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FIRST DEPARTMENT

CRIMINAL LAW, ATTORNEYS, JUDGES.

THE PROSECUTION'S REASONS FOR EXCLUDING AN AFRICAN AMERICAN PROSPECTIVE JUROR WERE PRETEXTUAL; NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction, in a full-fledged opinion by Justice Renwick, determined the two explanations offered by the prosecution for excluding an African-American prospective juror were pretextual and should not have been accepted by the court: "On its face, the subject explanation, that an older gentleman with no children living with roommates would not able to appreciate a domestic violence situation, was not a valid trial-related concern at all. 'To recognize the proffered explanation as valid and legitimate would, in our view, emasculate the constitutional protection recognized in Batson . . . and we refuse to do so' ... . In fact, the prosecutor does not cite to a single case where this Court or any other court has found such a dubious explanation as a valid-race neutral reason. * * * ... [T]he second explanation was equally pretextual. In essence, the prosecution explained that it 'selected people who had higher level jobs with all other things being equal,' as well as '[p]eople who indicated that they read.' According to the prosecutor, those types of jurors had more capacity to follow the instructions and understand the law. The prosecutor's explanation is essentially an attempt to convince this Court with the preposterous proposition that only jurors with 'higher level jobs' can effectively consider all the evidence in this case. While a juror's employment status might be an appropriate race-neutral reason for exclusion, it should be related to the facts of the case ... . However, if the employment of the potential juror has no connection with the specific facts of the case then an exclusion of such a juror could constitute discrimination ... . [T]he prosecutor did not relate his concerns about the prospective juror's employment to the factual circumstances of the case." ***People v. Murray*, 2021 N.Y. Slip Op. 04108, First Dept 6-29-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

BECAUSE PLAINTIFF WAS FOLLOWING THE DIRECTIONS OF HIS FOREMAN WHEN INJURED BY AN IMPROPERLY HOISTED LOAD, HE COULD NOT BE THE SOLE PROXIMATE CAUSE OF HIS INJURIES.

The First Department, reversing Supreme Court, determined the plaintiff in this Labor Law §§ 240(1) and 241(6) action could not be the sole proximate cause of his injuries because he was following the directions of his foreman when struck by an improperly hoisted load: "Plaintiff Samuel Hayek demonstrated prima facie entitlement to summary judgment on his Labor Law § 240(1) claim, where the undisputed evidence showed that he was injured when struck by an improperly hoisted or inadequately secured load of L-shaped steel rebar weighing between 2000 and 3000 pounds, while doing construction work at defendant Metropolitan Transportation Authority's Eastside Access project ... . In opposition, defendants failed to raise a triable issue as to the statutory violation and whether plaintiff was the sole proximate cause of his injury. Given the undisputed evidence that plaintiff was following the directions of his foreman at the time of his injury, plaintiff cannot be the sole proximate cause of his injuries ...". ***Hayek v. Metropolitan Transp. Auth.*, 2021 N.Y. Slip Op. 04103, First Dept 6-29-21**

LANDLORD-TENANT, CONTRACT LAW.

THE COVID-19 PANDEMIC DID NOT ENTITLE PLAINTIFF COMMERCIAL TENANT TO RENT ABATEMENT UNDER THE LEASE OR RESCISSION BASED UPON FRUSTRATION OF PURPOSE OR IMPOSSIBILITY.

The First Department, reversing Supreme Court, determined that the COVID-19 pandemic did not entitle plaintiff to rent abatement under the lease and did support rescission of the lease based upon frustration of purpose or impossibility: "... [P]laintiff is not entitled to a rent abatement under the lease 'due to loss of use of all or a portion of the Demised Premises due to [a] Casualty[.]' That portion of the lease refers to singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown ... . The doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not 'completely deprived of the benefit of its bargain' (... *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021] [finding that reduced revenues did not frustrate the purpose of the lease]). Furthermore, plaintiff's assertion that Executive Order 202.8 [re: COVID-related suspension of laws] rendered it objectively impossible to perform its operations as a retail store as required by the lease is

unavailing as defendant correctly points out that by the time plaintiff filed its complaint in July 2020, this was no longer the case ...". ***Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 2021 N.Y. Slip Op. 04115, First Dept 1-29-21**

SECOND DEPARTMENT

CONTRACT LAW, LEGAL MALPRACTICE, ATTORNEYS.

THE BREACH OF CONTRACT CAUSE OF ACTION ALLEGING DEFENDANT ATTORNEY OVERBILLED SHOULD HAVE SURVIVED THE MOTION TO DISMISS DESPITE THE DISMISSAL OF THE LEGAL MALPRACTICE CAUSE OF ACTION.

The Second Department, reversing (modifying) Supreme Court, determined the cause of action for breach of contract alleging overbilling by defendant attorney (Drexel) should have survived the motion to dismiss, even though the legal malpractice cause of action was properly dismissed: "... [T]he Supreme Court should have denied that branch of [defendant-attorney] Drexel's motion which was to dismiss so much of the first breach of contract cause of action as alleged that Drexel overbilled and charged the plaintiff for unnecessary legal services ... . In opposition to that branch of Drexel's motion which was to dismiss the first breach of contract cause of action, the plaintiff submitted an affidavit in which he averred that Drexel double-billed him for legal services in the sum of $291,000 and charged him at least $70,000 for unnecessary legal services. Contrary to Drexel's contention, the plaintiff's claim that Drexel overbilled and charged him for unnecessary legal services is distinct from a legal malpractice cause of action, as the plaintiff's claim does not challenge the quality of Drexel's work ...". ***Dubon v. Drexel*, 2021 N.Y. Slip Op. 04119, Second Dept 6-30-21**

CONTRACT LAW, LEGAL MALPRACTICE, ATTORNEYS.

THE LEGAL MALPRACTICE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THERE WAS NO WRITTEN RETAINER AGREEMENT AND THEREFORE NO ATTORNEY-CLIENT RELATIONSHIP; THE COMPLAINT ALLEGED WORDS AND ACTIONS SUFFICIENT TO ASSERT THE EXISTENCE OF AN ATTORNEY-CLIENT RELATIONSHIP.

The Second Department, reversing (modifying) Supreme Court, determined the legal malpractice action should not have been dismissed on the ground there was no retainer agreement and therefore no attorney-client relationship: "As to the legal malpractice cause of action, the ... defendants contend that they had no attorney-client relationship with the plaintiff. An attorney-client relationship may arise even in the absence of a written retainer agreement, and a court must look to the words and actions of the parties to determine whether such a relationship exists ... . Here, according the plaintiff the benefit of every favorable inference, she sufficiently alleged the existence of an attorney-client relationship ...". ***Edelman v. Berman*, 2021 N.Y. Slip Op. 04120, Second Dept 6-30-21**

CRIMINAL LAW.

DEFENDANT SHOULD HAVE BEEN ADJUDICATED A YOUTHFUL OFFENDER; IN ADDITION TO DEFENDANT'S MEETING THE CRITERIA, THE PEOPLE APPARENTLY LOST EXCULPATORY EVIDENCE BEFORE OFFERING A PLEA DEAL.

The Second Department, reversing Supreme Court, determined defendant should have been adjudicated a youthful offender, noting the People may have possessed exculpatory evidence which was lost before the plea offer was made: "... [U]pon its determination of eligibility, the Supreme Court should have adjudicated the defendant a youthful offender. 'In making such a determination, factors to be considered by the court include 'the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life' ... . Here, the updated presentence investigation report by the Department of Probation recommended youthful offender status for the defendant, who was 17 years old at the time of the offense, which was his first encounter with the criminal justice system. As the court noted during the ... hearing, the defendant was cooperative with authorities. Furthermore, the defendant was employed at the time of his probation interview, obtained his GED while incarcerated, and now has a child. We find that, in its consideration of youthful offender adjudication, the court also should have weighed the defendant's undisputed contention that the People had purportedly possessed exculpatory evidence that they had failed to provide to the defendant, the People's loss of which apparently preceded the plea agreement offered by the People, against the nature of the offense and the defendant's admitted role in it ...". ***People v. Terrence L.*, 2021 N.Y. Slip Op. 04149, Second Dept 6-30-21**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), CONSTITUTIONAL LAW, JUDGES.

THE JUDGE'S SUA SPONTE ASSESSEMENT OF RISK LEVEL POINTS WHICH WERE NOT REQUESTED BY THE PEOPLE OR THE BOARD VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS.

The Second Department, reversing County Court, determined defendant's due process rights were violated when the judge, sua sponte, assessed risk-level points which were not requested by the People or the Board of Examiners of Sex Offenders: " 'The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment' ... . 'A defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment' ... . Thus, 'a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond' ... . Here, as correctly conceded by the People, the County Court's assessment of these points, without prior notice to the defendant, deprived him of a meaningful opportunity to respond to the assessment ...". ***People v. Montufar-Tez*, 2021 N.Y. Slip Op. 04158, Second Dept 6-30-21**

FAMILY LAW.

MOTHER'S REFUSING TO SIGN MEDICAL CONSENT FORMS FOR PSYCHIATRIC TREATMENT OF HER CHILD DID NOT CONSTITUTE NEGLECT.

The Second Department, reversing Supreme Court, determined the Administration for Children's Services (ACS) did not demonstrate mother had neglected the child by refusing to sign medical consent forms which resulted in the child being discharged from the psychiatric care at the Richmond University Medical Center (RUMC): "ACS failed to establish by a preponderance of the evidence that the mother neglected the child. ACS did not establish that the mother's failure to sign the admissions paperwork for the child's stay at RUMC, or her failure to consent to the child being given a drug known as Risperdal, impaired, or caused imminent risk of impairment of, the child's physical, mental, or emotional condition. Contrary to the allegation in the petition, the child's medical records showed that she was discharged from RUMC because her condition had stabilized and she did not appear to be a threat to herself or others. Moreover, the mother agreed with the recommendation that the child receive follow-up outpatient care, and at the time that the child was discharged, the mother had two such appointments scheduled. As to the mother's failure to consent to the child being given Risperdal, the medical records showed that, despite not being given this medication, the child's condition stabilized during her hospitalization such that she was able to be released safely for outpatient treatment. ACS presented no evidence that outpatient treatment without the use of Risperdal was not 'an acceptable course of treatment in light of all of the surrounding circumstances' ...". ***Matter of Nabil H. A. (Vinda F.)*, 2021 N.Y. Slip Op. 04129, Second Dept 6-30-21**

LEGAL MALPRACTICE, ATTORNEYS.

THE ALLEGATION PLAINTIFF WOULD HAVE WON HIS WORKERS' COMPENSATION HEARING HAD HIS ATTORNEY PRESENTED EYEWITNESS TESTIMONY WAS TOO SPECULATIVE TO SUPPORT A LEGAL MALPRACTICE ACTION.

The Second Department, reversing Supreme Court, determined the legal malpractice action should have been dismissed. Plaintiff alleged he would have won his Workers' Compensation hearing had his attorney presented the testimony of alleged eyewitnesses to his alleged fall from a ladder. The claim that, "but for" the attorney's negligence, the plaintiff would have won the hearing was deemed too speculative: " 'To establish causation in a legal malpractice action, 'a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence' ... . 'Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative' ... . The plaintiff's allegations that the Judge who denied his workers' compensation claim and/or the Workers' Compensation Board would have credited certain evidence, including the testimony of alleged eyewitnesses, if such evidence had been presented by the defendants were speculative and conclusory ...". ***Denisco v. Uysal*, 2021 N.Y. Slip Op. 04118, Second Dept 6-30-21**

MUNICIPAL LAW, PERSONAL INJURY.

PETITIONER'S INCAPACITATING INJURIES EXCUSED THE DELAY IN FILING A NOTICE OF CLAIM; ALTHOUGH THE MUNICIPALITY DID NOT HAVE TIMELY NOTICE OF THE POTENTIAL LAWSUIT, IT SUFFERED NO PREJUDICE FROM THE DELAY.

The Second Department determined the petitioner's catastrophic injuries constituted a reasonable excuse for the delay in filing a notice of claim and, although the municipality did not have timely notice of the potential lawsuit, the municipality was not prejudiced by the delay: "As a result of the accident, the petitioner allegedly sustained a depressed skull fracture and a subdural hematoma with midline shift, and underwent an emergency craniotomy. The petitioner allegedly has been continuously hospitalized and confined to a bed and a wheelchair, cannot speak, and is fed through a feeding tube. Due to a

mistaken belief as to which municipality owned the location of the accident, the petitioner's attorneys initially commenced a proceeding against the County of Nassau, the Village of Oyster Bay Cove, and the Town. However, in April 2019, the petitioner's attorneys allegedly learned for the first time that the accident location was in Laurel Hollow. ... The petitioner's incapacitating injuries constituted a reasonable excuse for the delay in serving Laurel Hollow with a notice of claim ... . Although a police aided case report ... did not provide Laurel Hollow with actual knowledge of the essential facts constituting the claim, the petitioner established that Laurel Hollow would not be prejudiced by the delay. Of note, the roller that the petitioner was operating at the time of the accident has been continuously preserved by the petitioner's employer pursuant to a court order." ***Matter of Davis v. Incorporated Vil. of Laurel Hollow*, 2021 N.Y. Slip Op. 04133, Second Dept 6-30-21**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW, APPEALS.

ALTHOUGH AN ABUTTING PROPERTY OWNER CAN BE LIABLE FOR A DANGEROUS CONDITION IN THE GRASSY STRIP BETWEEN THE SIDEWALK AND THE CURB, HERE THE PROPERTY OWNER DEMONSTRATED HE DID NOT CREATE THE CONDITION; IN ADDITION, THE VILLAGE CODE DID NOT IMPOSE TORT LIABILITY ON PROPERTY OWNERS, AN ISSUE PROPERLY CONSIDERED FOR THE FIRST TIME ON APPEAL.

The Second Department, reversing Supreme Court, determined defendant property-owner's motion for summary judgment in this sidewalk slip and fall case should have been granted. Although, pursuant to the Vehicle and Traffic Law, defendant can be responsible for a dangerous condition in the grassy strip between the sidewalk and a curb, here defendant demonstrated he did not create the condition and the village code did not impose tort liability on abutting property owners. Although the "village code" issue was not raised below, it was a purely legal issue that can be considered on appeal: "The grass strip situated between a sidewalk and a roadway is part of the sidewalk (see Vehicle and Traffic Law § 144; Code of the Village of Westbury [hereinafter Village Code] § 215-2 ...). 'An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty' ... . Here, the defendant established his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him by demonstrating that he did not create the alleged dangerous condition or cause that condition through a special use of the sidewalk ... . In addition, while Village Code § 215-12 imposes a duty on owners and occupants of abutting land to keep sidewalks free of obstructions, the Village Code does not specifically impose tort liability for breach of that duty ... . Although the defendant did not make an argument based on the provisions of the Village Code in support of his motion before the Supreme Court, his argument in this regard is reviewable on appeal because it is a purely legal argument that appears on the face of the record and could not have been avoided had it been raised at the proper juncture ...". ***Lamorte v. Iadevaia*, 2021 N.Y. Slip Op. 04126, Second Dept 6-30-21**

THIRD DEPARTMENT

CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE.

IN THIS CHILD-VICTIMS-ACT SEXUAL-ABUSE (NEGLIGENT-SUPERVISION) ACTION AGAINST THE CATHOLIC DIOCESE OF ALBANY, PLAINTIFFS' DISCOVERY REQUEST FOR THE FILES OF SEVERAL NONPARTY PRIESTS WAS PROPERLY GRANTED ON THE GROUND THE FILES MAY REVEAL A "HABIT" OR "CUSTOM" REGARDING HOW THE DIOCESE HANDLED SUSPECTED CHILD-SEXUAL-ABUSE.

The Third Department determined plaintiffs' discovery request for the files of several nonparty priests in this Child-Victims-Act sexual-abuse (negligent-supervision) action against defendant Catholic Diocese of Albany was properly granted. The discovery was relevant to whether the diocese followed a "habit" or "custom" in dealing with priests suspected of sexually abusing children: "Although the Diocese raises several arguments concerning the appropriateness of habit evidence in this context — namely, that it is prejudicial and that the circumstances surrounding allegations of abuse vary and do not yield habitual responses from the Diocese — these arguments conflate plaintiffs' requirement on their motion to compel with plaintiffs' future requirements to introduce the files into evidence. For now, on their motion to compel discovery, plaintiffs are merely required to show that their discovery request is reasonably calculated to yield material and necessary information ... . Whether plaintiffs can actually demonstrate 'a sufficient number of instances' of the Diocese's repetitive conduct in order to introduce the subject files into evidence as habit evidence is plaintiffs' future burden ...". ***Melfe v. Roman Catholic Diocese of Albany, N.Y.*, 2021 N.Y. Slip Op. 04179, Third Dept 7-1-21**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE FOUR-YEAR PRE-INDICTMENT DELAY IN THIS RAPE CASE DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL SPEEDY-TRIAL RIGHTS; TWO JUSTICE DISSENT.

The Third Department, over a two-justice dissent, determined the four-year pre-indictment delay in this rape case did not violate defendant's constitutional speedy trial rights. The dissent disagreed: "... [T]he preindictment delay of four years was lengthy and the reasons for the delay proffered by the People certainly left something to be desired. However, the People's submissions established that the investigation was ongoing, that they were acting in good faith and that there were valid reasons for portions of the delay. Additionally, the charge of rape in the first degree can only be characterized as serious ... . Furthermore, there was no period of pretrial incarceration and there is no indication that the defense was prejudiced by the delay. In fact, defendant became aware of the accusations against him shortly after the offense occurred. In our view, the seriousness of the offense, the fact that defendant was not incarcerated pretrial and the absence of any demonstrated prejudice outweigh the four-year delay and the shortcomings in the People's reasons therefor ...". ***People v. Regan*, 2021 N.Y. Slip Op. 04161, Second Dept 7-1-21**

CRIMINAL LAW, JUDGES.

THE SENTENCING JUDGE'S REMARKS ABOUT THE DEFENDANT MIMICKED 19TH CENTURY POLYGENISM, A DEBUNKED RACIST IDEOLOGY; SENTENCE VACATED AND REDUCED.

The Third Department, vacating defendant's sentence, in a full-fledged opinion by Justice Lynch, determined the judge's racist remarks at the time of sentencing required vacation of the sentence, which the Third Department reduced from 15-years-to-life to five years: "The court, practically right out of the gate, stated, '[Defendant], I feel sorry for you. Because I know that if we were to look in your mind we would find that your brain, your frontal lobes, your decision making processes are probably retarded in growth.' The court then inexplicably and shockingly reiterated, 'Because we have learned through medicine, through science, that physical mental abuse especially at a young age will stunt the growth of the frontal lobes which prevents people from making decisions.' The court finally reinforced its own beliefs when it stated, '[T]he sentence here is in a way to make you safe from hurting yourself or others, because I appreciate the fact that your brain is not developed, through no fault of your own.' In fashioning an appropriate sentence, the trial court is required to weigh and consider societal protection, rehabilitation and deterrence, as well as the circumstances that gave rise to the conviction' ... . Factors that have zero role in this process are the skin color of the defendant and racist views — a premise that should not have to be explicitly stated. The commentary focusing on defendant's brain growth mimics 19th century polygenism, a racist ideology that focused on the claimed inferiority of black people based upon now debunked theories of reduced brain size ... . It is shocking that any court, in 2018, would refer to this black defendant's brain, frontal lobes and retardation of growth in concluding that defendant's brain was not developed. Defendant is not a child or an adolescent, but was a 41-year-old grown black man at the time of sentencing. County Court's statements are textbook language that has been used since the late 19th century and even today to justify racist ideologies and beliefs that black people are an inferior race. We find the court's commentary dehumanizing and offensive." ***People v. Johnson*, 2021 N.Y. Slip Op. 04162, Third Dept 7-1-21**

FAMILY LAW, EVIDENCE.

ALTHOUGH IT WAS A VERY CLOSE CASE, THE EVIDENCE DID NOT SUPPORT A CHANGE IN CUSTODY SUCH THAT THE COUPLE'S SON, WHO HAS BEEN DIAGNOSED WITH AUTISM, WOULD RELOCATE WITH FATHER TO MASSACHUSETTS, DESPITE FATHER'S BEING MORE FINANCIALLY SECURE THAN MOTHER; FAMILY COURT DID NOT GIVE PROPER WEIGHT TO THE SON'S WISHES.

The Third Department, reversing Family Court, determined, in a very close case where both parents love and want the best for their children (who have been diagnosed with autism), father did not demonstrate a sound basis for modifying the custody arrangement to allow relocation with his son to Massachusetts: "... [I]t is clear that the son is very strongly bonded to the mother. Indeed, he has lived with the mother for the last six years since the father moved to Massachusetts, except for short periods of visitation with the father. Moreover, the son has had very little visitation with the father since the 2019 holiday season due largely to the COVID-19 pandemic. Additionally, although the father cites the living conditions at the mother's home as the motivation for initially seeking custody, we find this questionable given that he testified that the condition of the mother's home has long been problematic and that, despite this, he relocated to Massachusetts and left both children in her care. Although ... issues with the hot water heater were no doubt problematic, that matter was remedied prior to trial. Even more troubling, however, is the father's strong opposition to the son changing schools because the son has difficulty with change, yet he feels it is in the son's best interests to relocate him to Massachusetts away from the mother and the life he has established with her. Although relocation would certainly enhance the son's life, as his living conditions would improve due to the father being more financially secure, this is only one factor in our analysis ... . Finally, although not dispositive, given the advanced age of the son [born 2005], as well as testimony regarding how intelligent he is, we find

that Family Court did not give proper weight to his wishes ...". ***Matter of Daniel G. v. Marie H.*, 2021 N.Y. Slip Op. 04178, Third Dept 7-1-21**

FAMILY LAW, JUDGES.

FAMILY COURT SHOULD NOT HAVE DELEGATED TO FATHER ITS AUTHORITY TO SUPERVISE MOTHER'S PARENTING TIME AND TELEPHONE AND ELECTRONIC CONTACT WITH THE CHILDREN.

The Third Department determined Family Court should not have delegated to father its authority to supervise mother's parenting time and telephone and electronic contact: "Family Court improperly delegated its authority over the mother's supervised parenting time and telephone and electronic contact with the children to the father. 'Unless [parenting time] is inimical to the children's welfare, the court is required to structure a schedule which results in frequent and regular access by the noncustodial parent. In so doing, the court cannot delegate its authority to determine [parenting time] to either a parent or a child' ... . Family Court ordered that the mother's supervised parenting time 'shall be arranged as to time, place, circumstances and supervisor as determined by the [f]ather' and that the mother shall have telephone, Facetime and/or other similar contact with the children 'as permitted by the [f]ather.' Although the father has sole custody of the children and, in such capacity, has discretion in the selection of an appropriate supervisor, Family Court failed to provide parameters with respect to the frequency of the supervised parenting time to which the mother is entitled and ... failed to consider the logistical concerns in ensuring that she has frequent and regular access to the children ...". ***Matter of Jessica HH. v. Sean HH.*, 2021 N.Y. Slip Op. 04165, Third Dept 7-1-21**

PERSONAL INJURY, EVIDENCE, COURT OF CLAIMS.

THE RES IPSA LOQUITUR DOCTRINE APPLIED TO A PLASTIC CHAIR IN THE RECREATIONAL ROOM OF DEFENDANT CORRECTIONAL FACILITY; THE CHAIR COLLAPSED WHILE CLAIMANT WAS SITTING IN IT; THE ISSUE WAS WHETHER DEFENDANT HAD EXCLUSIVE CONTROL OVER THE CHAIR; COURT OF CLAIMS REVERSED.

The Third Department, reversing the Court of Claims, determined the doctrine of res ipsa loquitur applied to a plastic chair in the recreational room of a state correctional facility. Claimant alleged the back legs of the chair broke off at the same time causing him to fall to the concrete floor: "... [T]he evidence of defendant's exclusive control, under the circumstances of this case, was sufficiently established ... . Indeed, '[a]s a species of circumstantial proof, . . . res ipsa [loquitor] does not depend on a showing that the instrumentality causing the harm was within the defendant's exclusive control; it is enough that the degree of dominion be such that the defendant can be identified with probability as the party responsible for the injury produced' ... . [D]efendant was 'under an affirmative duty to use reasonable care in making sure that the chair it provided was safe for the purpose for which it was to be used. That [claimant] had temporary possession of the chair does not negate the inference that its sudden collapse, under normal usage, was most likely caused by defendant's negligence' ... . Moreover, defendant, who no doubt had sole and exclusive possession of the chair immediately after the accident, failed to offer any evidence to support an inference of any other possible explanation for the accident ...". ***Draper v. State of New York*, 2021 N.Y. Slip Op. 04163, Third Dept 7-1-21**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

ALTHOUGH DEFENDANTS DID NOT SEE THE PLAINTIFF, THERE IS A QUESTION OF FACT WHETHER A PATIENT-PHYSICIAN RELATIONSHIP WAS CREATED BASED UPON ANOTHER DOCTOR'S ORDER THAT PLAINTIFF BE SEEN BY THOSE DEFENDANTS WITHIN ONE OR TWO DAYS.

The Third Department, reversing Supreme Court, determined the defendants' motions for summary judgment in this medical malpractice action should not have been granted. One of the issues was whether defendants, who had never seen plaintiff, could be found to have had a patient-physician relationship based upon the failure to schedule an appointment within the time-frame ordered by another doctor: "... [P]laintiff acknowledges that she never received treatment from or spoke with Connolly or Retina Associates. Instead, plaintiff relies on a notation in her medical records from Twin Tiers stating that Rosenberg initially requested that she be evaluated by Retina Associates within one to two days and that a later appointment was scheduled only after Connolly apparently informed Twin Tiers that she 'could wait to be seen until next week.' Moreover, after allegedly giving this advice regarding timing, Retina Associates scheduled the appointment beyond that acceptable time frame — for 13 days later. * * * Viewing the evidence in a light most favorable to plaintiff, a triable factual question exists regarding whether the notation in Twin Tiers' chart — attributing a comment to Connolly regarding scheduling of treatment — is sufficient to establish an implied physician-patient relationship between plaintiff and Connolly or Retina Associates ...". ***Marshall v. Rosenberg*, 2021 N.Y. Slip Op. 04180, Third Dept 7-1-21**

TRUSTS AND ESTATES, CONTRACT LAW.

DIFFERENCES BETWEEN AN ACTION TO IMPOSE A CONSTRUCTIVE TRUST AND AN ACTION ALLEGING UNJUST ENRICHMENT EXPLAINED.

The Third Department explained the differences between an action to impose a constructive trust and an action alleging unjust enrichment, here in the context of a couple's investment in building a new house and the allegation one party put in 800 hours of unpaid labor which benefitted the other party. The court held the constructive trust action was properly dismissed, but the unjust enrichment action should not have been dismissed: "Although the equitable claims of constructive trust and unjust enrichment are elementally related and involve overlapping proof, certain essential elements differ. '[A] constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest' ... . 'The elements of a constructive trust are a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment' ... .As relevant here, with respect to the promise element, it may be express or implied, as determined by the circumstances ... . 'Finally, a person . . . is unjustly enriched when retention of the benefit received would be unjust considering the circumstances of the transfer and the relationship of the parties' ... . Importantly, and as relevant here, 'the constructive trust doctrine serves as a fraud-rectifying remedy rather than an intent-enforcing one' ... . By contrast, an action based on unjust enrichment, which would only result in a money judgment rather than a judicially imposed lien, requires the plaintiff to establish that '(1) the other party was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered' ...". ***Clark v. Locey*, 2021 N.Y. Slip Op. 04176, Third Dept 7-1-21**

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