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FIRST DEPARTMENT

ADMINISTRATIVE LAW, CIVIL PROCEDURE.

A TIMELY BUT DEFECTIVE ATTEMPT TO COMMENCE AN ARTICLE 78 PROCEEDING IS A JURISDICTIONAL DEFECT WHICH CANNOT BE CURED BY A SECOND ATTEMPT AFTER THE FOUR-MONTH STATUTE OF LIMITATIONS HAS RUN.

The First Department, reversing Supreme Court, determined the petitioner's Article 78 action should have been dismissed because it was not properly commenced within four months. An attempt to commence the action was timely made, but the petition was returned: "An article 78 proceeding must be commenced within four months of the final determination under review (see CPLR 217[1]). Such a proceeding is commenced when the clerk of the court receives the petition in valid form ... . Although petitioners attempted to file the petition in Queens County within four months, they did not do so in a manner which was then authorized (see CPLR 304[b]; 22 NYCRR 202.5-b[a], 202.5-bb[a]). The petition was returned to petitioners, who filed it after the four-month period had passed. The petition was untimely, and the court had no discretion to extend the statute of limitations ... . Contrary to petitioners' contention, the deficiency in their initial filings is not subject to correction pursuant to CPLR 2001 so as to render the proceeding timely, as the failure to file the papers required to commence a proceeding constitutes a nonwaivable, jurisdictional defect ...". ***Matter of Heffernan v. New York City Mayor's Off. of Hous. Recovery Operations*, 2021 N.Y. Slip Op. 04276, First Dept 7-8-21**

CONTRACT LAW, ATTORNEYS, CIVIL PROCEDURE.

A SETTLEMENT EMAIL WILL BE DEEMED SIGNED BY THE SENDING ATTORNEY WITHOUT RETYPING THE ATTORNEY'S NAME IN THE EMAIL.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Moulton, overruling precedent, determined it is no longer necessary for an attorney to retype his or her name in an email stipulation of settlement. As long as the attorney's name appears in the "prepopulated" area of the email it will be deemed to have been signed by the attorney: "We now hold that this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today. It is not the signoff that indicates whether the parties intended to reach a settlement via email, but rather the fact that the email was sent. Since 1999, New York State has joined other states in allowing, in most contexts, parties to accept electronic signatures in place of 'wet ink' signatures. Section 304(2) of New York's Electronic Signatures and Records Act (ESRA) provides: 'unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.' Moreover, the statutory definition of what constitutes an 'electronic signature' is extremely broad under the ESRA, and includes any electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record' (State Technology Law § 302[a]). We find that if an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature." ***Matter of Philadelphia Ins. Indem. Co. v. Kendall*, 2021 N.Y. Slip Op. 04284, First Dept 7-8-21**

CRIMINAL LAW, APPEALS.

A SUPPRESSION MOTION CANNOT BE DENIED ON A GROUND NOT RAISED BY THE PEOPLE.

The First Department, holding the appeal in abeyance, noted that a suppression motion may not be denied on a ground not raised by the People: "The motion to suppress should not have been denied on a ground not raised by the People. It is unclear to what extent the suppression court considered and credited the People's argument regarding probable cause or whether the search was outside of the Fourth Amendment's purview under the circumstances. Accordingly, we hold the appeal in abeyance and remand for determination, based on the hearing minutes, of the issues raised at the hearing, but not decided ...". ***People v. Hatchett*, 2021 N.Y. Slip Op. 04282, First Dept 7-8-21**

PERSONAL INJURY, EVIDENCE.

THERE IS A QUESTION OF FACT WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE WORN STEP IN THIS SLIP AND FALL CASE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined there was a question of fact whether defendants had constructive notice of the condition of a step in this slip and fall case: "... [T]he affidavit of plaintiff's expert and the photographic evidence were sufficient to raise an issue of fact as to constructive notice. The expert opined that the condition depicted in the photographs violated the Building Code and that the step was worn for several years prior to the accident. Furthermore, the photographs depicted a condition that a jury might find was present for a sufficient time for defendants to have discovered and remedied it ...". ***Martinez v. 560-568 Audubon Realty LLC*, 2021 N.Y. Slip Op. 04277, First Dept 7-8-21**

SECOND DEPARTMENT

ATTORNEYS.

PLAINTIFFS' ATTORNEY PROPERLY WITHDREW ON IRRECONCILABLE DIFFERENCES GROUNDS AND WAS ENTITLED TO 95% OF THE CONTINGENCY FEE DESPITE THE FAILURE TO SUBMIT TIME RECORDS.

The Second Department, reversing Supreme Court, determined plaintiff's attorney, Greenberg, properly withdrew from representing the plaintiffs on the ground of irreconcilable differences and was entitled to 95% of the contingency fee: "Greenberg demonstrated its entitlement to an award of 95% of the contingency fee. 'In fixing an award of legal fees in quantum meruit, a court should consider evidence of the time and skill required in the case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit derived from the services, and the fee usually charged by attorneys for similar services' ... . 'Quantum meruit compensation is not limited to a calculation based on the numbers of hours worked multiplied by a reasonable hourly rate' ... . 'The calculation of an award of legal fees as a portion of a contingent fee and based on an hourly rate are both properly fixed as quantum meruit determinations' ... . Here, the record demonstrates, inter alia, the extensive work performed on the case by Greenberg over a period of 4½ years, the nature of the work performed, and the relative contributions made by Greenberg, entitling it to 95% of the contingency fee. While Greenberg failed to submit time records in support of the services it rendered, the value of its services could still be ascertained ...". ***Tucker v. Schwartzapfel Lawyers, P.C.*, 2021 N.Y. Slip Op. 04250, Second Dept 7-7-21**

CRIMINAL LAW, CONSTITUTIONAL LAW.

INDICTMENTS IN TWO COUNTIES RELATED TO THE SAME CONTINUOUS CONDUCT AND THE SAME VICTIM; DEFENDANT'S CONVICTION BY GUILTY PLEA IN NASSAU COUNTY AFTER A GUILTY PLEA IN SUFFOLK COUNTY VIOLATED THE DOUBLE JEOPARDY CLAUSE.

The Second Department, on double-jeopardy grounds, reversed defendant's conviction by guilty plea in Nassau County because he had already pled guilty to the same conduct in Suffolk County: "The charges in Suffolk County and Nassau County related to the same alleged victim. The Suffolk County indictment alleged that the defendant committed acts constituting course of sexual conduct against a child in the first degree and course of sexual conduct against a child in the second degree between approximately April 2015 and March 1, 2016, whereas the Nassau County indictment alleged that the defendant committed acts constituting course of sexual conduct against a child in the second degree between approximately March 1, 2016, and September 1, 2016. As the indictments in both counties, viewed together, alleged a single continuing and uninterrupted offense against the same alleged victim, constitutional double jeopardy principles precluded a second conviction, in Nassau County, after the Suffolk County criminal action terminated in a conviction by plea of guilty ...". ***People v. Kattis*, 2021 N.Y. Slip Op. 04240, Second Dept 7-7-21**

CRIMINAL LAW, EVIDENCE.

STATEMENTS MADE BY THE COMPLAINANT TO POLICE OFFICERS HOURS AFTER THE ALLEGED INCIDENT SHOULD NOT HAVE BEEN ADMITTED AS EXCITED UTTERANCES.

The Second Department, reversing defendant assault and criminal possession of a weapon convictions, determined the complainant's hearsay statement should not have been admitted as excited utterances: "... [T]he Supreme Court erred in permitting the People to elicit testimony from two police officers on the content of certain hearsay statements made to them by the complainant when they encountered her at a deli a few hours after the alleged assault. ... 'An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication' ... . 'The essential element of this hearsay exception is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that his [or her] reflective capacity was stilled' ... . '[T]he time for reflection is not measured in minutes or seconds, but rather is measured by facts' ... . [I]n light of the amount of time that elapsed between the incident and the statements ... , and the lack of evidence as to what transpired in the interim ... , the People did not establish that the complainant's capacity for reflection

and deliberation remained stilled by the time she spoke to the police officers at the deli ...". ***People v. Germosen*, 2021 N.Y. Slip Op. 04237, Second Dept 7-7-21**

CRIMINAL LAW, EVIDENCE.

IN THIS STREET STOP CASE, SOME OF THE POLICE OFFICERS' TESTIMONY WAS REJECTED AS INCREDIBLE; THE PEOPLE DID NOT DEMONSTRATE THE LEVEL THREE ENCOUNTER WAS JUSTIFIED BY REASONABLE SUSPICION.

The Second Department, dismissing the indictment, determined the People did not demonstrate the level three encounter with the defendant in the street stop was justified by reasonable suspicion. Some of the police officers' testimony was rejected as incredible: "Officer Washington's pursuit of the defendant and her attempt to grab him with her right hand were both level three actions requiring reasonable suspicion ... . Setting aside those portions of Officer Washington's account the Supreme Court properly disregarded as incredible, her testimony indicates that she began chasing and grabbing at the defendant in response to his flight. She did not, however, credibly describe anything more than equivocal circumstances in conjunction with the defendant's flight, meaning her testimony was insufficient to justify police pursuit ... . Officer Montano testified that the defendant dropped the gun before he fled, which in turn could justify Officer Washington's pursuit ... . But he also testified that Officer Washington was 'trying to take her shield out as she [was] approaching [the defendant] to try to grab him' before the defendant dropped the gun or started to run. Officer Montano thus observed the defendant drop the gun and flee as a result of Officer Washington's attempt to grab him before she had the reasonable suspicion necessary to do so. 'Since this level three intrusion was not justified, it cannot be validated by the officer's subsequent observation of the firearm' ...". ***People v. Rhames*, 2021 N.Y. Slip Op. 04242, Second Dept 7-7-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE EVIDENCE OF "PHYSICAL INJURY" WAS LEGALLY INSUFFICIENT, ASSAULT 2ND CONVICTION REVERSED.

The Second Department, reversing defendant's Assault 2nd conviction, determined the evidence of "physical injury" was legally insufficient: "... [T]he evidence, when viewed in the light most favorable to the prosecution ... , was legally insufficient to establish, beyond a reasonable doubt, that the complainant sustained a physical injury within the meaning of Penal Law § 10.00(9). Physical injury is defined as 'impairment of physical condition or substantial pain' ... . At the time of the incident, the complainant did not seek medical attention and proceeded on his way. He testified at trial that he continued to have pain in his back and neck for approximately three weeks, had pain when he lifted 'something' when working in construction, without specifying what 'something' was, and was unable to use a pillow to sleep. However, he never sought medical treatment after the incident, claiming that he did not need it, and he used only a topical pain relief cream to relieve pain. Under these circumstances, there was insufficient evidence from which a jury could rationally infer that the complainant suffered substantial pain or impairment of his physical condition ...". ***People v. Bowen*, 2021 N.Y. Slip Op. 04236, Second Dept 7-7-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE VAGUE IDENTIFICATION EVIDENCE RENDERED THE CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing defendant's conviction, determined the identification evidence was too weak to support a conviction, i.e., the conviction was against the weight of the evidence. Witnesses saw a man toss a bag of drugs over a fence and run away: "Both women saw the man holding what appeared to be a white shopping bag with red circles on it, which he threw over a chain-link fence nearby. The man continued running through the parking lot toward Grand Street. One of the women described the man she saw as a black man with short, dark hair, wearing a dark baseball cap, a T-shirt, jeans, and sneakers. The man was 'a little taller, somewhat taller' than five feet, two inches, but she was not sure. She estimated his weight to be 175 to 185 pounds, but she was not sure. She did not remember if he wore glasses. She could not describe the color of his clothing or give any description of the sneakers he wore. The other woman described the man as a young black male, approximately five feet, seven inches tall, but she could not say for sure, and 'guesstimat[ed]' that he may have weighed 170 pounds. She testified that he wore a baseball cap and might have been wearing dark pants and dark sneakers. Neither woman was able to identify the defendant as the man they saw. ... [N]either of the police witnesses observed the defendant carrying a bag, neither of the bystander witnesses was able to identify the defendant as the man carrying the bag, and no forensic evidence linked the defendant to the bag. ... [T]he rational inferences that can be drawn from the trial evidence do not support the convictions beyond a reasonable doubt. Although the vague description provided by the bystander witnesses was not inconsistent with the defendant's general appearance, we find that such evidence, coupled with nothing more than the defendant's proximity to the crime scene, is insufficient to establish, beyond a reasonable doubt, the defendant's identity as the perpetrator ...". ***People v. Hawkins*, 2021 N.Y. Slip Op. 04238, Second Dept 7-7-21**

FAMILY LAW, CONTRACT LAW.

THE SEPARATION AGREEMENT WAS NOT UNCONSCIONABLE, BUT THERE WAS A QUESTION WHETHER THE AGREEMENT WAS THE PRODUCT OF OVERREACHING, HEARING ORDERED.

The Second Department, reversing Supreme Court, determined that, although the separation agreement was not unconscionable, there were questions of fact whether the agreement was the product of overreaching requiring a hearing: "While the defendant waived the right to maintenance, this provision, by itself, is insufficient to render the agreement unconscionable ... . Nevertheless, the Supreme Court should have held a hearing on the issue of whether the agreement should be set aside on the ground of overreaching. 'Although courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching, the general rule is that if the execution of the agreement is fair, no further inquiry will be made' ... . No actual fraud needs to be shown in order to set aside an agreement, but 'the challenging party must show overreaching in the execution, such as the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception' ... . Here, the agreement reflects a vast disparity between the parties' assets at the time of its execution. Moreover, the defendant's submissions suggest that the plaintiff may have unilaterally selected and paid the defendant's attorney, and that negotiations between the parties' attorneys went on for approximately six weeks prior to the defendant's initial consultation with her attorney." ***Marinakis v. Marinakis*, 2021 N.Y. Slip Op. 04218, Second Dept 7-7-21**

FAMILY LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE DELEGATED THE AUTHORITY TO DETERMINE FATHER'S PARENTAL ACCESS TO THE PETITIONER, THE DECEASED MOTHER'S COUSIN, IN THIS GUARDIANSHIP CASE.

The Second Department, reversing (modifying) Family Court, noted that a judge cannot delegate the authority to determine father's parental access, here the mother's cousin petitioned to become the child's guardian: "... '[A] court may not delegate its authority to determine parental access to either a parent or a child' ... . In this case, the Family Court improperly delegated the determination of the father's parental access to the petitioner. Accordingly, we remit the matter to the Family Court, Suffolk County, to expeditiously establish an appropriate schedule for the father's parental access in accordance with the best interests of the child ...". ***Matter of Madelyn E. P. (Christine L.-B.--Kevin O.)*, 2021 N.Y. Slip Op. 04228, Second Dept 7-7-21**

FORECLOSURE, CIVIL PROCEDURE.

PLAINTIFF BANK'S MOVING FOR SUMMARY JUDGMENT TWO YEARS AFTER THE DEFENDANT'S DEFAULT DID NOT DEMONSTRATE IT DID NOT INTEND TO ABANDON THE ACTION; THEREFORE DEFENDANT WAS ENTITLED TO DISMISSAL OF THE COMPLAINT PURSUANT TO CPLR 3215(c).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate an adequate excuse for failure to take steps to enter a default judgment in this foreclosure action within one year of the default: "The plaintiff's ... argument ... [is] that, by moving for summary judgment and leave to enter a default judgment ... , the plaintiff had 'manifest[ed] its intent not to abandon this case.' However, while '[i]t is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)' ... , and a plaintiff is not even required to specifically seek a default judgment within a year, but may take 'the preliminary step toward obtaining a default judgment of foreclosure and sale by moving . . . for an order of reference pursuant to RPAPL 1321' ... that preliminary step still must be taken 'within one year of [a defendant's] default' ... . Here, since the plaintiff moved for summary judgment and an order of reference almost two years after the default, when the statutory time within which to enter a default had long since expired, it was too late for the plaintiff to 'manifest an intent not to abandon the case' ... so as to avoid dismissal of the complaint ...". ***US Bank N..A.. v. Davis*, 2021 N.Y. Slip Op. 04251, Second Dept 7-7-21**

PERSONAL INJURY, EVIDENCE.

IN THIS SLIP AND FALL CASE, PROOF OF GENERAL CLEANING AND INPSECTION PRACTICES WAS NOT ENOUGH TO DEMONSTRATE THE LACK OF CONSTRUCTIVE NOTICE OF LIQUID ON THE FLOOR.

The Second Department, reversing Supreme Court, determined the defendant did not demonstrate it didn't have constructive notice of the liquid on the floor in this slip and fall case. Proof of general cleaning and inspection practices is not enough: "[T]he defendant failed to eliminate triable issues of fact as to whether it had constructive notice of the hazardous condition and a reasonable time to correct it ... . In that respect, the deposition testimony of the defendant's witnesses as to their general cleaning and inspection practices, as well as the deposition testimony of a security supervisor surmising, based upon such general practices, when another security officer would have inspected the subject stairwell prior to the accident, was insufficient to demonstrate, as a matter of law, that the defendant lacked constructive notice of the hazardous condition ...". ***Roland v. Jackson Terrace Apts.*, 2021 N.Y. Slip Op. 04247, Second Dept 7-7-21**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW.

DEFENDANT PROPERTY OWNERS DID NOT DEMONSTRATE, AS A MATTER OF LAW, THE DECORATIVE FENCE IN THE GRASSY AREA BETWEEN THE CURB AND THE SIDEWALK WAS OPEN AND OBVIOUS.

The Second Department, reversing Supreme Court, determined defendant property-owner was not entitled to summary judgment in this slip and fall case. The plaintiff allegedly tripped over a decorative fence located in the grassy area between the curb and the sidewalk abutting defendants' home. The defendants argued the fence was open and obvious: " 'The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case' ... . 'A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' ... . Here, contrary to the Supreme Court's determination, the homeowner defendants failed to establish, prima facie, that the decorative fence was open and obvious and not inherently dangerous given the circumstances at the time of the accident, including the lighting conditions and color of the fence ...". ***Rosenman v. Siwiec*, 2021 N.Y. Slip Op. 04248, Second Dept 7-7-21**

THIRD DEPARTMENT

APPEALS.

UNDER THE NEW APPELLATE PRACTICE RULES FOR CROSS-APPEALS, DEFENDANTS ABANDONED THIER APPEAL BECAUSE THEY DID NOT FILE THEIR BRIEF WITHIN SIX MONTHS OF FILING THE NOTICE OF APPEAL; THE COURT OPTED TO WAIVE DEFENDANTS' NONCOMPLIANCE AND DEEMED THE CROSS APPEAL PROPERLY BEFORE THE COURT.

The Third Department, in a full-fledged opinion by Justice Lynch, discussed the applicability of the new practice rules for appeals to cross-appeals: "[T]he new practice rules pertaining to cross appeals specify that '[t]he party that first perfects the appeal shall be denominated the appellant-respondent' (Rules of App Div, All Depts [22 NYCRR] § 1250.9 [f] [1] [iii]). Until such time as either party has perfected, the identity of a party as either an appellant-respondent or a respondent-appellant remains to be determined. Having filed a notice of cross appeal on June 2, 2020, defendants had until December 2, 2020 to perfect their appeal or otherwise seek an extension. Defendants failed to do either. For this reason, plaintiff maintains that the cross appeal was effectively abandoned and technically plaintiff is correct. The rules, read as a whole, require each party to preserve its position until such time as one of the parties actually perfects its appeal. That said, the rules require the parties to 'consult and make best efforts to stipulate to a briefing schedule' (Rules of App Div, All Depts [22 NYCRR] § 1250.9 [f] [1] [i]), and there is no indication in this record or the briefs that such consultation occurred here. In any event, since this is our first decision addressing implementation of the new practice rules relating to cross appeals, we opt to waive defendants' noncompliance and deem the cross appeal properly before us (see Rules of App Div, All Depts [22 NYCRR] § 1250.1 [g])." ***New York Mun. Power Agency v. Town of Massena*, 2021 N.Y. Slip Op. 04268, Third Dept 7-8-21**

CONTRACT LAW, REAL PROPERTY LAW.

THE COMPLAINT STATED A CAUSE OF ACTION FOR BREACH OF CONTRACT; THE COMPLAINT ALLEGED THE AGREEMENT TO CONVEY A FARM TO A PARTNERSHIP WAS SUBJECT TO AN EXCEPTION TO THE STATUTE OF FRAUDS FOR PART PERFORMANCE.

The Third Department, reversing (modifying) Supreme Court, determined the complaint stated a cause of action for breach of contract. The complaint alleged the agreement to convey a farm to a partnership was subject to an exception to the statute of frauds for part performance: " 'General Obligations Law § 5-703 (4) has carved out an exception to the statute of frauds to permit courts of equity to compel the specific performance of agreements in cases of part performance' ... . 'A party's partial performance of an alleged oral contract will be deemed sufficient to take such contract out of the statute of frauds only if it can be demonstrated that the acts constituting partial performance are unequivocally referable to said contract' ... . In his complaint, plaintiff alleges that he drastically changed his behavior after the agreement, including leaving his studies at Cornell University to devote his full attention to the partnership. Plaintiff also claims that he moved onto the subject premises, that he contributed financially to the business, which was struggling under burdensome mortgage payments, and that defendant referred to him as his business partner and co-owner of the farm. Plaintiff also made substantial improvements to both his residence on the farm, in which he resided full time, and to the farm itself. Given that all of these actions are unequivocally referable to the alleged oral agreement, we find that dismissal of the complaint under CPLR 3211 (a) (5) based upon the statute of frauds was improper ...". ***Leonard v. Cummins*, 2021 N.Y. Slip Op. 04269, Third Dept 7-8-21**

CRIMINAL LAW, EVIDENCE.

THE DENIAL OF DEFENDANT'S REQUEST FOR A CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION REQUIRED REVERSAL.

The Third Department, reversing defendant's conviction, determined County Court should not have denied defendant's request for a circumstantial evidence jury instruction: "... [T]here was no direct evidence identifying defendant as the shooter or as having possessed a loaded firearm. Indeed, there was no DNA or fingerprint evidence linking defendant to the Colt .45 caliber handgun that was recovered near the scene or the shell casing and projectiles that were found to have been fired from that gun ... . Further, the surveillance footage — which only distantly captured the incident — did not depict defendant with a firearm. Nor was it possible to discern from the footage who shot the victim. ... Despite denying defendant's request for a circumstantial evidence charge, County Court nonetheless gave a modified version of the charge. This modified version, however, was wholly inadequate. Most importantly, the modified version failed to include a critical component of the circumstantial evidence charge — namely, 'that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence' ... . Given that County Court improperly denied defendant's request for a circumstantial evidence charge and that the modified charge was insufficient, 'the jury could not have known of its duty to apply the circumstantial evidence standard to the prosecution's entire case' ...". ***People v. Taylor*, 2021 N.Y. Slip Op. 04258, Third Dept 7-8-21**

ENVIRONMENTAL LAW, ZONING, LAND USE.

THE PLANNING BOARD TOOK THE REQUISITE HARD LOOK REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) WHEN IT APPROVED THE DEVELOPMENT WHICH INCLUDED APARTMENTS AND A COSTCO RETAIL FACILITY; SUPREME COURT SHOULD NOT HAVE ANNULLED THE APPROVAL AS ARBITRARY AND CAPRICIOUS.

The Third Department, reversing Supreme Court, in an exhaustive analysis which cannot be fairly summarized here, determined the Planning Board took the required hard look, pursuant to the State Environmental Quality Review Act (SEQRA), at all the aspects of the proposed development project. Therefore the Planning Board's approval of the project should not have been annulled as arbitrary and capricious. The development included apartments and a Costco Wholesale retail facility. With regard to the compatibility issues, the court wrote: "In essence, although the Costco store may, to some, not be the most compatible use, the Planning Board properly viewed it in the context of the entire project. As such, the Planning Board considered not only the fact that the Costco store is a permitted use that complied with all of the design standards contained in Local Law No. 4, but also the other tangible benefits of the project, which directly aligned with the purpose of the Local Law. These factors included pedestrian and bicycle accommodations and improvements. Also, the Planning Board considered access management and transit improvements in design and layout, including the reduction of lanes ... , the construction of a new roundabout to process traffic more efficiently, the reconfiguration of a major intersection to reduce vehicular speed and a new CDTA bus stop, which CDTA confirmed would ease congestion, improve safety and result in a 'marked improvement for customers' in the area. The Planning Board proposed the construction of a new connector road ... , and numerous project design features to prevent noise and visual and other impacts. All told, the Planning Board discharged its duty and took the requisite hard look as to compatibility and satisfied its obligations under SEQRA ...". ***Matter of Hart v. Town of Guilderland*, 2021 N.Y. Slip Op. 04273, Third Dept 7-8-21**

FOURTH DEPARTMENT

CIVIL PROCEDURE, MENTAL HYGIENE LAW, TRUSTS AND ESTATES.

ALTHOUGH DOMINICA, THE EXECUTRIX OF JOSEPHINE'S ESTATE, WAS NEVER SUBSTITUTED FOR JOSEPHINE AFTER JOSEPHINE'S DEATH, DOMINICA APPEARED AND ACTIVELY LITIGATED A MOTION TO VACATE; THE FAILURE TO EFFECT SUBSTITUTION IN THAT CIRCUMSTANCE IS A MERE IRREGULARITY; TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined the failure to substitute the executrix of Josephine's estate, Dominica P., after Josephine's death did not nullify the proceedings. Dominica P appeared and actively litigated a motion to vacate brought by Kathleen. In that circumstance the failure to effect substitution was deemed a mere irregularity: "Josephine died at some point before the entry of the order on appeal, and the executrix of her estate, Dominica P., was never formally substituted as the petitioner in this proceeding. There is no dispute, however, that Dominica was properly served with Kathleen's motion to vacate, and Dominica never objected to adjudicating Kathleen's motion in the absence of a formal substitution order. To the contrary, Dominica—acting in her capacity as the executrix of Josephine's estate—appeared and successfully opposed Kathleen's motion on the merits. Dominica likewise appeared in this Court to oppose Kathleen's appeal. Because Dominica appeared and actively litigated Kathleen's motion on the merits, it is well established that any 'defect in failing to first effect substitution was a mere irregularity' ... . Moreover, to formally correct this irregularity, we

now modify the order by substituting Dominica as the petitioner in this proceeding ...". ***Matter of Robinson v. Kathleen B.*, 2021 N.Y. Slip Op. 04320, Fourth Dept 7-9-21**

CIVIL PROCEDURE, TOXIC TORTS.

PLAINTIFFS' CAUSES OF ACTION ALLEGING EXPOSURE TO TOXIC FUMES ARE TIME-BARRED PURSUANT TO CPLR 214-c.

The Fourth Department, reversing Supreme Court, determined the causes of action alleging exposure to toxic fumes and hazardous substances were time-barred: "... [T]he ... causes of action [alleging] the purported exposure to toxic fumes and hazardous substances (exposure claims) because they are untimely under the applicable three-year statute of limitations (see CPLR 214-c [2]). ... [T]hat statute of limitations began to run from the date of discovery of plaintiff's injury. Discovery occurs 'when the injured party discovers the primary condition on which the claim is based' and not 'when the connection between . . . symptoms and the injured's exposure to a toxic substance is recognized' ... . By submitting, inter alia, plaintiff's deposition testimony and a workers' compensation claim filed by him in 2011, defendants established that the exposure claims accrued in 2003 when he 'made repeated visits to [his] treating providers for symptoms described in [his] bill of particulars as caused by the [chemical] exposure' ... , and well over three years prior to the commencement of this action in 2014. To the extent that plaintiff relies on the one-year statute of limitations provided by CPLR 214-c (4), plaintiff cannot avail himself of that limitations period because, inter alia, plaintiff explicitly linked his exposure-related symptoms to exposure at Niagara Lubricant in his workers' compensation claim, i.e., over one year prior to the commencement of this action ...". ***Cotter v. Lasco, Inc.*, 2021 N.Y. Slip Op. 04293, Fourth Dept 7-9-21**

CRIMINAL LAW.

INCLUSORY CONCURRENT COUNTS DISMISSED.

The Fourth Department dismissed course of criminal conduct first degree and rape first degree counts as inclusory concurrent counts of predatory sexual assault against a child: "... [C]ounts two and four of the indictment, charging defendant with course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and rape in the first degree (§ 130.35 [4]), respectively, must be dismissed inasmuch as they are inclusory concurrent counts of counts one and three, respectively, charging defendant with predatory sexual assault against a child (§ 130.96) ...". ***People v. Feliciano*, 2021 N.Y. Slip Op. 04289, Fourth Dept 7-9-21**

DEBTOR-CREDITOR, CONTRACT LAW, CIVIL PROCEDURE.

THE FULL AMOUNT OF THE NOTE WAS NOT RECOVERABLE BECAUSE THERE WAS NO ACCELERATION CLAUSE; CLAIMS FOR UNPAID INSTALLMENTS DUE MORE THAN SIX YEARS BEFORE FILING SUIRT WERE TIME-BARRED.

The Fourth Department, reversing (modifying) Supreme Court, determined the full amount of the note could not be recovered because it did not include an acceleration clause. In addition, claims for unpaid installments due more than six years before the filing of the lawsuit were time-barred: " 'As a general rule, in the absence of an acceleration clause providing for the entire amount of a note to be due upon the default of any one installment, [a plaintiff is] only entitled to recover past due installments and [can]not unilaterally declare the note[] accelerated' ... . 'Rather, each default on each installment gives rise to a separate cause of action' ... . Here, the record is devoid of any evidence of an acceleration clause and, thus, plaintiff was entitled to recover 'only the amount of the installments past due at the time of trial' ... . 'Where, as here, 'a loan secured by a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the statute of limitations begins to run on the date that each installment becomes due' ... . As defendant correctly asserted as a defense, inasmuch as plaintiff commenced this action on July 13, 2017, any claims for missed installments that accrued prior to July 13, 2011 were time-barred by the applicable statute of limitations ...". ***Estate of Kathryn Essig v. Essig*, 2021 N.Y. Slip Op. 04301, Fourth Dept 7-9-21**

FAMILY LAW.

PETITIONER'S OBJECTION TO THE SUPPORT MAGISTRATE'S ORDER SHOULD NOT HAVE BEEN DENIED; THE CSSA APPLIES EVEN WHEN THE CHILD RECEIVES PUBLIC ASSISTANCE; DOWNWARD DEVIATION FROM THE PRESUMPTIVE SUPPORT LEVEL IMPROPERLY APPLIED THE PROPORTIONAL OFFSET METHOD.

The Fourth Department, reversing Family Court, determined petitioner's objections to the Support Magistrate's order should not have been denied: "It is well settled that 'the CSSA [Child Support Standards Act] must be applied to all child support orders, regardless of a child's receipt of public assistance' ... . Here, the Support Magistrate purported to reduce the father's obligation pursuant to Family Court Act § 413 (1) (f) (10) because the father made additional expenditures to maintain his house to permit the child to stay there during the time that he stayed with the father. Such a reduction for extended visitation is permitted by section 413 (1) (f) (9), however, and that subdivision of the statute applies only where 'the child is not on public assistance' ... . Furthermore, we have previously stated that a determination to grant a downward deviation from the presumptive support obligation on the ground that the noncustodial parent incurred expenses while the child was in his or her care 'was merely another way of [improperly] applying the proportional offset method' ... , and the

proportional offset method of calculating child support has been explicitly rejected by the Court of Appeals ...". ***Matter of Livingston County Dept. of Social Servs. v. Hyde*, 2021 N.Y. Slip Op. 04316, Fourth Dept 7-9-21**

FAMILY LAW, EVIDENCE.

MOTHER VIOLATED A COURT ORDER BY RELOCATING TO ARIZONA WITH THE CHILD; HOWEVER, HER ALLEGATIONS OF DOMESTIC ABUSE BY FATHER WERE CREDIBLE AND WARRANTED GRANTING HER CROSS PETITION TO RELOCATE.

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined mother's cross petition to relocate with the child was properly granted, despite mother's violation of a court order prohibiting her from permanently leaving Monroe County with the child without father's consent, or without a court order allowing relocation. Mother testified that father was abusive and she feared for her life at times. Father denied all allegation of abuse. Family Court found mother's testimony credible and did not credit father's testimony: "Courts place considerable weight on the effect of domestic violence on the child ... , particularly when a continuing pattern of domestic violence perpetrated by the child's father compels the mother to relocate out of legitimate fear for her own safety ... , or where the father minimized the past incidents of domestic violence ... . Indeed, where domestic violence is alleged in a petition for custody, 'the court must consider the effect of such domestic violence upon the best interests of the child' ... . [T]he court appropriately considered the fact that the mother unilaterally removed the child from the jurisdiction, determining that the mother 'did not relocate to separate the father from the child, but instead acted in good faith to escape the threat of domestic violence' ... . Although the court did not countenance the mother's decision to relocate without permission, 'it was the father's [violent] conduct that prompted [her] move to [Arizona] in the first instance and triggered the resulting disruption of his relationship with his daughter' ... . Furthermore, although the court did not expressly engage in the analysis required under Tropea (87 NY2d at 740-741), according deference to the court's factual findings and credibility assessments ... we conclude that 'there is a sound and substantial basis in the record supporting the court's determination that 'relocation would enhance the child['s life] economically, emotionally, and educationally, and that the child['s] relationship with the father could be preserved through a liberal parental access schedule including, but not limited to, frequent communication and extended summer and holiday visits' ...". ***Matter of Edwards v. Ferris*, 2021 N.Y. Slip Op. 04306, Fourth Dept 7-9-21**

PERSONAL INJURY, IMMUNITY.

DEFENDANT OWNS A VINEYARD IN WHICH PLAINTIFF WAS INJURED IN AN ALL-TERRAIN-VEHICLE ACCIDENT; DEFENDANT WAS ENTITLED TO IMMUNITY PURSUANT TO GENERAL OBLIGATIONS LAW § 9-103 BECAUSE THE VINEYARD WAS "SUITABLE FOR RECREATIONAL USE."

The Fourth Department, reversing Supreme Court, determined defendant's property (a vineyard) was suitable for recreational use and therefore defendant was entitled to immunity pursuant to General Obligations Law § 9-103. Defendant was not liable for plaintiff's injuries from an all-terrain-vehicle (ATV) accident which occurred when the driver missed a bridge over a culvert: ... " '[D]efendant, as the party seeking summary judgment, ha[d] the burden of establishing as a matter of law that he is immune from liability pursuant to the statute' ... . We conclude that defendant met his initial burden on the motion of establishing that the site where the accident occurred was suitable for recreational use ... . The evidence defendant submitted on the motion showed that the vineyard's dirt and grass-covered roads, as well as the bridge where the accident occurred, were physically conducive to ATV riding. Additionally, defendant established that the vineyard's roads and the bridge were appropriate for public use for recreational ATV riding based on the uncontradicted testimony of defendant Aaron P. Gibbons, an adjoining property owner, that, over a significant period of time, he and his wife had frequently driven ATVs on the vineyard's roads and the bridge and had often observed others doing the same." ***Wheeler v. Gibbons*, 2021 N.Y. Slip Op. 04323, Fourth Dept 7-9-21**

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