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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

DNA TEST RESULTS DEEMED TESTIMONIAL HEARSAY TRIGGERING DEFENDANT'S RIGHT TO CONFRONT THE ANALYST(S) WITH FIRST-HAND KNOWLEDGE OF CRUCIAL STAGES OF THE ANALYSIS.

The Court of Appeals, in an extensive opinion by Judge DiFiore, over an equally extensive three-judge dissenting opinion, determined the results of DNA testing, which matched defendant's DNA to that found on a weapon, should not have been admitted based solely on the testimony of a laboratory analyst who did not witness crucial aspects of the testing. The evidence was deemed "testimonial" requiring the People to produce a witness with first-hand knowledge who can be cross-examined about essential aspects of the analysis: "Here, there was a criminal action pending against defendant, and the gun, found in the basement of a multifamily dwelling where defendant lived, was evidence seized by police for that prosecution. Swabs from the gun were then tested by an accredited public DNA crime laboratory with the primary (truly, the sole) purpose of proving a particular fact in a criminal proceeding — that defendant possessed the gun and committed the crime for which he was charged. The testing analysts purposefully recorded the DNA profile test results, thereby providing the very basis for the scientific conclusions rendered thereon. Under these circumstances, the laboratory reports as to the DNA profile generated from the evidence submitted to the laboratory by the police in a pending criminal case were testimonial. The DNA profiles were generated in aid of a police investigation of a particular defendant charged by an accusatory instrument and created for the purpose of substantively proving the guilt of a defendant in his pending criminal action." ***People v. John*, 2016 N.Y. Slip Op. 03208. CtApp 4-28-16**

FIRST DEPARTMENT

ARBITRATION, CONTRACT LAW.

ARBITRABLE CLAIMS WHICH ARE INEXTRICABLY TIED TO CLAIMS ALREADY IN COURT SHOULD BE LITIGATED IN COURT.

The First Department, over a two-justice dissent, reversing Supreme Court, determined the contract disputes should be litigated, despite arbitration clauses in some of the related agreements. One of the agreements, the Quennington Agreement, included a forum selection clause which designated the courts as the sole forum for dispute resolution. The First Department held that the forum selection clause demonstrated the intent of the parties, and the fact the Quennington Agreement had been terminated by a subsequent agreement did not contradict that intent. The issues which were arguably subject to arbitration under the other agreements were deemed to be intertwined with the issues which were already in court pursuant to the Quennington Agreement: "Although this Court does not appear to have directly addressed the issue, the other Departments have held that, where some of a group of claims are covered by an arbitration agreement, it is appropriate to litigate the entire group in court if all of the claims were already asserted in court and the claims not subject to arbitration would be 'inextricably bound together' with the claims that are subject to arbitration ... . Here, one could argue that all of the claims in the complaint arose under the Quennington Agreement ... . [E]ven if some of the claims could be said to arise out of the Quennington Agreement, and others out of [another agreement], they are cut from the same cloth, and are, unquestionably, inextricably bound together and therefore should be litigated in court." ***Garthon Bus. Inc. v. Stein*, 2016 N.Y. Slip Op. 03102, 1st Dept 4-26-16**

CONTRACT LAW.

REFORMATION OF CONTRACT TO CORRECT THE NAMING OF THE WRONG PARTY TO BE INDEMNIFIED, A MUTUAL MISTAKE, SHOULD HAVE BEEN ALLOWED.

The First Department, reversing Supreme Court, determined an indemnification agreement could be reformed on the grounds of mutual mistake. The wrong party was named as the "owner" and, therefore, the true owner was not named in the hold harmless clause of the indemnification agreement: " 'A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake' ... . To succeed, the party asserting mutual mistake must establish by 'clear, positive and convincing evidence' that the agreement does not accurately express the parties' inten-

tions or previous oral agreement ... . Parol evidence may be used . . . , and reformation is an appropriate remedy where the wrong party was named in the contract ... . On the record before us, plaintiffs clearly and convincingly established that K & K intended to indemnify the true owner, 313 West, and that, as a result of mutual mistake, the agreement misidentified Solil, the managing agent, rather than 313 West itself, as the 'Owner' of the property where the work was to be performed." ***313-315 W. 125th St. L.L.C. v. Arch Specialty Ins. Co.*, 2016 N.Y. Slip Op. 03105, 1st Dept 4-26-16**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT SHOULD HAVE BEEN PRESENT WHEN DEFENSE COUNSEL, DURING THE TRIAL, REQUESTED TO BE RELIEVED FROM REPRESENTING DEFENDANT; NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction, determined defendant should have been present when defense counsel explained his concerns about defendant to the judge and asked to be relieved from representing the defendant. The request was denied: "In conducting a colloquy on defense counsel's request to be relieved, the court erred in failing to permit defendant to provide any input, or to even be present. At least by the time that the substance of counsel's ex parte application became clear, defendant should have been included in the proceeding. ...[T]his proceeding was an 'ancillary proceeding[] [at which] he . . . may have [had] something valuable to contribute' . . . , and thus that his exclusion from it was error. While defendant may not have been able to justify counsel's removal, we cannot say that the 'new matter' brought to light at the ex parte proceeding — where counsel revealed the content of a privileged communication with the court, and expressed the belief that defendant's criticisms of his performance were insincere attempts to sow error in the record — implicated 'no potential for meaningful input from [] defendant' . . . on the subject of whether continued representation by counsel was appropriate. The proceeding also implicated the court's obligation to make a 'minimal inquiry' regarding whether the new facts justified substitution of counsel ...". ***People v. Moya*, 2016 N.Y. Slip Op. 03241, 1st Dept 4-28-16**

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT, MUNICIPAL LAW.

OUT-OF-POSSESSION LANDLORD CAN BE LIABLE UNDER LABOR LAW §§ 240 AND 241.

The First Department noted that an out-of-possession landlord can be held liable for Labor Law §§ 240 and 241 claims: "[T]he court improperly dismissed the Labor Law §§ 240 and 241 claims on the ground that the City was an out-of-possession landlord, since the statutes impose liability on property owners without regard to the owner's degree of supervision or control over the premises ...". ***Siguencia v. City of New York*, 2016 N.Y. Slip Op. 03108, 1st Dept 4-26-16**

PERSONAL INJURY.

PEDESTRIAN IN A CROSSWALK STRUCK FROM BEHIND IS NOT COMPARATIVELY NEGLIGENT AS A MATTER OF LAW.

The First Department, in a full-fledged opinion by Justice Saxe, determined plaintiff pedestrian was not comparatively negligent as a matter of law, and therefore plaintiff's motion for summary judgment should have been granted. Plaintiff was crossing a street in the crosswalk, with the light, when he was struck from behind: "[W]e hold that as a matter of law, plaintiff, who was struck by a bus that approached from behind and to the right, and which turned left into the crosswalk where it struck plaintiff, may not be held comparatively negligent based on a theory that he could have seen and avoided the bus through the exercise of ordinary care." ***Quintavalle v. Perez*, 2016 N.Y. Slip Op. 03126, 1st Dept 4-26-16**

PERSONAL INJURY, LANDLORD-TENANT, MUNICIPAL LAW (NYC).

VERTICAL LADDER FIRE ESCAPE, THROUGH WHICH PLAINTIFF FELL AND WAS RENDERED PARAPLEGIC, VIOLATED MULTIPLE DWELLINGS LAW § 53.

The First Department, in a full-fledged opinion by Justice Tom, determined the owner of an apartment building was in violation of Multiple Dwelling Law § 53, which prohibited vertical ladder fire escapes. Plaintiff fell through the hole in the vertical ladder fire escape when she was visiting her friend's apartment. Plaintiff was rendered paraplegic and sued the building owner: "[I]n 1948, the Legislature amended the section to add language to subsection nine of Multiple Dwelling Law § 53 (*see* Laws of New York, 1948, ch 850). The law was entitled 'An Act to amend the multiple dwelling law, in relation to existing fire escapes,' and subsection nine, as amended, expressly states that '[a] wire, chain cable, vertical ladder or rope fire-escape is an unlawful means of egress. Every such fire-escape, if required as a means of egress, shall be removed and replaced by a system of fire-escapes constructed and arranged as provided in this section' (Multiple Dwelling Law § 53[9]). A plain reading of the clear and unambiguous language of subsection nine leads to the conclusion that all vertical ladders on multiple dwellings, regardless of when the fire escape was constructed, are unlawful and must be removed and replaced by a fire escape that complies with the provisions of Multiple Dwelling Law § 53. Notably, the section includes no exceptions of any kind ...". ***Klupchak v. First E. Vil. Assoc.*, 2016 N.Y. Slip Op. 03276, 1st Dept 4-28-26**

SECOND DEPARTMENT

CRIMINAL LAW.

FOR CAUSE JUROR CHALLENGE SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED.

The Second Department determined the trial judge's denial of the defense's for cause juror challenge was reversible error: "CPL 270.20(1)(b) provides that a prospective juror may be challenged for cause if the juror 'as a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at the trial.' Where an issue is raised concerning the ability of a prospective juror to be fair and impartial, the prospective juror must state unequivocally that his or her prior state of mind will not influence his or her verdict, and that he or she will render an impartial verdict based solely on the evidence ... . A prospective juror's responses, construed as a whole, must demonstrate an absolute belief that his or her prior opinion will not influence his or her verdict ... . Here, during voir dire, one prospective juror indicated in response to questioning by defense counsel that, because she had a 14-year-old daughter and a 17-year-old daughter, this 'could' weigh on her ability to be fair and impartial because '[t]hey are the same age range' as the complainant. When defense counsel followed up by asking, '[w]ould you fear whether or not you could be fair and impartial?,' the prospective juror responded by stating, ' think it would be hard for me to watch a witness, being that I have daughters the same age.' Once the prospective juror expressed doubt regarding her ability to be impartial, it was incumbent upon the court to ascertain that she would render an impartial verdict based on the evidence ... . This was not done." ***People v. Valdez*, 2016 N.Y. Slip Op. 03203, 2nd Dept 4-27-16**

CRIMINAL LAW, EVIDENCE.

DEFENDANT RAISED SUBSTANTIVE FACTUAL DISPUTES ABOUT THE EFFICACY AND LEGALITY OF METHODS USED BY THE POLICE TO IDENTIFY HIS IP ADDRESS AND THE CONTENTS OF HIS COMPUTER, SUPPRESSION HEARING WAS REQUIRED.

The Second Department, in this child pornography case, determined Supreme Court should not have denied defendant's motion to suppress evidence seized from his computer without a hearing. The defense motion papers raised substantive factual disputes concerning the efficacy and legality of methods and software used by the police to identify defendant's IP address and the contents of defendant's computer, issues which can only be resolved by a hearing: "In determining a motion to suppress evidence, the court 'is required to grant a hearing if the defendant raise[s] a factual dispute on a material point which must be resolved before the court can decide the legal issue' of whether evidence was obtained in a constitutionally permissible manner' ... . '[T]he sufficiency of [a] defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information' ... . In his omnibus motion, the defendant contended that the search warrant was not supported by probable cause. The defendant's motion included detailed factual allegations regarding the functioning of peer-to-peer networks and, based on these assertions, challenged the detective's contention in the warrant application that he was able to identify child pornography files that actually existed on the defendant's computer. In his separate suppression motion, the defendant raised a factual dispute, inter alia, as to whether the use of certain software or other activity by the investigating detective prior to securing the warrant constituted a search of his computer." ***People v. Worrell*, 2016 N.Y. Slip Op. 03206, 2nd Dept 4-27-16**

DEBTOR-CREDITOR, ACCOUNT STATED.

CITIBANK NOT ENTITLED TO SUMMARY JUDGMENT UNDER AN ACCOUNT STATED THEORY TO COLLECT A CREDIT CARD DEBT.

The Second Department determined plaintiff bank (Citibank) was not entitled to summary judgment on its account stated cause of action. Defendant's credit card balance increased substantially every month when he failed to pay. The bank increased the interest rate from 3.99% and 6.99% to 29.99%. Between May and November, the credit card balance increased from under $24,000 to over $27,000. Defendant made a $75 payment at some point: "Citibank failed . . . to establish that the defendant retained this final monthly statement without objecting to the 'total new balance' contained on the statement within a reasonable time. In her affidavit, the Citibank employee averred that the 'attached Account Statement does not reflect any outstanding disputes on the account.' However, the fact that the final statement did not reflect a protest does not prove that the defendant did not dispute the statement, since any protest would necessarily come after the statement was received by the defendant. Moreover, the record does not establish when the defendant sent a partial payment of $75, and, in any event, that payment was so small in relation to the alleged amount due that it does not give rise, prima facie, to an inference of assent to the total amount alleged to be due ...". ***Citibank (South Dakota), N.A. v. Abraham*, 2016 N.Y. Slip Op. 03133, 2nd Dept 4-27-16**

INSURANCE LAW.

INSURED'S EXCUSES FOR DELAY IN NOTIFYING INSURANCE BROKERS OF PENDING ACTION NOT SUPPORTED BY SUFFICIENT EVIDENCE, SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BROKERS PROPERLY GRANTED.

The Second Department determined Supreme Court properly granted summary judgment in favor of the defendant-insurance-brokers who procured the policy on the plaintiff-insured's behalf. The insured did not notify the brokers of the action against the insured for 52 days. The excuses offered by the insured for the delay (complicated policy language, good-faith belief insured was not liable) were not supported by sufficient evidence: "Where an insurance policy requires an insured to provide notice 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time. The insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract' ... . '[T]here may be circumstances that excuse a failure to give timely notice, such as where the insured has a good-faith belief of nonliability,' provided that belief is reasonable' ... . It is the insured's burden to demonstrate the reasonableness of the excuse ... . 'Ordinarily, the question of whether the insured had a good-faith belief in nonliability, and whether that belief was reasonable, presents an issue of fact and not one of law' ... . 'Nevertheless, the issue of whether an insured's excuse for the delay is reasonable may be determined as a matter of law where the evidence, construing all inferences in favor of the insured, establishes that the belief was unreasonable or in bad faith' ...". ***Rockland Exposition, Inc. v. Marshall & Sterling Enters., Inc.*, 2016 N.Y. Slip Op. 03157, 2nd Dept 4-27-16**

PERSONAL INJURY, EVIDENCE.

STATEMENT IN HOSPITAL RECORD ATTRIBUTED TO PLAINTIFF WAS ADMISSIBLE AS PART OF A BUSINESS RECORD AND AS A PARTY ADMISSION, STATEMENT SHOULD NOT HAVE BEEN EXCLUDED FROM TRIAL.

The Second Department determined defendant was entitled to a new trial on liability because a statement attributed to the plaintiff in a hospital report should not have been excluded. Plaintiff alleged she was struck by defendant's vehicle as she walked behind it. The statement attributed to plaintiff indicated only that she fell in the road. The nurse who wrote the statement would have testified the plaintiff made the statement. The statement was admissible as part of a business record (hospital record) because it was germane to treatment or diagnosis. The statement was also admissible as a party admission: " 'Such records are admissible if the proponent offers either foundational testimony under CPLR 4518(a) or certification under CPLR 4518(c)' ... . The defendants should have been permitted to call the nurse to testify to establish a foundation for the admission of the entry from the hospital record as a business record. A hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient ... . Further, 'if the entry is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to diagnosis or treatment, as long as there is evidence connecting the party to the entry' ... . In this case, the nurse, had she been permitted to testify, would have provided the evidence connecting the plaintiff to the entry, and, since the entry was inconsistent with the plaintiff's position at trial, which was that she was struck by the vehicle, the entry would be admissible as a party admission." ***Berkovits v. Chaaya*, 2016 N.Y. Slip Op. 03131, 2nd Dept 4-27-16**

PERSONAL INJURY, EVIDENCE.

DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE, THE JURY FOUND DEFENDANT NEGLIGENT AND THERE WAS NO REASONABLE VIEW OF THE EVIDENCE IN WHICH DEFENDANT'S NEGLIGENCE WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT.

The Second Department determined plaintiffs' motion to set aside the defense verdict as against the weight of the evidence should have been granted. Defendant acknowledged she turned right coming out of a parking lot but was looking to her left. Defendant struck the pedestrian plaintiffs. The jury found defendant was negligent but that her negligence was not a proximate cause of the accident. The court noted that the plaintiffs may also have been negligent, but there was no reasonable view of the evidence in which defendant's negligence was not a proximate cause: "[T]he jury's determination that the defendant's negligence was not a proximate cause of the accident did not rest upon any fair interpretation of the evidence ... . The issues of negligence and proximate cause are so inextricably interwoven in this case that the jury's finding that the defendant was negligent cannot be reconciled with its finding that the negligence was not a proximate cause of the accident ... . That is, the defendant admitted that she turned right out of a parking lot while looking to her left despite the fact that she knew that pedestrians crossed 71st Avenue at that location to access the parking lot from which she was exiting. Notwithstanding any negligence on the part of the plaintiffs, the defendant's negligence in driving in one direction while looking in the other direction and thereby failing to see pedestrians who were there to be seen in the middle of the street was a substantial, not a slight or trivial, cause of this accident ... . Accordingly, although the plaintiffs may also have been negligent, no fair interpretation of the evidence supports the jury's finding that the defendant's negligence was not a proximate cause of the accident." ***Cruz v. Jeffrey*, 2016 N.Y. Slip Op. 03134, 2nd Dept 4-27-16**

PERSONAL INJURY, MUNICIPAL LAW.

CODE PROVISION DID NOT SPECIFICALLY IMPOSE TORT LIABILITY ON ABUTTING LANDOWNERS FOR BREACH OF THE DUTY TO MAINTAIN THE SIDEWALK, LANDOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined, under the town code, defendant abutting landowner was not liable for a sidewalk slip and fall. Although the code provision imposed a duty to maintain the sidewalk on the abutting landowner, the provision did not specifically impose tort liability: "Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality, and not the abutting landowner ... . 'However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates [him or her] to maintain the sidewalk' ... . 'In order for a statute, ordinance or municipal charter to impose tort liability upon an abutting owner for injuries caused by his or her negligence, the language thereof must not only charge the landowner with a duty, it must also specifically state that if the landowner breaches that duty he [or she] will be liable to those who are injured' ...". ***Kilfoyle v. Town of N. Hempstead*, 2016 N.Y. Slip Op. 03141, 2nd Dept 4-27-16**

PERSONAL INJURY, MUNICIPAL LAW.

MOTION TO AMEND NOTICE OF CLAIM TO ADD NEW THEORY OF LIABILITY SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the notice of claim should not have been granted. The notice of claim alleged plaintiff fell because of an uneven, broken sidewalk. The amended notice of claim alleged plaintiff slipped on snow or ice: " 'Amendments to notices of claim are appropriate only to correct good faith and nonprejudicial technical mistakes, defects or omissions, not substantive changes in the theory of liability' ... . Here, the proposed amendments to the notice of claim included a substantive change to the facts and added a new theory of liability. 'Such changes are not technical in nature and are not permitted as late-filed amendments to a notice of claim under General Municipal Law § 50-e[6]' ... . Moreover, under the circumstances of this case, the granting of leave to serve and file the proposed amended notice of claim prejudiced NYCHA by depriving it of the opportunity to promptly and meaningfully investigate the claim ...". ***Robinson .v City of New York*, 2016 N.Y. Slip Op. 03156, 2nd Dept 4-27-16**

TRUSTS AND ESTATES.

BENEFICIARIES OF ESTATE DID NOT HAVE STANDING TO BRING AN ACTION TO PRESERVE AN ESTATE ASSET, ONLY THE PERSONAL REPRESENTATIVE OF THE ESTATE HAS THAT POWER.

The Second Department determined plaintiffs, who were beneficiaries of decedent's estate, did not have standing to bring an action seeking to recover and preserve an asset allegedly wrongfully diverted from decedent's estate prior to her death. Only a personal representative of the estate could bring the action: "EPTL 11-3.2(b) provides that a cause of action for injury to person or property is not lost because of the death of the person in whose favor the cause of action existed, as the cause of action may be commenced or continued by the decedent's personal representative. '[A] beneficiary, absent extraordinary circumstances . . . , cannot act on behalf of [an] estate or exercise [a] fiduciary's rights with respect to estate property' ... . Rather, '[t]he appropriate avenue is to be appointed a representative pursuant to the requirements of the EPTL' ... . Here, the Supreme Court correctly determined that the plaintiffs lacked standing to commence an action to recover and preserve an asset alleged to have been wrongfully diverted from the decedent's estate prior to her death ... . The plaintiffs, as individual beneficiaries of the decedent's estate, had no independent right to maintain an independent cause of action for the recovery of estate property, as such a right belonged to the personal representative of the decedent's estate ...". ***Stallsworth v. Stallsworth*, 2016 N.Y. Slip Op. 03161, 2nd Dept 4-27-16**

THIRD DEPARTMENT

CRIMINAL LAW, PAROLE.

PRISONER CONVICTED OF A CRIME COMMITTED WHEN HE WAS 16 AND SUBJECT TO A LIFE SENTENCE IS CONSTITUTIONALLY ENTITLED TO A PAROLE HEARING WHICH TAKES HIS YOUTH AT THE TIME OF THE OFFENSE INTO ACCOUNT.

The Third Department, in a full-fledged opinion by Justice McCarthy, over a concurrence and a two-justice partial dissent, determined petitioner was entitled to a de novo parole hearing in which his age at the time of the offense, 16, is taken into account. Claimant was convicted of strangling his 14-year-old girlfriend and was sentenced to 22 years to life. Since serving 22 years in 2000, claimant, now 54, has been denied parole nine times. The Third Department ruled that the Eighth Amendment protection against cruel and unusual punishment required that the parole board consider petitioner's youth at the time of the offense, noting that claimant has a right not to be punished with a life sentence if the crime reflects tran-

sient immaturity: "[T]he Supreme Court of the United States held in *Miller v Alabama* (supra) that mandatory sentences of life without the possibility of parole for juvenile homicide offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment (*id*. at 2460). As that Court has since clarified, a substantive rule announced in *Miller* is 'that life without parole is an excessive sentence for children whose crimes reflect transient immaturity' (*Montgomery v Louisiana*, 136 S Ct at 735). The Court considered this guarantee in the context of the sentencing stage, and it found that the 'procedural requirement necessary to implement [this] substantive guarantee' is 'a hearing where youth and its attendant characteristics are considered' for the purpose of 'separat[ing] those juveniles who may be sentenced to life without parole from those who may not' ... . * * * A parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." ***Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision*, 2016 N.Y. Slip Op. 03236, 3rd Dept 4-28-16**

UNEMPLOYMENT INSURANCE.

PART-TIME ATTORNEY WAS AN EMPLOYEE OF SOLO PRACTITIONER.

The Third Department determined a part-time attorney was an employee of a solo practitioner, Charleston, who worked out of an office in the basement of his house: "Here, the record reflects that Charleston assigned specific legal work to the attorney, advised him of the general deadline associated with each assignment and paid him a set hourly rate for his services, which he received once the relevant clients paid their bills. While the attorney was free to accept or reject assignments, work from home and dictate his own schedule, the nature and frequency of the assignments were controlled by Charleston, and Charleston retained ultimate responsibility to the clients for the quality of the work performed. In addition, Charleston negotiated all retainer agreements, co-billed for his and the attorney's services, reimbursed the attorney for parking expenses, regardless of whether the clients paid that portion of their bills, and, at all times, remained the attorney of record. Furthermore, Charleston and the attorney did not have a written contract and the attorney was permitted to, and often did, use Charleston's office and equipment to carry out his assignments. Thus, despite evidence in the record that could support a contrary result, the Board's finding of an employment relationship is supported by substantial evidence ... ." ***Matter of Charleston (Commissioner of Labor)*, 2016 N.Y. Slip Op. 03230, 3rd Dept 4-28-16**

UNEMPLOYMENT INSURANCE.

NURSE WAS AN EMPLOYEE OF COMPANY WHICH DOES HEALTH SCREENING OF EMPLOYEES OF CORPORATE CLIENTS.

The Third Department determined a nurse who worked for Summit Health, which screens employees of corporate clients, was an employee entitled to unemployment insurance benefits: "Summit posted openings for medical examiners on its website, interviewed applicants and screened their education, license credentials and experience to ensure their qualifications and ability to perform the required medical services. Summit scheduled the clinics with its clients, who determined what services were needed; Summit then posted the clinic dates, enabling examiners to sign up to work based upon their availability, and they were paid a set hourly rate. Summit provided all of the equipment and supplies for the clinics and reimbursed the examiners for certain travel and other expenses. If examiners could not work as scheduled, they reported to Summit, which looked for a replacement. Summit solicited claimant to work for it after reviewing her credentials posted on a job website. Claimant worked as a health examiner and a registrar as well as a lead examiner responsible for oversight of the clinic, bringing and returning supplies and equipment provided by Summit, submitting patient consent forms to Summit, resolving problems and reporting back to Summit after the clinic was completed. Examiners were required to sign contracts designating them as independent contractors, which obligated them to comply with industry best practices and provided training available for that purpose; they were required to wear a Summit identification badge and to abide by a dress code at clinics, among other provisions. Given the foregoing, we find that there was substantial evidence to support the Board's determination that Summit retained sufficient overall control over the work performed by claimant to establish that she was an employee of Summit ...". ***Matter of Armbruster (Summit Health, Inc. — Commissioner of Labor)*, 2016 N.Y. Slip Op. 03231, 3rd Dept 4-28-16**

UNEMPLOYMENT INSURANCE.

SECURITY CONSULTANT WAS EMPLOYEE OF OFF-TRACK BETTING FACILITY DESPITE INDEPENDENT CONTRACTOR DESIGNATION IN AGREEMENT.

The Third Department determined a security consultant who worked undercover at an Off-Track Betting (OTB) facility (Race Palace) was an employee despite the "independent contractor" designation in the written agreement: "Claimant and the other security consultants provided services exclusively at the location of the Race Palace and claimant's work schedule was established through consultation with another security consultant. He was compensated at a negotiated hourly rate of pay that was set forth in an independent contractor agreement and was required to submit claim forms and activity reports detailing his services within established time frames in order to receive payment from OTB. In addition, he was reimbursed by OTB for certain preapproved expenses and was required to keep all information regarding his services strictly confidential. In view of the foregoing, substantial evidence supports the Board's finding that OTB retained the requisite control

necessary to establish the existence of an employment relationship ... . Although the written agreement designated claimant as an independent contractor, it is not dispositive of claimant's employment status ...". ***Matter of Dwyer (Nassau Regional Off-Track Corp. — Commissioner of Labor)*, 2016 N.Y. Slip Op. 03232, 3rd Dept 4-28-16**

UNEMPLOYMENT INSURANCE.

MECHANIC WAS AN EMPLOYEE OF USED CAR SELLER.

The Third Department determined a mechanic was an employee of Guardi, who bought used cars, repaired and sold them: "[A]lthough Guardi did not advertise for claimant's services, claimant filled out paperwork that he characterized as an application for employment prior to working for Guardi. Upon being hired, Guardi offered and established claimant's rate of pay at $10 an hour. Claimant testified that after pricing the cost of repairs for a used vehicle and discussing those repairs with Guardi, Guardi would instruct him whether to make the repairs and, at times, would also make repair suggestions to claimant. Guardi provided claimant with a garage to perform the repairs that included certain equipment, such as a vehicle lift, tire-changing machine and a compressor ... . Guardi also disposed of old motor oil and used tires and maintained the equipment located in the garage. While claimant owned his own tools, he kept those tools at the garage, and he did not maintain his own auto-repair business or repair vehicles for any other employer. Aside from repairing vehicles, claimant also assisted Guardi with customer service and, on occasion, sold a used vehicle, for which he would receive a commission of $50. In addition to issuing claimant a weekly paycheck, claimant was expected to work the same hours as other employees at Used Auto and report for work on time each day. Claimant was required to contact Guardi if he was sick or unable to report to work on a given day, was required to obtain permission to take time off from work and record the start and end of his shifts and meals on a timeclock ...". ***Matter of DeVaul (Guardi — Commissioner of Labor)*, 2016 N.Y. Slip Op. 03233, 3rd Dept 4-28-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

REVERSIBLE ERROR TO READ BACK TO THE JURY THE PROSECUTOR'S SUMMATION BUT NOT THE DEFENSE SUMMATION.

The Fourth Department determined the trial judge's reading back (to the jury) of only the prosecutor's summation was reversible error: "County Court abused its discretion in reading back the prosecutor's summation without also reading back the defense summation. * * * Pursuant to CPL 310.30, 'the jury can request a reading of not only evidentiary material, but also any material which is pertinent to its deliberation, including the summations, and the trial court must give such requested information or instruction as [it] deems proper' ... . We agree with defendant that the court abused its discretion in reading back only the prosecutor's summation under the circumstances presented here. The evidence of defendant's guilt is not overwhelming, and the jurors were clearly divided at times during their deliberations, as demonstrated by their frequent requests for guidance from the court through numerous notes." ***People v. Rivers*, 2016 N.Y. Slip Op. 03327, 4th Dept 4-29-16**

CRIMINAL LAW.

FAILURE TO PLACE ON THE RECORD THE REASONS FOR REQUIRING DEFENDANT TO WEAR A STUN BELT DURING TRIAL, AND FAILURE TO APPRISE DEFENSE COUNSEL OF THE CONTENTS OF A JURY NOTE, REQUIRED REVERSAL.

The Fourth Department, reversing defendant's conviction, determined County Court erred by failing to place on the record the reasons for requiring defendant to wear a stun belt during the trial, and by failing to apprise defense counsel of the contents of a note from the jury prior to accepting a verdict (an error that does not require preservation by objection): "We agree with defendant that the court erred in failing to make any findings on the record establishing that defendant needed to wear a stun belt during the trial ... . * * * We further agree with defendant that a new trial is required based on the court's failure to comply with CPL 310.30 in regard to Court Exhibit 11, a note from the jury during its deliberations. '[T]he [c]ourt committed reversible error by violating the core requirements of CPL 310.30 in failing to advise counsel on the record of the contents of a substantive jury note before accepting a verdict' ... . Furthermore, '[w]here, as here, the record fails to show that defense counsel was apprised of the specific, substantive contents of the note . . . [,] preservation is not required' ... . Contrary to the People's contention, the presumption of regularity does not apply to errors of this kind ...". ***People v. Gomez*, 2016 N.Y. Slip Op. 03358, 4th Dept 4-29-16**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA)

HOLDING SORA HEARING IN DEFENDANT'S ABSENCE VIOLATED DUE PROCESS.

The Fourth Department determined defendant's presence is required at a Sex Offender Registration Act (SORA) hearing to determined defendant's risk level: "A sex offender has a due process right to be present at a SORA hearing . . . , and the

court 'violated the due process rights of defendant when it held the SORA hearing in his absence without verifying that he had received the letter notifying him of the date of the hearing and his right to be present' ... . We are thus constrained to reverse the order and remit the matter to Supreme Court for a new hearing and sexually violent offender determination in compliance with Correction Law § 168-n (3)." ***People v. Encarnacion*, 2016 N.Y. Slip Op. 03369, 4th Dept 4-29-16**

CRIMINAL LAW, ATTORNEYS.

CODEFENDANT, WHO TESTIFIED AGAINST DEFENDANT, AND DEFENDANT REPRESENTED BY MEMBERS OF THE SAME FIRM; IN THIS SITUATION AN INQUIRY TO ENSURE DEFENDANT IS AWARE OF ALL THE FACTS AND CONSENTS IS REQUIRED; MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Fourth Department determined defendant's motion to vacate his conviction should not have been denied without a hearing. Defendant's codefendant, pursuant to a plea bargain, testified against the defendant. The attorney who represented the codefendant and defendant's counsel were members of the same law firm. This situation has the potential of depriving defendant of his right to effective counsel requiring an inquiry by the court to ensure defendant is aware of all the facts and consents: " 'Absent inquiry by the court and consent by the defendant, an attorney may not represent a criminal defendant in a trial at which a star prosecution witness is a codefendant whose plea bargain — including the promise to testify against defendant — was negotiated by a partner in the same firm. In these circumstances defendant is denied his right to effective assistance of counsel' ... . Thus, a defendant is denied effective assistance of counsel where a member of defense counsel's law firm represents a witness who testifies against defendant at trial unless the court conducts a 'Gomberg inquiry to ascertain that the facts had been disclosed to defendant and that he [or she] had made a reasoned decision whether to proceed to trial with his [or her] attorney' ...". ***People v. Jackson*, 2016 N.Y. Slip Op. 03317, 4th Dept 4-29-16**

ENVIRONMENTAL LAW, ZONING.

STATE WATER RESOURCES LAW DID NOT PREEMPT ZONING BOARD'S REQUIRING TOWN APPROVAL BEFORE WATER CAN BE EXTRACTED FOR COMMERCIAL PURPOSES.

The Fourth Department determined the state Water Resources Law, which governs the extraction of groundwater, did not preempt the town zoning board's special-permit condition requiring town approval before water can be extracted for commercial purposes. Petitioner sought to build a pipeline to carry water from under petitioner's land to another town where the water would be sold. Petitioner argued the Water Resources Law preempted the town from requiring approval for commercial use of the extracted water. The Fourth Department held that the town's power to regulate the use of land, here requiring permission before water can be extracted for commercial purposes, was not limited by the Water Resources Law: "[T]he Water Resources Law (ECL article 15, et seq.) does not preempt local zoning laws concerning land use. Instead, the Water Resources Law preempts only those local laws that attempt 'to regulate withdrawals of groundwater,' which 'includes all surface and underground water within the state's territorial limits' ... . The Water Resources Law does not preempt the authority of local governments to 'regulate the use of land through the enactment of zoning laws' ... . * * * ... [T]he statute regulates how a natural resource may be extracted but does not regulate where in the Town such extraction may occur." ***Matter of Smoke v. Planning Bd. of Town of Greig*, 2016 N.Y. Slip Op. 03322, 4th Dept 4-29-16**

EVIDENCE.

IMPROPER IMPEACHMENT REQUIRED NEW TRIAL.

The Fourth Department ordered a new trial in a personal injury action because defense counsel violated rules of evidence re: impeachment with collateral matters. Defense counsel improperly introduced evidence of plaintiff's drug test results and improperly informed the jury of prior lawsuits brought by plaintiff: "It is well settled that a cross-examiner at trial is 'bound by the answers of the witness to questions on collateral matters inquired into solely to affect credibility' . . . , and extrinsic evidence cannot be used to impeach a witness's credibility after the witness has provided an answer with which the cross-examiner is unsatisfied ... . Here, defense counsel asked plaintiff during cross-examination whether she had failed an employment-related drug test, a collateral issue relevant only to plaintiff's credibility. In response, plaintiff testified that the test result was a 'false positive' that was proved false upon retesting. Defense counsel then violated the collateral evidence rule when she not only referred to a lack of evidence supporting plaintiff's assertion, but introduced the drug test result in evidence in an attempt to impeach plaintiff's credibility ... . * * * [D]espite the court's pretrial ruling precluding defendants from questioning plaintiff about a personal injury claim she had filed in connection with a prior accident, defense counsel, over objection, asked plaintiff if she had been involved in any 'legal action' related to her 'neck and/or back condition.' Because evidence of prior accidents and lawsuits related thereto 'may not [be used to] . . . demonstrate that plaintiff is litigious and therefore unworthy of belief' . . . , it was error for the court to allow that questioning. In our view, the improper attacks on plaintiff's credibility, viewed as a whole, denied plaintiff a fair trial." ***Dunn v. Garrett*, 2016 N.Y. Slip Op. 03283, 4th Dept 4-29-16**

LANDLORD-TENANT, LIEN LAW.

PROPERTY OWNER (LANDLORD) LIABLE FOR PAYMENT FOR ELECTRICAL WORK REQUIRED BY THE LEASE AND CONTRACTED FOR BY THE LESSEE.

The Fourth Department determined the owner of property leased to the party who hired an electrical contractor was liable for payment of the electrical contractor's mechanic's lien. As part of the lease agreement, the owner/landlord required the lessee (Peaches) to contract for the electrical work. The Fourth Department noted that all the other departments have held the owner is not liable in this context unless the owner directly contracted for the work. The Fourth Department concluded, however, that a Court of Appeals case controlled: "Lien Law § 3 provides in relevant part that a 'contractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof . . . shall have a lien . . . upon the real property improved.' For purposes of this provision, a 'requirement in a contract between . . . landlord and tenant, that the . . . tenant shall make certain improvements on the premises is a sufficient consent of the owner to charge his property with claims which accrue in making those improvements' (*Jones v Menke*, 168 NY 61, 64; *see De Klyn v Gould*, 165 NY 282, 287). The Court of Appeals subsequently reaffirmed *Jones*'s broad interpretation of section 3 in *McNulty Bros. v Offerman* (221 NY 98), holding that, as long as 'the liens have been confined to work called for by the lease[,] . . . the landlords' estate may be charged to the same extent as if the owners of that estate had ordered the work themselves. In substance, they have made the lessee their agent for that purpose' (*id*. at 106). *Jones* and *McNulty Bros*. have not been overturned or disavowed." ***Ferrara v. Peaches Café LLC*, 2016 N.Y. Slip Op. 03286, 4th Dept 4-29-16**

PERSONAL INJURY, CONTRACT LAW, MUNICIPAL LAW.

DISABLED POLICE OFFICER SUFFICIENTLY ALLEGED BREACHES OF A DUTY OF CARE BY THE CITY AND BY HEALTH CARE MANAGERS WHICH CONTRACTED WITH THE CITY TO MANAGE PLAINTIFF'S HEALTH CARE.

The Fourth Department, reversing Supreme Court, determined plaintiff, a disabled police officer, had sufficiently alleged breaches of a duty of care by the city and by the health care providers who contracted with the city to manage plaintiff's health care. With respect to the contracting health care managers, the court wrote: "It is well established that there are situations in which 'a party who enters into a contract to render services may be said to have assumed a duty of care — and thus be potentially liable in tort — to third persons: [i.e.,] where the contracting party, in failing to exercise reasonable care in the performance of [the party's] duties, launche[s] a force or instrument of harm' . . . , and thereby 'creates an unreasonable risk of harm to others, or increases that risk' ... . Indeed, '[t]his principle recognizes that the duty to avoid harm to others is distinct from the contractual duty of performance' ... . Accepting plaintiff's allegations as true . . . , we conclude that the amended complaint alleges that those defendants assumed a duty of care to plaintiff and that, in failing to exercise reasonable care in the performance of their duties, they increased the risk of harm to plaintiff." ***Vassenelli v. City of Syracuse*, 2016 N.Y. Slip Op. 03344, 4th Dept 4-29-16**

PERSONAL INJURY, EVIDENCE.

CAUSE OF FALL SUFFICIENTLY DEMONSTRATED WITH CIRCUMSTANTIAL EVIDENCE, DEFENSE MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Fourth Department determined plaintiff sufficiently demonstrated the cause of her fall with circumstantial evidence. The defense motion for summary judgment was properly denied: " 'In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation' ... . In a circumstantial evidence case, however, '[the] plaintiff is not required to exclude every other possible cause of the accident but defendant's negligence . . . , [but the plaintiff's] proof must render those other causes sufficiently remote or technical to enable the jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' ... . Here, plaintiff consistently testified that her shoe became caught on a crack in the step, which caused her to fall. Although there were no witnesses to the fall, and plaintiff could not remember seeing the crack at the time of the accident, she testified that the fall occurred in the immediate vicinity of a crack in the step, as revealed by a photograph in the record, 'thereby rendering any other potential cause of [her] fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' ...". ***Rinallo v. St. Casimir Parish & Catholic Diocese of Buffalo*, 2016 N.Y. Slip Op. 03323, 4th Dept 4-29-16**

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