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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, REAL ESTATE.

ERROR TO IMPOSE PRE-JUDGMENT INTEREST AT THE STATUTORY RATE WHEN CONTRACT PROVIDED THAT THE INTEREST-BEARING DOWN PAYMENT WAS THE EXCLUSIVE REMEDY FOR BREACH.

The First Department determined the down payment bearing interest at the rate agreed to in the (real estate) contract was the exclusive remedy. The court should not have awarded interest at the statutory rate: "The contract's terms, requiring that the down payment be placed in an interest-bearing account, so that the party entitled to the down payment would receive compensation for the deprivation of its use of the money in the form of accrued interest, were sufficiently clear to establish that interest paid at the statutory rate was not contemplated by the parties at the time the contract was formed and that the amount escrowed, including interest earned, should be the exclusive remedy to the wronged party ...". ***Ithilien Realty Corp. v. 176 Ludlow, LLC*, 2016 N.Y. Slip Op. 04002, 1st Dept 5-24-16**

CONTRACT LAW, CORPORATION LAW.

PURCHASER OF UNSOLD SHARES IN A COOPERATIVE BOUND BY A STIPULATION TO WHICH PURCHASER WAS NOT A PARTY; STIPULATION RESTRICTED THE NUMBER OF BOARD MEMBERS WHO COULD BE ELECTED BY HOLDERS OF UNSOLD SHARES.

The First Department, in a full-fledged opinion by Justice Acosta, determined a purchaser of a cooperative apartment, Johnson, was bound by a pre-existing stipulation to which Johnson was not a party. The stipulation required that the holders of unsold shares in the cooperative (HUS) could elect no more than two of the five directors. Unsold shares are held by investors who do not live in the apartments: "The [relevant] documents, including Johnson's express agreement to take subject to the provisions of the proprietary lease, which incorporated the stipulation, make clear that he was an HUS and was bound by the stipulation's provisions, including the election restriction ... . [The holder of the unsold shares] should not be permitted to frustrate its obligations under the offering plan or stipulation by transferring its shares to puppet entities to syphon votes away from resident shareholder candidates in order to control the board well beyond the period contemplated by the Attorney General ... . Indeed, there is no question that the sole purpose of [the] assign[ment of] 600 shares to Johnson just four days before the . . . board election was to avoid the provision that prohibited holders of unsold shares from electing more than two directors." ***Matter of Tiemann Place Realty, LLC v. 55 Tiemann Owners Corp.*, 2016 N.Y. Slip Op. 04007, 1st Dept 5-24-16**

CORPORATION LAW, CIVIL PROCEDURE.

SHAREHOLDERS' DERIVATIVE ACTION IS EQUITABLE IN NATURE, MOTION TO STRIKE DEMAND FOR A JURY TRIAL SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion to strike plaintiff's demand for a jury trial in this shareholders' derivative action should have been granted. The court noted that a motion to strike a demand for a jury trial can be made anytime up to the opening of trial: "Supreme Court erred in finding that plaintiff in this shareholders' derivative action was entitled to a jury trial, since the claims brought in his capacity as a shareholder were 'derivative and therefore equitable in nature' ... . Contrary to plaintiff's contention, the motion was not untimely, since a motion to strike a demand for a jury trial may be made at anytime up to the opening of trial . . . , and we find no prejudice in defendants' delay of a few months, following the restoration of the case to the calendar, in making their motion." ***Moyal v. Sleppin*, 2016 N.Y. Slip Op. 04107, 1st Dept 5-26-16**

CRIMINAL LAW.

REVERSIBLE ERROR TO RECONSIDER THE VERDICT.

The First Department determined, in this bench trial, the court's failure to notify counsel, prior to summations, that it would consider a lesser included offense (attempted robbery) was reversible error. After the court found defendant guilty of attempted robbery, upon objection, the court allowed defense counsel to reopen his summation and issued another verdict. The First Department held the trial court did not have the power to reconsider the case after verdict: "The trial court's failure

to comply with CPL 320.20(5) by not notifying the parties that it intended to consider a lesser included offense until after it rendered the original verdict, constitutes reversible error. 'After formal rendition of a verdict at a bench trial, a trial court lacks authority to reweigh the factual evidence and reconsider the verdict' ... . Here, it is undisputed that upon defendant's CPL 330.30 motion, the court reopened summations, and rendered a new verdict. Although this Court has previously held that failure to comply with CPL 320.20(5) constitutes harmless error when the defendant has the opportunity to address the lesser included offenses in a new summation . . . , the same cannot be said here where the trial court attempted to rectify its error only after it rendered the verdict. ... We agree that the double jeopardy clause bars a new trial on the original indictment. The People must secure a new indictment if they wish to pursue further prosecution on the lesser included charge ...". ***People v. Agola*, 2016 N.Y. Slip Op. 04004, 1st Dept 5-24-16**

EMPLOYMENT LAW, ASSAULT.

BAR AND SECURITY COMPANY COULD BE LIABLE FOR AN ASSAULT BY A SECURITY GUARD UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR.

The First Department, reversing Supreme Court, determined defendants' motion for a directed verdict should not have been granted. Plaintiff alleged he was punched and severely injured by a man dressed like other security guards at a bar. The bar (Hiro) and the security company (NEC) could be liable under the doctrine of respondeat superior. A new trial was ordered: "The trial court erred in granting Hiro's motion for a directed verdict, since there is evidence to support a reasonable jury's finding that plaintiff's assailant was a Hiro employee or an NEC employee who was supervised by Hiro, for whose acts Hiro could have been found liable upon the theory of respondeat superior ... . An attack on plaintiff by a security guard could be found to be within the scope of the guard's employment ... . Plaintiff's inability to identify his assailant, who left after the incident, does not preclude him from recovery ...". ***Jones v. Hiro Cocktail Lounge*, 2016 N.Y. Slip Op. 04110, 1st Dept 5-26-16**

FREEDOM OF INFORMATION LAW (FOIL), APPEALS.

REQUEST FOR DOCUMENTS ABOUT AN UNSOLVED 1987 HOMICIDE SHOULD HAVE BEEN DENIED; APPEAL FROM A NONFINAL ORDER ALLOWED.

The First Department, reversing Supreme Court, determined petitioner was not entitled to all documents held by the NYC Police Department (NYPD) concerning an unsolved 1987 homicide. The court noted that, although an appeal as of right does not generally lie from a nonfinal order in an Article 78 proceeding, leave to appeal was granted here given the important, substantive issues raised: "NYPD properly withheld the requested materials pursuant to the exemption to FOIL for documents that 'are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations' (Public Officers Law § 87[2][e][i]). NYPD met its burden of 'identify[ing] the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents' ... . In particular, NYPD submitted an affidavit by a detective averring that he was handling an active, ongoing investigation into the homicide, and had recently pursued potential leads. The detective's affidavit established that disclosure of the records could interfere with the active investigation by, among other things, leading to witness tampering or enabling the perpetrator to evade detection. Given the foregoing determination, we need not reach the other exemptions cited by NYPD." ***Matter of Loevy & Loevy v. New York City Police Dept.*, 2016 N.Y. Slip Op. 04099, 1st Dept 5-26-16**

INSURANCE LAW, PERSONAL INJURY.

INSURER'S DUTY TO DEFEND MUST BE DETERMINED SOLELY UPON THE INFORMATION WITHIN THE COMPLAINT; MATTERS OUTSIDE THE COMPLAINT MUST BE RAISED IN A SUMMARY JUDGMENT MOTION OR AT TRIAL.

The First Department determined, in this declaratory judgment action, the insurer has the duty to defend the city in this slip and fall case. The fact that information which is outside the four corners of the complaint may indicate the insurer does not have the duty to defend must be raised in a summary judgment motion or at trial: "Under the circumstances presented, the City's cross motion is granted to the extent of declaring that plaintiff is obligated to defend it in the underlying litigation. The duty of an insurer to provide a defense for its insured is 'exceedingly broad,' arising 'whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage' ... . Accordingly, 'a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence,' even if 'facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered' ... . Thus, an insurer may be contractually bound to defend 'even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage' ... . Here, the four corners of the complaint in the underlying action place the allegations squarely within the responsibilities of plaintiff's insured, triggering the duty to defend. Plaintiff's primary argument, that the accident was not within its insured's area of responsibility, is properly made to Supreme Court in a motion for summary judgment dismissing Bari's complaint or at trial and cannot be resolved by this Court on a motion seeking declaratory relief ...". ***Axis Surplus Ins. Co. v. GTJ Co., Inc.*, 2016 N.Y. Slip Op. 04106, 1st Dept 5-26-16**

PERSONAL INJURY.

CONFLICTING EVIDENCE OF EXISTENCE OF PUDDLE CREATED A CREDIBILITY ISSUE IN THIS SLIP AND FALL CASE WHICH COULD NOT BE RESOLVED WITHOUT TRIAL.

The First Department determined conflicting evidence in this slip and fall case, submitted by defendants in support of summary judgment, created an issue of fact for trial: "Defendants' employees both testified that the building's janitorial schedule required that the stairs where plaintiff's fall occurred be cleaned before the time of the accident, and that they personally inspected the stairs several times on the morning of the accident, finding no such puddle at any time. In contrast, however, plaintiff's testimony, which was submitted by defendants, was that at nearly the same time that defendants' employees claim to have found the stairs urine-free, she observed a puddle of urine in the same spot where she would later fall. Furthermore, plaintiff's daughter stated that she observed a puddle of urine in the same spot two hours before the accident, which was several hours after plaintiff claimed to have seen the puddle ... . Accordingly, summary judgment was not appropriate because there remain issues of fact as to the credibility of defendants' employees and whether the urine puddle was extant on the stairs for six hours prior to plaintiff's accident without remediation by defendants." ***Mendoza v. Fordham-Bedford Hous. Corp.*, 2016 N.Y. Slip Op. 03997, 1st Dept 5-24-16**

PERSONAL INJURY, CONTRACT LAW.

RELEASE APPLICABLE TO INSTITUTION DID NOT APPLY TO A PRIVATE ATTENDING PHYSICIAN AT THE INSTITUTION.

The First Department, applying contract interpretation principles to a release, determined the release, narrowly interpreted by its precise terms, applied to the Cabrini Center for Nursing and Rehabilitation, but did not apply to a private attending physician (Nicolescu) at Cabrini: "Assuming arguendo that defendant Nicolescu, a private attending physician at Cabrini, could be considered a 'staff' member of Cabrini, the release is unambiguously limited only to 'causes of action' that plaintiffs had against Cabrini, and does not release any other tortfeasors not expressly named therein from liability for causes of action asserted against them (General Obligations Law § 15-108[a]...). Interpreting the release as urged by defendant Nicolescu to release him from liability for causes of action asserted against him individually would return to the common law rule in effect before enactment of General Obligations Law § 15-108(a), when general releases were 'trap for the average man who quite reasonably assumes that settling his claim with one person does not have any effect on his rights against others with whom he did not deal' ...". ***Linn v. New York Downtown Hosp.*, 2016 N.Y. Slip Op. 03992, 1st Dept 5-24-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

REMOVING A CRATE FROM A FLATBED TRUCK WAS AN ELEVATION-RELATED RISK COVERED BY LABOR LAW § 240(1).

The First Department determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted. Plaintiff was attempting to maneuver a 1,500-pound crate to a sling for removal from a flatbed truck when it fell over on him: "[P]reparing a six-foot-tall crate weighing at least 1,500 pounds for hoisting posed an elevation-related risk for plaintiff within the meaning of Labor Law § 240(1) . . . , and the crate was 'an object that required securing for the purposes of the undertaking' ... . Further, there is unrebutted evidence that various devices, including wooden blocks for bracing, would have stabilized the crate while it was being maneuvered into a position to have slings placed on it for hoisting by the crane." ***Grant v. Solomon R. Guggenheim Museum*, 2016 N.Y. Slip Op. 04003, 1st Dept 5-24-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

FIXING A LEAKY ROOF NOT ROUTINE MAINTENANCE, PLAINTIFF'S LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY SURVIVED MOTION TO DISMISS.

The First Department determined defendant's motion to dismiss plaintiff's Labor Law § 240(1) cause of action was properly denied. Plaintiff climbed up a permanent ladder to fix a roof leak. The ladder was wet with rain, shaky and too close to the wall. Plaintiff fell when he attempted to come back down the ladder from the roof: "[D]efendant [is not] entitled to dismissal of the Labor Law § 240(1) claim. Plaintiff was engaged in repairing the roof, an activity to which Labor Law § 240(1) applies, and not merely in routine maintenance ... . Moreover, the permanently affixed ladder that provided the sole access to plaintiff's elevated work site was a safety device within the meaning of Labor Law § 240(1) ... . In view of plaintiff's testimony that the ladder shook and was wet and was too close to the wall to allow room for his feet on the rungs, defendant failed to demonstrate as a matter of law that plaintiff was provided with proper protection." ***Kolenovic v. 56th Realty, LLC*, 2016 N.Y. Slip Op. 04005, 1st Dept 5-24-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH THE STATE IS THE TITLE OWNER OF PIER 40 ON THE HUDSON RIVER, THE HUDSON RIVER PARK ACT TRANSFERRED LABOR LAW ABSOLUTE LIABILITY TO THE HUDSON RIVER PARK TRUST.

The First Department, in a full-fledged opinion by Justice Saxe, determined that the state, although the title owner of the property (Pier 40) where plaintiff was injured by a falling beam, was not subject to absolute liability under the Labor Law. Under the Hudson River Park Act, the day to day operation and management of Pier 40 was transferred to a public benefit corporation, the Hudson River Park Trust. The court was careful to note that leasing property does not relieve the owner of Labor Law liability. However, the terms of the Hudson River Park Act indicated the legislature's intent transfer Labor Law liability to the trust. ***Costa v. State of New York*, 2016 N.Y. Slip Op. 04119, 1st Dept 5-26-16**

SECOND DEPARTMENT

ARBITRATION.

AFTER MAKING A FINAL AWARD, THE RABBINICAL COURT EXCEEDED ITS AUTHORITY BY MAKING A SECOND AWARD BASED ON NEW EVIDENCE.

The Second Department determined the arbitration award made by the rabbinical court was properly vacated. After making a final award, the rabbinical court, based on new information, made a second award: " 'An arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation of the arbitrator's power' ... . After an arbitrator renders an award, he or she is generally without power to render a new award or to modify the original award ... . Here, because the arbitration award dated May 5, 2011, was final and definite within the meaning of CPLR 7511 . . . , the rabbinical court exceeded its authority in modifying the original award by rendering the new arbitration award dated July 22, 2013...". ***Matter of Pinkesz v. Wertzberger*, 2016 N.Y. Slip Op. 04060, 2nd Dept 5-25-16**

ARBITRATION, IMMUNITY.

RABBINICAL COURT IMMUNE FROM SUIT UNDER DOCTRINE OF ARBITRAL IMMUNITY.

The Second Department, reversing Supreme Court, determined rabbinical arbitrators were immune from suit in the absence of an allegation the rabbinical court acted in the clear absence of all jurisdiction. The fact that a court previously determined the rabbinical court acted in excess of its authority did not destroy the arbitral immunity: "Here, the factual allegations of the complaint merely asserted conduct by the rabbinical defendants in their capacity as arbitrators ... . It is well established that arbitrators are immune from liability for acts performed in their arbitral capacity ... . Such immunity also applies to acts taken in excess of authority ... . As the plaintiffs failed to allege how any of the acts of the rabbinical court defendants were undertaken in the clear absence of all jurisdiction, these defendants enjoy arbitral immunity from civil liability ...". ***Pinkesz Mut. Holdings, LLC v. Pinkesz*, 2016 N.Y. Slip Op. 04034, 2nd Dept 5-25-16**

CIVIL PROCEDURE, APPEALS.

BURDENS OF PROOF FOR MOTION TO CHANGE VENUE EXPLAINED; CRITERIA FOR RAISING AN ISSUE FOR THE FIRST TIME ON APPEAL EXPLAINED.

The Second Department determined defendant did not meet its burden on its motion to change venue. The court noted that, although one of the arguments in opposition was not raised below, the argument met the criteria for an issue which may be raised for the first time on appeal. The court further noted that reply papers could not be used to meet the defendant's burden. The relevant law was explained as follows " '[T]o prevail on a motion pursuant to CPLR 510(1) to change venue, a defendant must show that the plaintiff's choice of venue is improper, and also that the defendant's choice of venue is proper' ... . 'Only if a defendant meets this burden is the plaintiff required to establish, in opposition, that the venue selected was proper' ... . * * * Although the plaintiff did not point out [the] deficiency in proof in opposing the motion to transfer venue, 'questions of law which appear on the face of the record and which could not have been avoided if raised at the proper juncture may be raised for the first time on appeal' ...". ***Pinos v. Clinton Cafe & Deli, Inc.*, 2016 N.Y. Slip Op. 04035, 2nd Dept 5-25-16**

CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S SISTER WRONGLY IMPEACHED BY QUESTIONS ABOUT HER CRIMINAL HISTORY AND BAD ACTS, TRIAL JUDGE SHOULD HAVE SET ASIDE THE VERDICT.

The Second Department determined the verdict in this personal injury case should have been set aside because of an evidentiary error. The injured plaintiff's sister, who was also her guardian, was wrongly questioned about her criminal history and bad acts: "Pursuant to CPLR 4404(a), a court 'may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence [or] in the interest of justice' (CPLR 4404[a]...).

'A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise' ... . In considering such a motion, '[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected . . . and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision' ... . Here, the Supreme Court erred in permitting the defendants to impeach the credibility of the injured plaintiff's sister on direct examination by questioning her with respect to her criminal history and prior bad acts ... . 'Indeed, it is well established that an adverse party or a hostile witness may not be impeached on direct examination by evidence of his or her criminal conviction[s]'...". ***Morency v. Horizon Transp. Servs., Inc.*, 2016 N.Y. Slip Op. 04029, 2nd Dept 5-25-16**

CIVIL PROCEDURE, FORECLOSURE.

TAKING TIMELY STEPS TO PROCEED TO JUDGMENT AFTER DEFAULT IN FORECLOSURE ACTION SUFFICIENT TO AVOID DISMISSAL OF COMPLAINT AS ABANDONED.

The Second Department, reversing Supreme Court, determined plaintiff-bank's taking timely steps to proceed to judgment after a default in this foreclosure action were sufficient to avoid dismissal of the complaint as abandoned: "CPLR 3215(c) provides that '[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.' However, '[i]t is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)' ... . Rather, it is enough that the plaintiff timely takes 'the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference' to establish that it 'initiated proceedings for entry of a judgment within one year of the default" for the purposes of satisfying CPLR 3215(c) ... . [A]s long as proceedings are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal' ... . This is so even where, as here, the timely motion for an order of reference was subsequently withdrawn ...". ***HSBC Bank USA, N.A. v. Traore*, 2016 N.Y. Slip Op. 04022, 2nd Dept 5-25-16**

CONTRACT LAW.

ASSUMPTION OF RISK DOCTRINE NO LONGER APPLIES TO ANY ACTIONS OTHER THAN THOSE STEMMING FROM ATHLETIC AND RECREATIONAL ACTIVITIES.

The Second Department noted that the doctrine of assumption of the risk no longer applies in any context other than athletic or recreational activities. Defendant attempted to apply the doctrine to a breach of contract action: "The defense of assumption of risk was abolished in 1975 with the adoption of CPLR 1411 ... . Nevertheless, the Court of Appeals has explained 'that a limited vestige of the assumption of the risk doctrine — referred to as primary' assumption of the risk — survived the enactment of CPLR 1411 as a defense to tort recovery in cases involving certain types of athletic or recreational activities' ... . Here, as the allegations in the amended complaint have nothing to do with athletic or recreational activities contemplated by the primary assumption of risk doctrine . . . , it follows that the defendant's reliance on *Turcotte v Fell* (68 NY2d 432) is misplaced, and her purported assumption of risk defense is barred by CPLR 1411." ***Ballow v. Lincoln Fin. Corp.*, 2016 N.Y. Slip Op. 04009, 2nd Dept 5-25-16**

CORPORATION LAW.

LIABILITY SHOULD NOT HAVE BEEN FOUND ON THE PART OF THE CORPORATE PRINCIPALS WHO COMMITTED OPPRESSIVE ACTS AGAINST PLAINTIFF SHAREHOLDER.

The Second Department, reversing (modifying) Supreme Court, determined that liability should not have been found on the part of the corporate principals who committed oppressive acts against the complaining (plaintiff) shareholder: "The Supreme Court also should not have found liability on the part of [the] corporate principals of the corporate defendants, because one of the primary legitimate purposes of incorporating is to limit or eliminate the personal liability of corporate principals . . . , and the court did not find that they 'abused the privilege of doing business in the corporate form'...". ***Qadan v. Tehseldar*, 2016 N.Y. Slip Op. 04036, 2nd Dept 5-25-16**

CRIMINAL LAW.

INDICTMENT DISMISSED ON SPEEDY TRIAL GROUNDS, DEFENDANT DID NOT CONSENT TO DELAY FOR DNA TEST RESULTS.

The Second Department dismissed defendant's indictment on speedy trial grounds. The court found (1) defendant did not consent to the 121-day delay to obtain DNA test results, (2) the defendant did not seek the DNA test results in discovery, and (3) the People did not exercise due diligence in obtaining the DNA test results: "Contrary to the People's contention, the defendant did not consent to a 121-day period of delay . . . , while the People were awaiting the DNA test results . . . , and the People did not establish that the defendant expressly sought the DNA test results as part of a discovery request ...

. In addition, because the People failed to exercise due diligence in obtaining DNA evidence, that period of delay was not excludable on the ground that their need to obtain the DNA test results constituted excusable, exceptional circumstances (*see* CPL 30.30[4][g] ...). Adding this period of time to the periods of delay correctly conceded by the People, the People exceeded the six-month period in which they were required to be ready for trial (see CPL 30.30[1][a])." ***People v. Cox*, 2016 N.Y. Slip Op. 04070, 2nd Dept 5-25-16**

FAMILY LAW.

VISITATION PROPERLY GRANTED TO GRANDMOTHER DESPITE ANIMOSITY BETWEEN GRANDMOTHER AND FATHER.

The Second Department determined Family Court properly found grandmother was entitled to visitation. Animosity between father and grandmother is not a sufficient basis for denial of visitation: " 'When a grandparent seeks visitation pursuant to Domestic Relations Law § 72(1), the court must make a two-part inquiry' ... . 'First, it must find that the grandparent has standing, based on, inter alia, equitable considerations' ... . 'If it concludes that the grandparent has established standing to petition for visitation, then the court must determine if visitation is in the best interests of the child' ... . 'In considering whether a grandparent has standing to petition for visitation based upon circumstances show[ing] that conditions exist which equity would see fit to intervene' (Domestic Relations Law § 72 [1]), an essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship,' among other factors' ... . The court must also consider 'the nature and basis of the parents' objection to visitation' ...". ***Matter of Seddio v. Artura*, 2016 N.Y. Slip Op. 04063, 2nd Dept 5-26-16**

FAMILY LAW, CONTRACT LAW, DAMAGES.

LIQUIDATED DAMAGES CLAUSE IN SEPARATION AGREEMENT CONSTITUTED AN UNENFORCEABLE PENALTY.

The Second Department determined the liquidated damages clause in a separation agreement constituted an unenforceable penalty. The clause provided that, upon a breach of any of the terms, child support would increase from $1,500 per month to over $5,000: " '[P]arties to an agreement may provide for the payment of liquidated damages upon its breach, and such damages will be upheld if (1) the amount fixed is a reasonable measure of the probable actual loss in the event of breach, and (2) the actual loss suffered is difficult to determine precisely. However, if the liquidated damages do not bear a reasonable proportion to the loss actually sustained by a breach, they will constitute an unenforceable penalty' ... . Here, the parties entered into a separation agreement . . . which was incorporated but not merged into the judgment of divorce. In relevant part, the agreement provided that . . . the defendant would pay $1,500 per month in child support until the date of the sale of the marital residence, and $5,076.29 per month thereafter. However, if at any time prior to the sale of the marital residence, the defendant was not in compliance with 'all of the terms' of the agreement, then his child support obligation would be increased to $5,076.29 per month. … Supreme Court correctly determined that the subject provision, as drafted, constituted an unenforceable penalty clause ...". ***Fitzpatrick v. Fitzpatrick*, 2016 N.Y. Slip Op. 04018, 2nd Dept 5-25-16**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE GRANTED PETITION FOR GUARDIANSHIP AND MADE FINDINGS ALLOWING CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS.

The Second Department, reversing Family Court, determined the petition for guardianship of the child should have been granted, and Family Court should have made the findings necessary for the child to petition for Special Immigrant Juvenile Status (SIJS): "Here, the child is under the age of 21 and unmarried, and since we have appointed Daniel J. K. as the child's guardian, the child is dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) ... . We further find that the record fully supports the child's contention that his reunification with the father is not a viable option due to parental neglect ... . Lastly, the record reflects that it would not be in the child's best interests to be returned to El Salvador." ***Matter of Axel S.D.C. v. Elena A.C.*, 2016 N.Y. Slip Op. 04046, 2nd Dept 5-25-16**

FREEDOM OF INFORMATION LAW (FOIL).

REQUEST FOR STATEMENTS OF NON-TESTIFYING WITNESSES IN A CRIMINAL MATTER PROPERLY DENIED.

The Second Department determined the request for statements made by non-testifying witnesses in a criminal matter was properly denied: "[T]he respondents met their burden of demonstrating that the statements and other documents containing information provided to law enforcement officials during the criminal investigation by witnesses who did not testify at trial were exempt from disclosure under Public Officers Law § 87(2)(e)(iii). Thus, the documents sought by the petitioner, which contain statements of nontestifying witnesses, are not disclosable under FOIL." ***Matter of Brown v. DiFiore*, 2016 N.Y. Slip Op. 04045, 2nd Dept 5-25-16**

PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN REAR-END COLLISION CASE.

The Second Department determined plaintiff's motion for summary judgment in this rear-end collision case was properly granted, despite defendant's (McCrowell's) claim plaintiff stopped 150 feet from the car in front: "Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law by submitting McCrowell's deposition testimony, the injured plaintiff's deposition testimony, and the injured plaintiff's affidavit, which demonstrated that the injured plaintiff's vehicle was stopped in heavy traffic when it was struck in the rear by the appellants' vehicle ... . In opposition, the appellants failed to raise a triable issue of fact. McCrowell's statement in his affidavit that the injured plaintiff brought his vehicle to a stop at least 150 feet behind the stopped vehicle in front of him did not adequately rebut the inference of negligence given McCrowell's deposition testimony that he was able to bring his vehicle to a stop behind the injured plaintiff's vehicle on two occasions prior to the accident in heavy stop-and-go traffic without incident during the one minute that the injured plaintiff was traveling in front of McCrowell's vehicle ... . Even if the injured plaintiff's vehicle came to a sudden stop, 'vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead' ...". ***Melendez v. McCrowell*, 2016 N.Y. Slip Op. 04028, 2nd Dept 5-25-16**

PERSONAL INJURY, CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

INFANCY DOES NOT TOLL 90-DAY PERIOD FOR FILING A NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE A LATE NOTICE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for leave to file a late notice of claim against defendant school district should have been denied. Although infancy tolls the one-year-ninety-days statute of limitations, it does not toll the 90-day period for filing a notice of claim. The motion for leave to file a late notice was not made until more than four years after the expiration of the 90-day filing period: "Here, the plaintiffs failed to establish that the defendant had 'acquired actual knowledge of the essential facts constituting the claim' within 90 days of the accident or a reasonable time thereafter (General Municipal Law § 50-e[5]). The school's principal prepared an accident claim form on the day of the accident, and the infant plaintiff's parents completed the medical claim portion of that form a couple of weeks after the accident. Contrary to the plaintiffs' contention, this form, which merely indicated that the infant plaintiff lost his left front tooth and part of his right front tooth when he hit his mouth on the gymnasium floor in an attempt to 'duck from a ball' during physical education class, did not establish that the defendant had timely, actual knowledge of the essential facts underlying the claims that it was negligent in supervising the students, in failing to provide a safe play area, and in allowing the infant plaintiff to engage in an inappropriate activity ... . Accordingly, the defendant had no reason to conduct a prompt investigation into the purported negligent supervision and alleged unsafe condition of the gymnasium floor ...". ***Horn v. Bellmore Union Free Sch. Dist.*, 2016 N.Y. Slip Op. 04021, 2nd Dept 5-25-16**

PERSONAL INJURY, DOG-BITE, STRICT LIABILITY IN TORT.

DOG-BITE COMPLAINT PROPERLY DISMISSED.

The Second Department determined plaintiffs' complaint in this dog-bite case was properly dismissed. There was no showing the dog had ever exhibited any vicious propensities: "The evidence submitted in support of [defendants' motion for summary judgment], including the deposition transcripts of the testimony of each plaintiff and each defendant, established that the defendants were not aware, nor should they have been aware, that this dog had ever bitten anyone or exhibited any aggressive behavior or vicious propensities. The deposition testimony demonstrated that prior to the subject incident, the dog at most merely barked at guests when they first came to the house. The dog did not snap its teeth. It did not chase people. The dog generally stayed in the kitchen, but was not kept away for the safety of others. The infant plaintiff had been a guest on multiple occasions at the defendants' home without concern about any vicious propensities of the dog. There was no evidence that the dog was trained to guard the home ...". ***Ioveno v. Schwartz*, 2016 N.Y. Slip Op. 04023, 2nd Dept 5-25-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

STUDENT ASSUMED THE RISK OF BEING STRUCK BY A BASEBALL.

The Second Department determined plaintiff-student assumed the risk of being struck by a baseball during his high-school team's practice: " 'The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' ... . 'An educational institution organizing a team sporting activity must exercise ordinary reasonable care to protect student athletes voluntarily participating in organized athletics from unassumed, concealed, or enhanced risks' ... . 'Defendant's duty under such circumstances is a duty to exercise care to make the conditions as safe as they appear to be' ... . 'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty' ... . '[I]t is not necessary to the application of the doctrine that the injured plaintiff may have foreseen the exact manner in which

the injury occurred so long as he or she is aware of the potential for injury of the mechanism from which the injury results' ...". ***Kaminer v. Jericho Union Free Sch. Dist.*, 2016 N.Y. Slip Op. 04024, 2nd Dept 5-25-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S ACT OF CLIMBING A FENCE SHOULD NOT HAVE BEEN DEEMED THE SOLE PROXIMATE CAUSE OF HIS INJURY AS A MATTER OF LAW, QUESTION OF FACT WHETHER DEFENDANT NEGLIGENT FOR LOCKING PLAINTIFF INSIDE WORK SITE.

The Second Department, reversing Supreme Court, determined summary judgment should not have been awarded to defendant on a Labor Law § 200 cause of action alleging a dangerous condition. Plaintiff was locked inside the work site (a stadium) and was injured when climbing over a six-foot fence. Supreme Court erred when it determined, as a matter of law, that plaintiff's act of climbing the fence was the sole proximate cause of the injury: " 'Defendants are liable for all normal and foreseeable consequences of their acts,' and the plaintiffs 'need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable' ... . 'An intervening act constitutes a superseding cause sufficient to relieve a defendant of liability if it is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct' ... . However, when the intervening act is a natural and foreseeable consequence of a circumstance created by the defendant, the causal nexus is not severed and liability will subsist ... . Whether an act is foreseeable is generally for the trier of fact ... . Summary judgment is appropriate 'where only one conclusion may be drawn from the established facts' ... . Here, viewing the evidence in the light most favorable to the plaintiffs . . . we find that there is a triable issue of fact as to whether [plaintiff's] act in scaling the fence was a natural and foreseeable response to a condition allegedly created by the defendant's negligence ...". ***Niewojt v. Nikko Constr. Corp.*, 2016 N.Y. Slip Op. 04030, 2nd Dept 5-25-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF DID NOT KNOW SOURCE OF FALLING WOOD WHICH STRUCK HIM, THEREFORE PLAINTIFF COULD NOT DEMONSTRATE, AS MATTER OF LAW, A VIOLATION OF LABOR LAW § 240(1).

The Second Department determined plaintiff's motion for summary judgment on a Labor Law § 240(1) cause of action was properly denied. Plaintiff was struck by a falling piece of wood, but did not know what caused the wood to fall: "To prevail on a motion for summary judgment in a section 240(1) 'falling object' case, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking ... . In addition, the plaintiff 'must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute' ... . The evidence submitted by the plaintiff was insufficient to establish that the wood fell because of the absence or inadequacy of a safety device. The plaintiff's mere belief that the wood that struck him was a part of the hoist mechanism is insufficient to establish that it was a component of the safety device itself ... . Moreover, under the circumstances, including that the plaintiff did not see where the wood fell from, the plaintiff did not establish, prima facie, that his injuries were proximately caused by the absence or inadequacy of a safety device or other violation of the statute ...". ***Pazmino v. 41-50 78th St. Corp.*, 2016 N.Y. Slip Op. 04032, 2nd Dept 5-25-16**

PERSONAL INJURY, MUNICIPAL LAW.

ABUTTING PROPERTY OWNER NOT LIABLE FOR CONDITION OF CITY OWNED TREE WELL WITHIN SIDEWALK.

The Second Department, reversing Supreme Court, determined defendant property owner could not be held liable for the condition of a NYC-owned tree well within the abutting sidewalk: "Administrative Code of the City of New York § 7-210(a) places the duty to maintain a sidewalk in a reasonably safe condition on the owner of the property abutting the sidewalk, and provides for civil liability for injuries proximately caused by the failure to so maintain the sidewalk. However, the statute does not extend that duty of maintenance to City-owned tree wells or provide for civil liability for injuries occurring in City-owned tree wells ... . Thus, liability may be imposed on the abutting landowner in such instances only where she or he has 'affirmatively created the dangerous condition, negligently made repairs to the area, [or] caused the dangerous condition to occur through a special use of that area' ...". ***Gibbons v. City of New York*, 2016 N.Y. Slip Op. 04019, 2nd Dept 5-25-16**

THIRD DEPARTMENT

ARBITRATION, EMPLOYMENT LAW.

WHERE THE COLLECTIVE BARGAINING AGREEMENT (CBA) IS AMBIGUOUS ABOUT ITS APPLICABILITY TO AN ACTION AGAINST A COVERED PUBLIC EMPLOYEE, WHETHER THE CBA GOVERNS MUST BE DETERMINED BY THE ARBITRATOR.

The Third Department, over a two-justice dissent, determined Supreme Court should have compelled arbitration of the dismissal of a probationary employee (Woods). The court deemed the collective bargaining agreement (CBA) ambiguous about whether the dismissal of a probationary employee constituted "discipline" within the meaning of the CBA. Therefore

it should have been left to the arbitrator to decide whether the CBA governs the dismissal: "Contrary to respondents' interpretation, we do not find that the cited provision of the CBA unambiguously excludes Woods from its coverage. Indeed, it can be read to wholly supplant the referenced provisions of the Civil Service Law and to require a demonstration of "just cause" to discipline any employee in the bargaining unit. While the dissent has concluded that Woods was not disciplined, it is for an arbitrator to interpret and apply the CBA, and we do not have authority to consider the merits of the argument ... . Since the CBA provision is ambiguous, an arbitrator must decide whether it governs Woods' dismissal from service, and Supreme Court should have granted the petition to compel arbitration ...". ***Matter of Woods v. State Univ. of N.Y.*, 2016 N.Y. Slip Op. 04084, 3rd Dept 5-26-16**

CIVIL PROCEDURE, TRUSTS AND ESTATES.

EXECUTOR-STATUS (PRIOR TO DEATH) AND FAMILIAL RELATIONSHIP DO NOT CREATE A FIDUCIARY RELATIONSHIP, EQUITABLE ESTOPPEL SHOULD NOT HAVE BEEN INVOKED TO SAVE A TIME-BARRED CLAIM.

The Third Department, over a two-justice dissent, determined the doctrine of equitable estoppel should not have been invoked to save a time-barred claim to real property. The real property was the subject of a 1977 will which placed the property in trust for decedent's children and named defendant executor. In 1988, the property was conveyed to the defendant, but the will was never amended. Supreme Court denied defendant's motion to dismiss, finding that defendant's executor-status and familial ties created a fiduciary relationship, requiring defendant to notify plaintiffs of the 1988 transfer. The Third Department held the appointment as executor did not create a fiduciary relationship (prior to death), and the familial relationship, as well, did not create a fiduciary relationship. Therefore, the Third Department ruled, the defendant was not barred, by equitable estoppel, from asserting the statute of limitations defense. ***Picard v. Fish*, 2016 N.Y. Slip Op. 04086, 3rd Dept 5-26-16**

MUNICIPAL LAW, EMPLOYMENT LAW.

MAYOR DID NOT HAVE THE AUTHORITY TO IGNORE DETERMINATION MADE BY AN APPOINTED HEARING OFFICER, PETITIONER FIREFIGHTER ENTITLED TO GENERAL MUNICIPAL LAW BENEFITS.

The Third Department determined the village mayor did not have the authority to ignore the ruling of a hearing officer who found petitioner, a former firefighter, was entitled to General Municipal Law § 207-a benefits based upon an on-the-job injury. When the mayor appointed the hearing officer, there was no indication the hearing officer's finding was merely advisory: "Based on the record, we conclude that Supreme Court's initial finding that the Village was not bound by the Hearing Officer's determination was in error. First, and contrary to respondents' argument, without any statutory or negotiated prohibition or direction, the Village was authorized to delegate its decision-making authority to the Hearing Officer ... . Second, that the Mayor did, in fact, appoint the Hearing Officer to make a final determination and not a recommendation is apparent from the record before us. Neither the 2010 nor the 2012 appointment was in any way qualified so as to limit the respective Hearing Officers to an advisory role." ***Matter of McKay v. Village of Endicott*, 2016 N.Y. Slip Op. 04085, 3rd Dept 5-26-16**

PERSONAL INJURY.

PLAINTIFF'S STATEMENT COUPLED WITH HER AFFIDAVIT RAISED A QUESTION OF FACT ABOUT THE CAUSE OF HER FALL.

The Third Department, reversing Supreme Court, determined plaintiff's (Costello's) statement in this slip and fall case, coupled with her affidavit in opposition to defendant's motion to dismiss, created a question of fact about the cause of her fall: "We reject defendant's argument that Costello will be unable to demonstrate proximate cause in this matter because she was unable, or perhaps unwilling, to immediately ascertain the cause of her fall. Defendant asserts that Costello was equivocal about the cause, based upon her statement that she 'believe[d]' that the flooring was bowed. Even assuming that Costello's use, on one occasion, of what might be characterized as a mere figure of speech may be read as an expression of uncertainty about the cause of her fall, her affidavit clarifies any ambiguity. In her affidavit, Costello asserted that the 'wood floor . . . was bowed and did not provide [her] with a proper walking surface.' Read together with the testimony of the two nonparty witnesses regarding the uneven, grooved state of the floor, there is adequate record proof to 'render other causes [of her fall] sufficiently remote such that the jury [could] base its verdict on logical inferences drawn from the evidence, not merely on speculation'…". ***Costello v. Pizzeria Uno of Albany, Inc.*, 2016 N.Y. Slip Op. 04087, 3rd Dept 5-26-16**

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