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CasePrepPlus

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FIRST DEPARTMENT

APPEALS. CIVIL PROCEDURE. MOTION TO VACATE DEFAULT JUDGMENT.

Defendant Port Authority's motion to vacate a judgment should not have been granted. Plaintiff, Nash, was injured in the 1993 World Trade Center bombing and was awarded a multi-million dollar judgment after trial. The Port Authority did not appeal the judgment, but sought to vacate the judgment pursuant to CPLR 5015(a), based upon the results of an appeal in an unrelated "companion" case (Ruiz), which held the Port Authority immune from such suits. Supreme Court granted the motion and the First Department reversed, explaining that the Port Authority's failure to appeal could not be "remedied" using Supreme Court's discretionary "CPLR 5015" powers. **Nash v Port Auth of NY & NJ, 2015 NY Slip Op 06095, 1st Dept 7-14-15**

FRAUD. SPECIAL FACTS DOCTRINE. CONTRACT LAW. JURY INSTRUCTIONS.

In an action stemming from the alleged breach of an Asset Purchase Agreement (APA), the First Department explained the applicability of the "special facts doctrine" to the related fraud allegations. There was a defense verdict. The issue was raised on appeal by the plaintiffs because the trial judge refused to instruct the jury on the special facts doctrine, an error the First Department deemed harmless. The court offered a clear description of the doctrine. "... [P]laintiffs claimed that defendants had a duty to disclose certain documents concerning alleged adverse contract information. The 'special facts' doctrine holds that 'absent a fiduciary relationship between parties, there is nonetheless a duty to disclose when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair' ... . As a threshold matter, the doctrine requires satisfaction of a two-prong test: that the material fact was information peculiarly within the knowledge of one party and that the information was not such that could have been discovered by the other party through the exercise of ordinary intelligence ...". **Greenman-Pedersen, Inc. v Berryman & Henigar, Inc., 2015 NY Slip Op 06091, 1st Dept 7-14-15**

SECOND DEPARTMENT

ARBITRATION. COURT REVIEW OF ARBITRATION AWARD.

The Second Department reversed Supreme Court's vacation of an arbitration award. The vacation was based in part on a finding of an appearance of bias on the part of the arbitrator. The motion to vacate the award alleged that the fact that both the mediator and arbitrator were past Supreme Court justices with overlapping terms demonstrated the arbitrator's bias or the appearance of bias. The Second Department explained the limited role of a court in reviewing an arbitrator's award and noted that any ground for vacation must be proven by clear and convincing evidence: "It is well settled that judicial review of arbitration awards is extremely limited ... . A party seeking to overturn an arbitration award on one or more grounds stated in CPLR 7511(b)(1) bears a heavy burden, and must establish a ground for vacatur by clear and convincing evidence ... . An arbitrator's partiality may be established by an actual bias or the appearance of bias from which a conflict of interest may be inferred ... . * * * [T]he fact that both the mediator and arbitrator were former Supreme Court Justices who served overlapping terms ..., standing alone, did not constitute clear and convincing evidence of actual bias or the appearance of bias on the part of the arbitrator ... . Moreover ... [the movant] failed to present clear and convincing evidence that the arbitrator exceeded his power in issuing the award (see CPLR 7511[b][1][iii]), or that he engaged in misconduct ...". [internal quotation marks omitted] **David v Byron, 2015 NY Slip Op 06107, 2nd Dept 7-15-15**

CIVIL PROCEDURE. DEFAULT JUDGMENT, FAILURE TO ENTER WITHIN ONE YEAR. COMPLAINT DISMISSED AS ABANDONED.

Pursuant to CPLR 3215(c), plaintiff's failure to enter a default judgment within one year, and plaintiff's failure to explain the delay, warranted dismissal of the complaint as abandoned. The court explained the reasons for the rule: "CPLR 3215(c), which is entitled 'Default not entered within one year,' states, as relevant to this appeal: '[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the

complaint should not be dismissed.' The policy underlying the statute is 'to prevent parties who have asserted claims from unreasonably delaying the termination of actions, and to avoid inquests on stale claims' ... . Upon a showing of the requisite one year of delay, dismissal is mandatory in the first instance ... . Failure to take proceedings for entry of judgment may be excused, however, upon a showing of sufficient cause." **Aurora Loan Servs., LLC v Hiyo, 2015 NY Slip Op 06100, 2nd Dept 7-15-15**

CIVIL PROCEDURE. DEFAULT JUDGMENT, VACATION OF.

Supreme Court should not have exercised its inherent power to vacate a default judgment more than one year after the judgment was entered (five years here): "… [T]o the extent the defendant sought to vacate the judgment against her pursuant to CPLR 5015(a)(1), that branch of her motion was untimely because it was not made within one year after service upon her of a copy of the judgment with notice of entry (see CPLR 5015[a][1]...) . Further, contrary to the Supreme Court's conclusion, the interests of substantial justice did not warrant vacating the judgment against the defendant in the exercise of the court's inherent power ...". **Yung Chong Ho v Uppal, 2015 NY Slip Op 06132, 2nd Dept 7-15-15**

CIVIL PROCEDURE. DISCOVERY. NEGLIGENCE. PERSONAL INJURY. POST-ACCIDENT MAINTENANCE OF ELEVATOR.

Plaintiff, who was injured in an elevator accident, was not entitled to the post-accident elevator-repair records. Such records are only discoverable if there is a question about whether a defendant actually maintains or has control over an instrumentality, not the case here. **Graham v Kone, Inc., 2015 NY Slip Op 06111, 2nd Dept 7-15-15**

CIVIL PROCEDURE. SPOLIATION OF EVIDENCE. PRODUCTS LIABILITY. PERSONAL INJURY.

Striking the defendant's answer was too severe a sanction for spoliation of evidence which was not "willful or contumacious." Plaintiff was injured attempting to use a tranquilizer gun. The gun was sent out for repairs after the incident and a portion of the gun was not found after a diligent search. The sanction was too severe because both parties were prejudiced by the loss and the loss did not deprive plaintiff of the means of proving his claim. **Morales v City of New York, 2015 NY Slip Op 06121, 2nd Dept 7-15-15**

CIVIL PROCEDURE. PLEADINGS. STATUTE OF LIMITATIONS DEFENSE. DISMISS, MOTION TO. SUMMARY JUDGMENT. MOTION FOR.

Defendant did not waive its statute of limitations defense, asserted in its answer, by not making a pre-answer motion to dismiss. Although defendant's subsequent motion was ostensibly brought pursuant to CPLR 3211(a)(5), the parties laid bare their proof. Therefore Supreme Court properly treated the motion as one for summary judgment pursuant to CPLR 3212, seeking to dismiss the complaint as time-barred. **Meredith v Siben & Siben, LLP, 2015 NY Slip Op 06120, 2nd Dept 7-15-15**

CIVIL PROCEDURE. PLEADINGS. STATUTE OF LIMITATIONS DEFENSE. DISMISS, MOTION TO. SUMMARY JUDGMENT. MOTION FOR.

There is no requirement that a statute of limitations defense be raised solely in a pre-answer motion to dismiss. The defense may be asserted in the answer, and subsequently raised in a summary judgment motion or at trial. Although defendant's post-answer motion was ostensibly brought pursuant to CPLR 3211 instead of 3212, the procedural irregularity should have been excused under CPLR 2001. **Wan Li Situ v MTA Bus Co., 2015 NY Slip Op 06130, 2nd Dept 7-15-15**

CIVIL PROCEDURE. VOLUNTARY DISCONTINUANCE. SECOND VOLUNTARY DISCONTINUANCE OPERATES AS AN ADJUDICATION ON THE MERITS.

Before bringing the instant proceeding, the plaintiff had voluntarily discontinued two prior proceedings involving the same matter. Pursuant to CPLR 3217(c), the second voluntary discontinuance operated as an adjudication of the merits requiring dismissal of the third action. **Haber v Raso, 2015 NY Slip Op 06113, 2nd Dept 7-15-15**

CIVIL PROCEDURE. VOLUNTARY DISCONTINUANCE. FORECLOSURE. PREVAILING PARTY. ATTORNEY'S FEES. REAL PROPERTY LAW.

After the grant of plaintiff's motion for a voluntary discontinuance (without prejudice) of a foreclosure action defendant sought the award of attorney's fees pursuant to Real Property Law 282 and CPLR 3217(b). The Second Department determined Supreme Court properly denied the request for attorney's fees. Under the Real Property Law, the prevailing party is entitled to attorney's fees, but plaintiff's voluntary discontinuance was not on the merits. Therefore defendant was not the prevailing party within the meaning of the statute. The award of attorney's fees under CPLR 3217(b) is discretionary and Supreme Court did not abuse its discretion in denying the request. **DKR Mtge. Asset Trust 1 v Rivera, 2015 NY Slip Op 06108, 2nd Dept 7-15-15**

CONSTRUCTIVE TRUST. ACCRUAL OF CAUSE OF ACTION. STATUTE OF LIMITATIONS.

In finding the constructive trust cause of action should not have been dismissed as time-barred, the Second Department explained that a cause of action for a constructive trust accrues (1) when the constructive trustee acquires the property wrongfully, or (2) when the constructive trustee wrongfully withholds property which was lawfully acquired but was to be transferred: "Here, the gravamen of the plaintiff's cause of action for the imposition of a constructive trust is not ... that the defendants wrongfully acquired the subject properties in or around 1995, or 1996, but rather that subsequent thereto, sometime in 2012, the defendant... breached her promise to the plaintiff that they would be equal partners with respect to those properties ...". **Barone v Barone, 2015 NY Slip Op 06102, 2nd Dept 7-15-15**

CONTRACT LAW. DISCLAIMERS. FRAUD IN THE INDUCEMENT. EVIDENCE. PAROL EVIDENCE. PROMISSORY NOTES.

Specific disclaimers in the contract indicating nothing extrinsic to the contract was relied upon by the parties precluded any claim alleging fraudulent inducement. The court also noted that plaintiff was not entitled to summary judgment on a promissory note because the note was intertwined with the breach of contract cause of action. **Oseff v Scotti, 2015 NY Slip Op 06123, 2nd Dept 7-15-15**

COOPERATIVE APARTMENT. BUSINESS JUDGMENT RULE. FIDUCIARY DUTY. DENIAL OF APPLICATION TO SELL SHARES TO SPECIFIC BUYER. DISCRIMINATION.

The board of a cooperative dwelling acted within the scope of its authority (pursuant to the business judgment rule) when it denied plaintiff's application to sell his shares in the cooperative to a specific buyer. Although the board's action would not be protected by the business judgment rule if it were tainted by discriminatory considerations, the court concluded there was no evidence that discriminatory considerations played a role in the denial. **Griffin v Sherwood Vil., Co-op "C", Inc., 2015 NY Slip Op 06112, 2nd Dept 7-15-15**

CRIMINAL LAW. JUSTIFICATION DEFENSE. PROSECUTORIAL MISCONDUCT.

Defendant was entitled to a new trial because his request for a jury instruction on the justification defense should not have been denied. There was evidence the victim was in defendant's home and was attempting to beat and rob the defendant at the time the victim was stabbed. That evidence was sufficient to require submission of the justification defense to the jury. Although the error was not preserved for appeal, the Second Department also noted that the prosecutor improperly characterized the defendant as a liar, vouched for the strength of the People's case, and asked the jury to draw inferences which were not based upon evidence. **People v Irving, 2015 NY Slip Op 06167, 2nd Dept 7-15-15**

CRIMINAL LAW. LABOR LAW. FAILURE TO PAY WAGES. SENTENCE.

Defendant was properly incarcerated for 60 days and sentenced to a period of probation for failure to pay wages in violation of Labor Law 191(1)(a), which is a Class A misdemeanor. However, the statute allows for incarceration or a fine. Because defendant had served 60 days, the imposition of the $5,000 fine was vacated. **People v DiSalvo, 2015 NY Slip Op 06164, 2nd Dept 7-15-15**

EMINENT DOMAIN. PARTIAL TAKING. VALUATION OF VACANT LAND.

The valuation of a partial taking of vacant land (the value before minus the value after the taking based on the highest and best use of the land) was flawed and remitted the matter for a new valuation. The decision is detailed and fact-specific and therefore is not fully summarized here. The court explained some of the most significant valuation criteria, noting that any comparable sales considered in the valuation must be similar in character to the subject land (not so here): "When private property is taken for public use, the condemning authority must compensate the owner so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred... . Where, as here, there is a partial taking of real property, the measure of damages is the difference between the value of the whole before the taking and the value of the remainder after the taking" ... . The measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time... . The determination of highest and best use must be based upon evidence of a use which reasonably could or would be made of the property in the near future ... . [internal quotation marks omitted] **Matter of County of Orange v Monroe Bakertown Rd. Realty, Inc., 2015 NY Slip Op 06143, 2nd Dept 7-15-15**

EMINENT DOMAIN PROCEDURE LAW (EDPL). COURT OF CLAIMS ACT. CIVIL PROCEDURE. VERIFICATION OF PETITION NOT A JURISDICTIONAL REQUIREMENT.

Service of a petition which was not verified was not a jurisdictional defect in a proceeding to recover money placed in escrow by the NYS Comptroller pending claims for the state's appropriation and use of easements: "While the time limitations and service requirements set forth in Court of Claims Act §§ 10 and 11 have been referred to as 'jurisdictional' ... , the instant matter concerns a special

proceeding pursuant to EDPL 304(E) for the distribution of money that had been deposited (see Court of Claims Act § 9[12]), and service of the petition without a verification did not constitute an incurable 'jurisdictional' defect ...". **Matter of Mazur Bros. Realty, LLC v State of New York, 2015 NY Slip Op 06149, 2nd Dept 7-15-15**

EMINENT DOMAIN PROCEDURE LAW (EDPL). COURT OF CLAIMS ACT.CIVIL PROCEDURE. JURISDICTION OVER PARTIES.

The Second Department explained the procedure under the Eminent Domain Procedure Law (EDPL) for determining how to apportion payment for a taking when there is a dispute about which parties are entitled to payment. Under the EDPL and the Court of Claims Act, the Court of Claims must determine the interests of all parties named by the Attorney General as having a possible claim. Therefore a claimant must join all the named parties in any action seeking payment: "EDPL 304(E)(1) ... provides that when the Attorney General determines that there is a conflict with regard to the person or persons legally entitled to receive payment for the value of property acquired by the State through the power of eminent domain, he or she shall request the Comptroller to deposit the funds in an interest-bearing account to be distributed as ordered by the Court of Claims on application of any person claiming an interest in the amount (EDPL 304[E][1]). The statute further provides that the procedure to be employed in connection with such an application shall be the same as provided in [Court of Claims Act § 23], and that [n]o judgment of distribution shall be made unless the court shall first obtain personal jurisdiction over all persons certified by the Attorney General as having or claiming to have an interest in the fund (EDPL 304[E][1])." [internal quotation marks omitted] **Mazur Bros. Realty, LLC v State of New York, 2015 NY Slip Op 06119, 2nd Dept 7-15-15**

FAMILY LAW. CUSTODY AWARDED TO NON-PARENTS.

The Second Department affirmed Family Court's award of custody to non-parents, explaining the relevant criteria: "In a custody proceeding between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other like extraordinary circumstances ... . The burden is on the nonparent to prove the existence of extraordinary circumstances ... . Where extraordinary circumstances are found to exist, the court must then consider the best interests of the child in awarding custody ..." . **Matter of Culberson v Fisher, 2015 NY Slip Op 06144, 2nd Dept 7-15-15**

FAMILY LAW. FAMILY COURT ACT. RIGHT TO COUNSEL. ORDER OF PROTECTION.

Forcing appellant to proceed without counsel (because he did not complete the paperwork for the assignment of counsel) deprived him of his fundamental right to counsel in a Family Court Act Article 8 action. The order of protection was reversed and the matter was remitted for a new hearing either with counsel or after appellant's knowing voluntary waiver of his right to counsel. **Matter of Nixon v Christian, 2015 NY Slip Op 06150, 2nd Dept 7-15-15**

LIEN LAW. NOTICE OF LIEN, VACATION OF.

A court has no inherent power to vacate a notice of lien which is valid on its face. Determination of the validity of the lien must await trial by foreclosure: "A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19(6) ... . Lien Law § 19 enumerates the grounds for the discharge of a mechanic's lien interposed against a nonpublic improvement ... . Where, as here, the notice of lien was not invalid on its face, any dispute regarding the validity of the lien must await trial thereof by foreclosure ...". **Rivera v Department of Hous. Preserv. & Dev. of City of New York, 2015 NY Slip Op 06126, 2nd Dept 7-15-15**

INSURANCE LAW. EXCLUSIONS FROM COVERAGE. EXCEPTIONS TO EXCLUSIONS FROM COVERAGE. BURDENS OF PROOF.

In finding the insurer was properly awarded summary judgment, the Second Department explained the burdens of proof re: exclusions from coverage (burden on insurer) and exceptions to exclusions from coverage (burden on insured). "In determining a dispute over insurance coverage, we first look to the language of the policy ... . Although the insurer has the burden of proving the applicability of an exclusion ..., it is the insured's burden to establish the existence of coverage ... . Thus, "[where] the existence of coverage depends entirely on the applicability of [an] exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied ...". [internal quotation marks omitted] **Copacabana Realty, LLC v Fireman's Fund Ins. Co., 2015 NY Slip Op 06106, 2nd Dept 7-15-15**

MENTAL HYGIENE LAW. INCAPACITATED PERSONS. GUARDIAN OF PERSON AND PROPERTY, REPLACEMENT OF.

Supreme Court properly exercised its broad discretion in granting the cross-motion to remove the guardian of Helen S.' person and property (pursuant to Mental Hygiene Law 81.35). Helen S. testified that the guardian yelled and screamed at her, made her very nervous and upset causing her body to shake, and causing her to throw up. The court explained the relevant analytical criteria: "A guardian may be removed pursuant to Mental Hygiene Law § 81.35 when the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just ... . The trial court is accorded considerable discretion in determining whether a guard-

ian should be replaced, and the overarching concern remains the best interest of the incapacitated person ... . [internal quotation marks omitted] **Matter of Helen S. (Falero), 2015 NY Slip Op 06153, 2nd Dept 7-15-15**

MUNICIPAL LAW. NEGLIGENCE. PERSONAL INJURY. NOTICE OF CLAIM. LATE NOTICE OF CLAIM.

In finding Supreme Court properly denied plaintiff's petition for leave to serve a late notice of claim, the Second Department explained the relevant criteria, noting it is most important that the municipality have timely knowledge of the actual facts underlying the claim: "In determining whether to grant a petition for leave to serve a late notice of claim, the court must consider all relevant circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits ... . While the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance ... . The determination to grant leave to serve a late notice of claim lies within the sound discretion of the Supreme Court ...". [internal quotation marks omitted] **Matter of Barrett v Village of Wappingers Falls, 2015 NY Slip Op 06138, 2nd Dept 7-15-15**

NEGLIGENCE. PERSONAL INJURY. EDUCATION-SCHOOL LAW. NEGLIGENT SUPERVISION OF STUDENTS.

The defendant-school's motion for summary judgment was properly denied. There were questions of fact concerning whether the school had notice of a student's prior altercations with infant plaintiff and whether a teacher took appropriate steps to intervene to prevent injury to infant plaintiff. Infant plaintiff alleged he was injured when assaulted by other students: "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision ... . Here, in support of their motion, the appellants failed to establish, prima facie, that they lacked sufficiently specific knowledge or notice of the dangerous conduct that allegedly caused the infant plaintiff's injuries ... . The appellants' moving papers failed to eliminate all triable issues of fact as to whether they had knowledge of a particular student's dangerous propensities arising from his involvement in other altercations with the infant plaintiff ... . The appellants' moving papers also failed to eliminate all triable issues of fact as to whether a teacher failed to take energetic steps to intervene to prevent the infant plaintiff's injuries at the hands of a group of his classmates ...". [internal quotation marks omitted] **Amandola v Roman Catholic Diocese of Rockville Ctr., 2015 NY Slip Op 06099, 2nd Dept 7-15-15**

NEGLIGENCE. PERSONAL INJURY. MEDICAL MALPRACTICE. HOSPITAL'S LIABILITY FOR ACTIONS OF NON-EMPLOYEE PHYSICIAN.

Summary judgment dismissing the complaint should have been granted to defendant hospital. The suit against the hospital was based upon the actions of a non-employee physician chosen by the plaintiff. The Second Department succinctly explained the theories under which a hospital may be liable for the actions of a non-employee physician (none of which applied here): "Generally speaking, a hospital may not be held vicariously liable for the negligence of a private attending physician chosen by the patient ... . Moreover, so long as the resident physicians and nurses employed by the hospital have merely carried out that private attending physician's orders, a hospital may not be held vicariously liable for resulting injuries ... . These rules will not, however, shield a hospital from liability in three situations. The first is when the private physician's orders so greatly deviate from normal medical practice that [the hospital's employees] should be held liable for failing to intervene ... . Put another way, a hospital may be held liable when the staff follows orders despite knowing that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders ... . Second, a hospital may be held liable when its employees have committed independent acts of negligence ... . Third, a hospital may be held liable for the negligence of a private, nonemployee physician on a theory of ostensible or apparent agency ...". [internal quotation marks omitted] **Doria v Benisch, 2015 NY Slip Op 06109, 2nd Dept 7-15-15**

NEGLIGENCE. PERSONAL INJURY. NOTICE OF DEFECT. LATENT DEFECT. CONSTRUCTIVE NOTICE. SUMMARY JUDGMENT, DEFENDANT'S BURDEN OF PROOF.

Supreme Court properly denied defendants' motion for summary judgment in a slip and fall case, in another illustration of the need to eliminate every possible theory of recovery in order to be awarded summary judgment. Here it was alleged plaintiff slipped and fell on a loose piece of slate. Defendants demonstrated the absence of actual notice, but did not present evidence of when the area was last inspected prior to the fall and did not demonstrate the defect was "latent" (which would have demonstrated the absence of constructive notice): "Here, the deposition testimony ... established, prima facie, that the defendants did not create or have actual notice of the allegedly loose piece of slate on the slate stone landing which allegedly caused the plaintiff Patrick Bergin to fall ... . However, in the absence of any evidence as to when the defendants last inspected the landing before the accident ..., or that the allegedly loose piece of slate on the landing was a latent defect

that could not have been discovered upon a reasonable inspection ... , the defendants failed to establish, prima facie, that they lacked constructive notice of the allegedly loose piece of slate on the landing ...". **Bergin v Golshani, 2015 NY Slip Op 06103, 2nd Dept 7-15-15**

THIRD DEPARTMENT

ANIMAL LAW. PERSONAL INJURY. LANDLORD-TENANT. LANDLORD'S LIABILITY FOR INJURY BY TENANT'S DOG.

In finding that there were questions of fact precluding summary judgment in a dog-bite case, the Third Department noted that a landlord with notice of a dog's vicious propensities can be liable to the injured plaintiff: "A landlord may be liable for the attack by a dog kept by a tenant if the landlord has actual or constructive knowledge of the animal's vicious propensities and maintains sufficient control over the premises to require the animal to be removed or confined ... . Defendant was empowered to require the [tenants] to remove the animal and, indeed, its site manager testified that he took steps to do so once he learned of the dog's existence in September 2012." [internal quotation marks omitted] **Rodgers v Horizons At Monticello, LLP, 2015 NY Slip Op 06189, 3rd Dept 7-16-15**

ARBITRATION. ARBITRATION, PETITION TO STAY-COMPEL. EDUCATION LAW. EDUCATION-SCHOOL LAW.

The dispute between teachers and the board of education (concerning the board's hiring of a teacher from an outside agency without posting the position as required by the collective bargaining agreement [CBA]) was arbitrable. The Third Department first determined a provision of the Education Law, which allowed hiring from an outside agency, did not erect a policy/statutory barrier to hiring in accordance with the procedures in the CBA. The statute merely allowed the board to hire from an outside agency, but the statute did not preclude the board from using the hiring process agreed to in the CBA. The Third Department then went on to hold there was a reasonable relationship between the subject of the dispute and the general subject matter of the CBA, the only factors a court can look at to determine arbitrability. The responsibility for any further inquiry and analysis then passed to the arbitrator. **Matter of Board of Educ. of the Catskill Cent. Sch. Dist. (Catskill Teachers Assn.), 2015 NY Slip Op 06190, 3rd Dept 7-16-15**

CRIMINAL LAW. INEFFECTIVE ASSISTANCE OF COUNSEL. FAILURE TO INVESTIGATE. FAILURE TO OBJECT. PROSECUTORIAL MISCONDUCT. EVIDENCE.

In a sexual abuse case based entirely on the victim's testimony (alleging anal intercourse), the Third Department determined defense counsel's failure to investigate the nature of the victim's bleeding disorder (which could have called into question the prosecution's expert's opinion that victims of sexual abuse, like the victim here, often show no signs of injury), the failure to object to the testimony of the defendant's spouse alleging his preference for anal intercourse (the prejudicial effect may well have outweighed the probative value—at the very least a limiting instruction should have been requested as to the jury's limited use of such evidence), and the failure to object to improper comments made by the prosecutor in summation (appealing to jurors' sympathy, exhorting the jurors to fight for the victim), required reversal and a new trial. **People v Cassala, 2015 NY Slip Op 06176, 3rd Dept 7-16-15**

CRIMINAL LAW. JURY INSTRUCTIONS. INCLUSORY CONCURRENT COUNTS. INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant was entitled to dismissal of the inclusory concurrent counts and the vacation of the sentences imposed thereon, but was not entitled to reversal based upon defense counsel's failure to request that the inclusory concurrent counts be presented to the jury in the alternative (conviction on the greater count is deemed a dismissal of every lesser count). Although the omission was a clear-cut error on defense counsel's part, the error did not deprive defendant of effective assistance. **People v Vanguilder, 2015 NY Slip Op 06175, 3rd Dept 7-16-15**

FAMILY LAW. CUSTODY AWARDED TO NON-PARENTS.

Grandmother demonstrated extraordinary circumstance justifying the award of custody to her with visiting rights for the parents. The court explained the relevant analytical criteria: "It is well settled that a parent has a claim of custody of his or her child, superior to that of all others, in the absence of surrender, abandonment, persistent neglect, unfitness, disruption of custody over an extended period of time or other extraordinary circumstances ... . The burden of proving such extraordinary circumstances rests with the nonparent seeking custody and, if established, the controlling consideration in determining custody is the best interests of the child ... . Proof regarding extraordinary circumstances may include, among other things, that the parent has neglected to maintain substantial, repeated and continuous contact with the child[] or make plans for [her] future ....". **Matter of Yandon v Boisvert, 2015 NY Slip Op 06177, 3rd Dept 7-16-15**

FAMILY LAW. PROHIBITING PRESENCE OF SIBLINGS DURING PARENTING TIME WITH FATHER.

Although the custody modification awarding sole custody to mother was upheld by the Third Department, the court was troubled by the requirement that father's other children could not be present during father's parenting time with the subject child. The restriction goes against the general policy that bonds with siblings should be strengthened and the record was not sufficient to warrant the ruling. The matter was sent back for further development of the evidence. **Matter of Demers v McLear, 2015 NY Slip Op 06178, 3rd Dept 7-16-15**

LABOR LAW. INDEMNIFICATION, COMMON LAW, IMPLIED. PERSONAL INJURY.

In affirming Supreme Court's denial of summary judgment to the defendants in a construction-accident case, the Third Department clearly explained the criteria for common law or implied indemnification. In a nutshell, any negligence by the party seeking indemnification for payments made to the injured party on behalf of a negligent tortfeasor will preclude recovery. Common law or implied indemnification applies only to parties who are liable vicariously without fault: "The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine ... . Accordingly, in order [t]o establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident ...". [internal quotation marks omitted] **Hackert v Emmanuel Cong. United Church of Christ, 2015 NY Slip Op 06192, 3rd Dept 7-16-15**

NEGLIGENCE. PERSONAL INJURY. EDUCATION-SCHOOL LAW. NEGLIGENT SUPERVISION OF STUDENTS. EVIDENCE.

Questions of fact precluded summary judgment in favor of defendant high school in a negligent supervision case. Plaintiff's son, LaValley, was assaulted by another student, Breyette, after plaintiff had alerted school officials about threats of violence made by Breyette against her son. Breyette had a history of assaultive behavior for which he was suspended in middle school. LaValley was punched 37 times in the school cafeteria in close proximity to a teacher who did not intervene and who was not aware of the conflict between the two students. The Third Department noted that, in determining a summary judgment motion, the evidence is viewed in the light most favorable to the nonmovant: "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision ... . Where a fellow student intentionally injures another, the duty is breached if the school had actual or constructive notice of the conduct that caused the injury such that the acts of the fellow student could have been reasonably anticipated ... . The adequacy of supervision and proximate cause are generally issues of fact for the jury ...". [internal quotation marks omitted] **LaValley v Northeastern Clinton Cent. Sch. Dist., 2015 NY Slip Op 06187, 3rd Dept 7-16-15**

TAX LAW. MANUFACTURING TAX CREDITS. POLLUTION TAX CREDITS. PREEMPTION. ADMINISTRATIVE LAW.

Petitioner, the owner of two nuclear power plants, was not entitled to manufacturing tax credits or pollution tax credits under the Tax Law. The production of electricity is specifically excluded from the range of "manufacturing" for which manufacturing credits are available. The petitioner argued that the water which is turned into steam and then back into water (to operate the turbines) constituted a manufacturing process within the meaning of the Tax Law. The Third Department disagreed, describing the process as recycling, not manufacturing. The pollution tax credits are available only to facilities certified by the Department of Environmental Conservation as compliant with state environmental, public health and sanitary rules. Petitioner's facilities were not so certified. The Third Department determined that the state certification requirement was not preempted by federal law, which exclusively regulates the construction and operation of nuclear power facilities, because tax credits do not regulate the construction or operation of such facilities. Petitioner was not, therefore, entitled to pollution tax credits. **Matter of Constellation Nuclear Power Plants LLC v Tax Appeals Trib. of the State of N.Y., 2015 NY Slip Op 06183, 3rd Dept 7-16-15**

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