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Editor: **Bruce Freeman**

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COURT OF APPEALS

CIVIL PROCEDURE.

NEW YORK RECOGNIZES CROSS-JURISDICTIONAL TOLLING OF THE STATUTE OF LIMITATIONS WHEN A CLASS ACTION IS FILED IN ANOTHER STATE OR FEDERAL COURT; THE TOLLING ENDS UPON DISMISSAL OF THE OUT-OF-STATE ACTION, EVEN WHEN NOT ON THE MERITS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge partial dissent, answering certified questions from the Second Circuit, determined: (1) New York recognizes the tolling of the statute of limitations for absent members of putative class actions filed in other state and federal courts (cross-jurisdictional tolling); and (2) the tolling of the statute ceases when the filed actions are terminated, even for reasons not on the merits (i.e., forum non conveniens or a denial of certification for any reason). Here class actions stemming from the use of a pesticide (nematicide) in the growing of bananas, involving foreign plaintiffs from countries where bananas are grown, were filed in Texas in 1993. The Texas actions were dismissed in 1995. The instant action was filed in 2012 in the Southern District of New York: "We conclude that a determination that tolling is not available cross-jurisdictionally would subvert article 9—the primary function of which is to allow named plaintiffs to bring truly representative lawsuits without necessitating a multiplicity of litigation that squanders resources and undermines judicial economy, while still ensuring that defendants receive fair notice of the specific claims advanced against them. CPLR article 9 is closely related to and modeled on Federal Rules of Civil Procedure rule 23 ..., and the same animating policies the United States Supreme Court discussed in American Pipe [414 US 538] and its progeny also underlie article 9. * * * Because recognition of cross-jurisdictional tolling implicates our statutes of limitations, a bright-line rule is necessary to provide clarity to all parties in understanding their rights and obligations and, in fairness—as with the policies underlying the application of statutes of limitations, generally—to balance the interests of both plaintiffs and defendants. Therefore, we hold that tolling ends—as a matter of law—when there is a clear dismissal of a putative class action, including a dismissal for forum non conveniens, or denial of class certification for any reason. Under those circumstances, future plaintiffs are on notice that they must take steps to protect their rights because the litigation no longer compels the court to address class certification or the named plaintiffs to advance absent class members' interests. At that point, it is no longer objectively reasonable for absent class members to rely upon the existence of a putative class action to vindicate their rights, and tolling is extinguished ... . Thus, in this case, the 1995 Texas orders that dismissed that action on forum non conveniens grounds ended tolling, as a matter of law." ***Chavez v. Occidental Chem. Corp.*, 2020 N.Y. Slip Op. 05839, CtApp 10-20-20**

CRIMINAL LAW.

AFTER DEFENSE COUNSEL REPEATEDLY USED THE N-WORD (QUOTING A CO-DEFENDANT) IN CROSS-EXAMINING THE VICTIM A JUROR STOOD UP AND SAID SHE FOUND THE WORD VERY OFFENSIVE AND WOULD LEAVE IF COUNSEL USED THE WORD AGAIN; THE TRIAL COURT DID NOT CONDUCT A BUFORD HEARING TO DETERMINE WHETHER THE JUROR SHOULD BE DISQUALIFIED; CONVICTION AFFIRMED OVER A THREE-JUDGE DISSENT.

The Court of Appeals, in a full-fledged opinion by Judge DeFiore, over a three-judge dissent, determined there was no need for the trial court to conduct a Buford hearing to determine whether a juror should be disqualified. Defense counsel, quoting the words used by a co-defendant, repeatedly said the "n-word." A juror stood up and said she would leave if counsel use the word again because she found very offensive. The trial court denied a motion for a mistrial and gave a curative instruction. On appeal the defendant argued the trial court should have conducted a Buford hearing and determined that the juror was grossly unqualified: "This appeal by defendant presents the issue ... whether the trial court abused its discretion as a matter of law in giving the jury a curative instruction and forgoing a Buford inquiry (People v. Buford, 69 NY2d 290 [1987]) of a sworn juror after her mid-trial exclamation that she was 'very offen[ded]' by the repetitive use of a racial slur by Bailey's counsel while cross-examining the victim. Viewed in context, the record supports the trial court's findings that the juror's reaction was triggered by counsel's fifth and gratuitous use of the epithet, and provided no basis to indicate she was grossly unqualified. Since the entire incident unfolded in open court, a Buford inquiry of the juror was unnecessary, as the court was able to adequately assess that her outburst was not a transformative one and her sworn oath to be impartial

remained intact. The court's remedy of admonishing the juror and counsel and issuing a carefully crafted curative instruction—which included a mechanism for any juror to advise the court if they could not be fair and impartial due to anything that occurred at trial—was not an abuse of its discretion. * * * ... [N]ot every allegation of juror misconduct warrants an intrusive Buford inquiry, and we have approved alternate procedures and ameliorative instructions when juror bias or partiality is not in doubt ... . In determining whether there are new facts to impugn the jury's original oath of impartiality or a need to investigate alleged juror misconduct, 'the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source' ... . Thus, while a court 'must investigate and, if necessary, correct a problem, it must also avoid tainting a jury unnecessarily. . . . In this endeavor, sometimes less is more' ...". ***People v. Batticks*, 2020 N.Y. Slip Op. 05840, Ct App 10-20-20**

CRIMINAL LAW, EVIDENCE.

DEFENSE COUNSEL WAS GIVEN NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE THE ISSUANCE OF THE WARRANT TO TAKE A DNA SAMPLE FROM THE DEFENDANT; DEFENSE COUNSEL WAS NOT ENTITLED TO DISCOVERY OF THE WARRANT APPLICATION PRIOR TO THE ISSUANCE OF THE WARRANT TO ASSESS PROBABLE CAUSE; A VIDEO DEPICTING DEFENDANT WAS PROPERLY AUTHENTICATED; APPELLATE DIVISION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurrence and a two-judge dissent, reversing the Appellate Division, determined defendant was not entitled to review the application for the warrant to collect DNA evidence from the defendant's person before the warrant was issued. Defense counsel was given notice and an opportunity to be heard on the application and did not contest the reasonableness of the bodily intrusion at that time. The Appellate Division held (1) the defense was entitled to review the search warrant application before the warrant was issued (to assess probable cause) and (2) a video depicting the defendant was not properly authenticated. The Court of Appeals reversed on both issues: "The [Appellate Division] held that Supreme Court erred in precluding defense counsel from reviewing the search warrant application and in denying counsel the opportunity to be heard on the issue of probable cause. The Court rejected the People's argument that Abe A. [56 NY2d 288] requires notice only for the first level of intrusion—seizure of the person—and held that the due process requirement of notice and an opportunity to be heard is likewise required for the subsequent search and seizure of corporeal evidence. The Court also held that the People failed to adequately authenticate the YouTube video ... . * * * It is evident that Abe A.'s requirement of notice and an opportunity to be heard in the pre-execution stage of a warrant authorizing the seizure of evidence by bodily intrusion was satisfied in this case. Defense counsel, having received notice of the hearing on the warrant, was given an opportunity to be heard on the application, other than on the issue of probable cause. Counsel failed to direct any argument to the nature of the intrusion, the value of comparative DNA analysis evidence or the sufficiency of the safeguards preventing unwarranted disclosure of the results of his DNA testing, either at the hearing or in his motion to suppress. ... [T]he method and procedures employed in taking the saliva undoubtedly respected relevant Fourth Amendment standards of reasonableness, and defendant's claim that the failure to provide him discovery of the extant probable cause and an adversarial hearing nonetheless warrants the invocation of the exclusionary rule is without constitutional basis. [With respect to the video,] ...defendant did not dispute that he was the individual who appeared in the video reciting certain words [and] the video contains distinctive identifying characteristics ... . [T]estimony ... provided evidence pertinent to the timing of the making of the video—including defendant's admission of his future intent to make the video the next morning ... —and the video was uploaded to YouTube close in time to the homicide. ... [T]he video was introduced for its relevance to defendant's motive related to territorial gang activity—which is not an element of the offense—rather than specifically offered for its truth." ***People v. Goldman*, 2020 N.Y. Slip Op. 05977, Ct App 10-22-20**

DEBTOR-CREDITOR, UNIFORM COMMERCIAL CODE, SECURITIES.

STRICT FORECLOSURE AT THE DIRECTION OF THE MAJORITY BONDHOLDERS WHICH CANCELLED THE NOTES PRECLUDED RECOVERY BY THE PLAINTIFFS WHO PURCHASED SOME OF THE NOTES IN THE SECONDARY MARKET.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, over a three-judge dissent, determined the strict foreclosure at the direction of the majority bondholders which cancelled the notes precluded plaintiffs from recovering on the notes purchased in the secondary market. The decision is fact-specific, dependent on the wording of documents, and cannot be fairly summarized here: "After the issuer defaulted, plaintiffs, the holders of a minority in principal amount of senior secured debt, brought this lawsuit against the debtor and its guarantors to recover payment of principal and interest. We are called upon to determine whether plaintiffs' right to sue for payment on the notes survived a strict foreclosure, undertaken by the trustee at the direction of a group of majority bondholders over plaintiffs' objection, that purported to cancel the notes. We hold that it did ... . In December 2005, defendant Cleveland Unlimited, Inc. (Cleveland Unlimited), a telecommunications company, issued $150 million of 'senior secured' debt in the form of 'Notes' pursuant to an indenture agreement (the Indenture). The Notes had a five-year term and required Cleveland Unlimited to pay interest to holders of the Notes (Noteholders or Holders) on a quarterly basis up to and including the maturity

date, at which point the principal also became due. The Indenture named Cleveland Unlimited as the 'Issuer' of the Notes, eighteen of Cleveland Unlimited's subsidiaries and affiliates as the 'Guarantors,' and U.S. Bank National Association (U.S. Bank) as the Indenture 'Trustee.' At the same time the Indenture was executed, the Issuer, the Guarantors, and the Trustee executed a Collateral Trust Agreement and a Security Agreement (collectively, Indenture Documents) ... . In April 2010, plaintiffs purchased approximately $5 million of the Notes in the secondary market, amounting to 3.33% of the outstanding principal value. At issue in this case are certain provisions in the Indenture Documents governing the rights of the Noteholders to receive payment, the remedies available in the event of default, and the power of a majority of Noteholders to direct the Trustee's choice of remedy." ***CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc.*, 2020 N.Y. Slip Op. 05976, Ct App 10-20-20**

MUNICIPAL LAW, EMPLOYMENT LAW, RETIREMENT AND SOCIAL SECURITY LAW.

NYC POLICE OFFICERS IN THE TIER 3 RETIREMENT SYSTEM ARE ENTITLED TO CREDIT FOR PERIODS OF UNPAID CHILDCARE LEAVE.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, over a two-judge dissent, determined that retiring police officers are entitled to credit for the unpaid leave for child care. The appeal raised a question of statutory interpretation. The Court of Appeals found that the relevant provision of the NYC Administrative Code was not preempted by the Retirement and Social Security Law (RSSL): "The Appellate Division order should be reversed and Supreme Court's judgment declaring that defendants violated the second subdivision (h) of Administrative Code of the City of New York § 13-218 by excluding police officers in tier 3 of the state retirement system from the retirement benefits conferred by that subdivision reinstated. Applying longstanding, basic rules of statutory interpretation, we conclude that the relevant part of Administrative Code § 13-218 renders officers of the New York City Police Department (NYPD) who are members of the tier 3 retirement system eligible for credit for certain periods of unpaid childcare leave, and that the grant of such benefits for those officers is consistent with the Retirement and Social Security Law (RSSL)." ***Lynch v. City of New York*, 2020 N.Y. Slip Op. 05841, Ct App 10-20-20**

PERSONAL INJURY, ANIMAL LAW.

VETERINARY CLINIC MAY BE LIABLE IN NEGLIGENCE FOR INJURY CAUSED BY A DOG IN THE CLINIC'S WAITING ROOM, BUT THE CLINIC'S LIABILITY SHOULD NOT TURN ON WHETHER THE CLINIC WAS AWARE OF THE DOG'S VICIOUS PROPENSITIES, THE STRICT LIABILITY STANDARD IMPOSED ON DOG-OWNERS.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge concurrence, determined that the defendant veterinary clinic (Palmer) should not have been awarded summary judgment in this dog-bite case. As a veterinarian was returning a dog (Vanilla) which had just been treated to the dog's owner in the waiting room the dog slipped out of its collar and allegedly attacked plaintiff. The question was whether the liability theory requiring knowledge of a dog's vicious propensities applied to the clinic as it does to a dog-owner. The clinic had been awarded summary judgment on the ground it had demonstrated it was not aware of the dog's vicious propensities. The Court of Appeals held the case against the clinic should be analyzed under a standard negligence theory, not under the strict liability theory applicable to dog-owners: "The vicious propensity notice rule has been applied to animal owners who are held to a strict liability standard, as well as to certain non-pet-owners—such as landlords who rent to pet owners—under a negligence standard ... . However, we have recognized that other competing policies and contemporary social expectations may be at play in certain instances where domestic animals cause injuries. For example, we held that the owner of a farm animal 'may be liable under ordinary tort-law principles' when that farm animal is allowed to stray from the property on which it is kept ... . It is undisputed that Palmer owed a duty of care to plaintiff—a client in its waiting room. Palmer is a veterinary clinic, whose agents have specialized knowledge relating to animal behavior and the treatment of animals who may be ill, injured, in pain, or otherwise distressed. An animal in a veterinary office may experience various stressors—in addition to illness or pain—including the potential absence of its owner and exposure to unfamiliar people, animals, and surroundings. Moreover, veterinarians or other agents of a veterinary practice may—either unavoidably in the course of treatment, or otherwise—create circumstances that give rise to a substantial risk of aggressive behavior. ... [W]e conclude that Palmer does not need the protection afforded by the vicious propensities notice requirement, and the absence of such notice here does not warrant dismissal of plaintiff's claim. To be sure, '[w]e do not intend to suggest that [Palmer] would be subject to the same strict liability' as the owner of a domestic animal ... . However, we are satisfied that, under the circumstances presented here, a negligence claim may lie despite Palmer's lack of notice of Vanilla's vicious propensities. Furthermore, viewing the record in the light most favorable to plaintiff, as we must ... , questions of fact exist as to whether the alleged injury to plaintiff was foreseeable, and whether Palmer took reasonable steps to discharge its duty of care. Thus, neither party was entitled to summary judgment." ***Hewitt v. Palmer Veterinary Clinic, PC*, 2020 N.Y. Slip Op. 05975, Ct App 10-20-20**

FIRST DEPARTMENT

FALSE ARREST, FALSE IMPRISONMENT, MALICIOUS PROSECUTION, BATTERY, MUNICIPAL LAW.

DEFENDANTS DID NOT DEMONSTRATE AS A MATTER OF LAW THAT THERE WAS PROBABLE CAUSE FOR PLAINTIFF'S ARREST FOR THE CHARGED CRIMES OR FOR ANY UNCHARGED CRIMES; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this false arrest, false imprisonment, malicious prosecution, assault and battery action should not have been granted because defendants did not demonstrate as a matter of law that there was probable cause for plaintiff's arrest. When plaintiff flagged down the police he told the police he had been shot and had the drug dealer's weapon on his person which he immediately surrendered: "... [D]efendants failed to establish prima facie that they had probable cause to arrest plaintiff for criminal possession of a weapon or firearm ... , which is the lynchpin to plaintiff's claims for false arrest, false imprisonment, malicious prosecution, assault and battery ... , as well as the arresting officer's entitlement to qualified immunity ... . While 'the police are not obligated to pursue every lead that may yield evidence beneficial to the accused, even though they had knowledge of the lead and the capacity to investigate it' ... , plaintiff's claim that he temporarily lawfully possessed the gun at issue after an alleged altercation with a drug dealer who attempted to rob him was not merely a lead. Rather, as soon as plaintiff flagged down the officers, he told them that he had been shot and volunteered that he had the drug dealer's gun on his person, which he immediately surrendered. Assuming, without deciding, that defendants could meet their prima facie burden by identifying probable cause to arrest plaintiff for an uncharged crime or offense ... , they failed to do so. Specifically, defendants have not established probable cause to arrest plaintiff for trespass ... , since there is no evidence that plaintiff knowingly entered or remained unlawfully in the basement where his altercation with the drug dealer took place. Nor did they establish probable cause to arrest plaintiff for attempted criminal possession of marijuana ... or attempted unlawful possession of marijuana in the first degree ... , since there is no evidence as to the quantity of marijuana that plaintiff allegedly attempted to possess. Finally, defendants failed to establish prima facie probable cause to arrest and detain plaintiff to the extent that they did for attempted unlawful possession of marijuana in the second degree ... , since, had they so charged him, they only would have been permitted to issue a desk appearance ticket ...". ***Idelfonso v. City of New York*, 2020 N.Y. Slip Op. 05854, First Dept 10-20-20**

FORECLOSURE, EVIDENCE.

REFEREE'S REPORT IN THIS FORECLOSURE ACTION RELIED UPON HEARSAY AND SHOULD NOT HAVE BEEN CONFIRMED.

The First Department, reversing Supreme Court, determined the referee's report should not have been relied upon in this foreclosure action because the report was based on hearsay: "The referee relied on an affidavit sworn to October 2, 2018 by an assistant vice president of plaintiff's loan servicer, who asserted that, according to the books and records of plaintiff pertaining to defendant's loan and payment history, defendant had been in default since March 1, 2009, and owed plaintiff the amount stated. However, because the books and records themselves were not submitted to the court, the affiant's assertions are inadmissible hearsay ... . Nor did the affiant lay a foundation for the introduction of the books and records as a business record (see CPLR 4518[a])." ***Deutsche Bank Natl. Trust Co. v. Kirschenbaum*, 2020 N.Y. Slip Op. 05849, First Dept 10-20-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS STRUCK BY A FALLING OBJECT; COMPARATIVE NEGLIGENCE IS NOT A DEFENSE TO A LABOR LAW § 240(1) CAUSE OF ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW §§ 240(1), 200 AND COMMON LAW NEGLIGENCE CLAIMS SHOULD HAVE BEEN GRANTED; THERE WAS A QUESTION OF FACT ABOUT WHETHER ONE OF THE DEFENDANT'S EXERCISED SUPERVISORY CONTROL OVER THE SITE.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action stemming from his being struck with a falling object. The allegation plaintiff should not have been where he was is an allegation of comparative negligence which is not a defense. Plaintiff also should have been awarded summary judgment on the Labor Law § 200 and common law negligence causes of action against the statutory agent of the general contractor on the ground the agent caused the dangerous condition: "Plaintiff should have been awarded summary judgment on the issue of liability on his Labor Law § 240(1) claim as against Sweeney and Structure Tech. Sweeney, as general contractor, and Structure Tech, as subcontractor and statutory agent of Sweeney, may be held strictly liable for failing to provide overhead protection to plaintiff ... . Thus even if, as Structure Tech's superintendent testified, plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, this would at most constitute comparative negligence which is not a defense to a Labor Law § 240(1) claim ... . Accordingly, the issue of their liability under Labor Law § 241(6) is academic ... . Plaintiff also should have been awarded summary judgment on his Labor Law § 200 and common-law negligence claims as against Structure Tech. As the statutory agent of the general contractor, Structure Tech may

be held liable pursuant to Labor Law § 200 and under common-law negligence for injuries caused by a dangerous condition that it caused or created or of which it had actual or constructive notice ... . Since no party disputes that a Structure Tech employee was responsible for dislodging the baluster and allowing it to fall and strike plaintiff, Structure Tech is liable to plaintiff under Labor Law § 200 and common-law negligence. However, an issue of fact exists as to Sweeney's liability to plaintiff under these claims based on the testimony of Structure Tech's superintendent that it was, in fact, Sweeney's superintendent who instructed Structure Tech to cut the baluster that ultimately struck plaintiff. If credited, this testimony could support a finding that Sweeney actually exercised supervisory control over the worksite so as to trigger liability under these claims ...". ***Hewitt v. NY 70th St. LLC*, 2020 N.Y. Slip Op. 05853, First Dept 10-20-20**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW, CIVIL PROCEDURE.

RES IPSA LOQUITUR NEEDN'T BE ALLEGED IN THE NOTICE OF CLAIM OR THE COMPLAINT BECAUSE IT IS NOT A THEORY OF LIABILITY, IT IS AN EVIDENTIARY RULE; NOTICE OF A DANGEROUS CONDITION CAN BE INFERRED UNDER THE RES IPSA LOQUITUR DOCTRINE.

The First Department, reversing Supreme Court, determined plaintiff properly raised res ipsa loquitur in opposition to defendant's motion for summary judgment even though the notice of claim and the complaint did not allege it. Res ipsa loquitur is not a theory of liability, it is a rule of evidence: "Plaintiff investigated a hissing sound coming from the electrical circuit box in her apartment and as she drew close to the circuit box, it suddenly burst into flame, burning her right arm. Plaintiff may raise res ipsa loquitur in opposition to defendant's motion without having alleged the doctrine in her notice of claim or complaint, as it is not a separate theory of liability, but rather, an evidentiary rule that involves 'a common sense application of the probative value of circumstantial evidence' ... . Plaintiff's evidence raised triable issues as to application of the doctrine, as it showed that she had resided in the apartment for nearly 19 years, she would contact defendant's employees to remedy any issues with the circuit box, and defendant's employees handled the inspection, maintenance, and repair of the circuit box ... . To the extent defendant argues its lack of notice of the alleged dangerous condition, a triable issue of fact exists here regarding the applicability of the res ipsa doctrine, and proof of notice of a dangerous condition may be inferred under the doctrine ...". ***Townsend v. New York City Hous. Auth.*, 2020 N.Y. Slip Op. 05874, First Dept 10-20-20**

SECOND DEPARTMENT

COURT OF CLAIMS, CIVIL PROCEDURE.

NEW YORK DOES NOT RECOGNIZE A COMMON LAW CAUSE OF ACTION FOR SEXUAL HARASSMENT.

The Second Department, reversing the Court of Claims, determined New York does not recognize a cause of action for sexual harassment: "... New York does not recognize an independent, common-law cause of action to recover damages for sexual harassment ... . Rather, allegations of sexual harassment—which typically arise in the context of an asserted violation of Title VII of the Civil Rights Law of 1964 (42 USC, ch 21, § 2000e et seq.), the New York State Human Rights Law (Executive Law § 296), and/or the New York City Human Rights Law (Administrative Code of City of NY § 8-107)—may form the basis of cognizable common-law tort theories such as, inter alia, assault and battery, negligent training and supervision, and intentional infliction of emotional distress ... . Accordingly, the Court of Claims should have granted that branch of the State's cross motion which was pursuant to CPLR 3211(a)(7) to dismiss so much of the claim as was predicated upon a purported common-law cause of action to recover damages for sexual harassment." ***Budha T. v. State of New York*, 2020 N.Y. Slip Op. 05966, Second Dept 10-21-20**

CRIMINAL LAW, APPEALS.

DEFENDANT PLED GUILTY TO POSSESSION OF A GRAVITY KNIFE WHICH WAS DE-CRIMINALIZED SHORTLY THEREAFTER; CONVICTION REVERSED IN THE INTEREST OF JUSTICE WITH THE PEOPLE'S CONSENT.

The Second Department, in the interest of justice and as a matter of discretion, with the People's consent, reversed defendant's conviction of possession of a gravity knife, which was de-criminalized shortly after the conviction: "On November 29, 2018, during his plea allocution to attempted criminal possession of a weapon in the third degree (see Penal Law §§ 110.00, 265.02[1]), the defendant admitted that on or about January 9, 2018, he attempted to possess a gravity knife. On January 31, 2019, pursuant to his negotiated plea agreement, the defendant was sentenced to an indeterminate term of imprisonment of 1½ to 3 years. The defendant contends that the judgment of conviction should be reversed because, inter alia, shortly after his conviction, Penal Law § 265.01(1) was amended to decriminalize the simple possession of a gravity knife. The People, in the exercise of their broad prosecutorial discretion, agree that the judgment should be vacated and the indictment dismissed. Even though the statute decriminalizing the simple possession of a gravity knife did not take effect until May 30, 2019 (see L 2019, ch 34, § 1), under the circumstances of this case, we vacate the judgment and dismiss the indictment, as a matter of discretion in the exercise of our interest of justice jurisdiction ...". ***People v. Merrill*, 2020 N.Y. Slip Op. 05936, Second Dept 10-21-20**

CRIMINAL LAW, APPEALS, ATTORNEYS.

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE A MODE OF PROCEEDINGS ERROR CONCERNING A JURY NOTE ON APPEAL; WRIT OF CORAM NOBIS GRANTED AND NEW TRIAL ORDERED.

The Second Department, granting the writ of coram nobis and ordering a new trial, determined defendant's appellate counsel was ineffective in failing to raise a mode of proceedings error on appeal. The was no evidence on the record that the trial judge notified counsel of a substantive note from the jury: "... [O]n the afternoon of the first day of jury deliberations, the Supreme Court received a jury note stating '11 of the 12 jurors find the defendant guilty on all counts. One juror after lengthy discussion still has a reasonable doubt on 9 counts. Juror feels we cannot change her/his mind no matter what we say or do. We need direction.' The record does not indicate that the court read the contents of the note to the parties, discussed its contents with counsel, or allowed trial counsel an opportunity to propose a response for the jury. * * * The failure to provide counsel with meaningful notice of a substantive jury note requires reversal, regardless of whether the Supreme Court provided the jurors with a meaningful response to their note ... . In short, in the absence of record evidence that the court complied with its core responsibilities under CPL § 310.30, a mode of proceedings error occurred requiring reversal ...". ***People v. Grant*, 2020 N.Y. Slip Op. 05922, Second Dept 10-21-20**

CRIMINAL LAW, EVIDENCE.

THE MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE CONVICTIONS STEMMING FROM A FATAL TRAFFIC ACCIDENT WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.

The Second Department, reversing the manslaughter and criminally negligence homicide convictions stemming from a traffic accident, determined the evidence was legally insufficient. There was evidence provided by another driver (Duke) that defendant was driving above the speed limit before the collision (which Duke did not witness), but nothing else. Two passengers and an unborn child died in the collision: "... [T]he evidence was legally insufficient to establish 'the kind of seriously condemnatory behavior' in addition to speeding that is necessary to 'transform 'speeding' into 'dangerous speeding' ... . While Duke testified that the defendant's vehicle 'swerv[ed] around' her into the left lane to pass, she did not testify that the defendant's vehicle came close to hitting her vehicle, that she had to engage in any evasive measures to avoid an accident, that there were any vehicles in the left lane when the defendant moved into it, or that the defendant swerved back in front of her after passing her ... . Rather, Duke testified that after the defendant moved into the left lane, she waited for him to pass before getting into the left lane behind him. Moreover, Duke testified that the defendant was driving at a slower rate while moving into the left lane to pass her before speeding up after he moved into the left lane, and that the defendant obeyed a red traffic signal, pausing and not again accelerating until the traffic signal 'turned green.' Duke also stated that there were 'no more lights' between that traffic signal and the location of the accident, and thus, there is no indication that the defendant disregarded any red traffic signals. Further, the People presented no evidence that the defendant proceeded in disregard of a warning to slow down or of a dangerous driving condition ... . Evidence was presented that Kent Avenue, which is partly situated in an industrial area, is not a busy road and generally has 'very few cars' on it around the time when the accident occurred. Thus, the People failed to establish that the defendant engaged in 'some additional affirmative act aside from driving faster than the posted speed limit,' as required to support a finding of recklessness or criminal negligence ...". ***People v. Acevedo*, 2020 N.Y. Slip Op. 05909, Second Dept 10-21-20**

CRIMINAL LAW, IMMIGRATION LAW, APPEALS.

DEFENDANT'S WAIVER OF APPEAL WAS INVALID; DEFENDANT'S ONE-YEAR SENTENCE, WHICH HAD ALREADY BEEN SERVED, WAS REDUCED BY ONE DAY IN PART TO ADDRESS THE IMMIGRATION CONSEQUENCES OF A ONE-YEAR SENTENCE.

The Second Department, finding the waiver of appeal invalid, reduced defendant's sentence by one day based in part on the immigration consequences of a one-year sentences: "The defendant's purported waiver of his right to appeal was invalid because the Supreme Court's colloquy mischaracterized the appellate rights waived as encompassing an absolute bar to the taking of a direct appeal, and failed to inform the defendant that appellate review remained available for certain issues ... . Further, the written waiver form signed by the defendant was insufficient to overcome the deficiencies in the court's explanation of the waiver of the right to appeal, since it did not contain language clarifying that appellate review remained available for certain issues ... . Thus, the purported waiver does not preclude this Court from reviewing the issue of whether the defendant's sentence was excessive ... . Although the defendant has served his sentence, the question of whether the sentence imposed should be reduced is not academic, since the sentence may have potential immigration consequences ...". ***People v. Joseph*, 2020 N.Y. Slip Op. 05928, Second Dept 10-21-20**

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE.

DERIVATIVE NEGLECT FINDING STEMMING FROM A MOTION FOR SUMMARY JUDGMENT REVERSED; MOTHER HAD SUCCESSFULLY PARTICIPATED IN MENTAL HEALTH TREATMENT SINCE THE NEGLECT FINDINGS WITH RESPECT TO THE OLDER CHILDREN.

The Second Department, reversing Family Court, determined a derivative neglect finding stemming from a motion for summary judgment should not have been granted. Mother had participated in mental health treatment and had made progress since the prior neglect findings with respect to her older children: "Although there is no express provision for a summary judgment procedure in a Family Court Act article 10 proceeding, summary judgment pursuant to CPLR 3212 may be granted in such a proceeding when there is no triable issue of fact outstanding (see Family Ct Act § 165[a] ...). In support of its motion, ACS [Administration for Children's Services] submitted the court's prior orders determining that the mother neglected the two older children ... . While there were findings of neglect as to the subject child's two siblings, 'there is no per se rule that a finding of neglect of one sibling requires a finding of derivative neglect with respect to the other siblings. The focus of the inquiry . . . is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood' ... . ACS failed to establish as a matter of law that, under the circumstances, the neglect of the subject child's siblings merits a finding of derivative neglect as to the subject child ... . The medical records submitted by ACS demonstrated that the mother had failed to comply with her mental health treatment in late 2016, which noncompliance was a basis of the prior findings of neglect. However, the records submitted also demonstrated that the mother recommenced treatment in early 2017, immediately after the finding of neglect as to the second child, Akira, and that the mother was thereafter compliant and made positive progress in her mental health treatment for the following year. Accordingly, it cannot be said that ACS established, prima facie, that the mother derivatively neglected the subject child through her failure to resolve the same issues that were the basis for the prior findings of neglect as to the two older children ...". ***Matter of Azayla K. L. (Aleisha L.)*, 2020 N.Y. Slip Op. 05902, Second Dept 10-21-20**

FAMILY LAW, JUDGES, EVIDENCE.

DENIAL OF MOTHER'S REQUEST TO PRESENT EVIDENCE OF HER FINANCIAL SITUATION WAS AN ABUSE OF DISCRETION; MOTHER WAS FACING INCARCERATION FOR VIOLATING HER CHILD SUPPORT OBLIGATIONS; NEW CONFIRMATION OF WILLFULNESS HEARING ORDERED.

The Second Department, reversing Family Court, determined it was an abuse of discretion to deny mother's request to present evidence of her financial situation and her request for an adjournment to obtain additional proof of her financial situation in this child support proceeding. Mother was facing incarceration for violation of her support obligations: "... [A]lthough the mother appeared in person before the Family Court at the confirmation of willfulness hearing, and proffered documentary and testimonial evidence in support of her assertion that she was indigent and unable to pay child support, the court did not permit the mother to adduce any evidence regarding her financial situation, and denied her request for an adjournment to obtain additional evidence of her inability to work. This was an abuse of discretion ... . Since the mother was facing a potential period of incarceration of up to six months in the event that the court determined that her failure to pay child support was willful (see Family Ct Act § 454[3][a]), the mother's testimony was 'essential to the court's determination as to whether she had had the ability to pay or willfully disobeyed the prior support order' ... . If the mother had been given an opportunity to substantiate her claimed inability to pay, and she had done so, the court would have been constrained to deny the father's petition ...". ***Matter of Palombelli v. Guglielmo*, 2020 N.Y. Slip Op. 05903, Second Dept 10-21-20**

FORECLOSURE, EVIDENCE.

THE EVIDENCE OF DEFENDANT'S DEFAULT WAS HEARSAY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. The proof of defendant's default was hearsay: "For evidence of default, the plaintiff relied upon the affidavit of a foreclosure manager employed by the plaintiff, wherein she attested, among other things, that the defendant defaulted under the loan in February 2011. By attesting that she was familiar with the record-making practices of her employer, that the records were made in the regular course of business, that it was the regular course of such business to make the record, and that the records were made 'at or about the time of the event being recorded' ... , the foreclosure manager satisfied the requirements for establishing a foundation for the admission of business records (see CPLR 4518[a] ...). However, since the foreclosure manager failed to submit any of the business records upon which she contends she relied in making her affidavit, her averment as to the defendant's purported default 'constitute[s] inadmissible hearsay and lack[s] probative value' ... . As 'it is the business record itself, not the foundational affidavit, [*2]that serves as proof of the matter asserted' ... , and 'a witness's description of a document not admitted into evidence is hearsay' ... , the assertions by the foreclosure manager as to the contents of the records were 'inadmissible hearsay to the extent that the records she

purport[ed] to describe were not submitted with her affidavit' ...". ***Selene Fin., L.P. v. Coleman*, 2020 N.Y. Slip Op. 05962, Second Dept 10-21-20**

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

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the notice requirements of RPAPL 1304. Therefore the bank's motion for summary judgment should not have been granted: "... [T]he plaintiff submitted, inter alia, the affidavit of Ray Thacker, a vice president of the plaintiff, based upon his review of his employer's records, which were attached thereto. However, Thacker's affidavit contained no statement as to Thacker's personal familiarity with the mailing practices of his employer ... . Moreover, although Thacker's affidavit laid a proper foundation for the admission of the business records which were attached thereto (see CPLR 4518[a] ...), the content of those records did not demonstrate, prima facie, that the requisite RPAPL 1304 mailings were completed. The copies of letters addressed to the defendant, bearing 20-digit bar codes, were insufficient to demonstrate, prima facie, that the certified mailing or first class mailing actually occurred ... . The 'Proof of Filing Statement' from the New York State Banking Department, pursuant to RPAPL 1306, reflecting a tracking number, a 'Mailing Date Step 1' of May 16, 2012, and a 'Filing Date Step 1' of May 17, 2012, also was insufficient to demonstrate, prima facie, the plaintiff's compliance with all of the requirements of RPAPL 1304 ...". ***JPMorgan Chase Bank, Natl. Assn. v. Gershfeld*, 2020 N.Y. Slip Op. 05895, Second Dept 10-21-20**

PERSONAL INJURY, EVIDENCE.

AN EYEWITNESS TO PLAINTIFF'S SLIP AND FALL TESTIFIED PLAINTIFF TOLD HER SHE TRIPPED OVER A MUDSILL BECAUSE OF DIM LIGHTING; PLAINTIFF'S STATEMENT WAS ADMISSIBLE AS AN EXCITED UTTERANCE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Although plaintiff IHayward) testified she did not know why she tripped on a mudsill, an eyewitness (Espy) testified plaintiff told her she tripped because of dim lighting. Plaintiff's statement was deemed admissible as an excited utterance. The court noted that defendants had demonstrated the mudsill was open and obvious and therefore did not need to demonstrate a lack of notice: " … [T]he defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the wooden mudsill that caused Hayward to fall was open and obvious and not inherently dangerous ... . Contrary to the plaintiff's contention on appeal, having made that showing, the defendants were not required to make a prima facie showing that they lacked notice of the alleged defect. In opposition, however, the plaintiff raised triable issues of fact, relying on, inter alia, Hayward's testimony at a hearing held pursuant to General Municipal Law § 50-h and the affidavit of an alleged eyewitness, Janice Espy. During the 50-h hearing, Hayward testified that the area underneath the sidewalk shed was dim and that some of the lighting fixtures were missing light bulbs. However, Hayward testified that she was able to see where she was going. When she was asked why she tripped on the mudsill, Hayward stated that she did not understand the question and that she did not know why she tripped on the wooden mudsill. Espy averred that when she saw Hayward fall, she went to assist her. Hayward told Espy that she tripped on the mudsill and that she did not see it before she fell because the lighting conditions under the sidewalk shed were poor. Hayward's statement to Espy was admissible as an excited utterance because it was made under the stress of excitement caused by her fall ... . Under the circumstances, triable issues of fact exist as to whether the accident site was adequately illuminated and whether the mudsill was open and obvious and not inherently dangerous ...". ***Hayward v. Zoria Hous., LLC*, 2020 N.Y. Slip Op. 05892, Second Dept 10-21-20**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

IN A VEHICULAR MANSLAUGHTER CASE, THE STANDARD OF PROOF OF IMPAIRMENT FROM MARIJUANA IS THE SAME AS THE STANDARD OF PROOF OF IMPAIRMENT FROM ALCOHOL.

The Third Department, in a comprehensive opinion by Justice Lynch, affirmed defendant's convictions stemming from a collision with a motorcycle at a time when defendant was impaired by marijuana (THC). The decision, which lays out the law of vehicular manslaughter, carefully goes through evidence of impairment and causation. The opinion is too detailed to be fairly summarized here. It is worth noting that, on the issue of impairment, the opinion indicates a prior decision describing a different standard of proof of impairment for marijuana, as opposed to alcohol, should no longer be followed. The same standard of proof of impairment is applied to the drugs enumerated in Public Health Law 3306, including marijuana, as is applied to alcohol: "... [T]he degree of impairment necessary to convict a motorist of vehicular manslaughter in the second degree based upon a death that was caused while such motorist was under the influence of one of the drugs enumerated in Public Health Law § 3306 (which includes marihuana) is the same degree of impairment as would be necessary to

sustain a conviction of driving while intoxicated by alcohol — namely, the People must prove that such motorist was 'incapable of employing the physical and mental abilities which he [or she was] expected to possess in order to operate a vehicle as a reasonable and prudent driver' ... . To the extent that this Court's decision in People v. Rossi (163 AD2d 660, 662 [1990], lv denied 76 NY2d 943 [1990]) can be read as holding that a conviction of vehicular manslaughter in second degree based upon a violation of Vehicle and Traffic Law § 1192 (4) only requires proof that the motorist was impaired 'to any extent,' it should no longer be followed." ***People v. Caden N.*, 2020 N.Y. Slip Op. 05979, Third Dept 10-22-20**

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE RECORD DOES NOT DEMONSTRATE WHETHER THE DEFENDANT REVIEWED THE VERDICT SHEET WHICH INCLUDED UNAUTHORIZED ANNOTATIONS BY THE JUDGE; MATTER REMITTED FOR A RECONSTRUCTION HEARING.

The Third Department, remitting the matter for a reconstruction hearing, determined the defendant's consent to the judge's annotations on the verdict sheet was required. Although the record indicated defense counsel was aware of the annotations and did not object, it was not clear from the record whether the defendant was shown the verdict sheet with the annotations: " 'CPL 310.20 (2) allows the trial court, when submitting two or more counts charging offenses from the same article of law, to set forth the dates, names of complainants or specific statutory language, without defining the terms, by which the counts may be distinguished. Absent a defendant's consent, any other notations on the verdict sheet offend the letter of the law' ... . 'Although generally the lack of an objection to the annotated verdict sheet by defense counsel cannot be transmuted into consent, it is well settled that consent to the submission of an annotated verdict sheet may be implied where defense counsel fails to object to the verdict sheet after having an opportunity to review it' ... . [T]he notations as to counts 3 and 4 were not [authorized] ... . Accordingly, defendant's consent was required. To that end, at the conclusion of the court's instructions to the jury, including an explanation of the annotations on the verdict sheet, the court explicitly asked the People and defense counsel if they had any additional requests or exceptions to the charge. Defense counsel answered in the negative. ... [W]e cannot determine from the record whether defendant had an opportunity to review the verdict sheet because the charge conference was held off the record in County Court's chambers." ***People v. Chappell*, 2020 N.Y. Slip Op. 05978, Third Dept 10-22-20**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO DECLARE THE PARENTAGE OF A CHILD BORN TO A MARRIED SAME-SEX COUPLE BECAUSE THE CHILD WAS NOT BORN "OUT-OF-WEDLOCK;" RECENTLY ENACTED LEGISLATION WILL SOON ALLOW SUCH A PETITION IN FAMILY COURT AND THE PARTIES MAY NOW SEEK A DECLARATORY JUDGMENT ON THE ISSUE IN SUPREME COURT, WHICH HAS SUBJECT MATTER JURISDICTION.

The Third Department, in a full-fledged opinion by Justice Devine, determined Family Court did not have subject matter jurisdiction over the petition to declare petitioners, a same-sex married couple, as the legal parents of the child conceived with donated sperm. Although the Family Court Act allows the court to determine "paternity" for a female parent, the court's jurisdiction in that regard is limited to children born out-of-wedlock. The Third Department noted that legislation will soon allow a Family Court petition for a judgment of parentage and Supreme Court has jurisdiction to hear an application for a declaratory judgment on the issue: "... [T]he Legislature has only empowered Family Court to hear 'proceedings to determine [parentage] and for the support of children born out-of-wedlock' ... and further defined a child in Family Ct Act article 5 as one 'born out of wedlock' ... . Petitioners were married at all relevant times, and their child was not born out of wedlock. ... We note the recent enactment of Family Ct Act article 5-C, which will soon allow a petition for a judgment of parentage ... . Moreover, if petitioners articulate how 'an adjudication of the merits will result in immediate and practical consequences to' them ... , they are presently free 'to bring a declaratory judgment action in Supreme Court to determine the status of the child and the rights of all interested parties' ...". ***Matter of Alison RR*, 2020 N.Y. Slip Op. 06002, Third Dept 10-22-20**

FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE DEEMED AN ADEQUATE EXCUSE FOR PLAINTIFF'S COUNSEL'S FAILURE TO APPEAR AT THE MANDATORY CONFERENCE IN THIS FORECLOSURE ACTION; PLAINTIFF BANK'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the default judgment should have been granted. The Third Department found that law office failure provided a reasonable excuse for the failure of the bank's counsel to appear at the mandatory conference in this foreclosure action (22 N.Y.C.R.R. § 202.27 (b)): "... [P]laintiff was required to demonstrate a reasonable excuse for its failure to appear at the conference and the existence of a potentially meritorious claim ... . A determination of reasonable excuse is left to the sound discretion of Supreme Court and will only be disturbed where there has been a clear abuse of that discretion ... . In exercising this discretion, Supreme Court may accept law office failure as an excuse 'where the claim of law office failure is supported by a detailed and credible explanation of the default' ... . Counsel explained that he was on vacation in Europe on the day scheduled for the conference.

When counsel realized this mistake, he contacted Supreme Court and requested to appear telephonically. Supreme Court accommodated this request and, according to counsel, offered to initiate the call. However, when counsel did not receive a telephone call at the scheduled time, he telephoned chambers, and was informed that defendants had not yet appeared. Counsel avers that he never received a follow-up telephone call from Supreme Court. Counsel also provided his telephone records showing the outgoing calls that he had made that morning to chambers and no incoming calls from Supreme Court. As such, plaintiff demonstrated a reasonable excuse for not appearing at the conference." ***U.S. Bank, N.A. v. Clarkson*, 2020 N.Y. Slip Op. 05994, Third Dept 10-22-20**

FAMILY LAW, CIVIL PROCEDURE. CONTRACT LAW.

FATHER'S CHILD SUPPORT OBLIGATIONS CONTROLLED BY THE JUDGMENT OF DIVORCE, NOT THE CONFLICTING PROVISIONS OF THE SEPARATION AGREEMENT.

The Third Department, reversing Family Court, determined the provisions in the judgment of divorce, not the separation agreement, controlled father's child support obligations: "Although the parties entered into a separation agreement directing what the husband was to pay for child support, the subsequent judgment of divorce specifically provided that 'the child support obligations of the parties hereto shall be as directed by the [c]orrective [o]rder of [s]upport . . . entered on November 16, 2017.' A conflict therefore exists between the separation agreement and the subsequently entered judgment of divorce. In such circumstance, the judgment of divorce controls ... . Although Family Court was without jurisdiction to modify the terms of the separation agreement (see Kleila v Kleila, 50 NY2d 277, 282 [1980]), the fact that the corrective order of support was denominated as an order by Family Court or that it emanated from a Family Court proceeding does not mean the terms therein are invalid. The parties voluntarily consented to the terms in the corrective order of support. Additionally, there is nothing in the record indicating that the parties disputed any of those terms. Under these circumstances, and because the judgment of divorce specifically stated that the parties' child support obligations were to be determined by the corrective order of support, we are not of the view that Family Court modified the separation agreement." ***Sherman v. Sherman*, 2020 N.Y. Slip Op. 05993, Third Dept 10-22-20**

FAMILY LAW, EVIDENCE.

FATHER WAS NOT ENTITLED TO SUMMARY JUDGMENT TERMINATING HIS PARENTAL RIGHTS ON THE GROUND HIS 18-YEAR-OLD CHILD HAD ABANDONED HIM.

The Third Department, reversing Family Court, determined father was not entitled to summary judgment on his petition to terminate his parental rights on the ground that the 18-year-old had abandoned him: "... [T]he father did not establish his entitlement, as a matter of law, to termination of his child support obligation on the ground of abandonment. Although the father's submissions detailed his efforts to establish a relationship with the child and the child's repeated rebuffs of those efforts, the father's proof failed to demonstrate as a matter of law that the child's refusal to have contact with him was totally unjustified, particularly given the father's prolonged absence from the child's life and the child's developmental disability and other diagnoses. Such factual issues warranted a full evidentiary hearing and should not have been summarily resolved by Family Court ... . Although Family Court had knowledge of prior proceedings between the parties, the justification issue had never been squarely before Family Court and required the presentation of evidence, including potential expert testimony, concerning the impact of the child's developmental disability and other diagnoses on the child's refusal to have contact with the father." ***Matter of Thomas GG. v. Bonnie Jean HH.*, 2020 N.Y. Slip Op. 05988, Third Dept 10-22-20**

FAMILY LAW, EVIDENCE.

UNDER THE CIRCUMSTANCES, A *LINCOLN* HEARING WILL PROVIDE INFORMATION PERTINENT TO FATHER'S PETITION FOR A MODIFICATION OF THE CUSTODY ORDER, MATTER REMITTED.

The Third Department, reversing Family Court, remitted the matter to determine whether a change in circumstance warranted a modification of the child custody order. The order did not address where the child should attend school after eighth grade and father sought an modified order allowing the child to attend a public high school and expanding his parenting time. Family Court refused to use information learned in a *Lincoln* hearing in connection with the father's burden to show a change in circumstances. The Third Department remitted the matter noting that a *Lincoln* hearing, under the circumstances, would provide the court with pertinent information: "... [T]he father established a change in circumstances requiring a thorough best interests analysis. To that end, it is undisputed that there is no current order governing where the child is to attend school. Also, the father's uncontested testimony established that the father and the mother cannot reach an agreement as to where the child should attend school, thus requiring judicial intervention ... . Family Court erred in denying the father's motion requesting a Lincoln hearing to aid in the court's determination of whether a change in circumstances had occurred. 'Although a child's wishes can support the finding of a change in circumstances, they are but one factor and are not determinative' ... . Although '[t]he decision whether to conduct such a hearing is discretionary, . . . it is 'often the preferable course' to conduct one' ... . Here, given that the child was 14 years old at the time of the fact-finding hearing and had expressed a preference to attend public school, that this preference was one of the changed circumstances alleged by

the father and that the attorney for the child joined in the father's request for the Lincoln hearing, a Lincoln hearing 'would have provided the court with significant pieces of information it needed to make the soundest possible decision' ...". ***Matter of Edwin Z. v. Courtney AA.*, 2020 N.Y. Slip Op. 05987, Third Dept 10-22-20**

FORECLOSURE, CIVIL PROCEDURE, TRUSTS AND ESTATES.

THE 2008 FORECLOSURE COMPLAINT WAS SERVED ON A DECEASED DEFENDANT AND WAS THEREFORE A NULLITY WHICH DID NOT TRIGGER THE SIX-YEAR STATUTE OF LIMITATIONS; THE INSTANT FORECLOSURE ACTION, THEREFORE, IS NOT TIME-BARRED.

The Third Department, reversing Supreme Court, determined the foreclosure action was not time-barred. Although a foreclosure complaint was served in 2008, it named a deceased defendant and was therefore a nullity which did not accelerate the debt and start the statute of limitations running: "Plaintiff contends that Supreme Court erred in dismissing the action as untimely because the 2008 action was commenced only against the decedent borrower and was thus a legal nullity. We agree. 'The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage' ... . Accordingly, as a general rule, the commencement of a mortgage foreclosure action triggers the statute of limitations ... . As pertinent here, however, '[a] party may not commence a legal action or proceeding against a dead person, but must instead name the personal representative of the decedent's estate' ... . Greenpoint [Mortgage Funding] served but did not substitute the executor of decedent's estate as a party in the 2008 action (see CPLR 1015 [a]). As such, the court lacked jurisdiction over the 2008 action, and that action was a legal nullity from its inception ... . It follows that the 2008 action, a legal nullity, did not trigger the statute of limitations. Since this action was commenced within six years of the 2013 acceleration letter, the action was timely." ***U.S. Bank Natl. Assn. v. Stewart*, 2020 N.Y. Slip Op. 05982, Third Dept 10-22-20**

INSURANCE LAW, CONTRACT LAW.

PLAINTIFF WAS ENTITLED TO THE REFORMATION OF THE INSURANCE POLICY TO NAME HIM AS MORTGAGEE; ALL PARTIES AGREED THEY INTENDED TO SO NAME THE PLAINTIFF AND THE FAILURE TO DO SO WAS THE RESULT OF A MISTAKE; PLAINTIFF WAS ENTITLED TO PAYMENT OF THE FIRE-DAMAGE PROCEEDS IRRESPECTIVE OF THE PROPERTY OWNER'S ACTS OR NEGLECT.

The Third Department, reversing Supreme Court, determined plaintiff was entitled to the reformation of an insurance policy and to the payment of the fire-damage proceeds. Through error plaintiff was never named as the mortgagee on the policy: "Plaintiff asserts that reformation of the property policy to name him as the mortgagee is appropriate because the undisputed evidence demonstrates that [all the parties] intended to have him so named and reached an oral agreement to that effect, but that, without their knowledge and because of mutual mistake, the property policy did not embody that agreement. In support of this claim, plaintiff submitted the uncontradicted testimony of [the buyer] and the wife that they were aware of the requirement to have plaintiff named as a mortgagee on the property policy as required by the mortgages and intended to comply with it, that the wife asked [the insurance agent] to make the change, and that she and [the buyer] believed afterward that the change had been made and that plaintiff had become a mortgagee on the property policy. * * * ... [W]e find that the property policy should be reformed to name plaintiff as mortgagee ... . Plaintiff's resulting identification as the mortgagee 'creates an independent insurance of [his] interest just as if he had received a separate policy from the company but without any inconsistent or repugnant conditions imposed upon the owner and free from invalidation by the latter's act or neglect' ...". ***Imrie v. Ratto*, 2020 N.Y. Slip Op. 05986, Third Dept 10-22-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

NEITHER THE "HABIT" NOR THE "ERROR IN JUDGMENT" JURY INSTRUCTION WAS APPROPRIATE IN THIS MEDICAL MALPRACTICE CASE; NEW TRIAL ORDERED.

The Third Department, reversing the defense verdict in this medical malpractice case and ordering a new trial, determined: (1) the "habit" jury instruction should not have been given; (2) the "error in judgment" jury instruction should not have been given; and (3) plaintiff's expert cardiologist should have been allowed to testify about the appropriateness of taking plaintiff off the anti-coagulant medication, DAPT. Plaintiff had a heart attack in 2012 and was put on DAPT permanently by his cardiologist to prevent blood clots. In 2014 defendant cardiologist agreed to the defendant gastroenterologist's request to have plaintiff stop taking DAPT temporarily to allow a colonoscopy procedure. While plaintiff was off the DAPT he had another heart attack: "... [T]he very conduct that is the subject of the [habit] charge in question is the 'course of treatment regarding patients they held in common.' In order for a habit charge to be appropriate, the proof must demonstrate 'a deliberate and repetitive practice by a person in complete control of the circumstances' ... . 'On no view . . . can conduct involving not only oneself but particularly other persons . . . produce a regular usage because of the likely variation of the circumstances in which such conduct will be indulged' ... . Here, neither defendant had complete control, and both defendants testified that their decisions regarding temporary cessation of DAPT prior to or after a colonoscopy varied depending on the circumstances of each patient. ... An error in judgment charge 'is appropriate only in a narrow category of medical

malpractice cases in which there is evidence that [the] defendant physician considered and chose among several medically acceptable treatment alternatives' ... . 'A distinction must therefore be made between an 'error in judgment' and a doctor's failure to exercise his or her best judgment. Giving the 'error in judgment' charge without regard for this distinction would otherwise relieve doctors whose conduct would constitute a breach of duty from liability' ... . Here, the primary issue at trial was whether defendants deviated from the standard of care in determining to temporarily cease [plaintiff's] DAPT both before and after his colonoscopy. There was no evidence presented that defendants chose between two or more medically accepted alternatives ... . Plaintiffs' cardiology expert established that he had knowledge and expertise in this area and should not have been barred from testifying as to whether [the gatroenterologist's] decision to temporarily cease DAPT for 14 days after the colonoscopy was a departure from the standard of care ...". ***Michalko v. Deluccia*, 2020 N.Y. Slip Op. 05991, Third Dept 10-22-20**

MENTAL HYGIENE LAW, CRIMINAL LAW, EVIDENCE, ATTORNEYS.

RESPONDENT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE JULY 2015 MENTAL HYGIENE ARTICLE 10 TRIAL; COUNSEL WAS INEFFECTIVE IN NOT REQUESTING A FRYE HEARING ON THE VALIDITY OF THE OSPD DIAGNOSIS; MATTER REMITTED FOR A FRYE HEARING BASED UPON WHAT WAS KNOWN ABOUT THE DIAGNOSIS AT THE TIME OF THE 2015 TRIAL.

The Third Department, in a full-fledged opinion by Justice Mulvey, remitting the matter for a Frye hearing, determined respondent was deprived of effective assistance of counsel in the July 2015 Mental Hygiene Article 10 trial because counsel did not request a Frye hearing on the validity of the "other specific paraphilic disorder (nonconsent)" (OSPD) diagnosis. It was not until just after the July 2015 trial that courts recognized it was an abuse of discretion to deny a Frye hearing regarding OSPD, but there was a substantial amount of literature calling the diagnosis into question at the time of the trial: "When evaluating whether counsel's failure to request a pretrial Frye hearing in this case constituted ineffective assistance, counsel's posttrial motion practice sheds light on what counsel knew, or should have known, prior to trial about the acceptance of paraphilic disorders. Counsel filed a posttrial motion, apparently at respondent's urging, to preclude from the dispositional hearing evidence of OSPD (nonconsent) and other paraphilic disorders by any name. In his motion papers, counsel not only cited to several of the foregoing trial court cases that had been recently issued, but also annexed several scientific articles from 2014, 2011 and 2008 that highlight the controversial nature and forensic misuse of paraphilic disorders generally or outright reject PNOS (nonconsent) or OSPD (nonconsent) as diagnoses reliable enough for the courtroom. At least one of these articles, as well as counsel's cross-examination of [an expert] at trial, reveal that counsel was at least generally aware that defined nonconsent paraphilias or paraphilic disorders had been rejected for inclusion in various versions of the Diagnostic and Statistical Manual ... . * * * ... [H]ad counsel been successful at a pretrial Frye hearing in precluding consideration of OSPD (nonconsent), it is possible that respondent could have had the petition dismissed before trial ... . In other words, counsel 'had everything to gain and nothing to lose' by challenging OSPD (nonconsent) in a Frye hearing ... . [T]his single failing deprived respondent of the effective assistance of counsel ... . Accordingly, we hold the appeal ... in abeyance and remit the matter to Supreme Court for a posttrial Frye hearing to consider the reliability of OSPD (nonconsent) based on the information that was available prior to the July 2015 trial, and to report back on its findings ...". ***Matter of State of New York v. Kenneth H*, 2020 N.Y. Slip Op. 05980, Third Dept 10-22-20**

PERSONAL INJURY.

PLAINTIFF, WHO WAS INTOXICATED AND TRESPASSING, WAS INJURED FALLING THROUGH AN OPENING IN THE FLOOR OF A HOUSE UNDER CONSTRUCTION; THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF'S PRESENCE WAS FORESEEABLE AND PLAINTIFF'S INTOXICATION WAS NOT A SUPERSEDING CAUSE AS A MATTER OF LAW; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff, who was intoxicated, entered defendants' construction site at 3:00 am and fell through an opening in the floor of a house under construction. Because defendants were aware of trespassers entering the site in the past, there was a question of fact whether the accident was foreseeable. The fact that plaintiff was intoxicated was not a superseding cause, although it may speak to comparative negligence: "... [A] triable issue of fact exists as to whether plaintiff's presence on the property was foreseeable. The testimony ... confirmed that it was common knowledge that people would routinely walk through houses still under construction. On this record, reasonable persons could disagree as to whether it was foreseeable for plaintiff to be on the subject property and whether defendants reasonably secured the property, thereby precluding summary judgment to defendants on this ground ... . 'An intervening act will be deemed a superseding cause and will serve to relieve [a] defendant of liability when the act is of such an extraordinary nature or so attenuates [the] defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably

attributed to the defendant' ... . Here, plaintiff had never been to the property before, and defendants did not establish that he either knew or should have known that such conduct was dangerous ... . Further, there are triable issues of fact as to whether there was a no trespassing sign on the property, whether the property was properly secured to prevent entry and even whether the floor opening was covered. Although defendants' expert opined that plaintiff was extremely intoxicated when he entered the property, [plaintiff's friend] did not observe plaintiff having any difficulty walking. Plaintiff's alcohol impairment may well have played a significant role in plaintiff's accident for comparative fault purposes, but that fact does not exonerate defendants from liability as a matter of law ...". ***Desroches v. Heritage Bldrs. Group, LLC*, 2020 N.Y. Slip Op. 05992, Third Dept 10-22-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT RETAILER'S EMPLOYEE ALLEGEDLY ATTEMPTED TO FIX A MALFUNCTIONING CROSSBOW AND RETURNED IT TO PLAINTIFF IN VIOLATION OF THE RETAILER'S RETURN POLICY; PLAINTIFF ALLEGED HE WAS THEREAFTER INJURED BY THE CROSSBOW; THE RETAILER'S MOTION FOR SUMMARY JUDGMENT ON THE NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined the negligence cause of action against the defendant retailer which sold an allegedly defective crossbow to plaintiff should not have been dismissed. Plaintiff alleged when he returned the malfunctioning crossbow to the retailer an employee attempted to fix it and gave it back to the plaintiff. Plaintiff alleged he was thereafter injured by the crossbow: "... [E]ven accepting that defendant had no duty to warn plaintiffs of the alleged defect in the crossbow, it was not entitled to summary judgment dismissing plaintiffs' negligence claim. Plaintiffs gave deposition testimony in which they explained that they were injured by the crossbow in separate incidents and that, when plaintiff James Garrison returned the crossbow to defendant's store after the first incident, one of defendant's employees attempted to repair it and gave it back to Garrison. Viewing the evidence in the light most favorable to plaintiffs as the non-moving parties and accepting their account of events as true ... , a duty of care arose when the employee chose to undertake the crossbow repair ... , and the fact that the repair violated defendant's return policy for defective or damaged items constituted some evidence of negligence ... . Defendant produced no evidence that conclusively demonstrated plaintiffs' accounts to be untrue or showed the employee's actions to have played no role in the second crossbow malfunction." ***Garrison v. Dick's Sporting Goods, Inc.*, 2020 N.Y. Slip Op. 05996, Third Dept 10-22-20**

WORKERS' COMPENSATION.

ALTHOUGH THERE WAS EVIDENCE CLAIMANT MADE A FALSE STATEMENT ABOUT THE LEVEL OF HER INVOLVEMENT IN AN ONLINE BUSINESS WHILE SHE WAS RECEIVING WORKERS' COMPENSATION BENEFITS, SHE WAS FORTHRIGHT ABOUT HER INVOLVEMENT WHEN QUESTIONED; PERMANENT DISQUALIFICATION FROM FUTURE BENEFITS WAS NOT WARRANTED.

The Third Department, modifying the Workers' Compensation Board, determined there was support in the record for the finding claimant omitted from her application for benefits that she was selling items online while receiving benefits, but the record did not support a permanent disqualification from future benefits. Claimant omitted the information because she had not turned a profit, but she was forthright about the online business when questioned about it: " 'The fact that claimant had not yet realized a profit from [the activities] does not diminish [her] obligation to provide true and accurate information regarding [her] employment activities and such misrepresentations are clearly material to [her] claim' ... . The evidence here revealed that claimant failed to accurately disclose her level of activity ... . We note that claimant was readily forthcoming about her activities when questioned and declined to cash benefits checks after she resumed part-time work with the employer ... . Based on all the circumstances presented, we do not find adequate support for the Board's determination that claimant engaged in 'an egregious pattern of conduct,' thus warranting permanent disqualification from future wage replacement benefits ...". ***Matter of Conliffe v. Darden Rest.*, 2020 N.Y. Slip Op. 06001, Third Dept 10-22-20**

WORKERS' COMPENSATION.

CLAIMANT PURCHASED OFFICE FURNITURE AFTER HE WAS HIRED TO WORK FROM HOME AND WAS INJURED CARRYING THE FURNITURE TO HIS HOME OFFICE; THE WORKER'S COMPENSATION BOARD SHOULD NOT HAVE ANALYZED THE CASE UNDER A RIGID NEW STANDARD FOR EMPLOYEES WORKING FROM HOME; MATTER REMITTED FOR APPLICATION OF THE LONG-ESTABLISHED STANDARD.

The Third Department, reversing the denial of benefits and remitting the matter to the Workers' Compensation Board, determined claimant, who was hired to work from home, may be entitled to workers' compensation benefits stemming from moving boxes during claimant's lunch hour. Claimant was told by his employer the company would not pay for office furniture. Claimant purchased the office furniture and was injured when carrying the boxes upstairs to his home office. The court addressed how workers' compensation principles should be applied to working from home: "… [T]he Board

eschewed the foregoing principles in favor of a rigid new standard for employees working from home under which injuries are only compensable if occurring during regular work hours and while the employee is actively engaged in work duties as opposed to, for example, taking a short break or using the bathroom. This novel standard is unsupported by precedent, is inconsistent with 'the remedial nature of the Workers' Compensation Law' and cannot be countenanced ... . A 'regular pattern of work at home' renders the employee's residence 'a place of employment' as much as any traditional workplace maintained by the employer ... . As a result, inasmuch as the Board determined that claimant was injured during his regular work shift ... , the compensability of his injury should have been determined using the long-established standard. We accordingly remit for the Board to apply that standard and determine whether claimant, when moving the boxes, was engaged in a 'purely personal' activity that was not 'reasonable and sufficiently work related under the circumstances' ...".
***Matter of Capraro v. Matrix Absence Mgt.*, 2020 N.Y. Slip Op. 06000, Third Dept 10-22-20**

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