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COURT OF APPEALS

CRIMINAL LAW, APPEALS.

DEFENDANT'S SPEEDY TRIAL ARGUMENT PRESERVED BY A HEARING; HAD THE HEARING NOT BEEN HELD, HOWEVER, DEFENDANT'S FAILURE TO REPLY TO THE PEOPLE'S EXPLANATION OF THE DELAY WOULD HAVE RENDERED THE ARGUMENT UNPRESERVED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined defendant's speedy trial argument was preserved for review and affirmed dismissal of the indictment on speedy trial grounds. In response to defendant's motion to dismiss, the People produced an explanation of the delay in seeking the indictment (witness out of the country). The defendant did not reply to the People's explanation. But a hearing on the speedy trial motion was subsequently held. The Court of Appeals found that the issue was preserved by the hearing. The court noted, however, had there been no hearing, the defendant's failure to reply to the People's explanation of the delay would have rendered the issue unpreserved. A defendant, therefore, should always reply to the People's explanation of a delay: "In the absence of a hearing, a defendant's substantive CPL 30.30 arguments will be unpreserved where the defendant failed to otherwise raise them, for instance, 'in his initial submission or in a reply' ... . Accordingly, a defendant would be well-advised to raise any CPL 30.30 arguments in a reply so as to ensure their preservation. For instance, where a defendant mistakenly believes that the People failed to 'conclusively refute[]' his motion (CPL 210.45[5][c]) — and therefore opts not to reply — the defendant risks summary denial of his motion, leaving him with an unsuccessful and unpreserved claim. However, a defendant's failure to reply is not fatal to his claim where, as here, the defendant properly requests and receives a hearing and, at that hearing, his arguments are raised and developed ...". ***People v. Allard*, 2016 N.Y. Slip Op. 06853, CtApp 10-20-16**

CRIMINAL LAW, APPEALS.

FAILURE TO PROVIDE MEANINGFUL NOTICE OF THE CONTENTS OF A JURY NOTE IS A MODE OF PROCEEDINGS ERROR WHICH NEED NOT BE PRESERVED; FAILURE TO PROVIDE A MEANINGFUL RESPONSE TO A JURY NOTE, HOWEVER, IS NOT A MODE OF PROCEEDINGS ERROR AND MUST BE PRESERVED BY OBJECTION.

The Court of Appeals, reversing the Appellate Division, determined the trial judge's acceptance of a verdict before responding to the jury's request for a readback was not a mode of proceedings error and therefore must be preserved by objection. Just prior to the verdict, the judge had read the jury's request verbatim in the presence of counsel, defendant and the jury. The judge's failure to respond to the request (unlike a failure to apprise the parties of the contents of the request) is not a mode of proceedings error: "... '[W]here counsel has meaningful notice of the content of a jury note and of the trial court's response, or lack thereof, to that note, the court's alleged violation of the meaningful response requirement does not constitute a mode of proceedings error, and counsel is required to preserve any claim of error for appellate review' ... . Here, the trial court complied with its responsibility to provide counsel with meaningful notice of the jury's notes by reading the notes verbatim into the record in the presence of counsel, defendant, and the jury ... . Inasmuch as counsel had meaningful notice of the jury notes, the trial court's failure to provide a response to the jury's outstanding request for a readback of testimony before accepting the verdict does not constitute a mode of proceedings error ... . Counsel was required to object to preserve any claim of error for this Court's review. 'Although the court's procedure here may have been error, it was not a mode of proceedings error, and we have no jurisdiction to review it' .. .". ***People v. Wiggs*, 2016 N.Y. Slip Op. 06860, CtApp 10-20-16**

CRIMINAL LAW, EVIDENCE, CIVIL PROCEDURE.

ADMISSIBILITY OF DOCUMENT ORIGINALLY CREATED IN ELECTRONIC FORM, HERE A RECORD OF TESTING OF THE SIMULATOR SOLUTION USED IN AN ALCOHOL BREATH TEST, IS DETERMINED UNDER CPLR 4518, NOT CPLR 4539.

The Court of Appeals determined evidence which was originally generated in electronic form was admissible under CPLR 4518 (a) and CPLR 4539 (b) applies only to documents originally in hard copy and subsequently scanned into digital form. The document in question was a record of testing of the simulator solution used during an alcohol breath test: "County Court correctly held that the applicable statute is CPLR 4518 (a), which was amended in 2002 (see L 2002, ch 136, § 1) to

provide that an 'electronic record . . . shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record' (CPLR 4518 [a]). The statute further provides that the court 'may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record,' but '[a]ll other circumstances of the making of the memorandum or record. . . may be proved to affect its weight,' and 'shall not affect its admissibility' … . The 2002 amendment to CPLR 4518 (a) was adopted by the legislature upon the recommendation of the Chief Administrative Judge's Advisory Committee on Civil Practice specifically because the Committee and the legislature concluded that CPLR 4539 (b) had no application to documents originally created in electronic form." ***People v. Kangas*, 2016 N.Y. Slip Op. 06857, CtApp 10-20-16**

JUDGES.

JUDGE'S EGREGIOUS BEHAVIOR WARRANTED REMOVAL FROM OFFICE.

The Court of Appeals determined the petitioner, a Town and Village Justice, should be removed from office for what might be termed "bullying" while on and off the bench: "The misconduct … 'qualifies as 'truly egregious' ... . The record reflects that, among other things, petitioner used a sanction — a tool meant to 'shield' from frivolous conduct — as a 'sword' to punish a legal services organization for a perceived slight in an inexcusable and patently improper way (see 22 NYCRR 130-1.1 [a] [authorizing the imposition of sanctions, but precluding town and village courts from applying such penalties]). The record is also replete with instances in which petitioner used his office and standing as a platform from which to bully and to intimidate. To that end, it is undisputed that petitioner engaged in ethnic smearing and name-calling and repeatedly displayed poor temperament — perhaps most significantly, by engaging in a physical altercation with a student worker. Those actions are representative of an even more serious problem. Petitioner — in what allegedly was a grossly misguided attempt to motivate — repeatedly threatened to hold various officials and employees of the Village of Spring Valley in contempt without cause or process. ... Significantly, too, petitioner's hectoring extended beyond the courthouse. In what ostensibly was an attempt to undermine a former co-Judge and an apparent political adversary, petitioner willfully injected himself into the political process involving the election of an office other than his own." ***Matter of Simon*, 2016 N.Y. Slip Op. 06855, CtApp 10-20-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

MID-TRIAL OBJECTION TO SUFFICIENCY OF EXPERT-NOTICE PROPERLY OVERRULED AS UNTIMELY.

The Court of Appeals determined the trial court did not abuse its discretion when it denied plaintiff's motion to strike defendant's expert's testimony. The "expert-evidence" notice indicated the expert would testify about the cause of plaintiff's decedent's death but did not indicate the substance of the testimony. At trial the expert did not agree with the cause described in the autopsy report (pneumonia) and testified death was attributable to cardiac arrhythmia. The motion to strike argued the "expert notice" was deficient because it did not provide any detail about the expert's opinion. Because the lack of detail was obvious pre-trial, the mid-trial objection was properly overruled: "Plaintiff made her motion mid-trial immediately prior to the expert's testimony. Plaintiff argues that at the time of the expert exchange, she had no reason to object to the disclosure statement because the statement gave no indication that defendant would challenge plaintiff's theory of decedent's cause of death. Assuming defendant's disclosure was deficient, such deficiency was readily apparent; the disclosure identified 'causation' as a subject matter but did not provide any indication of a theory or basis for the expert's opinion. This is not analogous to a situation in which a party's disclosure was misleading or the trial testimony was inconsistent with the disclosure. Rather, the issue here was insufficiency. The trial court's ruling did not endorse the sufficiency of the statement but instead addressed the motion's timeliness. The lower courts were entitled to determine, based on the facts and circumstances of this particular case, that the time to challenge the statement's content had passed because the basis of the objection was readily apparent from the face of the disclosure statement and could have been raised — and potentially cured — before trial." ***Rivera v. Montefiore Med. Ctr.*, 2016 N.Y. Slip Op. 06854, CtApp 10-20-16**

FIRST DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW,

DISMISSAL OF ACTIONS STEMMING FROM THE MADOFF PONZI SCHEME AFFIRMED PURSUANT TO THE DOCTRINE OF IN PARI DELICTO (COURT WILL NOT RESOLVE A DISPUTE BETWEEN TWO WRONGDOERS).

The First Department, in a full-fledged opinion too complex for summary here (by Justice Tom), affirmed the dismissal of complaints stemming from the Madoff Ponzi scheme pursuant to the doctrine of in pari delicto (courts will not resolve a dispute between two wrongdoers): "In this case, plaintiff's claims are precluded under the doctrine of in pari delicto. As the funds' bankruptcy trustee, plaintiff stands in the funds' shoes, and is subject to a defense based on the in pari delicto doctrine to the same extent as the funds ... . Thus, the doctrine 'prevents the trustee from recovering in tort if the corporation, acting through authorized employees in their official capacities, participated in the tort' ... . While a claim of in pari delicto sometimes requires factual development and is therefore not amenable to dismissal at the pleading stage ... , the doctrine

can apply on a motion to dismiss in an appropriate case … , such as where its application is 'plain on the face of the pleadings' ...". ***New Greenwich Litig. Trustee, LLC v. Citco Fund Servs. (Europe) B.V.*, 2016 N.Y. Slip Op. 06796, 1st Dept 10-18-16**

CRIMINAL LAW, EVIDENCE, CIVIL RIGHTS LAW.

JOURNALIST WHO INTERVIEWED DEFENDANT COULD NOT BE COMPELLED TO TESTIFY IN DEFENDANT'S MURDER TRIAL.

The First Department, reversing Supreme Court, determined a reporter (Robles) who interviewed defendant could not be compelled to testify at the defendant's murder trial and could not be compelled to turn over her interview notes. The information gathered by the reporter was not "critical or necessary" to the People's case: "In *People v. Bonie* (141 AD3d 401 [1st Dept 2016], *lv dismissed* 28 NY3d 956 [2016]), a murder case based on circumstantial evidence, we found that the outtakes of an interview of the defendant taken at a detention center in which he discussed, inter alia, the charges against him and his relationship with the victim were 'critical or necessary' to the People's effort to prove motive, intent, and consciousness of guilt, since they contradict[ed] defendant's earlier statements to police' ... . In contrast, in this case, the People have a videotaped confession by the defendant that has been found admissible at trial and that includes statements consistent with other evidence in the case. Under the circumstances, and in keeping with 'the consistent tradition in this State of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events' ... , we find that the People have not made a 'clear and specific showing' that the disclosure sought from Robles (her testimony and interview notes) is 'critical or necessary' to the People's proof of a material issue so as to overcome the qualified protection for the journalist's nonconfidential material (Civil Rights Law § 79-h[c])." ***People v. Juarez*, 2016 N.Y. Slip Op. 06900, 1st Dept 10-20-16**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE DISMISSED MOTHER'S PETITION FOR CUSTODY MODIFICATION WITHOUT HOLDING A HEARING AND INTERVIEWING THE CHILD.

The First Department, reversing Family Court, determined mother's petition for a modification of custody should not have been dismissed without a hearing and without interviewing the 13-year-old child: "... [P]etitioner submitted evidence of the younger child's preference, his growing apprehension about staying with respondent [father], and respondent's maltreatment of the child. She submitted evidence that she was addressing the mental health concerns that had led to her initial consent to relinquish custody to respondent and evidence that she had sought treatment for issues relating to a history of domestic violence and that she had obtained new living quarters for herself and the younger child. The child supported the petition and asked for an in camera hearing ... .Without meeting with the child or considering the sworn allegations of domestic abuse (see Domestic Relations Law § 240[1]), the court granted the motion to dismiss. This was error. Petitioner presented sufficient evidence to warrant a plenary hearing to determine whether the totality of the circumstances warrants a modification of the custody order, including its limited visitation provisions and the grant of complete decision-making authority to respondent, and whether such a change is in the best interests of the child ... . The child's wishes, to be discerned from an interview, should be considered in making the determination ...". ***Matter of Athena H.M. v. Samuel M.*, 2016 N.Y. Slip Op. 06865, 1st Dept 10-20-16**

LIEN LAW, CONTRACT LAW.

LIEN LAW DID NOT REQUIRE A BOND FOR A $170,000,000 PRIVATE CONSTRUCTION PROJECT ON PUBLIC LAND; CONTRACTUAL GUARANTEE SATISFIED THE STATUTE.

The First Department, in a full-fledged opinion by Justice Acosta, over a two-justice partial dissent, determined the requirements of section 5 of the Lien Law, which concerns private development on public land, was satisfied by a contractual guarantee, as opposed to the posting of a bond. The nearly $170,000,000 construction project ultimately collapsed. The opinion, which addresses the substance of the contracts, piercing the corporate veil, as well as a motion to disqualify a law firm on conflict grounds, is too complex to summarize here. With respect to the Lien Law issue, the court wrote: "That the legislature intended the term 'undertaking' in Lien Law § 5 to mean a 'guarantee' is strongly supported by the statute's legislative history, which indicates that the Governor vetoed an earlier version of the 2004 amendment that added the above quoted language because the earlier version would have required the posting of a bond in every instance, disallowing 'other forms of security designed to guarantee payment' ... . The senate sponsor of the amendment clarified that the phrase 'or some other form of undertaking' was added to meet the Governor's concerns by providing 'an alternative to posting a bond' ...". ***Skanska USA Bldg. Inc. v. Atlantic Yards B2 Owner, LLC*, 2016 N.Y. Slip Op. 06903, 1st Dept 10-20-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

PROPER VENUE FOR TWO LAWSUITS JOINED FOR TRIAL IS THE COUNTY WHERE THE FIRST LAWSUIT WAS FILED.

The Second Department determined Supreme Court abused its discretion when it ruled two lawsuits joined for trial could be held in the county where the second of the two actions, as opposed to the first, was commenced: " '[W]here actions commenced in different counties have been consolidated [or joined for trial] pursuant to CPLR 602, the venue should be placed in the county where the first action was commenced, unless special circumstances are present, which decision is also addressed to the sound discretion of the court' ... . Here, the motion court improvidently exercised its discretion in placing the venue of the joint trial in Queens County, since EMB [the defendants in the second suit] failed to establish the existence of special circumstances that would warrant a departure from the general rule ...". ***Tieshmaker v. EMB Contr. Corp.*, 2016 N.Y. Slip Op. 06819, 2nd Dept 10-19-16**

COURT OF CLAIMS, HIGHWAYS, GOVERNMENTAL IMMUNITY.

DOCTRINE OF QUALIFIED GOVERNMENTAL IMMUNITY PROTECTED STATE FROM SUIT ALLEGING INADEQUATE HIGHWAY GUARDRAIL.

The Second Department, affirming the Court of Claims, determined the state was protected from suit by the doctrine of qualified immunity. Plaintiffs were injured when a van in which they were riding struck a highway guardrail and concrete pillar. The complaint alleged the guardrail was not long enough: "To establish its entitlement to qualified immunity, the governmental body must demonstrate 'that the relevant discretionary determination by the governmental body was the result of a deliberate decision-making process' ... . 'A municipality is entitled to qualified immunity where a governmental planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury' ... . Accordingly, where the decision made by the municipality or governmental body was not the product of a governmental plan or study, the doctrine of qualified immunity is inapplicable ... . Here, the Court of Claims correctly applied the doctrine of qualified immunity based on the evidence the defendants submitted at trial that the guardrail was designed pursuant to the design standards set forth by the New York State Department of Transportation, which were the result of a deliberate decision-making process of the type afforded immunity from judicial interference ...". ***Ramirez v. State of New York*, 2016 N.Y. Slip Op. 06815, 2nd Dept 10-19-16**

CRIMINAL LAW.

SENDING THE VERDICT SHEET BACK TO THE JURY WITH A MESSAGE CONVEYED BY A COURT OFFICER, IN THE DEFENDANT'S ABSENCE, REQUIRED REVERSAL.

The Second Department determined Supreme Court committed reversible error when it, in the absence of defendant, received the verdict sheet from the jury indicating an impasse on two counts and sent the verdict sheet back to the jury with a message, conveyed by a court officer, to indicate what the jury's issues were: "This message communicated to the jury that the court was rejecting the verdict and was, in effect, instructing the jury to continue deliberations. Indeed, approximately 10 minutes later, the jury sent a note indicating that it had reached a verdict on one of the two counts upon which the jury had earlier been unable to reach a verdict. An instruction to continue deliberations when the jury has indicated an inability to reach a verdict is not a mere 'ministerial' matter ... . Thus, the defendant was absent during a material stage of the trial, and the trial court improperly delegated a judicial duty to a nonjudicial staff member ...". ***People v. Gray*, 2016 N.Y. Slip Op. 06839, 2nd Dept 10-19-16**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER HAD AN OBJECTIVE, CREDIBLE REASON FOR APPROACHING DEFENDANT IN HER CAR, EVIDENCE OF DWI SHOULD NOT HAVE BEEN SUPPRESSED.

The Second Department, reversing Supreme Court, determined evidence of defendant's intoxication should not have been suppressed. The arresting officer approached defendant's car because she was stopped for some time behind a police cruiser which was blocking the turning lane. The Second Department ruled that the officer did not need a suspicion of criminal activity to approach the defendant and ask for her license, insurance card and registration. In the course of interacting with the defendant, the officer noticed signs of intoxication: "Based on the testimony adduced at the suppression hearing, the officer had an objective, credible reason for approaching the defendant's vehicle and asking for her license, registration, and insurance card. The defendant's vehicle was oddly stopped in the left turning lane behind the officer's vehicle, when it was obvious that she could not make a left turn. The defendant could have easily proceeded north on Oceanside Road, but instead stopped her vehicle for several minutes behind the officer's vehicle. Under these circumstances, the officer had

an objective, credible reason to approach the defendant's vehicle and request information ...". ***People v. Karagoz*, 2016 N.Y. Slip Op. 06842, 2nd Dept 10-19-16**

CRIMINAL LAW, EVIDENCE, APPEALS.

ERROR TO ALLOW PROSECUTOR TO IMPEACH HER OWN WITNESS WITH THE WITNESS'S GRAND JURY TESTIMONY, EVIDENTIARY ERRORS COUPLED WITH PROSECUTORIAL MISCONDUCT REQUIRED REVERSAL IN THE INTEREST OF JUSTICE.

The Second Department determined the allowing the prosecutor to impeach her own witness with the witness's grand jury testimony, allowing inadmissible hearsay, together with the prosecutor's improper remarks in summation, required reversal in the interest of justice: "... [A] new trial is warranted as a result of two evidentiary errors, both of which were compounded by improper remarks made during the People's summation. Specifically, the Supreme Court allowed the prosecutor to impeach one of her own witnesses, who testified at trial that it was dark at the time of the shooting and she 'couldn't really see' the shooter. The prosecutor was permitted to read that witness's prior grand jury testimony, in which she stated that she recognized the shooter as a person going by the nickname of E-Villain. This was error ... . Moreover, during summation, the prosecutor compounded the error by improperly using the prior inconsistent statement as evidence in chief ... , telling the jury that when that witness previously spoke to the police, to an assistant district attorney, and to the grand jury, 'on each of those occasions, she said what it is she saw and who it is that she saw do it,' and urging the jury to find 'she was not telling you the truth when she said that I now am telling you I did not see who did it, that it was too dark.' Later, the prosecutor went one step further, stating, in direct contradiction to the witness's trial testimony, that '[she] saw who it was.' The Supreme Court also erred in allowing another witness to testify that a 'little girl said that [the defendant] shot [the victim]' ... . Moreover, on summation, the prosecutor not only repeated the improper hearsay testimony but also mispresented the defendant as having told one of the witnesses, 'You know what, that little girl that told you that was a hundred percent right.' " ***People v. Thomas*, 2016 N.Y. Slip Op. 06851, 2nd Dept 10-19-16**

JUDGES, CRIMINAL LAW, EVIDENCE.

DEFENSE COUNSEL NOT ENTITLED TO FULL NAMES OF ALL PERSONS WHOSE INITIALS APPEAR ON A DNA LAB REPORT; WRIT OF PROHIBITION ISSUED RE: JUDGE WHO ORDERED DISCLOSURE.

The Second Department determined the People were entitled to a writ of prohibition re: a County Court Judge's order that they produce the names of all lab personnel whose initials appeared on lab report concerning DNA test results. The People had notified defense counsel persons at the lab had cheated on an exam for certification for use of a DNA software program. The software program was not used in defendant's case. The People provided defense counsel with the names of the two persons implicated in the cheating whose initials appeared on the lab report. Defense counsel requested the names of all the persons whose initials were on the report. County Court granted that request: "...[T]he only relevant inquiry is whether or not [the judge's] actions exceeded his authorized powers ... . We conclude that Judge De Rosa exceeded his authority by directing the People to make available to the defendant the full names corresponding to the initials that appear on the subject laboratory reports ... . Nothing contained in CPL 240.20 imposes an obligation on the People to respond to the defendant's questions concerning notations that appear in discoverable materials, or to affirmatively create or compile material, or obtain it from sources beyond their control ...". ***Matter of Hoovler v. De Rosa*, 2016 N.Y. Slip Op. 06830, 2nd Dept 10-19-16**

REAL PROPERTY.

QUESTION OF FACT WHETHER PHYSICAL PARTITION OR SALE IS THE APPROPRIATE REMEDY RE: A FOUR-FAMILY BROWNSTONE.

In an action for partition and sale of a four-family brownstone, the Second Department determined Supreme Court properly determined there was a question of fact whether physical partition or sale was the appropriate remedy: " 'A person holding and in possession of real property as joint tenant or tenant in common, in which he [or she] has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners' (RPAPL 901[1]). 'The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties' ... . 'The actual physical partition of property is the preferred method and is presumed appropriate unless one party demonstrates that actual physical partition would cause great prejudice, in which case the property must be sold at public auction' ... . Contrary to the plaintiffs' contention, there is a question of fact as to whether physical partition or sale of the subject property is appropriate ... . Thus, the Supreme Court properly denied that branch of the plaintiffs' motion which sought a sale of the property, and properly appointed a referee to determine whether physical partition or sale was the appropriate remedy." ***Perretta v. Perretta*, 2016 N.Y. Slip Op. 06814, 2nd Dept 10-19-16**

ZONING.

ZONING BOARD DID NOT HAVE STATUTORY AUTHORITY TO IMPOSE DURATIONAL LIMIT ON PERMIT FOR A NONCONFORMING USE.

The Second Department, reversing Supreme Court, determined the zoning board did not have statutory authority to impose a durational limit on a permit allowing property in a residential zone to be used as a parking lot for the adjacent restaurant: "The Board did not have the authority to impose a durational limit on a permit granted pursuant to Town Code § 70-225(E). 'Judicial review of a determination by a zoning board is generally limited to determining whether the action taken by the zoning board was illegal, arbitrary and capricious, or an abuse of discretion' ... . '[W]here the issue involves pure legal interpretation of statutory terms, deference [to the board] is not required' ... . '[C]onditions imposed by a Board of Zoning Appeals must be authorized by the zoning ordinance' ... . '[I]f a zoning board imposes unreasonable or improper conditions, those conditions may be annulled although the variance is upheld' ... . Here, Town Code § 70-225(E) does not explicitly provide the Board with the authority to impose durational limits upon permits granted pursuant to that section. Thus, it was improper for the Board to include a five-year durational limit on a permit granted pursuant to that provision, and the durational limit must be annulled ...". ***Matter of Citrin v. Board of Zoning & Appeals of Town of N. Hempstead*, 2016 N.Y. Slip Op. 06827, 2nd Dept 10-19-16**

THIRD DEPARTMENT

CRIMINAL LAW.

COUNTY COURT DID NOT HAVE THE AUTHORITY TO REQUIRE DEFENDANT TO PAY COSTS ASSOCIATED WITH AN ALCOHOL-MONITORING BRACELET.

The Third Department, reversing County Court, determined County Court did not have the statutory authority to require defendant to pay for a Secure Continuous Remote Alcohol Monitoring (SCRAM) bracelet. Therefore revoking defendant's probation and imposing a prison sentence based on defendant's failure to make payments was error: "... [W]e are compelled to find 'that County Court did not have statutory authority for requiring [defendant] to pay for the cost of the electronic monitoring program' ... . While County Court can require a defendant to submit to the use of an electronic monitoring device if it determines that such a condition would advance public safety (see Penal Law § 65.10 [4]), it could not require a defendant to pay the costs associated with such monitoring since such costs do not fall within the category of restitution, but are more in the nature of a law enforcement expense ...". ***People v. Hakes*, 2016 N.Y. Slip Op. 06905, 3rd Dept 10-20-16**

CRIMINAL LAW, EVIDENCE.

NO INTENT TO PERMANENTLY DEPRIVE OWNER OF HIS PROPERTY, GRAND LARCENY CONVICTION REVERSED.

The Third Department, reversing defendant's grand larceny conviction, determined there was insufficient evidence defendant intended to permanently deprive the owner of his all-terrain vehicle (ATV). Defendant planned to return the ATV in exchange for return of his tools: "Larcenous intent is the 'intent to deprive another of property or to appropriate the same to himself or to a third person' ... . The terms 'deprive' and 'appropriate' are both essential to larcenous intent and refer to a purpose 'to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof' ... . For this reason, '[t]he mens rea element of larceny is simply not satisfied by an intent to temporarily take property without the owner's permission' ... . The proof introduced at trial supported the singular reasonable conclusion that defendant was executing a plan to temporarily deprive the tenant of the ATV in order to force him to return defendant's missing tools ...". ***People v. Drouin*, 2016 N.Y. Slip Op. 06906, 3rd Dept 10-20-16**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

SORA RISK LEVEL ASSESSMENT REVERSED, DEFENDANT WAS NOT GIVEN A MEANINGFUL OPPORTUNITY TO RESPOND TO COURT'S ASSESSMENT FOR VIOLENCE.

The Third Department, reversing County Court's risk level assessment, determined defendant was not given a meaningful opportunity to respond to the assessment of points: "A defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment ... . Not only did County Court fail to give defendant notice of its intention to sua sponte assess points for the category of use of violence, it affirmatively misled defendant by its assurance that it had already 'made a decision . . . regarding a point score,' which included no assignment of points for that risk factor. Accordingly, defendant was denied due process ... . Considering the fact that defendant was never aware of the potential of the assignment of such points until a point in time where he no longer had an opportunity to object — his only remaining opportunity to be heard being explicitly limited to arguing for a downward departure — he need not have taken any further action to preserve the issue for our review ...". ***People v. Griest*, 2016 N.Y. Slip Op. 06907, 33rd Dept 10-20-16**

ENVIRONMENTAL LAW.

PESTICIDE COMPANY WAS ENTITLED TO A HEARING BEFORE IMPLEMENTATION OF A CLEAN-UP PLAN BY THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

The Third Department, in a detailed decision, reversing Supreme Court, determined petitioner, a pesticide manufacturer, had not been afforded a hearing on a clean-up plan (CMA 9) which the respondent Department of Environmental Conservation sought to implement. Therefore the Department could not find that the pesticide company had "refused" to obey the implementation order and could not proceed with the clean-up itself: "Here, under the consent order, petitioner developed the CMA report. The focus in this proceeding turns to remedy selection and implementation. Under [the] statutory framework, petitioner was entitled to both notice (which was provided through the statement of basis process) and an opportunity for a hearing prior to the issuance of an order directing petitioner to implement CMA 9. As it turns out, petitioner was not accorded an opportunity for a hearing to assert its challenge to CMA 9 and no implementation order was issued. Absent such an order, we must agree with petitioner that respondent's determination that it was authorized to proceed with the remedial work based on petitioner's "refusal" to perform the work was arbitrary and capricious." ***Matter of FMC Corp. v. New York State Dept. of Envtl. Conservation*, 2016 N.Y. Slip Op. 06929, 3rd Dept 10-20-16**

FAMILY LAW.

FAMILY COURT IMPROPERLY DELEGATED ITS AUTHORITY TO STRUCTURE VISITATION.

The Third Department noted Family Court improperly delegated its authority to structure visitation and remitted the matter: "... [W]e find a sound and substantial basis in this record for Family Court's decision to modify the prior visitation order by limiting the mother's visitation to a counseling format — which the mother acknowledged was the best she could hope for given her strained relationship with the child ... . That said, by effectively making further visitation contingent on the success of counseling and the father's approval, Family Court improperly delegated its authority to structure a visitation schedule ... . We conclude that the matter must be remitted to Family Court for a determination as to whether a resumption of visitation with the mother would be in the child's best interests and, if so, under what conditions ...". ***Matter of Christine TT. v. Dino UU.*, 2016 N.Y. Slip Op. 06910, 3rd Dept 10-20-16**

FAMILY LAW.

FATHER WAS NOT AWARE FINAL HEARING ON TERMINATION OF HIS PARENTAL RIGHTS HAD BEEN SCHEDULED; HOLDING TERMINATION PROCEEDINGS IN HIS ABSENCE CONSTITUTED A DENIAL OF DUE PROCESS.

The Third Department, reversing Family Court, determined father (respondent) was denied due process when Family Court went ahead with proceedings to terminate his parental rights in his absence. Father was never informed that a final hearing or trial was scheduled: "A parent has a due process right to be present during proceedings to terminate parental rights, but that right 'is not absolute and must be balanced with the child's right to a prompt and permanent adjudication'... . 'Absent unusual justifiable circumstances, a parent's rights should not be terminated without his or her presence at the hearing' '... . Under the circumstances here, a brief adjournment to allow participation by respondent would not have significantly impinged upon the child's right to a prompt hearing ... , especially since respondent may have been the only witness regarding his defense that he had attempted to contact the child ... . Because the record does not provide any indication that either respondent or his counsel was aware that the August 4, 2015 proceeding was scheduled as a final hearing or trial on the petition, and because the record likewise provides no indication that either was aware of the stay expiring on September 25, 2015, we find that respondent was denied 'some opportunity to participate in a meaningful way' ... . Thus, respondent is entitled to a new hearing, with new counsel assigned to represent him." ***Matter of Chloe N. (Joshua N.)*, 2016 N.Y. Slip Op. 06926, 3rd Dept 10-20-16**

FAMILY LAW, ATTORNEYS.

FAMILY COURT IMPROPERLY DELEGATED AUTHORITY TO DETERMINE VISITATION; CHILD'S ATTORNEY PROPERLY TOOK A POSITION ADVERSE TO THE CHILD'S WISHES.

The Third Department noted: (1) Family Court improperly delegated the authority to determine mother's visitation to a counselor; and (2) under the circumstances, it was appropriate for the child's attorney to take a position that did not reflect the child's wishes: "Considering the evidence as a whole and particularly considering the psychologist's work with all of the parties and her reasoned explanation of how numerous factors led her to conclude that there was 'no credible evidence of abuse' by the father but that there was evidence of 'coaching, coercion and brainwashing' of the child by the mother, we find no reason to depart from Family Court's determination to credit the psychologist. * * * Family Court erred by delegating the determination of the mother's visitation to the child's counselor. A court cannot delegate its authority to determine visitation to a mental health professional ... . * * * ... [W]e find no fault in the attorney for the child's decision to advocate for a position contrary to the child's wishes, of which Family Court was aware, given that such wishes were 'likely to result in

a substantial risk of imminent, serious harm to [her]' ...". ***Matter of Zakariah SS. v. Tara TT.*, 2016 N.Y. Slip Op. 06923, 3rd Dept 10-20-16**

PERSONAL INJURY.

EXPERIENCED SKIER ASSUMED THE RISK OF STRIKING A DEPRESSION IN THE SKI TRAIL.

The Third Department, reversing Supreme Court, determined defendant, Oak Mountain Ski Center, was entitled to summary judgment based upon plaintiff's (Schorpp's) assumption of the risk. Plaintiff, who had decades of skiing experience, and who had skied at Oak Mountain weekly, flipped over when he struck a depression on a "black diamond" trail. It was the first time plaintiff used that particular trail: "Regarding downhill skiing, an individual 'assumes the inherent risk of personal injury caused by ruts, bumps or variations in the conditions of the skiing terrain' ... . The application of the assumption of risk doctrine must be measured 'against the background of the skill and experience of the particular plaintiff' ... . We conclude that defendants satisfied their moving burden by demonstrating that Schorpp assumed the risk of injury associated with downhill skiing ... . Although this was his first time on the particular black-diamond trail, Schorpp had 'decades of skiing experience' and had skied at Oak Mountain on a weekly basis prior to his accident. Taking into account his experience and skill level, Schorpp was aware of the risk of injury that could be caused by the depression on the ski slope ...". ***Schorpp v. Oak Mtn., LLC*, 2016 N.Y. Slip Op. 06932, 3rd Dept 10-20-16**

PERSONAL INJURY.

QUESTION OF FACT WHETHER OPERATORS OF A TUBING HILL UNREASONABLY INCREASED THE DANGERS INHERENT IN TUBING.

The Third Department, reversing Supreme Court, determined there was a question of fact whether the operators of a tubing hill unreasonably increased the risk of injury. The issues included whether there was adequate supervision, whether there was adequate protection at the bottom of the hill (hay to slow the tubes), and whether mother and son should have been allowed to tube together (thereby increasing speed): "... [I]t was plaintiff's burden to demonstrate 'facts from which it could be concluded that defendant . . . unreasonably enhanced the danger . . . or created conditions which were unique or above those inherent in [the] activity' ... . A supervisor for defendants testified that on busy days, two people were assigned to work at the base of the tubing hill to spread and 'fluff' the hay as needed based on conditions. At the time of the accident, however, there was only one attendant working in this area. Further, the supervisor decided to limit the tandem riders to a parent and a child based on conditions and confirmed that weight affected the speed of the tubes, i.e., the greater the weight, the greater the speed. Plaintiff testified that just before the accident, the attendant at the top of the tubing hill assured her that it was safe for her to ride in tandem with her adult-sized son, who was nearly six feet tall and weighed approximately 250 pounds. Plaintiff's son testified that 'there wasn't a whole lot of hay' spread at the bottom of the course. A nonparty witness testified that the tubing park was very busy and that, before the accident, he observed that the hay had diminished to the point where tubers were dragging their feet to stop their tubes. Notably, defendant's base attendant testified that once the tandem riders were limited to one adult and one child, no other groups went past the hay, while plaintiff and her son 'blew through everything.' She recalled being surprised to see two adult-sized people coming down in tandem because 'it was supposed to be an adult and a child.' ***Connolly v. Willard Mtn., Inc.*, 2016 N.Y. Slip Op. 06937, 3rd Dept 10-20-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER STACKED SCAFFOLDING, WHICH WAS ON THE SAME LEVEL AS PLAINTIFF, CONSTITUTED A "PHYSICALLY SIGNIFICANT ELEVATION DIFFERENTIAL," SUMMARY JUDGMENT DISMISSING PLAINTIFF'S LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined defendants' motions for summary judgment dismissing plaintiff's Labor Law 240(1) cause of action should not have been granted. Plaintiff was severely injured when a row of stacked scaffolding frames fell forward like "dominos." Whether Labor 240(1) applies depends on whether the scaffolding, which was on the same level as plaintiff, presented a risk related to a significant elevation differential: "... [W]e are unable to glean from the present record whether plaintiff's injury arose from the requisite 'physically significant elevation differential'... . In determining whether an elevation differential is physically significant or de minimis, we must consider not only the height differential itself, but also 'the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent' ... . Critically absent from the record is any indication as to plaintiff's height or any other evidence shedding light on the height differential between plaintiff and the stacked frames at the time they fell. Further, issues of fact remain with regard to such other relevant factors as the number of scaffolds stacked in the pile that collapsed, the weight of each scaffold and the manner in which the scaffold(s) struck plaintiff. Given these unresolved factual questions, summary judgment on plaintiff's Labor Law § 240 (1) is not appropriate ... ." ***Wright v. Ellsworth Partners, LLC*, 2016 N.Y. Slip Op. 06927, 3rd Dept 10-20-16**

REAL PROPERTY TAX LAW.

FIBER OPTIC CABLES ARE NOT TAXABLE REAL PROPERTY UNDER REAL PROPERTY TAX LAW (RPTL) 102.

The Third Department, in a full-fledged opinion by Justice Peters, reversing Supreme Court, determined that fiber-optic cables are not taxable real property under Real Property Tax Law (RPTL) 102. However, petitioner telecommunications company was not entitled to a refund of taxes paid because no protest was made at the time of payment: "We ... address petitioner's application for a judgment declaring that its fiber optic installations are not taxable real property under the RPTL. Resolution of this issue turns upon the construction of RPTL 102 (12) (f), which provides that real property shall include, among other things, 'equipment for the distribution of heat, light, power, gases and liquids.' The parties agree that the fiber optic cables at issue consist of filaments of glass through which light beams are used to transport information and data from one point to another. Yet they sharply disagree as to whether this constitutes the 'distribution' of light within the meaning of RPTL 102 (12) (f). ...[W]e hold that it does not." ***Matter of Level 3 Communications, LLC v. Clinton County*, 2016 N.Y. Slip Op. 06930, 3rd Dept 10-20-16**

TRUSTS AND ESTATES.

IN THIS WILL CONSTRUCTION PROCEEDING, ALTHOUGH THE WILL DID NOT ANTICIPATE DECEDENT'S HUSBAND WOULD DIE BEFORE HER, THE DECEDENT'S INTENT WAS CLEAR AND WAS PROPERLY ENFORCED BY SURROGATE'S COURT.

In this will construction proceeding, the Third Department determined Surrogate's Court properly found that the decedent intended to benefit all ten children, including two stepchildren from her husband's (Warren's) prior marriage. The will did not anticipate that Warren would die before the decedent. If the laws of intestacy were applied, the two stepchildren would have been excluded. But because decedent's contrary intent was clear, Surrogate's Court properly ignored the laws of intestacy: "... [W]hile the residuary clause of the will is silent as to what would happen if decedent outlived Warren, all of her other testamentary dispositions evince the goal of equally dividing her assets among all 10 children, either at the time of her death or Warren's death. There is nothing in the will to suggest that she intended a contrary result with regard to the residuary estate if Warren died before her, or that she had any interest in excluding petitioner and his sister from that part of her estate. The will implies the contrary and that decedent considered all 10 children as her own, as she named petitioner as one of several trustees in the will and regretted that she could not name all of her 'other children' as well. Thus, Surrogate's Court correctly 'g[ave] effect to the expressed general testamentary plan and purpose of the testator' by implying a provision in decedent's will leaving her residuary estate to all 10 children...". ***Matter of Warren*, 2016 N.Y. Slip Op. 06925, 3rd Dept 10-20-16**

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