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CasePrepPlus

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COURT OF APPEALS

CIVIL PROCEDURE.

ONCE JUDGMENT WAS ENTERED, SUPREME COURT DID NOT HAVE JURISDICTION TO ENTERTAIN A MOTION FOR STATUTORY INTEREST.

The Court of Appeals determined Supreme Court did not have jurisdiction to entertain a motion for statutory interest after judgment was entered. The post-judgment award of statutory interest ($4.9 million) was properly vacated by the appellate division: "While [petitioner] was appealing Supreme Court's judgment dismissing its action, some of the [respondents] filed a motion seeking an award of statutory interest under Civil Practice Law and Rules § 5001. Supreme Court granted the motion, and in August 2013, directed entry of a judgment of approximately $4.9 million, representing interest at the statutory rate. Upon appeal, the Appellate Division reversed; the court denied the [respondents'] motion and vacated the statutory interest judgment ... . We agree with the Appellate Division that Supreme Court lacked jurisdiction to award statutory interest on the January 2012 judgment that dismissed the petition. ... [T]he January 2012 paper, denominated an 'order,' was a final judgment dismissing the proceeding ... . Once Supreme Court dismissed [the] petition and judgment was entered, the court was without jurisdiction to entertain the [respondents'] post-judgment motion for statutory interest ...". ***CRP/Extell Parcel I, L.P. v. Cuomo*, 2016 N.Y. Slip Op. 04251, CtApp 6-2-16**

CRIMINAL LAW.

DEFENDANT MAY WAIVE RIGHT TO BE PRESENT FOR SENTENCING ON A FELONY.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined a defendant may waive his right to be present for sentencing on a felony: "Defendant contends that County Court violated CPL 380.40 (1) by permitting him to waive his presence for sentencing and in pronouncing judgment in his absence. We disagree. CPL 380.40 provides, with limited exceptions, that the 'defendant must be personally present at the time sentence is pronounced' (CPL 380.40 [1]). In situations where the sentence is to be pronounced for a misdemeanor or petty offense, a defendant may move to dispense with the personal presence requirement, and, with the court's permission, may be sentenced in absentia so long as the defendant executes a waiver 'reciting the maximum sentence that may be imposed for the offense and stating that the defendant waives the right to be personally present at the time sentence is pronounced' (CPL 380.40 [2]). On its face, the statute provides for no similar exception for felony defendants. * * * We conclude . . . that a defendant may expressly waive his right to be present. '[W]aiver results from a knowing, voluntary and intelligent decision' ... . Although CPL 380.40 protects a defendant's fundamental right to be present at sentencing . . . , that fundamental right may be waived just as many other fundamental rights may be similarly waived ...". ***People v. Rossborough*, 2016 N.Y. Slip Op. 04250, CtApp 6-2-16**

SECURITIES, FRAUD.

LIFETIME BAN ON PARTICIPATION IN THE SECURITIES INDUSTRY AND DISGORGEMENT OF WRONGFULLY OBTAINED PROFITS ARE AVAILABLE REMEDIES UNDER ANTI-FRAUD STATUTES.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined the Martin Act (General Business Law article 23-A) allowed a permanent injunction imposing a lifetime ban on defendants' participation in the securities industry and service as an officer or director of a public company. The court further found that both the Martin Act and the Executive Law allowed the remedy of disgorgement of wrongfully obtained profits. [This is the second time this securities-fraud case reached the Court of Appeals. The underlying facts were laid out in the prior decision, 21 N.Y.3d 439]: "[T]he Attorney General may obtain permanent injunctive relief under the Martin Act and Executive Law § 63 (12) upon a showing of a reasonable likelihood of a continuing violation based upon the totality of the circumstances ... . 'This is not a "run of the mill" action for an injunction, but rather one authorized by remedial legislation, brought by the Attorney General on behalf of the People of the State and for the purposes of preventing fraud and defeating exploitation ... . "[T]he standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief" '. Therefore, we reject defendants' argument that the Attorney General must show irreparable harm in order to obtain a permanent injunction. * * * We further conclude that disgorgement is an available remedy under the Martin Act and the Executive Law. The Martin Act contains a broad, residual relief clause, providing courts with the authority, in any action brought under the Act, to 'grant such other and further relief as may be proper' (General Business Law § 353-a). Indeed, this Court has previously recognized that the courts are not limited to the remedies specified under either of these statutes ... . In our view, disgorgement 'merely requires the return of wrongfully obtained profits [and] does not result in any actual economic penalty' ... . As we have previously stated, in

an appropriate case, disgorgement may be an available 'equitable remedy distinct from restitution' under this State's anti-fraud legislation ...". ***People v. Greenberg*, 2016 N.Y. Slip Op. 04253, CtApp 6-2-16**

FIRST DEPARTMENT

CRIMINAL LAW.

DISABLED, ILL DEFENDANT SHOULD HAVE BEEN ALLOWED TO APPEAR REMOTELY BY VIDEO AT TRIAL**.**

The First Department, reversing defendant's conviction, determined the trial court should have allowed the disabled and ill defendant to appear at trial remotely by video. Contrary to the trial court's reasoning, the prosecutor's consent to the procedure was not required: "[T]he court erred in believing that CPL article 182 restricted its authority to use video conferencing to effectuate a defendant's right to be present at trial. 'Although the Legislature has primary authority to regulate court procedure, the Constitution permits the courts latitude to adopt procedures consistent with general practice as provided by statute,' and '[b]y enacting Judiciary Law § 2-b(3), the Legislature has explicitly authorized the courts' use of innovative procedures where necessary to carry into effect the powers and jurisdiction possessed by [the court]' * * * ... [W]e conclude that where the court essentially accepted defendant's claims of extreme pain and physical distress, where the alternative of electronic appearance was actually available based on the court's own efforts, where it was not employed only because the court wrongly believed that it lacked the required discretion . . . , and where the accommodations actually offered by the court were far less efficacious, the court, despite the best intentions, failed to reasonably accommodate defendant's medical concerns ... . In these circumstances, defendant's waiver of the right to be present was not knowing, voluntary, and intelligent ...". ***People v. Krieg*, 2016 N.Y. Slip Op. 04134, 1st Dept 5-31-16**

CIVIL PROCEDURE.

OPENING STATEMENT ALLEGING EXCESSIVE FORCE WAS FATALLY INCONSISTENT WITH NEGLIGENCE CLAIMS, NEGLIGENCE CLAIMS PROPERLY DISMISSED ON THAT GROUND**.**

The First Department determined plaintiffs' opening statement, which alleged an intentional act by defendant, warranted dismissal of the negligence claims: "Plaintiffs' opening statement warranted dismissal of the negligence and negligent battery claims, because the claim that defendant . . . used excessive force in handcuffing plaintiff . . . is fatally inconsistent with the negligence claims ...". ***Vaynshelbaum v. City of New York*, 2016 N.Y. Slip Op. 04302, 1st Dept 6-2-16**

FRAUD, CORPORATION LAW.

PLAINTIFF, A SOPHISTICATED INVESTOR, DID NOT STATE A CAUSE OF ACTION FOR FRAUD ON THE PART OF THE COMPANY IN WHICH PLAINTIFF INVESTED AND PURCHASED A CONTROLLING INTEREST, PLAINTIFF HAD THE MEANS TO DISCOVER THE TRUTH BEHIND ANY ALLEGED FALSE CLAIMS.

The First Department, in a full-fledged opinion by Justice Gische, determined plaintiff, a sophisticated investor, did not state a cause of action for fraud on the part of the company (DuCool) in which plaintiff invested: "Plaintiff is an experienced and sophisticated investor. It did not plead facts to support the justifiable reliance element of fraud ... . Plaintiff had total, unfettered access to every aspect of DuCool's company information both before and after its initial investment, even before it held a controlling interest in DuCool. Although learning through the due diligence conducted by its own technology and business consultants that there were frequent technological problems with DuCool products, some of them 'severe,' plaintiff proceeded to invest in the company. Thereafter, as the 49% shareholder, plaintiff had the largest percentage ownership of any individual shareholder and it had access to information concerning the operations of the business. There is no factual basis on which to conclude that the alleged fraud involved matters peculiarly within defendants' knowledge, because plaintiff had the means to discover the truth behind any false claims about the condition of the company and whether this was a feasible investment ...". ***MP Cool Invs. Ltd. v. Forkosh*, 2016 N.Y. Slip Op. 04159, 1st Dept 5-31-16**

FREEDOM OF INFORMATION LAW (FOIL).

GLOMAR RESPONSE, NEITHER CONFIRMING NOR DENYING THE EXISTENCE OF DOCUMENTS, APPROPRIATE UNDER THE FACTS.

The First Department determined, under the facts, the police department's Glomar response to the request for documents was appropriate. A Glomar response refuses to admit or deny the existence of documents: "FOIL does not prohibit respondents from giving a Glomar response to a FOIL request — that is, a response 'refus[ing] to confirm or deny the existence of records' where, as here, respondents have shown that such confirmation or denial would cause harm cognizable under a FOIL exception ... . Although petitioners contend that such a response is impermissible in the absence of express statutory authorization, the Glomar doctrine is 'consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL' ... . * * * Respondents met their burden to 'articulate particularized and specific justification' for declining to confirm or deny the existence of the requested records, which sought information related to NYPD investigations and surveillance activities ... . In particular, respondents showed that answering petitioners' inquiries would cause harm cognizable under the law enforcement and public safety exemptions of Public Officers Law § 87(2) (*see* § 87(2)[e], [f] ...". ***Matter of Abdur-Rashid v. New York City Police Dept.*, 2016 N.Y. Slip Op. 04318, 1st Dept 6-2-16**

LABOR LAW-CONSTRUCTION LAW.

HOMEOWNER'S EXEMPTION FROM LABOR LAW LIABILITY APPLIED, DESPITE PRESENCE OF THREE FAMILIES IN THE HOME.

The First Department, reversing Supreme Court, determined the homeowner's exemption from liability under the Labor Law for one- and two-family homes applied, despite evidence three families lived in the home: "The applicability of the homeowner exemption is determined by a 'site and purpose' test . . . , which 'hinges upon the site and the purpose of the work' and 'must be employed on the basis of the homeowners' intentions at the time of the injury' ... . Here, the evidence established that, at the time of the accident, defendants' house was a two-family residential home with a basement apartment, where a family friend lived, and three upper floors, which defendants shared with an adult child and two grandchildren. Defendants did not receive any rental income. That three families, two of which are related, lived in the home is insufficient to raise an issue of fact as to whether the home was a three-family dwelling ...". ***Del Carnen Diaz v. Bocheciamp*, 2016 N.Y. Slip Op. 04305, 1st Dept 6-2-16**

MUNICIPAL LAW.

NYC LOCAL LAW REQUIRING DISCLOSURE ABOUT THE SELECTION PROCESS FOR CONSTRUCTION OF AFFORDABLE HOUSING IS NOT PREEMPTED BY STATE LAW AND IS NOT UNCONSTITUTIONAL.

The First Department, in a full-fledged opinion by Justice Andrias, over an extensive dissenting opinion, determined a New York City local law mandating the disclosure of information about the selection process for construction of affordable housing was not preempted by state statutes and was not unconstitutional: "Although one may reasonably argue, as does the dissent, that the disclosure requirements imposed by the law are costly, difficult or cumbersome, or that the law will not remedy corruption in the developer selection process or further the flexible and economical implementation of publicly funded housing, the wisdom, necessity or efficacy of the law is not the province of the courts ... . [T]he only issue before us is whether Local Law No. 44 is unconstitutional because it is preempted by state statutes or violates the Due Process and Equal Protection Clauses of the New York State Constitution. Applying well established precedent to the facts, we find that Local Law No. 44 does not unlawfully interfere with or frustrate [New York City Department of Housing Preservation and Development (HPD)'s] authority under the City Charter or impermissibly conflict with the State Legislature's delegation of authority and discretion over affordable housing programs to HPD, and that it is not otherwise unconstitutional." ***New York State Assn. for Affordable Hous. v. Council of the City of N.Y.*, 2016 N.Y. Slip Op. 04320, 1st Dept 6-2-16**

SECOND DEPARTMENT

ARBITRATION.

COURT'S LIMITED POWER TO REVIEW AN ARBITRATION AWARD SUCCINCTLY STATED.

In affirming an arbitration award, the Second Department succinctly stated its review powers in this context: "Unless an arbitration award violates a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's powers, it may not be vacated ... . Where the parties to a contract agree to submit disputes to an arbitrator, '[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies' ... . Absent a provision to the contrary in an arbitration agreement, arbitrators are not bound by principles of substantive law or rules of evidence ... . Thus, an arbitration award will not be vacated even where the court concludes that the arbitrator's interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law ...". ***Matter of T & C Home Design, LLC v. Stylecraft Corp.*, 2016 N.Y. Slip Op. 04228, 2nd Dept 6-1-16**

CIVIL PROCEDURE.

FRIVOLOUS DEMAND FOR PUNITIVE DAMAGES IN PROPERTY-INJURY CASE WARRANTED AWARD PURSUANT TO CPLR 8303-a.

The Second Department determined the assertion of a frivolous claim for punitive damages in a property-injury case warranted the award of $10,000 to each defendant pursuant to CPLR 8303-a: "CPLR 8303-a provides, in pertinent part, that where, as here, a plaintiff has commenced a 'frivolous' claim in an action to recover damages for injury to property, 'the court shall award to the successful party, costs and reasonable attorney's fees not exceeding ten thousand dollars.' " ***Baxter v. Javier*, 2016 N.Y. Slip Op. 04165, 2nd Dept 6-1-16**

CRIMINAL LAW.

EVIDENCE OF PHYSICAL INJURY NOT SUFFICIENT TO SUPPORT ROBBERY IN THE SECOND DEGREE.

The Second Department determined the evidence of physical injury was not sufficient to support robbery in the second degree and reduced defendant's conviction to robbery third degree: " 'Physical injury' is defined as 'impairment of physical condition or substantial pain' (Penal Law § 10.00[9]). 'Although the question of whether physical injury has been established is generally for the jury to decide, there is an objective level . . . below which the question is one of law' ... . The subject incident occurred as the complainant, a doctor, was on her way to work at Brooklyn Hospital. The complainant testified that during the incident the defendant and another man shoved

her and pulled her to the ground, then took her purse. After the incident, the complainant 'collected [herself]' and then resumed walking to the hospital. The complainant testified that she sustained a laceration and a welt on the back of her head, scratches and bruises on her elbow, and other bruises. At the hospital, she was given painkillers, ice, and bandages. The complainant was not able to work for the rest of that day, but returned to work the next day. She testified that she was 'sore for several days.' Under these circumstances, there was insufficient evidence from which a jury could infer that the complainant suffered substantial pain or impairment of her physical condition ...". ***People v. Stokes*, 2016 N.Y. Slip Op. 04245, 2nd Dept 6-1-16**

CRIMINAL LAW, ATTORNEYS.

ROBBERY CONVICTION UNSUPPORTED BY PROOF OF INTENT TO PERMANENTLY, AS OPPOSED TO TEMPORARILY, DEPRIVE OWNER OF PROPERTY; HEARING NECESSARY TO ASSESS DEFENDANT'S SPEEDY TRIAL ARGUMENTS; PROSECUTOR'S SUMMATION DEPRIVED DEFENDANT OF A FAIR TRIAL.

The Second Department, reversing defendant's conviction, determined: (1) the robbery conviction was not supported by legally sufficient evidence of an intent to permanently, as opposed to temporarily, deprive the owner of property; (2) the trial court needed to hold a hearing to revisit defendant's motion to dismiss on speedy trial grounds; and (3) the prosecutor's summation, in which the prosecutor repeatedly gave the jury the impression the defendant had the burden of proof and vouched for the People's witnesses, deprived defendant of a fair trial. The decision has substantive discussions of all three issues. With respect to prosecutorial misconduct, an issue reached in the interest of justice, the court wrote: "Here, the prosecutor repeatedly shifted the burden of proof to the defendant, first, by telling the jurors that they could only form a reasonable doubt if they believed the defense offered by the defendant . . . , and then, by repeatedly telling the jurors or implying that they would have to find that the People's witnesses lied in order to believe that defense ... . In essence, one of the prosecutor's themes in his summation was that the jurors had to determine whether they believed the People's witnesses or whether they believed the defendant (who testified), and only if they believed the defendant could they form a reasonable doubt about the defendant's guilt. Such an impression was clearly improper and prejudicial. The prosecutor additionally denigrated the defense . . . , and vouched for the credibility of the police witnesses based upon their position as law enforcement officers ...". ***People v. Cantoni*, 2016 N.Y. Slip Op. 04232, 2nd Dept 6-1-16**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL'S ELICITATION OF DAMAGING EVIDENCE, LACK OF PREPARATION, AND FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT DEPRIVED DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL.

The Second Department, reversing defendant's conviction, determined defendant did not receive effective assistance of counsel. On direct, the complainant did not indicate defendant participated in the robbery, but rather was simply present. Defense counsel elicited testimony from the complainant on cross which alleged defendant's direct participation by pulling her to the ground from behind. Defense counsel erroneously believed complainant had testified in the grand jury that she did not know who pulled her to the ground. However a review of the grand jury minutes found no such testimony, indicating defense counsel was not adequately prepared. In addition, the Second Department held that defense counsel's failure to object to prosecutorial misconduct during summation amounted to ineffective assistance. With regard to the prosecutorial misconduct, the court wrote: "Defense counsel failed to object to multiple improper summation statements made by the prosecutor. For example, among other improper comments, the prosecutor told the jury that the defendant was 'cocky' and 'brazen,' and that he 'did not deserve' the benefit of the doubt given to him by the complainant on the night at issue; that the deliberations 'should not take [the jury] very long'; that defense counsel 'harped' on certain facts; that the jury could believe the complainant and not the defendant 'who sits [during trial] with his buttoned up shirt hunched over'; and that the jury could rely on the complainant's testimony '[b]ecause no amount of lawyering or manipulating of her words and the details of that event were going to change the way she told it to [the jury].' The prosecutor also reiterated, without objection, certain improper testimony of the complainant that the trial court had erroneously, over defense counsel's objection, permitted the jury to hear regarding 'how what [the defendant] did changed [the complainant's] life.' The prosecutor reminded the jury that the complainant 'can't even put her trash out alone anymore,' and because of what the defendant did, the complainant 'had to move.' These patently improper comments by the prosecutor vouched for the credibility of the complainant and the strength of the People's case, appealed to the jury's sympathy, disparaged the defendant, and denigrated the defense ... . As no objection was made to such statements, the jury was able to consider these improper comments of the prosecutor ...". ***People v. McCray*, 2016 N.Y. Slip Op. 04240, 2nd Dept 6-1-16**

CRIMINAL LAW, HABEAS CORPUS.

WRIT OF HABEAS CORPUS SUSTAINED, BAIL GRANTED.

The Second Department sustained defendant's writ of habeas corpus and set bail at $1,000,000, bond or cash, together with electronic monitoring and other conditions. The underlying facts were not discussed: "ADJUDGED that the writ is sustained, without costs or disbursements, bail on Richmond County Indictment No. 61/16 is granted in the sum of $1,000,000, which may be posted in the form of an insurance company bail bond in that sum or by depositing the sum of $1,000,000 as a cash bail alternative, on condition that (1) the defendant surrender any and all passports he may have to the Office of the Richmond County District Attorney and is prohibited from applying for any new or replacement passports; (2) the defendant wear an electronic monitoring bracelet, with monitoring services to be provided by an entity approved by the Office of the Richmond County District Attorney and paid for by the defendant; and (3)

the defendant not travel outside of the counties comprising the City of New York in the State of New York, subject to any modification directed by the Supreme Court, Richmond County ... ." ***People ex rel. Brackley v. Warden, Brooklyn Detention Complex*, 2016 N.Y. Slip Op. 04247, 2nd Dept 6-1-16**

FAMILY LAW.

FAILURE TO COMPLY WITH ALL THE NOTICE REQUIREMENTS FOR JUDICIAL SURRENDER OF PARENTAL RIGHTS WAS NOT A GROUND FOR VACATION OF THE JUDICIAL SURRENDER.

The Second Department, over a dissent, determined Family Court's failure to strictly comply with all the notice requirements for judicial surrender of parental rights was not a ground for vacation of the judicial surrender: "Social Services Law § 383-c(3)(b) defines the procedures to be followed for the execution of judicial surrenders. Specifically, it requires the court to inform the parent of the right to legal counsel and to obtain supportive counseling, and to inform the parent of the consequences of the surrender, including the permanent loss of custodial rights and the immediate and irrevocable effect of the surrender. After informing the parent that the surrender becomes final and irrevocable upon its execution and acknowledgment, the court must provide the parent with a copy of the written instrument. * * * A clear reading of the statute indicates that the failure by a court to orally advise a surrendering parent in open court of his/her right to supportive counseling is not a ground upon which a parent may rely when seeking to vacate or revoke a surrender. Pursuant to Social Services Law § 383-c(6)(d), the only available grounds for such relief are fraud, duress, or coercion. No such allegations are present in this case." ***Matter of Naquan L.G. (Carolyn C.)*, 2016 N.Y. Slip Op. 04218, 2nd Dept 6-1-16**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE NEGLECT FINDING ALLOWING JUVENILE TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

The Second Department determined Family Court should have made the findings necessary for the juvenile to apply for Special Immigrant Juvenile Status (SIJS). Father's domestic violence in the presence of the juvenile and one act of excessive corporal punishment constituted neglect and reunification with the father was, therefore, not viable: "[A] 'special immigrant' is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law . . . , and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence ... . * * * Acts of domestic violence in the presence of children may establish neglect ... . Further, '[n]eglect may be established by even a single incident of excessive corporal punishment' ... . Here, the father's conduct constituted neglect, which established that his reunification with the child is not viable. ***Matter of Ena S.Y. (Martha R.Y. — Antonio S.)*, 2016 N.Y. Slip Op. 04229, 2nd Dept 6-1-16**

FREEDOM OF INFORMATION LAW (FOIL).

TOWN DID NOT DEMONSTRATE PREPAYMENT BEFORE RETRIEVING PAPER DOCUMENTS WAS JUSTIFIED.

The Second Department determined the town did not demonstrate the need for prepayment of the costs associated with locating the requested documents: "The only evidence in the record that justified the imposition of costs was a letter to the petitioner stating that it would take a Town employee a minimum of eight weeks, at $240 per week, to review 2,500–3,000 files to identify the records available for inspection. Although an agency may charge for employee time spent extracting or segregating data from an electronic database (*see* Public Officers Law § 87[1][c]), FOIL does not permit an agency to charge for employee time spent searching for paper documents ... . Here, the Town failed to demonstrate that the prepayment costs were properly based upon employee time related to retrieving electronic files, rather than a manual search of hard copies for which the Town's recoupment costs are limited to 25¢ per photocopy ...". ***Matter of Ripp v. Town of Oyster Bay*, 2016 N.Y. Slip Op. 04226, 2nd Dept 6-1-16**

LABOR LAW-CONSTRUCTION LAW.

ABSENCE OF SAFETY RAIL ON SCAFFOLDING ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON LABOR LAW § 240(1) CAUSE OF ACTION.

The Second Department determined plaintiff was entitled to summary judgment on the Labor Law § 240(1) cause of action. Plaintiff fell from scaffolding after suffering an electric shock. There was no safety rail on the scaffolding: "Labor Law § 240(1) is to be 'interpreted liberally to accomplish its purpose' … . To establish liability pursuant to Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold that lacked a safety railing, and that he was not provided with a safety device to prevent him from falling ...". ***Viera v. WFJ Realty Corp.*, 2016 N.Y. Slip Op. 04202, 2nd Dept 6-1-16**

LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW.

PLAINTIFF ENTITLED TO WHISTLEBLOWER PROTECTION UNDER LABOR LAW § 741.

The Second Department determined plaintiff was properly found to have been entitled to whistleblower protection under Labor Law § 741. Plaintiff complained about an infusion procedure during liver transplant surgery which plaintiff believed threatened the safety and health of the patient. Thereafter, plaintiff was demoted and given no further work: "Labor Law § 741 prohibits an employer from taking retaliatory action against an employee because the employee discloses, threatens to disclose, objects to, or refuses to participate in 'any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care' (Labor Law § 741[2][a], [b]). ' Improper quality of patient care' means, with respect to patient care, any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matter which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient' (Labor Law § 741[1][d]). It is a defense that 'the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section' (Labor Law § 741[5])." ***Galbraith v. Westchester County Health Care Corp.*, 2016 N.Y. Slip Op. 04176, 2nd Dept 6-1-16**

PERSONAL INJURY.

BATTERY CAUSE OF ACTION STEMMING FROM KICKBALL GAME SURVIVED SUMMARY JUDGMENT, ASSUMPTION OF RISK DOCTRINE DID NOT PRECLUDE ACTION AS A MATTER OF LAW.

The Second Department determined defendants did not eliminate questions of fact whether infant defendant intentionally pushed infant plaintiff to the ground during a kickball game. The battery cause of action was therefore not precluded (as a matter of law) by the doctrine of assumption of the risk: " 'To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature' ... . Contrary to the appellants' contention, they failed to eliminate triable issues of fact as to whether the bodily contact between the infant defendant and the infant plaintiff was intentional or offensive ... . The appellants also failed to establish, prima facie, that the complaint was barred by the doctrine of primary assumption of the risk. While a participant in a sporting activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation, the participant is not deemed to have assumed risks resulting from the reckless or intentional conduct of others ...". ***Dimisa v. Oceanside Union Free Sch. Dist.*, 2016 N.Y. Slip Op. 04172, 2nd Dept 6-1-16**

PERSONAL INJURY.

QUESTIONS OF FACT RAISED ABOUT CAUSE OF FALL AND CONSTRUCTIVE NOTICE OF CONDITION.

The Second Department determined plaintiff had raised a question of fact whether a slimy substance caused the ladder to slip (causation) and whether defendant had constructive notice of the condition: "Here, the defendant established her prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff could not identify what had caused the ladder to move without engaging in speculation ... . In opposition, the plaintiff submitted the deposition testimony of a nonparty witness, which raised a triable issue of fact as to whether the alleged slimy substance had caused the ladder to move and, consequently, the plaintiff to fall and sustain personal injuries ... . Additionally, a triable issue of fact exists as to whether the defendant, who did not inspect the garage within the week prior to the accident, had constructive notice of the alleged slimy condition ...". ***Giordano v. Giordano*, 2016 N.Y. Slip Op. 04177, 2nd Dept 6-1-16**

PERSONAL INJURY.

QUESTION OF FACT WHETHER STAIRS AND HANDRAIL CONSTITUTED A DANGEROUS CONDITION.

The Second Department determined questions of fact precluded defendant's motion for summary judgment in this slip and fall case. Plaintiff alleged the stairway where she fell was defective in that the treads were too narrow and the handrail was tight against the wall. Defendant argued the condition was open and obvious: " 'A landowner must act as a reasonable [person] in maintaining 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' . . . , and must warn of any dangerous or defective condition of which he or she has actual or constructive notice ... . However, '[a] property owner has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous' ... . Here, the defendant, who relied only on the plaintiff's deposition testimony in support of her motion, failed to establish, prima facie, that the dimensions of the stairs and the position of the handrail were not inherently dangerous as a matter of law ...". ***Rigatti v. Geba*, 2016 N.Y. Slip Op. 04193, 2nd Dept 6-1-16**

MUNICIPAL LAW, PERSONAL INJURY.

NYC LOCAL LAW REQUIRING DISCLOSURE ABOUT THE SELECTION PROCESS FOR CONSTRUCTION OF AFFORDABLE HOUSING IS NOT PREEMPTED BY STATE LAW AND IS NOT UNCONSTITUTIONAL.

The First Department, in a full-fledged opinion by Justice Andrias, over an extensive dissenting opinion, determined a New York City local law mandating the disclosure of information about the selection process for construction of affordable housing was not preempted by state statutes and was not unconstitutional: "Although one may reasonably argue, as does the dissent, that the disclosure requirements imposed by the law are costly, difficult or cumbersome, or that the law will not remedy corruption in the developer selection process

or further the flexible and economical implementation of publicly funded housing, the wisdom, necessity or efficacy of the law is not the province of the courts ... . [T]he only issue before us is whether Local Law No. 44 is unconstitutional because it is preempted by state statutes or violates the Due Process and Equal Protection Clauses of the New York State Constitution. Applying well established precedent to the facts, we find that Local Law No. 44 does not unlawfully interfere with or frustrate [New York City Department of Housing Preservation and Development (HPD)'s] authority under the City Charter or impermissibly conflict with the State Legislature's delegation of authority and discretion over affordable housing programs to HPD, and that it is not otherwise unconstitutional." ***New York State Assn. for Affordable Hous. v. Council of the City of N.Y.*, 2016 N.Y. Slip Op. 04320, 1st Dept 6-2-16**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

PROSECUTOR'S SUMMATION SHIFTED THE BURDEN OF PROOF, CONVICTION REVERSED IN THE INTEREST OF JUSTICE.

The Third Department reversed defendant's conviction in the interest of justice because of prosecutorial misconduct in summation: "Counsel is afforded wide latitude during summations, but when a prosecutor's remarks are so egregious such that they deprive a defendant of a fair trial, reversal is warranted ... . During his summation, the prosecutor remarked that defendant failed to provide an 'innocent explanation' for his actions or that it was necessary for him to do so. Indeed, a recurring and substantial theme in the prosecutor's summation was defendant's inability to provide an innocent explanation for his conduct following the incident giving rise to the charges against him or for the presence of incriminating evidence at the crime scene. We agree with defendant that these comments improperly shifted the burden of proof from the People to defendant ...". ***People v. Rupnarine*, 2016 N.Y. Slip Op. 04257, 3rd Dept 6-2-16**

CRIMINAL LAW, EVIDENCE.

CONSPIRACY TO SELL A CONTROLLED SUBSTANCE NOT PROVEN; PROOF REQUIREMENTS FOR SALE OF A CONTROLLED SUBSTANCE BASED PRIMARILY ON INTERCEPTED PHONE CONVERSATIONS AND TEXT MESSAGES EXPLAINED.

The Third Department determined the evidence was not sufficient to support defendant's conviction of conspiracy in the second degree in this drug-sale case. In addition, the Third Department explained the proof required for criminal sale of a controlled substance where the evidence is primarily recorded phone calls and text messages: "At the joint trial, the People sought to convict [co-defendant] Wright of [criminal sale of a controlled substance second degree] based solely upon recorded telephone conversations between [Wright and defendant], in which Wright allegedly agreed to sell heroin to defendant. However, during those conversations, defendant equivocated as to how much heroin he sought to buy, and none of the heroin from the transaction was recovered by police. As a result, the People failed to independently establish that the weight of the heroin sold exceeded the statutory threshold . . . and, in turn, they failed to prove an alleged overt act by defendant or Wright in support of the conspiracy charge ... . * * * Where, as here, the People primarily rely on intercepted telephone conversations as evidence of a sale of drugs (*see* Penal Law §§ 220.00 [1]; 220.39 [1]), all that [is required] is the production of 'some additional evidence establishing the existence of [the drug in question] to support [defendant's] convictions for [its sale]' ...". ***People v. Cochran*, 2016 N.Y. Slip Op. 04255, 3rd Dept 6-2-16**

EMPLOYMENT LAW.

DISLOYAL OR FAITHLESS PERFORMANCE OF EMPLOYMENT DUTIES (FAITHLESS SERVANT DOCTRINE) ENTITLED EMPLOYER TO THE RETURN OF COMPENSATION PAID TO THE EMPLOYEE DURING THE PERIOD OF THE THEFT.

The Third Department, in a full-fledged opinion by Justice Peters, determined plaintiff-employer was entitled to summary judgment on both liability and damages in this "disloyal or faithless performance of employment duties" case. Defendant-employee stole $50,000 from his employer. The employer sought recovery of the compensation paid to the employee over the six-year period of the theft and relief from the obligation to provide health insurance. Supreme Court granted summary judgment on liability but ruled the employee's otherwise unblemished career raised a question of fact about damages. The Third Department held Supreme Court's damages ruling was error: "New York law with respect to the disloyal or faithless performance of employment duties has developed for well over a century. Firmly rooted in this state's jurisprudence is the principle that 'an employee is to be loyal to his [or her] employer and is 'prohibited from acting in any manner inconsistent with his [or her] agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his [or her] duties' ... . Under what is commonly referred to as the faithless servant doctrine, '[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of his [or her] services is generally disentitled to recover his [or her] compensation, whether commissions or salary' ... . Thus, where an employee 'engage[s] in repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted' ... . * * * The Court of Appeals has made clear that forfeiture of compensation is required even when some or all of 'the services were beneficial to the principal or [when] the principal suffered no provable damage as a result of the breach of fidelity by the agent' ...". ***City of Binghamton v. Whalen*, 2016 N.Y. Slip Op. 04289, 3rd Dept 6-2-16**

FAMILY LAW.

DISMISSAL WITHOUT A HEARING OF PETITION TO MODIFY CUSTODY ARRANGEMENT WAS ERROR.

The Third Department, reversing Family Court, determined the dismissal without a hearing of mother's petition for modification of the custody arrangement was error: "In her petition, the mother alleged, among other things, that the father was charged with reckless endangerment, vehicular assault and driving while intoxicated after he crashed a car in January 2015, thereby causing injury to himself and his three passengers. The mother also alleged that the father engaged in a course of conduct that alienated the children from her, that the children desired to spend more time with her and that her work schedule had become more flexible since completing her medical residency. If established after a hearing, these allegations could afford a basis for modifying the prior custodial arrangement and, thus, Family Court erred in dismissing the petition without first conducting a hearing ... . Given that the mother's petition places both legal and physical custody in issue, we further note that if, after a hearing, the mother makes the requisite showing of a change in circumstances sufficient to warrant a best interests inquiry and Family Court determines that joint legal custody is not feasible, it is 'incumbent upon Family Court to determine a custodial arrangement based upon the best interests of the child[ren] despite the absence' of a petition definitively seeking sole custody' ...". ***Matter of Engelhart v. Bowman*, 2016 N.Y. Slip Op. 04294, 3rd Dept 6-2-16**

MUNICIPAL LAW, IMMUNITY.

COUNTY IMMUNE FROM SUIT BASED UPON DESIGN OF STORM DRAINAGE SYSTEM, PLAINTIFFS DID NOT RAISE A QUESTION OF FACT ALLEGING NEGLIGENT MAINTENANCE OF THE SYSTEM.

The Third Department, reversing Supreme Court, determined the county's motion for summary judgment should have been granted. During a hurricane, a county drainage system overflowed and damaged plaintiffs' property. The county was immune from suit based upon the design and placement of the drainage system. And the plaintiff's failed to raise a question of fact concerning the allegation the county negligently maintained the drainage system: "[T]o the extent that plaintiffs' negligence claim alleges that defendant failed to adequately design or redesign the drainage system, it cannot be maintained. Decisions 'determining when and where [drainage ditches] shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion . . . [which] is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land' ... . The act of maintaining a drainage system, on the other hand, is ministerial in nature and, thus, governmental immunity will not insulate defendant from plaintiffs' alternative claim that it did so negligently ... . 'Nonetheless, [defendant] is not an insurer of its [drainage] system and cannot be held liable for injury unless it is shown that the injury was caused by active negligence in the maintenance of the system' ...". ***Watt v. County of Albany*, 2016 N.Y. Slip Op. 04281, 3rd Dept 6-2-16**

MUNICIPAL LAW, TAX LAW.

PETITIONER'S EMPIRE ZONE CERTIFICATION SHOULD NOT HAVE BEEN REVOKED.

The Third Department, reversing the Empire Zone Designation Board, determined the decision to revoke petitioner's Empire Zones Program certification was arbitrary and capricious. The court noted that petitioner's affirmative response to a question mandated by the Tax Law concerning whether petitioner had ever been required to demonstrate the business was formed for a valid business purpose was not, standing alone, a basis for decertification: "In deciding whether a business should be decertified for failing the shirt-changer test, the Commissioner was directed to determine whether the entity had 'caused individuals to transfer from existing employment with another business enterprise with similar ownership . . . to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization' (General Municipal Law § 959 [a] [v] [5]; *see* General Municipal Law § 959 [w]). Petitioner contends that it never engaged in such transfers of real property or employment, that the administrative record lacks any evidence to the contrary, and, thus, that there is no factual basis for the determination that this provision was violated. We agree, and therefore find that the Board's denial of petitioner's appeal from the revocation of its certificate was 'arbitrary and capricious and without a rational basis' ...". ***Matter of PG Erie Props., LLC v. Department of Economic Dev.*, 2016 N.Y. Slip Op. 04284, 3rd Dept 6-2-16**

MUNICIPAL LAW, TAX LAW.

PETITIONER'S EMPIRE ZONE CERTIFICATION PROPERLY REVOKED.

The Third Department determined decertification of petitioner's Empire Zone status was supported by sufficient evidence, including, but not limited to, petitioner's affirmative response to whether it was subject to a Tax Law provision which required it to demonstrate the business was formed for a valid business purpose: "Petitioner's mere affirmative response to the question whether the Tax Law provision was applicable to its business, without more, would not have sufficed to provide a rational basis for the determination that it was a shirt-changer. * * * However, the statement that petitioner attached to the 2006 BAR to demonstrate that it was formed for a valid business purpose contained factual information that was relevant to the Commissioner's 2009 analysis. In the statement, petitioner averred that it was formed in 2002 by combining two previously existing accounting firms, one of which — then known as Dermody, Burke & Brown, P.C. — had been engaged in the practice of public accountancy for 50 years. According to the statement, the 14 shareholders of this firm joined with the seven partners of a second accounting firm, Pasquale and Bowers, LLP, to become members of a new entity, which subsequently carried on the combined practices of the two previous firms. These factual assertions were sufficient to give rise to the reasonable inference that petitioner had caused individuals to transfer from existing employment with the previous two accounting firms to similar employment with petitioner, and that — as petitioner's members were the same individuals who had been the members

and shareholders of its predecessors — its ownership was similar to that of the prior firms. Accordingly, there was an evidentiary basis for the determination that petitioner was a shirt-changer within the meaning of the 2009 legislation ...". ***Matter of Dermody, Burke & Brown, CPAs, LLC v. Department of Economic Dev.*, 2016 N.Y. Slip Op. 04286, 3rd Dept 6-2-16**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

QUESTION OF FACT WHETHER TOWN CREATED THE DANGEROUS CONDITION IN THIS TRIP AND FALL CASE, PRE-DISCOVERY SUMMARY JUDGMENT IN FAVOR OF DEFENDANT TOWN PREMATURE.

The Third Department, reversing Supreme Court, determined the pre-discovery granting of the defendant-town's motion for summary judgment in this trip and fall case was premature. Although the town proved it did not have written notice of the defect, the plaintiffs raised a question of fact whether the town created the dangerous condition, thereby eliminating the written notice requirement: "In opposition to defendant's motion, plaintiffs provided an affidavit from . . . Debra Rodriguez. According to Rodriguez, . . . she heard a 'loud bang while one of the [d]efendant's snowplows was clearing the roadway in front of [her] house.' Then, '[a]fter the snow melted, [she] saw that the end of the culvert pipe was mangled, bent upwards and protruding above the surrounding surfaces . . . [and] [she] believe[s] that this dangerous condition was created by [defendant's] snowplow.' * * * '[A] summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant' ... . We find that the Rodriguez affidavit is sufficient to demonstrate that discovery is required and, therefore, defendant's motion should have been denied as premature." ***Greener v. Town of Hurley*, 2016 N.Y. Slip Op. 04291, 3rd Dept 6-2-16**

SOCIAL SERVICES LAW.

JUSTICE CENTER DID NOT HAVE THE STATUTORY AUTHORITY TO MAKE A NEGLECT FINDING AGAINST A FACILITY FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES.

The Third Department, in a full-fledged opinion by Justice Peters, determined the controlling Social Services Law statutes did not give the Justice Center for the Protection of Persons with Special Needs (Justice Center) the authority to find make a "neglect" finding against a facility for people with developmental disabilities. When two staff members left a resident unsupervised the resident engaged in inappropriate sexual conduct. The resident had acted similarly in the past: "While the Justice Center is indeed permitted to make a 'concurrent finding' with respect to a facility or provider agency in conjunction with either a substantiated or unsubstantiated report, the scope of that 'concurrent finding' is expressly circumscribed by the statute. By its terms, the only 'concurrent finding' that may be made is 'that a systemic problem caused or contributed to the occurrence of the incident' (Social Services Law § 493 [3] [b]). Had the Legislature intended to authorize the Justice Center to make a concurrent finding of neglect as against a facility or provider agency, it could have expressly said so. Likewise, if it was the intent of the Legislature to equate a finding 'that a systemic problem caused or contributed to the occurrence of the incident' with a finding of 'neglect,' it could have easily done so through use of the term 'neglect.' It is axiomatic that 'new language cannot be imported into a statute to give it a meaning not otherwise found therein' (McKinney's Cons Laws of NY, Book 1, Statutes § 94 at 190), nor can a court 'amend a statute by inserting words that are not there' ...". ***Matter of Anonymous v. Molik*, 2016 N.Y. Slip Op. 04288, 3rd Dept 6-2-16**

UNEMPLOYMENT INSURANCE.

LONG-HAUL TRUCKERS NOT EMPLOYEES.

The Third Department, over a two-justice dissent, reversing the Unemployment Insurance Appeal Board, determined long-haul truckers working for LaValle were not employees entitled to unemployment insurance benefits: "No one from LaValle supervised the drivers. They were free to choose whatever routes they desired in transporting loads. The drivers received no fringe benefits, there was no dress code, they were not required to attend meetings, they were not trained by LaValle and they were not reimbursed for their expenses. Drivers carried their own independent business cards. Claimant testified that he considered himself an independent contractor. He was issued an IRS 1099 form, and he reported that he was self-employed on his state and federal taxes. * * * LaValle and the long-haul drivers met virtually none of the criteria typically considered for an employer-employee relationship ...". ***Matter of Bogart (LaValle Transp., Inc. — Commissioner of Labor)*, 2016 N.Y. Slip Op. 04264, 3rd Dept 6-2-16**

WORKERS' COMPENSATION LAW, EVIDENCE.

LINK BETWEEN HEART ATTACK AND WORK NOT ESTABLISHED BY SUBSTANTIAL EVIDENCE.

The Third Department, reversing the Workers' Compensation Board, found there was insufficient evidence linking claimant's heart attack (myocardial infarction) to his work: "While the Board is entitled to resolve conflicting medical opinions, there must be 'medical opinion evidence regarding the probability of a causal relationship supported by a rational basis; a general expression of possibility will not suffice' … . Here, because the testimony of claimant's treating cardiologist expressed merely the possibility that the physical activities in which claimant engaged could have caused his myocardial infarction, such testimony falls short of the required degree of medical proof. As a result, the Board's determination based upon that testimony lacked a rational basis and was not supported by substantial evidence ...". ***Matter of Hartigan v. Albany County Sheriff's Dept.*, 2016 N.Y. Slip Op. 04280, 3rd Dept 6-2-16**

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