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FIRST DEPARTMENT

CRIMINAL LAW.

BECAUSE THE PEOPLE PROVIDED NO INFORMATION ABOUT THE CIRCUMSTANCES OF DEFENDANT'S ARREST, DEFENDANT'S ALLEGATIONS IN THE OMNIBUS MOTION WERE SUFFICIENT TO REQUIRE A PROBABLE CAUSE HEARING.

The First Department determined defendant, who had pled guilty, was entitled to a hearing on whether the police had probable cause to arrest him. The defendant alleged he was arrested on October 12 at his home. The discovery provided by the People alleged defendant was arrested the following day at the police station. The People did not respond to defendant's allegation he was arrested at a different time and place. Because the People did not explain the circumstances of defendant's arrest, defendant's allegations in the omnibus motion were sufficient to require a hearing. The appeal was held in abeyance pending the hearing: "... [D]efendant's claim that he was arrested without probable cause at his home on October 12, 2012, at which time '[h]e was not acting in an illegal or suspicious manner,' although conclusory, was sufficient to entitle him to a hearing on the legality of his arrest and the admissibility of any evidence derived therefrom. It is undisputed that the arrest, whether it occurred on October 12 or (as the People claim) on October 13, took place 'at a time and place remote from the [crime] for which [defendant] was charged' ... . The People ... asserted that defendant was arrested around midday on October 13, at a police station, after giving statements at the same police station that morning and the previous night. Thus, at a minimum, defendant has raised a factual dispute concerning the time of his arrest. Further, the People provided defendant with no information at all as to how, by their account, he came to be at the police station in the first place, nor did they disclose the basis on which he first came to the attention of law enforcement in this investigation ...". ***People v. McUllin*, 2017 N.Y. Slip Op. 05795, 1st Dept 7-25-17**

CRIMINAL LAW, EVIDENCE.

RAW DATA IN REPORT CONNECTING DEFENDANT TO DNA EVIDENCE WAS NOT TESTIMONIAL IN NATURE, THEREFORE TESTIMONY ABOUT THE COLLECTION METHODS WAS NOT REQUIRED.

The First Department, in a full-fledged opinion by Justice Kahn, over an extensive, two-justice, dissenting opinion, determined a report on the DNA evidence which connected the defendant to the burglary did not violate the Confrontation Clause and was properly admitted. The majority argued that the report contained only raw data that was not part of a law enforcement effort aimed at the defendant because the sources of the DNA which were analyzed were not known to the technicians conducting the procedures. Therefore the raw data was not testimonial evidence (which would violate the Confrontation Clause). The criminologist (Huyck) who testified came to conclusions (testimonial) about the sources of the tested DNA by comparing the (non-testimonial) raw data. The report generated by the criminologist, therefore, was admissible because she testified and was cross-examined. The dissenters argued that someone involved in collecting the raw data should have testified and been cross-examined about the testing procedures (measures taken to avoid contamination, etc.): "Huyck herself conducted an independent review of the raw data derived from the testing of the DNA material derived from both the physical evidence and from defendant's person, and was not merely 'functioning as a conduit for the conclusions of others' ... .[T]he expert witness, 'testified that any conclusions or opinions she reached from the raw data . . . were her own' and were not merely conclusions of others with whom she agreed ... . Upon her own examination of the machine-generated graphs and raw data in this case, Huyck concluded that the two DNA profiles were a match. Her conclusion, based upon her own 'separate, independent and unbiased analysis of the raw data,' was reflected in the ... laboratory report bearing her name as analyst as well as in her own testimony at trial ... . Huyck did not base her testimony 'solely on the reports of the nontestifying analysts [which were then] admitted into evidence for their truth.' " ***People v. Rodriguez*, 2017 N.Y. Slip Op. 05799, 1st Dept 7-25-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH PLAINTIFF'S LANYARD WAS UNHOOKED AT THE TIME HE FELL, THERE WAS A QUESTION OF FACT WHETHER THE SCAFFOLD PROVIDED A PROPER WAY TO TIE OFF THE LANYARD.

The First Department determined defendant's motion for summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action was properly denied. Plaintiff (Giordano), who was wearing a harness and double lanyard, fell 30 feet from a scaffold when he stepped on a pipe brace which gave way. Although plaintiff had unhooked the lanyard, there was a question of fact whether the scaffold provided a proper method for tying off the lanyard: " '[T]he fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240(1),' and when 'there are questions of fact as to whether the [structure] provided adequate protection,' summary judgment is not warranted ... . In this case, plaintiff Paul Giordano fell 30 feet from scaffolding during construction on the Freedom Tower at 1 World Trade Center, when he stepped on a pipe brace that suddenly gave way. Although he was wearing a harness and double lanyard, the record presents issues of fact as to whether the scaffolding itself provided adequate anchoring points at which to tie off, and whether Giordano could have used his double lanyard to remain tied off at all times. Thus, under these circumstances, summary judgment to either party on the Labor Law § 240(1) claim, and the § 241(6) claim premised on a violation of Industrial Code (12 NYCRR) § 23-1.16, is precluded by issues of fact as to whether Giordano was provided with 'proper fall protection, namely, an appropriate place to . . . attach his harness' ... . Because there are issues of fact as to whether Labor Law § 240(1) was violated, the issue of whether Giordano was the sole proximate cause of the accident (because he unhooked his lanyard) cannot be determined as a matter of law ... ". ***Giordano v. Tishman Constr. Corp.*, 2017 N.Y. Slip Op. 05796, 1st Dept 7-25-17**

SECOND DEPARTMENT

EDUCATION-SCHOOL LAW, ARBITRATION.

THE DISCIPLINE AND SUSPENSION OF STUDENTS ARE NOT ARBITRABLE TOPICS, ARBITRATION WOULD CONFLICT WITH PUBLIC POLICY AFFORDING DISCRETION TO SCHOOL DISTRICTS.

The Second Department determined the disciplining and suspension of students were not arbitrable topics because there is a public policy affording the school district discretion in those areas: "In determining whether a dispute between a public sector employer and employee is arbitrable, a court must first determine whether 'there is any statutory, constitutional or public policy prohibition against arbitration of the grievance'... . If there is no prohibition against arbitration, the court must examine the parties' collective bargaining agreement to determine 'whether the parties in fact agreed to arbitrate the particular dispute'... Here, the appellant demanded arbitration to compel the petitioner, the Board of Education of the Newburgh Enlarged City School District, to implement certain measures regarding the discipline and suspension of students. Since New York's Education Law grants discretion to boards of education to implement disciplinary rules and regulations in schools ... , such demands are nonarbitrable on public policy grounds ...". ***Matter of Board of Educ. of the Newburgh Enlarged City Sch. Dist. v. Newburgh Teachers' Assn.*, 2017 N.Y. Slip Op. 05817, 2nd Dept 7-25-17**

FORECLOSURE.

BANK DID NOT COMPLY WITH THE STATUTORY NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) § 1304: "Here, the plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served the defendants pursuant to the terms of the statute ... . Contrary to the plaintiff's contention, the affidavit of an assistant secretary of the loan servicer was insufficient to establish that the notice was sent to the defendants in the manner required by RPAPL 1304, as the loan servicer did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing ...". ***Investors Sav. Bank v. Salas*, 2017 N.Y. Slip Op. 05811, 2nd Dept 7-26-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER PROPERTY OWNER EXACERBATED OR CREATED THE DANGEROUS CONDITION IN THIS SNOW-RELATED SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, in the context of a legal malpractice action, determined plaintiff had raised a question of fact whether the property owner created or exacerbated the dangerous condition by snow removal efforts. Plaintiff alleged she fell while stepping over a pile of snow: "Here, the defendant failed to demonstrate his prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for legal malpractice on the ground that the plaintiff could not have prevailed in an action against the property owner. While the defendant demonstrated, prima facie, through certified meteorological data and the plaintiff's deposition testimony, that the accident occurred less than one hour after the snowstorm ceased, he did not eliminate triable issues of fact as to whether the property owner created or exacerbated a hazardous condition through negligent snow removal efforts ... . In particular, in light of the plain-

tiff's deposition testimony, a triable issue of fact exists as to whether the property owner, upon clearing snow from a small portion of the premises, had left a pile of snow that the plaintiff had to 'lift [her] leg' to 'cross' over, causing her to slip and fall. Accordingly, that branch of the defendant's motion which was for summary judgment dismissing the legal malpractice cause of action should have been denied." ***Balan v. Rooney*, 2017 N.Y. Slip Op. 05801, 2nd Dept 7-26-17**

PERSONAL INJURY.

PLAINTIFF DID NOT RAISE A QUESTION OF FACT ON ACTUAL OR CONSTRUCTIVE NOTICE OF THE BLACK ICE IN THIS SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.
The Second Department, reversing Supreme Court, determined plaintiff did not raise a question of fact about whether defendant had actual or or constructive notice of the black ice which caused plaintiff to fall. There was precipitation earlier on the day plaintiff fell: " 'A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence' ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that the black ice that allegedly caused the plaintiff to fall developed as a result of precipitation that fell on the day of the accident, and that the defendant did not create or have actual or constructive notice of the existence of the black ice ... . Contrary to the plaintiff's contention, the Supreme Court properly considered her deposition transcript in determining the motion ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the black ice was the product of a prior storm ... ". ***Vozzo v. Fairfield Westlake Sq.*, LLC, 2017 N.Y. Slip Op. 05868, 2nd Dept 7-25-17**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

QUESTION OF FACT WHETHER HOLE IN GOLF COURSE UNREASONABLY INCREASED THE INHERENT RISKS, PERSON WHO AUTHENTICATED PHOTOGRAPHS WAS NOT A NOTICE WITNESS.
The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact whether the golf-course sprinkler-valve-hole, which caused plaintiff's decedent to trip and fall, was concealed or unreasonably increased the risks inherent in the golf course, thereby overcoming the assumption of risk doctrine. Supreme Court should not have excluded the photographs of the area where plaintiff fell. Contrary to Supreme Court's reasoning, the person who authenticated the photographs was a not a notice witness who should have been named prior to the filing of the note of issue: "... [P]laintiff raised a triable issue of fact as to whether the subject condition was concealed or unreasonably increased the risks inherent in the golf course ... In this regard, the Supreme Court erred in rejecting the affidavits and photographic evidence submitted by the plaintiff in opposition to the motion. Contrary to the court's determination, the plaintiff was not required to identify John Flower as a notice witness prior to filing the note of issue. The disclosure requirements of CPLR 3101 include the obligation to disclose the names of witnesses 'if they are material and necessary to the prosecution or defense of the action' ... . Here, Flower did not possess information material and necessary to the prosecution or defense of the action. In his affidavit, Flower merely authenticated certain photographs, most of which had been submitted by the decedent with his notice of claim prior to his death. Consequently, the court should not have rejected Flower's affidavit and the attendant photographs on the ground that the plaintiff had failed to identify Flower as a notice witness prior to the filing of the note of issue. As a related matter, the court improperly rejected the affidavit of the plaintiff's expert on the ground that he relied upon the photographs. Further, the court should not have rejected the two remaining affidavits from individuals who were disclosed to the defendant prior to the filing of the note of issue." ***MacIsaac v. Nassau County*, 2017 N.Y. Slip Op. 05814, 2nd Dept 7-25-17**

PERSONAL INJURY, EVIDENCE.

THERE WAS SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF THE CAUSE OF PLAINTIFF'S FALL (INADEQUATE LIGHTING), DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED 2ND DEPT.
The Second Department, reversing Supreme Court, determined there was sufficient circumstantial evidence of the cause of plaintiff's fall down a set of stairs to survive summary judgment. The plaintiff alleged there was inadequate lighting: "The defendant failed to establish its prima facie entitlement to judgment as a matter of law on the ground that the plaintiffs could not identify the cause of the injured plaintiff's fall. '[T]hat a defective or dangerous condition was the proximate cause of an accident can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the injury'... . Here, the defendant failed to eliminate triable issues of fact as to whether the alleged inadequate lighting condition for the subject staircase was a proximate cause of the injured plaintiff's fall... . Such a finding, given the eyewitness account of the circumstances surrounding the fall and the injured plaintiff's own statement just before the fall, warning his companions to "watch out, it is dark, you cannot see," would be based on logical inferences, not speculation ...". ***Pajovic v. 94-06 34th Rd. Realty Co., LLC*, 2017 N.Y. Slip Op. 05831, 2nd Dept 7-25-17**

REAL PROPERTY, FORECLOSURE.

ERRONEOUS HUSBAND AND WIFE DESIGNATION ON THE DEED CREATED A TENANCY IN COMMON, DEFENDANT'S INTEREST IN THE PROPERTY WAS SUBJECT TO FORECLOSURE.

The Second Department, reversing Supreme Court, determined that the mortgage-holder's motion for a default judgment and order of reference should not have been denied. The 1970 deed for the property named defendant and his mother as husband and wife. Pursuant to 1970 law (which changed in 1975) the erroneous "husband and wife" designation created a tenancy in common with no right of survivorship. Therefore, although defendant was not the sole owner at the time the mortgage loan was made, the mortgage was secured by his interest in the property and that interest was subject to foreclosure: "Contrary to the Supreme Court's determination, while the defendant may not have been the sole owner of the subject property at the time of the loan, he was still able to mortgage the subject property to the extent of his interest therein, since ' [a] mortgage given by one of several parties with an interest in the mortgaged property is not invalid; it gives the mortgagee security, but only up to the interest of the mortgagor' ... . '[T]here is nothing in New York law that prevents one of the co-owners from mortgaging or making an effective conveyance of his or her own interest in the tenancy. To the contrary, each tenant may sell, mortgage or otherwise encumber his or her rights in the property, subject to the continuing rights of the other' ...". ***John T. Walsh Enters., LLC v. Jordan*, 2017 N.Y. Slip Op. 05813, 2nd Dept 7-25-17**

ZONING.

SPECIAL USE PERMIT PROPERLY GRANTED, CRITERIA FOR A SPECIAL USE PERMIT VERSUS A VARIANCE EXPLAINED.

The Second Department determined a special use permit was properly granted to a golf course seeking permission to host nonmember events. The court explained the different criteria for a special use permit versus a variance: " 'Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special use permit gives permission to use property that is consistent with the zoning ordinance, although not necessarily allowed as of right' ... . The burden of proof on an applicant seeking a special use permit is lighter than that carried by an applicant for a zoning variance ... . Once an applicant shows 'that the contemplated use is in conformance with the conditions imposed, a special [use] permit or exception must be granted unless there are reasonable grounds for denying it that are supported by substantial evidence' ... . Here, on this record, there was substantial evidence that Hampshire Club, Inc.'s contemplated use comported with the requirements of Village of Mamaroneck Zoning Code ... , and there were no reasonable grounds for denying the special use permit. Therefore, the special use permit to host nonmember events at the Country Club should have been granted... . 'Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record' ...". ***Matter of Mamaroneck Coastal Envt. Coalition, Inc. v. Board of Appeals of the Vil. of Mamaroneck*, 2017 N.Y. Slip Op. 05822, 2nd Dept 7-25-17**

THIRD DEPARTMENT

CIVIL PROCEDURE.

CPLR 5003-A, WHICH MANDATES PROMPT PAYMENT OF A SETTLEMENT TO THE PLAINTIFF, DOES NOT APPLY TO PAYMENTS TO THIRD PARTIES REQUIRED BY THE SETTLEMENT AGREEMENT.

The Third Department, in a full-fledged opinion by Justice Peters, determined CPLR 5003-a, which requires the prompt payment of a settlement to the plaintiff, does not apply to payments owed to a third-party, even though the settlement agreement requires that the third party be paid. Here the settlement agreement required defendant to pay a Worker's Compensation lien: "... [W]e conclude that CPLR 5003-a applies only to the nonpayment of settlement monies owed directly to a settling plaintiff pursuant to a settlement agreement. This construction is not only in accord with the plain language of the prompt payment mandate itself, but is also supported by the language of the statutory enforcement mechanism set forth in subdivision (e). CPLR 5003-a (e), the teeth that effectuate subdivision (a)'s prompt payment directive, authorizes an 'unpaid plaintiff' to enter judgment inclusive of interest, costs and disbursements against the nonpaying settling defendant ... . Simply put, plaintiff here is not 'unpaid' — all sums required to be paid to him pursuant to the parties' settlement agreement (i.e., $3.25 million) were paid by defendant within the statutorily-prescribed 21-day time period. Had the Legislature intended to extend the reach of CPLR 5003-a to a settling defendant's failure to promptly pay all valuable consideration due a settling plaintiff pursuant to the parties' settlement agreement, it could have easily said so. It did not, and 'a court cannot amend a statute by inserting words that are not there' ... ". ***Ronkese v. Tilcon N.Y., Inc.*, 2017 N.Y. Slip Op. 05905, 3rd Dept 7-27-17**

CRIMINAL LAW.

NEITHER THE SUPERIOR COURT INFORMATION TO WHICH DEFENDANT PLED GUILTY NOR THE PLEA ALLOCUTION INDICATED THE TWO SEXUAL OFFENSES OCCURRED AT DIFFERENT TIMES, CONSECUTIVE SENTENCES WERE NOT AUTHORIZED.

The Third Department, reversing County Court, determined the People did not demonstrate the two sexual offenses to which defendant pled guilty occurred at different times, therefore consecutive sentences should not have been imposed. The Third Department explained that only the accusatory instrument to which defendant pled (here a superior court information) and the plea allocution can be considered in this context. To the extent that a prior ruling suggested admissions in a pre-sentence report and victim statements could be considered to determine the facts of the offenses, that ruling is no longer to be followed: "Pursuant to Penal Law § 70.25 (2), 'sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other' ... . Thus, 'to determine whether consecutive sentences are permitted, a court must first look to the statutory definitions of the crimes at issue to discern whether the actus reus elements overlap' ... . '[E]ven if the statutory elements do overlap under either prong of the statute, the People may yet establish the legality of consecutive sentencing by showing that the acts or omissions committed by [the] defendant were separate and distinct acts' ... . * * * ... [B]oth counts in the superior court information alleged that the acts occurred during the same time frame (between July 1, 2012 and July 31, 2012), neither count contained allegations about the specific acts constituting the crime, and there is no bill of particulars narrowing the specific type of sexual contact or sexual conduct alleged under either count … . Likewise, the plea allocution did not include admissions or particularity as to the acts committed that qualify as sexual contact or oral sexual conduct ... . Given that the term 'sexual contact' is broad enough to include all forms of 'oral sexual conduct' ... , the actus reus element could be the same for both offenses, that is, the same act could satisfy both crimes. As no specific date and time for each crime were alleged in the superior court information or plea allocution, and neither included underlying facts or alleged acts that were separate and distinct, consecutive sentences were not authorized ... ". ***People v. Mangarillo*, 2017 N.Y. Slip Op. 05872, 3rd Dept 7-27-17**

CRIMINAL LAW.

DESPITE THE TRAGIC CIRCUMSTANCES WHICH PRECEDED DEFENDANT'S CRIMINAL OFFENSES, COUNTY COURT DID NOT ABUSE ITS DISCRETION IN DENYING YOUTHFUL OFFENDER STATUS.

The Third Department, over a strong dissent, determined the denial of youthful offender status was not an abuse of discretion. Defendant lost both parents, dropped out of school after having been a successful student and admitted to college, became addicted to drugs, and was targeted and victimized by persons who moved into his home. He had never before committed a crime. He pled guilty to seven burglaries which took place in the space of two weeks: "Defendant contends that County Court abused its discretion in denying him youthful offender status and that the sentence imposed was harsh and excessive. '[T]he decision to grant or deny youthful offender status rests within the sound exercise of the sentencing court's discretion and, absent a clear abuse of that discretion, its decision will not be disturbed' ... . Upon our review of the record, we are unpersuaded that County Court abused its discretion in denying defendant's application for youthful offender status ... . In making its determination, County Court considered numerous mitigating circumstances, including, among other things, defendant's youth, his lack of a criminal record or prior acts of violence, his cooperation with authorities, his familial history and his expressed remorse for his conduct ... .. Nevertheless, based upon the seriousness of the charges for which defendant was convicted and the fact that he willingly participated in seven separate and distinct residential burglaries over a two-week period, we perceive no abuse of discretion in County Court's ultimate decision to deny defendant youthful offender status ... . Nor do we find any extraordinary circumstances or an abuse of discretion that would warrant a reduction of his sentence ...". ***People v. Strong*, 2017 N.Y. Slip Op. 05876, 3rd Dept 7-27-17**

DISCIPLINARY HEARINGS (INMATES).

RECORD DID NOT DEMONSTRATE PETITIONER KNOWINGLY WAIVED HIS RIGHT TO BE PRESENT AT THE HEARING, DETERMINATION ANNULLED AND EXPUNGED.

The Third Department annulled and expunged the misbehavior determination because the record did not reflect the petitioner's knowing and intelligent waiver of his right to be present at the hearing: " '[A]n inmate has a fundamental right to be present at his or her disciplinary hearing and, in order for an inmate to make a knowing, voluntary and intelligent waiver of that right, he or she must be informed of that right and of the consequences of failing to appear at the hearing' ... . Here, while there was testimony at the continuation of the hearing that the correction officers assigned to transport petitioner advised him that the hearing would continue in his absence, a videotape of the interaction between petitioner and the officers that resulted in his refusal to attend the hearing reveals no such advisement. Notably, the correction officer did not elaborate on the reason for petitioner's refusal, and the Hearing Officer did not inquire ... . Although the record also contains a written form, signed by one of the correction officers assigned to transport petitioner to the hearing, attesting to the fact

that petitioner was aware of the consequences of his refusal, petitioner did not sign the form and there is no indication on the form or anywhere else in the record as to the steps taken to either 'ascertain the legitimacy of petitioner's refusal or to inform him of . . . the consequences of his failure to [attend]' ... to assert that petitioner forfeited his right to be present is unavailing because the hearing was not nearing completion at the time of the refusal. In light of the foregoing, we cannot conclude that petitioner knowingly, intelligently and voluntarily relinquished his right to attend the hearing ... ". ***Matter of Micolo v. Annucci*, 2017 N.Y. Slip Op. 05893, 3rd Dept 7-27-17**

DISCIPLINARY HEARINGS (INMATES).

ALTHOUGH THE SEIZED SUBSTANCE TESTED NEGATIVE FOR MARIJUANA, THE SUPERVISOR'S STATEMENT THAT THE SUBSTANCE WAS SYNTHETIC MARIJUANA WAS SUFFICIENT SUPPORT FOR THE CONTRABAND-POSSESSION CHARGE.

The Third Department, over a two-justice dissent, determined the contraband-possession charge was supported by sufficient evidence. The petitioner had a small package of a leafy green substance which tested negative for marijuana. The supervisor who seized the substance, after the test had been done, alleged it was synthetic marijuana. Because all of the substance was used up in the marijuana test, no further tests were possible. The dissent argued the proof was insufficient because the supervisor did not describe the nature of his experience which led to his conclusion the substance was contraband: "As for the ... charge of possessing contraband, 'an inmate shall not possess any item unless it has been specifically authorized' ... . Given petitioner's concessions and the supervisor's representations in the misbehavior report that his identification was based upon his prior training and experience, we find that the item contained in the tobacco pouch was adequately identified as synthetic marihuana and, therefore, the determination that it was unauthorized contraband is supported by substantial evidence ... . * * * **FROM THE DISSENT:** The supervisor who identified the substance as synthetic marihuana offered no details regarding his training or experience, nor any explanation of how they qualified him to make such an identification. Indeed, he did not testify, so the Hearing Officer was left to rely on a vague and conclusory statement included in a misbehavior report and repeated in a memorandum. … The Hearing Officer should not have relied on the supervisor's second guess as to the nature of the substance, supported by nothing other than his own vague and self-serving statement regarding his training and experience." ***Matter of King v. Venettozzi*, 2017 N.Y. Slip Op. 05899, 3rd Dept 7-27-17**

DISCIPLINARY HEARINGS (INMATES).

RAISED FIST DID NOT SUPPORT AN INTERFERENCE-WITH-AN-EMPLOYEE CHARGE.

The Third Department determined a raised fist was sufficient to support the "creating a disturbance" charge, but not the "interference with an employee" charge: "... [A]s to the charge of interfering with an employee, while the evidence establishes that prison staff were alarmed by petitioner's gesture resulting in additional staff reporting to the mess hall, we agree with petitioner that these facts, standing alone, do not constitute substantial evidence to support the finding that petitioner 'physically or verbally obstruct[ed] or interfere[d] with an employee,' and, therefore, the determination should be annulled to that extent... . While the normal duties of the prison staff were presumably interrupted or redirected when they responded to the incident in the mess hall, this, in our view, is not the type of conduct that the at-issue rule was designed to prevent ...". ***Matter of Taylor v. Lee*, 2017 N.Y. Slip Op. 05903, 3rd Dept 7-27-17**

INSURANCE LAW.

THE PROOF OF PLAINTIFF'S CLAIM FOR LOST EARNINGS WAS INSUFFICIENT AS A MATTER OF LAW, DEFENDANT INSURER'S MOTION FOR SUMMARY JUDGMENT IN THIS NO-FAULT CASE SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff's evidence of lost earnings was insufficient to support his claim for no-fault benefits. The insurer's motion for summary judgment should, therefore, have been granted. The dissenters argued that there was enough evidence of lost earnings to raise a question of fact. "... [The potential employer's and] plaintiff's subjective beliefs about the financial health of the parts business and/or their subjective beliefs about plaintiff's skills are immaterial to the resolution of whether it is reasonable to project that the parts business would have employed plaintiff at a salary of $2,000 a week. In contrast, the uncontradicted evidence that the parts business was failing, that it had not made any efforts to acquire or open an automobile repair shop, and that, even if it had, plaintiff had a demonstrated history of being unable to run a profitable automobile repair shop all bear on the reasonableness of such a projection. That material evidence established as a matter of law that the projection that plaintiff would have received $2,000 a week from the parts business is unreasonable ... ". ***Freligh v. Government Empls. Ins. Co.*, 2017 N.Y. Slip Op. 05911, 3rd Dept 7-27-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER THERE WAS A NONNEGLIGENT EXPLANATION FOR PLAINTIFF'S COLLIDING WITH THE REAR OF DEFENDANT'S CAR.

The Third Department determined plaintiff had raised a question of fact about a nonnegligent explanation for his colliding with the rear of defendant's car. Plaintiff was riding a motorcycle when the car in front of him (driven by Daunais) suddenly swerved to the left and plaintiff struck the defendant's car, which was in front of Daunais. Daunais alleged the defendant suddenly stopped dead in the road and Daunais swerved to the left to avoid colliding with defendant: "It is undisputed that defendant has satisfied his initial summary judgment burden inasmuch as '[a] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle' ... . The burden therefore shifted to plaintiff to demonstrate a nonnegligent explanation for the collision ... . As relevant here, '[e]vidence that the vehicle which was rear-ended came to a sudden and abrupt stop will defeat summary judgment' ... . Although defendant contends that he was attempting to turn into a driveway when plaintiff rear-ended him and that he had appropriately slowed his vehicle and activated his turn signal prior to turning, Daunais contradicted him, testifying that defendant 'stopped dead in the road.' Daunais averred that he then 'took a chance' and swerved left into the oncoming traffic lane to avoid colliding with defendant's vehicle. Plaintiff explained that he was unable to do the same because another motorcyclist was by then blocking him from safely veering to the left. Other motorcyclists traveling with plaintiff also testified that they observed Daunais' van swerve into the oncoming traffic lane to reveal defendant's vehicle stopped in the road. This proof, when viewed 'in the light most favorable to plaintiff and affording him the benefit of every favorable inference'... , demonstrates a triable issue of fact as to whether a nonnegligent explanation exists for the rear-end collision ...". ***Bell v. Brown*, 2017 N.Y. Slip Op. 05898, 3rd Dept 7-27-17**

TRUSTS AND ESTATES.

THE TRUST AGREEMENT INDICATED THE DECEDENT INTENDED A CHARITABLE GIFT BE MADE TO A PARTICULAR LOCAL CATHOLIC SCHOOL WHICH HAD CLOSED, NOT TO THE ROMAN CATHOLIC CHURCH WHICH HAD OPERATED THE CLOSED SCHOOL.

The Third Department determined the intent of the decedent was to support a particular local (Oneonta) Catholic school with a charitable gift. The school had closed in 2011. The trustee wanted to distribute the gift equally to the two other named beneficiaries of the trust. Respondents, St. Mary's Roman Catholic Church, New York and Roman Catholic Diocese of Albany, New York, which operated the closed school, argued the gift should be made to them. The court looked at the nature of the trust as a whole and determined the intent of the gift was to benefit the particular school which closed, not the larger Roman Catholic church generally: "The gift to the school was 'charitable in nature and, for cy pres relief [to be appropriate], it was further necessary that the instrument[] establishing the gift[] revealed a general charitable intent and that circumstances had changed rendering impracticable or impossible strict compliance with the terms of the gift instrument[]' ... . Strict compliance with the terms of the trust agreement was impossible due to the closure of the school. We accordingly turn to whether the evidence evinces a general charitable intent on the part of decedent, defined 'as a desire to give to charity generally, rather than merely to give to a particular object or institution' ... . In answering that question, we will read the trust agreement in its entirety and afford its words 'their ordinary and natural meaning' ... . Turning to that agreement, all of the institutions to which decedent made gifts are in the City of Oneonta, Otsego County, suggesting an intent to limit her largesse to organizations in that area. When viewed in that context, a direction to distribute part of the residuary trust corpus 'to the [school at] 5588 State Route 7, Oneonta, New York 13820' indicates a desire to support a school at that location rather than religious education projects in general. This reading is bolstered by the silence of the trust agreement as to decedent's Catholic faith and the absence of gifts to the parish or other Roman Catholic institutions." ***Matter of Gurney*, 2017 N.Y. Slip Op. 05902, 3rd Dept 7-27-17**

UNEMPLOYMENT INSURANCE.

DESPITE CLAIMANT'S SIGNING A STIPULATION AGREEING TO RESIGN, A HOSTILE WORK ENVIRONMENT PROVIDED GOOD CAUSE FOR HER RESIGNATION.

The Third Department determined claimant was properly awarded unemployment insurance benefits, despite her signing a stipulation agreeing to resign. The stipulation did not mention any misconduct by the claimant. Claimant's testimony demonstrated a hostile work environment which provided good cause for her leaving: "Claimant and the employer's witnesses presented competing accounts of claimant's work history, her work product, her general demeanor and her interaction with others in her office. Without recounting the extensive testimony offered on these points, suffice it to say that the employer portrayed claimant as an insubordinate malcontent who failed to timely and appropriately complete assignments or respond to various emails or directives. Claimant, on the other hand, testified at length as to the 'bullying' and harassment that she endured at the hands of her supervisors, recounted the manner in which she was verbally threatened by certain individuals in her office and disputed the employer's account of her overall work performance. This conflicting testimony presented factual and credibility issues for the Board to resolve ... . As noted previously, the stipulation of set-

tlement entered into between claimant and the employer contained no finding or admission of wrongdoing on the part of claimant. Further, upon crediting claimant's testimony as to the nature of her work environment and her reasons for resigning, the Board agreed with the ALJ's findings that claimant's actions did not rise to the level of disqualifying misconduct but, rather, were undertaken in direct response to her 'hostile' and 'untenable' work environment — an environment that, in turn, provided 'a compelling reason for her to resign.' " ***Matter of Cohen (Commissioner of Labor)*, 2017 N.Y. Slip Op. 05885, 3rd Dept 7-27-17**

UTILITIES.

THE PUBLIC SERVICE COMMISSION HAS THE STATUTORY AUTHORITY TO IMPOSE RATES CHARGED FOR GAS AND ELECTRICITY BY ENERGY SERVICE COMPANIES.

The Third Department determined the Public Service Commission (PSC) has the power to regulate the rates charged by energy service companies (ESCO's) in an effort to bring down the cost of gas and electricity for mass market consumers. The rates imposed by the PSC were included in a Reset Order. The petitioner, the Retail Energy Supply Assn., challenged the statutory authority of the PSC to issue the Reset Order imposing the new rates: "We … find ... that the PSC's broad statutory jurisdiction and authority over the sale of gas and electricity authorized it to impose the limitations set forth in the Reset Order. Pursuant to Public Service Law § 5, '[t]he jurisdiction, supervision, powers and duties of the [PSC] shall extend . . . [t]o the manufacture, conveying, transportation, sale or distribution of gas . . . and electricity . . . to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same' ... . The emphasized language speaks to general authority over the sale of gas and electricity, followed by the specific extension of the PSC's jurisdiction over gas and electric plants. Importantly, there is no dispute that the PSC is authorized to set 'just and reasonable' tariff rates for gas and electric corporations pursuant to Public Service Law articles 1 and 4 ... . In fact, it is the PSC's broad jurisdiction that enabled it to allow ESCOs access to utility systems in the first place. The PSC essentially maintains that this same authority allows it to impose limitations on ESCO rates as a condition to continued access. We agree. * * * As explained in the Reset Order, the PSC discerned that most ESCOs only offered commodity resale to their customers in direct competition with utilities. In doing so, ESCOs have had difficulty competing because the PSC 'requires utilities to flow through energy commodity to end-users at cost, without a markup.' In consequence, numerous customer complaints have been made that ESCOs are charging more than the utilities — a result contrary to the very purposes of opening up the energy market in the first place, i.e., to promote lower energy costs to consumers. The rule change was implemented because the PSC determined that 'it is not in the public interest for ESCOs to provide commodity supply only products for mass market customers.' This decision falls within the PSC's broad authority to assure that 'just and reasonable rates' are charged for gas and electric sold to the consumer, consistent with its authority over utilities ... . Accordingly, we agree with Supreme Court that the PSC had jurisdiction to impose the rate limitations set forth in the Reset Order." ***Matter of Retail Energy Supply Assn. v. Public Serv. Commn. of The State of New York*, 2017 N.Y. Slip Op. 05908, 3rd Dept 7-27-17**

WORKERS' COMPENSATION LAW, CRIMINAL LAW.

EMPLOYER DID NOT SUBMIT SUFFICIENT PROOF THAT CLAIMANT RECEIVED UNREPORTED INCOME FROM THE SALE OF DRUGS, THEREFORE CLAIMANT WAS NOT DISQUALIFIED FROM RECEIVING WORKERS' COMPENSATION BENEFITS.

The Third Department determined claimant was entitled to resume receiving workers' compensation benefits when he left prison for offenses related to the sale of drugs. The employer argued claimant should be disqualified because he received benefits while he had unreported income from selling drugs. The Third Department found that the plea allocutions were not sufficient evidence that claimant received income from drug sales: "In support of its assertion that claimant violated Workers' Compensation Law § 114-a (1), the employer submitted the transcripts of the 2012 plea allocutions resulting in claimant's convictions for a violation of probation, criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in the fifth degree. As a result of recording or transcription errors, the transcript of the Alford plea proceeding is, at times, indecipherable. In addition, both transcripts of the 2012 criminal convictions were insufficient to establish that claimant received income while receiving workers' compensation benefits or that he otherwise concealed his work status. Further, the employer did not submit the certificate of conviction for claimant's 2010 convictions or the transcript of that underlying plea allocution. Although we agree with the employer that the Board incorrectly analyzed the 2012 criminal proceedings, we do not find that these inaccuracies warrant reversal and remittal to the Board, given that the Board primarily found that there was insufficient evidence to find a violation of Workers' Compensation Law § 114-a ...". ***Matter of Pompeo v. Auction Direct USA LP*, 2017 N.Y. Slip Op. 05910, 3rd Dept 7-27-17**

FOURTH DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE JURY'S FINDING THAT DEFENDANT'S ACTIONS IN THIS MANSLAUGHTER CASE WERE NOT JUSTIFIED WAS AGAINST THE WEIGHT OF THE EVIDENCE, CONVICTION REVERSED AND INDICTMENT DISMISSED.

The Fourth Department, reversing defendant's conviction and dismissing the indictment, over a two-justice dissent, determined the conviction was against the weight of the evidence. Defendant raised the justification defense in this manslaughter case. Once the defense was raised, the People were required to prove, beyond a reasonable doubt, the defendant's act was not justified. The Fourth Department held that the jury's finding the defendant's act was not justified was against the weight of the evidence: "... [T]he People were required to prove either that defendant lacked a subjective belief that her use of deadly physical force was necessary to protect herself against decedent's use or imminent use of deadly physical force, or that 'a reasonable person in the same situation would not have perceived that deadly force was necessary'... . Although the jury found that the People met that burden, we conclude, upon our independent assessment of the proof... , that the jury 'failed to give the evidence the weight it should be accorded'... . Defendant's statements at the scene and in her police interview evinced a belief that deadly force was necessary to protect her from decedent, and we conclude that the People did not demonstrate beyond a reasonable doubt that her belief was objectively unreasonable. Instead, the credible evidence established that decedent was in a drunken rage during a heated argument with defendant, that he had threatened 'trouble' if the police came, that he had repeatedly forced open doors in the course of pursuing defendant through the apartment, that he was not deterred even when she armed herself with a knife, that he had cornered her in the bathroom and pulled her hair, and that he had grabbed her by the hair to prevent her from leaving the bathroom just before she stabbed him. Under those circumstances, we conclude that the People failed to meet their burden of establishing that defendant lacked a reasonable belief that decedent was about to use deadly physical force against her, even though decedent was not armed ... . In other words, this is not a case in which the force employed by defendant 'exceeded that which was necessary to defend [herself]' ...". ***People v. Marchant*, 2017 N.Y. Slip Op. 05918, 4th Dept 7-27-17**

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