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COURT OF APPEALS

CRIMINAL LAW.

ENHANCED SENTENCING FOR SECOND CHILD SEXUAL ASSAULT FELONY OFFENDERS IS REQUIRED BY PENAL LAW § 70.07; LANGUAGE IN CRIMINAL PROCEDURE LAW 400.19 CANNOT BE INTERPRETED TO MEAN THE PEOPLE HAVE THE DISCRETION NOT TO SEEK AN ENHANCED SENTENCE.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, in affirming defendant's conviction and sentencing, discussed ineffective assistance, prosecutorial misconduct, and statutory interpretation issues. The ineffective assistance and prosecutorial misconduct discussions are fact-specific and not summarized here. With respect to the statutory interpretation issue, the defendant argued he should not have been sentenced as a second child sexual assault felony offender because the People were required to file a predicate statement (notifying him an enhanced sentence would be sought) prior to trial and did not do so. The court determined the statutory language indicating the predicate statement "may" be filed any time before trial (in Criminal Procedure Law 400.19 (CPL)) did not preclude the People from filing the statement after trial started, and did not indicate the People had the discretion not to seek an enhanced sentence: "The explicit language in section one [of Penal Law § 70.07] states that a person convicted of a felony offense for sexual assault against a child, who has a predicate felony conviction for child sexual assault, 'must be sentenced' in accordance with Penal Law § 70.07 sentencing provisions. The applicable time for invoking the procedures contained in CPL 400.19 does not change the import of the mandatory language in Penal Law § 70.07, which subjects this category of offenders to legislatively promulgated enhanced sentences. Furthermore, the specific language in CPL 400.19 (2) upon which defendant relies merely permits filing of the statement before commencement of a trial. It does not prohibit filing afterwards, and before sentencing. As courts have concluded, 'may' does not mean 'must; ... . Notwithstanding defendant's requests that we read the statute otherwise, this Court is without authority to read mandatory language into a statute where it is otherwise absent ...". **People v Wragg, 2015 NY Slip Op 08453, CtApp 11-19-15**

CRIMINAL LAW.

USE OF STOLEN NEW YORK CITY TRANSIT AUTHORITY (NYCTA) KEY TO ALLOW PERSONS TO ENTER THE SUBWAY SYSTEM FOR A SMALL FEE DEPRIVED THE NYCTA OF ITS PROPERTY AND THEREFORE CONSTITUTED PETIT LARCENY.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissent, determined the misdemeanor information adequately alleged petit larceny based upon the defendant's use of a stolen New York City Transit Authority (NYCTA) key to allow two people to enter the subway system in return for a small fee. The issue was whether the information alleged that the NYCTA was the "owner" of the fees paid to the defendant. The case turned on distinguishing *People v. Hightower* (18 N.Y.3d 249) where the court held the use of a legally purchased MetroCard to swipe persons through a subway turnstile (for a fee) did not constitute petit larceny because the NYCTA did not own the card and therefore no property was taken from the NYCTA. The fact that the NYCTA key was stolen was the distinguishing factor. The dissent, however, did not see the distinction. The majority wrote: "[T]he information adequately alleged all the elements of a larceny in setting forth defendant's unauthorized use of the illegally-obtained key to allow the undercover officers to enter through the emergency exit gate in exchange for money, thereby depriving the NYCTA, as the owner, of its property." **People v Matthew P., 2015 NY Slip Op 08454, CtApp 11-19-15**

CRIMINAL LAW.

DEFENDANT IMPLICITLY CONSENTED TO A MISTRIAL ON TWO OF THREE COUNTS BY REQUESTING A PARTIAL VERDICT.

The Court of Appeals, reversing the Appellate Division, determined the defendant, by requesting a partial verdict on the count on which the jury had reached a verdict, had consented to a mistrial on the two remaining counts and, therefore, had waived double jeopardy protection for those two counts: "After one juror was found unable to serve, defendant refused to substitute an alternate juror and requested a partial verdict on the one count on which the jury had indicated it had reached a verdict. The Appellate Division granted the [defendant's] petition [prohibiting retrial] on the basis that there was no man-

ifest necessity for a mistrial and did not address the issue of consent. Because defendant implicitly consented to a mistrial on two of three counts by requesting a partial verdict and by saying nothing about the court's plans for retrial ... , we need not reach the issue of manifest necessity." **Matter of Gentil v Margulis, 2015 NY Slip Op 08455, CtApp 11-19-15**

CRIMINAL LAW.

PRESUMPTION OF VINDICTIVE SENTENCING DID NOT APPLY HERE WHERE DEFENDANT REJECTED A PLEA OFFER WITH A SENTENCE OF 10 YEARS PROBATION AND, AFTER TRIAL, WAS SENTENCED TO 10 TO 20 YEARS IN PRISON.

The Court of Appeals, in a full-fledged opinion by Judge Lippman, over a dissent, determined defendant was not entitled to the presumption of vindictive sentencing. Defendant, in this rape case, was offered a plea to a D felony and 10 years of probation. The defendant went to trial and was sentenced to 10 to 20 years in prison. The court explained that the presumption of vindictive sentencing, which has been applied to sentencing upon retrial after a successful appeal, did not apply in this case: " '[C]riminal defendants should not be penalized for exercising their right to appeal' ... . After a new trial, the sentencing court must give affirmative reasons 'concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding' to justify a higher sentence ... . * * * By contrast, the same policy concerns are not implicated when a defendant rejects a plea offer, proceeds to trial for the first time, and is given a harsher sentence than the plea offer. **People v Martinez, 2015 NY Slip Op 08456, CtApp 11-19-15**

CRIMINAL LAW.

WHERE DEFENDANT WAS RELEASED ON A WRIT OF HABEAS CORPUS, THE RELEVANT PERIOD OF INCARCERATION CAN NOT BE EXCLUDED FROM THE 10-YEAR SECOND VIOENT FELONY OFFENDER CALCULATION; WITHOUT THAT EXCLUSION, DEFENDANT COULD NOT BE SENTENCED AS A SECOND FELON.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined (1) Criminal Procedure Law 120.90 (CPL), requiring a quick arraignment after arrest, only applies where the defendant is arrested by police officers (here corrections officers told defendant of his arrest); (2) CPL 190.50, requiring notice of a grand jury presentation, does not apply where defendant has not been arraigned in a local court; and (3) the 442 days defendant was incarcerated for a parole violation could not be excluded from the 10-year "second violent felony offender" calculation because he was released from that incarceration on a writ of habeas corpus. Without that 442-day exclusion, defendant's prior conviction was older than 10 years and he could not be sentenced as a second felon: "A defendant who stands convicted of a violent felony may be adjudicated a second violent felony offender if he was previously convicted of a violent felony within ten years of the current offense (*see* Penal Law § 70.04[1][b][iv]). '[A]ny period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony' is excluded from the ten-year calculation (Penal Law § 70.04[1][b][v]). * * * Although the habeas court did not vacate defendant's conviction for a parole violation, it did grant his immediate release from confinement after determining that 'the evidence did not support' defendant's incarceration. A person 'illegally imprisoned or otherwise restrained in his liberty . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance' (CPLR 7002[a]). If a judge considering the habeas petition determines that a person has been unlawfully detained, he 'shall . . . issue a writ of habeas corpus for the relief of that person' (*id*.). That the habeas court in this case granted defendant's immediate release based on a lack of evidence indicates that defendant was 'imprisoned without reason' from 1992-1993." **People v Small, 2015 NY Slip Op 08457, CtApp 11-19-15**

CRIMINAL LAW, EVIDENCE.

COURTS HAVE POWER TO EXCLUDE EVIDENCE ADMITTED BY STIPULATION; TRIAL JUDGE'S REFUSAL TO EXCLUDE THE EVIDENCE, UNDER THE FACTS, WAS NOT AN ABUSE OF DISCRETION HERE.

In a conspiracy prosecution arising from a scheme to defraud mortgage lenders, the Court of Appeals determined the trial judge properly refused to exclude documentary evidence, and testimony concerning the evidence, which, although inadmissible, was admitted by stipulation and was not objected to until the day after the testimony. The court noted that the trial judge, in the exercise of discretion, had the power to exclude the evidence, despite the stipulation. But because the admitted evidence did not raise a constitutional (confrontation) issue, was not highly prejudicial, and was not the subject of a timely objection, the trial judge did not abuse his discretion in this case: "Although courts are ordinarily bound to enforce party stipulations ... , where a party has in the interests of judicial economy stipulated to the admission of voluminous materials and there are among them scattered items, both prejudicial and ordinarily inadmissible that may reasonably have escaped counsel's attention, there is no rule preventing an exercise of judicial discretion to relieve the party, at least in part, from the stipulation, particularly where doing so would not significantly prejudice the other side. … While the court might have exercised its discretion differently, its decision not to revisit the issue of the notation's admissibility, cannot under the circumstances be characterized as an abuse of discretion, as would be necessary for it to qualify as a predicate for relief in this Court ... . Although the stipulation was not irreversibly binding, it was at least presumptively enforceable and defendant offered no plausible excuse for failing earlier to seek an exception from its coverage. Assuming that the disputed notation

might have reasonably escaped notice before trial — and that is at best questionable — it was prominently referenced in [the related] testimony, but even then elicited no contemporaneous protest." **People v Gary, 2015 NY Slip Op 08368, CtApp 11-18-15**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S STATEMENT WAS CIRCUMSTANTIAL EVIDENCE OF THE TAKING ELEMENT OF GRAND LARCENY BECAUSE AN INNOCENT INFERENCE FROM THE STATEMENT WAS POSSIBLE; VIDEO SURVEILLANCE WAS DIRECT EVIDENCE OF THE TAKING DESPITE DEFENDANT'S "INNOCENT" EXPLANATION OF HIS ACTIONS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined video surveillance showing defendant first hiding and then rifling through the victim's purse was direct, not circumstantial, evidence of the taking element of grand larceny (despite the defendant's non-criminal explanation of his actions). The court also determined the defendant's statement "I don't have it, but I can get it" (made when asked about the purse) was circumstantial evidence of the taking element because an innocent explanation for having the purse could be inferred from the statement. Because both direct and circumstantial evidence of grand larceny was presented, the circumstantial-evidence jury instruction was not required: "Here, defendant's statement — that he did not have the purse but could get it — was not a direct admission of his guilt of larceny. Rather, defendant's statement was also consistent with an inference that although he did not steal the purse, he knew where the purse was located and thought he could obtain it. Inasmuch as his statement merely included inculpatory facts from which the jury may or may not have inferred guilt, his statement was circumstantial rather than direct evidence ... . … [T]he surveillance video constituted direct evidence of defendant's guilt of larceny. The 'taking' element of larceny is satisfied by a showing that the thief exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights ...". **People v Hardy, 2015 NY Slip Op 08369, CtApp 11-18-15**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF PRIOR VIOLENT ACT BY DEFENDANT PROPERLY ADMITTED TO REFUTE "EXTREME EMOTIONAL DISTURBANCE" AFFIRMATIVE DEFENSE.

The Court of Appeals, in a full-fledged opinion by Judge Stein, in a murder case, determined that evidence of a prior violent act committed by the defendant was properly admitted to rebut defendant's "extreme emotional disturbance" defense. Defendant presented expert testimony alleging he suffered from post-traumatic stress disorder (PTSD) stemming from a stabbing attack. The defendant argued that his reaction to seeing his friend attacked, intensified by the PTSD, was the reason he fired his gun at a group of people, killing one of them. The defense argued that, prior to the stabbing which triggered the PTSD, defendant was a non-violent person. The evidence of the pre-PTSD violent act by defendant was properly admitted to call into question the "PTSD" defense. A violent incident which occurred after the charged offense, however, should not have been admitted: "Evidence of uncharged criminal conduct or bad acts that are probative of a defendant's state of mind may be admissible if the defendant 'opens the door' to such evidence by putting in issue his state of mind at the time of the commission of the charged crime by, for example, raising an extreme emotional disturbance or insanity defense ... . Nevertheless, such a defense opens the door to the People's rebuttal evidence 'only to the extent that [the proffered] evidence has a natural tendency to disprove [the defendant's] specific claim' ... . That is, evidence of uncharged crimes or bad acts is admissible to rebut an extreme emotional disturbance defense where the evidence has 'some "logical relationship" to, and a "direct bearing upon," the People's effort to disprove' the defense, and the probative value of the evidence outweighs its prejudicial effect ... . Although the balancing of probative value against potential prejudice is a matter that lies within the trial court's discretion ..., 'the threshold question of identifying a material issue to which the evidence is relevant poses a question of law' ...". **People v Israel, 2015 NY Slip Op 08370, CtApp 11-18-15**

EMPLOYMENT LAW, MUNICIPAL LAW.

PETITIONER, WHO WAS REQUIRED TO WORK IN THE "WORK EXPERIENCE PROGRAM (WEP)" TO RECEIVE PUBLIC ASSISTANCE, WAS AN "EMPLOYEE" ENTITLED TO MINIMUM WAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA).

The Court of Appeals, in a full-fledged opinion by Judge Lippman, over an extensive dissenting opinion by Judge Abdus-Salaam (in which Judge Pigott concurred), determined petitioner, who received public assistance from New York City and was therefore required to work 35 hours per week in the Work Experience Program (WEP), was an "employee" entitled to the minimum wage under the Fair Labor Standards Act (FLSA). Petitioner, after completing the WEP, won $10,000 in the state lottery. Under the lottery rules, the state sought one-half of the lottery proceeds as reimbursement for the public assistance paid to petitioner. Petitioner argued that the reimbursement reduced the amount the state paid him for his WEP work below the minimum wage required by the FLSA. The Court of Appeals agreed with petitioner's argument. The bulk of the opinion and the dissent dealt with the propriety of finding petitioner was an "employee" entitled to the minimum wage protections of the FLSA: "[W]e must apply the economic reality test and, under that test, the City should be considered Carver's employer. The City had the power to hire and fire WEP workers, in that it was the City's responsibility to assign public assistance recipients to a WEP agency and the City could dismiss workers from WEP based upon their performance.

Additionally, the City and its WEP agencies supervise and control the work schedule of the workers. Furthermore, the City and its agencies, such as HRA, maintain the employment records of the WEP workers. While the Social Services Law, not the WEP agencies or the City, determines the rate and method of payment of WEP workers, that is simply one factor. The economic reality test 'encompasses the totality of the circumstances' ...". **Matter of Carver v State of New York, 2015 NY Slip Op 08451, CtApp 11-19-15**

ENVIRONMENTAL LAW, MUNICIPAL LAW.

STANDING CRITERIA FOR PETITIONING FOR REVIEW OF MUNICIPAL ENVIRONMENTAL RULINGS CLARIFIED; THE FACT THAT MANY PEOPLE, IN ADDITION TO PETITIONER, WILL SUFFER THE SAME ADVERSE EFFECTS AS PETITIONER DID NOT NEGATE PETITIONER'S STANDING.

In a full-fledged opinion by Judge Abdus-Salaam, the Court of Appeals clarified the nature of the standing requirement for contesting municipal rulings under the State Environmental Quality Review Act (SEQRA). The Village of Painted Post had approved the sale of municipal water to a company which operates gas wells in Pennsylvania. As part of that project, construction of a railroad loading facility was approved. A resident of the village, Marvin, was one of the petitioners seeking the annulment of the Village's SEQRA rulings. Marvin, who lives near the rail facility, alleged the noise from the facility was different in degree from that experienced by the general public (thus according him standing to bring the petition). Supreme Court agreed Marvin had standing. The Appellate Division reversed. The Court of Appeals determined Marvin did in fact sufficiently allege standing to bring the petition. The fact that other nearby residents would experience the same intrusion as Marvin was not dispositive: "The number of people who are affected by the challenged action is not disposi-tive of standing. ... [S]tanding rules should not be 'heavy-handed,' ... [w]e are 'reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review' ... . Applying the Appellate Division's reasoning, because there are multiple residents who are directly impacted, no resident of the Village would have standing to challenge the actions of the Village, notwithstanding that the train noise fell within the zone of interest of SEQRA. That result would effectively insulate the Village's actions from any review and thereby run afoul of our pronouncement that the standing rule should not be so restrictive as to avoid judicial review." **Matter of Sierra Club v Village of Painted Post, 2015 NY Slip Op 08452, CtApp 11-19-15**

FIRST DEPARTMENT

CRIMINAL LAW.

EVIDENCE SUPPORTED CONVICTION OF POLICE OFFICER FOR DIVULGING EAVESDROPPING WARRANT.

The evidence supported the conviction of a police officer for divulging the existence of an eavesdropping warrant. The warrant was issued in connection with an investigation of corrupt police officers. Defendant warned police officers about the warrant and cautioned them to be careful on the phone: "Penal Law § 250.20 states as follows: 'A person is guilty of divulging an eavesdropping warrant when, possessing information concerning the existence or content of an eavesdropping warrant . . . , he discloses such information to another person . . .'. The trial court, prior to rendering its verdict, explained that 'knowledge, actual knowledge, is required[,]' and rejected the People's argument that mere rumor would be enough to satisfy the requirements for the divulging count. On appeal, viewing the evidence in the light most favorable to the People, the evidence was sufficient for the trial court to conclude that defendant divulged information concerning the existence and content of an eavesdropping warrant ... , and we see no reason to set the verdict aside as against the weight of the evidence ...". **People v Cobb, 2015 NY Slip Op 08498, 1st Dept 11-19-15**

CRIMINAL LAW, EVIDENCE.

PEOPLE WERE NOT REQUIRED TO DISCLOSE (PRIOR TO TRIAL) CONFESSION MADE BY DEFENDANT TO HEALTH CARE WORKER.

The People were not required to disclose, prior to trial, a confession defendant made to a health care worker (because the health care worker was not connected to law enforcement): "[M]idway through their case, the People introduced a previously undisclosed confession that defendant made to a health care worker at a hospital where he was being treated for a suicide attempt. This statement tended to corroborate a similar confession that defendant made to a detective shortly thereafter. It is undisputed that the People had no statutory duty to disclose this statement, because it was not made to anyone connected with law enforcement (*see* CPL 240.20[1][a]), and because no *Rosario* material was involved. Defendant nevertheless complains that his due process right to a fair trial was violated by the timing of the disclosure, because he would have formulated a different defense had he known the People intended to introduce a confession to a civilian witness. However, we find no evidence of deceit or trickery on the part of the People, and defendant's claim of prejudice is unpersuasive. ... [T]here was no misrepresentation that the undisclosed evidence did not exist, and the trial had not progressed to the point where defendant could not have adjusted his defense, or requested less drastic relief than a mistrial. Defense counsel did

not object to the health care worker's testimony on the ground of physician-patient privilege, and we decline to review this unpreserved claim in the interest of justice." **People v Tayo, 2015 NY Slip Op 08353, 1st Dept 11-17-15**

LANDLORD TENANT, CONTRACT LAW.

BECAUSE THE LEASE AUTHORIZED LANDLORD TO MAKE REPAIRS, THE ERECTION OF SCAFFOLDING COULD NOT CONSTITUTE A PARTIAL EVICTION; OCCUPANT NOT NAMED ON THE LEASE OWES RENT UNDER A QUANTUM MERUIT THEORY.

With respect to the lessee of a garage, the First Department determined the landlord's erection of scaffolding to make repairs was allowed by the lease and, therefore, did not constitute a partial eviction. With respect to a party which occupied the premises but which was not a party to the lease, the First Department determined rent was owed to the landlord under a quantum meruit theory: "The ... defendants' argument that they were partially evicted from the garage is unavailing. 'To be an eviction, constructive or actual, there must be a wrongful act by the landlord' ... . Plaintiff's installation of temporary scaffolding as part of its repairs to the garage's facade was not wrongful because it was authorized by the lease ... . '[T]enants are well advised . . . to specify some limits to the exculpatory clause concerning repairs. ... . * * * Notwithstanding the general rule that '[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter' ... , in the landlord-tenant context, the occupant of premises is liable to the owner of the property for use and occupancy irrespective of the existence of a lease in the name of another entity: '[t]he obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant[,] [but] [r]ather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties' ...". **Carlyle, LLC v Beekman Garage LLC, 2015 NY Slip Op 08499, 1st Dept 11-19-15**

PARTNERSHIP LAW, DEBTOR CREDITOR LAW.

PLAINTIFF JUDGMENT-CREDITOR'S ACTION UNDER THE DEBTOR CREDITOR LAW TO RECOVER PAYMENT MADE TO A LIMITED PARTNER TIME-BARRED BY THREE-YEAR STATUTE OF LIMITATIONS IN THE REVISED LIMITED PARTNERSHIP ACT (RLPA).

In a detailed and fact-specified full-fledged opinion by Justice Acosta, in an action under the Debtor and Creditor Law (DCL), the First Department determined plaintiff, a judgment-creditor with an unpaid judgment against a partnership, could not reach a $425,000 payment made by the partnership to a limited partner. The court held the payment was not fraudulent, constituted a partnership distribution, and was subject to the three-year statute of limitations in the Revised Limited Partnership Act (RLPA), not the six-year statute of limitations in the Debtor and Creditor Law (DCL). Therefore, plaintiff's action seeking to recover the payment was time-barred: "RLPA (Partnership Law) § 121-607 prohibits limited partnerships from making distributions 'to a partner to the extent that, at the time of the distribution, after giving effect to the distribution, all liabilities of the limited partnership . . . exceed the fair market value of the assets of the limited partnership' (Partnership Law § 121-607[a]) ... . A limited partner who knowingly receives a prohibited distribution is liable to the partnership in the amount of the distribution (§ 121-607[b]). However, 'a limited partner who receives a wrongful distribution . . . shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution' (§ 121-607[c]). ... [T]he Limited Liability Company Law (LLCL) contains a similar limitation on distributions to members (LLCL §§ 102[i], 508[a])." **Peckar & Abramson, P.C. v Lyford Holdings, Ltd., 2015 NY Slip Op 08363, 1st Dept 11-17-15**

PERSONAL INJURY.

QUESTION OF FACT WHETHER "INTERVENING CRIMINAL ACT" AT HOMELESS FACILITY WAS FORESEEABLE.

There was a question of fact whether an attack by one resident upon another resident of a facility for disabled homeless people was foreseeable: "Triable issues of fact exist as to whether defendants, the owner and operator of a transitional facility for disabled homeless people, breached their common-law duty to provide reasonable security measures to protect plaintiff's decedent from foreseeable harm ... . The fatal attack on decedent by a fellow resident was immediately preceded by two prior physical attacks, by the same resident, and police officers responding to the earlier attacks had told defendants' staff members to keep the two residents apart. In light of the conflicting testimony as to the perpetrator's demeanor prior to the final attack and whether defendants were on notice of his alleged threat to continue the attack on decedent, it is for a jury to determine whether a further attack was foreseeable. The fact that defendants may not have been able to 'anticipate the precise manner of the [attack] or the exact extent of injuries . . . does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable' ... . Furthermore, while unforeseeable and intentional criminal acts by third parties are supervening acts which sever the causal connection with any alleged negligence ... , here, 'the alleged intervening criminal act is itself the foreseeable harm that shapes the duty [of care sought to be] imposed' ...". **Corporan v Barrier Free Living Inc., 2015 NY Slip Op 08351, 1st Dept 11-17-15**

PERSONAL INJURY, CONTRACT LAW, EVIDENCE.

QUESTION OF FACT WHETHER REAL ESTATE BROKER "LAUNCHED AN INSTRUMENT OF HARM" IN AN APARTMENT BEING SHOWN TO PLAINTIFF; EVIDENCE OF CUSTOM NOT ENOUGH TO SHIFT BURDEN OF PROOF IN PREMISES LIABILITY ACTION.

The First Department determined defendant real estate broker's motion for summary judgment in a personal injury case should not have been granted. As an apartment was being shown by the real estate broker, plaintiff tripped and fell when her foot became tangled in a drapery cord which was on the floor. The broker submitted evidence in support of the motion for summary judgment stating that she did not remember whether she opened the drapes on the day in question, and further stating that her "custom" was to hang the cord up when she did open the drapes. The First Department held the broker's evidence was not sufficient to demonstrate, as a matter of law, that the broker did not "launch an instrument of harm," i.e., cause the cord to be on the floor. The court noted that evidence of "custom" is not sufficient to shift the burden of proof in a premises liability action. Therefore, the contract between the broker and the owner of the apartment could have given rise to a duty of care owed by the broker to the plaintiff. **Stimmel v Osherow, 2015 NY Slip Op 08340, 1st Dept 11-17-15**

SECOND DEPARTMENT

ANIMAL LAW, PERSONAL INJURY.

VICIOUS PROPENSITIES NOT DEMONSTRATED, SUMMARY JUDGMENT PROPERLY AWARDED TO DEFENDANTS.

Summary judgment was properly awarded to defendants in this dog bite case. Plaintiff, a postal worker, alleged the dog "flew" out of defendants' house and attacked as she approached the house to deliver mail: "To recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog, or a person in control of the premises where the dog was, knew or should have known of such propensities ... . Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snap or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm ... . Here, the defendants established their prima facie enti-tlement to judgment as a matter of law by demonstrating, through their deposition testimony, that their dog was friendly and had never growled at, chased, bitten, or attacked anyone, and that they were unaware of any prior complaints about their dog's behavior ... . Specifically, the defendants testified at their depositions that their dog had lived with them and their small children for approximately five years prior to this incident, and the dog had never previously attempted to run out their front door ... . The defendants also testified that they had never seen their dog act aggressively toward a mail carrier." [internal quotation marks omitted] **Jackson v Georgalos, 2015 NY Slip Op 08387, 2nd Dept 11-18-15**

CIVIL PROCEDURE, PERSONAL INJURY.

VIDEO RECORDING OF INDEPENDENT MEDICAL EXAM (IME) SHOULD BE DISCLOSED PRIOR TO TRIAL; COURT'S PERMISSION TO RECORD IME IS REQUIRED; REQUEST FOR ANOTHER IME BY A DIFFERENT DOCTOR SHOULD HAVE BEEN GRANTED.

The Second Department, in a full-fledged opinion by Justice Roman, determined: (1) a video of an independent medical exam (IME) surreptitiously made by plaintiff's attorney should have been turned over to the defense prior to trial; (2) the court's permission for recording an IME is required; and (3) under the unique circumstances of this case, the request for another IME by a different doctor should have been granted. With respect to the IME video, the Second Department wrote: "[T]he failure of plaintiff's counsel to seek and obtain the Supreme Court's permission to videotape the … IME was, by itself, a sufficient reason to prohibit the use of the recording at trial. Further compounding the improper conduct of plaintiff's counsel in making the recording without procuring the court's approval in advance was the failure to disclose the recording to defense counsel prior to trial, which was a clear violation of CPLR 3101. Subsection (a) of that statute provides that: 'There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) *a party*, or the officer, director, member, agent or employee of a party' (CPLR 3101[a] [emphasis added]). Subsection (i) provides, in relevant part, as follows: 'In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use' (CPLR 3101[i])." **Bermejo v New York City Health & Hosps. Corp., 2015 NY Slip Op 08374, 2nd Dept 11-18-15**

CRIMINAL LAW.

INACCURATE ADVICE ABOUT THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA CONSTITUTES INEFFECTIVE ASSISTANCE; DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION IN THIS PRE-*PADILLA* CASE.

The Second Department determined defendant was entitled to a hearing on his motion to vacate his conviction (by guilty plea) in this pre-*Padilla* case. Defendant alleged he was told deportation was not likely, or was a "possibility," when, in fact, deportation was mandatory. That allegation, plus an assertion he would have negotiated a different plea which did not require deportation had he known the actual consequences of his plea, was sufficient to warrant a hearing: "In *Padilla v Kentucky* (559 US 356), the United States Supreme Court ruled that the Sixth Amendment to the United States Constitution requires criminal defense counsel to advise their noncitizen clients about the risk of deportation arising from a guilty plea. However, that decision is not applied retroactively to state court postconviction proceedings ... . Since the defendant's judgment of conviction became final when his time to take an appeal expired — long before *Padilla* was decided in 2010 — *Padilla* is not applicable here. Therefore, counsel's failure to warn a defendant that a guilty plea might lead to removal from the United States ... does not, in this case, amount to ineffective assistance of counsel. However, inaccurate advice about a guilty plea's immigration consequences constitute[s] ineffective assistance of counsel ...". [internal quotation marks omitted] **People v Pinto, 2015 NY Slip Op 08441, 2nd Dept 11-18-15**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF CONSTRUCTIVE POSSESSION OF CONTRABAND INSUFFICIENT, CONVICTIONS REVERSED.

The defendant was convicted of possession of marijuana and weapons found in a bedroom of an apartment in which defendant and several others were present. The Second Department determined there was insufficient evidence that defendant constructively possessed the contraband and reversed: "Viewing the evidence in the light most favorable to the People ..., it was legally insufficient to establish the possession elements of the weapons possession and marijuana possession counts, as charged here. Although the defendant was present in the apartment when the search warrant was executed, 'it is settled that one's mere presence in an apartment or house where contraband is found does not constitute sufficient basis for a finding of constructive possession' ... . There was no evidence specifically connecting the defendant to the bedroom where the contraband was found, or otherwise connecting the defendant to the contraband. Under these specific circumstances, the People failed to prove that the defendant exercised dominion and control over the contraband, and therefore failed to prove the possession element of the counts as charged ...". **People v Brown, 2015 NY Slip Op 08428. 2nd Dept 11-18-15**

CRIMINAL LAW, EVIDENCE.

PORTABLE BREATH TEST DEVICE (PBT) RESULTS SHOULD NOT HAVE BEEN ADMITTED, DRIVING WHILE INTOXICATED CONVICTION REVERSED.

The Second Department reversed defendant's driving while intoxicated (DWI) conviction because the results of the portable breath test device (PBT) were allowed in evidence in the People's direct case: "Generally, the result of a PBT, such as an Alco-sensor, is not admissible to establish intoxication, as its reliability for this purpose is not generally accepted in the scientific community ... . * * * … [T]he People elicited testimony that, according to the PBT, the defendant's BAC was .128%, significantly higher than the legal limit of .08%, before defense counsel had an opportunity to raise this issue during cross-examination ... . … [T]he trial court did not provide the jury with any limiting instructions regarding the PBT result ..., but instead directed the jury to consider the PBT result as direct proof of the defendant's intoxication. The court told the jury that the PBT was a generally accepted instrument in determining blood alcohol content, and that no scientific expert was necessary. This was error ... . Under the circumstances, including the lack of evidence of admissible field sobriety tests, we find that this error was not harmless beyond a reasonable doubt." [internal quotation marks omitted] **People v Krut, 2015 NY Slip Op 08439, 2nd Dept 11-18-15**

CRIMINAL LAW, EVIDENCE.

STATEMENTS MADE BY DEFENDANT INDICATING HE WAS ON A FIRST NAME BASIS WITH POLICE OFFICERS AND THAT HE HAD BEEN IN JAIL SHOULD NOT HAVE BEEN ADMITTED BECAUSE THE STATEMENTS WERE NOT RELEVANT TO A MATERIAL ISSUE IN THE CASE, THE ERROR WAS HARMLESS, HOWEVER.

Although the error was deemed harmless, the Second Department determined statements made by the defendant indicating he was on a first name basis with police officers and mentioning he had been in jail should not have been admitted in evidence: "Evidence of prior crimes or bad acts is not admissible to show a defendant's predisposition to criminal conduct ... . Such evidence, however, is admissible when it is relevant to a material issue in the case, and the probative value of the evidence outweighs the potential prejudice to the defendant ... . We agree with the defendant that the County Court erred in allowing these statements to be admitted into evidence, as the prosecutor failed to establish that any of the comments were relevant to a material issue in the case ...". **People v McPhillips, 2015 NY Slip Op 08440, 2nd Dept 11-18-15**

CRIMINAL LAW, EVIDENCE.

EMERGENCY EXCEPTION TO WARRANT REQUIREMENT MISAPPLIED.

The police officers chased defendant when defendant ran and an officer thought he saw the handle of a gun on defendant's person. The officers entered defendant's house and found drugs. The Second Department determined the drugs should have been suppressed because there was no emergency justifying the warrantless entry and search of the house: "Under the emergency exception, the police may make a warrantless entry into a protected area if (1) they have reasonable grounds to believe that there was an emergency at hand and an immediate need for their assistance for the protection of life or property, (2) the search was not primarily motivated by an intent to arrest and seize evidence, and (3) there was some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched ... . There was no evidence of any circumstances which would have provided a reasonable basis for the patrol officers to believe that there was an emergency at hand and an immediate need for police assistance for the protection of life or property inside the house ...". **People v Scott, 2015 NY Slip Op 08445, 2nd Dept 11-18-15**

FORGERY.

QUESTION OF FACT RAISED ABOUT WHETHER SIGNATURE ON PROMISSORY NOTE WAS FORGED.

In this action on a promissory note, the Second Department reversed Supreme Court, finding that defendant raised a triable issue of fact whether his signature was forged. The court noted that expert evidence is not necessary to raise a question of fact in this context: "Something more than a mere assertion of forgery is required to create an issue of fact contesting the authenticity of a signature ... . Here, in addition to his own affidavit, the defendant submitted a copy of his driver license as an example of his signature, and an affidavit from the individual who allegedly witnessed execution of the note. Review of the defendant's signature on his driver license and the signature on the note reveal some difference to the untrained eye. More importantly, the individual who is identified as the witness on the note stated in his affidavit that he had no recollection of witnessing the defendant signing the note, and that he believed that his own signature thereon was forged. Furthermore, while the defendant did not submit an expert affidavit, an expert opinion is not required to raise a triable issue of fact regarding a forgery allegation ... . Finally, the defendant's signature on the note was not notarized, and thus, there is no presumption of due execution ...". **Kitovas v Megaris, 2015 NY Slip Op 08388, 2nd Dept 11-18-15**

PERSONAL INJURY.

SINGLE STEP WAS OPEN AND OBVIOUS.

Defendant was entitled to summary judgment in a slip and fall case because the alleged defective condition, a single step riser, was open and obvious and complied with building code requirements: "The defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence which demonstrated that the subject step complied with the relevant Building Code requirements and that it was open and obvious and not inherently dangerous ... . The burden then shifted to the plaintiff to defeat the defendants' motion with 'proof demonstrating the existence of an issue of fact as to whether other circumstances prevailed which could lead the trier of fact to conclude that a dangerous condition existed which was a substantial cause of the [accident] resulting in the plaintiff['s] . . . injury' ... . Contrary to the Supreme Court's determination, the plaintiff failed to raise a triable issue of fact." **Fishelson v Kramer Props., LLC, 2015 NY Slip Op 08380, 2nd Dept 11-18-15**

PERSONAL INJURY.

PLAINTIFF DID NOT KNOW CAUSE OF FALL.

Summary judgment was properly granted to defendant in a slip and fall case. Plaintiff apparently tripped on a rug. After the fall, plaintiff noticed a part of the rug was bent upwards. However, there was no evidence the rug was in that condition before the fall, forcing resort to speculation about the cause of the fall: "In a slip [or trip] and fall case, a defendant moving for summary judgment has the initial burden of establishing, prima facie, that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . However, [a] plaintiff's inability to identify what had caused him or her to fall is fatal to his or her case, and a defendant moving for summary judgment dismissing the complaint can meet its initial burden as the movant simply by demonstrating that the plaintiff did not know what had caused him or her to fall ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law by submitting the transcript of the plaintiff's deposition, during which she testified that she did not notice the subject rug at any time prior to her fall, and that it was only after she fell that she observed a part of the rug to be in a folded condition ... . The defendant also submitted the deposition testimony and an affidavit from the employee the plaintiff was following when she fell. The employee stated that she did not see any condition with respect to the subject rug which would cause anyone to trip. The defendant also submitted surveillance footage from the day of the plaintiff's fall depicting the rug, which does not show that the rug was in a defective condition prior to the plaintiff falling. Without proof that there was a defective condition present with respect to the subject rug when the plaintiff fell, and the possibility

that the folded condition of the rug the plaintiff observed after she fell was caused by her tripping, a jury would be required to impermissibly speculate as to the cause of her fall." [internal quotation marks omitted] **Giannotti v Hudson Val. Fed. Credit Union, 2015 NY Slip Op 08383, 2nd Dept 11-18-15**

PERSONAL INJURY.

TRACKED-IN WATER; FAILURE TO DEMONSTRATE WHEN AREA WAS LAST INSPECTED PRECLUDED SUMMARY JUDGMENT.

Defendant's failure to demonstrate when the area where the slip and fall occurred was last inspected precluded summary judgment in defendant's favor. Evidence of general cleaning procedures is not enough to demonstrate a lack of constructive notice of an alleged dangerous condition (tracked-in water here): "While a defendant [is] not required to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain ... , a defendant may be held liable for an injury proximately caused by a dangerous condition created by water tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action ... . To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall ... . Here, the defendant failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition. Neither the affidavit of the defendant's operations manager, nor the deposition testimony of the defendant's asset protection manager established when the area where the plaintiff fell, or any of the entrances to the store, were last inspected in relation to the plaintiff's fall." **Milorava v Lord & Taylor Holdings, LLC, 2015 NY Slip Op 08390, 2nd Dept 11-18-15**

PERSONAL INJURY.

HEIGHT DIFFERENTIAL OPEN AND OBVIOUS.

The Second Department, reversing Supreme Court, determined the condition which caused plaintiff to fall was open and obvious (nonactionable). Plaintiff tripped where there was a height differential between a bed of decorative stones and the abutting walkway: "Here, the evidence submitted by the defendant in support of its motion, including photographs of the accident site, demonstrated, prima facie, that it was entitled to judgment as a matter of law. Contrary to the plaintiff's contention, the height differential between the cement walkway and the abutting bed of stones was open and obvious and not inherently dangerous ...". **Mucciariello v A & D Hylan Blvd. Assoc., LLC, 2015 NY Slip Op 08391, 2nd Dept 11-18-15**

PERSONAL INJURY.

QUESTION OF FACT WHETHER HOSPITAL HAD A DUTY TO SAFEGUARD PLAINTIFF FROM ACTIONS BY THIRD PERSONS.

The Second Department determined there was a question of fact whether defendant hospital ("Winthrop defendants") had a duty to safeguard plaintiff-patient from harm caused by the emergency medical technicians (EMTs) who transported plaintiff to the hospital. Plaintiff was brought to the hospital by ambulance for dialysis. The EMTs placed plaintiff on a scale and left. Plaintiff fell when he was on the scale: "A hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety ... . This sliding scale of duty is limited, however; it does not render a hospital an insurer of patient safety or require it to keep each patient under constant surveillance. As with any liability in tort, the scope of a hospital's duty is circumscribed by those risks which are reasonably foreseeable ...". [internal quotation marks omitted] **Patel v American Med. Response, Inc., 2015 NY Slip Op 08395, 2nd Dept 11-18-15**

PERSONAL INJURY, MUNICIPAL LAW.

COUNTY DID NOT DEMONSTRATE ITS ENTITLEMENT TO QUALIFIED IMMUNITY RE: OBSTRUCTED INTERSECTION.

The county did not demonstrate (as a matter of law) it was entitled to qualified immunity for the placement of a sensor station and the failure to trim the nearby hedges. The complaint alleged the sensor station and hedges obstructed plaintiff's view of oncoming traffic, resulting in an accident. The county's motion for summary judgment was properly denied. The court explained the analytical criteria: "A governmental body owes a nondelegable duty to keep its streets in a reasonably safe condition ... . However, a governmental body is accorded a qualified immunity from liability arising out of a highway safety planning decision ... . Such immunity is predicated upon an ability to demonstrate that the relevant discretionary determination by the governmental body was the result of a deliberative decision-making process ... . Contrary to the County's contention, it did not sustain its prima facie burden on the issue of qualified immunity. The County failed to demonstrate, inter alia, that its placement of the sensor station cabinet and its decision to refrain from trimming the hedge were highway safety planning decisions resulting from a deliberative decision-making process of the type afforded immunity from judicial interference ...". **Iacone v Passanisi, 2015 NY Slip Op 08386, 2nd Dept 11-18-15**

PERSONAL INJURY, MUNICIPAL LAW.

QUESTION OF FACT WHETHER CITY CREATED HAZARDOUS CONDITION.

The Second Department, reversing Supreme Court, determined there was a question of fact whether the city created the allegedly hazardous condition (an expansion joint cover plate on a bridge which was struck by plaintiff's bicycle): "Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury ... . In addition, [a] municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies ... . The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality ... . Here, the City failed to establish, prima facie, that the subject metal expansion joint cover plate did not present a hazardous or defective condition ... . Although the plaintiff does not dispute that the City did not have prior written notice of the alleged hazardous or defective condition, a triable issue of fact exists as to whether the City created the alleged hazardous or defective condition ...". [internal quotation marks omitted] **Oser v City of New York, 2015 NY Slip Op 08393, 2nd Dept 11-18-15**

REAL ESTATE, CONTRACT LAW, FRAUD.

FRAUD ALLEGATIONS IN CONNECTION WITH A REAL ESTATE SALE MUST BE ANALYZED WITHIN THE DOCTRINE OF CAVEAT EMPTOR.

The Second Department, reversing Supreme Court, determined plaintiffs' complaint alleging fraudulent misrepresentation and fraudulent concealment in connection with a real estate purchase contract should have been dismissed. It was alleged the defendant made misrepresentations re: termite damage and mold. The court explained that allegations of fraud in a real estate transaction must be analyzed within the doctrine of caveat emptor. Here, the plaintiffs were aware that the house had been treated for wood-destroying insects, an inspection report had been issued, and plaintiffs had conducted their own inspection. The defendant made no representations on which plaintiffs relied and did not actively conceal the condition of the property or thwart plaintiffs' efforts to discover damage: "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury ... . However, in the context of real estate transactions, a claim of fraudulent misrepresentation must be analyzed within the doctrine of caveat emptor. New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment ... . If however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property ... . * * * To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor … . Here, the defendant showed, prima facie, that she did not thwart the plaintiffs' efforts to discover any termite or mold damage. Indeed, the plaintiffs conducted an inspection of the property for the purpose of determining if there were wood destroying insects, and they themselves saw some evidence that the property had been treated for insect activity during their … visit, but undertook no further investigation … . The mere fact that the defendant undertook previous repair work on the house is not tantamount to concealment of a defective condition." [internal quotation marks omitted] **Hecker v Paschke, 2015 NY Slip Op 08385, 2nd Dept 11-18-15**

REAL PROPERTY.

SIX-YEAR STATUTE OF LIMITATIONS FOR REFORMATION OF DEED EXCEEDED, NO EVIDENCE EXCEPTION TO THE STATUTE APPLIED.

The action to reform a deed (correction of alleged scrivener's error) was time-barred. The six-year statute was exceeded and there was no proof the exception to the six-year statute applied: "A cause of action seeking reformation of an instrument on the ground of mistake, including an alleged scrivener's error, is governed by the six-year statute of limitations pursuant to CPLR 213(6), which begins to run on the date the mistake was made ... . However, a well-recognized exception exists as to one who is in possession of real property under an instrument of title, whereby the statute of limitations never begins to run against his [or her] right to reform that instrument until he [or she] has notice of a claim adverse to his [or hers] under the instrument, or until his [or her] possession is otherwise disturbed ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the alleged scrivener's error occurred on August 8, 2005, and that the plaintiff did not commence this action until February 2013, more than six years after the alleged mistake ... . In opposition, the plaintiff failed to raise a question of fact as to the applicability of the exception to the statute of limitations based on his alleged possession of real property under an instrument of title ... . The plaintiff failed to submit any evidence with respect to whether or when he was in possession of the subject property." [internal quotation marks omitted] **Lopez v Lopez, 2015 NY Slip Op 08389, 2nd Dept 11-18-15**

THIRD DEPARTMENT

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

JUVENILE DELINQUENCY ADJUDICATION CAN NOT BE USED FOR THE "CRIMINAL HISTORY" POINTS ASSESSMENT.

The sex offender risk classification was reversed because County Court used a juvenile delinquency adjudication to calculate the "criminal history" points to be assessed. The Third Department noted that the juvenile delinquency adjudication cannot be used for the "criminal history" calculation, but it can be considered in determining whether to depart from the recommended risk level: "[B]ased on our recent holding in *People v Shaffer* (129 AD3d 54, 55-56 [2015]), County Court is precluded from using juvenile delinquency adjudications to assess points for criminal history under the RAI [risk assessment instrument], although the facts underlying a juvenile delinquency adjudication may still be 'considered when determining whether to depart from the recommended risk level' (*id*. at 56)." **People v Updyke, 2015 NY Slip Op 08481, 3rd Dept 11-19-15**

FORECLOSURE.

PLAINTIFF DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION.

The Third Department, over a two-justice dissent, determined plaintiff bank did not demonstrate standing to proceed with the foreclosure because the bank did not present evidence of the affiant's first-hand examination of the original note and the bank did not explain how it came into possession of the original note: "To establish physical possession, plaintiff produced an affidavit by an assistant secretary, who stated that plaintiff's 'custodial system of record' showed that plaintiff 'received the original [n]ote on February 16, 2007' and that plaintiff maintained 'possession of the [n]ote at its storage facility' in Monroe, Louisiana. Noticeably absent is any representation by the assistant secretary that she examined the original note and, contrary to the dissent, the affidavit is devoid of any detail as to how plaintiff actually acquired possession of the original note ...". **JP Morgan Chase Bank, N.A. v Hill, 2015 NY Slip Op 08479, 3rd Dept 11-19-15**

UNEMPLOYMENT INSURANCE.

REPORTER WAS EMPLOYEE.

The Third Department determined claimant, a reporter who worked for a company which produces news reports and shows for television (Everest), was an employee entitled to unemployment insurance benefits: "The record establishes that claimant routinely worked Tuesday through Thursday each week. On these days, Everest would inform claimant in the morning of what her reporting assignment was for that day and whether any story idea she suggested had been approved by Everest. If she refused to perform any of the approved story ideas, she would not work or be paid on that day. Claimant was then required to submit her finished report by a specific time ... . Everest provided claimant with support staff to assist in her work, including a videographer, and provided her with camera equipment, access to its electronic news database and graphics and background videos, and a computer for editing purposes ... . Everett also reviewed and edited claimant's work product and could direct her to make revisions or to add graphics to her video reports ... . Claimant was also free to use her own video camera operator, but Everest reimbursed claimant for that cost ... and retained ownership of claimant's stories and reports. Although there was also evidence in the record that could have supported a contrary conclusion, the foregoing amply furnished indicia of control over claimant's activities sufficient to support the Board's conclusion of an employer-employee relationship ...". **Matter of Redwoodturral (Everest Prod. Corp.—Commissioner of Labor, 2015 NY Slip Op 08482, 3rd Dept 11-19-15**

UNEMPLOYMENT INSURANCE.

PYROTECHNICIAN WAS NOT AN EMPLOYEE.

The Third Department determined a pyrotechnician who worked for a company (PEI) which puts on fireworks displays was not an employee and was not, therefore, entitled to unemployment insurance benefits: "Here, claimant did not submit a resume or employment application and did not undergo a job interview, but was retained by PEI through his contact with a lead technician and worked on PEI's displays intermittently over a five-year period. PEI relied on lead technicians, who were independent contractors, to oversee the production of the fireworks displays and they directed and supervised the pyrotechnicians involved in a particular project. Claimant's duties as a pyrotechnician included picking up the fireworks supplies, setting up the displays, igniting the fireworks, breaking down the displays and cleaning up. PEI did not attend the fireworks displays, but limited its activities to securing the sponsors, designing the shows and providing the fireworks and other necessary equipment. The lead technicians negotiated the price for production services with PEI and submitted invoices instructing PEI how much to pay the pyrotechnicans involved. PEI solicited assignments one at a time and the lead technicians and pyrotechnicians were free to refuse assignments and work for competitors. Although PEI offered to provide training, it was training that was required by regulatory agencies and could be obtained elsewhere. Furthermore, the lead technicians and pyrotechnicans did not wear clothing or other attire identifying them with PEI, but instead wore T-shirts

designating them as "staff" that were required by law. Under the circumstances presented, the indicia of control necessary to establish the existence of an employment relationship between PEI and the pyrotechnicans, like claimant, is clearly lacking ...". **Matter of Franco (Pyro Eng'g Inc.—Commissioner of Labor), 2015 NY Slip Op 08483, 3rd Dept 11-19-15**

UNEMPLOYMENT INSURANCE.

TRUCK DRIVER WAS EMPLOYEE.

The Third Department determined claimant truck driver was an employee of the trucking company (Leonard's) and was therefore entitled to unemployment insurance benefits: "While some indicia of control by Leonard was mandated by federal regulations ..., which, standing alone, 'is not sufficient to establish an employer-employee relationship' ... , the extent to which regulations governed the parties' contractual relationship can still be considered as part of the overall calculus of control exercised over claimant ... . Under the lease, claimant was not permitted to sublease or to allow any other party to use or operate the trucks without consent and was required under the parties' agreements to use the trucks that he leased from Leonard's related company ... . Claimant was also bound by a one-year noncompetition restriction prohibiting him from soliciting, transporting or handling business of any of Leonard's customers during the term of their agreements or for one year thereafter ... . Further, claimant was required to comply with Leonard's safety and procedures manual, which covered, among other things, safety concerns, delivery procedures and the scheduling of vacations. Although claimant had no set schedule, he was expected to keep Leonard informed daily of his status while hauling freight ..., and to contact Leonard if he anticipated any delay of delivery ... . Claimant also did not haul freight for any other company or customers, and claimant did not deal directly with customers because Leonard handled the orders, billing, customer service and complaints ... . In addition to claimant receiving freight assignments directly from Leonard, Leonard also established the rates for pickup and delivery services ... . Claimant was also instructed to be courteous and to represent the company in a professional manner at all times and to never argue with customers ... . Claimant was directed, prior to receiving payment from Leonard, to submit weekly paperwork, which included trip recaps, signed bills of lading, lumper receipts, toll tickets, fuel receipts and logs, and he received payment from Leonard directly regardless of whether the customer paid Leonard ...". **Matter of Harold (Leonard's Transp.—Commissioner of Labor), 2015 NY Slip Op 08485, 3rd Dept 11-19-15**

UNEMPLOYMENT INSURANCE.

MUSICIAN WAS EMPLOYEE.

The Third Department determined claimant, a musician who accompanied the Young People's Chorus of New York (YPCNY) was an employee of YPCNY and therefore was entitled to unemployment benefits: "Here, YPCNY provided claimant with the date, time and place for the concerts, the rehearsal times and the music to be performed. Claimant was paid a set rate of between $250 and $600 per concert and YPCNY paid his travel expenses. YPCNY would inform claimant of the required dress code for the concerts and claimant was required to inform YPCNY if he was going to be late or absent. YPCNY's president was the musical conductor at the concerts and was responsible for handling complaints about the musicians. While there is other evidence in the record that would support a different result, the foregoing constitutes substantial evidence supporting the Board's decision that YPCNY exercised sufficient control over the services provided by the musicians to establish an employment relationship ...". **Matter of North (Young People's Chorus of N.Y.—Commissioner of Labor), 2015 NY Slip Op 08486, 3rd Dept 11-19-15**

UNEMPLOYMENT INSURANCE.

TRUCK DRIVER WAS EMPLOYEE.

The Third Department determined claimant truck driver was an employee of RB Humphreys and was therefore entitled to unemployment insurance benefits: "Here, claimant entered a lease purchase agreement for use of a truck owned by RB Humphreys. RB Humphreys retained exclusive use of the vehicle while under lease and did not relinquish the title until the full purchase price was paid. RB Humphreys set the pay rate for claimant, who, absent negligence on his part, was paid regardless of whether the customer ultimately paid RB Humphreys. Although claimant could refuse assignments, testimony established that his lease purchase agreement would be terminated if an assignment was not accepted within a certain period of time. Furthermore, pursuant to the service contract with RB Humphreys, claimant was subject to a one-year noncompete clause following the cessation of their relationship." **Matter of Wilder (RB Humphreys Inc.—Commissioner of Labor), 2015 NY Slip Op 08487, 3rd Dept 11-19-15**

UNEMPLOYMENT INSURANCE.

MASSAGE THERAPIST WAS EMPLOYEE.

The Third Department determined claimant massage therapist was an employee of Addison Street Spa and was therefore entitled to unemployment insurance benefits: "Here, there is evidence in the record that Addison set the prices for the

massages and the percentage of which claimant was paid, scheduled its clients pursuant to claimant's weekly schedule, collected the fees from the clients and fielded any complaints. Addison required claimant to sign an agreement that she would not solicit, divert or take away any of Addison's clients during the term of the agreement and for one year after claimant stopped providing massages at the spa. Addison provided the room, equipment and supplies and required claimant to arrive 30 minutes before the scheduled massage time and to maintain professional attire ...". **Matter of Fatone (Addison St. Spa, LLC—Commissioner of Labor), 2015 NY Slip Op 08488, 3rd Dept 11-19-15**

UNEMPLOYMENT INSURANCE.

COPY WRITER AND EDITOR WAS AN EMPLOYEE.

The Third Department determined claimant copy writer and editor was an employee of Fox Mobile Distribution and was therefore entitled to unemployment insurance benefits: "Here, the record contains substantial evidence that Fox exercised the requisite control over claimant's work product to establish her status as its employee. Claimant was paid at a set hourly wage, entitled to reimbursement for approved travel and expenses and provided a cellular phone to test Fox's products ... . The project team leaders — who were employees — educated her regarding the product, delegated specific writing or editing tasks, provided direction and set completion deadlines. Claimant regularly reviewed her work progress with the project manager, received ongoing feedback and made necessary revisions and adjustments ... . She was also required to come to Fox's office for meetings and reviews of her copy. The fact that the parties' agreement designated claimant as a contractor is not dispositive ...". **Matter of Eckert (Fox Mobile Distrib. LLC—Commissioner of Labor), 2015 NY Slip Op 08489, 3rd Dept 11-19-15**

WORKERS' COMPENSATION LAW.

EMPLOYER WAS NOT PREJUDICED BY CLAIMANT'S FAILURE TO GIVE TIMELY NOTICE OF THE ACCIDENT; CLAIM ALLOWED.

The Third Department determined the claimant's failure to provide timely notice of the accident did not bar his claim: "Failure to provide timely written notice of an accident to an employer pursuant to Workers' Compensation Law § 18 generally bars the claim 'unless the Board excuses that failure on the ground that notice could not be given, the employer or its agent had knowledge of the accident, or the employer was not prejudiced' ... . Here, although claimant did not provide written notice of the January 2, 2012 accident to the employer, he filed his claim for benefits based upon that accident with the Workers' Compensation Board on January 31, 2012. On February 6, 2012, the Board provided its Notice of Case Assembly to the employer, which informed the employer of the claim, the date of the accident and that claimant was alleging injuries to his head, neck and back. Notably, the record reflects that claimant received prompt medical attention, including MRIs of his lumbar and cervical spine in February 2012. Under these circumstances, substantial evidence supports the decision of the Board that the short delay between the expiration of the 30-day notice period and the employer receiving notice of the claim did not prejudice the employer so as to prevent it from properly investigating the claim ...". **Matter of Lopadchak v R.W. Express LLC, 2015 NY Slip Op 08490, 3rd Dept 11-19-15**

WORKERS' COMPENSATION LAW, ATTORNEYS.

CARRIER'S WAIVER OF LIEN ON THIRD-PARTY SETTLEMENT IS NOT "COMPENSATION" UPON WHICH ATTORNEY FEES CAN BE BASED.

The Third Department determined the negotiation of a waiver of the carrier's lien on a third-party settlement was not "compensation" upon which an award of attorney fees can be based: "Pursuant to Workers' Compensation Law § 24, counsel fees approved by the Board 'shall become a lien upon the compensation awarded' and compensation is defined as 'the money allowance payable to an employee or to his [or her] dependents as provided for in this chapter' (Workers' Compensation Law § 2 [6]). Claimant contends that the carrier's waiver of its lien against the third-party settlement is equivalent to a payment of compensation and counsel fees based upon services provided in securing the waiver should be approved. While 'the term "compensation" should be liberally construed to advance the interest of injured employees' ..., we find no abuse of the Board's discretion in its finding that a waiver by a workers' compensation carrier of a lien against a third-party recovery is not compensation within the meaning of the Workers' Compensation Law ... . Although claimant does benefit from the waiver of the lien, the benefit derived relates to the third-party proceeds and not to compensation awarded him under the Workers' Compensation Law. Accordingly, the Board's refusal to award counsel fees will not be disturbed." **Matter of Pickering v Car Win Constr., Inc., 2015 NY Slip Op 08484, 3rd Dept 11-19-15**

FOURTH DEPARTMENT

ADMINISTRATIVE LAW (DRIVER'S LICENSES).

NEW RELICENSING REGULATIONS CAN BE APPLIED RETROACTIVELY (RE: ALCOHOL-RELATED DRIVING CONVICTIONS).

The Fourth Department, reversing Supreme Court, determined the Commissioner of Motor Vehicles had the power to retroactively apply regulations re: the relicensing of persons with three or more alcohol-related driving convictions: "[T]here is no merit to petitioner's contention that the Commissioner erred in retroactively applying the amended regulations to his application ... . '[P]etitioner's driver's license is not generally viewed as a vested right, but merely a personal privilege subject to reasonable restrictions and revocation by [the Commissioner] under her discretionary powers . . . Thus, [the Commissioner] remained free to apply her most recent regulations when exercising her discretion in deciding whether to grant or deny petitioner's application for relicensing. This is especially so in light of the rational, seven-month moratorium placed on all similarly-situated applicants for relicensing — i.e., persons with three or more alcohol-related driving convictions' ...". **Matter of Underwood v Fiala, 2015 NY Slip Op 08545, 4th Dept 11-20-15**

ARBITRATION.

ARBITRATOR'S MISAPPLICATION OF LAW IS NOT REVIEWABLE BY A COURT.

In affirming the denial of an application to vacate an arbitrator's award (in which petitioners were found to have wrongfully removed trees), the Fourth Department noted that the misapplication of law by an arbitrator is not reviewable by a court: "We reject, however, petitioners' contention that the arbitrator's alleged misapplication of RPAPL 861 is a sufficient ground to vacate the award in its entirety. 'An arbitrator's resolution of questions of substantive law or fact is not judicially reviewable' ... . Thus, even assuming, arguendo, that the arbitrator misapplied RPAPL 861, we conclude that such error is beyond our review." **Matter of Svenson v Swegan, 2015 NY Slip Op 08525, 4th Dept 11-20-15**

CRIMINAL LAW, EVIDENCE.

CRITERIA FOR A WARRANTLESS BLOOD SWAB.

In affirming defendant's murder conviction, the Fourth Department noted that a swab of a blood stain on defendant's body was properly taken without a warrant. The DNA in the swab matched the victim's. The court explained the criteria for a warrantless swab: "Defendant agreed to give his clothing to the police and, when he removed his shirt, an officer noticed a reddish brown stain on defendant's chest that appeared to be blood. When asked what it was, defendant responded that it was a bruise. The officer swabbed the area, which later tested positive for blood and matched the victim's DNA. Where, as here, the police did not obtain a warrant for the seizure of the blood evidence, the police had to satisfy two requirements in order to justify the action taken. First, the police had to have reasonable cause to believe the [blood stain] constituted evidence, or tended to demonstrate that an offense had been committed, or, that a particular person participated in the commission of an offense . . . Second, there had to have been an exigent circumstance of sufficient magnitude to justify immediate seizure without resort to a warrant ... . We agree with the court that the police had reasonable cause to believe that the blood stain on defendant's chest constituted evidence, and that the seizure was appropriate because it could have been easily destroyed by defendant ...". [internal quotation marks omitted] **People v Johnson, 2015 NY Slip Op 08540, 4th Dept 11-20-15**

CRIMINAL LAW, EVIDENCE.

ERRONEOUS ADMISSION OF EVIDENCE OF SPECIFIC PRIOR CRIMES AND BAD ACTS REQUIRED REVERSAL.

Evidence of prior crimes and bad acts on the part of the defendant (which took place just prior to defendant's arrest) were properly admitted to provide background information explaining the actions taken by the police. But other evidence of defendant's prior crimes and bad acts should not have been admitted and the errors warranted a new trial: "[A]lthough the court properly permitted the People to present evidence of the fact that he was on parole at the time of his arrest, the court erred in permitting the People to detail that he was on parole for a conviction of attempted criminal possession of a controlled substance in the third degree. The specific crime of which defendant was convicted does not constitute necessary background information, and it does not fit within any other recognized exception to the *Molineux* rule, i.e., motive, intent, identity, absence of mistake, or common plan or scheme ... . "... [T]he court erred in ruling that defense counsel [in cross-examining a police officer] opened the door to the admission of additional evidence of uncharged crimes and prior bad acts that the court had initially precluded by an earlier determination. * * * ... [D]efense counsel did not challenge on cross-examination the officer's credibility on the issue whether such prior interactions with defendant took place, thereby permitting the officer to fully explain the nature of the interactions...". **People v Dowdell, 2015 NY Slip Op 08567, 4th Dept 11-20-15**

FAMILY LAW.

EXTRAORDINARY CIRCUMSTANCES WARRANTED AWARD OF CUSTODY TO NONPARENT.

The Fourth Department, over a two-justice dissent, determined Family Court properly awarded custody of the child to the child's half-brother: "It is well-settled that, as between a parent and nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances ... . Here, the evidence established that the mother and the father changed residences frequently over a period of 18 months, and they were evicted from one residence and were homeless for several months, living in a tent or their vehicle. The child changed schools five times in four school districts over that same time period and, with each change in school, the child missed at least several days and sometimes several weeks of school. Indeed, we note that [u]nrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect ... . The evidence also supports the court's conclusion that the child had poor hygiene. Thus, the record establishes that the mother and the father have exhibited behavior evincing utter indifference and irresponsibility, and the court therefore properly concluded that extraordinary circumstances exist ... . It is well settled that, once extraordinary circumstances are found, the court must then make the disposition that is in the best interest[s] of the child ... , and we agree with the court that the child's best interests are served by awarding petitioner custody of the child with visitation to the mother and the father...". **Matter of Stent v Schwartz, 2015 NY Slip Op 08535, 4th Dept 11-20-15**

TRUSTS AND ESTATES.

TRUSTEE WAS NOT NEGLIGENT IN ITS MANAGEMENT OF THREE TRUSTS; SURROGATE'S COURT'S FINDINGS REVERSED.

Reversing Surrogate's Court, the Fourth Department determined the trustee of three trusts initially funded by Kodak stock was not negligent in its management of the trusts. The Fourth Department analyzed each trust using the relevant investment standards: "We conclude that the Surrogate erred in sustaining the objections to the three accounts because objectants failed to sustain their burden of proving that petitioner failed to diversify the trusts prudently within a reasonable time, and also failed to establish a reasonable date from which a surcharge could be calculated. As we explained in *Knox* (98 AD3d at 308-309), petitioner was subject to three separate standards of care as trustee: [f]rom [1966] until 1970, the standard was the common-law rule, which provided that the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent [persons] of discretion and intelligence in such matters, employ in their own like affairs . . . From 1970 to 1995, the standard of care was the prudent person rule established in EPTL 11-2.2 (a) (1), which provided that [a] fiduciary holding funds for investment may invest the same in such securities as would be acquired by prudent [persons] of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital . . . Effective, January 1, 1995, the Prudent Investor Act (EPTL 11-2.3 [L 1994, ch 609, § 1]) created a new standard of care by providing that [a] trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument (EPTL 11-2.3 [b] [2]). The statute lists various elements of the prudent investor standard, including: pursuing an overall investment strategy; considering numerous factors pertaining to the overall portfolio including, e.g., general economic conditions; and diversifying assets (see EPTL 11-2.3 [b] [3] [A]-[C]). Notably, the Prudent Investor Act requires a trustee to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify …". **Matter of JP Morgan Chase Bank, N.A., 2015 NY Slip Op 08533, 4th Dept 11-20-15**

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