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COURT OF APPEALS

CRIMINAL LAW.

FAIILURE TO READ JURY NOTES TO COUNSEL BEFORE CALLING IN THE JURY WAS NOT A MODE OF PROCEEDINGS ERROR, THE ERROR, THEREFORE, MUST BE PRESERVED BY OBJECTION.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissenting opinion by Judge Lippman in which Judge Rivera concurred, determined the trial judge's failure to read jury notes to counsel and seek their input before calling in the jury was not a mode of proceedings error. Therefore, absent objection, the error was not preserved: "Where, as here, counsel has meaningful notice of a substantive jury note because the court has read the precise content of the note into the record in the presence of counsel, defendant, and the jury, the court's failure to discuss the note with counsel before recalling the jury is not a mode of proceedings error. Counsel is required to object to the court's procedure to preserve any such error for appellate review. ... We have acknowledged that some departures from *O'Rama* procedures are subject to our rules of preservation, such as where the court reads the entire content of the note verbatim in open court prior to responding to the jury, (Walston, 23 NY3d at 989 …)." [internal quotation marks omitted] **People v Nealon, 2015 NY Slip Op 07781, CtApp 10-27-15**

CRIMINAL LAW.

COURT'S UNJUSTIFIABLY NARROW INTERPRETATION OF JURY'S REQUEST FOR EVIDENCE REQUIRED REVERSAL.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, with a concurring memorandum by Judge Rivera, determined the trial judge's narrow reading of a request for evidence of the benefits two prosecution witnesses received in return for their testimony required reversal. There was essentially no evidence other than the testimony of the two witnesses pointing to defendant as the shooter. A written cooperation agreement with one of the two witnesses outlined some of the benefits accorded him. However, there was also trial testimony in which both witnesses testified about other benefits received in exchange for testimony. The jury requested to "see" the evidence of the benefits. The court read the request narrowly to refer only to the written cooperation agreement and gave the jury the impression only the cooperation agreement was in evidence. The Court of Appeals held that the jury note should have been read as a request for all the evidence of benefits accorded the witnesses and the failure to provide all the requested evidence was reversible error: "In this case … the trial court abused its discretion by declining to provide the jurors with information that they plainly wanted and incorrectly characterizing the state of the evidence on the subject of their inquiry." **People v Taylor, 2015 NY Slip Op 07782, CtApp 10-27-15**

CRIMINAL LAW.

THE COURT'S FAILURE TO RESPOND TO JURY NOTE REQUESTING TRANSCRIPTS OF RECORDED PHONE CALLS, PORTIONS OF WHICH WERE TRANSLATED FROM SPANISH TO ENGLISH, MANDATED REVERSAL.

The Court of Appeals reversed the Appellate Division and held that the court's failure to respond to the jury's request for transcripts of recorded phone calls, portions of which were translated from Spanish to English, was reversible error. The request, under the facts, was substantive, not ministerial. Therefore, the court was required to inform counsel of the request and to respond to it: "For reasons stated in *People v Silva* (24 NY3d 294 [2014] ..., the Appellate Division erred in holding that reversal was not required. Contrary to the Appellate Division's determination, the jury's request to see the transcripts did not merely require 'the ministerial actions of informing the jury that none of the items they requested were in evidence' ... . Inasmuch as a significant portion of defendant's conversations were conducted in Spanish, the jury could not be expected to understand the recordings without the aid of the transcripts ... . Moreover, the trial court expressly invited the jurors to ask for the transcripts during deliberations and told them the procedure by which they could see the transcripts, which involved reassembling the jury in the courtroom. Thus, the jury's requests for the transcripts required a substantive response, and reversal is required because these 'substantive jury notes, marked as court exhibits, were neither revealed to the attorneys nor addressed by the court[]' (Silva, 24 NY3d at 300)." **People v Mendez, 2015 NY Slip Op 07786, CtApp 10-27-15**

CRIMINAL LAW.

PROPER "INITIAL AGGRESSOR" JURY INSTRUCTION WHERE DEFENDANT INTERVENES IN AN ONGOING FIGHT EXPLAINED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined a flawed "initial aggressor" jury instruction (an exception to the justification defense) required reversal. The defendant alleged that he intervened in an ongoing fight on behalf of his brother, who was being beaten with a hammer by the victim. The court described how the "initial aggressor" exception to the justification defense should be explained to the jury where a defendant intervenes in an ongoing fight. Essentially, if the intervenor knowingly intervenes on behalf of the initial aggressor, the defense is not available. However, if the intervenor had nothing to do with starting the fight and had no reason to know who started the fight, the justification defense is available: "[T]he standard [initial aggressor jury instruction] is misleading unless a supplemental charge is given on the meaning of 'initial aggressor' in the defense-of-another scenario ... . Thus, the jury should have been charged that, in the context of this case, the initial aggressor rule means — in sum and substance — that if defendant, as 'the intervenor[,] somehow initiated or participated in the initiation of the original struggle or reasonably should have known that [his brother, as] the person being defended[,] initiated the original conflict, then justification is not a defense . . . If [defendant] had nothing to do with [the] original conflict and had no reason to know who initiated the first conflict, then the defense is available' ...". **People v Walker, 2015 NY Slip Op 07784, CtApp 10-27-15**

CRIMINAL LAW, EVIDENCE.

THE UNACCEPTED OFFER OF A KEY TO DEFENDANT'S APARTMENT MADE TO THE 10-YEAR-OLD VICTIM WAS SUFFICIENT TO SUPPORT THE ATTEMPTED KIDNAPPING CHARGE; TWENTY-YEAR-OLD CHILD MOLESTATION CONVICTION PROPERLY ADMITTED TO SHOW DEFENDANT'S INTENT RE: KIDNAPPING.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a cogent dissenting opinion by Judge Pigott, determined evidence of a prior sex crime against a child was admissible in an attempted kidnapping prosecution, and further determined the evidence of attempted kidnapping was sufficient. Twenty years earlier, the defendant had been convicted of molesting his step-daughter. Apparently there was a pattern of behavior with his step-daughter which included dressing up (in costume) and inviting her to go places with him. That pattern was being repeated with the 10-year-old victim in the instant case. Defendant at one point showed up at the victim's door dressed up in a costume. Defendant repeatedly asked the victim to go with him for ice cream or to a movie. Defendant offered the key to his apartment to the victim (which she refused). It was that offer (of a key) which formed the basis of the attempted kidnapping charge. The defendant's conviction for molesting his step-daughter was allowed in evidence to show the defendant's intent re: kidnapping. The People and the defendant presented expert testimony about defendant's behavior pattern with his step-daughter and the current victim: "With respect to proof of defendant's intent … the People were required to prove that defendant intended to prevent the victim's liberation by secreting or holding her in a place where she was not likely to be found (see Penal Law §§ 135.00 [2] [a]; 135.20). Defendant's intent may be inferred from his actions and the surrounding circumstances ... . This Court has recognized that 'circumstantial evidence of intent is often essential to prosecution for an attempted crime because . . . such evidence may be the only way of proving intent in the typical case of criminal attempt'...". **People v Denson, 2015 NY Slip Op 07779, CtApp 10-27-15**

DISCIPLINARY HEARINGS (INMATES).

ABSENT A CLEAR DUE PROCESS VIOLATION, THE CORRECT REMEDY FOR FAILURE TO EXPLAIN WHY A WITNESS REQUESTED BY THE INMATE DID NOT TESTIFY (A RULE VIOLATION) IS A NEW HEARING, NOT EXPUNGEMENT.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that, under the facts, the correct remedy for the failure to call a witness requested by the inmate at a disciplinary hearing was a new hearing, not expungement. The court explained the due process requirements in this context, and the requirements of the Department of Correctional and Community Services' (DOCCS') rules, which go beyond the due process requirements. Under the rules, if a requested witness is not called, the inmate must be given a written explanation for the witness' absence. Due process does not require prison officials to explain why a witness did not appear. Here, because, under the facts, there was a clear rule violation, but no clear due process violation, a new hearing, not expungement, was appropriate. **Matter of Texeira v Fischer, 2015 NY Slip Op 07783, CtApp 10-27-15**

FIRST DEPARTMENT

ATTORNEYS.

MISREPRESENTATIONS, DISTORTIONS, ATTACKS ON THE COURT, ETC., INCLUDED IN MOTION PAPERS WARRANTED SANCTIONS AGAINST ATTORNEY.

The First Department, in a full-fledged opinion by Justice Andrias, with two concurring memoranda, over a full-fledged dissenting opinion by Justice Saxe, determined Supreme Court properly sanctioned one of the two attorneys who represented a 94-year-old woman in guardianship proceedings. Supreme Court's sanctioning of a second attorney and denial of all attorney fees were reversed. The sanctions stemmed from motion papers which, Supreme Court found, included misrepresentations, omissions, distortions, and attacks on the court and others which were wholly without merit and made in bad faith. The court explained the applicable law: "Upon our review of the record, we hold that the court's finding that the orders to show cause submitted in Motion Seq. Nos. 2 & 4 were based on material false statements, which constituted frivolous conduct within the meaning of 22 NYCRR § 130-1.1(c)(3) warranting the imposition of costs, including attorneys' fees, and a monetary sanction, was not a clear abuse of discretion ...". **Matter of Kover, 2015 NY Slip Op 07802, 1st Dept 10-27-15**

INSURANCE LAW.

PUBLIC ADJUSTER PROVIDED "VALUABLE SERVICES" AND WAS ENTITLED TO COMPENSATION, EVEN THOUGH ITS EFFORTS DID NOT LEAD DIRECTLY TO SETTLEMENT WITH THE INSURER.

The First Department, in a full-fledged opinion by Justice Saxe, determined a public adjuster (PAB), who initially aided the insured (Seward's Park) in making its claim against the insurer, was entitled to compensation, even though its efforts did not lead directly to a settlement. After the initial settlement negotiations failed there was a trial at which the insured prevailed. That verdict was vacated and a new trial ordered. The matter settled before the second trial. PAB sought payment based upon the amount of settlement (per the initial contract with the insured). After a jury trial, PAB was awarded compensation, but the trial judge issued a judgment notwithstanding the verdict. The First Department reversed finding there was a valid line of reasoning supporting the award of compensation to PAB based upon its provision of "valuable services" to Seward's Park when the claim was first made. **Public Adj Bur., Inc. v Greater N.Y. Mut. Ins. Co., 2015 NY Slip Op 07942, 1st Dept 10-29-15**

INSURANCE LAW, CONTRACT LAW, ATTORNEYS.

"BAD FAITH CLAIMS HANDLING" CAUSE OF ACTION PROPERLY DISMISSED AS DUPLICATIVE OF BREACH OF CONTRACT CAUSE OF ACTION; SANCTIONS APPROPRIATE FOR INCLUSION OF DISMISSED CAUSE OF ACTION IN AMENDED COMPLAINT.

The First Department determined a purported cause of action for "bad faith claims handling" in an insurance-coverage dispute was duplicative of the breach of contract cause of action (and was therefore properly dismissed). The court further determined that attorney sanctions were appropriate for including a dismissed cause of action in an amended complaint. The First Department explained the (rare) circumstance when breach of contract will give rise to a distinct tort cause of action (not the case here): "In some circumstances [t]he very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in performance of the contract obligations, and the breach of that independent duty will give rise to a tort claim ..., in which the Court held that a fire alarm company owed its customer a duty of reasonable care independent of its contractual obligations, and that notwithstanding a contractual provision exculpating the alarm company from damages flowing from its negligence, it could be held liable in tort for its gross failure to properly perform its contractual services … . Further, [w]here a party has fraudulently induced the plaintiff to enter into a contract, it may be liable in tort ... . However, where a party is merely seeking to enforce its bargain, a tort claim will not lie ...". [internal quotation marks omitted] **Orient Overseas Assoc. v XL Ins. Am., Inc., 2015 NY Slip Op 07788, 1st Dept 10-27-15**

LANDLORD-TENANT, CIVIL PROCEDURE.

CAUSE OF ACTION BASED UPON A DISPUTE ABOUT THE CORRECT RENT-INCREASE COMPUTATION ACCRUES ON THE FIRST USE OF THE DISPUTED COMPUTATIONAL METHODOLOGY.

The First Department determined a lawsuit stemming from a dispute about the proper rent computation in an ambiguous contract was time-barred. The lawsuit was started in 2009. However, the rent computation problem was apparent in 1999. That is when the statute of limitations started running and it does not start anew every year the problem persisted: "In *Goldman Copeland* [260 AD2d 370], this Court squarely held that a claim for breach of contract based on an allegedly erroneous computation of rent accrues upon the first use of that computational methodology, and the statute of limitations does not begin to run anew each time the same formula is used. * * * *Goldman Copeland* is a precedent of this Court, and we adhere to it as a matter of stare decisis. Its holding applies to this case, as Tenant consistently paid, and Landlord accepted, rent based on two successive 50-cents-per-square-foot escalations from 1999 through 2009, when this action was commenced. Further,

when the first rent escalation went into effect in late 1999, Landlord could have determined, through the use of simple arithmetic, that the lease's rent illustrations for the initial 25-year term were not based on 10% increases. When Landlord subsequently discovered in 2001 that it had not been billing rent based on a 10% escalation since 1999, the discovery was not based on any information that Landlord had not possessed in 1999." **K-Bay Plaza, LLC v Kmart Corp., 2015 NY Slip Op 07905, 1st Dept 10-29-15**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW.

COURTS' LIMITED REVIEW POWERS RE: AN ADMINISTRATIVE DETERMINATION MADE AFTER A HEARING CLEARLY EXPLAINED.

In reversing Supreme Court's annulment of the fire district board's determination petitioner was not entitled to benefits pursuant to General Municipal Law § 207-a(2), the Second Department explained the courts' review powers in this context: "Judicial review of an administrative determination made after a hearing required by law is limited to whether the determination is supported by substantial evidence ... . Substantial evidence means more than a mere scintilla of evidence, and the test of whether substantial evidence exists in a record is one of rationality, taking into account all the evidence on both sides ... . When there is conflicting evidence or different inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists ... . Moreover, where there is conflicting expert testimony, in making a General Municipal Law § 207-a determination, a municipality is free to credit one physician's testimony over that of another ... . Thus, even if conflicting medical evidence can be found in the record, the municipality's determination, based on its own expert's conclusions, may still be supported by substantial evidence ...". [internal quotation marks omitted] **Matter of Delgrande v Greenville Fire Dist., 2015 NY Slip Op 07838, 2nd Dept 10-28-15**

CIVIL PROCEDURE.

AFFIDAVITS AND TEXT MESSAGES DO NOT CONSTITUTE "DOCUMENTARY EVIDENCE" IN THE CONTEXT OF A MOTION TO DISMISS PURSUANT TO CPLR 3211(a)(1).

Defendant's motion to dismiss the breach of contract complaint should have been denied. The affidavits and text messages submitted in support of the motion did not constitute "documentary evidence" upon which a motion to dismiss may be based. The court defined "documentary evidence" in this context: "In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as 'documentary evidence,' it must be 'unambiguous, authentic, and undeniable' ... . '[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case' ... . However, '[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)' ... . Here, the affidavits and text messages relied upon by the Supreme Court in concluding that the plaintiff failed to comply with the alleged condition precedent were not 'essentially undeniable,' and did not constitute documentary evidence ...". **Eisner v Cusumano Constr., Inc., 2015 NY Slip Op 07812, 2nd Dept 10-28-15**

CONTRACT LAW.

IMPLIED DEFINITE TERM OF DURATION.

The Second Department explained the analytical criteria for determining the duration of a contract with no express definite term of duration. If there is no definite term of duration, the contract is terminable at will. However, a definite term of duration need not be express; it can be implied from the surrounding circumstances: "Contracts containing no definite term of duration are terminable at will ... . A definite term of duration need not be relayed in express terms, and may be implied ... , and where a duration may be fairly and reasonably supplied by implication, a contract is not terminable at will ... . In the absence of an express term fixing the duration of a contract, the courts may inquire into the intent of the parties and supply the missing term if a duration may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent ... . Here, the Supreme Court correctly determined that, by fair implication, the duration of the parties' agreements was dependent upon the continued sale of the products designated in the subject agreements and, thus, the agreements could be terminated only upon [defendant's] discontinuation of the sale of the designated products." [internal quotation marks omitted] **Bennett v Atomic Prods. Corp., 2015 NY Slip Op 07806, 2nd Dept 10-28-15**

CRIMINAL LAW.

NON-CONSTITUTIONAL APPELLATE ISSUES RE: REFUSAL TO SUBMIT TO A CHEMICAL TEST (DWI) DO NOT SURVIVE A GUILTY PLEA.

The Second Department, in a full-fledged opinion by Justice Leventhal, determined defendant, by pleading guilty, had forfeited his right to appellate review of rulings about the admissibility of his refusal to submit to a chemical test (DWI) after his involvement in a car accident. The court explained why some appellate issues survive a guilty plea and some don't: "[N]ot every claim is forfeited by a guilty plea. The issues that survive a valid guilty plea generally relate either to jurisdictional matters, such as an insufficient accusatory instrument, or to rights of a constitutional dimension that go to the heart of the criminal justice process ... . The critical distinction is between defects implicating the integrity of the process, which may survive a guilty plea, and less fundamental flaws, such as evidentiary or technical matters, which do not ... . Examples of rights of constitutional dimension which are not forfeited by a guilty plea include the constitutional right to a speedy trial, the protection against double jeopardy, and the competency of the defendant to stand trial ... . Among the limited group of issues that survive a valid guilty plea and may be raised on a subsequent appeal are those relating to the denial of a motion to suppress evidence under CPL 710.20 ... . * * * In this case, the defendant did not move to suppress the results of a chemical test of his blood. Indeed, the police did not perform a chemical test upon the defendant. Rather, he moved to preclude the People from admitting testimony of his refusal to submit to a chemical test. Such a motion cannot be characterized as one seeking suppression under CPL 710.20(5). Accordingly, the defendant does not have a statutory right to appellate review of the County Court's ruling permitting the introduction of evidence of his refusal to submit to a chemical test. Nor is the defendant's claim that the County Court erred in ruling that the People would be permitted to introduce evidence at trial of his refusal to submit to a chemical test a claim of constitutional dimension, or one that bears upon the integrity of the judicial process. Rather, the court's determination relates to an evidentiary or technical matter." [internal quotation marks omitted] **People v Sirico, 2015 NY Slip Op 07862, 2nd Dept 10-28-15**

CRIMINAL LAW, EVIDENCE.

FAILURE TO TURN OVER IMPEACHMENT EVIDENCE RE: A CENTRAL PROSECUTION WITNESS REQUIRED VACATION OF THE CONVICTION.

The Second Department determined County Court properly vacated defendant's conviction. The case against the defendant relied entirely on a statement taken by Detective Tavares. The prosecution did not turn over to the defense evidence alleging Detective Tavares had procured a false confession (leading to a federal lawsuit): "The People have an obligation to disclose exculpatory evidence in their possession that is favorable to the defendant and material to his or her guilt or innocence ... . The prosecutor's duty to exchange *Brady* material extends to the disclosure of evidence that can be used to impeach the credibility of a witness for the People whose testimony may be determinative of the defendant's guilt ... . In order to establish a *Brady* violation, a defendant must prove: (1) the evidence at issue is favorable to him or her, (2) the evidence was suppressed by the prosecution, either willfully or inadvertently, and (3) prejudice arose because the suppressed evidence was material ... . Here, the crucial evidence against the defendant at trial was his statement admitting to the shooting, taken by Detective Ronald Tavares. There was no physical evidence connecting the defendant to the crime, and the eyewitnesses could not identify him. Given the importance of Detective Tavares' testimony in establishing the defendant's guilt, the Supreme Court properly determined that evidence concerning allegations that he had procured a false confession in an unrelated matter involving two police officers, which led to an internal affairs investigation of those officers and a federal lawsuit against, among others, Detective Tavares, was favorable to the defense and material ... . The evidence was responsive to a defense demand and there is a reasonable possibility that the outcome of the trial would have differed had the evidence been produced ... . Furthermore, the defendant sufficiently established that the prosecutor had actual knowledge of the allegations against Detective Tavares and the related investigation in the unrelated matter ...". [internal quotation marks omitted] **People v Hubbard, 2015 NY Slip Op 07858, 2nd Dept 10-28-15**

DISCIPLINARY HEARINGS (INMATES).

IDENTICALLY WORDED MISBEHAVIOR REPORTS RE: DIFFERENT INMATES WERE INHERENTLY INCREDIBLE.

The Second Department determined the inmate's disciplinary determination must be annulled. Identically worded reports, concerning different inmates, signed by at least three different reporting officers, were "inherently incredible:" "The misbehavior report in this case was in the form of a first-person narrative, which provided a number of factual details about the reporting officer as well as the petitioner, including the direction from which the officer arrived at the scene, the exact location from which the officer first observed the disturbance, his personal observation of the petitioner 'yelling and shouting,' the officer's inability to hear the petitioner's exact words, and the number of direct orders the officer gave the petitioner. Ordinarily, such a particularized statement would be sufficiently relevant and probative to constitute substantial evidence supporting the determination ... . Here, however, the petitioner successfully challenged the reliability of the report by showing that identically worded reports (except for the name and identifying information of the subject inmate) were

signed by at least three different reporting officers. While it is entirely plausible that several inmates, in the course of a disturbance, may have engaged in substantially similar misbehavior, we find it inherently incredible that several officers could have experienced the same particularized encounter with a number of different inmates. We further note that the hearing officer twice precluded the petitioner from asking the reporting officer whether he had actually written the unsworn report." **Matter of Jackson v Annucci, 2015 NY Slip Op 07842, 2nd Dept 10-28-15**

FAMILY LAW.

TWO-JUSTICE DISSENT ARGUED TERMINATION OF FATHER'S PARENTAL RIGHTS WAS NOT IN THE BEST INTERESTS OF THE CHILD.

The Second Department, over a two-justice dissent, determined father had abandoned the child and his parental rights were properly terminated. The dissent argued that, because of new facts revealed after the order appealed from was issued, and because the mother's parental rights were not terminated, severing the child from his father was not in the child's best interests: [***From the Dissent***]: "A petition to terminate parental rights on the ground of abandonment may be denied where, despite evidence that the parent abandoned the child during the six-month period prior to the filing of the petition, the record nevertheless demonstrates that termination would not be in the best interests of the child ... . Here, my colleagues in the majority conclude that the father's failure to take prompt action to assert paternity after the mother informed him that he might be the child's father in the six months prior to the filing of the petition constituted abandonment. However, that finding does not mandate granting the petition to terminate parental rights where, as here, new facts arose after the filing of the petition, and after the issuance of the order appealed from, which demonstrate that termination of the father's parental rights is not in the child's best interests ... . * * * [T]here are no facts in this record which indicate that a relationship between the child and his father will be harmful to the child ... . * * * It appears from this record that terminating the father's parental rights would serve no purpose other than to sever any potential ties between the child and his father and paternal kindred." **Matter of Jake W.E. (Jonathan S.), 2015 NY Slip Op 07840, 2nd Dept 10-28-15**

FAMILY LAW.

CHILDREN'S REMAINING IN FOSTER CARE UNTIL FATHER'S RELEASE FROM PRISON WAS NOT A SUFFICIENT PLAN FOR THE CHILDREN'S FUTURE, PERMANENT NEGLECT FINDING PROPER.

The Second Department determined a permanent neglect finding was proper. Children's remaining in foster care until father's release from prison was not a sufficient plan for the children's future: "A parent's incarceration does not obviate the obligation to develop a realistic and feasible plan for the children's future ... . A plan for children to remain in foster care throughout a parent's incarceration and for a period of time thereafter as necessary to establish suitable living arrangements for the children is not a viable plan to secure permanency for the children ... . Thus, [t]he failure of an incarcerated parent to provide any realistic and feasible alternative to having the children remain in foster care until the parent's release from prison . . . supports a finding of permanent neglect ... . Here, the father failed to provide any feasible plan for the subject children other than continued foster care until after he was released from prison and had time to get on [his] feet. Accordingly, despite the petitioner's diligent efforts to encourage and strengthen the parental relationship, the father failed to adequately plan for the children's future, and the Family Court's finding of permanent neglect was supported by clear and convincing evidence ...". [internal quotation marks omitted] **Matter of Jenna K. (Jeremy K.), 2015 NY Slip Op 07843, 2nd Dept 10-28-15**

MENTAL HYGIENE LAW.

ANTI-SOCIAL PERSONALITY DISORDER (ASPD) ALONE WILL NOT SUPPORT CIVIL COMMITMENT OF SEX OFFENDER.

The Second Department noted that the diagnosis that a sex offender suffers from anti-social personality disorder (ASPD) is insufficient to justify civil commitment: "A diagnosis of anti-social personality disorder (hereinafter ASPD) has so little relevance to the controlling legal criteria of Mental Hygiene Law § 10.03(i) that it cannot be relied upon to show mental abnormality for [Mental Hygiene Law] article 10 purposes ... . Since ASPD was the sole diagnosis underlying the jury's finding that the appellant suffers from a mental abnormality as defined in Mental Hygiene Law § 10.03(i), the finding was not supported by legally sufficient evidence, and the petition must be dismissed ...". [internal quotation marks omitted] **Matter of State of New York v Odell A., 2015 NY Slip Op 07851, 2nd Dept 10-28-15**

PERSONAL INJURY.

TO PREVAIL ON A MOTION FOR SUMMARY JUDGMENT, LESSEE MUST SHOW BOTH (1) THE ABSENCE OF A STATUTE OR ORDINANCE IMPOSING TORT LIABILITY FOR FAILURE TO REMOVE ICE AND SNOW FROM A SIDEWALK AND (2) THE LESSEE DID NOT CREATE OR EXACERBATE THE CONDITION BY ITS SNOW REMOVAL EFFORTS.

The Second Department noted that defendant-lessee's motion for summary judgment in a sidewalk slip and fall case was properly denied. Although the lessee (Valley) demonstrated no statute or ordinance imposed a duty to remove snow and ice from the sidewalk, it did not demonstrate that it was free from negligence by showing it did not create or exacerbate

the condition with snow removal efforts: "The owner or lessee of property abutting a public sidewalk is under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so' ... . 'In the absence of a statute or ordinance imposing tort liability on the lessee, it can be held liable only if it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous' ... . Valley, as lessee, established that no statute or ordinance imposed tort liability on it. However ... Valley failed to make a prima facie showing that it was free from negligence. Valley did not show that it made no efforts to clear the sidewalk on the date of the injured plaintiff's accident or that any snow and ice removal efforts undertaken by it, or by persons on its behalf, did not exacerbate the hazardous condition which allegedly caused the injured plaintiff to fall ...". **Bleich v Metropolitan Mgt., LLC, 2015 NY Slip Op 07808, 2nd Dept 10-28-15**

PERSONAL INJURY.

CRITERIA FOR PROPERTY OWNER'S LIABILITY FOR AN ASSAULT BY AN INTOXICATED GUEST EXPLAINED.
The Second Department noted that the owners of property were not liable for injuries stemming from an assault by an intoxicated guest at a party hosted by the property owners' daughter. The property owners demonstrated they were out of town when the party was held and did not know their daughter held such parties: "Under a theory of common-law negligence, a landowner may have responsibility for injuries caused by an intoxicated guest ..., although liability may be imposed only for injuries that occurred on a defendant's property, or in an area under the defendant's control, where the defendant had the opportunity to supervise the intoxicated guest and was reasonably aware of the need for such control ... . 'Without the requisite awareness [of the risk or threat], there is no duty' ... . Here, the appellants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging common-law negligence insofar as asserted against them. The evidence submitted in support of the appellants' motion demonstrated that they were out of town when the party took place at their home, that they had not authorized their daughter Monica to have a party, and that they were unaware of its occurrence. Moreover, the evidence demonstrated that they had no knowledge that, prior to the subject party, their daughter had thrown any parties while they were out of town at which individuals under the age of 21 were drinking alcohol. Thus, the appellants had no opportunity to control [the assailant's] conduct, nor were they aware of the necessity therefor, both of which are prerequisites to imposing liability upon a landowner in these circumstances ...". **Heyman v Harooni, 2015 NY Slip Op 07818, 2nd Dept 10-28-15**

PERSONAL INJURY.

CHURCH HAD NO SPECIAL RELATIONSHIP WITH PLAINTIFF; CHURCH HAD NO AUTHORITY TO EXERCISE CONTROL OVER CONDUCT OF MAN WHO INJURED PLAINTIFF; THEREFORE, CHURCH DID NOT OWE PLAINTIFF A DUTY OF CARE.
Defendant church was properly granted summary judgment in a case stemming from an altercation between Edward, the husband of a church employee (Rhonda), and plaintiff, a pedestrian on a public sidewalk (presumably outside the church). It was alleged that Rhonda encouraged and facilitated an assault on plaintiff by Edward. The respondeat superior cause of action was properly dismissed because Rhonda was not acting within the scope of her employment during the altercation. And the negligence cause of action was properly dismissed because there was no special relationship between the church and the plaintiff, and, therefore, the church did not owe plaintiff a duty of care: "For a defendant to be held liable in tort, it must have owed the injured party a duty of care ... . The existence and extent of a duty is a question of law ... . Generally, there is no duty to control the conduct of third persons to prevent them from causing injury to others, even where, as a practical matter, the defendant could have exercised such control ... . A duty to control the conduct of others requires a special relationship: a relationship between defendant and a third person whose actions expose plaintiff to harm such as would require the defendant to attempt to control the third person's conduct; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others ...". [internal quotation marks omitted] **Rodriguez v Judge, 2015 NY Slip Op 07828, 2nd Dept 10-28-15**

PERSONAL INJURY.

PLAINTIFF'S OWN NEGLIGENCE BROKE ANY CAUSAL CHAIN BETWEEN DEFENDANT'S NEGLIGENCE AND PLAINTIFF'S INJURY.
Under the facts, proximate cause could be determined as a matter of law and plaintiff's negligence was the superseding cause of his injury. When plaintiff was unable to access second floor offices defendant suggested that plaintiff go to the third floor and drop down to the second floor balcony. Plaintiff was injured doing so. The court held that plaintiff's own negligence broke any causal chain between the defendant's negligence and the injury: "Generally, it is for the trier of fact to determine the issue of proximate cause ... . However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts ... . Here, the evidence submitted by the ... defendants in support of their motion established, prima facie, that the sole proximate cause of the accident was the injured plaintiff's negligence in dropping himself down from the third floor balcony to the terrace on the second floor. Even assuming the truth of the plaintiffs' allegations that the ... defendants were negligent and that [a defendant] suggested that the injured

plaintiff try to gain entry to the second floor offices by climbing down from the third floor balcony, the injured plaintiff's reckless act of dropping down from a balcony to a terrace on the floor below broke any causal chain stemming from the … defendants' alleged negligence, and was itself the superseding cause of the injured plaintiff's harm ...". [internal quotation marks omitted] **Sang Woon Lee v Il Mook Choi, 2015 NY Slip Op 07829, 2nd Dept 10-28-15**

PERSONAL INJURY, CIVIL PROCEDURE.

CRITERIA FOR AMENDING A COMPLAINT TO REPLACE "JOHN DOES" WITH NAMED DEFENDANTS EXPLAINED.
Plaintiff alleged he was injured when tackled by police officers. The officers were named in the complaint as "John Does." After the statute of limitations had run, plaintiff sought to amend the complaint to name the officers involved. The Second Department determined the motion was properly denied because plaintiff did not exercise due diligence in discovering the officers' names: "In order to employ the procedural 'Jane Doe' or 'John Doe' mechanism made available by CPLR 1024, a plaintiff must show that he or she made timely efforts to identify the correct party before the statute of limitations expired ... . '[W]hen an originally-named defendant and an unknown Jane Doe' [or John Doe'] party are united in interest, i.e. employer and employee, the later-identified party may, in some instances, be added to the suit after the statute of limitations has expired pursuant to the relation-back' doctrine of CPLR 203(f), based upon postlimitations disclosure of the unknown party's identity' ... . The moving party seeking to apply the relation-back doctrine to a later-identified 'Jane Doe' or 'John Doe' defendant has the burden, inter alia, of establishing that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of limitations ...". **Holmes v City of New York, 2015 NY Slip Op 07819, 2nd Dept 10-28-15**

PERSONAL INJURY, EVIDENCE.

DEFENDANT-DRIVER'S ADMISSION AND PRIOR INCONSISTENT STATEMENT, CONTAINED IN THE POLICE ACCIDENT REPORT, SHOULD HAVE BEEN ADMITTED IN EVIDENCE.
The Second Department reversed a defense verdict in a vehicular accident case because an admission and prior inconsistent statement by the defendant-driver, included in a police accident report, was not admitted in evidence: "On appeal, the plaintiff contends, among other things, that the Supreme Court erred in precluding her from admitting into evidence that portion of the police accident report which contained [defendant-driver's] statement that he never observed the plaintiff's vehicle prior to the accident. This statement was admissible against the defendant as an admission, since it tended to inculpate the defendant in connection with a material fact ... . Moreover, that same statement in the police accident report was admissible as a prior inconsistent statement ... . Under the circumstances presented her, the error in precluding the admission of that portion of the police accident report into evidence cannot be considered harmless, as it bore on the ultimate issue to be determined by the jury ...". **Brown v URS Midwest, Inc., 2015 NY Slip Op 07809, 2nd Dept 10-28-15**

PERSONAL INJURY, MUNICIPAL LAW, EDUCATION-SCHOOL LAW.

NO SPECIAL DUTY OWED BY SCHOOL DISTRICT TO ADULT EMPLOYEES.
The Second Department affirmed the grant of summary judgment to defendant school district in a suit brought by a school bus driver injured by a student. Although the district owes a special duty to students, no such duty is owed to adult employees: "Liability for a claim that a municipality negligently exercised a governmental function turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public ... . While a school district owes a special duty to its students to adequately supervise them to prevent foreseeable injuries to fellow students, that duty does not extend to adults ... . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it did not owe the injured plaintiff a special duty ...". [internal quotation marks omitted] **Guerrieri v New York City Dept./Bd. of Educ., 2015 NY Slip Op 07816, 2nd Dept 10-28-15**

REAL PROPERTY TAX LAW.

CRITERIA FOR DETERMINING IF LAND IS OVERVALUED EXPLAINED.
In finding that petitioner did not meet its burden of demonstrating the tax assessor overvalued petitioner's land, the Second Department explained the analytical criteria: "In an RPTL article 7 tax certiorari proceeding, a rebuttable presumption of validity attaches to the valuation of property made by the taxing authority. Consequently, a taxpayer challenging the accuracy of an assessment bears the initial burden of coming forward with substantial evidence that the property was overvalued by the assessor. In the context of tax assessment cases, . . . the substantial evidence standard requires the taxpayer to demonstrate the existence of a valid and credible dispute regarding valuation. If the taxpayer satisfies this threshold burden, the presumption disappears and the court must weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that its property has been overvalued ... . Here, while the petitioner's submissions were sufficient to demonstrate a valid and credible dispute regarding valuation of the properties in the relevant years ..., they were insufficient to meet the petitioner's burden to show that the properties were overvalued by the respondent." [internal quotation marks omitted] **Matter of Peaceful Val. Land Stewardship, LLC v Johnson, 2015 NY Slip Op 07846, 2nd Dept 10-28-15**

THIRD DEPARTMENT

CIVIL PROCEDURE.

OUT-OF-POSSESSION LANDLORD AND LESSEE ARE NOT "UNITED IN INTEREST" SUCH THAT THE LESSEE COULD BE ADDED TO THE COMPLAINT AFTER THE STATUTE OF LIMITATIONS HAD RUN (RELATION-BACK DOCTRINE).
Supreme Court, in a snow-ice slip and fall case, properly denied plaintiff's motion to amend the complaint, after the statute of limitations had run, to add the lessee of the property (Albany Medical Center Hospital [AMCH]) as a defendant. The defendant out-of-possession landlord demonstrated, under the terms of the lease, AMCH had the responsibility for maintaining the property in a safe condition. Because the out-of-possession landlord and AMCH were not "united in interest," the relation-back doctrine did not apply: "[T]he relation back doctrine permits a plaintiff to amend the complaint to add a defendant even though the statute of limitations had expired at the time of amendment so long as three requirements are met: (1) both claims must arise out of the same occurrence, (2) [the] defendant and [the new party] were united in interest, and by reason of that relationship can be charged with notice of the institution of the action such that it will not be prejudiced in maintaining a defense on the merits, and (3) [the new party] knew or should have known that, but for a mistake by [the] plaintiff as to the identity of the proper party, the action would have been brought against it as well ... . While there is no dispute that the first prong of this test is satisfied under these circumstances, we agree with Supreme Court that defendant and AMCH do not share unity of interest inasmuch as they cannot be said to stand or fall together ... . Indeed, unless the original defendant and new party are vicariously liable for the acts of the other[,] there is no unity of interest between them ...". [internal quotation marks omitted] **McLaughlin v 22 New Scotland Ave., LLC, 2015 NY Slip Op 07883, 3rd Dept 10-29-15**

CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

PAST RECOLLECTION RECORDED AND HEARSAY INADMISSIBLE AT TRIAL PROPERLY CONSIDERED IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION.
A statement made by defendant's employee [Mackey] near the time of plaintiff's slip and fall was admissible as past recollection recorded and was properly considered in opposition to defendant's summary judgment motion. In addition, hearsay which would not be admissible at trial was sufficiently corroborated to be considered in opposition to defendant's motion for summary judgment. Defendant's motion was properly denied: "[T]he requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his [or her] knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information ... . Further, in keeping with the principles that, [t]o grant summary judgment, it must clearly appear that no material and triable issue of fact is presented ... and such motion should be denied if there is any doubt as to the existence of such issues ..., we likewise find no error in Supreme Court's consideration of Mackey's oral statement, notwithstanding its likely inadmissibility at trial. With that said, however, we acknowledge that, although hearsay evidence that is inadmissible at trial may be sufficient to defeat a motion for summary judgment, there must be some additional competent evidence to support the motion or an excuse for the failure to present proof in admissible form ...". [internal quotation marks omitted] **Zupan v Price Chopper Operating Co., Inc., 2015 NY Slip Op 07893, 3rd Dept 10-29-15**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

FAILURE TO ASSESS RELIABILITY OF CONFIDENTIAL INFORMANTS REQUIRED ANNULMENT AND EXPUNGEMENT.
The Third Department annulled and expunged the disciplinary determination because the hearing officer was not given enough information to adequately assess the confidential informants' reliability: "A disciplinary determination may be based upon hearsay confidential information provided that it is sufficiently detailed and probative for the Hearing Officer to make an independent assessment of the informant's reliability ... . Here, the correction officer who investigated the incident and authored the misbehavior report testified that his information regarding petitioner's involvement was gleaned from confidential informants. Other than noting that the confidential informants either had proven reliable in the past or disclosed detailed information about the incident, the correction officer did not testify with any further specificity or detail regarding the substance of the information that was provided in order for the Hearing Officer to independently assess the informants' reliability or credibility. Given that the confidential information was instrumental in finding petitioner guilty of the charges, we find that substantial evidence does not support the determination and it, therefore, must be annulled ...". [internal quotation marks omitted] **Matter of Bridge v Annucci, 2015 NY Slip Op 07886, 3rd Dept 10-29-15**

EMPLOYMENT LAW (GENDER DISCRIMINATION).

PLAINTIFF'S ALLEGATIONS OF A HOSTILE WORK ENVIRONMENT AND RETALIATION WERE NOT SUFFICIENT AS A MATTER OF LAW.

The Third Department determined that plaintiff's action against her employer (UPS) alleging sexual harassment, rising to the level of a hostile work environment, and retaliation for complaining about it, was properly dismissed. Although the complaint alleged several instances of crude and improper language and physical contact, the allegations did not, as a matter of law, describe a "hostile work environment." Nor were the allegations of retaliation sufficient as a matter of law: "A party alleging the existence of a sexually hostile work environment must demonstrate that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment ... . To determine whether a hostile work environment exists, we must consider all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance ... . The test is both subjective and objective; that is, a plaintiff must demonstrate that the conditions of his or her employment were altered as a result of the conduct he or she perceived to be abusive and that the conduct created an environment that a reasonable person would find to be hostile or abusive ... . * * * A valid claim for retaliation under the Human Rights Law exists where a party demonstrates that (1) [he or] she has engaged in protected activity, (2) [his or] her employer was aware that [he or] she participated in such activity, (3) [he or] she suffered an adverse employment action based upon [his or] her activity, and (4) there is a causal connection between the protected activity and the adverse action...". [internal quotation marks omitted] **Minckler v United Parcel Serv., Inc., 2015 NY Slip Op 07882, 3rd Dept 10-29-15**

MENTAL HYGIENE LAW.

EXPERT WHO EVALUATED SEX OFFENDER AS PART OF THE INITIAL CASE REVIEW TEAM WAS PROPERLY ALLOWED TO TESTIFY AT THE CIVIL COMMITMENT HEARING.

The Third Department, in a full-fledged opinion by Justice Garry, determined that the psychologist/psychiatrist (Barnes), who was part of the sex offender's (respondent's) case review team which recommended civil commitment, was properly allowed to testify at the Article 10 hearing. The respondent had sought to prevent Barnes from testifying because another psychiatrist (for the state) had been appointed for the hearing. The Third Department held that nothing in the Mental Hygiene Law prevented both experts from testifying for the state, and nothing in the Mental Hygiene Law prevented Barnes from having access to relevant diagnostic information generated after he had completed his evaluation for the case review team. **Matter of State of New York v James K., 2015 NY Slip Op 07874, 3rd Dept 10-29-15**

UNEMPLOYMENT INSURANCE, ADMINISTRATIVE LAW.

FINDING THAT CLAIMANT'S ABSENTEEISM WAS NOT DISQUALIFYING MISCONDUCT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE; COURTS' REVIEW POWERS IN THIS CONTEXT EXPLAINED.

The board's finding that claimant's absenteeism did not amount to disqualifying misconduct (because it was related to his diabetes) was supported by substantial evidence. The court explained its review powers in this context: "While continued absenteeism, despite previous warnings, may rise to the level of misconduct disqualifying an employee from receiving unemployment insurance benefits ..., termination of employment attributable to symptoms of a diagnosed medical condition will not constitute disqualifying misconduct ... . Whether an absence is justified so as to remove it from disqualifying misconduct is a factual question for the Board to resolve, and its resolution of this issue will not be disturbed if supported by substantial evidence ... . * * * Pursuant to our limited review, this Court may not weigh conflicting evidence or substitute its own judgment, and if, as here, the findings turn on the credibility of witnesses, we may not substitute our perceptions for those of the agency ... . Under these circumstances, substantial evidence supports the Board's determination that claimant's loss of employment was not due to disqualifying misconduct ...". [internal quotation marks omitted] **Matter of Suchocki (St. Joseph's R.C. Church — Commissioner of Labor), 2015 NY Slip Op 07899, 3rd Dept 10-29-15**

UNEMPLOYMENT INSURANCE.

WORK FOR WHICH CLAIMANT WAS NOT PAID DID NOT DISQUALIFY HER FROM RECEIVING UNEMPLOYMENT INSURANCE BENEFITS.

Unemployment insurance benefits should not have been denied claimant. Claimant cared for a coworker's child but was not paid for doing so. The board's finding that claimant's lack of employment was not "total" was not, therefore, supported by substantial evidence: "Resolution of this case turns on whether claimant's activities in caring for her coworker's child without compensation while she was laid off constitute a lack of total unemployment rendering her ineligible to receive unemployment insurance benefits. Labor Law § 591 (1) limits eligibility for benefits to those claimants who are 'totally unemployed' ... , which has been defined as 'the total lack of any employment on any day' ... . In this context, the term employment contemplates that a claimant will potentially receive some type of monetary payment or future benefit in exchange for

services rendered ... . Here, it is undisputed that claimant did not receive any compensation for caring for her coworker's son and there is no evidence in the record that she was likely to obtain a future financial benefit for doing so. Consequently, we must conclude that the Board's finding that claimant's activities in this regard amounted to a lack of total unemployment is not supported by substantial evidence ...". **Matter of Connerton (Thousand Is. Cent. Sch. Dist. — Commissioner of Labor), 2015 NY Slip Op 07892, 3rd Dept 10-29-15**

UNEMPLOYMENT INSURANCE.

INSTRUCTOR AT COMMUNITY COLLEGE ENTITLED TO UNEMPLOYMENT BENEFITS, NO REASONABLE ASSURANCE OF CONTINUED EMPLOYMENT.

An adjunct instructor at a community college was properly awarded unemployment insurance benefits because he did not receive reasonable assurance of continued employment during the following term: "Labor Law § 590 (10) precludes a professional employed by an educational institution from receiving unemployment insurance benefits during the period between two successive academic terms if the educational institution has provided the professional with a reasonable assurance of continued employment ... . A 'reasonable assurance,' in turn, is a representation by the educational institution 'that substantially the same economic terms and conditions will continue to apply to the extent that the claimant will receive at least 90% of the earnings received during the first academic period' ... . This is a factual question for the Board to resolve and its determination in this regard will be upheld if supported by substantial evidence ... . Here, although the department chair mentioned that claimant could teach potentially four courses during the spring 2014 semester, which exceeded the number that he taught during the fall 2013 semester, this was never confirmed during any subsequent conversations nor in the letter sent to claimant. Significantly, the letter did not specify the details of the spring 2014 semester teaching assignment and conditioned claimant's further employment upon 'enrollment and/or budget constraints.' In cases where educational institutions have failed to set forth the terms or conditions of continued employment or have made such employment contingent upon certain conditions, courts have found that a reasonable assurance was lacking ...". **Matter of Upham (Dutchess Community Coll. — Commissioner of Labor), 2015 NY Slip Op 07898, 3rd Dept 10-29-15**

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