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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE TRIAL COURT PROPERLY ALLOWED EXPERT TESTIMONY ABOUT "COMMUNITY GUNS," A CONCEPT USED BY GANGS TO MAKE GUNS AVAILABLE WHILE AVOIDING BEING CAUGHT POSSESSING THE GUNS.

The First Department noted that the trial court properly allowed expert testimony about "community guns," a concept used by gangs to make guns available while avoiding being caught possessing the guns: "The court providently exercised its discretion in allowing expert testimony on what the expert described as 'community guns.' This concept involved the methods used by gangs to have their shared firearms ready to use while avoiding being caught in possession of these weapons, including by means of keeping firearms outdoors in closed containers under their constant observation but not on anyone's person. This testimony was necessary to explain the unusual behavior of defendant and persons who could be inferred to be his fellow gang members regarding their handling of the backpack containing the pistol, including evidence that defendant left the backpack unattended in the gang-controlled courtyard for two hours. These matters went beyond the general legal concept of constructive possession, they were not within the jurors' ordinary knowledge, and they tended to prove defendant's knowing and voluntary possession of the pistol ...". ***People v. Manley*, 2021 N.Y. Slip Op. 06814, First Dept 12-7-21**

CRIMINAL LAW, EVIDENCE.

THE ARRESTING DETECTIVE SHOULD NOT HAVE BEEN ALLOWED TO IDENTIFY THE PERSON DEPICTED IN SURVEILLANCE VIDEOS AS THE DEFENDANT, NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction and ordering a new trial, determined the arresting detective should not have been allowed to identify the person depicted in two surveillance videos as the defendant: "The court should not have permitted the arresting detective to give lay opinion testimony that defendant was the person depicted in two surveillance videos. In this case, the alleged difference in appearance — the addition of eyeglasses — was de minimis, and the jury had access to photos of defendant without eyeglasses ... . The People do not point to any case in which lay opinion testimony was permitted based on such a slight change in appearance. Moreover, 'no other circumstance suggested that the jury, which had ample opportunity to view defendant, would be any less able than the [officer] to determine whether he was seen in the videotape' ... . Indeed, at the time of trial, the arresting detective was a 20-year veteran of the force and had 14 years experience investigating robberies and burglaries on the Lower East Side, where the incident occurred. He had made nearly 600 arrests and assisted in approximately 200 others. Stating twice that the perpetrator in this case was defendant carried significant weight in the eyes of the jury. Although the court provided limiting instructions, '[t]ruly prejudicial evidence cannot be erased from a juror's mind by the court's instructions' ...". ***People v. Challenger*, 2021 N.Y. Slip Op. 06927, First Dept 12-9-21**

FAMILY LAW, CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

THE RESPONDENT IN THIS JUVENILE DELINQUENCY PROCEEDING WAS ENTITLED TO IMPEACHMENT EVIDENCE CONCERNING THE ARRESTING OFFICERS TO THE EXTENT ALLOWED UNDER CRIMINAL PROCEDURE LAW (CPL) § 245.20.

The First Department, reversing Family Court, determined the respondent-appellant in this juvenile delinquency proceeding was entitled to impeachment evidence concerning the arresting officers to the extent authorized by Criminal Procedure Law (CPL) § 245.20: "While not all provisions of the Criminal Procedure Law are applicable to proceedings under the Family Court Act (Family Ct Act § 303.1[1]) under the circumstances presented here, the denial of records available under CPL 245.10(1)(k)(iv), which broadly requires disclosure of all impeachment evidence deprived appellant of equal protection of the laws (US Const, 14th Amend; NY Const, art I, § 11 ...). A respondent in a juvenile delinquency proceeding has the same right to cross-examine witnesses as a criminal defendant ... , and there is no reason to allow more limited access to impeachment materials in a juvenile suppression or fact-finding hearing than in a criminal suppression hearing or trial. The need for impeachment evidence is equally crucial in both delinquency and criminal proceedings. A similarly situated defendant in a criminal proceeding would be entitled to access to the impeachment materials requested by appellant." ***Matter of Jayson C.*, 2021 N.Y. Slip Op. 06794, First Dept 12-7-21**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF ALLEGED THE COLLAPSE OF A CEILING CAUSED A BULGING DISC IN HER SPINE; SUPREME COURT HELD THE SURGERY TO REPAIR THE DISC CONSTITUTED SPOLIATION OF EVIDENCE AND PROHIBITED PLAINTIFF FROM INTRODUCING ANY EVIDENCE OF THE SPINE INJURY; THE 1ST DEPARTMENT REVERSED HOLDING THAT A SPOLIATION ANALYSIS CANNOT BE APPLIED TO MEDICAL TREATMENT.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Scarpulla, determined plaintiff's surgery to repair a bulging disc in her spine should not have been deemed spoliation of evidence. Plaintiff alleged the bulging disc was caused by the collapse of the ceiling in her apartment. Supreme Court prohibited plaintiff from introducing any evidence of the disc injury: "Spoliation analysis has long been applied to a party's destruction of inanimate evidence ... . The state of one's body is fundamentally different from inanimate evidence, and medical treatment, including surgery, is entirely distinct from the destruction of documents or tangible evidence which spoliation sanctions attempt to ameliorate. To find that a person has an 'obligation,' to preserve his or her body in an injured state so that a defendant may conduct an ME, is antithetical to our belief in personal liberty and control over our own bodies." ***Gilliam v. Uni holdings*, 2021 N.Y. Slip Op. 06798, First Dept 12-7-21**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION DID NOT SPECIFICALLY ADDRESS DEFENDANT'S EXPERT'S OPINIONS, THEREBY WARRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT.

The Frist Department determined plaintiff's expert's affidavit in this medical malpractice action was conclusory and did not address defendants' expert's opinions specifically. Therefore, defendant's motion for summary judgment was properly granted: "[P]laintiff failed to raise an issue of fact. His expert, who is board certified in surgery and thoracic surgery, was qualified to render an opinion ... . However, the opinion is conclusory and speculative and fails to address defendant's expert's opinions specifically ... . In addition, in forming his opinion, plaintiff's expert disregarded facts and medical evidence in the record, including a post-operative pathology report that indicated that plaintiff had a connective tissue disorder that put him at greater risk for developing serious complications if his aortic aneurysm were left untreated ...". ***Akel v. Gerardi*, 2021 N.Y. Slip Op. 06792, First Dept 12-7-21**

TRUSTS AND ESTATES, REAL ESTATE, TAX LAW, EVIDENCE, CIVIL PROCEDURE.

PURSUANT TO THE DOCTRINE OF TAX ESTOPPEL, TAX FORMS SIGNED BY DECEDENT INDICATING PROPERTY WAS TRANSFERRED WITHOUT CONSIDERATION PRECLUDED THE CONSTRUCTIVE TRUST CAUSE OF ACTION BASED UPON AN ALLEGED PROMISE TO PAY PETITIONERS PROCEEDS FROM THE SALE.

The First Department, reversing (modifying) Supreme Court, determined the constructive trust cause of action should have been dismissed under the doctrine of tax estoppel. The claim that decedent, Joseph Scott, Jr. promised to pay petitioners the proceeds from the sale of property was belied by the tax forms signed by Scott which indicated the property was transferred without consideration: "The tax forms utterly refute petitioners' factual allegations that, in consideration for his interest in the Amagansett property, Joseph Scott, Jr. paid respondents more than $410,000 in his lifetime as an advance on the sale of his Woodbine property ... . Since petitioners are precluded from arguing that there was an oral agreement that Joseph Scott, Jr. would pay respondents' decedents consideration for the Amagansett property, they cannot allege that a constructive trust should be imposed on the property ... . The application of the tax estoppel doctrine prevents, as a matter of law, petitioners from establishing an essential element of a claim for a constructive trust: a promise by respondents' decedents to Joseph Scott, Jr. regarding the Amagansett property." ***Matter of Chimsanthia*, 2021 N.Y. Slip Op. 06796, First Dept 12-7-21**

SECOND DEPARTMENT

ATTORNEYS, JUDGES.

SUPREME COURT SHOULD NOT HAVE ORDERED DEFENDANT TO PAY PLAINTIFF'S ATTORNEY'S FEES AS A SANCTION FOR FRIVOLOUS CONDUCT BECAUSE THE CONDUCT DID NOT OCCUR WITHIN THE PROCEEDINGS BEFORE THE COURT.

The Second Department, reversing Supreme Court, determined the defendant (Hudes) in this dispute over an easement should not have been sanctioned by ordering him to pay plaintiff's attorney's fees for "frivolous conduct." The facts were not described. The sanction was inappropriate because the behavior which triggered it did not occur within the proceeding before the court: "Courts have discretion to award costs or impose financial sanctions against a party or attorney in a civil action for engaging in frivolous conduct (see 22 NYCRR 130-1.1[a], [b]). Conduct may be deemed frivolous if it is 'undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another,' or 'asserts material factual statements that are false'... . However, the scope of the rule is limited to frivolous conduct in the proceeding before the court, and does not extend to 'tortious conduct in general' ... . Here, the Supreme Court erred in awarding the plaintiff attorneys' fees against Hudes personally, since Hudes' misconduct did not occur within the proceeding before the

court and, therefore, was not 'frivolous' within the meaning of 22 NYCRR 130-1.1 ...". ***Industry LIC Condominium v. Hudes*, 2021 N.Y. Slip Op. 06836, Second Dept 12-8-21**

CIVIL PROCEDURE, APPEALS.

GUIDELINES FOR FUTURE CHILD VICTIMS ACT COMPLAINTS WHERE DEFENDANT MOVES TO STRIKE "SCANDALOUS OR PREJUDICIAL MATTER."

The Second Department, in a full-fledged opinion by Justice Dillon, laid out guidelines for future pleadings in Child Victims Act (CVA) complaints alleging sexual abuse. The question before the court was how the statute allowing the striking of "scandalous and prejudicial matter" (CPLR 3024(b)) should be applied to CVA complaints. The court ultimately only struck one phrase which referenced "another survivor of [defendant's] molestation...". Although the denial of a motion to strike scandalous matter from a pleading is not appealable, the 2nd Department granted leave to appeal: "Based upon the conclusions directly reached here, there are bright lines that should be followed in the future:— Factual allegations about a plaintiff's own alleged sexual abuse will not be stricken from the complaint under CPLR 3024(b) as they are central and necessary to giving notice of the transaction or occurrence or series of transactions and occurrences, and the material elements of the cause(s) of action asserted.— Factual allegations about a defendant's prior sexually-abusive conduct will not be stricken from the complaint under CPLR 3024(b) where one or more causes of action includes, as a necessary element, what acts or propensities an institutional defendant knew or should have known by the time of the plaintiff's own abuse.— Factual allegations about a defendant's concurrent-in-time sexual abuse of another person will not be stricken from the complaint under CPLR 3024(b) where one or more causes of action includes, as a necessary element, what acts or propensities an institutional defendant knew or should have known by the time of the plaintiff's own abuse.— Factual allegations about a defendant's subsequent relevant statements or conduct that specifically relate back to the sexual abuse of the plaintiff will not be stricken from the complaint under CPLR 3024(b).— Factual allegations about a defendant's statements or conduct involving a subsequent sexual abuse survivor, other than the plaintiff, may be stricken from a complaint under CPLR 3024(b) on the ground that they are scandalous or prejudicial and not necessary to the elements of the plaintiff's specific cause(s) of action." ***Pisula v. Roman Catholic Archdiocese of N.Y.*, 2021 N.Y. Slip Op. 06872, Second Dept 12-8-21**

CIVIL PROCEDURE, ATTORNEYS.

SUPREME COURT SHOULD HAVE ACCEPTED PLAINTIFF'S LAW-OFFICE-FAILURE EXCUSE FOR LATE SUBMISSION OF PAPERS OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate a default judgment, based upon law office failure, should have been granted: "[T]he defendant moved for summary judgment dismissing the complaint. That motion was initially returnable on October 20, 2016, but the return date was adjourned to December 8, 2016, with opposition papers to be served by November 21, 2016. The plaintiff served opposition to the motion on or about November 28, 2016 ... . In an order entered February 2, 2017, the Supreme Court granted the defendant's motion for summary judgment. ... [G]iven the totality of all relevant factors, including the delay of only approximately seven days from the due date for opposition papers to the time the plaintiff served opposition papers, the lack of any evidence of willfulness by the plaintiff, or prejudice to the defendant from the delay, and the strong public policy in favor of resolving cases on the merits, the Supreme Court improvidently exercised its discretion in not accepting the plaintiff's excuse of law office failure ... . [T]he plaintiff demonstrated that he had a potentially meritorious opposition to the defendant's motion for summary judgment." ***Stango v. Byrnes*, 2021 N.Y. Slip Op. 06877, Second Dept 12-8-21**

CIVIL PROCEDURE, FORECLOSURE.

A CROSS-MOTION TO DISMISS THE COMPLAINT PURSUANT TO CPLR 3215 (C) IS NOT AN APPEARANCE AND DOES NOT WAIVE THE LACK-OF-JURISDICTION DEFENSE; INFANT DEFENDANT IN THIS FORECLOSURE ACTION WAS NOT SERVED IN ACCORDANCE WITH CPLR 309; THE COMPLAINT SHOULD HAVE BEEN DISMISSED FOR LACK OF PERSONAL JURISDICTION.

The Second Department, reversing Supreme Court, determined the infant defendant's (A.M.'s) cross-motion to dismiss the foreclosure complaint for lack of personal jurisdiction should have been granted: "The defendant James McGown purchased the subject property on January 25, 2006. On March 15, 2007, he executed a mortgage encumbering the subject property in favor of Mortgage Electronic Registration Systems, Inc. (... MERS) ... . MERS subsequently assigned the mortgage to the plaintiff. McGown failed to make a payment due under the terms of the mortgage ... . McGown executed a deed purportedly conveying the subject property to his daughter, the infant A.M., who at the time was less than one year old. * * * ... A.M. did not waive the defense of personal jurisdiction by cross-moving to dismiss the complaint pursuant to CPLR 3215(c). 'A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss' ... . However, certain types of limited involvement in an action by a defendant do not waive jurisdictional defenses, including 'cross-moving to dismiss the complaint pursuant to CPLR 3215(c), as such a motion by a defendant 'does not constitute an appearance in the action' ... . [T]he process server attested that he served A.M. pursuant to CPLR 308(2) by delivering a

copy of the summons and complaint to the 'housekeeper' at A.M.'s dwelling place and then completing the requisite mailing. ... [A]lthough McGown was served individually, he was not served ... as an individual and representative of A.M. ... . Since neither of these methods of service complied with the requirements of CPLR 309, the present action was jurisdictionally defective as asserted against A.M." ***US Bank N.A. v. McGown*, 2021 N.Y. Slip Op. 06879, Second Dept 12-8-21**

CRIMINAL LAW.

THE DEFENSE FOR CAUSE CHALLENGE TO A JUROR WHO SAID SHE WOULD EXPECT THAT THE DEFENSE WOULD PRESENT EVIDENCE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing defendant's conviction, determined the defense for cause challenge to a juror should have been granted: " '[A] prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial' ... . Here, the prospective juror's statements to the effect that she would expect the defense to present evidence raised a serious doubt about her ability to be impartial and her subsequent responses fell short of providing 'unequivocal assurances of impartiality' ...". ***People v. Feddaoui*, 2021 N.Y. Slip Op. 06859, Second Dept 12-8-21**

CRIMINAL LAW, JUDGES, APPEALS.

DEFENDANT, DURING THE PLEA COLLOQUY, DID NOT ADMIT POSSESSION OF A STOLEN "MOTOR VEHICLE," AS OPPOSED TO A "MOTOR CYCLE," AND THE JUDGE DID NOT INQUIRE FURTHER; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL BY A MOTION TO WITHDRAW THE PLEA; GUILTY PLEA VACATED.

The Second Department, vacating defendant's guilty plea, determined the judge should have inquired further when defendant did not admit he possessed a stolen "motor vehicle," as opposed to a "motor cycle." The court noted the issue may be raised on appeal without having moved to withdraw the plea: "As charged here, criminal possession of stolen property in the fourth degree requires possession of 'a motor vehicle . . . other than a motorcycle ... . During his plea allocution the defendant admitted to possession of 'a motor cycle.' No further inquiry was made by the Supreme Court. '[W]here a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered' ... . Where, as here, the court fails in its duty to inquire further, a defendant may raise a claim regarding the validity of the plea even without having moved to withdraw the plea ... . Here, as the defendant contends and the People correctly concede, the Supreme Court's failure to inquire into the validity of the plea after the allocution clearly negated an essential element of the crime requires reversal of the judgment of conviction ...". ***People v. Douglas*, 2021 N.Y. Slip Op. 06857, Second Dept 12-8-21**

FAMILY LAW, CONTRACT LAW, ARBITRATION, CIVIL PROCEDURE.

CUSTODY MATTERS ARE NOT SUBJECT TO ARBITRATION, DESPITE A PROVISION TO THAT EFFECT IN THE STIPULATION OF SETTLEMENT.

The Second Department, reversing Supreme Court, determined: (1) despite the stipulation calling for arbitration, custody matters are not subject to arbitration; and (2) upon remittal the court must determine whether New York has jurisdiction and, if so, whether New York is an inconvenient forum. Plaintiff is a citizen of the US and defendant is a citizen of Israel. The parties lived together in New York: "The Supreme Court erred in declining to exercise jurisdiction over the parties' custody/parental access disputes on the basis that their stipulation of settlement, which was incorporated but not merged into their judgment of divorce, contained an arbitration clause ... . 'Disputes concerning child custody and visitation are not subject to arbitration as 'the court's role as parens patriae must not be usurped' ... . Moreover, since the Supreme Court has made previous custody determinations concerning the parties' children, the court, prior to determining whether it has subject matter jurisdiction, must first determine whether the defendant and the children have a significant connection with New York and whether there is substantial evidence in New York ... . If, upon remittal, the court determines ... that it retains exclusive, continuing jurisdiction over the custody and parental access issues, it may exercise that jurisdiction, or it may decline to do so if it determines ... that New York is an inconvenient forum ...". ***Matsui v. Matsui*, 2021 N.Y. Slip Op. 06843, Second Dept 12-8-21**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF WAS DEEMED TO HAVE ASSUMED THE RISK OF PLAYING CRICKET ON A COURT WITH AN OPEN AND OBVIOUS CRACK.

The Second Department determined defendants' summary judgment motion was properly granted in this slip and fall, assumption of the risk case. Plaintiff alleged he stepped in a hole inside a crack in a tennis court while playing cricket. The crack was deemed open and obvious: " 'Assumption of risk is not an absolute defense but a measure of the defendant's duty of care' ... . The defendants' duty is 'to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, [the participant] has consented to them and defendant has performed its duty' ... . 'This includes risks associated with the construction of the playing surface and any open and obvious condition

on it, including less than optimal conditions' . 'It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results' ... . 'However, participants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport' ... . Further, 'the doctrine of assumption of risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises' ... . Here, the defendants' submissions in support of their motion, which included the plaintiff's deposition testimony and photographs allegedly depicting the accident site, reveal that the crack in the surface of the subject tennis courts, which allegedly caused the plaintiff's accident, was clearly visible ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the open and obvious crack concealed the depth and extent of the alleged hole ...". ***Maharaj v. City of New York*, 2021 N.Y. Slip Op. 06841, Second Dept 12-8-21**

PERSONAL INJURY, EVIDENCE.

DEFENDANT PROPERTY OWNER DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF ANY DEFECTS IN THE CEILING THAT FELL ON PLAINTIFFS; THE RES IPSA LOQUITUR DOCTRINE DID NOT APPLY BECAUSE DEFENDANTS DID NOT HAVE EXCLUSIVE CONTROL OVER THE CONDITION.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this premises liability case should have been granted. Plaintiffs alleged a portion of their bedroom ceiling collapsed on them. Defendant owner of the property demonstrated the lack of actual or constructive notice of any defect in the ceiling. The res ipsa loquitur doctrine did not apply because the condition was not under defendants' exclusive control: "The owner of property has a duty to maintain its property 'in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' ... . Here, the defendants established their entitlement to judgment as a matter of law by demonstrating, prima facie, that they did not have actual or constructive notice that the bedroom ceiling was in a defective condition ... . The evidence submitted by the defendants established that at least one of the plaintiffs had been residing in the third-floor apartment for more than four years, and that prior to the accident, the plaintiffs did not notice any defects in the bedroom ceiling, and had never complained to the defendants about the bedroom ceiling. Moreover, the debris and the ceiling from which it had fallen were dry, and there was no evidence of a leak in the building at or about the time of the accident. In opposition, the plaintiffs failed to raise a triable issue of fact. Contrary to the contention of the plaintiffs' expert, in the absence of a warning about the existence of a latent defect, there was no duty to remove portions of the ceiling plaster to discover what lay behind it ... . Additionally, the plaintiffs failed to raise a triable issue of fact as to whether the doctrine of res ipsa loquitur applied to this case since the defendants did not have the requisite exclusive control over the allegedly defective condition ...". ***Matson v. Dermer Mgt., Inc.*, 2021 N.Y. Slip Op. 06842, Second Dept 12-8-21**

PERSONAL INJURY, MUNICIPAL LAW.

IN THIS SIDEWALK ICE-AND-SNOW SLIP AND FALL CASE, THE MUNICIPALITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE CONDITION, AND THE ABUTTING PROPERTY OWNERS FAILED TO DEMONSTRATE THEY DID NOT CREATE THE CONDITION.

The Second Department, reversing (modifying) Supreme Court in this sidewalk ice-and-snow slip and fall case, determined; (1) the municipality demonstrated it did not have written notice of the ice-and-snow condition and plaintiff did not raise a question of fact about whether the municipality created the condition or benefitted from a special use; and (2), the abutting property-owner defendants did not demonstrate that they did not create the ice-and-snow condition. Summary judgment was properly granted to the municipality, but should not have been granted to the abutting property owners: "Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality, and not on the owner or lessee of abutting property ... . There is an exception to this general rule, however, where the landowner has affirmatively created the dangerous condition ... . The [abutting property-owner defendants] failed to demonstrate, prima facie, that their snow removal efforts around the time of the injured plaintiff's fall did not create or exacerbate the allegedly dangerous condition on the roadway ...". ***Thompson v. Nassau County*, 2021 N.Y. Slip Op. 06878, Second Dept 12-8-21**

REAL PROPERTY LAW.

PLAINTIFF WAS NOT ENTITLED TO AN EASEMENT BY IMPLICATION FOR A DRIVEWAY LEADING TO PLAINTIFF'S GARAGE.

The Second Department, reversing Supreme Court, determined plaintiff was not entitled to summary judgment finding an easement by implication for a driveway leading to a garage on plaintiff's property. The lot with the driveway, Lot B, and plaintiff's lot, Lot A, were previously owned by the same party who conveyed Lot A to plaintiff and Lot B to defendant, plaintiff's sister-in-law: " 'An easement may be implied from pre-existing use upon severance of title when three elements are shown: '(1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so

long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary to the beneficial enjoyment of the land retained' ... . 'Stated another way, an implied easement will arise upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate' ... . An implied easement must be 'a reasonable necessity, rather than a mere convenience' ... . The plaintiff did not establish that the use of the driveway on Lot B was a reasonable necessity to the beneficial use of the land and not a mere convenience. It is undisputed that Lot A is not landlocked and that the plaintiff can access Lot A without using the driveway on Lot B. ... [T]he home situated on Lot A is rented to one set of tenants, and the parking spaces in the garage are rented to another set of tenants. Since access to off-street parking is a mere convenience, the plaintiff cannot establish that the easement is a reasonable necessity." ***Bonadio v. Bonadio*, 2021 N.Y. Slip Op. 06830, Second Dept 12-8-21**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES); EVIDENCE.

ALTHOUGH THE DETERMINATION THE INMATE CURSED AT AND THREATENED A CORRECTION OFFICER WAS CONFIRMED, THE CONCURRENCE NOTED THE OFFICER WAS NOT WEARING A BODY CAMERA, DESPITE THE PILOT PROGRAM IMPLEMENTED IN 2018.

The Third Department confirmed the finding that petitioner cursed at and threatened a correction officer. The concurrence noted that a body camera would have provided crucial evidence in a case like this: "Although we can accept the explanation here that the correction officer had not been assigned a body camera on the day of the incident, the perplexing question that remains is why not? A recording of actual events would certainly assist in resolving credibility disputes such as the one at hand, either exonerating or condemning the actions of the facility's employees ... . We are mindful that the Department of Corrections and Community Supervision has taken steps since 2018 to implement a body camera pilot program and that legislation has been introduced in the State Assembly and Senate to amend the Correction Law to require respondent to establish a '[b]ody camera for correction officers pilot program' at maximum security facilities ... . As is evident from this case, it appears that a comprehensive body camera program has yet to be established." ***Matter of Pine v. Annucci*, 2021 N.Y. Slip Op. 06903, Third Dept 12-9-21**

FAMILY LAW, EVIDENCE.

FAMILY COURT SHOULD HAVE HELD A HEARING TO DETERMINE WHETHER THE CHILDREN SHOULD RECEIVE COVID VACCINATIONS; THE CHILDREN AND THEIR FATHER ALLEGEDLY WANTED THE VACCINE, MOTHER OBJECTED.

The Third Department, reversing Family Court, determined a hearing was required before allowing the children to be vaccinated against COVID. The attorney for the children (AFC) and father, reflecting the wishes of the children, asked for court-approval for vaccination. Mother objected to vaccinating the children: "Family Court gave the parties notice that it was considering the AFC's request and directed the parties to submit their positions to the court in writing, thus providing some limited opportunity to be heard. Having reviewed those submissions, the court rendered its decision. The court made specific findings that the subject children 'have been fully informed regarding COVID-19 and the vaccine' and that they 'have the capacity to consent.' These factual findings were made without evidence and based solely on hearsay, through unsworn letters containing representations by counsel. This does not constitute a sufficient basis to support these findings. Considering that providing a vaccine constitutes medical treatment, and given the general preference toward conducting a hearing in this type of situation, we find that a hearing was required before Family Court could grant petitioner's request over respondent's objection ... . At such a hearing, the court must focus on whether respondent's refusal to authorize vaccination constitutes 'an acceptable course of medical treatment for [her] child[ren] in light of all the surrounding circumstances,' while heeding the Court of Appeals' cautionary point that courts cannot 'assume the role of a surrogate parent' ... . As the Office of Children and Family Services' guidance documents prohibit local agencies from administering a COVID-19 vaccine if the child refuses to consent, the hearing must address whether the subject children have been fully informed about COVID-19 and the vaccine and whether they have the capacity to consent. After the hearing, the court must carefully balance the risks and benefits of the potential vaccination to decide whether to authorize it for the subject children ...". ***Matter of Athena Y. (Ashleigh Z.)*, 2021 N.Y. Slip Op. 06908, Third Dept 12-9-21**

FAMILY LAW, EVIDENCE.

SEXUAL BEHAVIOR IN FRONT OF THE CHILD AND SHOWING PORNOGRAPHY TO THE CHILD CONSTITUTED NEGLECT.

The Third Department, reversing (modifying) Family Court, determined the dismissal of the sexual-behavior-related neglect allegations was error. The petition alleged masturbation in front of the child, having sex in front of the child, and show-

ing pornography to the child. The Third Department concluded the allegations were sufficiently supported by the evidence. ***Matter of Chloe L. (Samantha L.)*, 2021 N.Y. Slip Op. 06892, Third Dept 12-9-21**

PERSONAL INJURY, MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

WHEN CONFRONTED WITH AN ARMED SUSPECT, DEFENDANT POLICE OFFICER FIRED HER WEAPON AND STRUCK PLAINTIFF, ANOTHER POLICE OFFICER; THE TWO POLICE OFFICERS, WHO WORKED FOR DIFFERENT MUNICIPALITIES, WERE DEEMED CO-EMPLOYEES PURSUANT TO A POLICE MUTUAL AID AGREEMENT; THEREFORE, PLAINTIFF'S NEGLIGENCE ACTION WAS PRECLUDED BY GENERAL OBLIGATIONS LAW § 11-106.

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff police officer and defendant police were co-employees pursuant a Police Mutual Aid Agreement between two municipalities, the Town of Glenville and the Village of Scotia. Plaintiff, a Glenville police officer, alleged defendant , a Scotia police officer, was negligent in firing her weapon at a suspect, thereby causing a bullet to strike plaintiff. Because the plaintiff and defendant were deemed co-employees pursuant to the agreement, General Obligations Law § 11-106 prohibited plaintiff from suing in negligence: "Pursuant to General Obligations Law § 11-106, a police officer may now assert a cause of action sounding in negligence 'for injuries suffered while in the line of duty against entities other than municipal employers and fellow workers' ... . The issue thus boils down to whether plaintiff and Peck [defendant] were acting as coemployees at the time of the incident, which would bar plaintiff's action. Based primarily upon the operative provisions of the Agreement, we find that they were coemployees on the night of the incident, thereby insulating defendants from liability." ***Ferretti v. Village of Scotia*, 2021 N.Y. Slip Op. 06895, Third Dept 12-9-21**

UNEMPLOYMENT INSURANCE.

CLAIMANT ACTOR WAS NOT AN EMPLOYEE OF THE SCHOOL OF VISUAL ARTS AND THEREFORE WAS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant actor was not an employee of the School of Visual Arts (SVA). Claimant was paid $10 an hour for a couple of acting jobs at SVA: "Claimant, a professional actor who maintained his own website and IMDb listing to showcase his acting experience and credentials, was referred for the two assignments at issue by an SVA faculty member. Claimant readily acknowledged that he only provided services for SVA once or twice a year, that he was free to provide similar services for other entities, that he could decline to participate in SVA projects for any reason, that he signed a written invoice proclaiming his status as an independent contractor and that no deductions were taken from his pay. Although claimant insisted, contrary to the testimony offered by SVA's representative, that the scripts provided to him were not authored — and the scenes in which he appeared were not directed — by students, a closer reading of claimant's testimony nonetheless reveals that the 'direction' that he purportedly received from SVA faculty members was minimal and for the purpose of teaching students how to direct. In short, despite other possible indicia of an employment relationship, the record as a whole does not demonstrate that SVA exercised overall control over important aspects of the professional services offered by claimant ...". ***Matter of Ewens (School of Visual Arts, LLC--Commissioner of Labor)*, 2021 N.Y. Slip Op. 06894, Third Dept 12-9-21**

UNEMPLOYMENT INSURANCE.

CLAIMANT WAS LAID OFF AFTER 15 YEARS BUT CONTINUED TO DO SIMILAR WORK FOR THE EMPLOYER; AFTER HE WAS LAID OFF HE WAS NO LONGER AN EMPLOYEE AND THEREFORE WAS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined a photograph researcher who continued to work for a publisher, Rosen Publishing, after he was laid off after 15 years, was not an employee and therefore was not entitled to unemployment insurance benefits: "[W]e conclude that ... the Board's finding of an employer-employee relationship is not supported by substantial evidence. After [claimant was laid off], when a photograph research project became available, Rosen Publishing would email claimant the project's title, the number of specs needed and the deadline for the project, which project he could accept or reject. If claimant accepted the project, an additional email with further information regarding the book's manuscript and further detail about the project was provided. Other than the deadline for the project, claimant was not required to work any specific hours, was not required to report to Rosen Publishing at any time during the course of the project, received no fringe benefits and could have others perform the research. Claimant was not prohibited from working for competitors, there was no written contract and he was not reimbursed for any expenses, nor was he provided with any equipment to perform his research." ***Matter of Levick (Rosen Publ. Group Inc.--Commissioner of Labor)*, 2021 N.Y. Slip Op. 06890, Third Dept 12-9-21**

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