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Editor: **Bruce Freeman**

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COURT OF APPEALS

CIVIL PROCEDURE, CORPORATION LAW.

COURT PROPERLY REFUSED TO APPROVE CLASS ACTION SETTLEMENT WHICH DID NOT GIVE OUT-OF-STATE SHAREHOLDERS THE RIGHT TO OPT OUT.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined Supreme Court properly refused to approve a settlement in a class action challenging a corporate merger because there was no opt-out provision for out-of-state shareholders. Because the suit included claims for damages, effectively prohibiting out-of-state shareholders from bringing actions in other jurisdictions would deprive them of a property right: "While the complaint seeks predominately equitable relief, the settlement would also release any damage claims relating to the merger by out-of-state class members. The broad release encompassed in the agreement bars the right of those class members to pursue claims not equitable in nature, which . . . are constitutionally protected property rights." ***Jiannaras v. Alfant*, 2016 N.Y. Slip Op. 03548, CtApp 5-5-16**

CORPORATION LAW.

STANDARD FOR REVIEW OF GOING-PRIVATE MERGERS ANNOUNCED; SHAREHOLDER CLASS ACTION CHALLENGING THE GOING-PRIVATE MERGER DISMISSED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined a shareholder class action complaint challenging a going-private merger was properly dismissed for failure to state a cause of action. The court adopted a Delaware standard of review for going-private mergers, i.e., where the controlling shareholder seeks to buy out all the outstanding shares and, in effect, take the publicly-traded company private. Plaintiff argued the "entire fairness" review standard should be applied. Defendants argued the "business judgment" review standard should be applied. The Court of Appeals chose a middle ground (the Delaware standard) which is essentially the business judgment standard with added protections for minority shareholders: "Plaintiff urges that we apply the entire fairness standard, which places the burden on the corporation's directors to demonstrate that they engaged in a fair process and obtained a fair price. Defendants seek application of the business judgment rule, with or without certain conditions. We are persuaded to adopt a middle ground. Specifically, the business judgment rule should be applied as long as the corporation's directors establish that certain shareholder-protective conditions are met; however, if those conditions are not met, the entire fairness standard should be applied. [The adopted Delaware standard has been summarized as follows:] . . . '[I]n controller buyouts, the business judgment standard of review will be applied if and only if: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority' ...". ***Matter of Kenneth Cole Prods., Inc.*, 2016 N.Y. Slip Op. 03545, CtApp 5-5-16**

CRIMINAL LAW.

DENIAL OF MOTION TO WITHDRAW PLEA WITHOUT A HEARING WAS NOT AN ABUSE OF DISCRETION.

The Court of Appeals determined that defendant's motion to withdraw his plea was properly denied without a hearing: " 'When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances' ... . '[O]ften, a limited interrogation by the court will suffice' ... . Here, the court gave the parties an opportunity to argue in furtherance of the motion to withdraw the plea, and because both parties declined, the motion was appropriately decided on the written submissions. Furthermore, while defense counsel claimed that defendant had been pressured by his family to take the plea, this Court has 'never recognized "coercion" by family members as a reason for withdrawing a guilty plea'. . . , and the record here does not demonstrate that the court abused its discretion in denying the motion on that ground. Additionally, given defendant's silence in any sworn statement regarding his alleged use of drugs and alcohol and the court's ability to observe defendant during the colloquy . . . , it was not an abuse of discretion for the court to have denied the motion to withdraw the plea without holding a hearing." ***People v. Manor*, 2016 N.Y. Slip Op. 03414, CtApp 5-3-16**

CRIMINAL LAW.

PEOPLE NEED NOT PROVE DEFENDANT KNEW THE KNIFE DEFENDANT POSSESSED MET THE STATUTORY DEFINITION OF A GRAVITY KNIFE.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the People do not need to prove a defendant charged with possession of a gravity knife was aware the knife opened and locked by flicking the wrist downward. Here, defendant claimed he always opened the knife with two hands, used it only to cut sheetrock and tile and did not know it was a gravity knife: "We . . . conclude that Penal Law § 265.01 (1) does not require the People to prove that defendants knew that the knife in their possession met the statutory definition of a gravity knife. The plain language of that subdivision demonstrates that the Legislature intended to impose strict liability to the extent that defendants need only be aware of their physical possession of the knife (*see* Penal Law §§ 15.00 [2]; 15.10). While knowing possession of the knife is required (*see* Penal Law § 15.15 [2]), we conclude it is not necessary that defendants know that the knife meets the technical definition of a gravity knife under Penal Law § 265.00 (5)." ***People v. Parrilla*, 2016 N.Y. Slip Op. 03417, CtApp 5-3-16**

CRIMINAL LAW, APPEALS.

PROBABLE CAUSE TO ARREST SUPPORTED BY THE RECORD.

The Court of Appeals noted that its review of whether there was probable cause for arrest, a mixed question of fact and law, is limited to whether there is support for a probable-cause finding in the record. Here, the police were conducting surveillance on a target drug dealer. The police observed defendant take a bag from the target's car, which was deemed sufficient to provide probable cause to arrest: "After a *Darden* hearing . . . , Supreme Court found that the confidential information had given the police 'cause to believe' that the surveillance target was engaged in 'drug activity.' Insofar as a *Darden* hearing is held to ensure 'that the confidential informant both exists and gave the police information sufficient to establish probable cause' . . . , it may be inferred from the *Darden* hearing court's ruling, which was adopted by the suppression court for the purpose of determining probable cause, that the confidential information was not stale by the time of defendant's arrest. Furthermore, the officer's justified belief that the surveillance target was trafficking in narcotics, together with the manner in which the bag was removed from the car, support the lower courts' conclusion that the police had probable cause to arrest defendant for criminal possession of a controlled substance. Record support for probable cause may be found on the basis of 'indicia of a drug transaction' known to 'an experienced officer . . . trained in the investigation and detection of narcotics,' which include 'handl[ing] [an] unidentified object in a manner typical of a drug sale' ...". ***People v. Joseph*, 2016 N.Y. Slip Op. 03416, CtApp 5-3-16**

CRIMINAL LAW, APPEALS, IMMIGRATION.

APPEALS AS OF RIGHT MAY NOT BE DISMISSED BASED UPON THE DEPORTATION OF APPELLANT; PERMISSIVE APPEALS, HOWEVER, ARE SUBJECT TO DISCRETIONARY DISMISSAL ON THAT GROUND.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a partial dissent, determined appeals as of right, irrespective of the issues raised, should not be dismissed because the appellant has been deported. Permissive appeals, such as an appeal of the denial of a motion to vacate a conviction, are, however, subject to discretionary dismissal because the appellant has been deported: "[W]e conclude that this Court's holding in *Ventura* [17 NY3d 675] prohibits an intermediate appellate court from exercising its discretion to dismiss a pending direct appeal on the ground that the defendant has been involuntarily deported, regardless of the appellate contentions raised by the defendant. ... We reach a different conclusion with respect to [a] pending permissive appeal. Our holding in *Ventura* was based upon a criminal defendant's fundamental right to a direct appeal granted by CPL 450.10. That statute has no application, however, in the context of permissive appeals. Rather, CPL 450.15 governs an appeal from an order denying a CPL 440.10 motion to vacate a judgment, and provides that a certificate granting leave to appeal must be obtained pursuant to CPL 460.15 (*see* CPL 450.15 [1]). In *Ventura*, this Court spoke of a criminal defendant's 'absolute right,' 'statutory right,' 'fundamental right,' and 'basic entitlement' to appellate consideration of a direct appeal ... . A defendant has no such fundamental right or basic entitlement to appeal where the defendant must seek permission to appeal to the intermediate appellate court pursuant to CPL 450.15. ... Where an intermediate appellate court has permissive jurisdiction over a pending appeal, the intermediate appellate court retains its discretion to dismiss the pending permissive appeal due to the defendant's involuntary deportation. ***People v. Harrison*, 2016 N.Y. Slip Op. 03547, CtApp 5-5-16**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

LEVEL THREE ASSESSMENT FOR INFLICTION OF SERIOUS INJURY PROPER EVEN THOUGH THERE WAS NO SEX OFFENSE COMMITTED DURING THE UNLAWFUL IMPRISONMENT OF A CHILD.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive dissent, determined County Court did not abuse its discretion when it applied a statutory override for infliction of serious injury, adjudicating defendant a level three sex offender, despite the fact defendant was not charged with a sex offense. By statute, a defendant convicted of the unlawful imprisonment of a child is deemed a sex offender, even when no sex offense was committed. Here, the child was

assaulted (tortured) and seriously injured over the course of a five-day ordeal, but no sex offense was involved. The points assessed under the Sex Offender Registration Act (SORA) criteria rose only to a level one. Because of the extreme violence, County Court applied the statutory override: "[T]he application of the override for 'infliction of serious physical injury,' 'automatically result[s] in a presumptive risk assessment of level [three]' (Guidelines at 3). Therefore, properly framed, defendant's argument is that the SORA court abused its discretion in declining to engage in a downward departure from the presumptive risk level three. We disagree. Defendant's sole argument to the SORA court was that the absence of a sexual component to his crime, in and of itself, warranted a level one adjudication. That factor, the existence of which was not in dispute, was considered [when] the Board assessed him 0 points for risk factor 2 — Sexual Contact with Victim. Defendant made no other argument of a mitigating factor to the SORA court in support of a downward departure. In the exercise of its discretion, the SORA court declined to depart from the presumptive risk level three." ***People v. Howard*, 2016 N.Y. Slip Op. 03415, CtApp 5-3-16**

DEALER ACT [FRANCHISED MOTOR VEHICLE DEALER ACT, VEHICLE AND TRAFFIC LAW § 460 ET SEQ].

FAILURE TO TAKE INTO ACCOUNT CONSUMER BRAND PREFERENCE IN EVALUATING A CAR DEALER'S PERFORMANCE VIOLATES THE DEALER ACT; UNILATERAL CHANGE TO THE GEOGRAPHIC AREA USED TO EVALUATE A CAR DEALER'S PERFORMANCE DOES NOT VIOLATE THE DEALER ACT.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissenting opinion, determined General Motors' [GM's] failure to take into account consumer-preference in determining an auto-dealer's [franchisee's] performance violated the Dealer Act. The court further determined that GM's changes to the geographic area in which plaintiff-dealer's sales performance is measured did not violate the act: "[O]nce GM determined that statewide raw data must be adjusted to account for customer preference as a measure of dealer sales performance, GM's exclusion of local brand popularity or import bias rendered the standard unreasonable and unfair because these preference factors constitute market challenges that impact a dealer's sales performance differently across the state. It is unlawful under section 463 (2) (gg) to measure a dealer's sales performance by a standard that fails to consider the desirability of the Chevrolet brand itself as a measure of a dealer's effort and sales ability. * * * ... [A] revision of the [geographic area] is not perforce violative of section 463 (2) (ff). Rather, such change must be assessed on a case-by-case basis, upon consideration of the impact of the revision on a dealer's position." ***Beck Chevrolet Co., Inc. v. General Motors LLC*, 2016 N.Y. Slip Op. 03412, CtApp 5-3-16**

INSURANCE LAW.

ANTISUBROGATION RULE DOES NOT APPLY TO A PARTY NOT COVERED BY THE RELEVANT POLICY.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, reversing the Appellate Division, re: claims stemming from lead paint exposure, determined the antisubrogation rule did not apply to a party, ANP, which was not covered by the relevant policy: "[T]he antisubrogation rule is an exception to the right of subrogation ... . Under that rule, 'an "insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered . . . even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived" ' ... . In effect, 'an insurer may not step into the shoes of its insured to sue a third-party tortfeasor . . . for damages arising from the same risk covered by the policy' . . . , even where there is an express subrogation agreement ... . The two primary purposes of the antisubrogation rule are to avoid 'a conflict of interest that would undercut the insurer's incentive to provide an insured with a vigorous defense' and 'to prohibit an insurer from passing its loss to its own insured' ... . * * * The antisubrogation rule . . . requires a showing that the party the insurer is seeking to enforce its right of subrogation against is its insured, an additional insured, or a party who is intended to be covered by the insurance policy in some other way ... . Here, as recognized by the courts below, ANP and its predecessor were not insured under the relevant insurance policies. ... Thus, the principal element for application of the antisubrogation rule — that the insurer seeks to enforce its right of subrogation against its own insured, additional insured, or a party intended to be covered by the insurance policy — is absent." ***Millennium Holdings LLC v. Glidden Co.*, 2016 N.Y. Slip Op. 03543, CtApp 5-5-16**

INSURANCE LAW, CONTRACT LAW.

BASED UPON THE POLICY LANGUAGE, AN ALL SUMS ALLOCATION AND VERTICAL EXHAUSTION APPLY TO EXCESS INSURANCE POLICIES IN THIS ASBESTOS INJURY ACTION.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined, pursuant to the language and provisions of the relevant excess insurance policies, (1) an "all sums," as opposed to a "pro-rata," allocation applies, and (2) vertical, as opposed to horizontal, exhaustion of available policies applies. The underlying claims relate to asbestos exposure over a period of years in the manufacture of pumps: "[The 'all sums'] theory of allocation 'permits the insured to "collect its total liability . . . under any policy in effect during" the periods that the damage occurred,' up to the policy limits ... . The burden is then on the insurer against whom the insured recovers to seek contribution from the insurers that issued the other triggered policies ... . * * * ... [V]ertical exhaustion is more consistent than horizontal exhaustion with . . . language tying attachment of the excess policies specifically to identified policies that span the same policy period. Further, vertical exhaustion is

conceptually consistent with an all sums allocation, permitting the Insured to seek coverage through the layers of insurance available for a specific year ...". ***Matter of Viking Pump, Inc.*, 2016 N.Y. Slip Op. 03413, CtApp 5-3-16**

PERSONAL INJURY.

STORM IN PROGRESS RULE APPLIED AS A MATTER OF LAW.
The Court of Appeals, over a three-judge dissent, determined claimant's slip and fall complaint was properly dismissed because defendant demonstrated the storm in progress rule applied. There had been an ice storm the night before, a wintry mix was falling at 6:50 a.m. and a light rain was falling when claimant slipped and fell on ice at 8:15 a.m. The dissent argued the weather conditions were contested raising questions of fact about when the storm ended, if at all, and, if it did end, how much time elapsed before the fall. ***Sherman v. New York State Thruway Auth.*, 2016 N.Y. Slip Op. 03546, CtApp 5-5-16**

PRODUCTS LIABILITY, CORPORATION LAW.

PARENT CORPORATION NOT LIABLE, UNDER A STRICT PRODUCTS LIABILITY THEORY, FOR ASBESTOS-CONTAINING PRODUCTS MANUFACTURED AND DISTRIBUTED BY A WHOLLY OWNED SUBSIDIARY.
The Court of Appeals, in a full-fledged opinion by Judge Pigott, reversing the Appellate Division, determined the products liability complaint against Ford USA, based upon asbestos brake linings manufactured and distributed by Ford UK, should have been dismissed. The Court of Appeals concluded Ford USA could only be held liable for a product manufactured and distributed by a wholly owned subsidiary by piercing the corporate veil, a theory unsupported by the facts alleged: "Ford USA was not a party within the distribution chain, nor can it be said that it actually placed the parts into the stream of commerce. Although plaintiff submitted evidence tending to show that Ford USA provided guidance to Ford UK in the design of certain tractor components, absent any evidence that Ford USA was in fact a manufacturer or seller of those components, Ford USA may not be held liable under a strict products liability theory ... . * * * Ford USA, as the parent corporation of Ford UK, may not be held derivatively liable to plaintiff under a theory of strict products liability unless Ford USA disregarded the separate identity of Ford UK and involved itself directly in that entity's affairs such that the corporate veil could be pieced . . . a conclusion that neither Supreme Court nor the Appellate Division reached in this instance." ***Finerty v. Abex Corp.*, 2016 N.Y. Slip Op. 03411, CtApp 5-3-16**

REAL PROPERTY TAX LAW.

PETITIONER NEED NOT CHALLENGE THE REAL PROPERTY TAX ASSESSMENT EVERY YEAR TO BE ENTITLED TO BUSINESS INVESTMENT EXEMPTION REFUNDS FOR THOSE YEARS.
The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissent, reversing the Appellate Division, determined petitioner need not challenge the real property tax assessment every year to be entitled to business-investment-exemption refunds for the years following the year the assessment and exemption were challenged. Real Property Tax Law § 485-b provides a partial 10-year exemption for certain improvements made to real property: "[T]he business investment exemption is often years' duration and the amount of the exemption in each of the ten years is calculated using a single assessment roll ... . * * * ... [W]hen a computational error based on a single assessment roll results in the miscalculation of the RPTL 485-b exemption, we hold that this error may be challenged by a single petition at the time the error is discernible. It is a waste of resources for all involved, including the courts, to require a property owner to bring a challenge addressing the same error in each and every year the exemption applies." ***Matter of Highbridge Broadway, LLC v. Assessor of the City of Schenectady*, 2016 N.Y. Slip Op. 03544, CtApp 5-5-16**

FIRST DEPARTMENT

CRIMINAL LAW.

FAILURE TO PRODUCE DEFENDANT FOR A PROBATION INTERVIEW FOR THE PRESENTENCE REPORT REQUIRED RESENTENCING.
The First Department determined the fact that defendant was not produced for a probation interview, and the resulting absence of a social history from the probation report, required resentencing: "Under all the circumstances, including the fact that this was a conviction after trial rather than a negotiated plea, there should be a new sentencing proceeding. Defendant was not produced for a probation interview, and the presentence report accordingly contains no social history. There is no indication in the record that defendant intentionally avoided the interview. Counsel brought the lack of an interview to the court's attention on the day of sentencing, and requested an adjournment for that purpose. Defendant's opportunity to make a statement at sentencing was not a sufficient substitute for an interview in this case, and his choice not to make such a statement does not warrant a different conclusion." ***People v. Harleston*, 2016 N.Y. Slip Op. 03428, 1st Dept 5-3-16**

CRIMINAL LAW.

PENAL LAW PROVIDES A STATUTORY BASIS FOR PROSECUTING PHYSICIANS WHO PROVIDE AID-IN-DYING TO TERMINALLY ILL PATIENTS; THE STATUTES DO NOT VIOLATE THE NEW YORK CONSTITUTION.

The First Department, in a comprehensive opinion by Justice Mazzarelli, determined Penal Law §§ 120.30 and 125.15 provide a valid statutory basis to prosecute licensed physicians who provide aid-in-dying to terminally ill patients and the application of the statutes does not violate the New York Constitution: "The word 'suicide' has a straightforward meaning and a dictionary is hardly necessary to construe the thrust of Penal Law sections 120.30 and 125.15. It is traditionally defined as 'the act or instance of taking one's own life voluntarily and intentionally,' especially 'by a person of years of discretion and of sound mind' (Merriam-Webster's Collegiate Dictionary [11th ed 2003]). Whatever label one puts on the act that plaintiffs are asking us to permit, it unquestionably fits that literal description, since there is a direct causative link between the medication proposed to be administered by plaintiff physicians and their patients' demise." ***Myers v. Schneiderman*, 2016 N.Y. Slip Op. 03457, 1st Dept 5-3-16**

CRIMINAL LAW.

POLICE DID NOT NOTICE SIGNS OF INTOXICATION UNTIL AFTER DEFENDANT WAS STOPPED AND SEIZED, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The First Department determined defendant's motion to suppress evidence of his intoxication should have been granted. The police did not notice signs of intoxication until after defendant was stopped and seized: "The officers' testimony indicated that they did not perceive signs that defendant had committed the crime of operating a motor vehicle while under the influence of alcohol until after defendant was seized while walking away from the officers and then turned toward them. Thus, the officers' observations did not provide reasonable suspicion to stop defendant, in the absence of 'a particularized and objective basis for suspecting the particular person stopped of criminal activity' ...". ***People v. Coronado*, 2016 N.Y. Slip Op. 03601, 1st Dept 5-5-16**

EDUCATION-SCHOOL LAW.

DENIAL OF TEACHER'S APPEAL OF UNSATISFACTORY RATING ANNULLED.

The First Department, reversing Supreme Court, annulled a determination denying the petitioner-teacher's appeal of an unsatisfactory performance rating: "The record demonstrates deficiencies in the performance review process resulting in petitioner's unsatisfactory rating (U-Rating) for the 2012-2013 school year that were not merely technical but undermined the integrity and fairness of the process ... . Petitioner was not given an adequate opportunity to improve her performance, and the observation reports did not suffice to alert her that her year-end rating was at risk. Petitioner's account of the post-observation conference . . . , where the principal allegedly focused on the Annual Review, rather than perceived flaws in petitioner's lesson, was not refuted at the hearing and, when viewed alongside the other evidence presented, raises a factual issue as to whether the principal engineered the U-Rating to force petitioner from her job for refusing to go along with her policy of steering children into special education classes despite parental wishes to the contrary." ***Matter of Taylor v. City of New York*, 2016 N.Y. Slip Op. 03454, 1st Dept 5-3-16**

INSURANCE LAW.

UNDER OHIO LAW, CLAIMS ASSERTED IN DEMAND FOR ARBITRATION FELL WITHIN THE SCOPE OF EXCLUSIONS FOR KNOWLEDGE OF FALSITY OF STATEMENTS BY THE INSURED AND BREACH OF CONTRACT BY THE INSURED.

The First Department, in a full-fledged opinion by Justice Moskowitz, applying Ohio law, determined claims asserted in a demand for arbitration fell within the scope of exclusions for "knowledge of falsity of statements" by the insured and "breach of contract" by the insured. The insurer was therefore not obligated to pay for the arbitration defense. ***Allied World Natl. Assur. Co. v Great Divide Ins. Co.*, 2016 N.Y. Slip Op. 03603, 1st Dept 5-5-16**

SECOND DEPARTMENT

CRIMINAL LAW.

MANIFEST NECESSITY JUSTIFIED DECLARATION OF A MISTRIAL, SECOND TRIAL NOT PRECLUDED.

The Second Department determined there was manifest necessity for a mistrial in this murder case. Defendant's petition to prohibit a second trial was therefore properly denied: "In general, 'double jeopardy will bar a retrial when a mistrial is granted over the defendant's objection, unless the mistrial is granted as the product of manifest necessity' ... . 'Manifest necessity for a mistrial has been found where the court concludes, after conducting a probing and tactful inquiry,[ ] that a juror is grossly unqualified to continue serving' and there are no alternates available ... . Before declaring a mistrial, the court has 'the duty to consider alternatives to a mistrial and to obtain enough information so that it is clear that a mistrial is actually

necessary' ... . A trial court's determination that a mistrial is necessary is entitled to deference, as that court is in the best position to assess the circumstances ... . Likewise, 'the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected" will be accorded 'the highest degree of respect' ... . Here, when the jury reconvened after the Sirois hearing, one juror (No. 10) had been excused, leaving 12 jurors, and the excusal of two more jurors (Nos. 7 and 9) was imminent, leaving only 10 jurors. Furthermore, although the mistrial was declared on the eighth business day after the presentation of evidence had commenced, only one partial day of evidence presentation had occurred, despite the Supreme Court's initial estimate that the trial would take approximately two weeks (i.e., 10 business days)." ***Matter of Whyte v. Nassau County Dist. Attorney's Off.*, 2016 N.Y. Slip Op. 03517, 2nd Dept 5-4-16**

CRIMINAL LAW, EVIDENCE.

PROVIDING AN UNREDACTED STATEMENT TO THE JURY BY MISTAKE DEPRIVED DEFENDANT OF A FAIR TRIAL AND REQUIRED REVERSAL.

The Second Department determined providing the unredacted statement to the jury by mistake deprived defendant of a fair trial, without regard to whether the mistake contributed to defendant's conviction: "CPL 310.20(1) provides, '[u]pon retiring to deliberate, the jurors may take with them: . . . Any exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take.' Here, the defendant's written statement was admitted into evidence at trial, but the parties agreed to redact the statement so as to omit a portion of it indicating, in part, that the defendant's girlfriend 'attempted to say I [the defendant] raped her [the defendant's girlfriend].' The parties further agreed that they would return to court before the jury received that exhibit. The redacted portion of the statement was unrelated to the robbery for which the defendant was standing trial. However, in violation of CPL 310.20(1) and the parties' express agreement, the defendant's statement was mistakenly provided to the jury, without the attorneys having been notified first, and without the statement having been fully redacted ... . Instead of granting the defense attorney's motion for a mistrial, as it should have done in view of the highly prejudicial nature of the redacted portion of the statement, the Supreme Court gave an instruction regarding the statement that was ineffectual in curing the prejudice. 'The right to a fair trial is self-standing,' and where error operates to deprive the defendant of a fair trial, an appellate court 'must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction' ...". ***People v. Reid*, 2016 N.Y. Slip Op. 03535, 2nd Dept 5-4-16**

CRIMINAL LAW, EVIDENCE.

EVIDENCE SUPPORTED JURY INSTRUCTION ON THE JUSTIFICATION DEFENSE, NEW TRIAL ORDERED.

The Second Department determined the trial evidence supported defendant's request for a jury instruction of the justification defense. A new trial was ordered: "Here, based upon the testimony of the People's witnesses, there was a reasonable view of the evidence that would permit the jury to conclude that the defendant reasonably believed that the use of deadly force was necessary to prevent Jimmy [the victim] from using deadly force against the defendant or his friend, Ranjit ... . There was testimony that, immediately before he was stabbed, Jimmy was belligerent and wielded a knife inside the defendant's home, and that he had threatened Ranjit's life. Significantly, Ranjit and another witness described Jimmy as the initial aggressor ... . Moreover, this incident occurred in the defendant's dwelling and, thus, to the extent that he believed that Jimmy was about to use deadly physical force against him, he was under no duty to retreat ...". ***People v. Singh*, 2016 N.Y. Slip Op. 03537, 2nd Dept 5-4-16**

EMPLOYMENT LAW.

COMPLAINT STATED A CAUSE OF ACTION UNDER THE WHISTLEBLOWER STATUTE.

The Second Department, reversing Supreme Court, determined plaintiff had stated a cause of action under Labor Law § 740, the whistleblower statute: "Labor Law § 740 creates a cause of action in favor of an employee who has suffered a 'retaliatory personnel action' as a consequence of, inter alia, 'disclos[ing], or threaten[ing] to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety,' or as a consequence of 'object[ing] to, or refus[ing] to participate in any such activity, policy or practice in violation of a law, rule or regulation' ... . The complaint alleged, among other things, that the plaintiff was offered a promotion ... . The complaint also alleged that the terms of the promotion would have placed the plaintiff under the supervision of the defendant Tonya Parker, who was not among the class of persons authorized by law or regulation to supervise a registered nurse in clinical activities. The complaint also alleged that the plaintiff pointed out that Parker was not authorized to supervise her, but the terms of the promotion were not changed. The complaint further alleged that after the plaintiff declined to accept the promotion, she was discharged from her position as Head of Nursing, and another nurse was given the position that plaintiff had turned down, under Parker's supervision." ***Fough v. August Aichhorn Ctr. for Adolescent Residential Care, Inc.*, 2016 N.Y. Slip Op. 03469, 2nd Dept 5-4-16**

INSURANCE LAW.

NO-FAULT CARRIER DID NOT DEMONSTRATE LETTERS TO DEFENDANT SCHEDULING AN EXAMINATION UNDER OATH WERE TIMELY AND PROPERLY MAILED, CARRIER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

The Second Department determined plaintiff insurance company's motion for summary judgment under the no-fault insurance law should have been denied. Plaintiff alleged defendant failed to comply with the requirement that defendant submit to an examination under oath (EUO). The Second Department determined plaintiff did not demonstrate the letters to defendant scheduling the EUO were timely and properly mailed: "Generally, 'proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee' ... . 'The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed' ... . However, for the presumption to arise, the office practice must be geared so as to ensure the likelihood that the item is always properly addressed and mailed ... . 'Denial of receipt by the insured[ ], standing alone, is insufficient to rebut the presumption' ... . As the defendant correctly contends, the plaintiffs failed to establish, prima facie, that they timely and properly mailed the EUO letters to the defendant. The affirmation of the plaintiffs' counsel contained conclusory allegations regarding his office practice and procedure, and failed to establish that the practice and procedure was designed to ensure that the EUO letters were addressed to the proper party and properly mailed ...". ***Progressive Cas. Ins. Co. v. Metro Psychological Servs., P.C.*, 2016 N.Y. Slip Op. 03485, 2nd Dept 5-4-16**

MUNICIPAL LAW, IMMUNITY.

TOWN BOARD MEMBERS AND TOWN OFFICIAL IMMUNE FROM SUIT UNDER 42 U.S.C. § 1983.

The Second Department, reversing Supreme Court, determined defendant members of a town board were absolutely immune from a lawsuit stemming from their legislative activities: "[T]he defendants are entitled to dismissal of the complaint insofar as asserted against the defendants who are members of the Town Board . . . based on the principle of absolute immunity. Local legislators are 'absolutely immune from suit under [42 U.S.C.] § 1983 for their legislative activities' . . . , and such immunity is applicable to all actions within the 'sphere of legitimate legislative activity' ... . The allegations asserted in the complaint against the Town Board defendants are based on actions that were legislative and within the sphere of legislative activity. Therefore, the Town Board defendants are entitled to absolute immunity ... . The defendants are also entitled to dismissal of the complaint insofar as asserted against the defendant Robert W. Fitzsimmons, an official with the Town . . . building department. The complaint does not allege that Fitzsimmons undertook any actions that violated 'clearly established constitutional rights of which a reasonable person would have been aware' ... . Therefore, the defendants are entitled to dismissal of the complaint insofar as asserted against Fitzsimmons, based on the principle of qualified immunity ...". ***24 Franklin Ave. R.E. Corp. v. Cannella*, 2016 N.Y. Slip Op. 03499, 2nd Dept 5-4-16**

PERSONAL INJURY, CONTRACT LAW, CIVIL PROCEDURE.

DEFENDANT, WHICH INSTALLED CHRISTMAS DISPLAYS AT A MALL, DID NOT OWE A DUTY TO PLAINTIFF STEMMING FROM ITS CONTRACT WITH THE MALL; SINCE PLAINTIFF ALLEGED ONLY ONE *ESPINAL* EXCEPTION TO SUPPORT LIABILITY STEMMING FROM THE CONTRACT, DEFENDANT NEED ONLY ADDRESS THAT ONE EXCEPTION IN ITS MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendant American Christmas did not owe a duty to plaintiff in this trip and fall case. American Christmas contracted with a shopping mall to install Christmas displays. After the installation contract was completed, plaintiff allegedly tripped over electrical wires taped to the floor. There was evidence American Christmas put up stanchions to prevent people from crossing over the cords. Plaintiff alleged American Christmas was liable in tort arising from the contract with the mall because it launched an instrument of harm. The court noted that because plaintiff only alleged one of the three possible criteria for liability to third persons arising from a contract, the defendant was only required to address that single theory in its motion for summary judgment: "Here, American Christmas demonstrated its prima facie entitlement to judgment as a matter of law by offering proof that the plaintiff was not a party to its holiday display contracts with the Mall Owner, and that it thus owed no duty of care to the plaintiff. American Christmas also established, prima facie, that the one *Espinal* exception alleged by the plaintiff that would give rise to a duty of care does not apply in this case (*see Espinal v Melville Snow Contrs*., 98 NY2d at 141-142). ... Inasmuch as the plaintiff did not allege facts that would establish the possible applicability of the second or third [*Espinal*] exception, American Christmas was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law …". ***Parrinello v. Walt Whitman Mall, LLC*, 2016 N.Y. Slip Op. 03481, 2nd Dept 3-4-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

PLAINTIFF ASSUMED THE RISK OF STEPPING IN A HOLE ON THE PLAYING FIELD.

The Second Department, reversing Supreme Court, determined infant plaintiff assumed the risk of stepping in a hole in a playing field on school grounds. The plaintiff was injured during a pick-up football game which was not organized by the

defendant: "Under the doctrine of primary assumption of risk, a voluntary participant in a sporting activity 'is deemed to have consented to apparent or reasonably foreseeable consequences of engaging in the sport; the landowner need protect the plaintiff only from unassumed, concealed, or unreasonably increased risks, thus to make conditions as safe as they appear to be' ... . Here, the hole was open, obvious, clearly visible, and known to the plaintiff ... . Moreover, the plaintiff and his friends understood the risk presented by the hole and set the boundaries of the playing field in order to avoid it. Since the plaintiff voluntarily chose to play on a field on which there was a faulty condition that was open and obvious, he assumed the risk of injury from stepping into the hole ...". ***Tinto v. Yonkers Bd. of Educ.*, 2016 N.Y. Slip Op. 03496, 2nd Dept 5-4-16**

PERSONAL INJURY, MUNICIPAL LAW.

VILLAGE FAILED TO ESTABLISH PRIMA FACIE ENTITLEMENT TO SUMMARY JUDGMENT WHERE INJURY CAUSED BY TREE FALLING IN ROADWAY.

The Second Department determined the defendant village's motion papers did not demonstrate entitlement to summary judgment dismissing the complaint alleging injury to plaintiff-driver caused by a tree falling in the roadway: "A municipality has a duty to maintain its roadways in a reasonably safe condition, and this duty extends to trees adjacent to the road which could pose a danger to travelers ... . However, a municipality will not be held liable unless it had actual or constructive notice of the dangerous condition ... . Here, the Village failed to establish its prima facie entitlement to judgment as a matter of law . . . by demonstrating that it owed no duty to maintain or inspect the tree which fell in the roadway on the date of the subject accident or that it lacked actual or constructive notice of the alleged dangerous condition of the tree ... . Furthermore, the Village failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating that the breach of any duty allegedly owed by it was not a proximate cause of the subject accident. Since the Village failed to establish its prima facie entitlement to judgment as a matter of law, we need not review the sufficiency of the opposition papers ...". ***Connolly v. Incorporated Vil. of Lloyd Harbor*, 2016 N.Y. Slip Op. 03463, 2nd Dept, 5-4-16**

THIRD DEPARTMENT

CRIMINAL LAW.

FAILURE TO READ JURY NOTE VERBATIM WAS A MODE OF PROCEEDINGS ERROR REQUIRING REVERSAL.

The Third Department determined the trial judge made a mode of proceedings error by failing to read to the parties, verbatim, a note from the jury: "[W]e conclude that County Court committed a mode of proceedings error for which no objection was necessary ... . The court had an affirmative obligation to read exhibit No. 5 verbatim so that the parties had the opportunity to accurately analyze the jury's question and frame intelligent suggestions for the court's response ... . The record is devoid of any information as to whether defendant knew about the portion of exhibit No. 5 stating '# 8G 4NG.' The ambiguity of the notation is also of concern to this Court. Although the parties requested that the court inquire as to whether the jury had reached a verdict and whether it was 'complete,' we cannot speculate as to what defendant knew about exhibit No. 5 ... . Furthermore, 'we cannot assume that the omission was remedied at an off-the-record conference' ... . Accordingly, as County Court committed a mode of proceedings error as to exhibit No. 5, we must remit for a new trial on counts 1 through 9 of the consolidated indictment." ***People v. Victor*, 2016 N.Y. Slip Op. 03551, 3rd Dept 5-5-16**

CRIMINAL LAW, EVIDENCE.

AMOUNT OF HEROIN ALLEGED TO HAVE BEEN SOLD NOT PROVEN, STATUTORY SALE AND RELATED CONSPIRACY COUNTS DISMISSED.

The Third Department reversed defendant's conviction of the statutory sale of more than one-half ounce of heroin and the related conspiracy conviction (the remaining 15 counts were not reversed). The court determined the evidence of the amount of heroin sold was equivocal: "A statutory sale may be proven by evidence of an offer or agreement to sell drugs, but 'the weight of the material must be independently shown' ... . Here, no narcotics were recovered by the police, and the proof of the weight of heroin that defendant agreed to procure for [codefendant] Cochran was equivocal; while the amount of 16 grams was discussed, Cochran also stated that he might purchase 'something like that' or, because he had limited funds and other expenses, might 'get something lower.' As the People correctly argue, the full amount of transferred narcotics need not always be recovered to satisfy the weight requirement when a sale is based upon an offer or an agreement; nevertheless, there must be some form of independent evidence from which the total weight can be extrapolated ... . As there was none here, defendant's conviction for criminal sale of a controlled substance in the second degree is reversed and the corresponding count of the indictment dismissed ...". ***People v. Wright*, 2016 N.Y. Slip Op. 03550, 3rd Dept 5-5-15**

EDUCATION-SCHOOL LAW, TAX LAW, CONSTITUTIONAL LAW.

EDUCATION LAW STATUTE REQUIRING A 60% MAJORITY TO AUTHORIZE A PROPERTY TAX INCREASE OVER THE STATUTORY CAP (TO FUND SCHOOL DISTRICTS) IS CONSTITUTIONAL.

The Third Department, in a full-fledged opinion by Justice Devine, over a partial dissent, determined the Education Law statute which requires a 60% majority vote to increase property taxes beyond the statutory cap (to fund local school districts) is constitutional. The Election Article of the New York Constitution, the due process clause, the right to equal protection under the law, and the fundamental right to vote were deemed not to have been violated by the statute. With regard to the equal protection argument, the court wrote: "Defendants suggest, and plaintiffs do not dispute, that Education Law § 2023-a . . . [was] designed with the legitimate goal in mind of restraining onerous property tax increases that were believed to be depressing economic activity in the State ... . Plaintiffs suggest that it is irrational to achieve this legitimate aim in a manner that impairs local control of schools and deters poorer school districts that would otherwise seek a property tax increase over the tax cap to keep pace with educational needs. It suffices to say that, while Education Law § 2023-a . . . incentivize[s] districts and their residents to avoid property tax increases over the tax cap, neither prevents such increases if sufficient community support exists for them (*see* Education Law § 2023-a [6]). The differences in the services offered by various school districts accordingly result from a permissible consequence of local control over schools, namely, the variable 'willingness of the taxpayers of [different] districts to pay for and to provide enriched educational services and facilities beyond what the basic per pupil expenditure figures will permit' ... . Inasmuch as there is nothing irrational in this, plaintiffs' equal protection claims fail ...". ***New York State United Teachers v. State of New York*, 2016 N.Y. Slip Op. 03572, 3rd Dept 5-5-16**

PERSONAL INJURY, TOXIC TORTS, CIVIL PROCEDURE.

DEFENDANT BUILDING OWNER NOT ENTITLED TO SUMMARY JUDGMENT IN TOXIC TORT (MOLD EXPOSURE) ACTION ON STATUTE OF LIMITATIONS GROUNDS.

The Third Department, reversing Supreme Court, determined defendant was not entitled to summary judgment dismissing plaintiff's toxic tort action on statute of limitations grounds. Plaintiff alleged injury caused by mold in a building owned by defendant: "[D]efendant was required to show, at a minimum, that plaintiff's alleged exposure to a toxic substance did not occur within three years of the commencement of the action ... . If defendant exposed or continued to expose plaintiff to a toxic substance within three years of the commencement of the action, plaintiff could not have discovered any resulting injuries from such exposure at a time that would be barred by CPLR 214-c (2). Given that a plaintiff cannot discover the injurious effects of exposure to a toxic substance prior to that exposure occurring, and considering defendant's concession that plaintiff continued to be exposed to the mold at a time less than three years prior to the commencement of the action, defendant is not entitled to summary judgment dismissing the complaint on statute of limitations grounds. Turning to the allegedly injurious exposure taking place more than three years prior to the commencement of the action, we find that defendant did not prove as a matter of law that plaintiff should have discovered his allergy and asthma conditions at a time that is barred by CPLR 214-c (2). Although plaintiff exhibited some symptoms, including skin and eye irritation and tightness in the throat, in the spring and summer of 2002, plaintiff also explained that such symptoms ceased when he would leave the building at the end of his shifts. Further, plaintiff averred that he did not seek medical treatment for these symptoms, miss work as a result of the symptoms or file a workers' compensation claim until late October 2002. Viewing the evidence in the light most favorable to plaintiff, the symptoms that plaintiff exhibited more than three years prior to the commencement of the action were too intermittent and inconsequential to trigger the running of the statute of limitations pursuant to CPLR 214-c (2) ...". ***Malone v. Court W. Developers, Inc.*, 2016 N.Y. Slip Op. 03571, 3rd Dept 5-5-16**

UNEMPLOYMENT INSURANCE.

CLASSICAL FLAUTIST NOT AN EMPLOYEE.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined that claimant, a professional classical flautist, was not an employee of the Syracuse Society for New Music (SNM) and was therefore not entitled to unemployment insurance benefits: "Here, claimant was retained only occasionally and sporadically by SNM to perform classical music with an orchestra at various venues. She was paid at a set rate of $300 for each concert. Claimant was not required to sign a written contract, was permitted to accept or reject any assignments offered, maintained other employment while performing for SNM and suffered no restrictions of any sort whatsoever upon her ability to perform for other organizations ... . She had never missed a performance, but testified that if she had hypothetically needed to be absent, it would be her ethical responsibility to attempt to obtain her own replacement. The treasurer of SNM testified that, assuming circumstances prevented claimant from attending a performance, 'it would be a collaboration' to obtain a substitute, although SNM would not generally ask a musician to provide his or her own substitute. * * * Viewed in context, we do not find that the requirements that claimant rehearse and perform specific pieces of music on set dates at set venues demonstrates meaningful control." ***Matter of Greene (Syracuse Socy. for New Music, Inc. — Commissioner of Labor)*, 2016 N.Y. Slip Op. 03567, 3rd Dept 5-5-16**

UNEMPLOYMENT INSURANCE.

TUTORS WERE EMPLOYEES OF TUTORING CENTER.

The Third Department determined claimant tutors were employees of Island Tutoring Center which provided tutors to school districts, private schools and private parties, despite the "independent contractor" contract designation: "[T]he record establishes that ITC advertises for tutors to provide tutoring services to its clients. Potential tutors, including [claimant] Ritch, were interviewed and screened by ITC's owner, Steven Thode, who would review a prospective tutor's résumé and list of references. If a prospective tutor was offered employment, he or she would typically sign a contract, as [claimant] Bianco did, identifying that tutor as an independent contractor. That contract provided that employment was contingent upon a favorable reference and fingerprint check and verification of employment eligibility. Although the tutors were permitted to work for other tutoring companies, the contract also included a provision prohibiting the tutors from soliciting ITC's clients or students. When clients contacted ITC to request tutoring services, ITC would select a tutor from its database and inform that tutor of the area of study or subject to be instructed and the number of tutoring hours required. Although tutors were free to decline assignments, ITC did not permit tutors to provide their own substitutes after accepting an assignment. Following provision of the services, ITC required tutors to fill out time sheets and its session report forms in order to receive payment. As to payment, ITC paid its tutors prior to receiving payment from its clients, reimbursed tutors for certain expenses and loaned tutors teaching materials from its library when necessary. ITC also fielded its clients' complaints and feedback concerning the performance of its tutors and could remove tutors from assignments if there was a negative complaint." ***Matter of Ritch (Island Tutoring Ctr., Inc.--Commissioner of Labor)*, 2016 N.Y. Slip Op. 03569, 3rd Dept 5-5-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION BY GUILTY PLEA SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, DEFENDANT SUFFICIENTLY ALLEGED HIS COUNSEL PROVIDED WRONG INFORMATION ABOUT THE POSSIBILITY OF DEPORTATION.

The Fourth Department determined defendant's motion to vacate his conviction by guilty plea should not have been denied without a hearing. Defendant alleged his attorney wrongly told him there was no possibility defendant would be deported based upon the conviction: "In support of his motion, defendant, who is not a United States citizen, submitted an affidavit in which he asserted that his attorney advised him prior to the plea that 'there is no way in the world' that he would be deported as a result of his plea because he was being sentenced to less than five years in prison. Defendant further asserted that he would not have pleaded guilty had he been properly advised of the deportation consequences of the plea. According to defendant, he was deported to Jamaica after serving his term of imprisonment. As the Court of Appeals has held, an affirmative misstatement of the law regarding the deportation consequences of a plea may provide a basis for vacatur of the plea if it can be shown that the defendant was thereby prejudiced, i.e., there is a reasonable probability that the defendant would not otherwise have pleaded guilty ...". ***People v Bennett*, 2016 N.Y. Slip Op. 03608, 4th Dept 5-6-16**

CRIMINAL LAW, ATTORNEYS.

COURT FAILED TO MAKE A MINIMAL INQUIRY INTO DEFENDANT'S COMPLAINT ABOUT A CONFLICT OF INTEREST WITH DEFENSE COUNSEL, CONVICTION REVERSED.

The Fourth Department reversed defendant's conviction because the trial judge did not make an adequate inquiry into defendant's complaint about a conflict of interest with defense counsel: "[T]he court violated [defendant's] right to counsel when it failed to conduct a sufficient inquiry into his complaint regarding a conflict of interest with defense counsel. Prior to commencement of a scheduled suppression hearing, defense counsel informed the court that, based on recent discussions, defendant wanted to request new counsel, and that there had been a breakdown in communication between defense counsel and defendant regarding the issues that they needed to address. Defendant subsequently confirmed that he was requesting new assigned counsel and informed the court that he had filed a grievance against defense counsel resulting in a conflict of interest. '[A]lthough there is no rule requiring that a defendant who has filed a grievance against his attorney be assigned new counsel, [a] court [is] required to make an inquiry to determine whether defense counsel [can] continue to represent defendant in light of the grievance' ... . Moreover, 'where potential conflict is acknowledged by counsel's admission of a breakdown in trust and communication, the trial court is obligated to make a minimal inquiry' ...". ***People v. Tucker*, 2016 N.Y. Slip Op. 03637, 4th Dept 5-6-16**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA)

EVIDENCE SUPPORTING UPWARD DEPARTURE WAS SPECULATIVE AND DID NOT RISE TO THE LEVEL OF CLEAR AND CONVINCING.

The Fourth Department, over a two-justice dissent, determined the evidence was not sufficient to justify an upward departure from a level two to a level three sex offender. Defendant restricted the freedom of a child who subsequently was either released or escaped when her friend, who had escaped, called for her. Defendant was convicted of attempted kidnapping. County Court's upward departure was, in the opinion of the majority, based upon speculation about defendant's motives and intentions, which did not rise to the level of clear and convincing evidence of aggravating circumstances not taken into account by the risk assessment: "We agree with defendant that the court erred in granting the People's request for an upward departure from a presumptive level two risk to a level three risk based upon its assumption that the victim would have suffered greater harm had the other child not intervened and allowed the victim to escape. While it may be reasonable to assume that defendant had sinister intentions when he lured two young children into his home, such an assumption does not constitute the requisite 'clear and convincing evidence that there exist aggravating circumstances of a kind or to a degree not adequately taken into account by the risk assessment guidelines'...". ***People v. Baldwin*, 2016 N.Y. Slip Op. 03609, 4th Dept 5-6-16**

FAMILY LAW.

FAMILY COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW MOTHER TO APPEAR BY TELEPHONE FROM FLORIDA.

The Fourth Department determined Family Court, in a neglect proceeding, abused its discretion by refusing mother's request to appear by telephone: "The record establishes that the mother moved to Florida, with financial assistance from DSS, during the period between the fact-finding hearing and the dispositional hearing. She requested permission to make future appearances by telephone, and the court denied the request, citing 'the facts and circumstances of the case' and its preference that the mother be present 'as any party of the proceeding should be present.' While section 75-j does not require courts to allow testimony by telephone or electronic means in all cases . . . , we conclude that the ruling here, in which the court failed to consider the impact of the mother's limited financial resources on her ability to travel to New York, was an abuse of discretion ...". ***Matter of Thomas B. (Calla B.)*, 2016 N.Y. Slip Op. 03640, 4th Dept, 5-6-16**

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