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CasePrepPlus

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SECOND DEPARTMENT

CONTRACT LAW.

RECOVERY FOR INJURY TO A KITTEN SHIPPED BY AIR LIMITED TO $50 BY THE TERMS OF THE AIR WAYBILL.

The Second Department, reversing Supreme Court, determined plaintiff's recovery for injury to a kitten shipped by air was subject to the $50 limit in the air waybill signed by plaintiff: "An air waybill forms the basic contract between a shipper and an air carrier ... . In order to enforce a limited liability provision contained in an air waybill, a carrier must demonstrate that its contract satisfies the released-valuation doctrine ... . Under the released-valuation doctrine, the shipper 'is deemed to have released the carrier from liability beyond a stated amount' in exchange for a low shipping rate ... . The shipper is bound by the limited liability provision if he or she (1) has reasonable notice of the rate structure, and (2) is given a fair opportunity to pay a higher rate in order to obtain greater protection ... . The fact that the language setting forth the limited liability provision is found on the reverse side of the air waybill does not render the provision unable to satisfy the released-valuation doctrine ... . Here, the air waybill signed by the plaintiff's shipper demonstrates that the shipper did not declare a value for the kitten and no additional coverage was purchased. The terms of the air waybill also provided a fair opportunity to purchase greater coverage ... . [T]he plaintiff had the burden of showing that she did not have a fair opportunity to purchase greater liability protection ... . The plaintiff, who submitted only her attorney's affirmation and certain veterinary bills in opposition, failed to raise a triable issue of fact as to whether she was not given the opportunity to purchase additional coverage." ***Lentini v. Delta Air Lines, Inc.*, 2018 N.Y. Slip Op. 01597, Second Dept 3-14-18**

CORPORATION LAW, DEFAMATION, CONTRACT LAW.

DEFAMATION ACTION AGAINST UNINCORPORATED ASSOCIATION SHOULD HAVE BEEN DISMISSED UNDER THE MARTIN RULE, DEFAMATION ACTION AGAINST INDIVIDUAL DEFENDANTS SHOULD NOT HAVE BEEN DISMISSED, BREACH OF CONTRACT ACTION AGAINST THE ASSOCIATION SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, modifying Supreme Court, determined a defamation action against an unincorporated association (the Grand Lodge of Free & Accepted Masons of the State of New York) was properly dismissed, but the defamation action against individuals acting in individual capacities should not have been dismissed. The court further held that the breach of contract action against the association should not have been dismissed. The action was brought against a lodge after plaintiff was accused of fraud and was expelled: "Actions against unincorporated associations, whether for breaches of agreements or for tortious wrongs, are limited to cases where the individual liability of every single member can be alleged and proven ... . The Martin rule 'bars all actions against an unincorporated voluntary membership association, and bars claims against the officers of such an association in their representative capacities where there is no allegation that the members of the association authorized or ratified the wrongful conduct complained of' ... . Here, the plaintiff made no factual allegations in the complaint or in opposition to the motion to dismiss to indicate that all members of the Grand Lodge did in fact ratify the allegedly defamatory statements. ... ... [T]he Martin rule does not purport to immunize individual members of an unincorporated association, acting in their individual capacities, from the consequences of their own tortious conduct ... . Moreover, the Martin rule does not preclude breach of contract causes of action against unincorporated associations and their officers acting in their representative capacities based on an allegedly wrongful expulsion from the association ...". ***Bidnick v. Grand Lodge of Free & Accepted Masons of the State of N.Y.*, 2018 N.Y. Slip Op. 01591, Second Dept 3-14-18**

CRIMINAL LAW.

DEFENDANT WAS NOT APPRISED OF THE DEPORTATION CONSEQUENCES OF HIS PLEAS, MATTER REMITTED FOR OPPORTUNITY TO MOVE TO VACATE THE PLEAS.

The Second Department determined defendant was not warned of the deportation consequences of his guilty pleas. The matter was remitted to give the defendant the opportunity to move to vacate the pleas: "Here, the record does not demonstrate that the Supreme Court apprised the defendant of the possibility of deportation as a consequence of the defendant's pleas. Accordingly, we remit the matter to the Supreme Court, Kings County, to afford the defendant an opportunity to move to vacate his pleas, and for a report by the Supreme Court thereafter. Any such motion shall be made by the defendant

within 60 days after the date of this decision and order ... , and, upon such motion, the defendant will have the burden of establishing that there is a 'reasonable probability' that he would not have pleaded guilty had the court advised him of the possibility of deportation... . In its report to this Court, the Supreme Court shall state whether the defendant moved to vacate his pleas of guilty, and if so, shall set forth its finding as to whether the defendant made the requisite showing or failed to make the requisite showing ...". ***People v. Cole*, 2018 N.Y. Slip Op. 01612, Second Dept 3-14-18**

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

DEFENDANT'S TESTIMONY AND ARGUMENT IN SUPPORT OF A DOWNWARD DEPARTURE IMPROPERLY CUT OFF, NEW HEARING ORDERED.

The Second Department, reversing Supreme Court, remitted the matter for a new SORA hearing because the court cut off the defendant's testimony and arguments in support of a downward departure: " 'A court determining a defendant's risk level under the Sex Offender Registration Act (hereinafter SORA) may not downwardly depart from the presumptive risk level unless the defendant first identifies and proves by a preponderance of the evidence the facts in support of a mitigating factor of a kind, or to a degree, that is not otherwise adequately taken into account by the SORA Guidelines' ... . In this case, during the SORA hearing, the Supreme Court improperly, sua sponte, curtailed the defendant's testimony and arguments in support of, inter alia, his request for a downward departure." ***People v. Williams*, 2018 N.Y. Slip Op. 01629, Second Dept 3-14-18**

ENVIRONMENTAL LAW, MUNICIPAL LAW, LAND USE.

LOCAL LAWS GOVERNING USE OF AGRICULTURAL LAND DID NOT VIOLATE THE PUBLIC TRUST DOCTRINE.

The Second Department, reversing Supreme Court, over a partial dissent, determined that local laws governing the use of agricultural land did not violate the public trust doctrine: "The Supreme Court correctly determined that the public trust doctrine applied to the property interest at issue, namely, development rights in agricultural land, as the plaintiffs demonstrated prima facie that the County acquired these development rights for public use and not in its 'corporate capacity' ... . [T]he County defendants demonstrated, prima facie, that the contested provisions in Local Law Nos. 52-2010 and 44-2013, namely, those concerning commercial horse boarding and equine operations, agricultural development permits for structures and alternative energy systems, maximum lot coverages and the hardship exemption thereto, agricultural tourism, special use permits to conduct a site disturbance or a special event, agricultural processing facilities, hay rides, and agricultural educational tours, did not waste public property or violate the public trust doctrine ...". ***Long Is. Pine Barrens Socy., Inc. v. Suffolk County Legislature*, 2018 N.Y. Slip Op. 01598, Second Dept 3-14-18**

INSURANCE LAW.

SETTLEMENT WITH INSURER DID NOT RESOLVE THE UNDERLYING WRONGFUL DENIAL OF COVERAGE ALLEGATION AGAINST THE INSURER, THE ACTIONS AGAINST THE INSURANCE BROKERS, ALLEGING FAILURE TO PROCURE THE REQUESTED INSURANCE, SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the defendant insurance brokers' (Praxis and HUB) motion to dismiss should not have been granted. Plaintiff settled with the insurer (Affiliated) on its breach of contract claim (which alleged the claim was wrongly denied). Plaintiff's actions against the brokers alleged failure to procure the requested coverage: "... [T]he validity of Affiliated's denial of the plaintiffs' claim for property damage remains undecided, notwithstanding the fact that the plaintiffs settled this action with respect to Affiliated ... . The complaint alleges that the denial was based on actions taken by Praxis and the HUB defendants. Should the plaintiffs prevail on their causes of action against Praxis and the HUB defendants, any damages they recover must necessarily be reduced by the amount of the settlement from Affiliated, in order to avoid a double recovery ...". ***Prime Alliance Group, Ltd. v. Affiliated FM Ins. Co.*, 2018 N.Y. Slip Op. 01630, Second Dept 3-14-18**

PERSONAL INJURY.

QUESTIONS OF FACT WHETHER BAR LIABLE FOR THIRD PARTY ASSAULT UNDER THE DRAM SHOP ACT AND NEGLIGENCE.

The Second Department determined the bar owner's (SNMT's) motion for summary judgment on the Dram Shop Act and negligence causes of action were properly denied. Plaintiff was struck by a bar patron (Coscia). There were questions of fact whether the patron was served alcohol while visibly intoxicated and whether the assault was foreseeable: "… [T}he Supreme Court properly denied that branch of SNMT's motion which was for summary judgment dismissing the General Obligations Law § 11-101 cause of action, and properly denied that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on that cause of action. The submissions of both parties revealed the existence of triable issues of fact as to whether the bar served alcoholic beverages to Coscia while he was visibly intoxicated, whether the bar served alcoholic beverages to Coscia when it had knowledge or reasonable cause to believe that he was under 21 years of age, and whether there was some reasonable or practical connection between the service of alcohol to Coscia and the plaintiff's injuries ... . In addition, the Supreme Court properly denied that branch of SNMT's motion which was for

summary judgment dismissing the negligence cause of action. 'Although a property owner must act in a reasonable manner to prevent harm to those on its premises, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control. Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults' ... . Here, SNMT failed to establish, prima facie, that the attack on the plaintiff was not foreseeable ...". ***Tansey v. Coscia*, 2018 N.Y. Slip Op. 01633, Second Dept 3-14-18**

PERSONAL INJURY, CIVIL PROCEDURE.

SUPREME COURT PROPERLY REFUSED TO CONSIDER THEORY OF LIABILITY RAISED FOR THE FIRST TIME IN OPPOSITION TO DEFENDANTS' SUMMARY JUDGMENT MOTION IN THIS SLIP AND FALL CASE.

The Second Department noted that Supreme Court properly refused to consider a new theory raised for the first time in opposition to a summary judgment motion. Plaintiff alleged she slipped on a piece of trash on stairs. In opposition to defendants' motion for summary judgment code violations and the absence of a handrail were alleged: "On their motion, the defendants established their prima facie entitlement to judgment as a matter of law by establishing that they did not create or have actual or constructive notice of the alleged dangerous condition ... . In opposition, the plaintiff failed to raise a triable issue of fact in this regard. A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint ... . As such, the Supreme Court did not err in declining to consider the plaintiff's new theory of recovery, raised for the first time in opposition to the defendants' motion, based on alleged building code violations related to the lack of a handrail on the subject staircase, since this theory was not pleaded in her amended complaint or set forth in her bill of particulars." ***Mazurek v. Schoppmann*, 2018 N.Y. Slip Op. 01601, Second Dept 3-14-18**

PERSONAL INJURY, CONTRACT LAW.

SNOW REMOVAL CONTRACTOR AND PARKING LOT MANAGER NOT LIABLE FOR SLIP AND FALL UNDER ESPINAL.

The Second Department, in a comprehensive decision dealing with several related issues not summarized here, determined a snow removal contractor (Cristi) and parking lot manager (Five Star) demonstrated their contracts with Port Authority did not give rise to liability for a slip and fall in the parking lot: "A contractual obligation, standing alone, does not generally give rise to tort liability in favor of a third party unless one of three exceptions applies: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely' ... . The submissions in support of their respective motions show that neither Cristi nor Five Star created or exacerbated the icy condition and thereby launched an instrument of harm. Rather, they merely failed to be 'an instrument for good,' which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party' ... The contracts between the Port Authority, Cristi, and Five Star were not comprehensive and exclusive property maintenance agreements intended to displace the Port Authority's general duty to keep the premises in a safe condition ...". ***Castillo v. Port Auth. of N.Y. & N.J.*, 2018 N.Y. Slip Op. 01593, Second Dept 3-14-18**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS DEMONSTRATED THEY HAD NO NOTICE OF THE FORMATION OF ICE IN THE PARKING LOT WHERE PLAINTIFF FELL, BECAUSE PLAINTIFF DID NOT ALLEGE THE ICE WAS A RECURRING CONDITION DEFENDANTS DID NOT NEED TO PRESENT PROOF THAT IT WAS NOT A RECURRING CONDITION, DEFENDANTS ENTITLED TO SUMMARY JUDGMENT.

The Second Department, over a dissent, determined defendants were entitled to summary judgment in this parking lot slip and fall case. Defendants demonstrated they did not have notice that water pooled in the parking lot in the area where plaintiff allegedly fell on ice. The dissent argued that defendants did not demonstrate the formation of ice was not a recurring condition. The majority held that, because plaintiff did not allege the ice was a recurring condition, defendants did not have to present evidence on the issue: "The evidence submitted by the defendants in support of their motion established, prima facie, that they did not create the alleged black ice condition or have actual or constructive notice of it ... . In particular, Picone's [Picone worked at the property] statement in his affidavit that water did not pond in the parking lot during the 38 years he worked at the property necessarily addresses and excludes any recurring condition in the same lot. In opposition to the prima facie showing, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact as to whether the defendants created the alleged condition or had actual or constructive notice of it. ... .[T]he plaintiff failed to allege the existence of a recurring condition at the specific site of her fall. Thus, the defendants had no obligation, in support of their motion for summary judgment, to address the issue of a recurring condition. Further, in opposition to the motion, the plaintiff failed to argue that any recurring condition was specific to the location within the parking lot where she is alleged to have fallen ...". ***Bader v. River Edge at Hastings Owners Corp.*, 2018 N.Y. Slip Op. 01588, Second Dept 3-14-18**

PERSONAL INJURY, EVIDENCE.

NO SPECIFIC PROOF OF WHEN AREA OF THE SLIP AND FALL WAS LAST INSPECTED, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant did not demonstrate a lack of constructive notice of the condition alleged to have caused plaintiff's parking lot slip and fall. The evidence described only general inspection practices and did not indicate when the area of the fall was last inspected: "... [T]he defendant failed to demonstrate that it lacked constructive notice of the hazardous condition which allegedly caused the injured plaintiff's fall. The defendant relied upon, inter alia, the deposition testimony and affidavit of the property manager, which merely referred to her general inspection practices for the parking lot and provided no evidence regarding any specific inspection of the area in question prior to the injured plaintiff's fall ...". ***Maria De Los Angeles Baez v. Willow Wood Assoc., LP*, 2018 N.Y. Slip Op. 01589, Second Dept 3-14-18**

THIRD DEPARTMENT

CRIMINAL LAW.

UNDER THE LAW AT THE TIME OF THE OFFENSE, DEFENDANT COULD NOT BE SENTENCED TO ADDITIONAL INCARCERATION FOR A VIOLATION OF HIS CONDITIONAL DISCHARGE IN THIS DRIVING WHILE INTOXICATED CASE.

The Third Department determined, under law at the time of the offense, defendant should not have been sentenced to additional incarceration for a violation of his conditional discharge in this driving while intoxicated case: "After he served his jail term, a declaration of delinquency was filed in 2015, claiming that he violated his conditional discharge by operating a vehicle without an ignition interlock device. In 2016, defendant admitted to violating the terms of his conditional discharge, and County Court revoked the conditional discharge and sentenced him to an additional aggregate prison term of 1 to 3 years, to be followed by three years of conditional discharge. Defendant appeals. The People concede, and we agree, that pursuant to our recent decision in People v. Coon (156 AD3d 105 [2017]), the sentence of imprisonment imposed upon defendant's violation of the terms of his conditional discharge must be vacated. 'A defendant must be sentenced according to the law as it existed at the time that he or she committed the offense and, at the time defendant operated a vehicle without an ignition interlock device, the applicable law did not allow for the imposition of an additional period of imprisonment' ...". ***People v. Arvidson*, 2018 N.Y. Slip Op. 01682, Third Dept 3-15-18**

UNEMPLOYMENT INSURANCE, EMPLOYMENT LAW.

CLAIMANT PROPERLY DENIED UNEMPLOYMENT BENEFITS DURING FIRST SEVEN WEEKS OF A STRIKE, ALTERNATIVE WORK SITE AVAILABLE.

The Third Department determined claimant was properly denied unemployment insurance benefits for the first seven weeks of a strike because an alternative work site was available: "Pursuant to Labor Law § 592 (1), unemployment insurance benefits are suspended during the first consecutive seven weeks of a strike or industrial controversy beginning the day after a claimant ceases working due to a strike, unless there has been a peremptory lockout by the employer ... . The record reflects that claimant did not work during the relevant period due to the strike, and that he refused his manager's directive to report to an alternate work site that was open, staffed by supervisors and operational during the strike. Thus, substantial evidence supports the Board's determination to suspend his benefits pursuant to Labor Law § 592 (1) ... . The record also demonstrates that the employer did not, at any point, institute a work stoppage or lockout preventing employees from working but, rather, the union initiated the strike and work stoppage, in which claimant participated. Further, as the Board correctly determined, the employer's decision to consolidate operations due to the strike and to temporarily assign claimant to a nearby work site did not constitute a 'lockout[]' ... , which only occurs upon 'the refusal by an employer to furnish available work to [its] regular employees' ...". ***Matter of Parron (Commissioner of Labor)*, 2018 N.Y. Slip Op. 01696, Second Dept 3-15-18**

FOURTH DEPARTMENT

CIVIL PROCEDURE.

ATTEMPT TO FILE AND SERVE AN AMENDED SUMMONS AND COMPLAINT WAS UNTIMELY AND THE RELATION BACK DOCTRINE DID NOT APPLY, TWO-JUSTICE DISSENT DISAGREED ON THE RELATION-BACK AND SEVERAL OTHER SUBSTANTIVE PROCEDURAL ISSUES.

The Fourth Department, over an extensive two-justice dissent which addresses many substantive procedural issues not summarized here, determined plaintiff's attempt to file and serve an amended complaint was untimely and the relation-back

doctrine did not apply: "Pursuant to CPLR 203 (f), '[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.' It is well established that 'the linchpin' of the relation back doctrine [is] notice to the defendant within the applicable limitations period'... . Here, it is undisputed that the original complaint was never served on defendants. The original complaint thus did not give defendants notice of the transactions or occurrences to be proved pursuant to the amended complaint. The claims in the amended complaint, therefore, are measured for timeliness by service (or filing in this case) of the amended complaint ... . 'Because no one was served until [after the statute of limitations expired], there is no basis to conclude that defendant[s] had any idea that a lawsuit was pending, much less that [they] would be . . . named [as] defendants,' within the applicable limitations period ...". ***Vanyo v. Buffalo Police Benevolent Assn., Inc.*, 2018 N.Y. Slip Op. 01827, Fourth Dept 3-16-18**

CONTRACT LAW.

THE STIPULATED SUM CONTRACT FOR SCHOOL CONSTRUCTION DID NOT ALLOW THE SCHOOL DISTRICT ACCESS TO THE PROGRAM MANAGER'S ACTUAL CONSTRUCTION AND ADMINISTRATIVE COSTS.

The Fourth Department, over a two-justice partial dissent, in a complex decision covering many issues not summarized here, determined that the language of the contracts and agreements re: the construction of new schools precluded the City of Buffalo Joint Schools Construction Board (Board) from learning the program manager's (LPC's) construction and administrative costs. The Board entered construction agreements with LPC as an agent of the City of Buffalo School District (District): "In 2014 and 2015, after operating under the [relevant contracts and agreements] for over 12 years, the Board and the District refused to process or pay the last four payment requisitions until LPC provided them with documentation concerning LPC's actual construction and administrative costs, information that LPC contended was confidential, proprietary and not subject to disclosure under the [relevant contracts and agreements]. * * * [The relevant agreements provide] the District with audit and examination rights to any and all records related to the ' construction contingency' portion of the stipulated sum. Nevertheless, that section further provides that, '[n]otwithstanding anything to the contrary contained herein, the foregoing audit and examination rights do no[t] apply to any records maintained by [LPC] (or . . . on behalf of [LPC]) with respect to any Project Administration Costs or Construction Costs other than records directly related to the expenditure of the construction contingency.' ... The contract is a stipulated-sum construction contract. In such contracts, '[t]he owner is obligated to pay the contractor the fixed amount no matter what it costs to finish the work' and, generally, 'the owner is not entitled to review the costs that the contractor incurs during the project' ... . Considering the general purpose of the contract and the fact that the [related agreements] specifically provide that the audit rights for construction contingency funds did not apply to records concerning LPC's 'Project Administration Costs or Construction Costs' unrelated to the construction contingency, we conclude that the only reasonable way to interpret [the applicable contract] is to determine that it applies to the District's actual costs only." ***City of Buffalo City Sch. Dist. v. LPCiminelli, Inc.*, 2018 N.Y. Slip Op. 01832, Fourth Dept 3-16-18**

COURT OF CLAIMS, IMMUNITY, ANIMAL LAW.

PARK SAFETY IS A PROPRIETARY FUNCTION WHICH DOES NOT TRIGGER GOVERNMENTAL IMMUNITY, PLAINTIFF BITTEN BY A RABID FOX IN A STATE PARK, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY PROPERLY GRANTED.

The Fourth Department determined the duty to keep a state park safe is a proprietary function, not a governmental function. The governmental immunity doctrine does not apply. Therefore the claimant's motion for summary judgment based upon his being bitten by a rabid fox in a park was properly granted: " 'The relevant inquiry in determining whether a governmental agency is acting within a governmental or proprietary capacity is to examine . . . the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred' ... . Here, claimant's injuries allegedly resulted from defendant's negligent failure to take adequate steps to protect park patrons from reasonably foreseeable danger, despite having actual notice of a potentially rabid animal on the park premises hours before the incident. 'It is well settled that regardless of whether or not it is a source of income the operation of a public park by a municipality is a quasi-private or corporate and not a governmental function'... . Further, 'a municipality is under a duty to maintain its park . . . facilities in a reasonably safe condition' ... . That 'duty goes beyond the mere maintenance of the physical condition of the park . . . and, although strict or immediate supervision need not be provided, the municipality may be obliged to furnish an adequate degree of general supervision which may require the regulation or prevention of such activities [or other conditions] as endanger others utilizing the park' ... . Thus, we conclude that the court properly determined that claimants' allegations that defendant failed 'to minimize the risk posed with a relevant warning and effective notification to the [p]ark [p]olice' implicated defendant's proprietary, not governmental, duties." ***Agness v. State of New York*, 2018 N.Y. Slip Op. 01747, Fourth Dept 3-16-18**

CRIMINAL LAW.

DEFENDANT WAS NOT INCLUDED IN THE SANDOVAL CONFERENCE, NEW TRIAL ORDERED.

The Fourth Department reversed defendant's conviction and ordered a new trial because defendant was not included in the *Sandoval* conference (re: whether defendant could be cross-examined about prior convictions): "Defendant appeals from a judgment convicting him after a jury trial of, inter alia, burglary in the second degree ... . As the People correctly concede, reversal is required. The record establishes that defendant was excluded from Supreme Court's Sandoval conference ... and, because '[t]he court's Sandoval ruling in this case was not wholly favorable to defendant, . . . it cannot be said that defendant's presence at the hearing would have been superfluous' ...". ***People v. Cooper*, 2018 N.Y. Slip Op. 01823, Fourth Dept 3-16-18**

CRIMINAL LAW.

UNDULY HARSH AND SEVERE SENTENCE OF PERSISTENT VIOLENT FELONY OFFENDER.

The Fourth Department determined defendant's sentence was unduly harsh and severe. The defendant, a persistent violent felony offender, was convicted of criminal possession of a weapon and sentenced to 25 years to life: "The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree. * * * ... [T]he sentence imposed, an indeterminate term of imprisonment of 25 years to life as a persistent violent felony offender, is unduly harsh and severe. Defendant did not fire or even directly possess the weapon, and there is no evidence that he knew that his co-defendant intended to use it unlawfully. Although defendant has multiple prior felony convictions, several of which are for weapon offenses, he has no history of violence on his record, and his conduct in this case does not in our view warrant the maximum sentence permitted by law. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of imprisonment of 16 years to life ...". ***People v. Ray*, 2018 N.Y. Slip Op. 01796, Fourth Dept 3-16-18**

CRIMINAL LAW.

INDICTMENT DID NOT PROVIDE SUFFICIENT NOTICE OF THE TIME PERIODS IN TWO COUNTS, MOTION FOR A TRIAL ORDER OF DISMISSAL OF THOSE TWO COUNTS SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing County Court, determined defendant's motion for a trial order of dismissal on two counts of the indictment should have been granted because the indictment did not notify defendant of the time periods of the alleged offenses: "... County Court erred in denying his motion for a trial order of dismissal with respect to counts one and two of the indictment, both charging him with use of a child in a sexual performance, on the ground that the indictment failed to provide defendant with sufficient notice of the time periods during which he allegedly committed those acts ...". ***People v. Carrigan*, 2018 N.Y. Slip Op. 01733, Fourth Dept 3-16-18**

CRIMINAL LAW, ATTORNEYS.

JUDGE SHOULD HAVE INQUIRED INTO DEFENDANT'S REQUEST FOR NEW COUNSEL AFTER LEARNING DEFENDANT HAD FILED A GRIEVANCE, NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined County Court should have inquired into defendant's request for new counsel after learning defendant had filed a grievance against his attorney: "Defendant contends that County Court erred in denying his request to substitute his second assigned attorney and, at a minimum, should have conducted a more detailed inquiry with respect to his complaints about counsel's performance. '[A]lthough there is no rule requiring that a defendant who has filed a grievance against his attorney be assigned new counsel, [a] court [is] required to make an inquiry to determine whether defense counsel [can] continue to represent defendant in light of the grievance' ... . Here, we agree with defendant that the court should have 'made at least some minimal inquiry in light of defense counsel's statement that the defendant had filed a grievance against him,' in order to determine whether defense counsel was properly able to continue to represent defendant ... . We thus conclude that the court thereby violated defendant's right to counsel and that defendant is entitled to a new trial ... , prior to which he should be given the opportunity to retain counsel or be assigned new counsel if appropriate." ***People v. Hardy*, 2018 N.Y. Slip Op. 01837, Fourth Dept 3-16-16**

CRIMINAL LAW, EVIDENCE.

LEGALLY INSUFFICIENT EVIDENCE THAT DEFENDANT WAS THE SHOOTER IN THIS HOME INVASION CASE, FIRST DEGREE MURDER CONVICTION REDUCED TO SECOND DEGREE MURDER.

The Fourth Department, reducing defendant's conviction from first degree to second degree murder, over a two-justice dissent, determined there was legally insufficient evidence that the defendant shot the victim in this home invasion case: "To support a conviction of murder in the first degree under Penal Law § 125.27 (1) (a) (vii), the People were required to establish beyond a reasonable doubt that defendant intentionally caused the victim's death during the commission of a crime enumerated in the statute, such as a robbery or burglary in the first degree. A conviction under subparagraph (vii)

cannot be based on accomplice liability under section 20.00, 'unless the defendant's criminal liability . . . is based upon the defendant having commanded another person to cause the death of the victim or intended victim' ... . Here, the jury was never presented with the command theory of liability, but was instead expressly instructed in response to a jury note that, to convict defendant of murder in the first degree, it would have to determine that defendant 'pulled the trigger himself.' Viewing the evidence in the light most favorable to the People, we conclude that no rational trier of fact could have found beyond a reasonable doubt that defendant shot the victim... . Here, the evidence established that defendant's girlfriend was also inside the victim's house with defendant at the time when the victim is believed to have been shot, but the People presented no evidence whatsoever with respect to the series of events inside the home or with respect to who ultimately 'pulled the trigger' against the victim." ***People v. Henry*, 2018 N.Y. Slip Op. 01833, Fourth Dept 3-16-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT HAD STANDING TO CONTEST THE SEARCH, MATTER REMITTED.

The Fourth Department, reversing Supreme Court, determined defendant had standing to contest the search which turned up the weapon defendant was charged with possessing: " '[A] defendant seeking to suppress evidence, on the basis that it was obtained by means of an illegal search, must allege standing to challenge the search and, if the allegation is disputed, must establish standing' ... . To establish standing, the defendant must demonstrate that he or she has a legitimate expectation of privacy in the place searched ... . A defendant has no expectation of privacy in a home where he or she is merely a casual visitor with tenuous ties to it... . In such cases, the defendant does not have standing to challenge the legality of the search of the home... . According to the unrefuted testimony at the suppression hearing of defendant's brother and sister-in-law, the lessors of the home, defendant resided there until two months prior to the incident. Nevertheless, defendant maintained the address associated with the home as his permanent mailing address, and, although he removed much of his property, he continued to keep clothes there. He returned frequently to care for his nieces and nephews, and he was entrusted with the home when his brother and sister-in-law were away. Defendant was at the home often and slept there overnight between 5 and 12 times per month. Thus, we conclude that defendant's 'connection with the premises was substantially greater than that of a casual visitor, and . . . that . . . defendant had a reasonable expectation of privacy in the home' ... . Inasmuch as 'our review is limited to the issues determined by the court'... , and the court failed to determine whether one of the lessors of the home consented to the search, we continue to hold the case and reserve decision, and we remit the matter to Supreme Court to determine that issue." ***People v. Sweat*, 2018 N.Y. Slip Op. 01786, Fourth Dept 3-16-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

EXPERT EVIDENCE ON CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME (CSAAS) WAS IMPROPERLY ADMITTED TO SHOW THE VICTIM WAS ABUSED, CONVICTIONS REVERSED IN THE INTEREST OF JUSTICE.

The Fourth Department, reversing defendant's conviction in the interest of justice, determined the expert evidence on child sexual abuse accommodation syndrome (CSAAS) was improperly admitted to prove the crime took place, depriving defendant of a fair trial: "... [W]e acknowledge that expert testimony concerning CSAAS and similar psychological syndromes has long been admissible to explain the behavior of a victim that might be puzzling to a jury ... . Here, however, the expert witness did not confine her testimony to 'educat[ing] the jury on a scientifically recognized pattern of secrecy, helplessness, entrapment [and] accommodation' experienced by a child victim' ... . Instead, the expert explained 'grooming' and other behaviors associated with perpetrators of child sexual abuse. Her detailed description of a typical perpetrator's modus operandi, moreover, closely tracked the victim's testimony concerning defendant's conduct, and the prosecutor on summation urged the jury to conclude that defendant's interactions with the victim fit the description of a typical perpetrator's conduct as described by the expert. In sum, that part of the testimony of the expert describing the conduct of a typical perpetrator was not directed at explaining the victim's behavior. Rather, it was presented 'for the purpose of proving that the [victim] was sexually abused' ... , which purpose was reinforced by the prosecutor's summation." ***People v. Ruiz*, 2018 N.Y. Slip Op. 01722, Fourth Dept 3-16-18**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

TRIAL JUDGE SHOULD HAVE ALLOWED DEFENSE COUNSEL TO REOPEN THE PROOF AFTER A VIDEO PLAYED DURING SUMMATION DEMONSTRATED THE ALLEGED VICTIM HAD NOT TESTIFIED TRUTHFULLY, DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO VIEW THE ENTIRE VIDEO PRIOR TO TRIAL.

The Fourth Department, reversing defendant's conviction, determined: (1) the court erred when ii refused to reopen the proof after a video played for the first time during summation demonstrated defendant's estranged wife, the alleged victim, had apparently not testified truthfully; and (2) defense counsel was ineffective for failing to view the entire video before trial. The video was from a convenience store. The estranged wife testified that the defendant fired shots at her as she was driving two minutes after leaving the convenience store. She testified she was driving a green Lexus with one child when the shots were fired. The video apparently showed her leaving the convenience store in a blue-gray Nissan with two children: "... [T]he decision to permit a party to reopen the case, at least prior to its submission to the jury, lies within the discretion of the trial court ... . A trial court's discretion to preclude evidence is nonetheless 'circumscribed by the defen-

dant's constitutional rights to present a defense and confront his [or her] accusers' ... , because '[a] defendant always has the constitutional right to present a complete defense'... and 'to put before a jury evidence that might influence the determination of guilt' ... . Here, defendant's arguments in support of his motion to reopen the proof implicated the constitutional aspects of his contention raised on appeal, i.e., that reopening the proof was necessary to afford him a fair trial and his right to present a defense to the allegations upon which he was being prosecuted. To the extent that defendant did not preserve the constitutional aspects of his contention for our review by failing to raise them sufficiently before the trial court ... , we exercise our power to review those aspects of his contention as a matter of discretion in the interest of justice ...". ***People v. Owens*, 2018 N.Y. Slip Op. 01712, Fourth Dept 3-16-18**

DEBTOR-CREDITOR.

QUESTIONS OF FACT WHETHER FORGED NOTE AND GUARANTIES WERE RATIFIED.

The Fourth Department, modifying Supreme Court, determined, inter alia, that there were questions of fact whether a note and guaranties were ratified, despite forged signatures: "It is well established that a forged instrument may be ratified where 'the principal retains the benefit of an unauthorized transaction with knowledge of the material facts' ... . The evidence submitted in support of the motion contained sworn statements of Wheeler and his business partner establishing that the proceeds of the loan were used to provide the corporation with capital and that its president, Wheeler, knew that his signature had been forged on the documents authorizing the loan. Wheeler, however, never attempted to return the proceeds of the loan, and the loan 'cannot now be repudiated' ... . Thus, Wheeler's own submissions raised issues of fact whether he ratified the forged note ... . Even assuming, arguendo, that Wheeler established as a matter of law that the guaranties were forged, we conclude that plaintiff raised issues of fact whether he had knowledge of the guaranties and thus whether he ratified them ...". ***Adirondack Bank v. Midstate Foam & Equip., Inc.*, 2018 N.Y. Slip Op. 01713, Fourth Dept 3-16-18**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, EVIDENCE.

FINDING THAT PETITIONER HAD NONCONSENSUAL SEX WITH ANOTHER COLLEGE STUDENT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, DETERMINATION ANNULLED AND RECORD EXPUNGED.

The Fourth Department, annulling the respondent-college's determination and expunging the petitioner-student's record, determined the finding that the petitioner had nonconsensual sex with another student was not supported by substantial evidence: "Respondent sanctioned petitioner by placing him on persona non grata status, barring him from the college campus, and making a notation of a disciplinary violation on petitioner's academic transcript. This Court may review whether 'the determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence' ... . 'Substantial evidence' is defined as 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'... . We conclude that respondent's determination that the complainant lacked the ability to consent because of her incapacitation is not supported by substantial evidence. The complainant's testimony at the disciplinary hearing contradicted her version with respect to the sequence of events made in her statement to the Buffalo Police Department, which statement was the most contemporaneous to the incident. Moreover, the affidavit and testimony of the witness who was with the complainant the morning following the incident was consistent with the complainant's earlier version of the sequence of events, which establishes that she could not have been incapacitated at the time of the incident. Thus, considering the record as a whole, respondent's determination is not supported by substantial evidence and must be annulled ...". ***Matter of West v. State Univ. of N.Y. at Buffalo*, 2018 N.Y. Slip Op. 01839, Fourth Dept 3-16-18**

FAMILY LAW.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO FIND A FOSTER HOME FOR A FAMILY'S PET CAT.

The Fourth Department, reversing Family Court, determined the Department of Social Services made reasonable efforts to prevent or eliminate the need for the temporary removal of the children while the neglect petition is pending. The court noted that Family Court did not have the power to find a foster home for the family's cat: "... [T]he court lacked the authority to order it to find a foster home for respondents' cat, and we therefore further modify the order accordingly. 'Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute' ... , or by the New York Constitution (see NY Const, art VI, § 13). Inasmuch as animals are property ... , and Family Court does not have jurisdiction over matters concerning personal property, we conclude that the court exceeded its authority in directing petitioner to find foster care for respondents' cat." ***Matter of Ruth H. (Marie H.)*, 2018 N.Y. Slip Op. 01840, Fourth Dept 3-16-18**

LABOR LAW-CONSTRUCTION LAW, VEHICLE AND TRAFFIC LAW.

DEFENDANT GENERAL CONTRACTOR DID NOT EXERCISE SUPERVISORY CONTROL OVER THE PLAINTIFF OR PLAINTIFF'S CO-WORKER WHO INJURED PLAINTIFF, THE FACT THAT DEFENDANT GENERAL CONTRACTOR SUPPLIED THE EQUIPMENT WHICH INJURED PLAINTIFF DID NOT GIVE RISE TO LIABILITY ON THE GENERAL CONTRACTOR'S PART.

The Fourth Department, modifying Supreme Court, granted the defendant general contractor's motion for summary judgment in this common law negligence and Labor Law § 200 action. The Fourth Department further found that the plaintiff's Labor Law § 241(6) and Vehicle and Traffic Law § 388 causes of action were properly dismissed. Plaintiff worked for the property owner, GTO, and did not work for defendant general contractor. Plaintiff was injured by a GTO co-worker who was using a piece of equipment owned by the defendant (a skid steer used in landscaping work). The defendant did not exercise supervisory control over the skid steer operator and demonstrated entrusting the skid steer to the co-worker did not constitute negligent entrustment of a dangerous instrument. The plaintiff, a landscaper, was not engaged in construction work within the meaning of Labor Law § 241(6) and the skid steer was not operated on a public highway within the meaning of the Vehicle and Traffic Law: "Here, the evidence submitted by defendant established that plaintiff and the coworker were both employed by GTO, not by defendant. They were performing landscaping work in the parking lot of the complex, and were not involved in the construction work that was being performed by defendant. Defendant did not give any instructions to plaintiff and the coworker about what work to perform or how to perform their work, and no one from GTO was required to use the skid steer to perform his or her duties. The coworker chose to use the skid steer to move topsoil, and defendant permitted him to do so for such use. Although we are mindful that there might be circumstances in which a party may be said to exercise control over the manner of work based on the provision of the equipment to be used, we conclude that defendant did not exercise such control in this case ... . The fact that defendant allowed a GTO employee to use its equipment to perform work on the grounds did not give defendant supervisory control over the manner in which the landscaping work was being performed by the GTO employees. To the contrary, the record establishes that defendant exercised no supervisory control over the landscaping work that was being performed by plaintiff and the coworker and, thus, defendant cannot be held liable for any injuries that were caused by the manner in which that work was being performed." ***Calvert v. Duggan & Duggan Gen. Contr., Inc.*, 2018 N.Y. Slip Op. 01841, Fourth Dept 3-16-18**

PRODUCTS LIABILITY, NEGLIGENCE.

SOPHISTICATED INTERMEDIARY DOCTRINE DOES NOT APPLY AS A MATTER OF LAW IN THIS SILICA INHALATION FAILURE TO WARN PRODUCTS LIABILITY CASE, QUESTION OF FACT WHETHER DEFENDANT LIABLE FOR FAILURE TO WARN PLAINTIFF EMPLOYEE, DESPITE ANY KNOWLEDGE OF THE DANGER ON THE PART OF PLAINTIFF'S EMPLOYER.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined that the sophisticated intermediary doctrine did not apply as a matter of law to this failure to warn case. Under the doctrine the manufacturer of the silica product at issue would be under a duty to warn plaintiff's employer, a sophisticated intermediary, but not the plaintiff: "... [I]t is not a complete defense to a failure to warn claim against a product manufacturer under New York law that an injured worker's employer was adequately warned or otherwise knowledgeable of the dangers of the product... , or that the employer may have been in the best position to give the warning at issue ... . Instead, evidence that an employer had knowledge of a hazard or was better able than the manufacturer to provide a warning to the injured worker is relevant to whether a manufacturer satisfied its duty to provide adequate warnings, which is typically a question of fact ... . * * * ... [W]e decline to recognize the sophisticated intermediary doctrine on the facts of this case, and we conclude that there is a triable issue of fact whether defendants provided adequate warnings to the injured workers ...". ***Rickicki v. Borden Chem.*, 2018 N.Y. Slip Op. 01829, Fourth Dept 3-16-18**

REAL ESTATE, MORTGAGES.

DOWNPAYMENT NOT FORFEITED BASED UPON THE BANK'S REVOCATION OF THE MORTGAGE COMMITMENT, NO SHOWING THE REVOCATION WAS DUE TO DEFENDANT PURCHASER'S BAD FAITH.

The Fourth Department, reversing Supreme Court, determined that defendant purchaser did not forfeit the downpayment under the real estate purchase agreement based upon the bank's revocation of the commitment letter: " 'When a mortgage commitment letter is revoked by the lender after the contingency period, in contrast to the failure to obtain a commitment letter in the first instance, the contractual provision relating to failure to obtain an initial commitment is inoperable, and the question becomes whether the revocation was attributable to any bad faith on the part of the purchaser' ... . Thus, where a mortgage commitment is revoked in the absence of bad faith on the part of the purchaser, performance of the contract is excused and the purchaser avoids the 'unenviable position of either having to proceed to closing [without financing], or to risk forfeiture of the down payment' ... . Notably, the fact that a mortgage commitment was revoked based on new information supplied by the purchaser does not, by itself, establish that he or she acted in bad faith ... . Here, plaintiff failed to establish as a matter of law that 'the lender's revocation of the mortgage commitment was attributable to bad faith on the part of [defendant]' ... , rather than to defendant's efforts to honor his duty of fair dealing to the bank by providing it with

further information regarding the proposed transaction ...". ***Md3 Holdings, LLC v. Buerkle*, 2018 N.Y. Slip Op. 01836, Fourth Dept 3-16-18**

ZONING, MUNICIPAL LAW, CIVIL PROCEDURE.

ZONING BOARD'S FAILURE TO REFER THE AREA VARIANCE APPLICATION TO THE PLANNING BOARD AS REQUIRED BY THE GENERAL MUNICIPAL LAW WAS A JURISDICTIONAL DEFECT, DETERMINATION GRANTING THE VARIANCE VACATED.

The Fourth Department, modifying Supreme Court, determined the town respondents violated General Municipal Law § 239-m by not referring an application for an area variance by respondent mining operation to the planning board. The violation was a jurisdictional defect that did not trigger the 30-day statute of limitations: 'General Municipal Law § 239-m requires that a municipal agency, before taking final action on an application for [land use] approval, refer that application to a county or regional planning board for its recommendation'... . It is undisputed that the ZBA (zoning board of appeals) did not refer the initial application for an area variance to the Cayuga County Planning Board (County Planning Board) before taking final action on that application. Contrary to the contention of the Town respondents, area variances are proposed actions for which referral is required under the statute ... . 'The alleged failure to comply with the referral provisions of the statute is not a mere procedural irregularity but is rather a jurisdictional defect involving the validity of a legislative act' ... . Thus, the ZBA's failure to refer the initial application for an area variance to the County Planning Board renders the subsequent approval by the ZBA 'null and void' ...". ***Matter of Fichera v. New York State Dept. of Envtl. Conservation*, 2018 N.Y. Slip Op. 01843, Fourth Dept 3-16-18**

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