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CasePrepPlus

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FIRST DEPARTMENT

CRIMINAL LAW. ATTEMPT. WEIGHT OF THE EVIDENCE REVIEW. APPEALS.

The evidence was not sufficient to support a conviction for attempted possession of burglar's tools (the conviction was against the weight of the evidence). The defendant had tools in his possession and stopped his bicycle to look inside two or three cars (in broad daylight). However the defendant did not touch the tools. Therefore the element of the offense which requires circumstances indicating the tools were about to be used to commit a burglary was not supported. **People v Pannizzo, 2015 NY Slip Op 05894, 1st Dept 7-7-15**

CRIMINAL LAW. EXIGENT CIRCUMSTANCES. WARRANTLESS ARREST IN THE HOME. JUROR DISQUALIFICATION.

The warrantless entry into defendant's home to arrest him was justified by exigent circumstances and did not, therefore, constitute a "Payton" violation. In addition, a juror's temporary absence from the trial (during which the trial was adjourned), and the juror's inaccurate statement he had discussed his absence with the judge, did not reveal juror bias and did not therefore warrant a "Buford" hearing or disqualification of the juror. With respect to exigent circumstances, the court explained: "Factors to be considered in determining whether exigent circumstances are present include "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause ... to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry ...". **People v Paulino, 2015 NY Slip Op 05898, 1st Dept 7-7-15**

FRAUD IN THE INDUCEMENT. BREACH OF CONTRACT. CONTRACT LAW.

Misrepresentations supported both a claim for breach of contract and a claim for fraud in the inducement. The misrepresentations involved the alleged failure to disclose an audit prior to the sale of a company which, plaintiff alleged, induced plaintiff to pay more than the company was worth. The majority offered a clear explanation of the legal requirements for a distinct fraud (tort) cause of action which is not duplicative of the related breach of contract cause of action: "It is axiomatic that in order to state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury ... . In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim… . Moreover, these misrepresentations of present fact must be collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract ... . Therefore, [a]s a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from, or in addition to, the breach of contract ...". [internal quotation marks omitted] **Wyle Inc. v ITT Corp., 2015 NY Slip Op 05877, 1st Dept 7-7-15**

NEGLIGENCE. PERSONAL INJURY. REAR-END COLLISIONS. DOUBLE-PARKED VEHICLE. PROXIMATE CAUSE. CONDITION OR OCCASION FOR THE OCCURRENCE OF THE ACCIDENT.

The fact that defendant's (Pepsi's) vehicle was double-parked did not warrant denial of defendant's summary judgment motion in a rear-end collision case. The fact that the vehicle was double-parked was merely the condition or occasion for the occurrence of the accident, not the cause. Plaintiff's claim that sunlight temporarily blinded him did not constitute a nonnegligent explanation for his striking the rear of the Pepsi vehicle. **Barry v Pepsi-Cola Bottling Co. of N.Y., Inc., 2015 NY Slip Op 06034, 1st Dept 7-9-15**

NEGLIGENCE. PERSONAL INJURY. TORT LIABILITY ARISING FROM CONTRACT.

Summary judgment should not have been granted to the defendants in a slip and fall case. The complaint alleged that there was liquid on the floor of a women's homeless shelter operated by defendant Camba. The complaint further alleged that plaintiff frequently observed liquid on the floor after defendant food service, Whitson's, delivered prepared food. Plaintiff also alleged she had complained about the condition to Camba's maintenance staff. The First Department found the affi-

davit of Camba's employee did not demonstrate the absence of actual or constructive notice (no evidence of the cleaning schedule was presented). The First Department also found there was a question of fact whether Whitson's launched an instrument of harm, which would support tort liability for plaintiff's fall arising from Whitson's food service contract with Camba. **Jackson v Whitson's Food Corp., 2015 NY Slip Op 05889, 1st Dept 7-7-15**

NEGLIGENCE. PERSONAL INJURY. TORT LIABILITY ARISING FROM CONTRACT. ELEVATOR MAINTENANCE.

An elevator maintenance company did not owe a duty of care to the plaintiff who was injured when the elevator free-fell three stories in September 2010. The maintenance contract with the elevator maintenance company had been cancelled for non-payment, but the company had subsequently agreed to do, and had done, emergency repairs when called to do so. Although there was evidence the elevator maintenance company was negligent re: repairs done in early 2010, applying the "Espinal" criteria, the First Department held there was no evidence the maintenance company "launched an instrument of harm," the only available theory of liability. **Medinas v MILT Holdings LLC, 2015 NY Slip Op 06044, 1st Dept 7-9-15**

SECOND DEPARTMENT

CRIMINAL LAW. CLOSURE OF COURTROOM. PUBLIC TRIAL.

Supreme Court properly closed the courtroom to alleged gang members during the testimony of a witness who indicated she was afraid of the gang members. The Second Department explained the relevant criteria: "In order to comport with the requirements of the Sixth Amendment, a courtroom closure must satisfy a four-prong standard set forth by the United States Supreme Court in Waller v Georgia: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure …". [internal quotation marks omitted] **People v Dawson, 2015 NY Slip Op 05959, 2nd Dept 7-8-15**

CRIMINAL LAW. WEIGHT OF THE EVIDENCE REVIEW. EVIDENCE. JURY INSTRUCTIONS, PROSECUTION HELD TO ERRONEOUS. APPEALS.

Defendant's assault-related convictions were not supported by the weight of the evidence. In addition, the prosecution should have been held to an erroneous burglary jury instruction which was not challenged. The defendant was acquitted of possession of a weapon and was not charged with acting in concert with others. Absent any evidence the defendant caused the injury to the victim his assault-related convictions could not stand. The jury was erroneously instructed that burglary requires proof the defendant unlawfully entered "and" (not "or") remained in the victim's dwelling. Because the erroneous instruction was not challenged, the People are held to it. The burglary conviction could not stand because the defendant was invited into the dwelling. **People v Samuels, 2015 NY Slip Op 05968, 2nd Dept 7-8-15**

FAMILY LAW. CONDITIONS FOR FUTURE VISITATION.

A court may not condition future visitation upon a parent's participation in counseling or treatment because such a condition effectively removes control over visitation from the court. **Lajqi v Lajqi, 2015 NY Slip Op 05916, 2nd Dept 7-8-15**

FAMILY LAW. CONTRACT LAW. DOMESTIC RELATIONS LAW. SEVERABILITY OF CONTRACT. SEPARATION AGREEMENTS. AGREEMENT TO ASSIST SPOUSE IN VISA APPLICATION.

The provision in a separation agreement in which one spouse agreed to help the other obtain a visa did not render the marriage a sham and the separation agreement unenforceable. Therefore the provision of the separation agreement, that one spouse pay the other one-half of the value of a jointly-owned business, was enforceable. The Second Department noted that even if a portion of the agreement was not enforceable, the valid provisions could remain enforceable. The Second Department further noted that equitable distribution rules apply even when a marriage is annulled as void or voidable. **Lanza v Carbone, 2015 NY Slip Op 05917, 2nd Dept 7-8-15**

FAMILY LAW. DOMESTIC RELATIONS LAW. EQUITABLE DISTRIBUTION. PENSIONS.

The Second Department, in an extensive, full-fledged opinion, discussed: (1) the effect of a delay in submitting a Qualified Domestic Relations Order (QDRO) for a share of the other spouse's pension (despite the delay the submitting spouse is entitled to arrears to the date of retirement); (2) the requirement that any QDRO be in accordance with a stipulation of settlement which has not merged (court cannot expand what was agreed to); (3) whether a loan taken against a pension should reduce the other spouse's portion of the pension (no, it should not); and (4) whether a spouse's portion of the other spouse's pension should be reduced because of the election of a survivorship benefit in favor of a the other spouse's new spouse (yes, it should). In a nutshell, the court held that the late submission of a QDRO did not deprive the submitting spouse of

the right to arrears, and a spouse's share if the other spouse's pension should not be reduced because of the other spouse's taking out a loan against the pension. **Kraus v Kraus, 2015 NY Slip Op 05915, 2nd Dept 7-8-15**

FORECLOSURE. STANDING. SUA SPONTE DISMISSAL. CIVIL PROCEDURE.

Supreme Court should not have, sua sponte, dismissed the foreclosure action for an alleged lack of standing. The defendants did not raise the standing defense and, therefore, waived it. Standing is not a jurisdictional defense warranting sua sponte action by the court. **Onewest Bank, FSB v Prince, 2015 NY Slip Op 05922, 2nd Dept 7-8-15**

MUNICIPAL LAW. TOWN LAW. HIGHWAY LAW. MANDAMUS. DECLARATORY JUDGMENT. CIVIL PROCEDURE.

Supreme Court properly converted a mandamus proceeding to a declaratory judgment proceeding and properly found that the town was obligated, under the Highway Law, to repair an unsafe bridge. However, Supreme Court did not have the power to direct the town to make the repairs "as expeditiously as possible." **Matter of Hyde Park Landing, Ltd. v Town of Hyde Park, 2015 NY Slip Op 05945, 2nd Dept 7-8-15**

NEGLIGENCE. PERSONAL INJURY. CARE AND SUPERVISION OF A CHILD BY A NONPARENT. AMNESIA SUFFERED BY THE INJURED PARTY, EFFECT ON PROOF REQUIREMENTS. EVIDENCE.

In concluding summary judgment dismissing the complaint was proper, the Second Department explained the criteria for negligent care of a child by a nonparent and noted the effect of amnesia suffered by the injured party on the plaintiff's proof requirements: With respect to liability for the care of an infant, the court explained: "A person, other than a parent, who undertakes to control, care for, or supervise an infant, is required to use reasonable care to protect the infant over whom he or she has assumed temporary custody or control. Such a person may be liable for any injury sustained by the infant which was proximately caused by his or her negligence. While a person caring for entrusted children is not cast in the role of an insurer, such an individual is obliged to provide adequate supervision and may be held liable for foreseeable injuries proximately resulting from the negligent failure to do so ...". **Alotta v Diaz, 2015 NY Slip Op 05899, 2nd Dept 7-8-15**

NEGLIGENCE. PERSONAL INJURY. CIRCUMSTANTIAL EVIDENCE. EVIDENCE.

Summary judgment in favor of the respondents should not have been granted. Plaintiffs had raised a question of fact by producing circumstantial evidence that the respondents were responsible for the placement of a "shoe paddle" in a subway car which fell and injured plaintiff. The court explained the criteria for circumstantial evidence in this context: "To establish a prima facie case of negligence based wholly on circumstantial evidence, [i]t is enough that [the plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred ... . The law does not require that plaintiff's proof positively exclude every other possible cause of the accident but defendant's negligence ... . Rather, [the plaintiff's] proof must render those other causes sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence ... . A plaintiff need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency ...". [internal quotation marks omitted] **Hernandez v Alstom Transp., Inc., 2015 NY Slip Op 05911, 2nd Dept 7-8**

NEGLIGENCE. PERSONAL INJURY. STRICT PRODUCTS LIABILITY. DESIGN DEFECT.

Summary judgment should have been granted as a matter of law to the manufacturer of a table saw. Plaintiff alleged the absence of an interlock device which would not allow the saw to operate without a protective guard in place was a design defect. However, it is settled that such an interlock device on a table saw renders the saw unusable for some cuts and, therefore, the absence of the device is not a design defect. **Chavez v Delta Intl. Mach. Corp., 2015 NY Slip Op 05903, 2nd Dept 7-8-15**

NEGLIGENCE. PERSONAL INJURY. TORT LIABILITY ARISING FROM CONTRACT. LIABILITY OF ELECTRICITY SUPPLIER. APARTMENT COOPERATIVE. CAUSE OF SLIP AND FALL UNKNOWN.

The electricity-supplier, Con Edison, did not owe a duty of care to plaintiff, a shareholder in an apartment cooperative, who fell in a common area of the building during a power outage. In addition, the plaintiff's lack of knowledge re: the cause of his fall was fatal to the lawsuit. With respect to the (non) liability of the electric company, the court explained: "The Court of Appeals has held that an electricity-supplying utility is not answerable to the tenant of an apartment building injured in a common area as a result of [the utility's] negligent failure to provide electric service as required by its agreement with the building owner … . Contrary to the plaintiffs' contention, the injured plaintiff's status as a shareholder in the cooperative corporation that owned the building did not make him a party to the contract with Con Edison, such that Con Edison owed him a duty of care ...". [internal quotation marks omitted] **O'Connor v Metro Mgt. Dev., Inc., 2015 NY Slip Op 05921, 2nd Dept 7-8-15**

THIRD DEPARTMENT

CRIMINAL LAW. AGENCY DEFENSE.

Defendant was entitled to a jury instruction on the agency defense to drug sale and possession charges. Because the request for the instruction was denied, the defendant was granted a new trial. The Third Department explained the relevant law: "Under the agency doctrine, a person who acts solely as the agent of a buyer in procuring drugs for the buyer is not guilty of selling the drug to the buyer, or of possessing it with intent to sell it to the buyer ... . The issue of whether a defendant is criminally responsible as a seller, or merely a purchaser doing a favor for a friend, is generally a factual question for the jury to resolve on the circumstances of the particular case ... . A trial court must grant a request for an agency charge when, viewed in the light most favorable to the defendant, some evidence, however slight[,] supports the inference that the [defendant] was acting, in effect, as an extension of the buyer ...". [internal quotation marks omitted] **People v Nowlan, 2015 NY Slip Op 05973, 3rd Dept 7-9-15**

CRIMINAL LAW. INEFFECTIVE ASSISTANCE OF COUNSEL. DEPORTATION AS CONSEQUENCE OF GUILTY PLEA. MOTION TO VACATE CONVICTION.

Defendant was entitled to a hearing on her motion to vacate her conviction. Defendant alleged she was erroneously told by her attorney (pre "Padilla") her conviction (for an "aggravated felony") would not cause her to be deported. **People v Ricketts-simpson, 2015 NY Slip Op 05975, 3rd Dept 7-9-15**

CRIMINAL LAW. MULTIPLICITOUS INDICTMENT. WARRANTLESS SEARCH OF IMPOUNDED VEHICLE.

Several counts of an indictment stemming from a fatal car accident (involving reckless driving under the influence) were dismissed as multiplicitous. The warrantless search of the impounded vehicle was valid. With respect to the search of the vehicle, the court explained: "Testimony at the suppression hearing established that, at the request of law enforcement, defendant's vehicle was removed from the accident scene and taken to an unsecured lot, where it remained for several hours until it was transported — at the direction of a Rensselaer County deputy sheriff — to a secure impound lot. While defendant does not contest the initial towing from the accident scene, he claims that the seizure of the vehicle from the unsecured lot to the secured lot was unconstitutional. We disagree. 'It is well settled that once the police possess a reasonable belief that the vehicle was, in some way, associated with the crime and that a search of the vehicle would produce the fruits, instrumentalities, contraband or evidence of the crime the police can conduct[] a warrantless search and seizure of the vehicle ... . Here, the vehicle was moved from a lot where it was easily accessible to any member of the public to the secure lot only after it became clear that it was involved in a fatal accident.'...." **People v Hoffman, 2015 NY Slip Op 05976, 3rd Dept 7-9-15**

CRIMINAL LAW. PLEA COLLOQUY (INADEQUATE). FORCIBLE COMPULSION ERRONEOUSLY EQUATED WITH LACK OF CONSENT (SEXUAL ABUSE).

During the plea colloquy, County Court's equating a lack of consent (re: sexual abuse) with the "forcible compulsion" element of the offense required vacation of the plea: "By equating forcible compulsion with lack of consent, County Court misdefined an essential element of the crime to which defendant was pleading. While defendant was not required to recite facts establishing every element of the crime ... , we cannot countenance a conviction that rests upon a misconception of the key element of forcible compulsion ... . Because the record fails to establish that defendant understood the nature of the charge or that his guilty plea was knowingly and intelligently entered, his plea must be vacated and the matter remitted to County Court ...". **People v Marrero, 2015 NY Slip Op 05974, 3rd Dept 7-9-15**

ENVIRONMENTAL LAW. EXECUTIVE LAW. ADMINISTRATIVE LAW. STATE ADMINISTRATIVE PROCEDURE ACT. PUBLIC OFFICERS LAW. FREEDOM OF INFORMATION LAW (FOIL).

The Secretary of State's expansion of a statutory "significant coastal fish and wildlife habitat area" along the Hudson River in the vicinity of the Indian Point nuclear power facility was upheld. The petitioner, the owner of Indian Point, sought to have the designation of the area as a statutorily protected environmental habitat annulled. The Third Department (1) explained a court's powers when reviewing an agency's interpretation of its own regulations; (2) determined the agency did not engage in formal rulemaking (which would be subject to the stringent procedural requirements of the State Administrative Procedure Act); and (3) determined certain documents were properly withheld re: petitioner's Freedom of Information Law (FOIL) requests. **Matter of Entergy Nuclear Indian Point 2, LLC v New York State Dept. of State, 2015 NY Slip Op 05988, 3rd Dept 7-9-15**

FAMILY LAW. CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT. EXPUNGEMENT OF MALTREATMENT DETERMINATION. ADMINISTRATIVE LAW. EVIDENCE. HEARSAY.

The Commissioner of Children and Family Services should have granted the petition to expunge and amend as unfounded a maltreatment report maintained by the Central Register of Child Abuse and Maltreatment. Although the denial could properly be based upon hearsay and double hearsay, the maltreatment finding was not based upon substantial evidence. The court explained: "Like any administrative determination, one made after an expungement hearing may be based solely upon hearsay evidence — or even double hearsay evidence — in the appropriate case ... . As such, our concern is not the hearsay nature of the evidence, but whether it is sufficiently relevant and probative to constitute substantial evidence ... . Hearsay evidence will not satisfy that standard if the facts it purportedly establishes are seriously controverted ... . Serious controversy is precisely what surrounds the hearsay evidence here, given the hearing testimony that the maltreatment had not occurred and that the child had recanted his claims, the proof that motivations may have existed for the child to fabricate the maltreatment, and the total lack of physical evidence suggesting that it occurred. We accordingly agree with petitioner that substantial evidence does not support the challenged determination, which must be annulled as a result ...". [internal quotation marks omitted] **Matter of Gerald HH. v Carrion, 2015 NY Slip Op 05982, 3rd Dept 7-9-15**

LABOR LAW. PERSONAL INJURY.

A two-to-five foot fall from the edge of a roof to scaffolding properly survived summary judgment on the Labor Law 240(1) cause of action: "The parties' submissions … raise a question of fact as to whether the scaffolding afforded ... adequate protection and, if not, whether the absence of an appropriate safety device was the proximate cause of his injuries ...". **Scribner v State of New York, 2015 NY Slip Op 05993, 3rd Dept 7-9-15**

LABOR LAW. PERSONAL INJURY.

Plaintiff's injury was elevation-related and therefore was covered under Labor Law 240(1). Plaintiff was standing on a building-roof using hand signals to guide a crane when he fell from the roof. Supreme Court reasoned plaintiff could have accomplished his job while staying away from the edge of the roof and, therefore, the accident was not elevation-related within the meaning of the statute. The Third Department rejected that reasoning and noted that the parapet wall around the edge of the roof was part of the structure of the building and could not, therefore, be considered a safety device. **Salzer v Benderson Dev. Co., LLC, 2015 NY Slip Op 06001, 3rd Dept 7-9-15**

NEGLIGENCE. PERSONAL INJURY. MEDICAL MALPRACTICE. EVIDENCE. PLEADINGS. CIVIL PROCEDURE.

Allowing evidence of a theory of liability that was not explicitly included in the pleadings and bill of particulars was not error. The theory was implicit in the pleadings and the defendants could not have been surprised by the related evidence. The court noted it would have been better had the plaintiffs moved to conform the pleadings to the evidence. **Boyer v Kamthan, 2015 NY Slip Op 05983, 3rd Dept 7-9-15**

TRUSTS AND ESTATES. FORECLOSURE. CIVIL PROCEDURE. NECESSARY PARTIES.

The estate of one of the mortgage-holders was a necessary party in a foreclosure proceeding. The court explained the relevant law: "In an action to foreclose a mortgage, all parties having an interest, including persons holding title to the subject premises, must be made a party . . . to the action ... . Although defendant did not specifically raise the argument that decedent's estate was a necessary party to the instant action, the absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion ... . [W]here two individuals are the co-holders of a mortgage and one dies, the plaintiffs in a related foreclosure action would be the living mortgagee — or, in this case, his assignee ... — and the personal representative of the deceased mortgagee ...". [internal quotation marks omitted] **Bayview Loan Servicing, LLC v Sulyman, 2015 NY Slip Op 05989, 3rd Dept 7-9-15**

WORKERS' COMPENSATION LAW. PERSONAL INJURY. MENTAL/PSYCHOLOGICAL INJURIES.

The Workers' Compensation Law Judge found a retail employee suffered compensable psychological injury because he was directed by a supervisor to submit false reserve orders for a product in order to deceive the manufacturer. The Workers' Compensation Board disagreed and disallowed the claim. The Third Department reinstated the claim, finding the Board's conclusion was not supported by substantial evidence. **Matter of Cox v Saks Fifth Ave., 2015 NY Slip Op 06003, 3rd Dept 7-9-15**

FOURTH DEPARTMENT

ANIMAL LAW. NEGLIGENCE. FARM ANIMAL, ESCAPE OF. PROXIMATE CAUSE. CONDITION OR OCCASION FOR THE OCCURRENCE OF AN ACCIDENT.

A calf escaped from defendant farm. Plaintiff's decedent stopped her car and got out to aid the calf. Both plaintiff's decedent and the calf were struck by a car when they were in the road, although there was no evidence decedent stopped her car because the calf blocked the road. The Fourth Department held that the escape of the calf did not "cause" the decedent to be in the road. Rather the escape of the calf furnished the condition or occasion for decedent to be in the road. Therefore the defendant farm was entitled to summary judgment. **Hain v Jamison, 2015 NY Slip Op 06074, 4th Dept 7-10-15**

CIVIL PROCEDURE. JURY TRIAL, RIGHT TO.

Plaintiffs' demand for a jury trial should not have been struck. Defendants attempted to recoup alleged overpayments made to plaintiffs for ambulance services by reducing payments for ongoing services. Plaintiffs brought suit challenging defendant's right to recoup the alleged overpayments. As part of their complaint, the plaintiffs sought "a declaration that [defendant] is not entitled to offset or recoup any funds from [p]laintiffs." The Fourth Department held that, despite the request for a "declaration," the crux of the lawsuit was for monetary relief and the demand for a jury trial was therefore appropriate. **Canandaigua Emergency Squad, Inc. v Rochester Area Health Maintenance Org., Inc., 2015 NY Slip Op 06056, 4th Dept 7-10-15**

ENVIRONMENTAL LAW. STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA). ADMINISTRATIVE LAW. MUNICIPAL LAW. TOWN LAW.

The town's negative declaration under the State Environmental Quality Review Act (SEQRA) with respect to the construction of a casino and resort should have been annulled because the town did not strictly comply with mandated procedure. Specifically the negative declaration did not include a "reasoned elaboration" as required by the relevant regulation. A document prepared by the town's counsel explaining the reasons for the negative declaration was never approved or adopted by the town board and therefore did not meet the statutory/regulatory "reasoned elaboration" requirement. **Matter of Dawley v Whitetail 414, LLC, 2015 NY Slip Op 06082 4th Dept 7-10-15**

MUNICIPAL LAW. GENERAL MUNICIPAL LAW. COUNTY LAW. COMPETITIVE BIDDING. WITHDRAWAL OF MISTAKEN BID. REBIDDING. STATUTORY INTERPRETATION.

A party (Kandey) who withdrew a mistaken bid on a public works project should have been allowed to rebid: "The court properly concluded that a rational basis supported the County's determination that Kandey made the showing required by General Municipal Law § 103 (11) (a) when it sought permission to withdraw its mistaken bid. The court erred, however, in concluding that the County failed to comply with General Municipal Law § 103 (11) (b) when it permitted Kandey to participate in the rebid. That section provides that the sole remedy for a bid mistake in accordance with this section shall be withdrawal of that bid and the return of the bid bond or other security, if any, to the bidder. That is precisely what the County did here when it permitted Kandey to withdraw the mistaken bid. The statute further provides that, after the mistaken bid is withdrawn, the County "may, in its discretion, award the contract to the next lowest responsible bidder or rebid the contract," and the County acted within the discretion extended to it under the statute when it elected to rebid the contract. The statute is silent on the question whether a contractor that was permitted to withdraw its bid may participate in the rebid. We agree with Kandey and the County that, had the Legislature intended to forbid a contractor in Kandey's position from participating in the rebid, it would have done so explicitly. Further, [a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit ... . Thus, we do not interpret the statute to include an implicit prohibition against Kandey's participation in the rebid following the withdrawal of its mistaken bid." [internal quotation marks omitted] **Matter of Concrete Applied Tech. Corp. v County of Erie, 2015 NY Slip Op 06087, 4th Dept 7-10-15**

NEGLIGENCE. NUISANCE. TRESPASS. INVERSE CONDEMNATION. COURT OF CLAIMS. SUBJECT MATTER JURISDICTION.

An action against the state alleging recurrent flooding of plaintiffs' property was properly in Supreme Court, despite the statutory requirement that claims against the state for monetary damages be brought in the Court of Claims. The Fourth Department held the state did not demonstrate that the essential nature of the claim was to recover money. The Fourth Department further determined that the cause of action for inverse condemnation was properly dismissed, explaining the criteria. With respect to the jurisdiction of Supreme Court, the Fourth Department explained: "Contrary to defendant's contention, the court properly denied that part of its cross motion seeking summary judgment dismissing all claims for money damages. Although defendant is correct that claims that are primarily against the State for damages must be brought in the Court of Claims, the Supreme Court may consider a claim for injunctive relief as long as the claim is not primarily for

damages (... see Court of Claims Act § 9 [2]). Whether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case ... . Here, defendant failed to establish in support of its cross motion that the essential nature of the causes of action for negligence, continuing nuisance, and continuing trespass is to recover money damages, and thus the court properly declined to grant summary judgment dismissing those causes of action." **Greece Ridge, LLC v State of New York, 2015 NY Slip Op 06072, 4th Dept 7-10-15**

NEGLIGENCE. PERSONAL INJURY. GENERAL OBLIGATIONS LAW. RECREATIONAL USE. ASSUMPTION OF RISK.

Supreme Court properly denied defendant's motion for leave to amend its answer to allege a "recreational use" "assumption of the risk" affirmative defense. Plaintiff's son was injured when his bicycle struck a depressed area in defendant's parking lot. Defendant sought to allege plaintiff's son assumed the risk of injury because the parking lot was covered by the "recreational use" statute, General Obligations Law 9-103. The Fourth Department, finding that the parking lot was not "suitable" for recreational use, explained the relevant analytical criteria: "It is undisputed that plaintiff's son was engaged in one of the recreational activities enumerated in section 9-103, i.e., bicycle riding, when he was injured. To establish applicability of the statute, however, defendant was also required to show that its property was suitable for the recreational activity in which plaintiff['s son] was participating when the accident occurred ... . Whether a parcel of land is suitable and the immunity [of the recreational use statute] available is a question of statutory interpretation, and is, therefore, a question of law for the Court ... . Suitability is established by showing that the subject property is (1) physically conducive to the activity at issue, and (2) of a type that is appropriate for public use in pursuing that activity as recreation ... . A substantial indicator that the property is physically conducive to the particular activity is whether recreationists have used the property for that activity in the past; such past use by participants in the [activity] manifests the fact that the property is physically conducive to it" … . Here, defendant failed to submit any evidence that the property had been used in the past by 'recreationists' for bicycle riding. Moreover, under the circumstances of this case, we conclude that the subject property is not appropriate for public use in pursuing bicycle riding as a recreational activity ... . Indeed, the Court of Appeals has made clear that recreational use immunity should apply only to property that the Legislature would have envisioned as being opened up to the public for recreational activities … . Here, defendant failed to establish that its employee parking lot comes within the purview of that standard." [internal quotation marks omitted] **Sasso v WCA Hosp., 2015 NY Slip Op 06066, 4th Dept 7-10-15**

REAL PROPERTY TAX LAW. ASSESSED VALUE OF PROPERTY. WEIGHT OF THE EVIDENCE REVIEW. APPEALS.

The trial judge's findings re: the assessed value of a retail property (for property tax purposes) were against the weight of the evidence. Specifically, the trial judge accepted the petitioner's (Rite Aid's) expert's valuation which failed to take into account the actual price paid in a recent arm's-length sale of the property, comparable sales, the actual rent (negotiated at arm's length) and comparable rentals. **Matter of Rite Aid Corp. v Haywood, 2015 NY Slip Op 06049, 4th Dept 7-10-15**

Similar issues and result in **Matter of Rite Aid Corp. v Huseby, 2015 NY Slip Op 06051, 4th Dept 7-10-15**

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