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CasePrepPlus

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FIRST DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW, CORPORATION LAW, ATTORNEYS.

ALTHOUGH PETITIONER-ATTORNEY FORMED THE CORPORATIONS WHICH OWNED THE BUILDINGS ON WHICH HE POSTED SIGNS ADVERTISING HIS LAW PRACTICE, THE ADVERTISING VIOLATED THE NYC ADMINISTRATIVE CODE.

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissenting opinion, determined that petitioner (Ciafone), an attorney, who used several buildings owned by his corporate entities for exterior signs promoting his law practice, engaged in unauthorized outdoor advertising and was properly penalized. Ciafone argued that the corporate entitles formed by him which owned the buildings were not "others" within the meaning of the NYC Administrative Code provision which defined an outdoor advertising company as an entity which makes advertising space available to "others:" "Administrative Code § 28-502.1 states that an OAC [outdoor advertising company] is '[a] person, corporation, partnership or other business entity that as a part of the regular conduct of its business engages in or, by way of advertising, promotions or other methods, holds itself out as engaging in the outdoor advertising business.' An Outdoor Advertising Business is '[t]he business of selling, leasing, marketing, managing, or otherwise either directly or indirectly making space on signs situated on buildings and premises within the city of New York available to others for advertising purposes, whether such advertising directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered on the same or a different zoning lot.' ... . [P]etitioners, which are corporations, made space on signs available to Ciafone's law practice (a professional corporation), a separate and distinct entity. Of course, it is fundamental that individuals, corporations, and partnerships are each recognized as separate legal entities, and in this statutory context constitute 'others' regardless of the common principal ownership or connection between the entities. Indeed, '[a]s a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders'... . ECB [New York City Environmental Control Board] rationally rejected petitioners' argument that they had not made the signs available to 'others.' The record shows that the building owners are not Ciafone or Ciafone P.C, but separate corporate entities, and that the advertising signs promoted legal services by Ciafone, not any services of the corporate entities that own the buildings. Contrary to petitioners' argument, there is no basis for overturning ECB's determination that, in these circumstances, the advertising space was made available 'to others.' Nor is ECB's interpretation of the statutory language arbitrary or irrational." ***Matter of Franklin St. Realty Corp. v. NYC Envtl. Control Bd.*, 2018 N.Y. Slip Op. 05407, First Dept 7-19-18**

FAMILY LAW.

IN A COMPLEX PATERNITY CASE SPANNING EIGHT YEARS, ORDER PRECLUDING CHILD FROM ESTABLISHING ESTOPPEL AND FINDING PETITIONER HAD STANDING TO SEEK CUSTODY AND VISITATION PROPERLY GRANTED.

The First Department, in a complex paternity case spanning eight years, over a comprehensive dissent, determined the order precluding the child, G, from establishing estoppel and finding that petitioner had standing to seek custody and visitation was properly granted. The facts cannot be fairly summarized here: "… [T]here is no basis to apply the [estoppel] doctrine here, where petitioner has consistently and diligently asserted his paternity; attempted to visit the hospital in time for G.'s birth; attempted to support G. financially; commenced proceedings and consistently appeared in court by telephone or in person, as he was able. By contrast, JAC [mother's partner who acknowledged paternity] failed to appear in court in person after September 21, 2011, and failed to appear by his counsel or any other means in any proceeding after June 18, 2012. Moreover, any delay in bringing the paternity proceedings to a conclusion is not attributable to petitioner, but to respondent and JAC, who failed to appear in court on numerous occasions, and to the AFC [attorney for the child], who waited three years before challenging the 2012 estoppel order. Moreover, contrary to our dissenting colleague's view, this is not a case where a man may be estopped from claiming to be a child's biological father on the basis of his acquiescence to the establishment of a strong parent-child bond between the child and another man ... . Here, petitioner's efforts to establish his paternity were far from acquiescent. Petitioner sought, and was granted, leave to postpone commencement of his prison sentence for one month in order to allow him to be present at G.'s birth. When he arrived in New York on October 9, 2008 for that purpose, he called respondent's mother, who told him that his daughter had been born but did not disclose the hospital

in which the birth had taken place. He was then contacted by JAC, who made clear to him that petitioner should have nothing to do with G. Undaunted by these incidents, upon entering prison, he attempted to send money orders to respondent which he intended for G.'s support, but the money orders were returned to him. While still in prison, he commenced the instant paternity proceeding, consistently appearing before the court by telephone and, upon his release from prison in July 2011, in person. And, approximately one month after the June 2012 estoppel ruling was issued, petitioner commenced the custody/visitation proceeding, repeatedly appearing in person and ultimately hiring private counsel in that proceeding, as well." ***Matter of Michael S. v. Sultana R.*, 2018 N.Y. Slip Op. 05404, First Dept 7-19-18**

SECOND DEPARTMENT

CIVIL PROCEDURE, DEBTOR-CREDITOR, LANDLORD-TENANT.

TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE.

The Second Department, reversing Supreme Court, determined petitioner did not demonstrate the tenant, Cohen, violated a court order directing Cohen to pay his rent directly to the petitioner, who had a judgment against Cohen's landlord. The court order required that Cohen pay any rent due under the lease to petitioner (CPLR 5225). However, the landlord terminated Cohen's lease. Therefore Cohen did not violate the order and should not have been held in civil contempt: "Here, the petitioner failed to establish that Cohen disobeyed the ... order, which required him to 'pay rent to petitioner as due under the lease' ... . Since Cohen's lease ... expired on July 31, 2015, on August 1, 2015, Cohen became a holdover tenant. Damages attributable to Cohen's continued occupation of the premises were not due 'under the lease,' but rather, were due as use and occupancy for the reasonable value of the premises ... . 'The obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant' ... . 'Rather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties' … . Accordingly, the motion to hold Cohen in contempt should have been denied." ***Matter of First Am. Tit. Ins. Co. v. Cohen*, 2018 N.Y. Slip Op. 05306, Second Dept 7-18-18**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INVALID, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER.

The Second Department determined defendant's waiver of the right to appeal was invalid, despite his signing a written waiver. The court noted that an appellate court cannot exercise its interest of justice jurisdiction where there is a valid waiver of appeal: "The Supreme Court did not provide the defendant with an adequate explanation of the nature of the right to appeal or the consequences of waiving that right ... . The court failed to advise the defendant that he would ordinarily retain the right to appeal even after pleading guilty, but that in this case he was being asked to voluntarily relinquish that right as a condition of the plea agreement ... . Moreover, the court never elicited an acknowledgment that the defendant was voluntarily waiving his right to appeal ... . Although the record on appeal reflects that the defendant signed a written appeal waiver form, a written waiver 'is not a complete substitute for an on-the-record explanation of the nature of the right to appeal'... . While the written waiver in this case 'expressly provided that the court had informed the defendant about the nature of his right to appeal, that representation is contradicted by the oral colloquy'... . Rather, the record reflects that the Supreme Court's colloquy regarding the written waiver amounted to nothing more than 'a simple confirmation that the defendant signed [it]'... . The transcript of the plea proceedings shows that the court did not ascertain on the record whether the defendant had read the written waiver or discussed it with defense counsel, or whether he was even aware of its contents... . Under the circumstances here, we conclude that the defendant did not knowingly, voluntarily, and intelligently waive his right to appeal ...". ***People v. Alston*, 2018 N.Y. Slip Op. 05327, Second Dept 7-18-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND, EVIDENTIARY ARGUMENT NOT RAISED BELOW OR ON APPEAL CANNOT BE CONSIDERED.

The Second Department, over a dissent, affirmed defendant's conviction for possession of a weapon. In a comprehensive decision too detailed to fairly summarize here the court ruled: the stop of the vehicle in which defendant was a passenger was justified by traffic infractions; the officer's noticing pictures of firearms on defendant's phone and the butt of a handgun on defendant's hip justified asking defendant to step out of the car; defendant's statement as he got out of the car that he had a handgun on him was admissible; defendant was not entitled to put in evidence his prior statements about his intent to turn the weapon in at the police station; pictures of handguns from defendant's phone that did not related to the handgun which was the subject of the possession charge should not have been admitted (harmless error); and defense

counsel should have been allowed to cross-examine one of the arresting officers about a federal civil rights suit which had been settled which alleged misconduct with regard to an arrest (harmless error). The court rejected the arguments that the prior statements about turning the handgun in should have been admitted as prior consistent statements or under the state of mind exception to the hearsay rule: "... [A]s an essential part of its case-in-chief, the prosecution elicited, through the testimony of a police officer, the defendant's statement regarding his intent to surrender the gun. As was his right, the defendant elected not to take the stand and subject himself to cross-examination, instead relying upon the officer's testimony to establish his defense of temporary lawful possession of the weapon. Having so elected, he foreclosed any possibility that the prosecutor would cross-examine him and challenge his defense as a recent fabrication during such questioning. Thus, since the requisite claim of a recent fabrication was absent, the defendant could not adduce evidence of a prior consistent statement to rebut it ... . * * * ... [O]ur dissenting colleague instead primarily argues that [the] proffered testimony regarding the defendant's alleged statement to her of his intention to surrender the gun should have been admitted as evidence of the defendant's state of mind rather than for the truth of its contents, thereby obviating any hearsay objection. However, the defendant never advanced this 'state of mind' argument at the trial level, nor does he currently contend on this appeal that his purported statement to Armstrong should have been admitted as evidence of his state of mind. Accordingly, this issue is both unpreserved for appellate review ... and not before this Court for consideration on the present appeal ...". ***People v. Watson*, 2018 N.Y. Slip Op. 05342, Second Dept 7-18-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY

PLAINTIFF PROPERLY GRANTED SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION STEMMING FROM A FALL FROM A LADDER, DEFENDANT WAS APPARENTLY LIABLE AS AN AGENT OF THE OWNER WITH AUTHORITY OVER SAFETY MEASURES.

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action stemming from a fall from a ladder which moved for no apparent reason. The court determined that the defendant, Arrow, which had contracted with plaintiff's employer, was liable as an agent of the owner or general contractor because of its supervisory control and authority to enforce safety standards: "Labor Law § 240(1) applies to 'contractors and owners and their agents'... . 'A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured' ... . 'To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition' ... . The determinative factor is whether the defendant had 'the right to exercise control over the work, not whether it actually exercised that right' ... . Here, Arrow Steel had the authority to enforce safety standards and choose the subcontractor who did the asbestos work. Additionally, Arrow Steel directly entered into a contract with [plaintiff's employer], and had the authority to exercise control over the work, even if it did not actually do so ... ". ***Cabrera v. Arrow Steel Window Corp.*, 2018 N.Y. Slip Op. 05275, Second Dept 7-18-18**

PERSONAL INJURY.

ALTHOUGH PLAINTIFF INDICATED SHE DID NOT KNOW THE CAUSE OF HER FALL IN HER DEPOSITION, IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHE RAISED A QUESTION OF FACT ABOUT WHETHER THE FLOOR WAS WET FROM TRACKED IN SNOW AND DEFENDANT DID NOT PRESENT ANY EVIDENCE ON THE ISSUE OF NOTICE.

The Second Department, reversing Supreme Court, determined that defendant's motion for summary judgment should not have been granted in this slip and fall case. The defendant demonstrated that plaintiff did not know the cause of her fall. In her opposing affidavit plaintiff alleged she felt the back of her coat when she got up and it was wet. Plaintiff also presented evidence it was snowing at the time. The court noted Supreme Court had found that defendant did not have notice of the condition, but the defendant had not presented any evidence on that issue: "The defendant established its prima facie entitlement to judgment as a matter of law through the deposition testimony of the plaintiff, which demonstrated that she was unable to identify the cause of her fall ... . However, in opposition to the defendant's prima facie showing on this ground, the plaintiff raised a triable issue of fact through her affidavit, in which she averred that when she stood up after falling, she put her hands on the back of her coat to straighten it and felt that the coat was wet. This, coupled with the fact that it had been snowing, led her to believe that she slipped on snow that had been tracked into the bank. Viewing the evidence in the light most favorable to the plaintiff, which included climatological data establishing that it had been snowing that morning, and according her the benefit of all reasonable inferences ... , we find that there are triable issues of fact as to whether a slippery condition was present where the plaintiff allegedly fell... . We note that although the Supreme Court found that the defendant established that it did not have actual or constructive notice of the allegedly dangerous condition... , the defendant did not move for summary judgment on this ground and did not submit evidence that would eliminate issues of fact on the issue of notice." ***Matadin v. Bank of Am. Corp.*, 2018 N.Y. Slip Op. 05297, Second Dept 7-18-18**

PERSONAL INJURY, CIVIL PROCEDURE, MUNICIPAL LAW.

MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED.

The Second Department determined Supreme Court properly granted defendants' motion for a new trial (CPLR 4404) in this car-bus-accident wrongful death case if plaintiff did not agree to a reduction of damages for pre-impact terror and conscious pain and suffering: "Here, the evidence at trial established that the decedent made eye contact with the defendant bus operator, William R. Dortch, for approximately one second before the bus collided with the decedent's vehicle. Under these circumstances, we agree with the Supreme Court's determinations that the $250,000 award for pre-impact terror deviated materially from what would be reasonable compensation and to grant the branch of the defendants' cross motion which was for a new trial on the issue of pre-impact terror unless the plaintiff agreed to an award in the principal sum of $50,000 ... . Here, we agree with the Supreme Court's determination that the jury award in the principal sum of $1,250,000 deviated materially from what would be reasonable compensation for the decedent's post-impact conscious pain and suffering. The evidence established that the decedent was able to feel pain following the collision, but that she was able to do so for, at most, 11 to 20 minutes and that, during that time, she was minimally conscious (see id. at 460). Under these circumstances, that branch of the defendants' motion which was for a new trial on the issue of conscious pain and suffering unless the plaintiff agreed to an award in the principal sum of $400,000 was properly granted ...". ***Vatalaro v. County of Suffolk*, 2018 N.Y. Slip Op. 05352, Second Dept 7-18-18**

PERSONAL INJURY, MUNICIPAL LAW.

COUNTY DID NOT DEMONSTRATE THAT IT DID NOT CREATE THE DANGEROUS CONDITION, I.E. SNOW PILED AT AN INTERSECTION, PLAINTIFF ALLEGED THE INTERSECTION COLLISION WAS CAUSED BY THE INABILITY TO SEE BECAUSE OF THE PILE OF SNOW, COUNTY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the county was not entitled to summary judgment in this intersection collision case. Plaintiff alleged her field of vision was blocked by snow piled at the intersection. The county demonstrated it did not have written notice of the condition, but did not demonstrate it did not create the condition: "Where 'a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street . . . unless it has received written notice of the defect, or an exception to the written notice requirement applies'... . As relevant here, an exception to the prior written notice laws exists where the municipality creates the defective condition through an affirmative act of negligence ... . Here, the plaintiff alleged that the County affirmatively caused or contributed to the dangerous condition through its snow plowing operations, which caused snow to be piled unreasonably high at the intersection. Therefore, to establish its prima facie entitlement to judgment as a matter of law, the County was required to demonstrate, prima facie, that it did not receive prior written notice of the alleged dangerous condition and that it did not create the alleged dangerous condition ... . Although the County demonstrated, prima facie, that it did not receive prior written notice, the County's submissions failed to demonstrate, prima facie, that its snow removal operations did not create a dangerous condition ...". ***Manzella v. County of Suffolk*, 2018 N.Y. Slip Op. 05296, Second Dept 7-18-18**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP.

The Third Department, over a dissent, determined the officer who stopped the car in which defendant was a passenger had a reasonable basis to frisk the defendant for safety. The frisk resulted in the seizure of a handgun. At the time of the frisk, the officer knew the defendant was out past his parole curfew and suspected defendant had violated his conditions of parole by consuming alcohol. In addition, defendant was riding in an unregistered car and the driver did not have a license: "A suspect's status as a parolee is a relevant factor to consider when evaluating the reasonableness of a particular search or seizure ... , particularly where, as here, the officer had reason to believe that defendant was then and there violating both the curfew and alcohol conditions of his parole. The hour was late and the driver was driving an unregistered vehicle without a license. Defendant's evasive, if not flippant, 'sales' response as to why he was on parole, coupled with his repeated denial of alcohol use, heightened the volatility of the situation. Cumulatively, these factors validate County Court's conclusion that the officer had a reasonable basis to conduct the frisk to assure his own safety ...". ***People v. Carey*, 2018 N.Y. Slip Op. 05376, Third Dept 7-19-18**

EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW, CIVIL PROCEDURE.

PARENTS HAD STANDING TO BRING A MANDAMUS ACTION SEEKING A SOUND BASIC EDUCATION FOR THEIR CHILDREN, HOWEVER MANDAMUS LIES ONLY FOR GOVERNMENT ACTIONS WHICH ARE MANDATORY, NOT THE DISCRETIONARY ACTIONS SOUGHT BY THE PETITION HERE.

The Third Department the petitioners, parents of children in the East Ramapo Central School District, had standing to bring an Article 78 (mandamus) proceeding seeking to enforce the children's constitutional right to a sound basic education, but the petition must be dismissed because mandamus lies only for mandatory, not discretionary, actions: "... [P]etitioners have sufficiently alleged a threatened harm to the children's constitutional right to receive a sound basic education based upon respondents' alleged failure to take corrective action as identified in the petition's cited reports ... . Notwithstanding the foregoing, we conclude that the petition was properly dismissed. Mandamus to compel is 'an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought' ... . It is beyond cavil that students are entitled to a sound basic education (see NY Const art XI). The manner in which such goal is achieved, however, involves discretionary decisions by respondents ... . As such, to the extent that petitioners seek to compel respondents to implement specific recommendations set forth in the reports cited in the petition — an act involving 'the exercise of reasoned judgment which could typically produce different acceptable results'... — they are not entitled to such relief." ***Matter of Curry v. New York State Educ. Dept.*, 2018 N.Y. Slip Op. 05393, Third Dept 7-19-18**

ENVIRONMENTAL LAW.

STATE PROPERLY SOUGHT OIL SPILL CLEANUP COSTS FROM DEFENDANT PROPERTY OWNER, EVEN THOUGH THOSE COSTS WERE COVERED BY PAYMENT FROM THE LEAKING UNDERGROUND STORAGE TANK FUND, PAYMENT BY THE DEFENDANT WOULD BE USED TO REPLENISH THE FUND AND DID NOT CONSTITUTE DOUBLE RECOVERY BY THE STATE.

The Third Department determined defendant's cross motion in this oil spill action was properly denied. Defendant argued that for the plaintiff (New York State) to recover funds paid out to the plaintiff from the Leaking Underground Storage Trust Fund would not amount to double recovery. The recovery from the defendant would be used to replenish the fund: "The Navigation Law prohibits the discharge of petroleum and requires a discharger to immediately notify the Department of Environmental Conservation (hereinafter DEC) of the discharge and 'undertake to contain such discharge' ... . Where a petroleum discharge has occurred, DEC may retain agents and contractors to clean up and remove the contamination ... , with the cost of such cleanup efforts to be initially paid with money from the Spill Fund ... and/or the Leaking Underground Storage Tank Fund, which contains federal appropriations earmarked for remediating petroleum discharges... . The owner or operator of a major oil storage facility that discharges petroleum is 'strictly liable, without regard to fault, subject to [certain defenses], for all cleanup and removal costs and all direct and indirect damages paid by the [Spill F]und' ... . Plaintiff is required to seek recovery of '[c]osts incurred by the [Spill F]und in the cleanup and removal of a discharge when the [discharger] has failed to promptly clean up and remove the discharge to the satisfaction of [DEC]' … . Plaintiff is also required to seek recovery of remediation costs incurred by the Leaking Underground Storage Tank Fund ... . By commencing this action, plaintiff fulfilled its obligation to seek recovery of the $221,192 provided by the Leaking Underground Storage Tank Fund to pay for the costs associated with cleaning and removing the alleged petroleum discharges on defendant's alleged property ...". ***State of New York v. Ronney*, 2018 N.Y. Slip Op. 05389, Third Dept 7-19-18**

UNEMPLOYMENT INSURANCE.

NURSE PROVIDING HOME HEALTH CARE SERVICES WAS AN EMPLOYEE ENTITLED TO BENEFITS.

The Third Department determined a registered nurse who worked for Human Care which provided home health care services was an employee entitled to unemployment insurance benefits: "Human Care maintains a list of registered nurses, designated as field nurse supervisors, who provide home health care services to its patients on an on-call basis. Human Care hired claimant as a field nurse supervisor following an interview and screening of her experience and license credentials. Upon hiring claimant, Human Care required claimant to sign a job summary detailing the various duties and responsibilities of a field nurse supervisor, which included completing clinical and progress notes, informing Human Care's Director of Patient Services of any changes in a patient's condition and needs and submitting all required paperwork to the Director within 48 hours of a visit. The job summary further stated that field nurse supervisors reported to the Director and were required to follow Human Care policies and procedures. Claimant was provided with Human Care's handbook of policies and procedures. With respect to individual assignments, the Director would contact claimant when a client needed services and advise what services were to be provided. Claimant was free to accept or decline any assignment and, if she was unable to complete an assignment that she had accepted, Human Care would find a replacement. Claimant was required to complete and submit a written 'base assessment' of the client to the Director for review. Additionally, Human Care set the fee paid to claimant for her services, which was not negotiable, and billed its clients or the clients' insurance companies for claimant's services." ***Matter of Dillon (Commissioner of Labor)*, 2018 N.Y. Slip Op. 05386. Third Dept 7-19-18**