in the patrol vehicle. The officer looked in the bag and found needles, 'narcotics,' and 'some residue'—not diabetes medication. Defendant's vehicle was subsequently impounded pursuant to Buffalo Police Department (BPD) written policy. During the inventory search of the vehicle, the officers recovered, inter alia, methamphetamine. * * * We agree with defendant, however, that the court erred in refusing to suppress the evidence obtained from the diabetes bag pursuant to the inevitable discovery doctrine. The contents of the diabetes bag that defendant sought to suppress was the 'very evidence' that was obtained as the 'immediate consequence of the challenged police conduct' ...". ***People v. Hayden-Larson*, 2020 N.Y. Slip Op. 00791, Fourth Dept 1-31-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THERE SHOULD ONLY BE ONE SORA RISK ASSESSMENT PROCEEDING BASED UPON THE SAME RISK ASSESSMENT INSTRUMENT (RAI); HERE THERE WERE TWO ASSESSMENTS IN TWO COUNTIES, ONE AT LEVEL TWO AND ONE AT LEVEL THREE; THE LEVEL THREE RISK ASSESSMENT WAS VACATED.

The Fourth Department determined there should not be more than one SORA risk assessment for convictions stemming from the same course of conduct and based upon the same Risk Assessment Instrument (RAI). The first risk assessment was in Allegany County and designated defendant a level two risk. The second risk assessment was in Cattaraugus County and designated defendant a level three risk based upon the evidence. The Cattaraugus County assessment was vacated: "... [D]efendant was convicted in Cattaraugus County Court upon his plea of guilty of attempted sodomy in the second degree and, that same year, he was convicted in Allegany County Court upon his plea of guilty of sexual abuse in the first degree. The convictions stemmed from a course of conduct against one victim that occurred in both jurisdictions. Defendant was sentenced in both cases and, prior to his release from prison, Allegany County Court held a proceeding to determine his risk level designation under the Sex Offender Registration Act (SORA) (Correction Law § 168 et seq.) and designated him a level two risk. Cattaraugus County Court subsequently held a SORA proceeding utilizing a risk assessment instrument (RAI) and case summary that were substantively identical to those used in the Allegany County SORA proceeding, but designated defendant a level three risk. On a prior appeal ... , we affirmed the order of Cattaraugus County Court designating him a level three risk. 'Where, as here, a single RAI addressing all relevant conduct is prepared, the goal of assessing the risk posed by the offender is fulfilled by a single SORA adjudication. To hold otherwise—that is, to permit multiple risk level determinations based on conduct included in a single RAI—would result in redundant proceedings and constitute a waste of judicial resources' ... . In order to prevent multiple courts from reaching conflicting conclusions based on the same RAI, 'one—and only one—sentencing court should render a risk level determination based on all conduct contained in the RAI'

... . Inasmuch as the Cattaraugus County SORA proceeding was duplicative, we reverse the order and vacate defendant's risk level determination by Cattaraugus County Court ...". ***People v. Miller*, 2020 N.Y. Slip Op. 00766, Fourth Dept 1-31-20**

ENVIRONMENTAL LAW, ZONING, LAND USE, REAL PROPERTY LAW.

UNRESOLVED QUESTIONS OF FACT CONCERNING WHETHER THE CONSTRUCTION OF A WHOLE FOODS STORE IN THE VICINITY OF A RECREATIONAL TRAIL AND A PUBLIC USE EASEMENT VIOLATES THE PUBLIC TRUST DOCTRINE.

The Fourth Department, reversing (modifying) Supreme Court, determined petitioner's violation of the public trust doctrine causes of action should not have been dismissed. The action relates to the construction of a Whole Foods store in the vicinity of a recreational trail and a public use easement: "... [T]he court erred by granting a declaration in favor of respondents on petitioner's ... causes of action ... which allege violations of the public trust doctrine, because there are unresolved factual issues concerning the impact of the Whole Foods development on a recreational trail known as the Auburn Trail, including whether the development would require the constructive abandonment of the existing public use easements for that trail …". ***Matter of Brighton Grassroots, LLC v. Town of Brighton*, 2020 N.Y. Slip Op. 00754, Fourth Dept 1-31-20**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE HELD A CUSTODY HEARING WITHOUT FATHER'S PARTICIPATION.

The Fourth Department, reversing Family Court, determined Family Court should have held a custody hearing without father's participation: "During an appearance at which Family Court specifically stated that it was not 'making any findings' and that it would make findings only after a future hearing, the father apparently grew frustrated with the proceedings and walked out of court. As the father was leaving, the court warned him that it would issue a permanent order in his absence. Thereafter, the court proceeded to hold a hearing, take testimony from the mother, and issue its determination on custody and visitation. 'It is axiomatic that 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[s] of the child[ren]' ... . Indeed, custody determinations 'require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child. The value of a plenary hearing is particularly pronounced in custody cases in light of the subjective factors—such as the credibility and sincerity of the witnesses, and the character and temperament of the parents—that are often critical to the court's determination'...". ***Matter of Williams v. Davis*, 2020 N.Y. Slip Op. 00777, Fourth Dept 1-31-20**

FAMILY LAW, ATTORNEYS.

THE CHILDREN WISHED TO REMAIN WITH MOTHER BUT CUSTODY WAS AWARDED TO FATHER; THE ATTORNEY FOR THE CHILD AGREED FATHER SHOULD HAVE CUSTODY; MOTHER REQUESTED A *LINCOLN* HEARING WHICH WAS DENIED; THE DISSENT ARGUED A *LINCOLN* HEARING SHOULD HAVE BEEN HELD.

The Fourth Department determined custody of the children was properly granted to father, against the children's wishes. The attorney for the child (AFC) informed the court of the children's wishes but supported custody by the father. The mother unsuccessfully argued a *Lincoln* hearing should have been held. The dissent agreed that a *Lincoln* hearing was necessary: "The mother further contends that the court erred in declining to conduct a Lincoln hearing. Inasmuch as the AFC expressed the children's wishes to the court ... , the children were both of young age ... , and there are indications in the record that they were being coached on what to say to the court ... , we perceive no abuse of discretion in the court's denial of the mother's request for a Lincoln hearing ... . * * * **From the dissent:** While the decision whether to conduct a Lincoln hearing is discretionary, it is 'often the preferable course' to conduct one ... . Indeed, a child's preference, although not determinative, is an 'important' factor that provides the court, while considering the potential for influence and the child's age and maturity, 'some indication of what is in the child's best interests' ... . In addition, the in camera testimony of a child may 'on the whole benefit the child by obtaining for the [court] significant pieces of information [it] needs to make the soundest possible decision' ... . In this case, the children were 10 and 7 years old, respectively, at the time of the proceeding, ages at which a child's 'wishes [are] not necessarily entitled to the great weight' we accord to the preferences of older adolescents . . . [but are], at minimum, entitled to consideration' ... . Most importantly, the Attorney for the Children (AFC) substituted his judgment for that of the children and advocated that custody be transferred from the mother to the father, despite the fact that the children had been in the mother's custody since birth and the fact that the father admitted to having committed an act of domestic violence against the mother. While the AFC did inform the court of the children's expressed wishes to live with the mother, in my view, the court should have conducted a Lincoln hearing to consider those wishes and the reasons for them." ***Matter of Muriel v. Muriel*, 2020 N.Y. Slip Op. 00776, Fourth Dept 1-31-20**

PERSONAL INJURY.

DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE; DEFENDANT MADE A LEFT TURN IN FRONT OF PLAINTIFF'S MOTORCYCLE.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this traffic accident case should have been granted. Defendant made a left turn in front of plaintiff's motorcycle: "A court should be guided by the rule that, 'if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury' ... . Here, as the court charged the jury, 'defendant had a common-law duty to see that which [he] should have seen through the proper use of [his] senses' ... . The evidence undisputedly established that the area of the accident did not have any obstructions and that defendant had a clear line of sight of oncoming traffic. Inasmuch as defendant admitted at trial that he never saw plaintiff or his motorcycle prior to the accident, we conclude that the finding that defendant was not negligent could not have been reached on any fair interpretation of the evidence ...". ***Cramer v. Schruefer*, 2020 N.Y. Slip Op. 00728, Fourth Dept 1-31-20**

PERSONAL INJURY, EMPLOYMENT LAW.

DEFENDANT'S EMPLOYEE WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE ARM-WRESTLED WITH PLAINTIFF; THEREFORE THE EMPLOYER WAS NOT LIABLE FOR THE ALLEGED INJURY TO PLAINTIFF UNDER A RESPONDEAT SUPERIOR THEORY.

The Fourth Department, reversing Supreme Court, determined plaintiff's action against the owner of a defendant strip club for injuries incurred when plaintiff was arm-wrestling with defendant's employee should have been dismissed. Defendant's employee was not acting within the scope of his employment and defendant therefore could not be liable under a respondeat superior theory: "... [W]e conclude that defendants met their initial burden on the motion by establishing that the employee's act of arm wrestling plaintiff was not within the scope of his employment and that plaintiff failed to raise a triable issue of fact in response ... . The uncontroverted evidence submitted by defendants demonstrated that, although the employee had various responsibilities at the club, he was not required to entertain the club's patrons, and he arm wrestled plaintiff out of personal motives unrelated to any of his job responsibilities ...". ***Gehrke v. Mustang Sally's Spirits & Grill, Inc.*, 2020 N.Y. Slip Op. 00741, Fourth Dept 1-31-20**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE, CIVIL PROCEDURE.

MEDICAL MALPRACTICE ACTIONS REINSTATED AGAINST SEVERAL DEFENDANTS; TWO JUSTICE DISSENT ARGUED THE ACTIONS WERE REINSTATED BASED UPON A NEW THEORY WHICH SHOULD NOT HAVE BEEN CONSIDERED.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, reinstated the medical malpractice action against several defendants. The dissent argued that evidence submitted in opposition to defendants' motion for summary judgment presented a new theory and should have been rejected on that ground. The dissent argued that the new theory was raised for the first time in a "supplemental" bill of particulars which, the majority concluded, had been properly struck by Supreme Court: "... [W]e conclude that the court properly granted the motions to strike plaintiff's 'supplemental' bills of particulars inasmuch as they were actually amended bills of particulars. We further conclude that the amended bills of particulars are 'a nullity' inasmuch as the note of issue had been filed and plaintiff failed to seek leave to serve amended bills of particulars before serving them upon defendants ... . **From the dissent:** ... [P]laintiff's expert's opinions on malpractice and causation cannot create a question of fact because they are based on a new condition and new injury. Plaintiff's expert opined that: plaintiff's son developed Henoch-Schonlein Purpura (HSP) in the days before presenting to the emergency room and was suffering from HSP when he presented to the emergency room; plaintiff's son was misdiagnosed and the correct diagnosis was HSP; as a result of the mistriage, plaintiff's son went into hypovolemic shock; and, if properly triaged, plaintiff's son's condition, i.e., HSP, never would have progressed to hypovolemic shock. Plaintiff's expert's opinion regarding failure to triage and diagnose relates to a new condition, HSP, and his opinion on proximate cause relates to a new injury, hypovolemic shock, neither of which were included in plaintiff's original bill of particulars and both of which were included in the "supplemental" bills of particulars, which this Court unanimously agrees were properly struck. Inasmuch as plaintiff's expert's opinions regarding the defendants' negligence and proximate cause involve a new condition and new injury not included in plaintiff's original bill of particulars, they constituted a new theory of recovery and thus could not be used to defeat the defendants' motions ...". ***Jeannette S. v. Williot*, 2020 N.Y. Slip Op. 00743, Fourth Dept 1-31-20**

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