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CasePrepPlus

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COURT OF APPEALS

ADMINSTRATIVE LAW. MUNICIPAL LAW. NEW YORK CITY TAXI AND LIMOUSINE COMMISSION (TLC). TAXI OF TOMORRW (T o T).

The NYC Taxi and Limousine Commission (TLC) did not exceed the authority granted the commission by the City Council when it entered a 10-year exclusive agreement with Nissan to provide the "Taxi of Tomorrow (T o T)," New York City's official taxicab. The court wrote: "In granting the TLC … broad authority, the City Charter includes guidelines for the TLC to consider, such as safety, and design, comfort, convenience, noise and air pollution control and efficiency in the operation of vehicles (NY City Charter § 2303 [b] [6]). Although the TLC has generally applied the 'specs method' when promulgating rules about the design of taxis, it points to a major shortcoming of that method — the situation where no available model meets the specs in the rules as, for example, when Ford discontinued the Crown Victoria ... . The TLC determined that [t]he most obvious alternative to vehicle specifications [is the] competitive selection of taxicab vehicle models, as embodied in the ToT project ... . This new method was intended to be a more efficient way to reach the same result and, in our view, falls within the broad authority granted to the TLC." [internal quotation marks omitted] **Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., 2015 NY Slip Op 05514, CtApp 6-25-15**

CRIMINAL LAW. APPEALS. DRUG LAW REFORM ACT (DLRA).

No appeal lies from the Appellate Division's affirmance of the denial of resentencing pursuant to the 2004 Drug Law Reform Act (DLRA). The fact that the order (denying resentencing) was consolidated with appealable orders did not confer jurisdiction to hear the appeal upon the Court of Appeals. **People v Lovett, 2015 NY Slip Op 05512, CtApp 6-25-15**

CRIMINAL LAW. ATTORNEYS. RIGHT TO COUNSEL. POSITION ADVERSE TO CLIENT'S. CONFLICT OF INTEREST (WITH CLIENT).

Defense counsel's answering the judge's questions about his performance did not place the attorney in a position adverse to his client's. The client, prior to trial, sought the appointment of new counsel by filing a form ("Affidavit in Support of Motion for Reassignment of Counsel") circling every reason for the appointment of new counsel listed on the form, including the failure to discuss strategy, the failure to seek discovery, the failure to contest identification evidence, and the failure to communicate with the defendant. The form did not reach the judge until after the defendant's trial and conviction. The defendant did not mention the motion or his concerns during the trial. The judge, based on his observations during the trial, determined many of the circled claims on the form were not true. The judge asked the attorney about what he had done prior to trial and the attorney explained what he had done. In so doing, the attorney did not take a position adverse to the defendant's. The court explained: "Although an attorney is not obligated to comment on a client's pro se motions or arguments, he may address allegations of ineffectiveness when asked to by the court and should be afforded the opportunity to explain his performance ... . We have held that counsel takes a position adverse to his client when stating that the defendant's motion lacks merit ..., or that the defendant, who is challenging the voluntariness of his guilty plea, made a knowing plea . . . [that] was in his best interest ... . Conversely, we have held that counsel does not create an actual conflict merely by outlin[ing] his efforts on his client's behalf ... and defend[ing] his performance ..." . [internal quotation marks omitted] **People v Washington, 2015 NY Slip Op 05511, CtApp 6-25-15**

INSURANCE LAW. CONTRACT LAW. HACKING OF COMPUTERS.

The rider in a financial institution bond covered loss caused by hackers gaining access to the insured's computer system, not loss caused by the entry of fraudulent billing information into the computer system by authorized users. Here fraudulent medical claims made by authorized users of the computer system cost the insured (Universal) $18 million. The language of the relevant rider was deemed unambiguous. **Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA., 2015 NY Slip Op 05516, CtApp 6-25-15**

FIRST DEPARTMENT

ADMINISTRATIVE LAW. LIQUOR LICENSE. 500 FOOT RULE.

A petition to annul the NYS Liquor Authority's conditional approval of a liquor license was properly denied. The Liquor Authority properly considered the factors associated with the "500-foot-rule" requiring good cause for the issuance of a license when there are three or more licensed premises within 500 feet. The court explained: "In cases implicating this 500-foot rule, [b]efore it may issue any such license, the [A]uthority shall conduct a hearing, upon notice to the applicant and the municipality or community board, and shall state and file in its office its reasons therefor (ABCL § 64[7][f]). A reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious ... . Courts look to whether the determination is without sound basis in reason and is generally without regard to the facts ... . Regarding the substance of the reasons stated by the Authority, this Court has held that something more than a 'perfunctory recitation' is needed to comply with the requirement that the Authority state its reasons for concluding that issuance of a license would be in the public interest ... . Here, the Authority's written statement sets forth detailed, concrete reasons for its determination, made after a hearing, that issuance of a liquor license ... would be in the public interest (ABCL § 64[7][b], [f])." [internal quotation marks omitted] **Matter of BarFreeBedford v New York State Liq. Auth., 2015 NY Slip Op 05428, 1st Dept 6-23-15**

ATTORNEYS. FRIVOLOUS LAWSUIT. SANCTIONS.

Sanctions and the award of attorney fees were appropriate for a frivolous lawsuit brought by an attorney who had represented himself in a related divorce proceeding. The lawsuit sought $27,000 allegedly loaned to the defendant-wife by plaintiff. However, the $27,000 claim was made in the divorce proceedings and, although the lower court did not directly rule on the loan, the claim was effectively rejected by the court in a "catch-all" provision denying all relief not specifically addressed. The court explained: "A court may, in its discretion, award to any party costs in the form of reimbursement for expenses reasonably incurred and reasonable attorneys' fees resulting from 'frivolous conduct,' which includes: (1) conduct completely without merit in law, which cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) conduct undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; and (3) the assertion of material factual statements that are false (22 NYCRR 130-1.1[a], [c][3]). The court may also award financial sanctions on the same grounds (22 NYCRR 130-1.1[b]). * * * Here, the circumstances are that the husband, an experienced divorce lawyer, ignored a long-standing principle of matrimonial jurisprudence. Thus, his decision to commence an action that he knew, or should have known, was futile from its inception, weighs heavily in favor of a finding that his conduct was intended solely to harass the wife." [internal quotation marks omitted] **Borstein v Henneberry, 2015 NY Slip Op 05390, 1st Dept 6-23-15**

CRIMINAL LAW. JURIES. WAIVER OF 12-PERSON JURY.

Defendant validly waived his right to be tried in front of a 12-person jury. During defendant's trial, after the court had been closed for several days due to Hurricane Sandy, one of the jurors informed the court he was leaving town. The defendant, against the advice of his lawyer, was insistent that he wanted the trial to continue with 11 jurors: "Counsel informed the court that, against her advice, defendant wanted deliberations to continue with the remaining 11 jurors. Defense counsel stated that she had told defendant 'a number of times that I do not think we should go forward with 11,' but defendant was 'extremely insistent,' was 'tired of this process,' and did 'not want to retry the case.' The court confirmed with defendant on the record that he wanted to continue with 11 jurors, and defendant executed a written waiver of a 12-person jury. Defense counsel also signed the written waiver." **People v Perry, 2015 NY Slip Op 05394, 1st Dept 6-23-15**

NEGLIGENCE. PERSONAL INJURY. INDEPENDENT CONTRACTORS. LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR. NEGLIGENT HIRING OF INDEPENDENT CONTRACTOR. EMPLOYMENT LAW.

Plaintiff, who was working for the roofing contractor on a building damaged by fire, was asked by a salvager to help move a refrigerator. Plaintiff agreed and was injured while moving the refrigerator down some stairs. The salvager was allowed to go through the building and pick out the items the salvager wanted (which included the refrigerator). Plaintiff sued the building owner (E & M). In finding the plaintiff did not have a cause of action against E & M, the First Department explained the relevant law with respect to liability for the acts of an independent contractor (the salvager) and negligent hiring of an independent contractor: "E & M established that even if it hired the salvager as an independent contractor, there is no basis to impose liability on it. As a general rule, a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work ... . Although liability will attach where the employer is negligent in selecting, instructing or supervising the contractor, where the contractor is employed to do work that is inherently dangerous or where the employer bears a specific nondelegable duty ..., these exceptions are inapplicable... . * * * Plaintiff's contention that issues of fact exist as to whether E

& M or its principal were negligent in selecting the salvager, i.e. whether they failed to exercise reasonable care in ascertaining whether he was qualified to move a refrigerator down a flight of stairs, is also unavailing. [A]n employer has the right to rely on the supposed qualifications and good character of the contractor, and is not bound to anticipate misconduct on the contractor's part ... . Thus, an employer is not liable on the ground of his having employed an incompetent or otherwise unsuitable contractor unless it also appears that the employer either knew, or in the exercise of reasonable care might have ascertained, that the contractor was not properly qualified to undertake the work ...". [internal quotation marks omitted] **Nelson v E&M 2710 Clarendon LLC, 2015 NY Slip Op 05391, 1st Dept 6-23-15**

NEGLIGENCE. MUNICIPAL LAW. GENERAL MUNICIPAL LAW. NOTICE OF CLAIM. SAVINGS CLAUSE. CIVIL PROCEDURE. MOTION TO RENEW.

The savings provision of General Municipal Law 50-e applied and a notice of claim which was timely served by an unauthorized method was valid. The court noted that a motion court can exercise its discretion to hear a motion to renew which relies on information known but not raised at the time the original motion was made. With respect to the notice of claim, the court explained: "Defendant moved for summary judgment on the ground that plaintiff's notice of claim was not served within the 90-day period set forth in General Municipal Law § 50-e, and plaintiff had not timely moved for an extension of time to serve. Plaintiff contended that she qualified under either or both prongs of the 'savings provision' under General Municipal Law § 50-e(3)(c), which provides that [i]f the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant ... be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received. * * * Here, the record shows that plaintiff served a notice of claim on defendant on December 8, 2011 via regular mail, which did not comply with the requirement that service be completed in person or via registered or certified mail. However, defendant subsequently demanded that plaintiff appear for examinations pursuant to General Municipal Law § 50-h with regard to her claim. Under such circumstances, plaintiff's service of the notice of claim is valid under the first prong of General Municipal Law § 50-e(3)(c)." [internal quotation marks omitted] **Person v New York City Hous. Auth., 2015 NY Slip Op 05417, 1st Dept 6-23-15**

TAX LAW. REAL ESTATE TAXES. LANDLORD-TENANT. TAX ESCALATION CLAUSE.

The landlord should not have been granted summary judgment. Plaintiff-tenant sought a declaration that it was not responsible for increased real estate taxes related to improvements to the building which benefitted only the landlord and not the tenant. The matter was sent back for a determination whether and to what extent the improvements benefitted only the landlord. The court explained: "The Court of Appeals has made clear that [i]t is not the aim of ... a [tax escalation] clause ... to impose upon the tenant responsibility for increases in real estate taxes resulting from improvements on the property redounding solely to the benefit of the landlord ... . The motion court incorrectly found that this principle was limited to circumstances where the improvement involved a vertical or horizontal enlargement of the building. ... The improvement at issue is a renovation solely of the residential aspects of the building. Plaintiff is a commercial tenant. Our declaration here simply states the well settled principle regarding tax escalation clauses." [internal quotation marks omitted] **Enchantments Inc. v 424 E. 9th LLC2015 NY Slip Op 05409, 1st Dept 6-23-15**

SECOND DEPARTMENT

CIVIL PROCEDURE. MOTION FOR LEAVE TO INTERVENE.

In finding the motion for leave to intervene was properly denied, the Second Department explained the criteria: "Upon a timely motion, a person is permitted to intervene in an action as of right when, among other things, the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment (CPLR 1012[a][2]...). In addition, the court, in its discretion, may permit a person to intervene, inter alia, when the person's claim or defense and the main action have a common question of law or fact (CPLR 1013...). However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance [and that] intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings ...". [internal quotation marks omitted] **Trent v Jackson, 2015 NY Slip Op 05467, 2nd Dept 6-24-15**

CIVIL PROCEDURE. SUMMARY JUDGMENT. EVIDENCE. ADMISSIBILITY OF UNSIGNED DEPOSITION. PARTY ADMISSION IN POLICE REPORT.

In reversing the grant of summary judgment to the defendant in a vehicle accident case, the Second Department noted the unsigned deposition transcripts of both plaintiff and defendant were admissible for purposes of the motion. The court also noted that a party admission included in a police report was admissible, while the hearsay report itself was not. The

court explained: "[T]he failure to submit an affidavit by a person with knowledge of the facts is not necessarily fatal to a motion where ... the moving party submits other proof, such as deposition testimony ... . Here, the defendant's certified deposition transcript, although unsigned, was admissible since it was his own testimony that he was proffering in support of his motion and, in effect, he adopted it as accurate ... . In addition, the transcript of the plaintiff's deposition testimony, which was unsigned, was also admissible for the purpose of the defendant's motion, since the transcript was certified by the reporter and the plaintiff did not challenge its accuracy ... . With respect to the police accident report submitted by the defendant in support of his motion, it was not certified as a business record and thus constituted inadmissible hearsay (see CPLR 4518[a]...), except for that portion of the report which contained a party admission by the plaintiff that she did not have a recollection of the accident ...". [internal quotation marks omitted] **Gezelter v Pecora, 2015 NY Slip Op 05440, 2nd Dept 6-24-15**

CIVIL RIGHTS. MUNICIPAL LAW. 42 USC 1983. POLICE OFFICERS. EXCESSIVE FORCE. PERSONAL INJURY.

A question of fact had been raised about whether police officers used excessive force in violation of plaintiff's civil rights. The court explained the relevant law: "A claim that a law enforcement official used excessive force during the course of an arrest ... is to be analyzed under the objective reasonableness standard of the Fourth Amendment ... . The reasonableness of a particular use of force is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight ..., and takes into account the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight ... .[A]n officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others ... . Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide ... . If found to be objectively reasonable, the officer's actions are privileged under the doctrine of qualified immunity...". [internal quotation marks omitted] **Williams v City of New York, 2015 NY Slip Op 05470, 2nd Dept 6-24-15**

CONTRACT LAW. BREACH OF CONTRACT. DAMAGES. LOST PROFITS.

In affirming the judgment, the Second Department explained the criteria for the award of lost profits as damages in a breach of contract action: "To prevail on a cause of action alleging breach of contract, the plaintiff must demonstrate that it sustained actual damages as a natural and probable consequence of the defendant's breach ... . Where the plaintiff seeks to recover damages for lost profits, such profits must also be within the contemplation of the parties at the time the contract was entered into and, even though required to be proven with reasonable certainty, damages resulting from the loss of future profits are often an approximation ... . Here, contrary to the defendant's contentions, the evidence and credible testimony adduced at trial demonstrated that the plaintiff incurred actual damages due to the defendant's breach of the agreement ... . The plaintiff's witness testified that he determined the lost profits for the plaintiff by subtracting the expenses from the revenue, which would have been generated [if the contract had not been breached]. The evidence produced by the plaintiff provided a reasonably reliable foundation upon which to calculate the plaintiff's damages ...". [internal quotation marks omitted] **Family Operating Corp. v Young Cab Corp., 2015 NY Slip Op 05437, 2nd Dept 6-24-15**

CRIMINAL LAW. SENTENCING. RESENTENCING. POSTRELEASE SUPERVISION (PRS).

The Second Department sent the matter back for resentencing because the judge was unaware he/she had the discretion as to the length of the post-release period. The court wrote: "... [R]esentencing is required because the record supports the defendant's contention that the Supreme Court was unaware that it had discretion as to the length of the period of PRS. Specifically, the court stated that the law required it to impose a period of PRS of 5 years. In fact, the court had the authority to impose a period of PRS of between 2½ years and 5 years (Penal Law § 70.45[2][f])." **People v Battee, 2015 NY Slip Op 05491, 2nd Dept 6-24-15**

CRIMINAL LAW. REASONABLE SUSPICION OF CRIMINAL ACTIVITY. FLIGHT/ PURSUIT.

Defendant's motion to suppress a gun thrown away during a foot pursuit by a police officer was properly denied. Unusual activity in and around a car (a "Malibu") in a high crime area gave the police an objective, credible reason to approach the car. Under the totality of the circumstances, when defendant began walking away, the police officer (Detective Talt), having a reasonable suspicion of criminal activity, properly pursued the defendant. The court explained: "Police pursuit of an individual significantly impede[s] the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed ... . Flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit ... . Here, Detective Talt had reasonable suspicion of criminal activity based on the defendant's flight, combined with the unusual activity of the occupants of the Malibu, Detective Talt's knowledge that that specific location was a high-crime area, and his knowledge

that contraband could be hidden under a car hood. Accordingly, the court properly declined to suppress the gun." [internal quotation marks omitted] **People v Jennings, 2015 NY Slip Op 05497, 2nd Dept 6-24-15**

DEFAMATION. NONACTIONABLE OPINION. NEWSPAPER ARTICLE.

The defamation action against a newspaper was properly dismissed. The newspaper article referred to writings by the plaintiff which were described as racist. The article questioned whether plaintiff, who allegedly held "white supremacist" views, should be the principal of a school with minority students. The court determined the relevant statements in the article were statements of opinion which were linked directly to quotations from plaintiff's writings. Therefore the statements constituted nonactionable opinion. The court explained: "Since falsity is a necessary element of a defamation cause of action and only facts' are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action ... . In distinguishing between facts and opinion, the factors the court must consider are (1) whether the specific language has a precise meaning that is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether the context in which the statement appears signals to readers that the statement is likely to be opinion, not fact ... . The dispositive inquiry . . . is whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff ...". [internal quotation marks omitted] **Silverman v Daily News, L.P., 2015 NY Slip Op 05463, 2nd Dept 6-24-15**

EDUCATION-SCHOOL LAW. TEACHERS. TENURE BY ESTOPPEL. PROBATIONARY PERIOD. MATERNITY LEAVE.

The Second Department determined a teacher was entitled to tenure by estoppel. The number of days the teacher was on unpaid, approved maternity leave was excluded from the probationary period. Properly calculated (the proper method was explained), the teacher worked beyond the three-year probationary period and was therefore entitled to tenure by estoppel. The court explained: "Tenure by estoppel results when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term ... . A teacher who has acquired tenure by estoppel, but is nonetheless improperly terminated, is entitled to reinstatement, retroactive to the last date of employment, back pay, and all accrued benefits ... . Where a teacher is granted a period of unpaid maternity leave during her three-year probationary period, that period of leave may properly be excluded from computation of a teacher's three-year probationary period ...". [internal quotation marks omitted] **Matter of Brown v Board of Educ. of Mahopac Cent. Sch. Dist., 2015 NY Slip Op 05471, 2nd Dept 6-24-15**

FAMILY LAW. SOCIAL SERVICES LAW. OFFICE OF CHILDREN AND FAMILY SERVICES (OCFS). CHILD PROTECTIVE SERVICES (CPS). STATEWIDE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT (SCR). FAMILY ASSESSMENT RESPONSE (FAR). EXPUNCTION (EXPUNGEMENT) OF RECORDS.

The Office of Children and Family Services (OCFS) did not have the authority to expunge a Family Assessment Response (FAR) report prior to the end of the 10-year statutory period. The Second Department's decision includes an in-depth analysis of the early expunction (expungement) of reports pursuant to Social Services Law 422(5)(c) and why such early expunction (expungement) is not authorized for Family Assessment Response (FAR) reports pursuant to Social Services Law 427-a. The court explained: "...[T]he interpretation of Social Services Law § 427-a as not incorporating the early expunction process set forth in Social Services Law § 422(5)(c) does not conflict with the legislative intent of section 427-a. As explained in the relevant legislative history, "[t]raditionally, CPS [Child Protective Services] is required to respond to reports of child abuse and maltreatment with a standard investigation that is narrowly focused on determining whether a specific incident of abuse actually occurred and if the child is at risk ... . The focus of the CPS system on investigation of abuse and maltreatment has created an environment that, for many families, casts suspicion over any offer of services or service referrals … . Implementation of a differential response, in the form of a FAR track, permits a social service district to conduct an assessment of the family's needs and strengths rather than investigate the validity of the allegations in a child abuse and maltreatment report ... . The expectation of FAR is that families will be more likely to seek necessary help when a less adversarial, less threatening, approach is taken ...". [internal quotation marks omitted] **Matter of Corrigan v New York State Off. of Children & Family Servs., 2015 NY Slip Op 05473, 2nd Dept 6-24-15**

INSURANCE LAW. PERMISSION TO SETTLE WITH TORTFEASOR. PERSONAL INJURY.

In determining the insurer's (GEICO's) motion to stay arbitration should have been denied, the Second Department explained the procedure where the insured has been offered a settlement by the tortfeasor for the full amount of the tortfeasor's policy and permission to settle is sought from the insured's carrier (GEICO here). The insured timely notified and requested permission to settle from GEICO, but GEICO sent its response to the wrong address and the insured never received it. After the passage of 30 days, the insured accepted the settlement and served a demand for arbitration on GEICO re: the supplemental uninsured/underinsured motorist (SUM) benefits under the GEICO policy: "As a general rule, an insured who settles with a tortfeasor in violation of a policy condition requiring his or her insurer's consent to settle,

thereby prejudicing the insurer's subrogation rights, is precluded from asserting a claim for SUM benefits under the policy ... . However, the language set forth in 11 NYCRR 60-2.3(f), which must be included in all motor vehicle liability insurance policies in which SUM coverage has been purchased, creates an exception to this rule in situations where the insured advises the insurer of an offer to settle for the full amount of the tortfeasor's policy, which obligates the insurer either to consent to the settlement or to advance the settlement amount to the insured and assume the prosecution of the tort action within 30 days ... . In the event that the insurer does not timely respond in accordance with this condition, the insured may settle with the tortfeasor without the insurer's consent, and without forfeiting his or her rights to SUM benefits (see 11 NYCRR 60-2.3[f]...)". **Matter of Government Empls. Ins. Co. v Arciello, 2015 NY Slip Op 05477, 2nd Dept 6-24-15**

LABOR LAW. ROUTINE CLEANING. PERSONAL INJURY.

Supreme Court properly dismissed an action by plaintiff-janitor who fell from an A-frame ladder while cleaning the basketball backboard in a school gymnasium. The Labor Law 240(1) cause of action was properly dismissed because cleaning the backboard was routine maintenance, not covered by Labor Law 240(1). The Labor Law 200 and common law negligence causes of action were properly dismissed because the defendant school demonstrated the ladder was not defective and it did not have the authority to control the manner in which plaintiff did his work. **Torres v St. Francis Coll., 2015 NY Slip Op 05466, 2nd Dept 6-24-15**

MUNICIPAL LAW. EMPLOYMENT LAW. GENERAL MUNICIPAL LAW 207-c. POLICE OFFICERS. DISABILITY PAYMENTS. LIGHT-DUTY ASSIGNMENT.

A police officer was not entitled to refuse a light-duty assignment during the period his entitlement to disability benefits pursuant to General Municipal Law 207-c was being determined. The court explained: "A disabled officer receiving General Municipal Law § 207-c benefits is entitled to a due process hearing before those benefits may be terminated when the officer submits medical evidence contesting the finding of a municipality's appointed physician that the officer is fit for duty ... . Once such evidence has been submitted, an order to report for duty may not be enforced, or benefits terminated, pending resolution of an administrative hearing, which itself is subject to review under CPLR article 78 ... . However, where the municipality's physician is of the opinion that the officer is able to perform specified types of light police duty, payment of the full amount of salary or wages may be discontinued should the officer refuse to perform such light police duty if same is available and offered to [the officer] and enables him or her to continue to be entitled to his [or her] regular salary or wages (General Municipal Law § 207-c[3]...). If an officer who refuses to return to light duty fails to provide medical proof that he or she is unable to do so, the municipality may discontinue disability payments without a hearing ...". [internal quotation marks omitted] **Matter of Garvey v Sullivan, 2015 NY Slip Op 05476, 2nd Dept 6-24-15**

NEGLIGENCE. PERSONAL INJURY. DUTY OF CARE. COMMON CARRIER. BUSES.

Reversing Supreme Court, the Second Department determined the defendant bus company could not be held liable for a slip and fall on wet steps on a bus during a snow storm: "[A] common carrier is subject to the same duty of care as any other potential tortfeasor—reasonable care under all of the circumstances of the particular case ... . Here, contrary to the Supreme Court's determination, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by showing that it did not breach any duty to the plaintiff under the circumstances that existed at the time of the accident ... . Given the inclement weather conditions when the accident occurred, it would be unreasonable to expect the [defendant] to constantly clean the steps of the subject bus ...". [internal quotation marks omitted] **Batista v MTA Bus Co., 2015 NY Slip Op 05430, 2nd Dept 6-24-15**

NEGLIGENCE. GENERAL BUSINESS LAW 349. CONTRACT LAW. TORTIOUS INTERFERENCE WITH CONTRACT.

Supreme Court properly dismissed (for failure to state a cause of action) the negligence cause of action, should not have dismissed the General Business Law 349 cause of action, and properly denied the motion to dismiss the tortious interference with contract cause of action. The court succinctly described the elements of the three causes of action (facts not described in the decision): "To prevail on a negligence cause of action, a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages. Absent a duty of care, there is no breach, and without breach there can be no liability ... . * * * To state a cause of action under General Business Law § 349, the complaint must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice ... . * * * The elements of a cause of action to recover damages for tortious interference with contract are the existence of a valid contract between it and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of that contract without justification, and damages ...". [internal quotation marks omitted] **MVB Collision, Inc. v Allstate Ins. Co., 2015 NY Slip Op 05453, 2nd Dept 6-24-15**

NEGLIGENCE. PERSONAL INJURY. NOTICE OF CONDITION.

Reversing Supreme Court, the Second Department determined the defendant was entitled to summary judgment in a slip and fall case. The defendant demonstrated it did not have actual or constructive notice of the condition (wet floor). An affidavit by a member of the maintenance crew stated that the area where plaintiff fell had been inspected 10 to 15 minutes before the fall and there had been no complaints about a wet condition. The court explained the relevant law: "The owner or possessor of property has a duty to maintain his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk ... . A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it ... . To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall ... . Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice ..." . [internal quotation marks omitted] **Mehta v Stop & Shop Supermarket Co., LLC, 2015 NY Slip Op 05450, 2nd Dept 6-24-15**

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. PRIVATE NUISANCE. LANDLORD-TENANT.

The Second Department reversed Supreme Court and dismissed the complaint for failure to state a cause of action. The opinion is important because it clarified "negligent infliction of emotional distress," explaining that "extreme and outrageous conduct" is not one of the elements. Although the court held that the complaint did not state causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, or private nuisance, the nature of those causes of action was explained in some depth. The defendants owned property next door to the plaintiffs' home. The defendants rented to tenants, who were not parties to the lawsuit. The tenants apparently held loud parties at which drugs were used and sold. The plaintiffs at one point called the police to complain about the tenants' behavior. Subsequently two masked men entered plaintiffs' home to intimidate them. Plaintiff-husband ultimately shot the two intruders and in the process accidently shot his dog. The men were arrested by the police. The opinion is too detailed to properly summarize here, but the essence of the court's ruling is that the tenants' behavior was not sufficiently linked to any acts or omissions by the defendants. **Taggart v Costabile, 2015 NY Slip Op 05464, 2nd Dept 6-24-15**

REAL ESTATE. CONTRACT LAW. CONTINGENT PURCHASE CONTRACT. GENERAL OBLIGATIONS LAW.

Supreme Court should have granted the purchasers' motion for summary judgment on the complaint seeking return of the downpayment. The contract for sale of real property was contingent upon purchasers receiving a commitment for a loan. The commitments received by the purchasers were contingent upon a property appraisal. The house was damaged in Hurricane Sandy and the lender, based upon the post-Sandy appraisal, would not issue the loan. The Second Department determined the purchasers were entitled to a return of their downpayment under the terms of the contract and pursuant to General Obligations Law 5-1311. The court explained: "Here, the contract of sale was conditioned upon the issuance of a written commitment from an institutional lender. The contract of sale expressly provided that 'a commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a Commitment' hereunder until an appraisal is approved.' Accordingly, the plaintiffs established their prima facie entitlement to judgment as a matter of law by demonstrating that they were unable to secure a firm commitment in accordance with the contract of sale, and that they were entitled to the return of their down payment pursuant to the terms of the contract ... . In addition, the plaintiffs demonstrated, prima facie, that they were entitled to a return of their down payment by virtue of General Obligations Law § 5-1311, since a 'material part' of the property was destroyed by Hurricane Sandy before legal title or possession of the property could be transferred (General Obligations Law § 5-1311[1][a][1])." **Walsh v Catalano, 2015 NY Slip Op 05468, 2nd Dept 6-24-15**

THIRD DEPARTMENT

CRIMINAL LAW. SUPERIOR COURT INFORMATION. JURISDICTIONAL DEFECT.

Defendant's plea to a superior court information (SCI) could not stand because the crimes in the information were not the same as, or lesser included offenses of, those in the felony complaint. The court explained: "... [T]he SCI was jurisdictionally defective in this case. The crimes charged in the SCI, to which defendant pleaded guilty, were required to be the same or lesser included offenses of those listed in the felony complaint ... . However, the only crimes listed in the felony complaint were the class E felony of possessing a sexual performance by a child and two class A misdemeanors. The SCI, on the other hand, charged defendant with the class C felony of use of a child in a sexual performance and the class B felony of course of sexual conduct against a child in the first degree. Clearly, the latter crimes were not lesser included offenses of the former.

Accordingly, due to this jurisdictional defect, we are constrained to conclude that the guilty plea must be vacated and the matter remitted to County Court for further proceedings." **People v O'Neill, 2015 NY Slip Op 05517, 3rd Dept 6-25-15**

DISCIPLINARY HEARINGS (INMATES). EVIDENCE.

The absence of information corroborating the confidential-source allegations which were the basis for the misbehavior report, coupled with the hearing officer's failure to interview either the source or the sergeant who obtained the confidential information, required annulment and expungement of the misbehavior determination. The court explained: "... [C]onfidential information may provide substantial evidence supporting a prison disciplinary determination as long as it is sufficiently detailed and probative that the Hearing Officer may make an independent assessment of the reliability of the information ... . Petitioner contends that the Hearing Officer failed to independently assess the reliability of the confidential information considered here. Based upon our review of the record, we must agree. The misbehavior report was the primary evidence supporting the disciplinary determination, as the sergeant who prepared it did not testify at the hearing. The sergeant based the report upon confidential memoranda that she prepared after obtaining incriminating information directly from the confidential source. The memoranda, however, do not contain additional information or corroborating details to facilitate verification of the source's reliability ... . Moreover, the Hearing Officer did not personally interview either the source or the sergeant who obtained the information. In view of this, we agree with petitioner that the necessary independent assessment of the confidential information was lacking and that the determination must be annulled and all references thereto expunged from petitioner's institutional record ..." . **Matter of Cooper v Annucci, 2015 NY Slip Op 05548, 3rd Dept 6-25-15**

NEGLIGENCE. PERSONAL INJURY. HIGHWAY CONDITIONS. BLOWING SNOW. STORM IN PROGRESS RULE. QUALIFIED IMMUNITY.

The Third Department, reversing the Court of Claims, determined questions of fact had been raised about whether the state had taken adequate measures to address a recurrent "blowing snow" condition in the vicinity of plaintiff's-decedent's highway accident. The court rejected defendant's argument that the "storm in progress" rule should be applied to blowing snow on a roadway. Rather the inquiry is whether the defendant exercised reasonable diligence in maintaining the roadway under the prevailing circumstances. There was evidence that the area in question was the site of several accidents and that installation of a snow fence may have prevented the problem. The state was unable to demonstrate it had undertaken a relevant study and was therefore unable to invoke qualified immunity. **Frechette v State of New York, 2015 NY Slip Op 05538, 3rd Dept 6-25-15**

TAX LAW. REAL PROPERTY TAX LAW. REDUCTION IN ASSESSED VALUE.

The trial court properly found petitioner's expert-appraisal of the value of a Home Depot store to be the most appropriate. Petitioner was therefore entitled to a reduction in the assessed value of the property. The Third Department carefully explained the valuation methods used by the competing experts (that discussion is not summarized here). As to the courts' role in property-tax assessment proceedings, the Third Department explained: "A local tax assessment is presumptively valid and, to overcome that presumption, a petitioner must present substantial evidence that the property is overvalued ... . Petitioner met this threshold burden here through its submission of the detailed appraisal of Harland, a certified real estate appraiser with considerable experience, who utilized accepted methodologies and adequately set forth his calculations and the necessary details regarding the properties ... . The appropriateness of the comparable properties used by Harland in his analysis goes to the weight to be given to his appraisal, not, as respondents contend, the appraisal's competency to raise a valid dispute regarding valuation ... . With petitioner having rebutted the presumptive validity of the assessments, Supreme Court was obligated to weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that its property has been overvalued ... . Where, as here, conflicting expert evidence is presented, we defer to the trial court's resolution of credibility issues, and consider whether the court's determination of the fair market value of the subject property is supported by or against the weight of the evidence ...". [internal quotation marks omitted] **Matter of Home Depot U.S.A. Inc. v Assessor of the Town of Queensbury, 2015 NY Slip Op 05556, 3rd Dept 6-25-15**

UNEMPLOYMENT INSURANCE. PRECEDENT.

The Third Department determined claimant, who transcribed administrative hearings for "The Mechanical Secretary," was an employee entitled to unemployment insurance benefits. The court noted that the unemployment insurance appeals board was not required to explain why it did not follow a prior "unappealed" ruling by an administrative law judge that went the other way: "Here, the record establishes that The Mechanical Secretary advertised for transcriber positions. The president would interview the applicants and assess the quality of their work. The transcriber was required to have certain equipment, but The Mechanical Secretary would loan the transcriber a transcription machine if needed. The Mechanical Secretary arranged to have the work delivered to and picked up from the transcribers within a certain area. In claimant's case, however, because she did not live in close proximity to the company, she was required to pick her work up at its office and to return the completed work to that office by 9:00 a.m. Claimant was occasionally reimbursed for her travel expenses.

Significantly, The Mechanical Secretary set the nonnegotiable pay rate, supplied all the paper needed by the transcribers, and reviewed the final product for mistakes and would correct any minor mistakes or, where the mistakes were significant, send it back to be corrected by the transcriber. Furthermore, The Mechanical Secretary had to be notified if a transcriber was going to take any vacation. Given the evidence produced, we find that there is substantial evidence to support the Board's finding that The Mechanical Secretary exercised a sufficient degree of control over claimant's work to establish an employment relationship ...". **Matter of Ingle (The Mech. Secretary, Inc.—Commissioner of Labor), 2015 NY Slip Op 05553, 3rd Dept 6-25-15**

UNEMPLOYMENT INSURANCE. SUITABLE EMPLOYMENT. PRECEDENT.

The Third Department reversed the Unemployment Insurance Appeals Board's determination claimant was not eligible for unemployment insurance benefits because he refused suitable employment. Claimant is a skilled carpenter. He refused a yogurt-packaging job in a factory. The yogurt-packaging job was not, under the circumstances, "suitable employment" for the claimant: "Pursuant to Labor Law § 593 (2), a claimant who refuses an offer of employment for which he or she is reasonably fitted by training and experience will be disqualified from receiving unemployment insurance benefits ... . Significantly, a claimant need not accept every job offered but, rather[,] only those job offers which bear a reasonable relationship to [the] claimant's skills ... . Here, it is undisputed that claimant was skilled in finish carpentry and had no experience working in a factory. Consequently, substantial evidence does not support the Board's decision that he refused an offer of suitable employer ... . The Board's decision, in fact, runs contrary to a similar case in which the Board awarded benefits to another claimant who worked at the millwork company as a skilled craftsman and refused the same offer to work as a packager in a yogurt factory ... . In view of the foregoing, the Board's decision must be reversed." [internal quotation marks] **Matter of Reisen (Commissioner of Labor), 2015 NY Slip Op 05560, 3rd Dept 6-25-15**

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