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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

CRITERIA FOR ALLOWING EXPERT EVIDENCE ON THE RELIABILITY OF EYEWITNESS IDENTIFICATION CLARIFIED; EXCLUDING THE PROFFERED EVIDENCE HERE WAS NOT AN ABUSE OF DISCRETION.

The Court of Appeals, over a three-judge dissent, reversing the Appellate Division, determined the trial court did not abuse its discretion (as a matter of law) when it denied defendant's motion to present expert evidence about eyewitness identification. The Court of Appeals clarified how its precedent on the topic should be applied: "The decision to admit or exclude expert testimony concerning factors that affect the reliability of eyewitness identifications rests within the sound discretion of the trial court ... . When the motion is considered during the People's case-in-chief, the trial court performs this function by weighing the request to introduce such testimony 'against other relevant factors, such as the centrality of the identification issue and the existence of corroborating evidence' (... *see* ... *People v LeGrand*, 8 NY3d 449, 459 [2007]). To the extent *LeGrand* has been understood to require courts to apply a strict two-part test that initially evaluates the strength of the corroborating evidence, it should instead be read as enumerating factors for trial courts to consider in determining whether expert testimony on eyewitness identification 'would aid a lay jury in reaching a verdict' ... . Courts reviewing such a determination simply examine whether the trial court abused its discretion in applying the 'standard balancing test or prejudice versus probative value' ... . ***People v. McCullough*, 2016 N.Y. Slip Op. 05060, CtApp 6-28-16**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICERS MAY BE CROSS-EXAMINED BASED ON ALLEGATIONS MADE IN A PENDING CIVIL SUIT, CRITERIA EXPLAINED.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, clarified the criteria for cross-examination of police officers who are defendants in a pending law suit alleging bad acts such as false arrest and fabrication of evidence. The court looked at three cases and applied the criteria to the facts of each. With respect to the one case which was reversed, the court wrote: "Specific allegations of prior bad acts in a federal lawsuit against a particular witness do establish a good faith basis for cross-examining that witness about the misconduct. Because defendant had the necessary good faith basis to ask about the prior bad acts alleged in the complaint, and there was no danger that such cross-examination would go to anything other than the police officers' credibility, the trial court abused its discretion in not allowing cross-examination into the acts alleged in the federal lawsuit based on the reasoning that the prejudicial value outweighed the probative value merely because the lawsuit was still pending. While we recognize that the scope of cross-examination rests in the sound discretion of the trial judge ... , in this case, it was an abuse of discretion to restrict defendant's right to cross-examine key prosecution witnesses based on a finding that some unidentified prejudice outweighed the probative value of the questions. The questions had a good faith basis and there is no suggestion in this record that the main issues would have been obscured and the jury confused ...". ***People v. Smith*, 2016 N.Y. Slip Op. 05061, CtApp 6-28-16**

CRIMINAL LAW, EVIDENCE, SEX OFFENDER REGISTRATION ACT (SORA)

SORA COURT PROPERLY REJECTED DOWNWARD DEPARTURE BECAUSE CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD DID NOT INVOLVE A SEXUAL OFFENSE.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined the *SORA* court did not err when it assessed 30 points for defendant's prior conviction (involving a different victim) for endangering the welfare of a child which did not involve a sexual offense. Based upon the language of the guidelines, the majority concluded the non-sexual offense could properly be considered subject to a possible downward departure. Here the *SORA* court, taking into consideration all the relevant evidence, was deemed justified in rejecting a downward departure: "As we recently stated, '[i]n determining whether to depart from a presumptive risk level, the hearing court weighs the aggravating or mitigating factors alleged by the departure-requesting party to assess whether, under the totality of the circumstances, a departure is warranted' ... . Here, the only mitigating factor defendant presented to the *SORA* court was that the prior endangering the welfare of a child conviction was not sexual in nature. Although the *SORA* court considered this argument when deciding whether to downwardly depart, it certainly was not required to consider the mitigating factor in a vacuum without

considering any aggravating factors that would weigh against a downward departure ... . In this case, there were numerous aggravating factors not adequately captured by the [risk assessment] that countered defendant's argument for a downward departure. Therefore, the *SORA* court did not abuse its discretion in determining that the 'totality of the circumstances' did not warrant a downward departure because such a departure would have resulted in an 'under-assessment of the defendant's dangerousness and risk of sexual recidivism' ...". ***People v. Sincerbeaux*, 2016 N.Y. Slip Op. 05062, CtApp 6-28-16**

DUTY OF CARE, FRAUD.

LABORATORY WHICH TESTS URINE FOR THE PRESENCE OF DRUGS DID NOT OWE A DUTY TO A TESTEE TO FOLLOW REGULATIONS NOT RELATED TO THE SCIENTIFIC TESTING PROCEDURE; FRAUD CAUSE OF ACTION CANNOT BE BASED ON THE RELIANCE OF A THIRD-PARY, AS OPPOSED TO THE PLAINTIFF, UPON A MISREPRESENTATION.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over two dissenting opinions, determined: (1) a laboratory (LabCorp) which tests urine for the presence of drugs did not owe a duty of care to a testee based upon the violation of a federal regulation which did not involve a scientific testing procedure; and (2), a fraud cause of action against the laboratory could not be based upon a third party's, as opposed to the plaintiff's, reliance upon a misrepresentation. Here plaintiff, a physician and a pilot, was selected for a random drug test. Plaintiff could not produce enough urine for the test and left the laboratory, returning the next day. Under Federal Aviation Administration (FAA) regulations, plaintiff's leaving the laboratory constituted a refusal to take the test. The FAA revoked plaintiff's airman certificates and his authority to conduct FAA mandated pilot examinations. A court ultimately restored plaintiff's certificates and examination authority. In his lawsuit against the laboratory, plaintiff alleged: (1) the laboratory was negligent in not informing him of the procedures and rules surrounding the inability to provide a urine sample; and (2) a laboratory employee (Montalvo) misrepresented to the FAA that plaintiff was uncooperative during the test: "... [I]n *Landon* (22 NY3d 1) we held that a drug testing laboratory can be liable to a test subject under the common law for negligent testing of a biological sample. We decline to extend *Landon's* reasoning to impose a duty upon a laboratory to test subjects that requires the laboratory to adhere to aspects of the federal regulations and guidelines that do not implicate the scientific integrity of the testing process. * * * Plaintiff alleges fraud against LabCorp, contending that Montalvo, LabCorp's employee, made false statements to the FAA investigators, which they relied on to plaintiff's detriment. Specifically, plaintiff points to Montalvo's statement to the FAA investigators that plaintiff was on his cell phone and uncooperative during the test, making it impossible to warn him of the consequence of leaving the testing site without giving a sample, which statement the FAA relied on in revoking plaintiff's airman certificates. We hold that under New York law, such third-party reliance does not satisfy the reliance element of a a fraud claim." ***Pasternack v. Laboratory Corp. of Am. Holdings*, 2016 N.Y. Slip Op. 05179, CtApp 6-30-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

EVIDENCE OF PRIOR BAD ACTS BY DEFENDANT PHYSICIAN SHOULD NOT HAVE BEEN ADMITTED IN THIS MEDICAL MALPRACTICE ACTION, PLAINTIFF'S VERDICT REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined evidence of a consent order, in which defendant physician acknowledged a negligent failure to adequately monitor a dozen patients for whom he prescribed medication, should not have been admitted in evidence. The essence of the malpractice claim was defendant's continued prescription of an anti-depressant for plaintiff's decedent over a ten-year period, without seeing plaintiff's decedent in his office, proximately caused plaintiff's decedent's suicide: "The record establishes that the Consent Order was neither probative of defendant's negligence or the question of proximate cause. As part of the Consent Order defendant agreed not to contest negligent treatment of certain anonymous patients, none of whom was the decedent. As such, defendant preserved his objections to factual allegations related to decedent and any charges of misconduct based on those allegations. Since the Consent Order did not establish facts concerning defendant's treatment of decedent, it was not probative as to that issue. In any event, given defendant's pre-trial concession that he deviated from accepted medical practice, the issue of negligent treatment did not require resolution by the jury. Further, any possible relevance of the Consent Order's contents was outweighed by the obvious undue prejudice of his repeated violations of accepted medical standards ... . The Consent Order was nothing more than evidence of unrelated bad acts, the type of propensity evidence that lacks probative value concerning any material factual issue, and has the potential to induce the jury to decide the case based on evidence of defendant's character ...". ***Mazella v. Beals*, 2016 N.Y. Slip Op. 05182, CtApp 6-30-16**

PERSONAL INJURY, PRODUCTS LIABILITY.

MANUFACTURER'S DUTY TO WARN EXTENDS TO JOINT USE OF ITS PRODUCT AND A PRODUCT MANUFACTURED BY A THIRD PARTY.

The Court of Appeals, in an extensive opinion by Judge Abdus-Salaam, with a concurring opinion, determined the manufacturer of valves used on Navy ships had a duty to warn of the dangers associated with the necessary replacement of asbestos packing made by a third-party.: "Under our precedent, '[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known' ... . Additionally, the manufacturer

must warn of dangers arising from the product's 'intended use or a reasonably foreseeable unintended use' ... . The manufacturer's duty also includes a legal obligation to issue warnings regarding hazards arising from foreseeable uses of the product about which the manufacturer learns after the sale of the product ... . The duty 'extends to the original or ultimate purchasers of the product, to employees of those purchasers and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn' ... . * * * Accordingly, we recognize a manufacturer's duty to warn of the peril of a known and foreseeable joint use of its product and another product that is necessary to allow the manufacturer's product to work as intended." ***Matter of New York City Asbestos Litig.*, 2016 N.Y. Slip Op. 05063, CtApp 6-28-16**

FIRST DEPARTMENT

ATTORNEYS, PRIVILEGE.

COMMUNICATIONS BETWEEN ATTORNEYS IN A LAW FIRM AND THE FIRM'S IN HOUSE COUNSEL CONCERNING ETHICAL ISSUES IN A FORMER CLIENT'S CASE PROTECTED FROM DISCLOSURE IN THE FORMER CLIENT'S MALPRACTICE ACTION.

The First Department, in an extensive full-fledged opinion by Justice Friedman (which cannot be fairly summarized here), determined the communications between attorneys in a law firm and the firm's in house counsel were protected by attorney-client privilege and were not subject to the fiduciary exception to the privilege. The communications were sought by plaintiff, a former client of the firm, who brought the instant malpractice action against the firm: "The primary issue on this appeal is whether attorneys who have sought the advice of their law firm's in-house general counsel on their ethical obligations in representing a firm client may successfully invoke attorney-client privilege to resist the client's demand for the disclosure of communications seeking or giving such advice. We hold that such communications are not subject to disclosure to the client under the fiduciary exception to the attorney-client privilege ... because, for purposes of the in-firm consultation on the ethical issue, the attorneys seeking the general counsel's advice, as well as the firm itself, were the general counsel's 'real clients' ... . Further, we decline to adopt the 'current client exception,' under which a number of courts of other jurisdictions ... have held a former client entitled to disclosure by a law firm of any in-firm communications relating to the client that took place while the firm was representing that client. Because we also find unavailing the former client's remaining arguments for compelling the law firm and one of its attorneys to disclose the in-firm attorney-client communications in question, we reverse the order appealed from and deny the motion to compel." ***Stock v. Schnader Harrison Segal & Lewis LLP*, 2016 N.Y. Slip Op. 05247, 1st Dept 6-30-16**

CIVIL PROCEDURE, EVIDENCE.

DISMISSAL OF COMPLAINT TOO SEVERE A SANCTION FOR SPOLIATION OF EVIDENCE, RELEVANT LAW CLEARLY EXPLAINED.

The First Department determined the trial court correctly found sanctions should be imposed on plaintiff (Arbor) for spoliation of evidence, but the dismissal of the complaint was too severe. The court offered a clear explanation of the relevant law: " 'Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold []; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail' ... . Here, the motion court correctly determined that Arbor's destruction of evidence was, at a minimum, gross negligence, since Arbor failed to institute a formal litigation hold until approximately two years after even Arbor admits it had an obligation to do so. The minutes further reveal the extent to which Arbor failed to identify all of the key players in the loan transaction, and failed to preserve their electronic records. Where, as here, the spoliation is the result of the plaintiff's intentional destruction or gross negligence, the relevance of the evidence lost or destroyed is presumed ... . Plaintiff failed to rebut this presumption. Accordingly, the motion court properly determined an appropriate sanction should be imposed on plaintiff. However, the sanction must reflect 'an appropriate balancing under the circumstances,' ... . Generally, dismissal of the complaint is warranted only where the spoliated evidence constitutes 'the sole means' by which the defendant can establish its defense ... , or where the defense was otherwise "fatally compromised" ... or defendant is rendered 'prejudicially bereft' of its ability to defend as a result of the spoliation ... . The record upon renewal does not support such a finding, given the massive document production and the key witnesses that are available to testify ... . Accordingly, an adverse inference charge is an appropriate sanction under the circumstances ...". ***Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 2016 N.Y. Slip Op. 05065, 1st Dept 6-28-16**

CRIMINAL LAW.

BROADER FLORIDA STATUTE COULD NOT PROVIDE THE BASIS FOR SECOND FELONY OFFENDER STATUS.

The First Department determined a Florida statute was broader than its New York counterpart and the Florida conviction (for a violation of the Florida statute) could not be the basis of second felony offender status in New York: "The court incorrectly adjudicated defendant a second felony offender based on a conviction under a Florida statute that is broader than its

New York counterpart for enhanced sentencing purposes ... . Florida Statutes Annotated § 831.02 is broader than Penal Law § 170.25 because the Florida statute could be violated by uttering or publishing an instrument that merely contained false information, while under the New York statute an instrument is only considered forged if it is falsely made, completed or altered; a genuine instrument containing false information does not suffice ...". ***People v. Catmon*, 2016 N.Y. Slip Op. 05228, 1st Dept 6-30-16**

EMPLOYMENT LAW.

ARCHDIOCESE NOT LIABLE FOR ACTIONS OF NURSING HOME FOR WHICH PLAINTIFF WORKED UNDER THE SINGLE-EMPLOYER DOCTRINE, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department explained when employer liability can be imposed under the single-employer doctrine. Although not discussed in the decision, the underlying lawsuit appears to allege employment discrimination. Plaintiff sued the Archdiocese in addition to the nursing home for which she worked. The First Department determined the Archdiocese's motion for summary judgment should have been granted: "The single-employer doctrine and the four factor test used in its application were originally created by the NLRB to determine whether two intertwined entities should be treated as a single employer in the labor dispute context, and subsequently upheld by the U.S. Supreme Court ... . The Second Circuit adopted the doctrine for the purpose of determining whether a parent company can be considered an employer for the purpose of employment discrimination liability ... . While the four factor test analyzes (1) interrelation of operations, (2) centralized control of labor operations, (3) common management, and (4) common ownership, the primary focus is on the second factor of centralized control of labor operations ... . Centralized control of labor operations requires some showing of a central human resources department ... . Here plaintiff fails to plead that the Archdiocese provided any human resources services for the nursing home, and plaintiff's allegations that church personnel regularly work at the nursing home, without more, do not suffice to show the Archdiocese controlled the Nursing Home Defendants's labor operations ..." ***Batilo v. Mary Manning Walsh Nursing Home Co., Inc.*, 2016 N.Y. Slip Op. 05096, 1st Dept 6-28-16**

EMPLOYMENT LAW, MUNICIPAL LAW.

PRE-ANSWER MOTION TO DISMISS PETITION ALLEGING WRONGFUL TERMINATION OF A PROBATIONARY CORRECTIONS OFFICER SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, over an extensive dissent, determined a pre-answer motion to dismiss the petition of a probationary corrections officer alleging wrongful termination should not have been granted. Petitioner had repeatedly informed his superior that an inmate had swallowed soap and bleach and needed medical care. After the inmate died, petitioner was terminated: "Petitioner Raymond Castro commenced this article 78 proceeding to contest respondent New York City Department of Correction's (DOC) termination of his employment as a probationary correction officer. His termination occurred after an inmate died because petitioner's superior, a captain, thwarted the efforts of several people, including Officer Castro, to assist the inmate with his medical condition. Officer Castro cooperated in the investigation of the inmate's death and the federal prosecution of his superior. As fully detailed below, on the present record, Officer Castro's conduct, both in response to the inmate's medical emergency and during the investigation of the inmate's death, appears appropriate. Likewise, Officer Castro's termination, without an explanation, appears questionable and in bad faith. Under the circumstances, this Court is unable to conclude that his claim of wrongful termination as a probationary correction officer is without foundation to warrant a pre-answer dismissal based solely on the ground that it fails to state a cause of action. * * * A probationary employee may be dismissed for almost any reason, or for no reason at all, and the employee has no right to challenge the termination in a hearing or otherwise, absent a showing that he or she was dismissed in bad faith or for an improper or impermissible reason ... . The burden falls on the petitioner to demonstrate by competent proof that bad faith exists, or that the termination was for an improper or impermissible reason ...". ***Matter of Castro v. Schriro*, 2016 N.Y. Slip Op. 05105, 1st Dept 6-28-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

PLAINTIFF NEED NOT SHOW BOTH A JUSTIFIABLE EXCUSE AND A MERITORIOUS CAUSE OF ACTION TO AVOID DISMISSAL FOR NEGLECT TO PROCEED.

The Second Department, reversing Supreme Court, determined the action should not have been dismissed pursuant to CPLR 3216 for neglect to proceed. The court noted that plaintiff need not show both and justifiable excuse and meritorious cause of action to avoid dismissal: "CPLR 3216 is 'extremely forgiving' ... in that it 'never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed' ... . While the Supreme Court is prohibited from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a potentially meritorious cause of action ... , a dual showing of justifiable excuse and meritorious cause of action is not

strictly necessary for a plaintiff to avoid dismissal of the action ...". ***Bell v. United Parcel Serv., Inc.*, 2016 N.Y Slip Op. 05110, 2nd Dept 6-29-16**

CIVIL PROCEDURE.

UNTIMELY MOTION TO INTERVENE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined a motion to intervene in a foreclosure action was untimely and should have been dismissed. The potential intervenor (Shelepers) knew of the foreclosure action at the time the property was transferred to it but waited four months to bring the motion: "Intervention under CPLR 1012 and 1013 requires a timely motion ... . Here, Shelepers purchased the subject property with the knowledge that this foreclosure action was pending, and yet it waited over four months before seeking leave to intervene. Under the circumstances of this case, Shelepers' motion for leave to intervene in the action was untimely ...". ***Castle Peak 2012-1 Loan Trust v. Sattar*, 2016 N.Y. Slip Op. 05111, 2nd Dept 6-29-16**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

PROSECUTOR'S QUESTIONING DEFENDANT ABOUT AN ADMISSION ALLEGEDLY MADE TO HIS ATTORNEY REQUIRED REVERSAL IN THE INTEREST OF JUSTICE.

The Second Department reversed defendant's conviction in the interest of justice because he was improperly cross-examined about an admission allegedly made to his attorney: "The defendant contends that he was deprived of a fair trial because the Supreme Court allowed the prosecutor, on cross-examination, to question him, in violation of the attorney-client privilege, as to whether he made a certain admission to his attorney which contradicted his trial testimony. Although the defendant failed to preserve this claim for appellate review ... , we nevertheless reach it in the exercise of our interest of justice jurisdiction ... . Allowing this questioning was error, as it concerned a statement the defendant allegedly made to his attorney ... . The error was not harmless, as the proof of the defendant's guilt was not overwhelming and the questioning was highly damaging to the defendant's credibility, the jury's assessment of which, compared to that of the complainant, was the central issue in the case ... . Under the circumstances of this case, the court's instructions to the jury in its preliminary instructions and final charge that questions in and of themselves were not evidence, and that the jurors were prohibited from inferring any facts from the mere asking of a question, cannot be deemed to have obviated any prejudice resulting from the error ...". ***People v. Loiseau*, 2016 N.Y. Slip Op. 05172, 2nd Dept 6-29-16**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

COMPLAINT ADEQUATELY ALLEGED CAUSES OF ACTION FOR AGE DISCRIMINATION AND A HOSTILE WORK ENVIRONMENT.

The Second Department determined plaintiff had stated causes of action for age discrimination and a hostile work environment. The court outlined the relevant law and applied the facts alleged to the legal principles. The law was described as follows: "To state a cause of action alleging age discrimination under the New York Human Rights Law (Executive Law § 296), a plaintiff must plead facts that would tend to show (1) that he or she was a member of a protected class, (2) that he or she was actively or constructively discharged or suffered an adverse employment action, (3) that he or she was qualified to hold the position for which he or she was terminated or suffered an adverse employment action, and (4) that the discharge or adverse employment action occurred under circumstances giving rise to an inference of age discrimination ... . * * * To state a cause of action alleging a hostile work environment under Executive Law § 296, a plaintiff must plead facts that would tend to show " that the complained of conduct: (1) is objectively severe or pervasive—that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's [protected class]'" ... . The United States Supreme Court has observed that courts examining hostile work environment causes of action should consider, among other things, 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance' ...". ***Godino v. Premier Salons, Ltd.*, 2016 N.Y. Slip Op. 05118, 2nd Dept 6-29-16**

MENTAL HYGIENE LAW, EVIDENCE.

FRYE HEARING REQUIRED TO DETERMINE WHETHER "OTHER UNSPECIFIED PARAPHILIC" DISORDER IS A DIAGNOSIS WHICH IS GENERALLY ACCEPTED IN THE PSYCHIATRIC AND PSYCHOLOGICAL COMMUNITIES.

The Second Department determined a Frye hearing was necessary "to resolve the question of whether the diagnosis of 'other unspecified paraphilic disorder' has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible ...". Two psychologists evaluated the appellant sex offender and found he suffered from "other unspecified paraphilic" disorder. The defense asked for a Frye hearing to ascertain whether the diagnosis was generally accepted in the psychiatric and psychological communities. The request was denied. The jury found appellant suffered from a mental abnormality within the meaning of the Mental Hygiene Law and the court deter-

mined appellant was a sex offender requiring strict and intensive supervision and trreatment: " '[E]xpert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field' ... . Recently, in *Matter of State of New York v Donald DD.* (24 NY3d 174), the Court of Appeals noted that paraphilia NOS 'is a controversial diagnosis' ... and that the Court of Appeals had not yet decided 'the question that would be decided at a Frye hearing: whether the diagnosis of paraphilia NOS . . . has received general acceptance in the psychiatric community ' ... . However, the Court of Appeals declined to reach this issue in *Donald DD.* because no Frye hearing had been requested or held ... . Here, given the fact that 'other unspecified paraphilic disorder' was the primary diagnosis upon which the State's experts relied to show that the appellant's attempted kidnapping offense was sexually motivated and that he suffered from a mental abnormality, the Supreme Court should have conducted a Frye hearing to resolve the question of whether the diagnosis of 'other unspecified paraphilic disorder' has achieved general acceptance in the psychiatric and psychological communities ...". ***Matter of State of New York v. Hilton C.*, 2016 N.Y. Slip Op. 05158, 2nd Dept 6-29-16**

PERSONAL INJURY, CONTRACT LAW.

CONTRACTOR WHICH REPAIRED EXTERIOR STAIRS DID NOT OWE A DUTY OF CARE TO PLAINTIFF IN THIS SLIP AND FALL CASE.

The Second Department determined a slip and fall complaint against a contractor which repaired exterior stairs was properly dismissed. The court explained the three theories under which a contract can result in a duty of care owed to a third party and the requirements of a defendant-contractor's motion for summary judgment in this context: " 'Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party' ... . However, there are three exceptions to that general rule: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely' ... . 'As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars' ... . Here, the plaintiff alleged facts in his complaint and bills of particulars in support of his assertion that the defendants created or exacerbated the alleged dangerous conditions and, thus, launched a force or instrument of harm. Therefore, in support of their motion for summary judgment dismissing the complaint insofar as asserted against them, the defendants were required to establish, prima facie, that they did not create or exacerbate the alleged dangerous conditions ... . The defendants met this burden and established their prima facie entitlement to judgment as a matter of law by demonstrating that they neither created nor exacerbated the dangerous conditions that allegedly caused the plaintiff to sustain injuries. The parties' deposition testimony established, prima facie, that the defendants did not leave the subject step or the handrail in a condition more dangerous than they had found them ...". ***Barone v. Nickerson*, 2016 N.Y. Slip Op. 05107, 2nd Dept 6-29-16**

PERSONAL INJURY, LABOR/CONSTRUCTION LAW.

RENOVATION OF PROPERTY FOR COMMERCIAL PURPOSES DISQUALIFIES HOMEOWNER FROM HOMEOWNERS' EXEMPTION FROM LIABILITY UNDER LABOR LAW 240(1) AND 241(6); QUESTION OF FACT HERE ABOUT INTENTION OF HOMEOWNER AT TIME OF INJURY.

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant was entitled to the homeowner's exemption from liability under Labor Law 240(1) and 241(6). Homeowners who renovate property for commercial purposes cannot assert the exemption: "Although the Labor Law generally imposes liability for worker safety on property owners and contractors, it exempts from liability 'owners of one and two-family dwellings who contract for but do not direct or control the work' ... . The exemption 'was not intended to insulate from liability owners who use their one- or two-family houses purely for commercial purposes' ... . '[R]enovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose' ... . However, where a one- or two-family property serves both residential and commercial purposes, '[a] determination as to whether the exemption applies in a particular case turns on the nature of the site and the purpose of the work being performed, and must be based on the owner's intentions at the time of the injury' ...". ***Batzin v. Ferrone*, 2016 N.Y. Slip Op. 05108, 2nd Dept 6-29-16**

PERSONAL INJURY, MUNICIPAL LAW.

VILLAGE CODE DID NOT SPECIFICALLY MAKE ABUTTING PROPERTY OWNERS LIABLE IN TORT FOR FAILING TO MAINTAIN A SIDEWALK; SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO PLAINTIFF.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff fell on a concrete sidewalk and sued both the village and the abutting property owner. The village code required abutting property owners to keep sidewalks in good repair but did not impose tort liability for failure to keep the sidewalk in good repair. To hold an abutting property owner liable, therefore, plaintiff must demonstrate the property owner created the dangerous condition or subjected the sidewalk to special use: "Although the Code of Incorporated Village of Valley Stream requires an abutting landowner to keep a sidewalk in good and safe repair

.... , it does not specifically impose tort liability for a breach of that duty ... . Thus, without proof that [the property owner] either created the alleged defective condition or caused it to occur because of a special use, which is absent in the record before us, the plaintiff failed to establish her prima facie entitlement to judgment as a matter of law on the issue of liability ...". ***Obee v. Ricotta*, 2016 N.Y. Slip Op. 05129, 2nd Dept 6-29-16**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE.

INTERPRETER WAS AN EMPLOYEE.

The Third Department determined a foreign language interpreter (linguist) was an employee of Legal Interpreting Services (LIS) entitled to unemployment insurance benefits: "The record establishes that LIS recruits through advertisements in newspapers and social media. Before adding an individual to its database of available interpreters, LIS recruiters meet with the applicant, review his or her resume, request certain personal identification information and negotiate his or her hourly pay rate. Claimants signed contracts, which set forth rules and regulations governing their conduct when providing translation or interpretation services. Although the principal of LIS testified that the rules and regulations were included at the insistence of certain customers and were merely "suggestions," the contracts were drafted by an attorney hired by LIS and printed on LIS letterhead and do not indicate that the rules and regulations were merely suggestions. "When clients contacted LIS to request interpretation services, LIS selected a linguist from its database and provided that linguist with the specifics of the assignment, including the languages required and the date, time and location. Linguists were free to accept or decline assignments at their convenience. However, once they accepted an assignment, the linguists were required to notify LIS if they were running late, were unable to complete the assignment or were sending a substitute in their stead. With respect to pay, LIS required the linguists to submit time sheets, billed its clients and paid its linguists prior to receiving payment from those clients. A linguist's payment was not contingent upon the client's payment of the bill." ***Matter of Bin Yuan (Legal Interpreting Servs., Inc.--Commissioner of Labor)*, 2016 N.Y. Slip Op. 05200, 3rd Dept 6-30-16**

FOURTH DEPARTMENT

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW.

ARBITRATOR EXCEEDED HIS POWERS BY REFUSING TO REVIEW THE ENTIRE RECORD OF THE PROCEEDINGS, AWARD PROPERLY VACATED.

The Fourth Department, affirming Supreme Court, determined the arbitrator exceeded his powers vacation of the award was therefore proper. The arbitration concerned the termination of a deputy sheriff for driving while intoxicated and related charges. The arbitrator refused to consider some of the evidence (finding it inadmissible) and reinstated the deputy: " 'Under CPLR 7511 (b) an arbitration award must be vacated if, as relevant here, a party's rights were impaired by an arbitrator who exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made' ... . 'It is well settled that a court may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power' ... . 'Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact' ... . Here, we conclude that the arbitrator clearly exceeded his authority as provided by the CBA [collective bargaining agreement]. The CBA mandated that '[t]he arbitrator shall review the record of the disciplinary hearing and determine if the finding of guilt was based upon clear and convincing evidence.' Rather than comply with that mandate and review the record from the hearing, the arbitrator considered a portion of the record only, deciding to exclude certain evidence from his review. Having failed to review that which he was required to review, the court properly concluded that the arbitrator exceeded his authority and vacated the arbitration award ...". ***Matter of O'Flynn (Monroe County Deputy Sheriffs' Assn., Inc.)*, 2016 N.Y. Slip Op. 05261, 4th Dept 7-1-16**

CRIMINAL LAW, EVIDENCE.

COUNTY COURT ERRONEOUSLY DISMISSED THREE INDICTMENT COUNTS AFTER IMPROPERLY WEIGHING THE EVIDENCE PRESENTED IN THE GRAND JURY PROCEEDINGS.

The Fourth Department, reversing County Court, reinstated three indictment counts which County Court had dismissed. The Fourth Department explained the criteria for sufficient evidence in grand jury proceedings and the court's sufficiency-review powers. Here it was determined County Court improperly weighed the evidence: " 'The standard for reviewing the legal sufficiency of the evidence before the grand jury is whether the evidence, viewed in the light most favorable to the People, if unexplained and uncontradicted, would be sufficient to warrant conviction by a trial jury' ... . 'On a motion to dismiss, the reviewing court's inquiry is confined to the legal sufficiency of the evidence and the court is not to weigh the proof or examine its adequacy' ... . ' In the context of the [g]rand [j]ury procedure, legally sufficient means prima facie, not proof beyond a reasonable doubt' ... . Further, the fact '[t]hat other, innocent inferences could possibly be drawn from the facts is

irrelevant on this pleading stage inquiry, as long as the [g]rand [j]ury could rationally have drawn the guilty inference' ... . Here, we conclude that the evidence, viewed in the light most favorable to the People ... , is legally sufficient to support the counts that were dismissed by County Court, and that the court improperly weighed the evidence ...". ***People v. Roth*, 2016 N.Y. Slip Op. 05257, 4th Dept 7-1-16**

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