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CasePrepPlus

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FIRST DEPARTMENT

AGENCY, CONTRACT LAW, ARBITRATION.

ALTHOUGH THE PUBLIC HEALTH LAW GAVE THE DECEDENT'S DAUGHTER THE AUTHORITY TO EXECUTE THE NURSING HOME'S ADMISSION AGREEMENT ON BEHALF OF HER FATHER, THE PUBLIC HEALTH LAW DID NOT GIVE HER THE AUTHORITY TO SIGN A BINDING ARBITRATION AGREEMENT ON HER FATHER'S BEHALF; THEREFORE, THE DECEDENT'S WIFE WAS NOT BOUND BY THE ARBITRATION AGREEMENT IN HER SUIT AGAINST THE NURSING HOME.

The First Department, reversing Supreme Court, determined plaintiff wife's adult daughter had the authority, pursuant to the Public Health Law, to execute the nursing home's admission agreement on behalf of plaintiff's husband (her father), who was deemed incapable of making health-care related decisions. In addition to the admission agreement, plaintiff's daughter signed a binding arbitration agreement on her father's behalf. After plaintiff's husband died, plaintiff sued the nursing home which asserted that that the matter was subject to the arbitration agreement. The First Department held that, pursuant to the Public Health Law, plaintiff's daughter had the authority to sign the admission agreement, because it related to her father's health care, but she did not have the authority to sign the arbitration agreement: "The authority of the decedent's daughter to act as a 'surrogate' decision-maker pursuant to PHL 2994-d at the time decedent was admitted to JHL was limited to making decisions regarding '[a]ny treatment, service, or procedure to diagnose or treat an individual's physical or mental condition' (PHL 2994-a[12]). Although she had authority, pursuant to PHL 2994-d, to execute the Agreement for purposes of admitting her father into the facility for health care treatment, she did not have the authority to execute the Binding Arbitration Agreement on his behalf. Such agreement was entirely optional and had no bearing on the father's health care. Accordingly, it is entirely outside of the purview of surrogate decision-maker's authority set forth in PHL 2994-d." ***Gayle v. Regeis Care Ctr., LLC*, 2021 N.Y. Slip Op. 01197, First Dept 2-25-21**

CRIMINAL LAW, APPEALS.

THE JURY WAS NOT INSTRUCTED THAT ACQUITTAL ON THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON THE LESSER COUNT; ALTHOUGH DEFENSE COUNSEL DID NOT OBJECT TO THE JURY INSTRUCTIONS, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE.

The First Department, reversing defendant's attempted assault conviction, in a full-fledged opinion by Justice Manzanet-Daniels, determined the jury instructions did not make it clear that if defendant was acquitted of the top count (attempted assault first) based upon the justification defense, it must not consider the lesser count (attempted assault second). Defendant was acquitted of attempted assault first and convicted of attempted assault second. Although defense counsel did not object to the jury instruction, the appeal was considered in the interest of justice: "The trial court instructed the jury that defendant had raised justification as a defense with respect to counts one and two and stated that the People were required to prove three elements to establish defendant's guilt on count one, including 'that defendant was not justified.' With respect to count two, the court stated that defendant had also raised the defense of justification. The court stated that as an element of count two the People were required to prove beyond a reasonable doubt that 'the defendant was not justified.' * * * The trial court here did not give the required Velez [131 AD3d 129] instruction. ... [T]he trial court indicated to the jury that the attempted first-degree and second-degree assault charges ... were wholly independent, even if the prosecution had not disproved justification as to the greater charge. The trial court ... charged justification separately with respect to the two counts with no mention on the verdict sheet that acquittal on the greater charge would necessitate an acquittal on the lesser charge ... . The court compounded the error by giving the same erroneous instruction in response to a note from the jury." ***People v. Herrera*, 2021 N.Y. Slip Op. 01148, First Dept 2-23-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION; THE ROPE AND FRAME USED TO PREVENT A HEAVY OBJECT FROM FALLING WHEN PLAINTIFF DETACHED IT FROM THE WALL DID NOT WORK.

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was struck by a 200-pound fire damper when it fell from the wall. A co-worker was holding a rope tied to the damper and looped over a temporary frame. When plaintiff broke the last weld securing the fire damper the co-worker who was holding the rope was unable to keep the damper from falling: "... [T]he statute is violated where an object, while being hoisted or secured, falls because of the absence or inadequacy of a safety device of the kind enumerated in the statute ... , including where, as here, the inadequacy or absence of a safety device results in the uncontrolled descent of an object ... . Here, plaintiff was entitled to summary judgment because the rope proved inadequate to prevent the damper from falling ... . The eight-foot fall of the 200-pound damper that plaintiff was tasked with removing was not an ordinary construction site peril but an elevation-related hazard, within the ambit of Labor Law § 240(1), which was required to be secured against unregulated descent to prevent it from falling on plaintiff ... . Further, regulating its descent to prevent it from falling would not have been contrary to the purpose of work ...". ***Mayorga v. 75 Plaza LLC*, 2021 N.Y. Slip Op. 01204, First Dept 2-25-21**

PERSONAL INJURY.

QUESTION OF FACT WHETHER AN OPEN AND OBVIOUS CONDITION—A STEEP EMBANKMENT NEXT TO A GRASSY WALKWAY—SHOULD HAVE BEEN MADE SAFE BY THE INSTALLATION OF A RAILING OR BARRIER.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Kapnick, over a dissent, determined the defendant property owner's (COU's) motion for summary judgment in this slip-and-fall case should not have been granted. COU owned a campground for developmentally disabled persons. Plaintiff, a developmentally disabled adult, slipped on a narrow grassy walkway and fell down the adjacent steep embankment, striking his head on one of the rocks at the bottom. The First Department held there were questions of fact whether the accident was foreseeable and whether the area should have been made safe with a barrier or handrail: "... [A]n issue of fact does exist as to whether COU violated its duty to maintain the premises in a reasonably safe condition by failing to erect a railing or barrier along the walkway. 'A landowner must act as a reasonable [person] in maintaining [its] 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' ... . Indeed, 'the duty of the owner or occupier will vary with the likelihood of plaintiff's presence at the particular time and place of the injury. While [plaintiff's] status is no longer determinative, considerations of who plaintiff is and what [his or her] purpose is upon the land are factors which, if known, may be included in arriving at what would be reasonable care under the circumstances' ... . [A] landowner or occupier 'has a duty to take reasonable precautions to prevent accidents which might foreseeably occur as the result of dangerous terrain on its property by posting warning signs or otherwise neutralizing dangerous conditions' ... . '[E]ven if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition' ... . 'A landlord's duty to maintain premises in a reasonably safe condition ... is not satisfied by permitting a highly dangerous — but correctible — condition to remain, simply because the dangerous condition is obvious' ...". ***Aberger v. Camp Loyaltown, Inc.*, 2021 N.Y. Slip Op. 01188, First Dept 2-25-21**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO AMEND THE CAPTION TO CORRECT THE NAMES OF THE PARTIES SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiffs' cross-motion to amend the caption to reflect the correct name of the defendant and the defendant's church should have been granted: "Where the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that the intended but misnamed defendant was fairly apprised that he or she was the party the action was intended to affect, and the intended but misnamed defendant would not be prejudiced ... . Here, the allegations contained in the complaint fairly apprised Sidney Klestov that he was the intended party defendant, and there is no evidence of any prejudice to him. Likewise, the plaintiffs established that the caption should be amended to correct the name of the Parish of the Holy Assumption Russian Orthodox Greek Church Catholic Church, Inc., to The Russian Orthodox Church of the Assumption, Inc. '[W]here the right party plaintiff is in court but under a defective name or title as party plaintiff, . . . an amendment correcting the title is permissible' ... . Accordingly, the Supreme Court should have granted the plaintiffs' cross motion for leave to amend the caption to correct the names of the parties." ***Parish of the Holy Assumption Russian Orthodox Greek Church Catholic Church, Inc. v. Klestoff*, 2021 N.Y. Slip Op. 08198, Second Dept 2-24-21**

CRIMINAL LAW, APPEALS.

THE ROBBERY COULD NOT BE COMMITTED WITHOUT COMMITTING THE ASSAULT; ASSAULT COUNT DISMISSED AS MULTIPLICITOUS; ISSUE CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE.

The Second Department, reversing defendant's assault first conviction, determined the robbery first and assault first counts were multiplicitous. The redundant count was dismissed in the interest of justice (error was not preserved): " 'An indictment is multiplicitous when two separate counts charge the same crime' ... . 'Multiplicity does not exist where each count requires proof of an additional fact that the other does not' or where 'a conviction on one count would not be inconsistent with acquittal on the other' ... . 'If an indictment is multiplicitous it creates the risk that a defendant will be punished for, or stigmatized with a conviction of, more crimes than he actually committed' ... . Here, the record reflects that the jury charges regarding the count of assault in the first degree and the count of robbery in the first degree were essentially identical since one cannot commit robbery in the first degree under Penal Law § 160.15(1) without simultaneously committing assault in the first degree under Penal Law § 120.10(4) ... . As such, those charges were multiplicitous ... . Although the dismissal of the multiplicitous count will not affect the duration of the defendant's sentence of imprisonment, it is nevertheless appropriate in this case to dismiss the count charging assault in the first degree in consideration of the stigma attached to the redundant convictions ...". ***People v. Edmondson*, 2021 N.Y. Slip Op. 08201, Second Dept 2-24-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S MOTION TO WITHDRAW HIS PLEA WAS MADE PURSUANT TO CPL § 220.60, NOT CPL § 330.30; THEREFORE, THE "OUTSIDE THE RECORD" EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION SHOULD HAVE BEEN CONSIDERED; MATTER REMITTED.

The Second Department, reversing County Court and remitting the defendant's motion to withdraw his plea, determined defendant's motion was made pursuant to CPL § 220.60, not CPL § 330.30. Therefore, the evidence submitted by the defendant demonstrating his innocence of the charged crime could properly be considered. County Court had not considered the motion because the supporting evidence was outside the record: "The defendant's motion to withdraw his plea of guilty was clearly made pursuant to CPL 220.60(3), and the County Court should not have deemed it to be a motion to set aside a verdict pursuant to CPL 330.30(1). CPL 220.60(3) provides that '[a]t any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty . . . to withdraw such plea, and in such event the entire indictment, as it existed at the time of such plea, is restored' ... . 'The decision as to whether to permit a defendant to withdraw a previously entered plea of guilty rests within the sound discretion of the court and generally will not be disturbed absent an improvident exercise of discretion' ... . In general, 'such a motion must be premised upon some evidence of possible innocence or of fraud, mistake, coercion or involuntariness in the taking of the plea' ... . 'When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' and a hearing will be granted only in rare instances' ... . Here, the County Court, improperly relying upon CPL 330.30(1), determined that the defendant's submissions in connection with his motion to withdraw his plea were outside the record and did not consider them." ***People v. Murphy*, 2021 N.Y. Slip Op. 08203, Second Dept 2-24-21**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

PLAINTIFF STUDENT WAS ASSAULTED BY ANOTHER STUDENT AND SUED THE SCHOOL UNDER A NEGLIGENT SUPERVISION THEORY; THE SCHOOL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the negligent supervision action by a student who was assaulted at school should not have been dismissed: "While the plaintiff testified that he had never been physically assaulted by the other student prior to the subject incident, he testified that the other student always made threatening comments to him during Spanish class, of which seven or eight were serious in nature, and three or four were accompanied by a closed fist motion in an attempt to get the plaintiff to flinch. The plaintiff also testified that he complained about these threats to the Spanish teacher, who had witnessed the other student make a closed fist motion toward the plaintiff on at least one or two occasions, and that he asked the teacher if she could do something about these threats, but she never said anything to the other student. Moreover, while the plaintiff testified that he did not know whether the other student had ever threatened or assaulted other students, the School District failed to submit any affidavit or deposition testimony from its own personnel establishing that it did not have specific knowledge or notice of the dangerous conduct that caused the alleged injuries to the plaintiff ... . With respect to proximate cause, the School District did not demonstrate, prima facie, that the subject incident occurred so quickly and spontaneously 'that even the most intense supervision could not have prevented it' ... . The plaintiff testified that approximately 10 minutes before the end of class on the date of the assault, while the class was silently working on an assignment, the other student threatened out loud to stab him, which was overheard by the rest of the class and the teacher." ***Nizen-Jacobellis v. Lindenhurst Union Free Sch. Dist.*, 2021 N.Y. Slip Op. 08195, Second Dept 2-24-21**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), APPEALS.

RPAPL §§ 1304 AND 1302-a DO NOT APPLY WHERE THE LOAN SUBJECT TO FORECLOSURE IS NOT A "HOME LOAN;" COMPLIANCE WITH RPAPL § 1303 IS A CONDITION PRECEDENT TO FORECLOSURE BUT FAILURE TO COMPLY CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL; FAILURE TO PROVIDE NOTICE OF DEFAULT CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should have been granted. The Second Department noted: (1) RPAPL §§ 1304 (re: notice) and 1302-a (re: standing) do not apply where the subject loan is not a "home loan" because the property was not defendant's principal dwelling; (2) compliance with the notice requirements of RPAPL 1303 is a condition precedent to the commencement of a foreclosure action, but the issue cannot be raised for the first time on appeal; (3) the failure to provide notice of default as required by the mortgage cannot be raised for the first time on appeal. ***Nationstar Mtge., LLC v. Gayle*, 2021 N.Y. Slip Op. 08194, Second Dept 2-24-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE, ATTORNEYS.

ALLEGED ATTORNEY MISCONDUCT DID NOT WARRANT SETTING ASIDE THE OVER $21 MILLION VERDICT IN THIS MEDICAL MALPRACTICE CASE; SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined defendant's motion to set aside the verdict based upon the conduct of plaintiff's counsel should not have been granted in this medical malpractice action. Plaintiff suffered a brain injury rendering him unable to take care of himself and was awarded over $21 million: "... [W]e conclude that the Supreme Court improvidently exercised its discretion in ordering a new trial in the interest of justice based upon attorney misconduct. Some of the challenged conduct was improper, and we do not condone it ... . However, 'where counsel, in summing up, exceeds the bounds of legal propriety, it is the duty of the opposing counsel to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any improper remarks, and to admonish counsel from repetition of improper remarks' ... . Here, defense counsel did not object to the challenged remarks during summation or request a curative instruction, thus depriving the court of the opportunity to direct the jury to disregard improper remarks or give other curative instructions, and to avoid further error ... . 'Where no objection is interposed, a new trial may be directed only where the remarks are so prejudicial as to have caused a gross injustice, and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party of a fair trial' ... . The misconduct of the plaintiff's counsel in the instant case was not so pervasive or prejudicial as to have deprived the defendant of a fair trial, or to have affected the verdict, particularly in light of the strength of the plaintiff's case ... . Accordingly, we deny that branch of the defendant's motion pursuant to CPLR 4404(a) which was to set aside the verdict and for a new trial in the interest of justice, and reinstate the verdict." ***Yu v. New York City Health & Hosps. Corp.*, 2021 N.Y. Slip Op. 08215, Second Dept 2-24-21**

REAL PROPERTY LAW.

DESPITE AMBIGUITIES IN THE DESCRIPTION OF THE EASEMENT, THE LOCATION CAN BE DETERMINED AND THE EASEMENT IS THEREFORE VALID.

The Second Department, reversing Supreme Court (referee), determined the easement granted to defendants was valid. The easement related to an area which included a stucco wall and a covered wooden deck. The fact that the area may not have been accurately described by metes and bounds did not defeat the validity of the easement: " 'In order to create an easement by express grant, plain and direct language must be used which evidences the grantor's intention to permanently give a use of the servient estate to the dominant estate' … . The extent of an easement claimed under a grant is generally determined by the language of the grant ... . The fact that the easement grant does not give the precise location of the easement is not fatal to a finding that an easement was intended ... . Where the language of the grant is ambiguous or unclear, the court will consider surrounding circumstances tending to show the grantor's intent in creating the easement ... . [W]here, as here, the language was ambiguous, the Supreme Court should have considered 'the surrounding circumstances and the situation of the parties when it was executed' ... . The evidence presented at the hearing, which included the testimony of Emily Mazzuoccola [defendant], surveys, and photographs, demonstrated that the grantor intended to grant a perpetual easement with regard to the disputed area of land ... containing improvements of a stucco wall and a covered wooden deck. The easement was specifically referenced on a survey dated July 2, 2002. Accordingly, the court should have determined that the subject easement was valid." ***Marino v. Mazzuoccola*, 2021 N.Y. Slip Op. 08176, Second Dept 2-24-21**

THIRD DEPARTMENT

ENVIRONMENTAL LAW, NEGLIGENCE, CIVIL PROCEDURE, ADMINISTRATIVE LAW, NUISANCE, TRESPASS.

PLAINTIFFS' ACTION STEMMING FROM PFOA CONTAMINATION PROPERLY SURVIVED SUMMARY JUDGMENT; THE DOCTRINE OF PRIMARY JURISDICTION DID NOT APPLY; QUESTIONS OF FACT RAISED ABOUT THE DUTY OF CARE, PROXIMATE CAUSE, PRIVATE NUISANCE, TRESPASS AND PUNITIVE DAMAGES.

The Third Department determined plaintiffs' complaint in this PFOA contamination case properly survived defendant's motion for summary judgment. The court found that the doctrine of primary jurisdiction did not apply, defendant owed plaintiffs a duty of care, defendant did not demonstrate it did not proximately cause the alleged injuries, there was a question of fact on the private nuisance and trespass causes of action, and the punitive damages claim was proper. With respect to the doctrine of primary jurisdiction, the court wrote: "[The] doctrine 'applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views'... . Defendant argues that the various regulatory agencies, who have the requisite expertise, have been investigating the matter at issue and that the recovery sought by plaintiffs is already being provided by these agencies. We disagree. Although defendant points to an announcement that the Department of Health will be providing medical monitoring, this announcement merely stated that a study was being proposed and that, if funded, the study would last for five years. Contrary to defendant's representation, there was no definitive statement that the medical monitoring would be provided. As to the remediation of plaintiffs' private wells, the consent order and other announcements, upon which defendant relies, do not address all of the relief requested by plaintiffs in the second amended complaint. Accordingly, defendant's argument is without merit." ***Burdick v. Tonoga, Inc.*, 2021 N.Y. Slip Op. 01178, Third Dept 2-25-21**

FAMILY LAW.

FATHER PROPERLY FOUND TO HAVE SEVERELY ABUSED ALL THE CHILDREN IN THE HOME; DESPITE THE WORDING OF THE SEVERE ABUSE STATUTE, WHICH USES THE TERM "PARENT," THE COVERAGE OF THE STATUTE IS NOT LIMITED TO BIOLOGICAL CHILDREN.

The Third Department, on February 23, 2021, vacated and replaced the opinion which was originally released on February 18, 2021. In the vacated opinion the court held father could not be deemed to have severely abused the children who were not his biological children because the severe abuse statute uses the term "parent." However, in the replacement opinion, the court ruled father was properly found to have severely abused all of the children in the home. Father was present when mother severely beat her daughter, who subsequently died: "With respect to the father, although he is only the biological father of the younger daughter and the younger son, he lived with and had been in a relationship with the mother for approximately five years and, in his statement to police, referred to … all of the children in the home as '[o]ur kids.' The older daughter and the older son, moreover, refer to him as "dad" and there is no dispute that he was a person legally responsible for the subject children's care at all relevant times (see Family Ct Act §§ 1012 [a]; 1051 [e]). Thus, as the deceased child's brutal beating occurred while the father was present in the downstairs of the home, at a time when the mother's yelling and the deceased child's screaming could be heard throughout the house, we are satisfied that the father's conduct in failing to intervene or otherwise take any action to provide the deceased child with life-saving medical care satisfied the elements of severe abuse as against her (see Social Services Law § 384-b [8] [a] [i]; Family Ct Act § 1051 [e] ...). The father's conduct also evinced 'such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care' ... . Accordingly, we discern no reason to disturb Family Court's finding that the father derivatively severely abused the four surviving children ...". ***Matter of Lazeria F. (Paris H.)*, 2021 N.Y. Slip Op. 01155, Third Dept 2-18-21**

WORKERS' COMPENSATION.

CARRIER PROPERLY ORDERED TO PAY FOR CLAIMAINT'S PAIN TREATMENT WITH MEDICAL MARIJUANA.

The Third Department, in a comprehensive opinion by Justice Egan, determined the Workers' Compensation Board properly issued a variance allowing coverage for medical marijuana for treatment of claimant's pain. The opinion is too detailed to fairly summarize here. The carrier's federal conflict preemption and statutory (Public Health Law) exemption arguments were rejected: " 'The federal preemption doctrine has its roots in the Supremacy Clause of the United States Constitution, and federal preemption of state laws generally can occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law' ... . At issue here is conflict preemption, 'which occurs when compliance with both federal and state law is a physical impossibility, or where the state law at issue . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' ... . * * * [R]equiring the

carrier to reimburse claimant ... does not serve to subvert, in any way, the principal purposes of the Controlled Substances Act in combating drug abuse and controlling 'the legitimate and illegitimate traffic in controlled substances' ... , particularly where, as here, claimant was validly prescribed and authorized to use medical marihuana by his pain management specialist to both treat his chronic pain and reduce his reliance on opiates." ***Matter of Quigley v. Village of E. Aurora*, 2021 N.Y. Slip Op. 01174, Third Dept 2-25-21**

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