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CasePrepPlus

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FIRST DEPARTMENT

CRIMINAL LAW.

DENIAL OF A FOR CAUSE CHALLENGE TO A JUROR WHO SAID IT WOULD BE DIFFICULT TO REACH A VERDICT WITHOUT HEARING FROM THE DEFENDANT REQUIRED REVERSAL.

The First Department, reversing Supreme Court, determined that defendant's for cause challenge to a juror who stated she wanted to hear from the defendant should have been granted: "... [T]he court erred in denying defendant's challenge for cause to a prospective juror who stated that her belief in "hearing both sides of the story" would make it difficult for her to reach a verdict 'without hearing from the defendant,' and who was repeatedly unable to give an equivocal assurance that she would follow the law as charged by the court." ***People v. Rivera*, 2018 N.Y. Slip Op. 08750, First Dept 12-20-18**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL'S FAILURE TO OBTAIN EXPERT OPINION EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, THE CASE TURNED ON WHETHER DEFENDANT WAS INTOXICATED, THE INTOXILYZER RESULTS WERE INCONSISTENT, CONVICTION REVERSED.

The First Department, reversing Supreme Court, determined defendant's motion to vacate the judgment of conviction on ineffective assistance grounds should have been granted: "This case turned on whether defendant was intoxicated at the time of the vehicular accident at issue, and there was a serious issue about the accuracy of the final Intoxilyzer reading, which conflicted with an earlier reading showing no intoxication. Defense counsel failed to take steps to consult with and produce an appropriate expert on breath and blood alcohol analysis to rebut the People's proof ... . At the 440.10 hearing, trial counsel conceded that his only reason for not calling an expert was the inability of his client, who was also unable to pay counsel's fee, to pay for an expert. He also conceded that he took no steps to obtain a court-appointed expert, and was unaware that this remedy might be available. This constituted constitutionally deficient performance ... . As for the prejudice prong of an ineffective assistance claim, we find that there is a reasonable probability that calling an expert would have affected the outcome of the trial, and that the absence of expert testimony rendered the proceeding unfair under the facts of the case." ***People v. Carter*, 2018 N.Y. Slip Op. 08745, First Dept 12-20-18**

FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

DEFENDANT'S ALLEGATION THAT SHE DOES NOT LIVE AT THE ADDRESS WHERE HER BROTHER WAS SERVED IN THIS FORECLOSURE ACTION NECESSITATED A TRAVERSE HEARING.

The First Department, reversing Supreme Court, found that a traverse hearing should have been held to determine whether defendant was properly served with the summons, complaint and Real Property Actions and Proceedings Law (RPAPL) 1303 notice: "In this foreclosure matter commenced in 2009, plaintiff's affidavit of service indicated that service of the summons, complaint and RPAPL 1303 notice was effectuated upon defendant Nicola McCallum pursuant to CPLR 308(2) by serving an individual, who allegedly identified himself as her brother, at her 'dwelling place,' and mailing the same documents to that address. In response, defendant averred that she was never served with the summons and complaint, that she does not reside at the address where service was made, and that her primary residence has always been at the property that is the subject of this foreclosure action. 'While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing'... . The competing averments concerning plaintiff's residence at the time of service raise a factual issue concerning whether the service address was her 'dwelling place or usual place of abode' at the time of service (CPLR 308[2]) warranting a traverse hearing concerning whether defendant was properly served with the summons, complaint and RPAPL 1303 notice ...". ***Nationstar Mtge. LLC v. McCallum*, 2018 N.Y. Slip Op. 08755, First Dept 12-20-18**

FRAUD, CONVERSION, BANKING LAW.

COMPLAINT ALLEGED VALID CAUSES OF ACTION FOR AIDING AND ABETTING FRAUD AND AIDING AND ABETTING CONVERSION AGAINST A BANK WHICH PROVIDED A LETTER TO PLAINTIFF STATING DEFENDANT MAINTAINED ENOUGH IN HIS BANK ACCOUNTS TO COVER A POST-DATED CHECK FOR OVER $400,000.

The First Department, reversing Supreme Court, over a dissent, determined that plaintiff auction house stated causes of action for aiding and abetting fraud and aiding and abetting conversion against defendant bank HSBC. Defendant Stettner bid over $425,000 for antique jewelry and sought to pay with a post-dated check. At plaintiff's request HSBC provided a letter attesting to Stettner's good standing at the bank and stating that Stettner maintained a balance of between $1 and $20 million. Stettner's check bounced. The dissent argued that the complaint did not allege the bank's knowledge of the fraud and conversion: " 'A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance' ... . In turn, the elements of an underlying fraud are 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' ... . Aiding and abetting conversion requires the existence of a conversion by the primary tortfeasor, actual knowledge, and substantial assistance... . 'A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession' ...". ***William Doyle Galleries, Inc. v. Stettner*, 2018 N.Y. Slip Op. 08743, First Dept 12-20-18**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, PLAINTIFF'S LADDER SHIFTED AND HE FELL, HEARSAY IN A REPORT WHICH CONSTITUTED A MISTRANSLATION OF THE PLAINTIFF'S STATEMENT DID NOT RAISE A TRIABLE ISSUE OF FACT.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action based upon his fall from a ladder which shifted. The hearsay evidence in a report which mistranslated plaintiff's statement using the word "stairs" rather than "ladder" (the Spanish word means both) did not create an issue of fact. The court noted that the tenant who hired plaintiff's employer and the property owner were liable: "Defendants ... failed to raise a triable issue of fact. Hearsay, standing alone, is insufficient to defeat summary judgment. The mistranslated statement in the C-3 report ('while walking I fell down stairs') does not qualify as a prior inconsistent statement or as a business record so as to fit within an exception to the hearsay rule ... . The declaration against interest hearsay exception to the hearsay rule is likewise inapplicable inasmuch as, among other reasons, the declarant was indisputably unaware that the statement was adverse when made ... . Defendants, as the proponents of the evidence, were obligated to show that plaintiff was the source of the information recorded in the C-3 indicating that he fell from 'stairs,' and that 'the translation was provided by a competent, objective interpreter whose translation was accurate, a fact generally established by calling the translator to the stand' ... . This defendants have failed to do." ***Nava-Juarez v. Mosholu Fieldston Realty, LLC*, 2018 N.Y. Slip Op. 08744, First Dept 12-20-18**

PERSONAL INJURY, CONTRACT LAW.

PROPERTY OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE KNOWLEDGE OF THE SNOW AND ICE CONDITION IN THIS SLIP AND FALL CASE, AND THE SNOW REMOVAL CONTRACTOR DID NOT OFFER ANY EVIDENCE OF THE STATE OF THE AREA WHERE PLAINTIFF FELL, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined that the property owner's (PA's) and snow removal contractor's (Cristi's) motions for summary judgment in this parking lot snow and ice slip and fall case. PA did not demonstrate a lack of constructive knowledge of the condition and Cristi offered no evidence of the actual state of the area where plaintiff fell: "To demonstrate lack of constructive notice, a defendant must 'produc[e] evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned' ... . PA failed to produce such evidence. PA's representative testified that PA's logs for the day of and day prior to the accident did not identify any icy conditions in the parking lot. However, he also admitted that it would not necessarily be documented in these logs (or elsewhere) if a PA employee noticed an icy condition. Moreover, he testified that checking for icy conditions was not the focus of PA's inspections. ... '[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party' ... . However, there are exceptions to this rule, including where 'the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launches a force or instrument of harm' by 'creat[ing] or exacerbat[ing]' a dangerous condition... . It is undisputed that Cristi performed snow removal and salting in the area of the accident and that it had a continuing obligation to inspect and maintain the area even after snow removal was complete, but it offered no evidence regarding the actual state of the area at issue prior to the accident. Its 'silence with respect to the actual snow removal operations at issue' renders Cristi's prima facie showing 'patently insufficient' ...". ***Barrett v. Aero Snow Removal Corp.*, 2018 N.Y. Slip Op. 08753, First Dept 12-20-18**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

CONSECUTIVE SENTENCES NOT SUPPORTED BY ALLEGATIONS OR PLEA ALLOCUTION, NO ALLEGATION THE THREE CRIMINAL POSSESSION OF A WEAPON COUNTS WERE SEPARATE ACTS.

The Second Department determined consecutive sentences should not have been imposed for the three counts of criminal possession of a weapon to which defendant pled guilty. There were no allegations of three separate acts of possession: "Sentences imposed for two or more offenses may not run consecutively where, inter alia, 'a single act constitutes two offenses' ... . Conversely, consecutive sentences may be imposed when, among other things, 'the facts demonstrate that the defendant's acts underlying the crimes are separate and distinct' ... . The People bear the burden of establishing the legality of consecutive sentencing ... . Here, no facts were alleged in the Superior Court Information or adduced at the defendant's plea allocution which establish three separate acts of possession ... . Accordingly, there was no basis for imposing consecutive sentences for three counts of criminal possession of a weapon in the third degree ...". ***People v. Bailey*, 2018 N.Y. Slip Op. 08674, Second Dept 12-19-18**

CRIMINAL LAW, EVIDENCE.

NO EVIDENCE THREE WEAPONS IN A SAFE WERE POSSESSED BY THREE SEPARATE ACTS, SENTENCES SHOULD HAVE BEEN CONCURRENT, DECISIONS TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED.

The Second Department determined there was no indication the three weapons in a safe were possessed by three separate acts. The sentences therefore should have been concurrent: "... [T]he defendant's convictions of criminal possession of a weapon in the third degree ... were based upon his act of constructively possessing three guns in a safe on December 2, 2009 ... . Since these convictions were based upon the defendant's constructive possession of guns in the same location at the same time, and there was no proof of any separate act by the defendant which constituted possession of one of the guns, as opposed to either of the other two guns, the convictions were based upon the same act, and the sentencing court was required to impose concurrent sentences ... . [T]he mere fact that the defendant possessed three guns does not prove three separate acts of possession, and, to the extent that our decisions in *People v. Horn* (196 AD2d 886) and *People v. Negron* (184 AD2d 532, 533) can be read to so hold, those cases should no longer be followed. In an analogous context, the Court of Appeals held, to the contrary, that a sentencing court was not authorized to impose consecutive sentences on a defendant's convictions of three counts of possessing a sexual performance by a child, despite the defendant's possession of separate images depicting child pornography, because the People failed to allege or adduce facts demonstrating separate acts of downloading the digital images (see *People v. Dean*, 8 NY3d at 930-931). Similarly, possession of three guns without further proof of separate and distinct acts of possession cannot support consecutive sentences for three counts of criminal possession of a weapon in the third degree ...". ***People v. Smith*, 2018 N.Y. Slip Op. 08695, Second Dept 12-19-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PROOF REQUIREMENTS FOR DEPRAVED INDIFFERENCE MURDER CHANGED WHEN THE COURT OF APPEALS DECIDED *PEOPLE v. PAYNE*, BEFORE DEFENDANT'S CONVICTION BECAME FINAL, SUPREME COURT SHOULD HAVE HEARD DEFENDANT'S MOTION TO VACATE THE CONVICTION AND SHOULD HAVE REVERSED THE DEPRAVED INDIFFERENCE MURDER CONVICTION AND DISMISSED THE COUNT.

The Second Department, reversing Supreme Court, determined: (1) the law on the proof requirements for depraved indifference murder changed when *People v. Payne* (3 NY2d 266) was decided, not later when *People v. Feingold* (7 NY3d 288) was decided; (2) defendant's judgment of conviction did not become final until after *People v. Payne* was decided; (3) therefore defendant's motion to vacate his judgment of conviction should have been heard on the merits; and (4) the evidence of depraved indifference murder was not sufficient to support the verdict: "As noted, the motion court determined that the law regarding depraved indifference murder did not change until *People v. Feingold*, and that the defendant is therefore not entitled to any benefit under the new law ... . However, in *People v. Wilkens* (126 AD3d 1293) and *People v. Baptiste* (51 AD3d 184), the Third and Fourth Departments of the Appellate Division each held that the law changed on October 19, 2004, when the Court of Appeals decided *People v. Payne*. We agree with the Third and Fourth Departments that *People v. Payne* signaled the change in the law of depraved indifference murder. ... Under the unique circumstances of this case, where the cases here relied upon ... had not yet been decided at the time that the direct appeal was perfected, we find that the failure to challenge the legal sufficiency of the evidence on direct appeal was justified. ... [T]he trial evidence was not legally sufficient to support a verdict of guilt of depraved indifference murder ... . ***People v. Hernandez*, 2018 N.Y. Slip Op. 08690, Second Dept 12-19-18**

FAMILY LAW.

FAMILY COURT'S TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS NOT SUPPORTED BY THE EVIDENCE, MOTHER WAS DEALING WITH HER MENTAL HEALTH AND DRUG PROBLEMS AND THE SPECIAL NEEDS OF THE CHILDREN WERE BEING ADDRESSED.

The Second Department, reversing Family Court, determined that the proof requirements for the termination of parental rights were not met: "To establish that a parent has permanently neglected a child, an agency must demonstrate, by clear and convincing evidence, that the parent 'failed for a period of either at least one year or fifteen out of the most recent twenty-two months following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child' (Social Services Law § 384-b[7][a]). ... The mother testified that she complied with all of the requirements that were communicated to her in order for the children to be returned to her care. According to the mother, these requirements included visiting with the children regularly, undergoing multiple mental health evaluations, consistently participating in mental health treatment, undergoing drug testing, completing parenting skills classes, visiting the children's school as much as allowed, and keeping up with the children's health status. The case files ... generally supported the mother's testimony ... . In light of the petitioner's failure to adduce other evidence beyond the mother's own testimony as to the initial reasons for the children's removal from her care, the significance of the mother's mental health diagnosis, or the significance of the special needs diagnoses of the children, there was no basis for a determination that the mother's testimony on these subjects demonstrated a failure 'to take such steps as may be necessary to provide an adequate, stable home and parental care for the child[ren] within a period of time which is reasonable under the financial circumstances available to the parent' ...". ***Matter of Jaylen R.B. (Lisa G.)*, 2018 N.Y. Slip Op. 08643, Second Dept 12-19-18**

FAMILY LAW, ATTORNEYS.

FATHER WAS NOT ADEQUATELY INFORMED OF THE CONSEQUENCES OF PROCEEDING WITHOUT AN ATTORNEY, NEW HEARING ORDERED.

The Second Department, reversing Family Court in this neglect proceeding, determined father was not adequately informed of his right to an attorney: "... [A]lthough the Family Court repeatedly asked the father whether he wanted to represent himself, told him that he would have to follow the same legal rules as the other parties, and cautioned him generally against self representation, the court did so without detailing the dangers and disadvantages of proceeding pro se ... . More specifically, the court failed to adequately warn the father of the risks inherent in proceeding without an attorney; failed to adequately apprise the father of the critical importance of having an attorney in a child neglect proceeding, particularly where there is a related criminal matter pending; failed to adequately explore the defendant's age, education, occupation, previous exposure to legal procedures and other factors bearing on a competent, intelligent, voluntary waiver; and failed to ensure that the father acknowledged his understanding of the perils of self-representation. Because the court failed to conduct a sufficiently searching inquiry of the father to be reasonably certain that he understood the dangers and disadvantages of giving up the fundamental right to counsel, and thus failed to ensure that the father's waiver of his right to counsel was made knowingly, intelligently, and voluntarily, we must reverse the order and remit the matter to the Family Court, Suffolk County, for a new hearing and a new determination, after a proper inquiry into the father's understanding of the consequences of self-representation ...". ***Matter of Alivia F. (John F.)*, 2018 N.Y. Slip Op. 08649, Second Dept 12-19-18**

FAMILY LAW, EVIDENCE.

FATHER MADE OUT A PRIMA FACIE CASE FOR A MODIFICATION OF CUSTODY BASED UPON LOSS OF EMPLOYMENT, PETITION SHOULD NOT HAVE BEEN DISMISSED, REMITTED FOR A CONTINUED HEARING.

The Second Department, reversing Family Court, determined father's petition to modify the custody arrangement should not have been dismissed and the matter was remitted for a continued hearing. Father's proof had made out a prima facie case based upon the loss of employment: "... [F]ather petitioned to modify the order of custody and parental access to remove the requirement that the parental access be professionally supervised at his expense, on the ground that he had recently lost his job and could not afford the cost of professional supervision. At a hearing on his petition, the father testified that he had lost his job in February 2016, a few months after the order of custody and parental access was made, and since that time, he had exercised parental access with the child on a limited basis due to the cost of professional supervision. He admitted that the cost of professional supervision was prohibitive even when he was employed but that, since losing his job, his parental access had further decreased. ... A party seeking modification of an existing custody or parental access order must demonstrate that there has been a change in circumstances such that modification is required to protect the best interests of the child ... . The best interests of the child are determined by a review of the totality of the circumstances ... . In deciding a motion to dismiss for failure to establish a prima facie case, the court must accept the petitioner's evidence as true and afford the petitioner the benefit of every favorable inference that can reasonably be drawn therefrom ... . Here, accepting the father's evidence as true and affording him the benefit of every favorable inference, the father presented sufficient prima

facie evidence of a change of circumstances which might warrant modification of parental access in the best interests of the child." ***Matter of Gonzalez v. Santiago*, 2018 N.Y. Slip Op. 08652, Second Dept 12-19-18**

FAMILY LAW, EVIDENCE.

FATHER SHOULD NOT HAVE BEEN PRECLUDED FROM BRINGING FUTURE PARENTAL ACCESS PETITIONS WITHOUT COURT APPROVAL.

The Second Department, reversing Family Court in this modification of custody proceeding, determined father should not have been precluded from submitting future parental access petitions: "A party seeking modification of an existing custody or parental access order must demonstrate that there has been a change in circumstances such that modification is required to protect the best interests of the child... . 'One who seeks a change in [parental access] is not automatically entitled to a hearing but must make a sufficient evidentiary showing of a material change of circumstances to warrant a hearing'... . However, where a facially sufficient petition has been filed, a full and comprehensive hearing is required to afford the parent a full and fair opportunity to be heard ... . Here, the Family Court should not have dismissed the father's petition without a hearing. His evidentiary submissions were sufficient to warrant a hearing ... . The Family Court improvidently exercised its discretion in enjoining the father from filing any future parental access petitions without prior express written permission from the court. The court's conclusion that the father had previously filed an 'excessive number of petitions' was not supported by the record, nor was there any evidence that the father's continued litigation had become abusive and vexatious ...". ***Matter of Gonzalez v. Santiago*, 2018 N.Y. Slip Op. 08653, Second Dept 12-19-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT DID NOT HAVE SUFFICIENT EVIDENCE TO DETERMINE IT WAS IN THE CHILD'S BEST INTERESTS TO BE WITH FATHER IN THIS TEMPORARY CUSTODY PROCEEDING, ALLEGATIONS OF EXCESSIVE CORPORAL PUNISHMENT REQUIRED A HEARING.

The Second Department, reversing Family Court, determined questions of fact about father's use of corporal punishment required a hearing in this temporary custody matter about whether it was in the child's best interests to be placed with father: " '[I]n any action concerning custody or [parental access] where domestic violence is alleged, the court must consider the effect of such domestic violence upon the best interest of the child, together with other factors and circumstances as the court deems relevant in making an award of custody' {... see Domestic Relations Law § 240[1]...). In addition, consideration may be given to the express wishes of older and more mature children, but such wishes are not dispositive ... .As a general rule, 'a custody determination should be made only after a full and fair hearing at which the record is fully developed'... . Under the circumstances of this case, the Family Court did not have sufficient evidence before it to reach a sound conclusion that it was in the subject child's best interests for the father to have temporary custody pending determination of the issue of permanent custody. Throughout the proceedings, there were controverted allegations of excessive corporal punishment by the father against the subject child and the court was informed that the subject child suffers from certain mental health issues that were being treated in Connecticut." ***Matter of Poltorak v. Poltorak*, 2018 N.Y. Slip Op. 08662, Second Dept 12-19-18**

FAMILY LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT TEMPORARY REMOVAL OF CHILD FROM FATHER'S CUSTODY DURING THE PENDENCY OF A CHILD PROTECTIVE PROCEEDING.

The Second Department, reversing Family Court, determined the evidence did not support temporary removal of the child from father's custody during the pendency of a child protective proceeding: " '[O]nce a child protective petition has been filed, Family Court Act § 1027(a)(iii) authorizes the court to conduct a hearing to determine whether the child's interests require protection, including whether the child should be removed from his or her parent'... . Upon such a hearing, temporary removal is only authorized where the court finds it necessary 'to avoid imminent risk to the child's life or health' ... . 'In determining a removal application pursuant to Family Court Act § 1027, the court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal' ... . Here, the petitioner failed to establish that Chloe would be subject to imminent risk if she remained in the father's care pending the outcome of the neglect proceeding ... . The hearing evidence showed that at no time did the father inflict excessive corporal punishment upon Chloe. In addition, the evidence showed that Dasanie may have been coached by Chloe's mother, and Dasanie recanted, before several individuals, the allegations that the father inflicted excessive corporal punishment upon her." ***Matter of Chloe-Elizabeth A.T. (Albert T.)*, 2018 N.Y. Slip Op. 08666, Second Dept 12-19-18**

FORECLOSURE, CIVIL PROCEDURE.

CROSS-MOTION TO EXTEND THE TIME FOR SERVICE OF PROCESS PURSUANT TO CPLR 306-b IN THIS FORECLOSURE ACTION PROPERLY GRANTED, THE JUDGMENT OF FORECLOSURE HAD BEEN VACATED BECAUSE DEFENDANT WAS NOT PROPERLY SERVED INITIALLY.

The Second Department, modifying Supreme Court, determined the judgment of foreclosure should have been vacated because defendant was not served and therefore the court did not acquire personal jurisdiction. However, plaintiff's timely cross-motion to extend the time for service pursuant to CPLR 306-b was properly granted: " 'If service is not made upon a defendant within the time provided in [CPLR 306-b], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service' … . Good cause requires the plaintiff to demonstrate, as a threshold matter, 'reasonably diligent efforts' in attempting to effect service ... . In deciding whether, in the interest of justice, to grant an extension of time to serve a summons and complaint, 'the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant' ... . 'A determination of whether to grant the extension in the interest of justice is generally within the discretion of the motion court' ...". ***Bank United, FSB v. Verbitsky*, 2018 N.Y. Slip Op. 08623, Second Dept 12-19-18**

FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS, APPEALS.

NOTICE OF APPEARANCE FILED BY DEFENDANT'S ATTORNEY WAIVED ANY SUBSEQUENT OBJECTION TO PERSONAL JURISDICTION IN THIS FORECLOSURE ACTION, ISSUE HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW.

The Second Department, reversing Supreme Court on a ground not raised below, determined that defendant's attorney's notice of appearance waived any objection to personal jurisdiction over defendant: " 'The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction' ... . Here, in November 2014, the defendant's attorney appeared in the action on her behalf by filing a notice of appearance dated October 31, 2014, and did not move to dismiss the complaint on the ground of lack of personal jurisdiction at that time, or assert lack of personal jurisdiction in a responsive pleading... . The defendant did not move to dismiss the complaint until September 2015, 10 months after filing a notice of appearance. Under those circumstances, the defendant waived any claim that the Supreme Court lacked personal jurisdiction over her in this action ... . Although the plaintiff raises this issue for the first time on appeal, it involves a question of law that appears on the face of the record, and could not have been avoided if brought to the attention of the Supreme Court ...". ***Deutsche Bank Natl. Trust Co. v. Vu*, 2018 N.Y. Slip Op. 08629, Second Dept 12-19-18**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the proof defendant was properly served with notice pursuant to Real Property Actions and Proceedings Law (RPAPL) 1304 was insufficient. The bank's motion for summary judgment should not have been granted: "... [T]he bank failed to submit an affidavit of service, or proof of mailing by the post office, evincing that it properly served the defendant pursuant to RPAPL 1304. Contrary to the Supreme Court's conclusion, the affidavit of the employee of the plaintiff's successor in interest failed to establish that the notices were sent to the defendant in the manner required by RPAPL 1304. The affiant did not aver that she was familiar with the mailing practices and procedures of the entity that allegedly sent the RPAPL 1304 notice. Accordingly, her affidavit did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . Nor was the affidavit of the employee of the plaintiff's successor in interest sufficient to lay a foundation for the admission of business records to establish a proper mailing. The affiant did not state that the records of the entity that allegedly sent the RPAPL 1304 notice had been incorporated into the records of the plaintiff's successor in interest and were routinely relied upon by the successor in interest in its business ...". ***Aurora Loan Servs., LLC v. Vrionedes*, 2018 N.Y. Slip Op. 08622, Second Dept 12-19-18**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), UNIFORM COMMERCIAL CODE (UCC), CONTRACT LAW.

LOST NOTE AFFIDAVIT INSUFFICIENT BECAUSE UCC REQUIREMENTS NOT MET, PROOF OF RPAPL 1304 NOTICE INSUFFICIENT, PROOF OF COMPLIANCE WITH NOTICE CONDITION OF THE MORTGAGE INSUFFICIENT, SUPREME COURT SHOULD NOT HAVE GRANTED THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING.

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this foreclosure action should not have been granted for three reasons: (1) the lost note affidavit was insufficient pursuant to the requirements of the Uniform Commercial Code (UCC); (2) the proof of compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 was not sufficient; and (3) the plaintiff did not show it had complied the notice condition of the mortgage (a condition precedent ro foreclosure): "Pursuant to UCC 3-804, the owner of a lost note may maintain an action 'upon due proof of [1] his [or her] ownership, [2] the facts which prevent his [or her] production of the instrument and [3] its terms' (UCC 3-804). The party seeking to enforce a lost instrument is required to 'account for its absence' ... . Here, although the plaintiff came forward with evidence establishing that the note was assigned to it and establishing the note's terms, the affidavit of lost note submitted in support of its motion failed establish the facts that prevent the production of the original note ... . [T]he affidavit of a representative of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the representative did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing ... . [T]the plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in the mortgage requiring it to give notice of default prior to demanding payment in full ... . The affidavit of a representative of the plaintiff's loan servicer claiming that notice of default was sent to the defendant ... was conclusory and unsubstantiated and ... was insufficient to prove that the notice was sent in accordance with the terms of the mortgage ...". ***U.S. Bank N.A. v. Cope*, 2018 N.Y. Slip Op. 08709, Second Dept 12-19-18**

INSURANCE LAW, EVIDENCE, CIVIL PROCEDURE.

THE PETITION SEEKING LEAVE TO COMMENCE AN ACTION AGAINST THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) IN THIS PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING, THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE NOTICE CONDITIONS PRECEDENT TO THE ACTION WERE MET.

The Second Department, reversing Supreme Court, determined this pedestrian accident action seeking coverage by the Motor Vehicle Accident Indemnification Corporation (MVAIC) should not have been dismissed without a hearing: "A petitioner seeking leave of court to commence an action against the MVAIC has the initial burden of demonstrating that he or she is a '[q]ualified person' within the meaning of Insurance Law § 5202 and by making an evidentiary showing that he or she has satisfied certain other statutory requirements ... . In a special proceeding, to the extent that no triable issues of fact are raised, the court is empowered to make a summary determination (see CPLR 409[b]). If, however, triable issues of fact are raised, an evidentiary hearing must be held (see CPLR 410). Here, there are triable issues of fact as to whether the petitioner is an uninsured resident of New York, and, therefore, a '[q]ualified person' pursuant to article 52 of the Insurance Law (Insurance Law § 5202[b]); whether the accident, which the petitioner admitted that he did not report to the police within 24 hours as required by Insurance Law § 5208(a)(2)(A), was, nonetheless, reported to the police 'as soon as was reasonably possible' within the meaning of Insurance Law § 5208(a)(2)(B); and whether the petitioner served a notice of claim upon the MVAIC within 90 days of the accident (see Insurance Law § 5208[a][2][A]), which issues could not have been resolved without an evidentiary hearing ...". ***Matter of Laszlone v. Motor Veh. Acc. Indem. Corp.*, 2018 N.Y. Slip Op. 08657, Second Dept 12-19-18**

INSURANCE LAW, ARBITRATION, CONTRACT LAW, CIVIL PROCEDURE.

INSURER WAIVED THE CONTRACTUAL ISSUE WHETHER PETITIONER WAS A PASSENGER IN THE CAR BY NOT SEEKING A STAY OF ARBITRATION, THEREFORE THE ARBITRATOR EXCEEDED HIS POWERS BY FINDING PETITIONER WAS NOT A PASSENGER AT THE TIME OF THE HIT AND RUN ACCIDENT.

The Second Department, reversing Supreme Court, determined the insurer (GEICO) had waived the contractual issue whether petitioner was a "qualified person" entitled to uninsured motorist benefits in this hit and run accident by not moving to stay arbitration. Therefore the arbitrator exceeded his powers in finding petitioner was not a "qualified person" because he was not a passenger in the car at the time of the accident. The matter was remitted to be heard by another arbitrator to determine whether petitioner suffered "serious injury:" "... [T]he issue presented to the arbitrator was whether the claimants, the petitioner and his girlfriend, sustained serious injuries as a result of the negligence of the operator of the hit-and-run vehicle, and if so, the reasonable compensatory value thereof. With a hit-and-run cause of action, in order to proceed to arbitration, there must be 'physical contact' by a hit-and-run vehicle to a 'qualified person' (Insurance Law § 5217). Accordingly, the determination of whether the petitioner is a 'qualified person' pursuant to the policy is a condition

precedent to arbitration and therefore is a basis for an application to stay arbitration to be determined by the courts ... . Here, since GEICO never moved to stay the arbitration, it waived the ability to litigate this issue and essentially conceded that the petitioner was a covered person under the policy ...". ***Matter of Banegas v. GEICO Ins. Co.*, 2018 N.Y. Slip Op. 08644, Second Dept 12-19-18**

LANDLORD-TENANT, CONTRACT LAW.

LEASE INCLUDED AN EXPRESS PROVISION ALLOWING TENANT TO WITHHOLD RENT IF THE PREMISES IS DAMAGED AND NOT REPAIRED, THEREFORE WITHHOLDING RENT WAS NOT AN ELECTION OF REMEDIES AND THE TENANT COULD WITHHOLD RENT AND SUE FOR DAMAGES.

The Second Department, reversing (modifying) Supreme Court, determined that an express lease provision allowed the tenant to withhold rent when the property is damaged, and therefore the withholding of rent did not constitute an election of remedies: "The second affirmative defense stated that the tenant elected a remedy by not paying rent, and therefore the tenant is not entitled to damages. However, the lease contained an express provision that the tenant could withhold rent if the premises were damaged and not repaired. Generally, a tenant's duty to continue to pay rent is not suspended if the tenant remains in possession of the leased premises, even if the landlord breaches its obligations under the lease, unless there is an express provision in the lease declaring the circumstances under which the tenant may withhold rent ... . Such an express provision was present here. Therefore, the withholding of rent was not an election of remedies." ***Fifth Line, LLC v. Fitch*, 2018 N.Y. Slip Op. 08630, Second Dept 12-19-18**

PERSONAL INJURY, EVIDENCE.

DEFENDANT PROPERTY MANAGER AND DEFENDANT OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE KNOWLEDGE OF THE ICE AND SNOW CONDITION WHERE PLAINTIFF FELL IN THIS STRIP MALL PARKING LOT SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this parking lot slip and fall case should not have been granted. The defendant Benderson managed the strip mall where the slip and fall occurred, and defendant Fitzgerald owned the property. The defendants did not demonstrate they did not have construction notice of the snow and ice condition: "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . This burden cannot be satisfied merely by pointing out gaps in the plaintiff's case, as the defendants did here... . The defendants failed to show what the accident site actually looked like within a reasonable time after the cessation of the prior snowstorm and what the accident site actually looked like within a reasonable time prior to the incident. The defendants also failed to submit any meteorological data to show that the alleged ice condition that caused the plaintiff to fall was not the product of a prior storm." ***Bronstein v. Benderson Dev. Co., LLC*, 2018 N.Y. Slip Op. 08625, Second Dept 12-19-18**

THIRD DEPARTMENT

CIVIL PROCEDURE, WORKERS' COMPENSATION, TRUSTS AND ESTATES.

COUNTERCLAIMS AGAINST INDIVIDUAL TRUSTEES RELATED BACK TO THE COUNTERCLAIMS AGAINST THE TRUST AND THEREFORE WERE NOT TIME-BARRED, SUPREME COURT REVERSED.

The Third Department, reversing (modifying) Supreme Court, determined the counterclaims against the trustees of the plaintiff workers' compensation self-insurance trust should not have been dismissed as time-barred because they related back to the counterclaims against the trust: "Supreme Court determined that, because defendant was aware of the identity of the trustees when it interposed its original answer and counterclaims in September 2010, its failure to assert claims against the individual trustees between September 2010 and December 2016 represented 'either a strategic litigation decision on its part or a mistake of law,' neither of which it found would entitle defendant to application of the doctrine. We disagree. There is nothing in the record before us demonstrating that defendant intentionally elected not to assert its counterclaims against the individual trustees and/or that it did so to obtain 'a tactical advantage in the litigation' ... . A review of defendant's pleadings demonstrates that it intended to sue the individual trustees ... . Although the specific names of the individual trustees could have been ascertained from certain documentation that the trust provided to defendant on an annual basis, 'we need no longer consider whether [such a] mistake was excusable' ... . Rather, as the Court of Appeals has recognized, the primary question — and 'the linchpin of the relation back doctrine' — is whether the newly added party had actual notice of the claim ... . As trustees of the trust, we find it implausible that the individual trustees were not aware of the trust's commencement of this action and the counterclaims that defendant asserted against the trust — such knowledge being imputed to them as trustees ...". ***NYAHSA Servs., Inc., Self-Insurance Trust v. People Care Inc.*, 2018 N.Y. Slip Op. 08735, Third Dept 12-20-18**

CONTRACT LAW, ACCOUNT STATED.

ALTHOUGH THERE WAS NO ENFORCEABLE CONTRACT TO INSTALL SOLAR PANELS, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ITS ACCOUNT STATED CAUSE OF ACTION BASED ON INVOICES SENT TO DEFENDANT FOR THE SOLAR PANELS.

The Third Department, reversing (modifying) Supreme Court, determined plaintiff's breach of contract action was properly dismissed but plaintiff should have been granted summary judgment on its account stated cause of action based upon the submission of invoices for $1.9 million. There was no executed agreement between plaintiff and defendant for the installation of solar panels. However, defendant did not object to the invoices for the solar panels: "Plaintiff attempted to raise 'material questions of fact' with proof that it had already entered into an agreement to install one solar system at the complex, that defendants expressed interest in having plaintiff install the two additional systems, and that plaintiff purchased solar cells and performed other work in the expectation that it would do so ... . These submissions did not, however, raise any question on the dispositive issue of whether the parties reached agreement on the material terms of a contract to install the additional systems ... . We reach a different result with regard to plaintiff's claim for an account stated, which is 'an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due, and may be implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances' ... . In the course of the unsuccessful negotiations over an agreement to install the two proposed systems, plaintiff purchased approximately $1.9 million worth of solar cells for one of the projects and, beginning in December 2011, periodically invoiced defendants for the purchase price and storage costs of the cells. The initial invoice stated that the solar cells were 'purchased and held pursuant to agreement with' defendants, and noted that defendants' representative had 'acknowledge[d] receipt of [defendants'] inventory.' Plaintiff's chairperson averred that defendants' chief executive officer and a consultant had acknowledged receipt of the solar cells on behalf of defendants, and attached purchase documents for the solar cells bearing what plaintiff's chairperson stated were the initials of those two individuals. In response, defendants admitted that they had never objected to the invoices, which 'is deemed acquiescence and warrants enforcement of the implied agreement to pay' ...". ***Solartech Renewables, LLC v. Techcity Props., Inc.*, 2018 N.Y. Slip Op. 08739, Third Dept 12-20-18**

CORPORATION LAW, CIVIL PROCEDURE.

IN THIS CPLR ARTICLE 4 PROCEEDING BROUGHT BY THE ATTORNEY GENERAL, THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE RESPONDENT NOT-FOR-PROFIT CORPORATION VIOLATED ITS FIDUCIARY DUTY AND THE NOT-FOR-PROFIT-CORPORATION LAW WITH RESPECT TO ITS AFFILIATE NOT-FOR-PROFIT CORPORATIONS AND WHETHER THE BUSINESS JUDGMENT RULE APPLIED.

The Third Department, reversing (modifying) Supreme Court, in a decision too fact-specific to be fairly summarized here, determined issues of fact were presented about whether certain actions taken by respondent not-for-profit corporation (TLCN) breached its fiduciary duty to its not-for-profit corporation affiliate (Coburn) and violated the Not-for-Profit Corporation Law. The action was brought by the Attorney General in a special proceeding pursuant to CPLR article 4 which is similar to a summary judgment motion. The Third Department further held there were questions of fact whether the business judgment rule could properly be applied: "... Supreme Court acted properly in ordering TLCN to adopt a conflict of interest policy ... . [I]nasmuch as Coburg is an independent corporation, TLCN may not operate Coburg in a manner inconsistent with Coburg's purpose, nor engage in related party transactions without complying with the relevant provisions of the Not-For-Profit Corporation Law. * * * Genuine issues of material fact exist as to whether respondents violated their duty to Coburg by improperly utilizing its surplus to benefit TLCN and its other affiliates and by engaging in related party transactions that were not in Coburg's best interest. ... [T]he business judgment rule has no place where corporate officers or directors take actions that exceed their authority under the relevant corporate bylaws ... , or where they make decisions affected by an inherent conflict of interest... . There are issues of fact in the present record that preclude application of the business judgment rule, specifically regarding whether respondents exceeded their authority by improperly utilizing Coburg's surplus to benefit TLCN and its other affiliates and by engaging in related party transactions that were not in Coburg's best interest." ***Matter of the People of the State of New York v. The Lutheran Care Network, Inc.*, 2018 N.Y. Slip Op. 08727, Third Dept 12-20-18**

FAMILY LAW, EVIDENCE.

FAILURE TO HOLD A LINCOLN HEARING WAS NOT AN ABUSE OF DISCRETION.

The Third Department, over a two-justice dissent, determined that Family Court's custody and parenting time rulings were supported by the evidence. The dissenting justices argued a Lincoln hearing should have been held to learn the preferences of the older child. The majority ruled Family Court did not abuse its discretion in not holding a Lincoln hearing: "We ... do not share Family Court's view that '[c]ourts are rarely only supposed to have Lincoln [h]earings.' To the contrary, conducting such hearings is the 'preferred practice' ... . That said, whether to conduct a Lincoln hearing rests in the discretion of Family Court ... . Family Court noted that the testimony from the fact-finding hearing was 'not remarkable nor extremely disturbing' and did not raise 'any red flags.' In our view, the record was sufficiently developed for the court to make a cus-

tody and visitation determination. Furthermore, although the wishes of the older child, who was nearly 11 years old at the time of the hearing, were 'entitled to consideration' ... , this is just one factor in the best interests analysis and is not dispositive ... . As such, under the [*3]circumstances of this case, we find no abuse of discretion ...". ***Matter of Lorimer v. Lorimer*, 2018 N.Y. Slip Op. 08721, Third Dept 12-20-18**

FAMILY LAW, EVIDENCE, CRIMINAL LAW.

UNLIKE IN FAMILY COURT ACT ARTICLE 10 AND 6 PROCEEDINGS, CHILDREN'S HEARSAY STATEMENTS ARE NOT ADMISSIBLE IN FAMILY COURT ACT ARTICLE 8 (FAMILY OFFENSE) PROCEEDINGS.

The Third Department, reversing Family Court in this family offense proceeding, in a full-fledged opinion by Justice McCarthy, determined the hearsay statements of the children should not have been admitted in evidence. Family Court had found that father committed harassment by grabbing one of the children. Although children's hearsay has been deemed admissible in Family Court Act article 10 and 6 proceedings, such hearsay is not admissible in Family Court Act article 8 (family offense) proceedings: "Despite the extension of the exception from Family Ct Act articles 10 and 10-A to article 6, this Court has never directly addressed whether Family Ct Act § 1046 (a) (vi) can be applied in a proceeding pursuant to Family Ct Act article 8 ... . The First and Second Departments have concluded that even though the exception has been applied in custody proceedings under article 6 that are founded on abuse or neglect, because Family Ct Act § 1046 (a) (vi) 'is explicitly limited to child protective proceedings under articles 10 and 10-A, [it] has no application to family offense proceedings under article 8' ... . This conclusion comports with the language of the statute. ... Having determined that Family Court should not have relied upon the children's hearsay statements, we must consider whether the remaining evidence at the fact-finding hearing was sufficient to establish that the father committed a family offense. Setting aside the children's statements to the detectives, to the mother and on the videotape, the evidence directly related to the incident is extremely limited. It includes a photograph showing a barely visible bruise on the middle child's arm, the detectives' evaluation of the children's body language and the father's testimony that he grabbed the middle child while removing him from a situation where he was misbehaving. The father testified that his intention in taking hold of the child was not to alarm him, but to get him and the situation under control. This testimony contradicts the intent required to prove harassment in the second degree and supports the father's defense of justification, which permits a parent to use physical force to the extent that he or she deems reasonably necessary to maintain discipline ... . Although the court could have disbelieved the father's testimony and inferred his state of mind from the circumstances ... , without the hearsay testimony, there was not a sufficient basis for the court to find that the father committed a family offense." ***Matter of Kristie GG. v. Sean GG.*, 2018 N.Y. Slip Op. 08718, Third Dept 12-20-18**

FAMILY LAW, EVIDENCE, CRIMINAL LAW.

FAMILY COURT, IN THE WIFE'S ABSENCE, SUA SPONTE, RAISED ALLEGATIONS NOT INCLUDED IN THE FAMILY OFFENSE PETITION BEFORE THE COURT, FAMILY COURT THEN ALLOWED THE ALLEGATIONS TO BE ADDED TO THE PETITION, AND THE COURT WENT ON TO FIND THAT THE WIFE HAD COMMITTED THE FAMILY OFFENSES OF HARASSMENT AND MENACING, BECAUSE THE WIFE WAS NOT GIVEN NOTICE OF THE ADDED ALLEGATIONS, REVERSAL WAS REQUIRED.

The Third Department, reversing Family Court, determined the wife was not given notice of the allegations which led to the court's finding she had committed the family offenses of harassment and menacing. The wife did not appear in court and her attorney told the court she was not authorized to represent her in the proceeding. Certain allegations were added to the family offense petition in the wife's absence and without prior notice to her: "The court ... , sua sponte, addressed a new subject, inquiring about allegations that had apparently been raised on some other occasion. When the court asked whether the alleged events had occurred, the husband responded, 'Yes, ma'am,' without specifically describing those factual allegations. Upon this basis, the court then granted a request by the husband's counsel to amend the petition to add certain offenses; notably, counsel made no request to amend the petition's substantive allegations. The court then found the wife had committed the family offenses of harassment in the second degree, assault in the third degree, and menacing in the third degree, and directed the entry of a two-year order of protection. Nothing in the record indicates that the wife was given any notice that the matters raised by Family Court would be addressed at the hearing. The allegations described by the court were not set forth within the husband's July 2016 petition. ... '[N]otice is a fundamental component of due process' ... . In the absence of notice to the wife, Family Court's sua sponte consideration of extraneous allegations violated the wife's due process rights ...". ***Matter of King v. King*, 2018 N.Y. Slip Op. 08724, Third Dept 12-20-18**

INSURANCE LAW, NEGLIGENCE, EVIDENCE.

IN THIS TRAFFIC ACCIDENT CASE, AN AFFIDAVIT FROM A LICENSED CLINICAL SOCIAL WORKER (LCSW) CONSTITUTED COMPETENT EVIDENCE PLAINTIFF SUFFERS FROM POST-TRAUMATIC STRESS DISORDER (PTSD), PTSD IS A 'SERIOUS INJURY' WITHIN THE MEANING OF INSURANCE LAW § 5102.

The Third Department, reversing Supreme Court, determined an affidavit from a licensed clinical social worker (LCSW) was competent evidence that plaintiff in this traffic accident case suffered from post-traumatic stress disorder (PTSD) which is recognized as a "serious injury" within the meaning of Insurance Law § 5102(d): "Under Education Law § 7701 (2), an LCSW can diagnose 'mental, emotional, behavioral, addictive and developmental disorders and disabilities' and can administer and interpret tests of psychological functioning, create assessment-based treatment plans and provide 'short-term and long-term psychotherapy and psychotherapeutic treatment.' These are functions comparable to those of a psychologist (see Education Law § 7601-a [1], [2]). For licensing purposes, an LCSW must 'have at least three years full-time supervised postgraduate clinical social work experience in diagnosis, psychotherapy, and assessment-based treatment plans, or its part-time equivalent, obtained over a continuous period not to exceed six years, under the supervision . . . of a psychiatrist, a licensed psychologist, or [an LCSW] in a facility setting' ... . Given the above, we conclude that an LCSW is competent to render an opinion as to whether a person has PTSD for purposes of establishing a serious injury under the Insurance Law. ... Iantorno [the LCSW] averred that she 'personally witnessed physical anxiety exhibited by . . . Vergine [plaintiff]. This was visible to me and further validated diagnosis of PTSD.' Such clinical observations qualify as objective medical evidence for purposes of establishing a serious injury ... . Iantorno opined that Vergine was significantly limited in her ability to drive and even distressed as a passenger, conditions that impacted her independence and imposed a significant limitation of her psychological function. We find that this submission presents an issue of fact as to whether Vergine sustained causally-related PTSD, constituting a 'significant limitation of use of a body function or system' (Insurance Law § 5102 [d])." ***Vergine v. Phillips*, 2018 N.Y. Slip Op. 08740, Third Dept 12-20-18**

WORKERS' COMPENSATION, APPEALS.

THE WORKERS' COMPENSATION BOARD DID NOT PROVIDE AN EXPLANATION FOR DISQUALIFYING CLAIMANT FROM FUTURE WAGE REPLACEMENT BENEFITS, MATTER REMITTED SO THAT ASPECT OF THE PENALTY CAN BE REVIEWED ON APPEAL.

The Third Department, remitting the matter to the Workers' Compensation Board, determined the Board must provide some explanation of the discretionary sanction against claimant disqualifying him from future benefits. The Board had found that claimant misrepresented his physical condition, based upon video surveillance evidence. The Third Department held there was sufficient evidence to support the Board's finding on the misrepresentation claim before it, but an explanation for prohibiting future claims was required before that aspect of the penalty could be reviewed on appeal: "Claimant also challenges the Board's imposition of the discretionary sanction disqualifying him from receiving future wage replacement benefits. By not providing any reason for its imposition of this discretionary penalty, the Board failed to satisfy its obligation to 'provide some basis for appellate review' ... . Accordingly, the matter must be remitted so that the Board can fulfill its obligation and 'provide some explanation for its determination in this regard' ...". ***Matter of Papadakis v. Fresh Meadow Power NE LLC*, 2018 N.Y. Slip Op. 08728, Third Dept 12-29-18**

FOURTH DEPARTMENT

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

ARBITRATOR DID NOT EXCEED HIS AUTHORITY IN FINDING THAT THE COLLECTIVE BARGAINING AGREEMENT REQUIRED DUE PROCESS PROTECTIONS, INCLUDING NOTICE, BEFORE AN EMPLOYEE COULD BE TERMINATED FOR ALLEGED MISCONDUCT, ARBITRATOR'S AWARD SHOULD HAVE BEEN CONFIRMED.

The Fourth Department, reversing Supreme Court, determined the arbitration award in this employment matter should have been confirmed. The grievant was employed by the respondent town as a school crossing guard. Without notice, the town's chief of police called the grievant to his office and fired her for alleged misconduct. The arbitrator determined the collective bargaining agreement (CBA) required limited due process protections, including notice, and found termination of the grievant was without just cause: " '[A]n arbitrator exceed[s] his [or her] power' under the meaning of the statute where his [or her] award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' ... . 'Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact' ... . 'An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be' ... . The court lacks the power to review the legal merits of the award, or to substitute its own judgment for that of the arbitrator, 'simply because it believes its interpretation would be the better one' ... . … The 'for cause' language contained in the management rights provision expressly circumscribed respondent's right to discipline or discharge the grievant. The arbitrator interpreted that language, consistent with arbitral precedent, as incorporating a just cause standard that

encompasses a right to due process. We thus conclude that 'the arbitrator merely interpreted and applied the provisions of the CBA, as [he] had the authority to do' ...". ***Matter of Town of Greece Guardians' Club, Local 1170 (Town of Greece)*, 2018 N.Y. Slip Op. 08775, Fourth Dept 12-21-18**

CIVIL PROCEDURE.

PURELY CONCLUSORY ALLEGATIONS IN A COMPLAINT WILL NOT SURVIVE A PRE-ANSWER MOTION TO DISMISS.

The Fourth Department, in determining a negligent training and supervision cause of action was properly dismissed, noted that purely conclusory allegations in a complaint will not survive a pre-answer motion to dismiss: "We reject plaintiffs' contention that the court erred in dismissing the third cause of action, alleging negligent training and supervision. We are cognizant of our duty on a motion to dismiss to 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' .. , and that the issue ' [w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' ... . Nevertheless, although 'it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support . . . Indeed, a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations'... . Here, the only factual allegations in the third cause of action concern the actions of other defendants not involved in this appeal; therefore, plaintiffs' conclusory allegations with respect to defendants fail to state a valid cause of action for negligent training and supervision against them ...". ***Bratge v. Simons*, 2018 N.Y. Slip Op. 08778, Fourth Dept 12-21-18**

CRIMINAL LAW.

INCARCERATION AFTER A PROBATION VIOLATION IN THIS VEHICULAR MANSLAUGHTER CASE DEEMED HARSH AND SEVERE, PROBATION REINSTATED WITH 100 HOURS COMMUNITY SERVICE.

The Fourth Department exercised its discretion to find a legal sentence was unduly harsh and severe. Defendant had been sentenced to incarceration after a probation violation in this vehicular manslaughter case. The Fourth Department reinstated probation with 100 hours of community service: "We agree with defendant ... that the sentence is unduly harsh and severe. 'The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime[s] charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence' ... . Although we conclude that the court did not abuse its discretion in revoking defendant's probation and sentencing her to an indeterminate term of incarceration, 'we can [nevertheless] substitute our own discretion for that of a trial court [that] has not abused its discretion in the imposition of a sentence' ... . Here, defendant, who was 18 years old and had no criminal history at the time of the underlying crimes, completed substance abuse counseling and was fully compliant with the reporting requirement during the nearly 2½ years between her release to probation from an initial period of incarceration and the death of her grandfather ... . A clinical psychologist who treated defendant in the years following the underlying crimes and during the probation period noted that, despite the effects that her grandfather's death had on defendant, she did not revert to previous unhealthy coping mechanisms, i.e., using alcohol and drugs, and she thereafter re-engaged in her treatment program. The psychologist also opined that incarceration would impede defendant's progress and create a setback in her recovery, and that continuation of probation and her treatment program would best facilitate defendant's commitment to a sober, productive lifestyle. Significantly, in consideration of all the circumstances, including a single 'low positive reading' for marihuana approximately one year prior to her grandfather's death that did not result in a violation petition against defendant, the probation officer recommended against incarceration given that defendant was otherwise compliant with the terms of probation until her failure to report on four occasions. Further, the record establishes that defendant was employed on a full-time basis, intended to re-enroll in college classes, and committed no crimes after the underlying conviction." ***People v. Clause*, 2018 N.Y. Slip Op. 08815, Fourth Dept 12-21-18**

CRIMINAL LAW, ATTORNEYS, APPEALS.

LEGAL SENTENCE FOR A PERSISTENT FELONY OFFENDER DRASTICALLY REDUCED IN THE INTEREST OF JUSTICE PURSUANT TO A MOTION FOR A WRIT OF CORAM NOBIS BASED UPON APPELLATE COUNSEL'S FAILURE TO CONTEND THE SENTENCING COURT ABUSED ITS DISCRETION.

The Fourth Department drastically reduced defendant's sentence pursuant to a motion for a writ of coram nobis based on appellate counsel's failure to to contend that the sentencing court abused its discretion in finding defendant to be a persistent felony contender. The Fourth Department found that the sentencing court was not erroneous as a matter of law because it did not act arbitrarily or irrationally. However, the Fourth Department noted that it has the authority to vacate a harsh or severe persistent felony offender finding pursuant to Criminal Procedure Law (CPL) § 470.20(6) and did so. Defen-

dant's 15 to life sentence was reduced to an aggregate sentence of 5 1/2 to 11: "Although defendant has a lengthy criminal history, almost all of his offenses stem from him stealing from stores to get money to support his long-standing drug habit. It does not appear from the presentence report that defendant has ever inflicted violence on anyone, and he certainly did not physically harm anyone in this case. We note that the People never requested that defendant be adjudicated a persistent felony offender; instead, the court sua sponte ordered the persistent felony offender hearing. As noted, the People, in a pretrial plea bargain, offered defendant a sentence of concurrent indeterminate terms of incarceration of 2 to 4 years. Moreover, the judge who initially handled this case transferred it to Drug Treatment Court, which rejected defendant due to his extended period of sobriety—he had been in jail for more than a year at the time awaiting trial. Defendant thus went from having his case transferred to Drug Treatment Court, where successful completion may have resulted in reduction of the felony charges to misdemeanors, to being sentenced to 20 years to life, on the same charges [reduced to 15 to life on a prior appeal]. Such a disparity between the plea offer and the ultimate sentence militates in favor of a sentence reduction, especially for a nonviolent offender such as defendant." ***People v. Ellison*, 2018 N.Y. Slip Op. 08833, Fourth Dept 12-21-18**

CRIMINAL LAW, ATTORNEYS, APPEALS.

ALTHOUGH THE PROSECUTOR WAS GUILTY OF SERIOUS MISCONDUCT, DEFENDANT DID NOT OBJECT TO THE PROSECUTOR'S REMARKS AND REVERSAL IN THE INTEREST OF JUSTICE WAS NOT WARRANTED, TWO-JUSTICE DISSENT.

The Fourth Department determined the prosecutor had exceeded the bounds of the propriety but the prosecutorial misconduct, which was not preserved for appeal by objection, did not warrant reversal. Two dissenting justices argued the misconduct warranted reversal: "We agree with defendant … that the prosecutor exceeded the bounds of propriety by cross-examining a defense witness regarding an uncharged crime that defendant allegedly committed and by placing his own credibility in issue while doing so. 'A prosecutor may not refer to matters not in evidence or call upon the jury to draw conclusions that cannot fairly be inferred from the evidence' ... and, in this case, the prosecutor strayed outside ' the four corners of the evidence' when he implied that defendant committed different crimes ... . Nevertheless, reversal is unwarranted where a prosecutor's error has not substantially prejudiced a defendant's trial ... and, although the dissent is correct that we have previously admonished this prosecutor, the instant trial occurred before that admonition. Therefore, although we strongly condemn the prosecutor's conduct during cross-examination, we conclude that it does not warrant reversal here ... . **From the Dissent:** We agree with defendant that the prosecutor caused him substantial prejudice during the cross-examination of a defense witness. ' It is fundamental that evidence concerning a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate that the defendant was predisposed to commit the crime charged' ... . We further agree with defendant that remarks in the prosecutor's summation were inflammatory and prejudicial. The prosecutor referred to defendant's witnesses as 'liars,' compounding the prejudicial effect of his improper cross-examination ... . More egregiously, the prosecutor referred to defendant as a 'monster' four times." ***People v. Fick*, 2018 N.Y. Slip Op. 08788, Fourth Dept 12-21-18**

CRIMINAL LAW, EVIDENCE.

SENTENCES FOR MURDER AND CRIMINAL POSSESSION OF A WEAPON MUST RUN CONCURRENTLY.

The Fourth Department determined consecutive sentences for murder and criminal possession of a weapon were illegal: "... [T]he sentence is illegal insofar as the court directed that the sentence imposed for criminal possession of a weapon in the second degree shall run consecutively to the sentence imposed for murder in the second degree... . As the People correctly concede, 'the sentence on the murder conviction should run concurrently with the sentence on the weapon possession conviction that requires unlawful intent ... , because the latter offense was not complete until defendant shot the victim[]' ...". ***People v. Maull*, 2018 N.Y. Slip Op. 08780, Fourth Dept 12-21-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE ALFORD PLEA WAS NOT SUPPORTED BY STRONG EVIDENCE OF DEFENDANT'S INTENT TO COMMIT GRAND LARCENY, THE PLEA WAS VACATED IN THE INTEREST OF JUSTICE.

The Fourth Department vacated defendant's Alford plea finding that the record lacked the requisite strong evidence of actual guilt. The defendant and two codefendants were seen by a security guard heading toward the exit of a store with unpaid merchandise in a cart. They abandoned the merchandise near the exit, got in a car, and led the police on a high speed chase resulting in two accidents and injury to a police officer. The Alford plea issue was not preserved but the Fourth Department reviewed it in the interest of justice. The Fourth Department found the evidence of intent to commit grand larceny lacking: "We agree with defendant, however, that County Court erred in accepting his Alford plea because the record lacks the requisite strong evidence of his actual guilt ... . Although defendant failed to preserve that contention for our review by moving to withdraw his plea or to vacate the judgment of conviction ... , and this case does not fall within the rare

exception to the preservation requirement set forth in *People v. Lopez* (71 NY2d 662, 666 [1988]...), we exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]...). The record, which includes sworn grand jury testimony, sufficiently establishes that defendant 'exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights' ... , and that the value of such property exceeded one thousand dollars... . We conclude, however, that the record lacks strong evidence that defendant acted with the intent to deprive the owner of the property or to appropriate the property to himself or to a third person ... . Thus, inasmuch as the record lacks strong evidence that defendant acted with the intent to commit grand larceny in the fourth degree, the record also lacks strong evidence that defendant caused injury to a person in the course of and in furtherance of the commission or attempted commission of that crime or during the immediate flight therefrom ...". ***People v. Johnson*, 2018 N.Y. Slip Op. 08802, Fourth Dept 12-21-18**

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

INSUFFICIENT EVIDENCE THAT DEFENDANT HAD A HISTORY OF DRUG AND ALCOHOL ABUSE, RISK ASSESSMENT REDUCED.

The Fourth Department, in this Sex Offender Registration Act (SORA) risk assessment proceeding, determined there was insufficient evidence that defendant had a history of alcohol and drug abuse: "We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had a history of alcohol and drug abuse ... . The SORA Risk Assessment Guidelines and Commentary for risk factor 11 state in relevant part that '[a]lcohol and drug abuse are highly associated with sex offending . . . The guidelines reflect this fact by adding 15 points if an offender has a substance abuse history . . . It is not meant to include occasional social drinking. In instances where the offender abused drugs and/or alcohol in the distant past, but his more recent history is one of prolonged abstinence, the . . . court may choose to score zero points in this category' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006]). At the SORA hearing, the People presented evidence that defendant drank one can of beer each month. We agree with defendant that such evidence was insufficient to warrant the assessment of points under risk factor 11 ... . The People also presented evidence that defendant smoked marihuana in his teenage years and early twenties, but thereafter participated in a drug treatment program and, at the time of the presentence interview, had not smoked marihuana for four years. We agree with defendant that the People's evidence established that his recent history of drug use was one of prolonged abstinence and was also insufficient to warrant the assessment of points under risk factor 11 ...". ***People v. Madonna*, 2018 N.Y. Slip Op. 08789, Fourth Dept 12-21-18**

EDUCATION-SCHOOL LAW, PERSONAL INJURY, EMPLOYMENT LAW.

INFANT PLAINTIFF WAS ALLEGEDLY SEXUALLY ABUSED BY ANOTHER STUDENT ON A PRIVATE BUS TAKING THE CHILD HOME FROM SCHOOL, CERTAIN NEGLIGENCE CAUSES OF ACTION AGAINST THE SCHOOL SURVIVED A PRE-ANSWER MOTION TO DISMISS, NEGLIGENT SUPERVISION, HIRING AND TRAINING CAUSES OF ACTION DISMISSED BECAUSE THE EMPLOYEES WERE ALLEGED TO HAVE BEEN ACTING WITHIN THE SCOPE OF EMPLOYMENT, TWO DISSENTING JUSTICES ARGUED THE STUDENT WAS NO LONGER IN THE CUSTODY AND CONTROL OF THE SCHOOL WHEN THE ABUSE OCCURRED ON THE BUS.

The Fourth Department, over a two-justice dissent, determined certain negligence causes of action against the school properly survived a pre-answer motion to dismiss. Infant plaintiff, a special needs student, was allegedly sexually abused by another student on a private bus which provided transportation from the school under a contract with the city. All the justices agreed that the negligent hiring, supervision and training causes of action were properly dismissed because the relevant employees were alleged to have been acting within the scope of their employment, rendering the employer liable under the doctrine of respondeat superior. The dissenters argued that the child was no longer in the custody of the school when the child was on the private bus: **From the Dissent:** "'[A] school has a duty of care while children are in its physical custody or orbit of authority' (Chainani v. Board of Educ. of City of N.Y., 87 NY2d 370, 378 [1995]), which generally 'does not extend beyond school premises'... . A school continues to have a duty of care to a child released from its physical custody or orbit of authority only under certain narrow circumstances, specifically, where the school 'releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating' (Ernest v. Red Cr. Cent. Sch. Dist., 93 NY2d 664, 672 [1999], rearg denied 93 NY2d 1042 [1999]...). In determining that the sixth, ninth, twelfth, thirteenth, and fourteenth causes of action adequately set forth a cognizable theory of negligence, the majority effectively ignores the language in Ernest limiting a school's duty of care to instances where 'it releases a child without further supervision'... . Those circumstances do not exist here inasmuch as the child was released to the care of the bus company, which was then responsible for the 'further supervision' of the child (id.). The majority also ignores the precedent set by Chainani, which states that a school that has 'contracted-out responsibility for transportation' to a private bus company 'cannot be held liable on a theory that the children were in [the school's] physical custody at the time of injury' ... . Therefore, defendants' duty of care ended when

the child was released to the physical custody of the bus company, especially where, as here, the bus company was hired by the City and had no contractual relationship with the School." ***Brown v. First Student, Inc.*, 2018 N.Y. Slip Op. 08776, Fourth Dept 12-21-18**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE DELEGATED ITS AUTHORITY TO ORDER VISITATION TO THE THERAPISTS BY CONDITIONING FATHER'S VISITATION ON HIS PARTICIPATION IN THERAPEUTIC COUNSELING.

The Fourth Department determined Family Court should not have conditioned father's visitation upon his participation in therapeutic counseling because the condition effectively delegated the court's power to order visitation to the therapists: "... [T]he court erred in conditioning the father's visitation upon his participation in therapeutic counseling. 'Although a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation'... . Here, the court erred in making participation in counseling the 'triggering event' in determining visitation … . We further conclude that the court impermissibly delegated the decision to hold family therapy sessions to the father's and the child's therapists and therefore improperly gave the therapists the authority to determine if and when visitation would occur... . We therefore modify the order by vacating the sixth, seventh, and eighth ordering paragraphs, and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation between the father and the subject child." ***Matter of Rice v. Wightman*, 2018 N.Y. Slip Op. 08813, Fourth Dept 12-21-18**

FAMILY LAW, CIVIL PROCEDURE.

IN THIS CUSTODY PROCEEDING BROUGHT BY MOTHER, A HEARING IS NECESSARY TO DETERMINE WHETHER NEW YORK HAD JURISDICTION AFTER THE CHILD SPENT FOUR OR FIVE MONTHS WITH FATHER IN NORTH CAROLINA.

The Fourth Department, reversing Family Court, found that a hearing is necessary in this custody proceeding to determine whether New York had jurisdiction after the child spent four or five months in North Carolina: "Petitioner mother appeals from an order that dismissed for lack of jurisdiction her petition for custody of the subject child. Domestic Relations Law § 76 (1) (a) provides in relevant part that a New York court has jurisdiction to make an initial custody determination if New York 'is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent . . . continues to live in this state . . . .' ' Home state' means the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding' (§ 75-a [7]). A period of temporary absence during the six-month time frame is considered part of the time period to establish home-state residency ... . Moreover, if 'a parent wrongfully removes a child from a state, the time following the removal is considered a temporary absence' ... . We conclude that Family Court erred in dismissing the petition based on lack of jurisdiction without holding a hearing. Here, there are disputed issues of fact whether the child's four- or five-month stay in North Carolina constituted a temporary absence from New York State in light of allegations that respondent father withheld the child from the mother for purposes of establishing a 'home state' in North Carolina ... and whether the mother's absence from New York State interrupted the child's six-month pre-petition residency period required by Domestic Relations Law § 76 (1) (a) ...". ***Matter of Dean v. Sherron*, 2018 N.Y. Slip Op. 08807, Fourth Dept 12-21-18**

FAMILY LAW, CIVIL PROCEDURE, MENTAL HYGIENE LAW, SOCIAL SERVICES LAW.

HEARING IS REQUIRED TO DETERMINE WHETHER A GUARDIAN SHOULD BE APPOINTED FOR MOTHER IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, MOTHER SUFFERS FROM SCHIZOPHRENIA.

The Fourth Department, reversing Family Court, determined a guardian should have been appointed for mother in the proceeding which terminated her parental rights: "It is well settled that courts cannot 'shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such. There is a duty on the courts to protect such litigants'... . Indeed, '[t]he public policy of this State . . . is one of rigorous protection of the rights of the mentally infirm'... . Thus, 'where there is a question of fact . . . whether a guardian ad litem should be appointed, a hearing must be conducted' ... , and the failure to make such an inquiry once a meritorious question of a litigant's competence has been raised requires remittal ... . [W]e conclude that a meritorious question of the mother's competence was raised. It is of no moment that the mother's attorney did not move for the appointment of a guardian ad litem inasmuch as the court may make such an appointment on its own initiative (see CPLR 1202 [a] ...). ...There is no dispute that the mother, who had been diagnosed with, inter alia, schizophrenia, had been in and out of psychiatric hospitals throughout her life. … Given 'the magnitude of the rights at stake [in a termination proceeding], as well as the allegations of mental illness' ..., we conclude that the court

erred in failing to hold a hearing on whether a guardian ad litem should have been appointed for the mother." ***Matter of Jesten J.F. (Ruth P.S.)*, 2018 N.Y. Slip Op. 08812, Fourth Dept 12-21-18**

FAMILY LAW, CIVIL RIGHTS LAW.

SUPREME COURT SHOULD NOT HAVE AUTHORIZED CHANGING THE CHILD'S NAME TO A NAME NOT REQUESTED IN FATHER'S PETITION, A HEARING IS REQUIRED TO DETERMINE WHETHER THE NAME CHANGE IS IN THE CHILD'S BEST INTERESTS.

The Fourth Department, reversing Supreme Court, determined that the court should not have authorized a change in the child's name to a different name than that requested in father's petition. The Fourth Department further found that a hearing to determine whether the name change is in the best interests of the child must be held: "The father filed the instant petition seeking to change the last name of the child to his surname and to alter the child's first name because the father's older daughter has the same name and lives with him and the child. The mother opposed the petition via sworn affidavit and provided a list of alternative names for the child to which she would not object. In its order, Supreme Court authorized the child to assume one of the names proposed by the mother, concluding that 'the inclusion of both biological parents' names in a child's last name is reasonable and in the best interests of the child, particularly where, as here, both parents are active participants in the child's life.' Thus, the court, in essence, denied the father's petition in its entirety, and the father appeals. ... Civil Rights Law § 63 provides that, upon presentation of a petition for a name change, if the court 'is satisfied . . . that the petition is true, and that there is no reasonable objection to the change of name proposed, . . . the court shall make an order authorizing the petitioner to assume the name proposed.' In the absence of a cross petition filed by the mother proposing a name change for the child, the only name that was properly before the court for consideration was the name change sought by the father in his petition. Furthermore, 'if the petition be to change the name of an infant, . . . the interests of the infant [must] be substantially promoted by the change'... . 'With respect to the interests of the infant, the issue is not whether it is in the infant's best interests to have the surname of the mother or father, but whether the interests of the infant will be promoted substantially by changing his [or her] surname' ... . 'As in any case involving the best interests standard, whether a child's best interests will be substantially promoted by a proposed name change requires a court to consider the totality of the circumstances' ...". ***Matter of Segool v. Fazio*, 2018 N.Y. Slip Op. 08799, Fourth Dept 12-21-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT SHOULD NOT HAVE GRANTED GRANDMOTHER'S PETITION FOR VISITATION, THE PARENTS WERE FIT AND THEIR TESTIMONY SHOULD HAVE BEEN GIVEN WEIGHT, INSTEAD FAMILY COURT IGNORED THE PARENTS' TESTIMONY.

The Fourth Department, reversing Family Court, determined the record did not support granting visitation rights to grandmother. The parents of the children were deemed fit and the relationship between the parents and the children was deemed to be loving and supportive. Therefore the wishes of the parents were to be given weight, Family Court ignored the testimony of the parents. Grandmother is an attorney who practices in Family Court. After a minor argument at her home between father and his brother, grandmother instituted litigation, which the Fourth Department characterized as using her position in the legal system to undermine the parental relationship: "It is well established that a fit parent has a 'fundamental constitutional right' to make parenting decisions ... . For that reason, the Court of Appeals has emphasized that 'the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one' ... . Because the parents are fit, their decision to prevent the children from visiting the grandmother is entitled to 'special weight' ... . [The] evidence makes it difficult to draw any conclusion other than that the grandmother 'is responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact [her] behavior would have on the [family relationships] and making no effort to mitigate that impact' ...". ***Matter of Jones v. Laubacker*, 2018 N.Y. Slip Op. 08822, First Dept 12-20-18**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

EXPERTS MAY NOT RELY ON DISPUTED FACTS IN RENDERING AN OPINION IN A MEDICAL MALPRACTICE CASE.

The Fourth Department, modifying Supreme Court in this medical malpractice action, noted that experts cannot rely on disputed facts when rendering an opinion: "Although defendants submitted affidavits from medical experts opining that the individual defendants did not deviate from the standard of care and that any alleged deviation was not a proximate cause of the postsurgery medical complications, those experts relied solely on the symptoms as documented in the medical records of [two of the defendants]. ... [T]hose symptoms are vastly different from the symptoms allegedly reported to the remaining defendants and demonstrated by plaintiff before the surgery. It is well settled that experts may not rely upon disputed facts when rendering an opinion ... . Moreover, we note that defendants' experts failed to address plaintiff's contention that, had he been timely diagnosed, he would not have been required to undergo the surgery in the first place. ... 'By ignoring the

[allegation that the remaining defendants' malpractice caused plaintiff to undergo the very surgery that caused the brain bleed], defendant[s'] expert[s] failed to tender[ ] sufficient evidence to demonstrate the absence of any material issues of fact' . . . as to proximate causation and, as a result, [the remaining] defendant[s] [were] not entitled to summary judgment' with respect to those parts of their respective motions and cross motions ...". ***Kubera v. Bartholomew*, 2018 N.Y. Slip Op. 08784, Fourth Dept 12-21-18**

MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

CITY EMPLOYEE'S CONTRACTUAL RIGHT TO MEDICAL BENEFITS VESTED BEFORE THE COLLECTIVE BARGAINING AGREEMENT WAS TERMINATED.

The Fourth Department determined that plaintiff city employee's medical benefits vested before the collective bargaining agreement (CBA) was terminated: " 'As a general rule, contractual rights and obligations do not survive beyond the termination of a collective bargaining agreement . . . However, [r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement' . . . , and we must look to well established principles of contract interpretation to determine whether the parties intended that the contract give rise to a vested right. [A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' ... . [W]e conclude that the court properly determined that the plain meaning of the provisions at issue in the ... CBA establishes that plaintiff has a vested right to medical benefits, those rights vested when he completed his 20th year of service, and plaintiff became eligible to receive said benefits when he reached retirement age... . Plaintiff's right to medical benefits vested when he satisfied the criteria in the ... CBA, and there is no language in the ... CBA indicating that employees would forfeit or surrender their vested rights if they transferred jobs or unions prior to reaching retirement age. We thus conclude that the court's interpretation of the ... CBA 'give[s] fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized . . . [and does] not . . . leave one of its provisions substantially without force or effect' ...". ***Timkey v. City of Lockport*, 2018 N.Y. Slip Op. 08792, Fourth Dept 12-21-18**

PERSONAL INJURY, EVIDENCE.

ISSUE OF FACT WHETHER DRIVER WITH THE RIGHT OF WAY SHOULD HAVE SEEN THE CAR THAT WAS NOT SLOWING DOWN AS IT APPROACHED THE INTERSECTION, SUPREME COURT REVERSED, TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined Supreme Court should not have granted the Sile defendants' motion for summary judgment in this intersection traffic accident case. Matthew Sile had the right of way when his truck was broadsided by a car (driven by Buck) which failed to stop an the intersection. The majority held that the papers submitted by the Sile defendants raised an issue of fact whether Matthew Sile should have seen the Buck car which was not slowing down as it approached the intersection: "Although plaintiffs do not dispute that Buck was negligent in violating the Vehicle and Traffic Law or that Matthew had the right-of-way as he proceeded straight through the intersection, it is well settled that 'there may be more than one proximate cause of [a collision]' ... . Thus, in their motions, the Sile defendants had the initial burden of establishing as a matter of law either that Matthew was not negligent or that any negligence on his part was not a proximate cause of the accident... . We conclude in both appeals that the Sile defendants failed to meet that burden ... . Although 'a driver who has the right[-]of[-]way is entitled to anticipate that [the drivers of] other vehicles will obey the traffic laws that require them to yield' ... , that driver nevertheless has a 'duty to exercise reasonable care in proceeding through [an] intersection' ... , and 'cannot blindly and wantonly enter an intersection'... . Here, by their own submissions, the Sile defendants raised a triable issue of fact whether Matthew met his 'duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' ...". ***Gilkerson v. Buck*, 2018 N.Y. Slip Op. 08782, Fourth Dept 12-21-18**

REAL PROPERTY LAW, CIVIL PROCEDURE, JUDGES.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, SEARCHED THE RECORD AND ISSUED A DECLARATORY JUDGMENT ALLOWING PLANTIFFS TO PAVE AN EASEMENT.

The Fourth Department, reversing Supreme Court, determined Supreme Court should not have, sua sponte, searched the record and issued a declaratory judgment allowing plaintiffs to pave an easement and further should not have granted defendant's motion for summary judgment. Plaintiffs have an easement which allows access to their driveway. Plaintiffs alleged the easement needed to be paved because their vehicle would hit bottom crossing it: "A party's right of passage over an easement carries with it the 'right to maintain it in a reasonable condition for such use' ... . The right to repair and maintain an easement includes 'the right to carry out work as necessary to reasonably permit the passage of vehicles and, in so doing, to not only remove impediments but supply deficiencies in order to construct [or repair] a suitable road' ... .

The right to repair and maintain, however, is 'limited to those actions necessary to effectuate the express purpose of [the] easement' ... , and thus the work performed must not 'materially increase the burden of the servient estate[] or impose new and additional burdens on the servient estate[]' ... . Relatedly, the servient landowner has a 'corresponding right[] to have the natural condition of the terrain preserved, as nearly as possible' . . . and to insist that the easement enjoyed shall remain substantially as it was at the time it accrued, regardless of whether benefit or damage will result from a proposed change' ... . Defendant contends on his appeal that the court erred in searching the record and entering a declaratory judgment in plaintiffs' favor. We agree. As an initial matter, although plaintiffs did not seek declaratory relief, the court has the authority to 'grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just' (CPLR 3017 [a]...). We conclude, however, that the declaration was not appropriate given the evidence presented here." ***Tarsel v. Trombino*, 2018 N.Y. Slip Op. 08779, Fourth Dept 12-21-18**

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