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COURT OF APPEALS.

CIVIL PROCEDURE, APPEALS.

APPELLATE DIVISION APPLIED THE WRONG TEST TO A MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW; APPLYING THE CORRECT TEST, THE JURY VERDICT WAS NOT "UTTERLY IRRATIONAL" AND SHOULD NOT HAVE BEEN SET ASIDE.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined the Appellate Division used the wrong test when it reversed a civil assault verdict and ordered a new trial. The central issue was whether defendant was the initial aggressor. In the first trial, the jury found that the defendant had acted in self-defense. The plaintiff moved to set aside the verdict as a matter of law and, alternatively, to set aside the verdict as against the weight of the evidence. The trial court denied the motion. The Appellate Division, applying a weight of the evidence test, reversed and held " 'no fair interpretation of the evidence' supported 'the verdict finding that defendant acted in self-defense' inasmuch as it was predicated upon 'a conclusion that defendant was not the initial aggressor in the encounter' ." Based on the Appellate Division's ruling, at the second trial, the defendant was deemed the initial aggressor as a matter of law and the jury found for the plaintiff. The Court of Appeals held that the test the Appellate Division should have applied on its review of the first trial was the "utterly irrational (matter of law)" test, not the "weight of the evidence" test. Applying the correct test, the Court of Appeals found that the jury's conclusion the defendant acted in self-defense was not "utterly irrational." Therefore the Appellate Division should not have set aside defendant's verdict and then precluded him from presenting the "initial aggressor/self-defense" question to the jury in the second trial. ***Killon v. Parrotta*, 2016 N.Y. Slip Op. 07048, CtApp 10-27-16**

CRIMINAL LAW.

PEOPLE DID NOT ACT WITH DUE DILIGENCE SEEKING DNA TEST RESULTS; INDICTMENT PROPERLY DISMISSED ON SPEEDY TRIAL GROUNDS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, affirming the dismissal of the attempted first degree murder indictment on speedy trial grounds, determined the People did not act with due diligence in seeking DNA test results. DNA had been recovered from the gun involved. A DNA swab was not taken from the defendant until nine months after indictment: "The time to conduct DNA testing and to produce a DNA report may, under certain circumstances, be excluded from speedy trial computation as an exceptional circumstance. To invoke the exclusion provided in CPL 30.30 (4) (g), however, the People must exercise due diligence in obtaining the evidence. If the exclusion 'is to be given reasonable effect and [] is to fulfill the legislative purpose, [it] must be limited to instances in which the prosecution's inability to proceed is justified by the purposes of the investigation and credible, vigorous activity in pursuing it' ... . In addition, while we have recognized that '[t]here is no precise definition of what constitutes an exceptional circumstance under CPL 30.30 (4) (g),' we have stated 'that the range of the term's application is limited by the dominant legislative intent informing CPL 30.30, namely, to discourage prosecutorial inaction' ... . Here, as a result of the People's inaction in obtaining defendant's DNA exemplar, the 161-day period of delay to test the DNA and to produce the DNA report was not excludable from speedy trial computation as an exceptional circumstance." ***People v. Clarke*, 2016 N.Y. Slip Op. 06939, CtApp 10-25-16**

CRIMINAL LAW.

RESIDENTIAL AREA OF MIXED USE BUILDING COULD NOT BE ACCESSED FROM WHERE DEFENDANT ENTERED, BURGLARY (ENTRY OF DWELLING) CONVICTION REVERSED.

The Court of Appeals, over an extensive dissent, determined defendant should not have been convicted of burglary (entry of a "dwelling") because the residential area of the building could not be accessed from where he entered: "Under the narrow circumstances of this case, application of the general rule as to what constitutes a dwelling in a mixed residential and commercial building within the meaning of Penal Law § 140.00 (2) is not warranted. Defendant, from a public sidewalk, entered the open cellar doors into a basement that was both entirely disconnected from the building and completely inaccessible to the residences in that building. The basement was not contiguous to any residential units. * * * ... [T]he deli basement was both inaccessible to, and remote from, the residential apartments. It was inaccessible because defendant could not go anywhere into the building from the basement. He could not reach the deli or the apartments. All that he could reach

from the basement was the public sidewalk. The basement was remote given that it was not used by the residents for any purposes and that there was no proof of any relationship between that space and the residents. In sum, there was no 'close contiguity' ... between the basement and the dwellings. Under these facts, 'the special dangers inherent in the burglary of a dwelling do not exist' ...". ***People v. Joseph*, 2016 N.Y. Slip Op. 06945, CtApp 10-25-16**

CRIMINAL LAW.

ADDING DEFENDANT'S NAME TO A "JOHN DOE DNA INDICTMENT" WITHOUT FURTHER GRAND JURY PROCEEDINGS IS NOT A JURISDICTIONAL DEFECT AND IS THEREFORE WAIVED BY A GUILTY PLEA.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over an extensive dissenting opinion, determined defendants' challenges to the procedure by which he was indicted were not jurisdictional in nature and, therefore, did not survive his guilty plea. A so-called "DNA indictment" named a John Doe because the DNA from the perpetrator could not be matched to anyone in the DNA database. Years later, DNA taken from the defendant was matched to that in the "John Doe" DNA indictment. The People then moved to add defendant's name to the indictment based upon hearsay statements in the motion papers. The motion was granted. Defendant argues that he was deprived of his right to indictment by grand jury because his name was added to the "John Doe" indictment in the absence of any additional proceedings in front of a grand jury: "Here, the DNA indictment properly charged a person with acts that constitute a crime, albeit identifying the individual by a unique DNA profile rather than by his name. As such, it avoided ... jurisdictional infirmities ... . Defendant's challenge to the legal sufficiency of the DNA indictment is based on the failure to identify him as the perpetrator by name, but this alleged defect is not a jurisdictional one, and therefore, does not survive his guilty plea. By pleading guilty, defendant acknowledged that he was the person who committed the offense. Defendant therefore forfeited his challenge and is foreclosed from raising the issue on appeal. Once defendant pleaded guilty, his 'conviction rest[ed] directly on the sufficiency of the plea, not on the legal or constitutional sufficiency of any proceedings which might have led to a conviction after trial'...". ***People v. Guerrero*, 2016 N.Y. Slip Op. 07044, CtApp 10-27-16**

CRIMINAL LAW, ATTORNEYS.

FAILURE TO ARGUE PEOPLE DID NOT ACT WITH DUE DILIGENCE IN SEEKING DNA TEST RESULTS WAS NOT DEMONSTRATED TO CONSTITUTE INEFFECTIVE ASSISTANCE.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined defense counsel's failure to argue, in a motion to dismiss on speedy trial grounds, that the People did not act with due diligence in seeking DNA test results was not demonstrated to constitute ineffective assistance: "On this record, defense counsel was not ineffective for failing to raise the argument that the People were not acting with due diligence, as there is nothing in the record to demonstrate that the People were not diligent in requesting DNA testing on the evidence or that the manner in which the DNA testing was conducted by [the medical examiner] was inconsistent with standard laboratory protocols. In addition, at the time of defendant's CPL 30.30 motion, there already was Appellate Division authority holding that the period of time needed to obtain the results of DNA testing could be excluded from speedy trial computation as an exceptional circumstance ...". ***People v. Henderson*, 2016 N.Y. Slip Op. 06938, CtApp 10-25-16**

CRIMINAL LAW, EVIDENCE.

PRECEDENT ALLOWING VOLUNTARY POST-MIRANDA STATEMENTS TO BE USED TO IMPEACH REAFFIRMED.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, reaffirmed its precedent allowing voluntary statements made after Miranda rights have been invoked to be used to impeach should the defendant take the stand: "This Court has long held that if a statement made by the defendant to the police is voluntary, it may be used for impeachment purposes; but if a statement is involuntary, it will not be admissible, even if it may be deemed reliable ... . * * * Here, County Court determined that the statements were voluntary and the Appellate Division affirmed that determination. ... ... [T]here is nothing in the record to support defendant's contention that [the interrogating officer] consciously circumvented defendant's invocation of his Fifth Amendment rights or otherwise rendered defendant's statements involuntary as a matter of law. Thus, it cannot be said that County Court abused its discretion in denying defendant's motion to preclude the People from utilizing the statements on cross-examination or rebuttal." ***People v. Wilson*, 2016 N.Y. Slip Op. 06942, CtApp 10-25-16**

DEBTOR-CREDITOR.

PLAINTIFF'S PURCHASE OF NOTES WAS FOR THE PRIMARY PURPOSE OF BRINGING A LAWSUIT IN VIOLATION OF THE JUDICIARY LAW (CHAMPERTY STATUTE).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined plaintiff Jusitian Capital's purchase of notes from DPAG was champertous (purchased for the primary purpose of bringing a lawsuit), and further determined Justinian was not entitled to the "safe harbor" provision of the champerty statute (which exempts securities purchased for "an aggregate purchase price of at least five hundred thousand dollars"): "...[T]he impetus for the assignment of the Notes to Justinian was DPAG's desire to sue [defendant] for causing the Notes' decline in value and not be named as the plaintiff in the lawsuit. Justinian's business plan, in turn, was acquiring investments that suffered major

losses in order to sue on them, and it did so here within days after it was assigned the Notes. ... [T]here was no evidence, even following completion of champerty-related discovery, that Justinian's acquisition of the Notes was for any purpose other than the lawsuit it commenced almost immediately after acquiring the Notes …". ***Justinian Capital SPC v. WestLB AG*, 2016 N.Y. Slip Op. 07047, CtApp 10-27-16**

DEFAMATION.

STATEMENTS ALLEGING MAFIA INVOLVEMENT IN A STRIP CLUB WERE NOT "OF AND CONCERNING" INDIVIDUAL PLAINTIFFS WHO PROVIDED FOOD, BEVERAGE AND TALENT SERVICES TO THE CLUB.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a dissent, determined a defamation suit was properly dismissed because the alleged defamatory remarks were not "of and concerning" the plaintiffs. Television news broadcasts claimed that the Cheetah Club, a strip club, was involved in human trafficking orchestrated by the mafia. The story claimed women from Russia and Eastern Europe were brought into this country, set up with sham marriages to American citizens, and then forced to dance at the club. The plaintiffs, Times Square Restaurant Group, Times Square Restaurant No. 1 and individual plaintiffs associated with the Times Square plaintiffs, O'Neill, Callahan and Stein, provided management and talent services to the Cheetah Club. Only the individual plaintiffs, O'Neill, Callahan and Stein, appealed the dismissal of the defamation complaint: "Accepting as true each and every allegation in the complaint, the challenged statements were not of and concerning plaintiffs O'Neill, Callahan and Stein. The news broadcast stated that Cheetah's was purportedly used by the mafia to carry out a larger trafficking scheme. It did not mention any employees of the club or of the management and talent agencies that facilitate its daily operations, let alone the individual plaintiffs in these appeals, who were not identified or pictured in the report." ***Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 2016 N.Y. Slip Op. 06941, CtApp 10-25-16**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER FAILED TO MAKE A MEANINGFUL INQUIRY INTO INMATE WITNESS'S ALLEGATION HE WAS COERCED INTO REFUSING TO TESTIFY.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined: (1) an inmate's statement that he/she does not wish to be involved or does not want to testify is sufficient to protect the inmate's right to call the witness; and (2) the hearing officer's failure to inquire into an inmate witness's allegation of he was coerced into refusing to testify required reversal: "... [W]hen there is a 'claim of coercion, . . . the Hearing Officer ha[s] a duty to inquire further into [the] refusal to testify' ... . Whether such an inquiry will require an in-person or telephone interview of the refusing inmate by the hearing officer or may instead proceed through the intermediary of a suitably briefed correction officer will depend on the circumstances surrounding the allegation. Here, the hearing officer failed to make a meaningful inquiry, either personally or through a correction officer, into the allegation of coercion by the refusing inmate witness." ***Matter of Cortorreal v. Annucci*, 2016 N.Y. Slip Op. 06943, CtApp 10-25-16**

FAMILY LAW, CRIMINAL LAW, APPEALS.

SEARCH OF JUVENILE'S SHOES WHILE HE WAS DETAINED AT THE POLICE DEPARTMENT WAS REASONABLE AND THE WEAPON SEIZED FROM THE SHOE WAS THEREFORE ADMISSIBLE; DUAL DISSENT PRESENTED A QUESTION OF LAW REVIEWABLE BY THE COURT OF APPEALS.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Pigott, over a three-judge dissent, determined the search of a juvenile's shoe at the police station was reasonable. Therefore, the weapon found in the shoe was admissible. The dissent argued the Court of Appeals did not have jurisdiction to hear the appeal because the dissent below did not present a question of law, but rather a mixed question of law and fact: "Respondent initially told police on the street that he was 16 years old. Because he lacked identification, the police transported him to the precinct, where, nearly an hour later, he told them that he was only 15 years old. Thereafter, the officers treated respondent as a juvenile, placing him in a juvenile room and making him remove his belt, shoelaces and shoes as a protective measure until his parents were notified and he could be picked up from the precinct. Based on respondent's representation that he was 16 years old and the officers' observations of him in the street, the officers had probable cause to arrest respondent for disorderly conduct. We also conclude that the limited search of respondent's shoes was reasonable. The majority found no fault with the request that respondent remove his belt and shoelaces as a safety precaution; rather it was the request to remove his shoes that the majority held to be 'far more intrusive than a frisk or patdown' ... . However, the officers were not first required to suspect that respondent either possessed contraband or posed a danger to himself or officers before being directed to remove his shoes. In that regard, the limited search of respondent's shoes while he was temporarily detained and awaiting the notification of his parents was a reasonable protective measure employed by police to ensure both the safety of respondent and the officers, and the intrusion was minimal ...". ***Matter of Jamal S.*, 2016 N.Y. Slip Op. 07045, CtApp 10-27-16**

MEDICAID, MUNICIPAL LAW.

STATUTE CUTTING OFF COUNTIES' ABILITY TO SEEK MEDICAID OVERBURDEN EXPENSES IS CONSTITUTIONAL.
The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined Section 61 of the Executive Budget Law, which cut-off counties' ability to seek Medicaid "overburden expenses" as of January 1, 2006, is constitutional. The State Executive Budget Memorandum explained that the purpose of Section 61 was to "to clarify that local governments cannot claim for overburden expenses incurred prior to January 1, 2006 when the 'local cap' statute that limited local contributions to Medicaid expenditures took effect. This is necessary to address adverse court decisions that have resulted in State costs paid to local districts for pre-cap periods, which conflict with the original intent of the local cap statute:" "Once the State complied with its statutory obligation under Social Services Law § 368-a (1) (h) (i) to pay the counties for overburden reimbursements, it was fully consistent with the prior mandatory reimbursement scheme for the Legislature to impose a deadline on claims for unpaid funds. That deadline was neither in conflict with a fundamental law nor our constitutional principles. Just as the Counties cannot be heard to complain that the Legislature replaced one Medicaid allocation scheme with another, thus redefining the counties' expense burden, so too are the counties without recourse when the Legislature imposes a deadline on the counties' submission of claims for overburden reimbursements, thereby closing the door on pre-2006 claims." ***Matter of County of Chemung v. Shah*, 2016 N.Y. Slip Op. 07043, CtApp 10-27-16**

MUNICIPAL LAW, PERSONAL INJURY, GOVERNMENTAL IMMUNITY.

PLAINTIFF SUING SHERIFF FOR FAILURE TO KEEP HIM SAFE FROM ASSAULT IN JAIL (1) DID NOT NEED TO FILE A NOTICE OF CLAIM AND (2) STATED A CAUSE OF ACTION IN NEGLIGENCE.
The Court of Appeals, in a full-fledged opinion by Judge Stein, concerning a lawsuit alleging the Erie County Sheriff was negligent in failing to protect plaintiff from sexual assault while in jail, determined: (1) plaintiff did not need to file a notice of claim because the county can not, under the NYS Constitution, indemnify and defend the sheriff in connection with the action; (2) the complaint stated a cause of action in negligence (failure to keep an inmate safe); and (3) governmental immunity is an affirmative defense on which the sheriff bears the burden of proof which cannot be addressed at the pleading stage. The fact that the county provided law enforcement liability insurance for the sheriff did not trigger the notice of claim requirement under the Municipal Law: "... [T]hat the County agreed to provide "Liability Insurance" for the Sheriff in exchange for consideration because 'policies of law enforcement liability insurance paid for by the County' had become prohibitively expensive. In resolving to act as an insurer, the County recognized — as was commonly understood at the time — that it could not statutorily obligate itself to defend and indemnify the Sheriff, as it had agreed to do for the Sheriff's employees, under the New York State Constitution ... . Absent the existence of any statutory obligation on the County to indemnify the Sheriff — as opposed to an agreement to act as his insurer — the Appellate Division correctly ruled that service of a notice of claim was not required under General Municipal Law § 50-e. ... While the State is by no means an insurer of inmate safety or required to provide unremitting surveillance in all circumstances ... , we explained in Sanchez [99 NY2d 247] that, '[h]aving assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard inmates, even from attacks by fellow inmates' ... . Inasmuch as 'the Sheriff is [similarly] prescribed, by law, to safely keep inmates of the County Jail' ... , the rule set forth in Sanchez applies equally here." ***Villar v. Howard*, 2016 N.Y. Slip Op. 06944, CtApp 10-25-16**

PERSONAL INJURY.

CRIMINAL ASSAULT BY ONE HOCKEY GAME SPECTATOR AGAINST ANOTHER NOT FORESEEABLE; YOUTH HOCKEY ASSOCIATION NOT NEGLIGENT.
The Court of Appeals determined defendant youth hockey association could not be held liable for an assault by one spectator on another spectator after the hockey game: "On this record, the criminal assault on plaintiff was not a reasonably foreseeable result of any failure to take preventive measures. While defendant owed a duty to protect spectators from foreseeable criminal conduct, the scope of that duty is defined by the likelihood that the aggressive behavior would lead to a criminal assault. Defendant took measures to address player and spectator conduct. The behavior of the fans, however inappropriate, certainly did not create the risk that failure to eject any specific spectator would result in a criminal assault, particularly since such an assault had never happened before ... . Plaintiff argues that defendant's failure to enforce the Zero-Tolerance policy by ejecting spectators constitutes independent evidence of negligence. The policy provides that 'the on-ice official' will remove spectators using "obscene, racial or vulgar language" from the game. However, the '[v]iolation of a[n] [organization]'s internal rules is not negligence in and of itself' ... , and where an internal policy exceeds "the standard of ordinary care,it 'cannot serve as a basis for imposing liability ...". ***Pink v. Rome Youth Hockey Assn., Inc.*, 2016 N.Y. Slip Op. 06946, CtApp 10-25-16**

UNEMPLOYMENT INSURANCE.

YOGA INSTRUCTORS NOT EMPLOYEES.

The Court of Appeals, reversing the Appellate Division, over a two-judge dissent, determined the non-staff yoga instructors who worked for Yoga Vida were not employees entitled to unemployment insurance benefits: "The non-staff instructors make their own schedules and choose how they are paid (either hourly or on a percentage basis). Unlike staff instructors, who are paid regardless of whether anyone attends a class, the non-staff instructors are paid only if a certain number of students attend their classes. Additionally, in contrast to the staff instructors, who cannot work for competitor studios within certain geographical areas, the studio does not place any restrictions on where the non-staff teachers can teach, and the instructors are free to inform Yoga Vida students of classes they will teach at other locations so the students can follow them to another studio. Furthermore, only staff instructors, as distinct from non-staff instructors, are required to attend meetings or receive training. The proof of incidental control relied upon by the Board, including that Yoga Vida inquired if the instructors had proper licenses, published the master schedule on its web site, and provided the space for the classes, does not support the conclusion that the instructors are employees. Similarly, in this context, the evidence cited by the dissent, including that Yoga Vida generally determines what fee is charged and collects the fee directly from the students, and provides a substitute instructor if the non-staff instructor is unable to teach a class and cannot find a substitute, does not supply sufficient indicia of control over the instructors. Furthermore, that Yoga Vida received feedback about the instructors from the students does not support the Board's conclusion. 'The requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee and not conclusive as to either' ...". ***Matter of Yoga Vida NYC (Commissioner of Labor),*** **2016 N.Y. Slip Op. 06940, CtApp 10-25-16**

FIRST DEPARTMENT

CRIMINAL LAW APPEALS.

AFTER REMITTAL FROM THE COURT OF APPEALS, THE APPELLATE DIVISION REFUSED TO EXERCISE ITS INTEREST OF JUSTICE JURISDICTION TO HEAR AN UNPRESERVED SENTENCING ISSUE; DEFENDANT WAS NOT ELIGIBLE FOR THE THREE-YEAR SENTENCE PROMISED AS PART OF A PLEA BARGAIN.

The First Department, in a case remitted by the Court of Appeals, in a full-fledged opinion by Justice Tom, over a two-justice dissent, determined defendant's challenge to the legality of his sentence would not be reviewed in the interest of justice. Defendant had been promised a three-year sentence, but was not eligible for a sentence less than six years. In violation of his plea agreement, defendant committed a crime while awaiting sentence. As a result the three-year promise was properly withdrawn and a six year sentence imposed. The Court of Appeals held that defendant's failure to object based upon the illegal three-year sentence promise precluded appeal to the Court of Appeals. However, upon remittal, the Appellate Division could consider the question if it exercised its interest of justice jurisdiction (which the majority declined to do): "... [T]here is nothing rare or unusual about this case or this defendant. The plea proceedings do not raise a concern about defendant's guilt. Defendant was advised of the rights he was waiving by pleading guilty and affirmed he was pleading guilty of his own free will. Defendant was represented by counsel and received a favorable sentence. Finally, defendant violated the plea agreement by committing another crime and the final sentence imposed was both legal and within the range announced by the court. Nor has defendant presented anything to demonstrate that his case is extraordinary. These facts, coupled with defendant's failure to preserve the issue for review, fail to support the exercise of our discretion to review in the interest of justice, and militate against such exercise." ***People v. Williams,*** **2016 N.Y. Slip Op. 07102, 1st Dept 10-27-16**

CRIMINAL LAW, EVIDENCE.

SEARCH OF DEFENDANT'S CAR DEEMED A VALID INVENTORY SEARCH, CRITERIA EXPLAINED.

The Second Department, over an extensive dissent, determined the search of defendant's car was a valid inventory search: "The critical issue in this case is whether the officers' search of the car, which was conducted back at the police district headquarters and not at the arrest location, was a legitimate inventory search. We conclude that it was. The People introduced a copy of the relevant patrol guide section outlining the procedures for inventory searches. Everything was removed from the car, under the direction of a sergeant, and even items such as nail clippers were vouchered. A contemporaneous list was made of the items that were removed, and the list was introduced at the hearing. Copies of property clerk invoices also were admitted in evidence at the hearing. The testimony at the hearing established that the officers did not exercise discretion in removing items from the car, and that the search was not a ruse to recover incriminating evidence ...". ***People v. Lee,*** **2016 N.Y. Slip Op. 07081, 1st Dept 10-27-16**

EDUCATION-SCHOOL LAW.

MEETINGS OF NYC SCHOOL LEADERSHIP TEAMS ARE SUBJECT TO THE OPEN MEETINGS LAW.

The First Department, in a full-fledged opinion by Justice Kapnick, determined the exclusion of a retired teacher from meetings of New York City School Leadership Teams (SLT's) violated the Open Meetings Law: "By regulation, respondent New York City Department of Education (DOE) has implemented this mandate through the establishment of SLTs in every school ... . SLTs have between 10 and 17 members, made up of school parents, teachers, staff, and administrators, and may also include 'representatives of Community Based Organizations' ... . The school principal, president of the parent association, and chapter leader of the teachers' union must be members. At least two student members are also required for each high school ... . SLTs must meet at least once a month 'at a time that is convenient for the parent representatives' ... . Notice of this meeting must be provided in a manner 'consistent with the open meetings law' ... . * * * As the IAS court properly found ... SLTs qualify as a public body performing governmental functions, and, therefore, are subject to the Open Meetings Law." ***Matter of Thomas v. New York City Dept. of Educ.*, 2016 N.Y. Slip Op. 06989, 1st Dept 10-25-16**

FAMILY LAW, ATTORNEYS.

FATHER DEPRIVED OF HIS STATUTORY RIGHT TO ASSIGNED COUNSEL, REVERSAL REQUIRED.

The First Department, reversing Family Court, determined, inter alia, father had been deprived of his right to counsel: "Reversal is required because the father was deprived of his statutory right to assigned counsel ... . The record shows that after Family Court dismissed the father's assigned counsel, it conducted several hearings in this custody matter, and granted a final order of custody to the mother, without the father's presence and without reassigning him counsel." ***Matter of Melinda M. v. Anthony J.H.*, 2016 N.Y. Slip Op. 06978, 1st Dept 10-25-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

STANDING ON THE TOP STEP OF AN A FRAME LADDER WAS NOT THE SOLE PROXIMATE CAUSE OF THE PLAINTIFF'S FALL; SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was injured when he fell descending from the top step of a six-foot A frame ladder. Plaintiff used the six-foot ladder because debris prevented the use of an eight-foot ladder (the eight-foot ladder could not opened due to the debris). Standing on the top step was not the sole proximate cause of the accident: "Denial of summary judgment on plaintiff's claim pursuant to Labor Law § 240(1) was in error where plaintiff electrician was injured when he fell from an A-frame ladder as he was attempting to descend it. Plaintiff's use of a six-foot ladder that required him to stand on the top step did not make him the sole proximate cause of his accident where the eight-foot ladder could not be opened in the space due to the presence of construction debris ... . Defendants' reliance on the affidavit of the high-rise superintendent is misplaced. Although the superintendent speculated that there was sufficient space to open an eight-foot ladder, this was inconsistent with his prior deposition testimony and was thus calculated to create a feigned issue of fact ... . Nor was plaintiff a recalcitrant worker ... . While the site safety manager who worked for a subcontractor of defendants testified that she told plaintiff that he should not work in the room because it was unsafe due to all the debris, she explicitly denied that she directed plaintiff to stop work, explaining that she had no such authority." ***Saavedra v. 89 Park Ave. LLC*, 2016 N.Y. Slip Op. 06974, 1st Dept 10-25-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

ELEVATOR NOT A SAFETY DEVICE, LABOR LAW 240(1) CAUSE OF ACTION PROPERLY DISMISSED.

The First Department determined plaintiff's Labor Law 240(1) cause of action, which was based upon injury incurred in an elevator, was properly dismissed. Under the circumstances (not explained in the decision) the elevator could not be considered a safety device. Plaintiff's Labor Law 241(6) cause of action, alleging debris as a slipping hazard, should not have been dismissed: "Dismissal was properly granted with respect to plaintiff's Labor Law § 240(1) cause of action in that plaintiff alleged that he was injured while riding in one of the building's elevators. In this case, the passenger elevator was not a safety device for protecting a construction worker from a risk posed by elevation as contemplated by Labor Law § 240(1) ... . The court erred, however, in dismissing that portion of plaintiff's Labor Law § 241(6) claim to the extent the claim was predicated on violations of Industrial Code ... . While there were no facts alleged to support a claim that plaintiff was injured as the result of a slipping hazard, plaintiff's complaint, as supplemented by his affidavit in opposition to defendant's motion, sufficiently alleged that debris was one of the causes of his fall ...". ***Smith v. Extell W. 45th St. LLC*, 2016 N.Y. Slip Op. 07089, 1st Dept 10-27-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFFS' EXPERTS PRESENTED SUFFICIENT PROOF TO WARRANT A FRYE HEARING ON WHETHER A TUMOR MAY HAVE BEEN DETECTABLE BEFORE BIRTH.

The First Department, over a two justice dissent, determined plaintiffs' experts had presented sufficient evidence to warrant a *Frye* hearing in this medical malpractice case. The plaintiffs' baby suffered neurological damage caused by a rapidly growing tumor. The question tackled by the experts was whether the tumor was detectable prior to birth (ultrasound). The majority concluded plaintiffs' experts had presented sufficient evidence that the tumor may have been detectable to warrant a hearing. The dissent argued the evidence presented by the plaintiffs' experts was not sufficient to raise a question of fact: "Defendant's experts established a prima facie case that the ultrasound studies were properly interpreted and that none of defendant's acts or omissions caused the infant plaintiff's alleged injuries. In light of plaintiffs' expert opinions to the contrary, however, we cannot hold on the record presented to us that the opinions of plaintiffs' experts are not generally accepted within the medical and scientific communities. Accordingly, the motion court properly set the matter down for a *Frye* hearing ... to determine (1) whether it is generally accepted in the medical and scientific communities that a physician may offer an opinion to a reasonable degree of medical certainty as to when a tumor such as the infant plaintiff's tumor would have been detectable by ultrasound examination; and (2) whether it was possible to use any formula, including a doubling formula, to assess whether a neuroblastoma would have been detectable at the ultrasound of the infant plaintiff performed at 30.9 weeks ...". ***Sepulveda v. Dayal*, 2016 N.Y. Slip Op. 06949, 1st Dept 10-25-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

ALTHOUGH SUPREME COURT CORRECTLY SET ASIDE THE VERDICT AS THE PRODUCT OF SUBSTANTIAL CONFUSION, SUPREME COURT DID NOT HAVE THE POWER TO "REINSTATE" A PRIOR VERDICT THAT HAD NOT BEEN REPORTED TO THE JUDGE.

The Second Department, reversing Supreme Court, determined Supreme Court did not have the power to "reinstate" a "verdict" that had not been recorded in open court. When the jury first announced they had a verdict, the court officer, without reporting the verdict to the judge, handed the verdict sheet back to the jurors, pointing to directions on the sheet. After the judge accepted a subsequent verdict, the court officer informed the judge of the prior "verdict" and his interaction with the jurors: " '[A] trial court has discretion to set aside a verdict which is clearly the product of substantial confusion among the jurors' ... . Here, the Supreme Court providently exercised its discretion in setting aside the jury's verdict on the basis that it was the product of substantial confusion. However, the court erred in attempting to 'reinstate' the jury's original verdict as reported by the court officer. 'A verdict is not recognized as valid and final until it is pronounced and recorded in open court' ... . Under these circumstances, upon setting aside the verdict, the court should have granted the branch of the defendant's motion which was for a new trial ...". ***Kitenberg v. Gulmatico*, 2016 N.Y. Slip Op. 07004, 2nd Dept 10-26-16**

CRIMINAL LAW.

FAILURE TO FOLLOW STATUTORY SENTENCING PROCEDURES FOR A PERSISTENT FELONY OFFENDER RENDERED SENTENCE "ILLEGALLY IMPOSED."

The Second Department, reversing Supreme Court, determined the failure to follow the statutory procedures for sentencing a persistent felony offender required that the motion to set aside the sentence be granted: "CPL 400.15 and 400.16 'govern the procedure that must be followed in any case where it appears that a defendant who stands convicted of a violent felony offense . . . has previously been subjected to two or more predicate violent felony convictions . . . and may be a persistent violent felony offender' (CPL 400.16[1]). Here, neither the People nor the Supreme Court complied with that mandatory procedure. Therefore, the sentence was 'illegally imposed' (CPL 440.20[1]), regardless of whether the defendant is, in fact, a persistent violent felony offender (see Penal Law § 70.08[1]), and the Supreme Court should have granted the motion to set aside the sentence ...". ***People v. Rivera*, 2016 N.Y. Slip Op. 07036, 2nd Dept 10-26-16**

PERSONAL INJURY.

PLAINTIFF'S CONFLICTING EVIDENCE ABOUT WHEN THE PUDDLE WAS FIRST SEEN AND HOW LONG THE PUDDLE HAD BEEN ON THE FLOOR PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined plaintiff's conflicting evidence about how long a puddle of water had been on defendant store's floor precluded summary judgment, without regard for the sufficiency of defendant's opposing papers. Plaintiff testified she didn't see the puddle before she fell and she and her daughter had been shopping for 15 minutes prior to the fall. . Plaintiff's daughter testified she saw the puddle when they first entered the store and they had been shopping for 45 minutes prior to the fall: "... [T]he plaintiff failed to make a prima facie showing of her entitlement to judgment as a matter of law on the issue of liability. The plaintiff's submissions provided conflicting evidence with

respect to how long the puddle had been on the floor prior to the plaintiff's accident, and were insufficient to demonstrate, prima facie, that the defendant had actual notice of the puddle, or that it had existed for a sufficient length of time for the defendant's employees to discover and remedy it. The plaintiff's submissions also failed to demonstrate, prima facie, that she was free from comparative fault ...". ***Hernandez v. Conway Stores, Inc.*, 2016 N.Y. Slip Op. 07001, 2nd Dept 10-26-16**

PERSONAL INJURY.

PLAINTIFF'S FAILURE TO AFFIRMATIVELY DEMONSTRATE THE ABSENCE OF COMPARATIVE FAULT IN THIS CAR ACCIDENT CASE REQUIRED DENIAL OF SUMMARY JUDGMENT WITHOUT REGARD TO OPPOSING PAPERS.

The Second Department determined plaintiff's motion for summary judgment in this car accident case was properly denied because plaintiff did not demonstrate the absence of comparative fault: "There can be more than one proximate cause of an accident ... . Accordingly, a plaintiff moving for summary judgment on the issue of liability in a personal injury action has the burden of establishing, prima facie, not only the defendant's negligence, but also the absence of his or her comparative fault ... . Here, although the plaintiff demonstrated that [defendant] was negligent ... , the plaintiff failed to demonstrate the absence of his own comparative fault ... . The plaintiff's failure to satisfy his burden required the denial of his motion without regard to the sufficiency of the evidence that the defendants submitted in opposition ...". ***Padilla v. Biel*, 2016 N.Y. Slip Op. 07009, 2nd Dept 10-25-16**

REAL PROPERTY TAX LAW.

CELL PHONE TRANSMISSION EQUIPMENT TAXABLE UNDER REAL PROPERTY TAX LAW.

The Second Department, applying principles of statutory interpretation, determined that cell phone system equipment owned by T-Mobile was taxable under provisions of the Real Property Tax Law: "... T-Mobile's fiber optic, T-1, and coaxial cables, as well as the connections between T-Mobile's equipment and that of the local exchange carrier, are 'lines' or 'wires' within the meaning of RPTL 102(12)(i) and, thus, are taxable real property. ... [S]ince T-Mobile's base transceiver station cabinets contain, among other things, primary and battery backup power systems and equipment for '[m]odify[ing] and retransmit[ting] . . . radio signals for landline retransmission via separate electrical conductors or fiber optics,' they can properly be characterized as 'inclosures for electrical conductors' within the meaning of RPTL 102(12)(i). Likewise, while T-Mobile's rooftop antennas, which are flat and four to five feet in both length and width, cannot be characterized as 'poles' within the ordinary understanding of that term, they can be properly characterized as 'inclosures for electrical conductors' inasmuch as they are a part to the base transceiver station cabinet. Further, the contention of the School District and the City that T-Mobile's rooftop antennas can also be taxed as fixtures pursuant to RPTL 102(12)(b) is correct." ***Matter of T-Mobile Northeast, LLC v. DeBellis*, 2016 N.Y. Slip Op. 07031, 2nd Dept 10-26-16**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

ALTHOUGH THE ISSUE HAD NOT BEEN RAISED ON APPEAL, THE APPELLATE COURT, REVERSING SUPREME COURT, ADJUDICATED DEFENDANT A YOUTHFUL OFFENDER.

The Third Department, in a full-fledged opinion by Justice Peters, determined Supreme Court's summary denial of youthful offender status, which had not even been addressed by counsel or the probation department, did not satisfy the statutory requirements. The Third Department, notwithstanding that the youthful offender issue had not been raised on appeal, stepped in and adjudicated the defendant a youthful offender. The defendant took sneakers from the victim after lifting his shirt, revealing what may have been a gun in his waistband: "The grievous error of the Probation Department, the People and defense counsel, while not specifically raised on appeal, cries out for resolution. Since we are vested with the broad, plenary power to modify a sentence in the interest of justice, we can address this injustice and, if warranted, exercise our power to adjudicate defendant a youthful offender ... . * * * Defendant was just 16 years old at the time of the present offense and, although he had served a period of juvenile probation, he had no prior criminal record or history of violence ... . We reiterate that the crime, although serious, did not cause physical injury to anyone involved and defendant neither brandished the object nor uttered any direct threats of violence during the incident. After his arrest, defendant cooperated with police and provided a statement admitting that he had taken the shoes with no intention of returning them to the victim but denying that he had possessed or displayed anything that resembled a gun ...". ***People v. Marquis A.*, 2016 N.Y. Slip Op. 07060, 3rd Dept 10-27-16**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT DID NOT PROPERLY APPLY THE STATUTORY FACTORS, FORUM NON CONVENIENS FINDING REVERSED.

The Third Department, reversing Family Court, determined father's petition should not have been dismissed on forum non conveniens grounds. Father, who is incarcerated, was entitled to six visits per year with the child. Mother, unbeknownst

to father, relocated to Georgia and cut off all communication between the child and father: "[A 'forum non conveniens'] determination 'depends on the specific issue(s) to be decided in the pending litigation,' and must involve consideration of all relevant factors, including those set forth in the statute ... . Although Family Court articulated its consideration of each of the statutory factors, we disagree with the weight it accorded certain factors and find that it failed to view those factors in light of the sole issue to be decided in this proceeding, namely, whether the mother violated [the court order]. First, in considering whether the child or a sibling was the victim of violence, mistreatment or abuse that was likely to continue in the future ... , Family Court found that the child was negatively affected by the father's criminal actions, despite the fact that all of the parties agreed that this factor was not relevant, neither the child nor a sibling was involved in the 2008 [criminal case] case [against father] and Family Court had awarded the father six visits per year in 2011. Next, the father promptly commenced this proceeding four months after the mother relocated with the child ... — which occurred without his knowledge or Family Court's permission — and we find that the additional 12 months that it took to dispose of this proceeding does not militate in favor of finding that New York is an inconvenient forum. Further, the father and the paternal grandmother, whose testimony would be central to the issue of whether a violation occurred, are located in New York, and any testimony by the mother could be presented "by telephone, audiovisual means, or other electronic means" ...". ***Matter of Snow v. Elmer*, 2016 N.Y. Slip Op. 07075, 3rd Dept 10-27-16**

INSURANCE LAW.

DEPARTMENT OF FINANCE PROPERLY INCLUDED THE COSTS OF SUB-ALLOCATED PROGRAMS (ADMINISTERED BY OTHER DEPARTMENTS) IN ITS ASSESSMENTS OF OPERATING EXPENSES TO BE PAID BY INSURERS.

In an extensive, detailed opinion by Justice Clark (too detailed to be fairly summarized here), the Third Department determined statutes requiring insurers to pay pro rata shares of the annual operating expenses of the Department of Finance (formerly the Insurance Department), including expenses associated with certain programs administered by other departments (sub-allocated programs), are constitutional. The Third Department further found the assessments imposed on the insurers, which included the costs of the sub-allocated programs, were not arbitrary and capricious and were not imposed in excess of the authority of the Department of Finance. ***New York Ins. Assn., Inc. v. State of New York*, 2016 N.Y. Slip Op. 07076, 3rd Dept 10-27-16**

PERSONAL INJURY.

QUESTIONS OF FACT ABOUT WHETHER SIDEWALK DEFECT WAS TRIVIAL AND WHETHER PLAINTIFF COULD IDENTIFY THE CAUSE OF HER FALL PRECLUDED SUMMARY JUDGMENT.

The Third Department determined there was a question of fact whether the defect in a sidewalk was trivial, and whether plaintiff could identify the cause of her fall. Therefore, defendant's motion for summary judgment was properly denied: "Photographs of the sidewalk where plaintiff fell depict a deteriorated area with various cracks in several adjacent slabs on the side of the walk bordering the street. In the location where plaintiff alleges her accident occurred, the deteriorated area takes up approximately one third of the sidewalk. The photographs reveal that the cracked section of concrete where plaintiff fell is depressed below the surface of the rest of the sidewalk, creating a raised, irregular vertical edge measuring, as previously noted, approximately one inch high and 18 inches long. In view of the length and depth of the crack where the fall occurred, the uneven surface of the walkway and the overall size of the deteriorated area, we agree with Supreme Court that it cannot be determined as a matter of law that the condition 'was so trivial and slight in nature that it could not reasonably have been foreseen that an accident would happen'… . * * * …[A]lthough plaintiff acknowledged the delay in identifying the cause of her fall, she testified that she knew that her toe had caught on some object and decided to examine the location in question because she knew that it was 'where something has to be.' She identified the cracked area as 'exactly that spot that [her] shoe caught.' " ***Brumm v. St. Paul's Evangelical Lutheran Church*, 2016 N.Y. Slip Op. 07079, 3rd Dept 10-27-16**

UNEMPLOYMENT INSURANCE.

OPERATOR OF A JANITORIAL CLEANING BUSINESS PURSUANT TO A FRANCHISE AGREEMENT WAS AN EMPLOYEE OF THE FRANCHISOR.

The Third Department determined claimant, who operated a janitorial cleaning business, based upon a franchise agreement with Jan-Pro, was an employee of Jan-Pro and was therefore entitled to unemployment insurance benefits: "The record evidence demonstrates that Jan-Pro assigned claimant a specific geographic territory and required new franchisees to undergo initial mandatory training, which was paid for by Jan-Pro. Franchisees were also required to operate the business in accordance with the procedures established at the training and the standards set forth by Jan-Pro ... . To that end, franchisees had to use Jan-Pro-sanctioned equipment, supplies, products and business forms ... . Jan-Pro helped resolve any complaints between a customer and a franchisee and retained the right to discontinue a franchisee's services to any client any time ... . Jan-Pro provided franchisees with a starter set of business cards, which contained Jan-Pro's logo, and claimant's business card listed Jan-Pro's name, logo and address ... . Although claimant had the option of designing his own business card, any such designs required Jan-Pro's approval. Furthermore, according to the franchise agreement, if claimant developed any

new concepts or techniques that improved Jan-Pro's business, they became Jan-Pro's property ... The franchise agreement also contained a non-compete provision barring claimant from operating for one year in any area of Jan-Pro's affiliates or franchises ... . Moreover, the franchise agreement gave Jan-Pro the sole right to invoice and collect from claimant's customer accounts, maintain revenue records with respect to such accounts and accept payment from claimant's customers. While the franchise agreement designated claimant as an independent contractor, such terms are not dispositive of claimant's status ...". ***Matter of Baez (PD 10276, Inc.–Commissioner of Labor)*, 2016 N.Y. Slip Op. 07061, 3rd Dept 10-27-16**

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