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CasePrepPlus

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COURT OF APPEALS

ARBITRATION, INSURANCE LAW.

DELEGATION CLAUSES, PLACING THE DETERMINATION OF ARBITRABILITY IN THE ARBITRATOR, NOT THE COURT, ENFORCEABLE UNDER FEDERAL ARBITRATION ACT.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined "delegation clauses" in insurance-related contracts were enforceable under the Federal Arbitration Act (FAA). The "delegation clauses" required that the initial determination whether a dispute is arbitrable is to be made by the arbitrator, not the court. Before reaching the merits, and after explaining the history of the FAA and the McCarran-Ferguson Act, the Court of Appeals decided, under the facts, the McCarran-Ferguson Act did not remove the matter from the jurisdiction of the FAA: "[A] review of the record reveals that [the insureds] did not specifically direct any challenge to the delegation clauses empowering the arbitrators to determine gateway questions of arbitrability ... . Those delegation provisions, which state that the arbitrators 'have exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability,' are valid because the parties 'clearly and unmistakably' agreed to arbitrate arbitrability ... . As the delegation clauses are severable from the remainder of the agreements to arbitrate, we must enforce them according to their terms and, under these circumstances, the question of arbitrability is one for the arbitrators ... . [W]e hold that the FAA applies to the [contracts in issue] because it does not 'invalidate, impair, or supersede' . . . any insurance regulations and, consequently, the McCarran-Ferguson Act is not triggered ... . Further, because the parties clearly and unmistakably delegated the question of arbitrability and enforceability of the arbitration clauses to the arbitrators — in provisions that were not specifically challenged by the insureds — the FAA mandates that the arbitration provisions be enforced as written." **Matter of Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA, 2016 NY Slip Op 01209, CtApp 2-18-16**

CRIMINAL LAW.

MECHANISMS FOR SEEKING DEFERRAL OF MANDATORY SURCHARGE EXPLAINED.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined, where a sentence of incarceration exceeds 60 days, a sentencing judge does not have the power to waive the mandatory surcharge. The only mechanism available to such a defendant who seeks to demonstrate the inability to pay the surcharge is a motion for resentencing: "[T]he relevant statutes prohibit judicial waiver of a mandatory surcharge, require collection of any unpaid amounts from an inmate's funds as of the moment of confinement and throughout the period of incarceration, and provide for deferral under limited circumstances, namely an inability to pay that is not solely due to incarceration. A person subject to a mandatory surcharge may seek to defer payment at any time after sentencing, by way of a motion to resentence under CPL 420.10 (5). In addition, persons sentenced to confinement of 60 days or less, may avoid filing such motion, and instead present information in support of a request to defer on the appearance date set forth on a summons issued pursuant to Penal Law § 60.35 (8). Under either procedural mechanism, if the court grants a deferral it must place its reasons on the record . . . , and issue a written order, which shall be treated as a civil judgment in accordance with CPLR 5016 ... . This statutory scheme is structured to further the legislative goals of raising revenue and ensuring payment of the mandatory surcharge by persons convicted of crimes." **People v Jones, 2016 NY Slip Op 01208, CtApp 2-18-16**

CRIMINAL LAW, APPEALS.

APPELLATE DIVISION PROPERLY DECIDED APPEAL ON GROUNDS WHICH WERE NOT EXPLICITLY STATED BY THE TRIAL COURT BUT WHICH WERE IMPLICIT IN THE TRIAL COURT'S RULING.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the Appellate Division did not exceed its statutory powers when it decided an evidentiary issue on grounds which were implicit in the trial court's ruling, but not explicitly stated by the trial court. The trial judge had ruled rebuttal testimony was admissible to show defendant's witness had lied when she testified she was currently "just friends" with the defendant. The Appellate Division found the testimony was admissible to show the defendant's witness's bias or motive to fabricate. The Court of Appeals held that the "bias or motive to fabricate" reasoning simply recognized the underlying premise of the trial court's ruling, and did not violate the rule that the Appellate Division cannot decide an appeal on a ground not ruled upon by the lower court. The Court of

Appeals also found that evidence of uncharged acts of violence against or witnessed by the child sex-abuse victim were admissible to explain the victim's delay in reporting the abuse, and the expert evidence of Child Sexual Abuse Accommodation Syndrome was properly presented despite jurors stating in voir dire that a child's delay in reporting would be understandable. With respect to the Appellate Division's review powers, the Court of Appeals wrote: "Where a trial court does not identify the predicate for its ruling, the Appellate Division acts appropriately in considering the import of the trial judge's stated reasoning. Moreover, nothing in the language of CPL 470.15 (1) . . . prohibits an appellate court from considering the record and the proffer colloquy with counsel to understand the context of the trial court's ultimate determination, as it did in defendant's case. Unlike the case where the Appellate Division renders a decision on grounds explicitly different from those of the trial court, or on grounds that were clearly resolved in a defendant's favor — the type of appellate overreaching prohibited by CPL 470.15 (1) . . . , the Appellate Division here affirmed the evidentiary ruling on the ground relied on by the trial court, namely to establish the defense witness lied that she and defendant were merely friends, as well as the unspoken, record-supported inferences that can be drawn from that testimony. We therefore conclude that the Appellate Division acted within its statutory appellate review power." **People v Nicholson, 2016 NY Slip Op 01206, CtApp 2-18-16**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL NOT INEFFECTIVE; EVIDENCE OF CHILD'S MULTIPLE DISCLOSURES OF SEX ABUSE WAS NOT BOLSTERING; DEFENSE COUNSEL ARTICULATED LEGITIMATE REASONS FOR NOT CALLING A MEDICAL EXPERT.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a dissent, determined defense counsel was not ineffective in a child sex abuse case. The central issues concerned the evidence of the child's disclosures of the alleged abuse to several people (including the People's expert), the prosecutor's emphasis on the multiple disclosures without objection, and defense counsel's failure to call a medical expert. The Court of Appeals held defense counsel articulated arguably legitimate reasons for not calling an expert, and the evidence of multiple disclosures did not constitute bolstering, but rather was properly admitted as background information, fleshing out the investigation and the People's expert's diagnosis. With respect to the multiple disclosures, the court wrote: "In Ludwig [24 NY3d 221], we acknowledged that 'New York courts have routinely recognized that nonspecific testimony about [a] child-victim's reports of sexual abuse [does] not constitute improper bolstering [when] offered for the relevant, nonhearsay purpose of explaining the investigative process' and assisting in the completion of the narrative of events which led to the defendant's arrest ... . Here, the testimony of the child's mother, sister, principal and the two officers fulfilled these legitimate nonhearsay purposes, and defense counsel's objections to the testimony of the witnesses ensured that the witnesses did not specifically repeat what the child told them. The majority of [the People's medical expert's] testimony as to the child's specific allegations of sexual abuse was admissible under *People v Spicola* (16 NY3d 441 [2011]). In *Spicola*, we held that testimony of a nurse-practitioner concerning the child's history of sexual abuse was permissible testimony because the child's statements to the nurse-practitioner 'were germane to diagnosis and treatment' and therefore 'were properly admitted as an exception to the hearsay rule' (16 NY3d at 451)." **People v Gross, 2016 NY Slip Op 01204, CtApp 2-18-16**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

EVIDENCE SUFFICIENT TO TRIGGER DRUG FACTORY PRESUMPTION OF DRUG POSSESSION; WHETHER TO TESTIFY BEFORE A GRAND JURY IS A STRATEGIC DECISION TO BE MADE BY DEFENSE COUNSEL, NOT DEFENDANT.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissenting opinion by Judge Rivera, determined the evidence supported the jury's consideration of the "drug factory presumption" re: possession of drugs. In addition, the Court of Appeals held the decision whether to testify before a grand jury is a strategic decision to be made by the attorney, not the defendant, and, in order to demonstrate ineffective assistance in this context, a defendant must show prejudice. The presence of some loose cocaine on the floor, some baggies and a razor blade was sufficient to trigger the "drug factory presumption", i.e., a presumption of possession by everyone in close proximity to the cocaine. Without the presumption, there would not have been enough evidence defendant possessed the drugs: "While there was not a vast quantity of cocaine found, the evidence presented at trial supported an inference of more than mere intent to use or sell. Specifically, the evidence of packaged and loose drugs, paraphernalia and a razor blade in plain view was sufficient to establish that drugs were being 'package[d] or otherwise prepare[d] for sale' in the apartment, permitting the conclusion that defendant, who was in close proximity to the drugs, knowingly possessed them ...'. * * * [With respect to the right to testify before a grand jury] [i]n contrast to the 'constitutional nature of the right to testify at trial' . . . , the right to testify before the grand jury is a limited statutory right … . Whether to exercise that right is a decision that requires 'the expert judgment of counsel' … . … [T]his Court has repeatedly and consistently held that — even when it is due to attorney error — a 'defense counsel's failure to timely facilitate defendant's intention to testify before the [g]rand [j]ury does not, per se, amount to a denial of effective assistance of counsel' ... . That is, even where no strategy is involved, a defendant must show prejudice ...". **People v Hogan, 2016 NY Slip Op 01207, CtApp 2-18-16**

CRIMINAL LAW, EVIDENCE.

THERE WAS AN INEXCUSABLE 28-HOUR DELAY BETWEEN DEFENDANT'S ARREST AND ARRAIGNMENT, BUT THE DELAY DID NOT RENDER THE CONFESSION INVOLUNTARILY GIVEN.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, in a double-murder case, determined defendant's motion to suppress his confession was properly denied. The central issue was whether the delay between defendant's arrest and his arraignment (28 hours) rendered the confession involuntary. The Court of Appeals determined there was inexcusable delay, but that the delay was only one factor in an analysis of whether the confession was voluntarily given: "Although defendant was detained for over 24 hours, and spent most of the time in a windowless room, his basic human needs were provided for because he was able to eat, drink, and take bathroom breaks. He was even allowed to smoke cigarettes. ... [T]he interrogations were not done in continuous rotations, but rather were intermittent, and provided breaks during which defendant was able to rest and sleep, as well as remain silent and consider his situation. Defendant was not placed in the untenable position of bargaining his rights . . . , as he was neither induced to confess in order to speak with a lawyer, nor dissuaded from exercising his rights to counsel or to remain silent. Instead, as the detectives testified and the Miranda form indicates, defendant was informed of his rights early during the interrogation process. The record establishes defendant confessed only once he was faced with evidence of his guilt, not because he was exhausted and desperate to escape his interrogators. Thus, the totality of the circumstances here do not 'bespeak such a serious disregard of defendant's rights, and were so conducive to unreliable and involuntary statements, that the prosecutor has not demonstrated beyond a reasonable doubt that the defendant's will was not overborne' ...". **People v Jin Cheng Lin, 2016 NY Slip Op 01205, CtApp 2-18-16**

FIRST DEPARTMENT

CIVIL PROCEDURE, PRIVILEGE.

COMMON INTEREST PRIVILEGE MAY APPLY TO SUBPOENAED DOCUMENTS.

The First Department determined Supreme Court should have conducted an in camera review of documents sought from Morgan Stanley by the petitioner to see whether the documents are privileged under a "common interest privilege." Even though a third party, NaturEner, was privy to the documents, and despite a debtor-creditor relationship between Morgan Stanley and NaturEner, because Morgan Stanley and NaturEner shared a common interest in the underlying contract dispute, the common interest privilege may apply: "The common interest privilege is an exception to the rule that the presence of a third party will waive a claim that a communication is confidential. It requires that the communication otherwise qualify for protection under the attorney-client privilege and that it be made for the purpose of furthering a legal interest or strategy common to the parties asserting it ... . We find that Morgan Stanley and NaturEner shared a common interest in their desire to have plaintiff comply with its contractual obligations under the Rim Rock agreements. The fact that respondent and defendant were in a debtor-creditor relationship did not make their interests adverse in all matters and at all times ... . Under the circumstances, the court should have ordered an in camera inspection, the limited relief requested in the petition ...". **Matter of San Diego Gas & Elec. Co. v Morgan Stanley Senior Funding, Inc., 2016 NY Slip Op 01238, 1st Dept 2-18-16**

CORPORATION LAW.

ANALYTICAL FRAMEWORK FOR DE FACTO MERGER OF NONPROFIT CORPORATIONS FASHIONED BY THE COURT.

The First Department determined questions of fact were raised about whether there was a de facto merger of two nonprofit corporations. If a de facto merger is found in the sale of a corporation, the liabilities of the seller become the liabilities of the buyer. Because the established "de facto merger" law does not address nonprofits (which have no "owners"), the First Department fashioned a "nonprofit de facto merger" analytical framework: "Since, unlike for-profit corporations, nonprofits do not have owners, we hold that continuity of ownership is not a sine qua non of de facto merger of nonprofits, as it is for a finding of a de facto merger of for-profits ... . Thus, it is necessary to examine the other elements of de facto merger. Plaintiffs satisfied the second and third elements, 'cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction,' and 'the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business'... . ... Triable issues of fact exist as to the fourth element of de facto merger, 'continuity of management, personnel, physical location, assets and general business operation'...". **Ring v Elizabeth Found. for the Arts, 2016 NY Slip Op 01127, 1st Dept 2-16-16**

FAMILY LAW.

PROCEDURES MANDATED BY THE CHILD SUPPORT STANDARDS ACT NOT FOLLOWED; SUPREME COURT'S ORDER MODIFIED.

The First Department, in a full-fledged opinion by Justice Gische, determined Supreme Court did not follow the statutory requirements of the Child Support Standards Act (CSSA) and modified Supreme Court's order. Supreme Court directed plaintiff-father to pay 100% of private school tuition for the child, and further ordered that plaintiff-father pay 100% of the

cost of extracurricular, weekend and summer activities for the child. The First Department determined, under the CSSA, the extracurricular, weekend and summer activities should have been factored into child support. The court further determined that, because father and mother never married and lived together for only four months, the discussions between mother and father about private school for the child were not a sufficient ground for ordering father to pay for private school. The private school and extracurricular weekend and summer activities portions of Supreme Court's order were vacated. **Michael J.D. v Carolina E.P., 2016 NY Slip Op 01252, 1st Dept 2-18-16**

INSURANCE LAW

COVERAGE AT ISSUE WAS THE SUBJECT OF A POLICY EXCLUSION (WHICH WAS THEN ADDED BACK IN BY AN ENDORSEMENT); BECAUSE THE COVERAGE WAS NOT OUTSIDE THE SCOPE OF THE POLICY A TIMELY DISCLAIMER WAS REQUIRED.

The First Department, reversing Supreme Court, determined the insurance coverage at issue was the subject of a policy exclusion which required a timely disclaimer. The disclaimer was deemed untimely and ineffective. The plaintiff city was an additional insured on a general liability policy issued by defendant insurance company. The city was a defendant in a lawsuit alleging negligence by the Administration for Children's Services resulting in the abuse and death of decedent. The policy excluded coverage for "abuse or molestation" but an endorsement added that coverage back in. The First Department noted that if "abuse or molestation" was outside the scope of the policy, no disclaimer would have been necessary. However, because "abuse or molestation" coverage was eliminated by a policy exclusion (and then added back in) a timely disclaimer was mandatory: "When a claim falls outside the scope of an insurance policy's coverage portion, a disclaimer of coverage is unnecessary because the policy did not contemplate coverage in the first instance and requiring coverage for a failure to disclaim in such instances 'would create coverage where it never existed' ... . By contrast, when a refusal to provide coverage is based on a policy exclusion, a timely disclaimer of coverage is necessary to invoke the policy exclusion ... . Here, abuse and molestation claims occurring during the policy period but not reported until afterwards were eliminated from coverage by the exclusion but not added back in by the endorsement, and thus required a disclaimer (*id*.), which defendant failed to timely provide." **City of New York v Granite State Ins. Co., 2016 NY Slip Op 01124, 1st Dept 2-16-16**

LANDLORD-TENANT, MUNICIPAL LAW.

LANDLORD'S FAILURE TO PROCURE TOWN RENTAL PERMIT IS NOT A DEFENSE TO THE LANDLORD'S ACTION TO COLLECT RENT.

The First Department determined the landlord's failure to procure a rental permit in accordance with the Town Code did not provide the tenant, Fairfield, with a defense to the landlord's action to collect rent: "[P]laintiff does not dispute that it failed to comply with the provisions of the Town of Southampton Code that, as enacted in 2008, require an owner to obtain a $200 biennial rental permit before the rental period commences or within 30 days after receiving actual notice from the Town of the failure to comply (*see* §§ 270-5[A][1]; 270-8[A]; 270-13). However, under the circumstances, the Town Code does not provide a defense to plaintiff's claims against the Fairchild defendants, because it 'does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment' ... . While the Town Code addresses matters affecting public welfare, it does not expressly preclude [*2]an owner from bringing a lawsuit to collect rent, it imposes relatively minor sanctions to redress violations, and it allows the owner to cure a default after receiving actual notice of a violation (Town Code §§ 270-5; 270-13; 270-19). We conclude that the Fairchild defendants, having occupied the premises and raised a patently inadequate forgery defense, should not be permitted to rely on the provisions of the Town Code 'as a sword for personal gain rather than a shield for the public good,' i.e., to avoid payment of rent due under the lease . . . or enforcement of the absolute and unconditional guaranty given by Fairchild to induce plaintiff to enter into the lease ...". **1424 Millstone Rd., LLC v James B. Fairchild, LLC, 2016 NY Slip Op 01250, 1st Dept 2-18-16**

PERSONAL INJURY.

DEFENDANTS DID NOT DEMONSTRATE LACK OF NOTICE OF DANGEROUS CONDITION, SUMMARY JUDGMENT PROPERLY DENIED.

The First Department determined the defendants in a slip and fall case were not entitled to summary judgment because they did not affirmatively demonstrate a lack of notice of the icy condition: "Defendants did not demonstrate that they lacked constructive notice of the icy condition since they did not proffer an affidavit or testimony based on personal knowledge as to when its employees last inspected the driveway or as to the driveway's condition prior to the accident ... . The testimony of defendants' branch manager as to his usual and customary practice of inspecting the premises each morning does not satisfy defendants' burden of showing that they lacked notice of the alleged condition of the driveway prior to the accident, as there was no evidence to show that the manager's customary practice was followed on the day of the accident ...". **Singh v Citibank, N.A., 2016 NY Slip Op 01120, 1st Dept 2-16-16**

PERSONAL INJURY.

DEFENDANTS DEMONSTRATED SIDEWALK DEFECT WAS TRIVIAL.

The First Department determined defendants were entitled to summary judgment in this slip and fall case because the sidewalk defect was trivial: "Defendants established their entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when she tripped and fell on a long crack between pavement flags in a walkway that was between two buildings owned by defendants. Defendants submitted evidence, including deposition testimony, an affidavit of an inspector who measured the crack as 1/4" deep, and photographs, demonstrating that the subject defect was trivial and thus, not actionable ... . The photographs show that the crack was in the middle of the walkway, in a well-illuminated location, and was not hidden or covered in any way so as to make it difficult to see and identify as a hazard ... . In opposition, plaintiff failed to raise a triable issue of fact as to whether the crack in the walkway constituted a dangerous condition under the circumstances. She provided no affidavit of a person who had measured the crack, but only her own and her daughter's estimates of its depth." **Garcia v 549 Inwood Assoc., LLC, 2016 NY Slip Op 01249, 1st Dept 2-18-16**

PERSONAL INJURY, LABOR LAW.

INSTALLATION OF TEMPORARY FLAG HOLDERS NOT A PROTECTED ACTIVITY UNDER LABOR LAW § 240(1).

The First Department determined plaintiff's injuries from a two-story fall were not covered by Labor Law § 240(1). Plaintiff was installing temporary flag holders at the time of the fall: "The record establishes that plaintiff was not engaged in a protected activity under Labor Law § 240(1) at the time of his accident. Plaintiff testified that the installation of the three flag holder brackets entailed marking the location of the screws, drilling three holes for each bracket, placing plastic fasteners in the holes, and attaching each flag holder with three screws to hold it in place. Such work did not constitute 'altering' since it did not result in a 'significant physical change' to the building's structure ... . The cosmetic and nonstructural nature of the work is reflected by the temporary placement of the flags to enhance the exterior appearance of the building during the St. Patrick's Day celebration, after which they were removed ...". **Lannon v 356 W. 44th St. Rest., Inc., 2016 NY Slip Op 01129, 1st Dept 2-16-16**

PERSONAL INJURY, LABOR LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW § 240(1) CLAIM EVEN WHEN NOT FREE FROM NEGLIGENCE.

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim, noting that comparative negligence on the part of the plaintiff is not a defense. Plaintiff alleged he was operating a forklift lifting bricks to be placed on a scaffold when the forklift pitched forward and catapulted him over the front of the machine: "We agree with the motion court that plaintiff is entitled to summary judgment on his Labor Law § 240 claim. Plaintiff was using the prime mover to hoist a load; if the prime mover pitched forward due to the force of gravity, it failed to offer adequate protection and Labor Law § 240(1) applies ... . Similarly, if the accident occurred because either the prime mover or scaffold could not support the weight of the brick load, the accident also resulted from the application of the force of gravity to the load during the hoisting operation, and Labor Law § 240(1) applies ... . * * * '[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence' ... . On the contrary, that plaintiff may have negligently lowered the pallet, as the dissent posits, makes no possible difference to the outcome here, as '[n]egligence, if any, of the injured worker is of no consequence' ... . Rather, the law is clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it' ... . Here, the failure to provide a proper hoisting device to protect plaintiff violated Labor Law § 240(1)." **Somereve v Plaza Constr. Corp., 2016 NY Slip Op 01236, 1st Dept 2-18-16**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

CITY IS NOT LIABLE FOR ACCIDENT WHICH OCCURRED WHEN AN UNLICENSED CAR-WASH ATTENDANT WAS DRIVING A POLICE VAN.

The First Department, reversing Supreme Court, determined the city's motion for summary judgment in this car-accident case should have been granted. Plaintiff was struck by a police van driven by an unlicensed car-wash attendant. The city was not liable for negligently entrusting the vehicle to the unlicensed driver because, inter alia, there was no duty to make sure the attendant had a license before handing over the keys to him. In addition, the city was not vicariously liable as the owner of the van pursuant to Vehicle and Traffic Law § 388. Police vehicles are statutorily exempt from such liability. Plaintiff argued that the exemption did not apply because the van was not being "operated" by the police department at the time of the accident. The First Department held that "operated" in this context means "to exercise power over," and not "driven." **Guevara v Ortega, 2016 NY Slip Op 01106, 1st Dept 2-16-16**

SECOND DEPARTMENT

ATTORNEYS.

IN A FEE DISPUTE, PLAINTIFF-ATTORNEY'S FAILURE TO NOTIFY CLIENT OF THE CLIENT'S RIGHT TO ARBITRATE REQUIRED DISMISSAL OF THE COMPLAINT.

The Second Department determined, in a fee dispute, plaintiff-attorney's failure to give notice to his client of the client's right to arbitrate required dismissal of the complaint without prejudice: "Except in limited circumstances, where an attorney commences an action to recover a fee, the attorney must provide written notice by certified mail or by personal service of the client's right to elect to arbitrate and must allege in the complaint that the client received notice of his or her right to pursue arbitration and did not file a timely request to arbitrate or that the dispute is not otherwise covered by the rules governing the resolution of attorney-client fee disputes by arbitration (*see* 22 NYCRR 137.6 . . .). A plaintiff's failure to provide the defendant with written notice of his or her right to elect to submit the fee dispute to arbitration, and the failure to allege in the complaint that the defendant received such notice and did not file a timely request for arbitration, or that fee dispute arbitration is inapplicable to the matter for specified reasons, requires dismissal of the complaint ...". **Pascazi Law Offs., PLLC v Pioneer Natural Pools, Inc., 2016 NY Slip Op 01160, 2nd Dept 2-17-16**

CIVIL PROCEDURE.

CRITERIA FOR A MOTION TO RENEW IS FLEXIBLE; HERE MOTION SHOULD HAVE BEEN GRANTED EVEN THOUGH MOVANT SHOULD HAVE BEEN AWARE OF THE "NEW" EVIDENCE.

The Second Department, reversing Supreme Court, determined plaintiff's motion to renew an application for an order of reference in a mortgage foreclosure action should have been granted. The court noted that the criteria for a motion to renew is flexible, there is no time limit for bringing the motion, and the motion can be granted even when movant should have been aware of the "new" evidence: "Generally, 'a motion for leave to renew is intended to bring to the court's attention new or additional facts which were in existence at the time the original motion was made, but unknown to the movant' ... . However, the requirement that a motion for leave to renew be based upon new or additional facts unknown to the movant at the time of the original motion is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made ... . Except where a motion to renew is based upon a change in the law, which is not the case here, CPLR 2221 does not impose a time limit for making a motion for leave to renew ... . Here, the plaintiff established its entitlement to an order of reference, as it submitted documentary proof that the defendants failed to answer the complaint within the time allowed, that it was the holder of the note and mortgage, that the defendants defaulted, 'and that, as a preliminary step in obtaining a judgment of foreclosure, the appointment of a referee to compute the amount due on the . . . mortgage would be proper' ... . Although the plaintiff should have been aware of the durable power of attorney at the time it initially sought an order of reference, the Supreme Court, under the circumstances, improvidently exercised its discretion in denying the plaintiff's motion for leave to renew, where the plaintiff, having otherwise established its entitlement to an order of reference, submitted, inter alia, the durable power of attorney in support of its renewal motion and the motion was unopposed." **Citimortgage, Inc. v Espinal, 2016 NY Slip Op 01148, 2nd Dept 2-17-16**

CRIMINAL LAW.

A TRIAL JUDGE DOES NOT HAVE THE AUTHORITY TO CONDUCT A WEIGHT OF THE EVIDENCE ANALYSIS, ONLY THE APPELLATE DIVISION HAS THAT POWER.

The Second Department, reversing Supreme Court, determined a trial judge who renders a guilty verdict on an indictment count in a bench trial cannot thereafter conduct a weight of the evidence analysis and dismiss the count. Here, the judge reserved decision on defendant's motion for a trial order of dismissal, found the defendant guilty, and then dismissed the count pursuant to the motion for a trial order of dismissal based up a weight of the evidence analysis: "'A Trial Judge who has rendered a guilty verdict after a nonjury trial has neither inherent power nor statutory authority to reconsider his [or her] factual determination. Although he [or she] may correct clerical or ministerial errors, he [or she] is without authority to reassess the facts and change a guilty verdict to not guilty' ... . 'After formal rendition of a verdict at a bench trial, a trial court lacks authority to reweigh the factual evidence and reconsider the verdict' ... . 'The term "verdict" is defined as the announcement . . . by the court in the case of a non-jury trial, of its decision upon the defendant's guilt or innocence of the charges . . . considered by it' ... . Thus, '[t]rial judges are prohibited from setting aside a verdict as against the weight of the evidence. This power is reserved to the Appellate Division, which essentially sits as a thirteenth juror' ... . * * * Here, the defendant moved pursuant to CPL 290.10, at the close of evidence, for a trial order of dismissal, and the court reserved decision, as permitted by CPL 290.10 (1)(b), until after the verdict was rendered. We conclude that, where a defendant has moved for a trial order of dismissal pursuant to CPL 290.10 and the court has held all or part of that motion in abeyance, a court conducting a nonjury trial likewise may not render a verdict and then reconsider its factual determination; instead, the court must consider the legal sufficiency of the evidence in support of its original verdict ... . Accordingly, in this matter,

the Supreme Court's order vacating its verdict of guilty as to count two of the indictment and dismissing that count must be reversed." **People v Dobson, 2016 NY Slip Op 01198, 2nd Dept 2-17-16**

ENVIRONMENTAL LAW, LAND USE.

1987 NEGATIVE DECLARATION DID NOT EXPIRE AND REMAINS VALID WITH RESPECT TO A PRELIMINARY PLAT APPLICATION; HOWEVER, BECAUSE OF CHANGES MADE TO THE PROJECT, THE PLANNING BOARD HAS THE POWER TO AMEND OR RESCIND THE NEGATIVE DECLARATION.

The Second Department determined that a 1987 negative declaration with respect to a preliminary plat application had not expired and was still valid. Therefore, the planning board's determination that a new State Environmental Quality Review Act (SEQRA) review was necessary was annulled. However, since changes had been made to the project, the planning board has the power to amend or rescind the original negative declaration: "[I]n light of . . . the changes to the project, the Planning Board has the responsibility to assess whether the 1987 negative declaration should be amended (*see* 6 NYCRR 617.7[e][1]) or "must" be rescinded (6 NYCRR 617.7[f][1]) under the standards set forth in 6 NYCRR 617.7(e) and (f) ... . The provisions of 6 NYCRR 617.7(e) and (f) specifically authorize an agency to take into account changes in projects, new information, and changed circumstances affecting a project. The Planning Board erroneously concluded that the amendment and rescission provisions were, by their terms, inapplicable. Rescission and amendment are authorized '[a]t any time prior to [the lead agency's] decision to . . . approve an action' (6 NYCRR 617.7[e], [f]). Here, the Planning Board has never given final approval for subdivision of the entire parcel or for subdivision of the portion of the parcel the plaintiffs/petitioners now seek to develop. Accordingly, contrary to its conclusion otherwise, the Planning Board is still authorized to assess possible adverse environmental impacts with respect to the proposed East Mountain North subdivision pursuant to 6 NYCRR 617.7(e) and (f)." **Leonard v Planning Bd. of Town of Union Vale, 2016 NY Slip Op 01156, 2nd Dept 2-17-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

INFANT PLAINTIFF ASSUMED RISK OF INJURY PLAYING BASKETBALL.

The Second Department, reversing Supreme Court, determined defendant school district's motion for summary judgment should have been granted. Infant plaintiff was injured playing basketball when he struck the pole holding the hoop. The Second Department held the school district had demonstrated infant plaintiff assumed the risk of that injury: "The doctrine of primary assumption of risk applies where a consenting participant in a sporting activity 'is aware of the risks [inherent in the activity]; has an appreciation of the nature of the risks; and voluntarily assumes the risks' ... . 'However, the doctrine will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased' ... . 'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty' ... . The defendant established its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging premises liability by demonstrating that the subject pole was open and apparent, that the risk of colliding with it was inherent in the activity of playing basketball in the courtyard, that the defendant did nothing to conceal or unreasonably increase the risk, and that the plaintiff assumed the risk of injury by voluntarily participating in the activity at that location, as he had on numerous prior occasions ...". **Altagracia v Harrison Cent. Sch. Dist., 2016 NY Slip Op 01141, 2nd Dept 2-17-16**

THIRD DEPARTMENT

CRIMINAL LAW.

PROSECUTOR'S REFUSAL TO PROVIDE A RACE-NEUTRAL REASON FOR STRIKING A JUROR REQUIRED REVERSAL.

The Third Department reversed defendant's conviction because the prosecutor refused to give a race-neutral reason for striking a nonwhite juror. The prosecutor argued that no reason need be provided for juror no. 2 because juror no. 2 was the first nonwhite juror to be struck. The Third Department noted that the judge asked for race-neutral reasons after defense counsel objected to a pattern of striking four nonwhite jurors. Therefore, the judge had implicitly concluded defense counsel had made a prima facie showing of discrimination. At that point the prosecutor was obligated to provide race-neutral reasons for striking all four nonwhite jurors, including juror no. 2: " 'The purpose of the Batson rule is to eliminate discrimination, not minimize it' ... . Accordingly, because '[t]he exclusion of any [nonwhite prospective jurors] solely because of their race is constitutionally forbidden' . . . , a defendant asserting a Batson challenge need not show a pattern of discrimination. 'Although as part of their prima facie case parties often rely on numbers to show a pattern of strikes against a particular group of jurors, a prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination' ... . Here, County Court implicitly concluded that defendant had made a prima facie showing of discrimination as to all four of the jurors in question, and the burden then shifted to the People to provide race-neutral explanations for all four — not just three — of the nonwhite prospective jurors against whom the People asserted peremp-

tory challenges. Given the People's failure to provide — and County Court's failure to require — such an explanation as to all four prospective jurors, defendant is entitled to a new trial." **People v Jones, 2016 NY Slip Op 01212, 3rd Dept 2-18-16**

CRIMINAL LAW, CIVIL COMMITMENT.

A DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER WITH NARCISSISTIC AND PARANOID FEATURES IS SUFFICIENT TO SUPPORT CIVIL COMMITMENT IN A SECURE FACILITY PURSUANT TO CPL § 330.20.

In finding that respondent suffers from a dangerous mental disorder requiring civil commitment in a secure facility, the Third Department first determined a diagnosis of antisocial personality disorder (ASPD) with narcissistic and paranoid features was sufficient to justify civil commitment pursuant to Criminal Procedure Law § 330.20: "Expert testimony established that ASPD causes individuals to have 'distortions related to their thoughts [and] behaviors, and . . . a reckless disregard for societal norms.' Individuals are diagnosed with narcissistic features when they engage in 'grandiose' thinking, have a 'sense of self-importance' and feel 'entitled' and possibly omnipotent. Finally, individuals with paranoid features often have feelings that 'people are out to get them.' Considering this evidence, we conclude that a mental condition marked by a disregard for societal norms and specifically amplified by an unreasonably inflated sense of self worth and an irrational attribution of hostile intentions to other people sufficiently distinguishes a respondent from the typical recidivist and has a relationship to the requisite dangerousness pursuant to CPL 330.20. Accordingly, we conclude that the diagnosis of ASPD with narcissistic and paranoid features is not legally insufficient to support civil confinement pursuant to CPL 330.20." **Matter of John Z. (Commissioner of Mental Health), 2016 NY Slip Op 01234, 3rd Dept 2-18-16**

FAMILY LAW, APPEALS.

FAMILY COURT APPLIED THE WRONG LAW RE: EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THE AWARD OF CUSTODY TO A NONPARENT; EXTRAORDINARY CIRCUMSTANCES FINDING IS APPEALABLE EVEN THOUGH CUSTODY WAS AWARDED TO MOTHER.

The Third Department reversed Family Court's finding that extraordinary circumstances justified the award of custody of the child to mother's cousin. After finding extraordinary circumstances supporting the award of custody to a nonparent had been demonstrated, Family Court went on to find that the best interests of the child required an award of custody to mother. The Third Department noted that a finding of extraordinary circumstances justifying the award of custody to a nonparent is appealable by the mother, even though custody was ultimately awarded to her. In making the "extraordinary circumstances" finding, Family Court had erroneously relied on Domestic Relations Law § 72, which applies only to custody awards to grandparents. The court explained the correct applicable law: " '[A] parent has a claim of custody of his or her child, superior to that of all others, in the absence of surrender, abandonment, persistent neglect, disruption of custody over an extended period of time or other extraordinary circumstances' ... . '[T]he nonparent bears the heavy burden of proving extraordinary circumstances and the existence of a prior consent order of custody in favor of the nonparent is not sufficient to demonstrate extraordinary circumstances' ... . 'the extraordinary circumstances analysis must consider "the cumulative effect" of all issues present in a given case' . . . , including, among others, 'the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the . . . parent allowed such custody to continue without trying to assume the primary parental role' ... . Since a finding of extraordinary circumstances may have enduring consequences for the parent . . . , it can be challenged on appeal even if, as here, the parent ultimately obtained custody." **Matter of Brown v Comer, 2016 NY Slip Op 01218, 3rd Dept 2-18-16**

INSURANCE LAW.

QUESTION OF FACT WHETHER A SPECIAL RELATIONSHIP EXISTED WHICH WOULD SUPPORT THE INSURANCE MALPRACTICE ACTION.

The Third Department, reversing Supreme Court, determined a question of fact had been raised whether a special relationship had developed between plaintiff (the insured) and plaintiff's insurance agency (defendant Cardell), such that plaintiff could maintain an action for insurance malpractice. Plaintiff put on rodeos and procured insurance from defendant for each event. One policy mistakenly excluded coverage for injuries caused by animals. Another policy didn't cover the trailers used to transport the rodeo animals. After the rodeo, a few animals escaped as they were about to be loaded onto trailers and injured several people. Both carriers disclaimed coverage. The court explained the law re: a special relationship between an insured and the insurance agency: "Although an insurance agent's common-law duty to his or her clients does not include a continuing duty to advise the clients on appropriate coverage or to recommend additional coverage that the clients did not request . . . , an agent may be liable for failing to provide appropriate advice in circumstances where there is a special relationship. As pertinent here, such a relationship may arise when 'there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on' ... . The question whether a special relationship exists between an insurance agent and a client giving rise to a duty to guide and advise the client is a factual determination that 'is governed by the particular relationship between the parties and is best determined on a case-by-case basis' ... ." **Finch v Steve Cardell Agency, 2016 NY Slip Op 01231, 3rd Dept 2-18-16**

INSURANCE LAW.

GENERAL CONTRACTOR'S FAILURE TO TIMELY NOTIFY INSURER OF UNDERLYING LAWSUIT BY INJURED WORKER ENTITLED INSURER TO DISCLAIM COVERAGE WITHOUT A SHOWING OF PREJUDICE.

The Third Department, reversing Supreme Court, determined defendant insurer properly disclaimed coverage because the insured, plaintiff general contractor, did not timely notify the insurer of a lawsuit brought by an injured construction worker. Plaintiff was not notified of the suit because it had not appointed a new registered agent for service to replace a defunct agent (not an adequate excuse). The court noted that the "no prejudice" rule applied to the disclaimer, meaning that the insurer need not show it was prejudiced by the lack of notice to disclaim: "There is no dispute that plaintiff provided timely notice of the underlying accident, but it is equally clear that plaintiff failed to '[n]otify [defendant] as soon as practicable' that the personal injury action had been commenced. Indeed, plaintiff never gave notice to defendant, although counsel for Speirs did so approximately four months after papers had been served ... . That delay, 'in the absence of an excuse or mitigating factors, is unreasonable as a matter of law' ... . Plaintiff never gave notice because it did not receive the summons and complaint but, inasmuch as its nonreceipt flowed from its failure to appoint a new registered agent for service to replace a defunct one that had been named decades earlier, that explanation was 'insufficient as a matter of law' ...". **Kraemer Bldg. Corp. v Scottsdale Ins. Co., 2016 NY Slip Op 01233, 3rd Dept 2-18-16**

UNEMPLOYMENT INSURANCE.

FITNESS INSTRUCTOR NOT AN EMPLOYEE.

The Third Department determined claimant, a fitness instructor at a senior living facility (Classic Riverdale), was not an employee, and was not, therefore, entitled to unemployment insurance benefits: "After learning from a client that Classic Riverdale was seeking an exercise instructor, claimant contacted the facility's executive director and offered his services. Claimant and the director negotiated a flat fee for each class and set a schedule for the classes. Classic Riverdale did not provide any training or require claimant to wear a uniform. He was not required to punch in or out on the employee time clock, did not use the employee facilities, such as the locker room or cafeteria, and was not invited to attend employee meetings. Claimant alone determined the content of the classes and method of instruction ... . There was no limitation placed on the amount of time that claimant could miss from work and his attendance was not monitored. He was never given a performance evaluation and was not subject to any form of discipline ... . Claimant also maintained his own liability insurance ... . Notably, in addition to providing classes at the facility, claimant also provided services to other clients and solicited the facility's residents for private, one-on-one classes without any objection from Classic Riverdale ...". **Matter of Cohen (Classic Riverdale, Inc. — Commissioner of Labor), 2016 NY Slip Op 01222, 3rd Dept 2-18-16**