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FIRST DEPARTMENT

CONTRACT LAW.

VOLUNTARY PAYMENT DOCTRINE PRECLUDED LAWSUIT.

The First Department, over a dissent, determined plaintiff's (Klein's) complaint alleging breach of contract, fraud, violation of General Business Law, etc., was properly dismissed pursuant to the voluntary payment doctrine. Klein procured a multi-million dollar loan from defendant. After paying interest and fees to defendant in order to refinance with another lender, Klein sued defendant alleging the fees were excessive and were paid under duress. The majority concluded the voluntary payment doctrine warranted dismissal of the complaint: "The voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts, in the absence of fraud or mistake of material fact or law ... . The onus is on a party that receives what it perceives as an improper demand for money to take its position at the time of the demand, and litigate the issue before, rather than after, payment is made ... . Here, there is no claim of fraud or mistake. Defendant was entirely aboveboard about the amount of money it expected to be paid to settle the loan. Nevertheless, Klein made the calculated decision to schedule the closing and to pay off the entire amount demanded. Nor … did Klein take [his] position at the time of the demand." [internal quotation marks omitted] **DRMAK Realty LLC v Progressive Credit Union, 2015 NY Slip Op 08044, 1st Dept 11-5-15**

CRIMINAL LAW.

LINEUP WAS UNDULY SUGGESTIVE; COURT SUGGESTED EVERYONE IN THE LINEUP SHOULD HAVE BEEN GIVEN AN EYE PATCH BECAUSE THE COMPLAINANT DESCRIBED THE PERPETRATOR AS HAVING A DEFORMED EYE.

The First Department reversed defendant's conviction and ordered a new trial because the lineup in which defendant was identified by the complainant was unduly suggestive. The complainant had described the perpetrator as having a "deformed eye," and defendant was the only person in the lineup with that feature. The court suggested having everyone in the lineup wear an eye patch: "The complainant described the perpetrator of the alleged robbery as having one distinctive physical feature: a 'deformed right eye' which 'appeared to be something further into his head.' At the suppression hearing, the detective who prepared a photo array and a postarrest lineup testified that, in each instance, defendant was the only participant who had an 'apparently defective eye.' Under the circumstances, we find that the photo array and lineup were unduly suggestive because 'only the defendant matche[d] a key aspect of the description of the perpetrator,' namely, a deformed right eye ... . While we recognize the practical difficulties in finding fillers with similarly defective eyes, or photographs of such persons, '[a] simple eye patch provided to each of the lineup participants or a hand over an eye would have sufficed to remove any undue suggestiveness of the procedure' ..., and similar measures could have been taken with regard to the photos." **People v Perry, 2015 NY Slip Op 08046, 1st Dept 11-5-15**

CRIMINAL LAW.

REPORT OF A BURGLARY FIVE MINUTES BEFORE JUSTIFIED STREET STOP, FLIGHT JUSTIFIED PURSUIT.

The First Department, in a full-fledged opinion by Justice Friedman, over a two-justice dissent, determined the police were justified in stopping the defendants for a level two inquiry, and were further justified in pursuing and detaining them. The majority found that the report of a burglary at a country club five minutes before, together with seeing the defendants on the private country club driveway, justified a level two street stop and inquiry. When one of the men fled and the others walked away, the police were justified pursuing and detaining them. The dissenters argued that the police knew only that a burglary in the vicinity of the country club had been reported, and that seeing the defendants walking on the driveway in broad daylight justified only a level one inquiry and, therefore, did not justify pursuit: "[D]efendants were first seen on private property where a burglary had just been reported, in a suburban area, with nobody else visible anywhere in the vicinity. This gave rise to a founded suspicion of criminality, justifying a level-two common-law inquiry under the *De Bour* analysis." **People v Nonni, 2015 NY Slip Op 08081, 1st Dept 11-5-15**

MUNICIPAL LAW, CIVIL PROCEDURE, REAL PROPERTY.

DUE DILIGENCE REQUIREMENTS FOR NAIL AND MAIL SERVICE DO NOT APPLY UNDER THE NYC CHARTER, ONE ATTEMPT AT PERSONAL SERVICE AND USE OF NAIL AND MAIL METHOD FOR A NOTICE OF VIOLATION (BY THE DEPARTMENT OF BUILDINGS) SUFFICIENT.

Although the New York City Charter refers to CPLR article 3, the "due diligence" requirements for "nail and mail" service in article 3 do not apply to service of a notice of violation (NOV) by the Department of Buildings (DOB). Therefore, one attempt at personal service followed by use of the "nail and mail" method was sufficient service: "The reference to CPLR article 3 in the City Charter's affix and mail provision merely prescribes the class of individuals whom respondents must try to personally serve, and does not import the 'due diligence' requirement of CPLR article 3 ... . This interpretation of the City Charter is supported by the statutory language as a whole, and by the legislative history showing a legislative intent to make service under section 1049-a(d)(2) of the City Charter less onerous than service under CPLR article 3 (*see id*.; *see also* Governor's Mem approving L 1979, ch 623, 1979 McKinney's Session Laws of NY at 1816–1817)." **Matter of Mestecky v City of New York, 2015 NY Slip Op 08077, 1st Dept 11-5-15**

SECOND DEPARTMENT

ATTORNEYS.

ATTORNEY WHOSE TESTIMONY WOULD SUPPORT CLIENT SHOULD HAVE BEEN DISQUALIFIED UNDER ADVOCATE-WITNESS RULE, HOWEVER THE MOTION TO DISQUALIFY THE ATTORNEY'S FIRM WAS PROPERLY DENIED.

The Second Department noted that an attorney (Wolman) should have been disqualified under the advocate-witness rule but the motion to disqualify the attorney's firm and "of counsel" was properly denied. The attorney's testimony would not be prejudicial to the client: "The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to disqualify Derek Wolman from representing the defendant in this action, since Wolman's testimony will be necessary regarding 'a significant issue of fact' in the dealings between the plaintiff and the defendant (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7[a]...). Contrary to the defendant's contention, the fact that Wolman's testimony is necessary to and will support the defendant's case does not preclude application of the advocate-witness rule (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7...). However, the Supreme Court providently exercised its discretion in denying those branches of the plaintiff's motion which were to disqualify [the attorney's firm and "of counsel"]. Under rule 3.7(b)(1) of the Rules of Professional Conduct (*see* 22 NYCRR 1200.0), which are not binding authority and provide guidance only ... , '[a] lawyer may not act as an advocate before a tribunal if another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client' (22 NYCRR 1200.0, rule 3.7[b][1]). Here, the plaintiff did not argue that Wolman's testimony would be prejudicial to the defendant. Rather, the plaintiff argued that Wolman's testimony would support the defendant's case. Thus, the plaintiff failed to establish any basis for disqualifying [the firm and "of counsel"]. They can continue to represent the defendant despite the fact that Wolman, their colleague, is a necessary witness ...". **NY Kids Club 125 5th Ave., LLC v Three Kings, LLC, 2015 NY Slip Op 07958, 2nd Dept 11-4-15**

CIVIL PROCEDURE.

LATE MOTION TO AMEND ANSWER SHOULD HAVE BEEN GRANTED, NO PREJUDICE.

Supreme Court should have granted plaintiff's motion to amend the answer by adding an affirmative defense. The court noted that, absent prejudice, mere lateness is not a sufficient ground for denial of the motion: "Permission to amend a pleading should be 'freely given' (CPLR 3025[b]...). Leave to amend an answer to assert an affirmative defense should generally be granted where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that it would prejudice or surprise the opposing party ... . Here, the defendant sufficiently alleged that the driver of his vehicle did not have his permission or consent to operate his vehicle at the time of the subject accident ... . The proposed affirmative defense set forth allegations based on factual matters that are not palpably insufficient or patently devoid of merit ... . Furthermore, mere lateness is not a basis for denying an amendment unless the lateness is coupled with 'significant prejudice to the other side' ... . Although the defendant waited over 1 ½ years before moving for leave to amend the answer, there was no showing that the plaintiff would be significantly prejudiced, as discovery was ongoing ...". **Jeboda v Danza, 2015 NY Slip Op 07951, 2nd Dept 11-4-15**

CIVIL PROCEDURE.

DEFENDANT WHO WAS NOT SERVED BECAUSE CURRENT ADDRESS NOT ON FILE WITH SECRETARY OF STATE ENTITLED TO VACATE DEFAULT PURSUANT TO CPLR 317.

Defendant's motion to vacate a default judgment should have been granted pursuant to CPLR 317, even though that ground was not raised below. Apparently defendant did not keep a current address on file with the Secretary of State. Therefore,

although the Secretary of State was served, defendant did not receive notice of the suit in time to defend: "[A]lthough the defendant did not cite CPLR 317 in support of its motion, this Court may, under the circumstances presented here, consider CPLR 317 as a basis for vacating the default (*see* CPLR 2001...). CPLR 317 permits a defendant who has been served with a summons other than by personal delivery to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a meritorious defense (CPLR 317...). Here, there was no evidence that the defendant or its agent received actual notice of the summons, which was delivered to the Secretary of State, in time to defend this action ... . Proof that additional copies of the summons and complaint were delivered to an employee of the tenant occupying premises owned by the defendant was insufficient to establish that the defendant received notice of the summons and complaint ... . Furthermore, there is no basis in the record to conclude that the defendant deliberately attempted to avoid service, especially since the plaintiff had knowledge of the defendant's actual business address ... . Moreover, the defendant met its burden of demonstrating the existence of a potentially meritorious defense ...". [internal quotation marks omitted] **Schacker Real Estate Corp. v 553 Burnside Ave., LLC, 2015 NY Slip Op 07963, 2nd Dept 11-4-15**

CRIMINAL LAW.

POLICE DID NOT HAVE SUFFICIENT INFORMATION TO JUSTIFY PURSUIT OF DEFENDANT; STREET STOP (*DE BOUR*) CRITERIA CLEARLY EXPLAINED.

Defendant's motion to suppress the weapon he discarded during a police pursuit should have been granted. The police approached defendant after seeing him make several adjustments to his waistband. When defendant ran, the police pursued him. Because the police, based on their observations, could make only a level one inquiry (which the defendant had a right to ignore), the pursuit was not justified. The court offered a clear explanation of the criteria for street stops (*De Bour* criteria): "On a motion to suppress physical evidence, the People bear the burden of going forward to establish the legality of police conduct in the first instance ... , the Court of Appeals established a graduated four-level test for evaluating the propriety of police encounters when a police officer is acting in a law enforcement capacity ... . The first level permits a police officer to request information from an individual, and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality ... . The second level, known as the common-law right of inquiry, requires a founded suspicion that criminal activity is afoot, and permits a somewhat greater intrusion ... . The third level permits a police officer to forcibly stop and detain an individual. Such a detention, however, is not permitted unless there is a reasonable suspicion that an individual is committing, has committed, or is about to commit a crime ... . The fourth level authorizes an arrest based on probable cause to believe that a person has committed a crime ... . In order to justify police pursuit, the officers must have reasonable suspicion that a crime has been, is being, or is about to be committed ... . Reasonable suspicion has been defined as that quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe criminal activity is at hand ... . A suspect's [f]light alone . . . even [his or her flight] in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit ... . However, flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit ...". [internal quotation marks omitted] **People v Clermont, 2015 NY Slip Op 07989, 2nd Dept 11-4-15**

CRIMINAL LAW, EVIDENCE.

DEFENSE REQUEST TO REVIEW PSYCHIATRIC RECORDS OF PROSECUTION WITNESS PROPERLY DENIED; EVIDENCE OF SHOOTING OF PROSECUTION WITNESS PROPERLY ADMITTED TO SHOW DEFENDANT'S CONSCIOUSNESS OF GUILT.

Supreme Court properly reviewed in camera the psychiatric records of a prosecution witness and properly denied the defense request to review the records. Evidence defendant's brother (and a member of the same gang defendant belonged to) shot a prosecution witness was properly admitted to show defendant's consciousness of guilt. With respect to the shooting of the witness, the court explained: "Contrary to the defendant's contentions, the Supreme Court did not improvidently exercise its discretion when it permitted the prosecution witness to testify to the circumstances leading up to and culminating in him being shot by two persons directly connected to the defendant. Certain post crime conduct is [viewed as] indicative of consciousness of guilt, and hence of guilt itself ... . Consciousness of guilt evidence includes evidence of coercion and harassment of witnesses ... and [e]vidence that a third party threatened a witness with respect to testifying at a criminal trial is admissible where there is at least circumstantial evidence linking the defendant to the threat ... . Here, there was sufficient circumstantial evidence linking the defendant to the plot to shoot the witness ... and the evidence of the defendant's gang membership was relevant to establish the relationship between the actors ... . Under the circumstances, the probative value of the evidence as to the defendant's consciousness of guilt outweighed the prejudice ...". [internal quotation marks omitted] **People v Viera, 2015 NY Slip Op 07998, 2nd Dept 11-4-15**

MENTAL HYGIENE LAW.

NEED FOR APPOINTMENT OF A GUARDIAN OF PROPERTY NOT DEMONSTRATED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the appellant's sister, Marie F., did not meet her burden of proving by clear and convincing evidence appellant was incapacitated. The sister had been appellant's property guardian and, in being removed, requested that another guardian be appointed. The court explained the relevant criteria: "Mental Hygiene Law article 81 confers upon the court the discretion to determine whether a guardian should be appointed for an alleged incapacitated person ... . In exercising its discretion to appoint a guardian for an individual's property . . . , a court must make a two-pronged determination: first, that the appointment is necessary to manage the property or financial affairs of that person, and, second, that the individual either agrees to the appointment or that the individual is incapacitated as defined in Mental Hygiene Law § 81.02(b) ... . A person is incapacitated when the person is likely to suffer harm because: (1) the person is unable to provide for property management, and (2) the person cannot adequately understand and appreciate the nature and consequences of such inability (see Mental Hygiene Law § 81.02[b]). A determination that a person is incapacitated under the provisions of Mental Hygiene Law article 81 must be based on clear and convincing evidence (Mental Hygiene Law § 81.12[a]). When a party seeks to terminate a guardianship, the burden of proof shall be on the person objecting to such relief (Mental Hygiene Law § 81.36[d])." [internal quotation marks omitted] **Matter of Deborah P. (Marie F.), 2015 NY Slip Op 07977, 2nd Dept 11-4-15**

MUNICIPAL LAW. PERSONAL INJURY.

FINDING BY WORKERS' COMPENSATION BOARD THAT CORRECTIONS OFFICER'S CONDITION WAS WORK-RELATED DID NOT AUTOMATICALLY ENTITLE OFFICER TO DISABILITY BENEFITS UNDER GENERAL MUNICIPAL LAW § 207-C.

In upholding the county's determination petitioner (a corrections officer) was not entitled to disability benefits under General Municipal Law § 207-c, the Third Department noted that the finding by the Workers' Compensation Board that petitioner's condition was work-related did not, under the doctrine of collateral estoppel, automatically entitle the petitioner to disability benefits: "Contrary to petitioner's initial contention, it is settled law that a determination by the Workers' Compensation Board that an injury is work-related does not, by operation of collateral estoppel, automatically entitle an injured employee to General Municipal Law § 207-c benefits ... . Accordingly, the Board's determination did not collaterally estop [the county] from denying petitioner's application for General Municipal Law § 207-c benefits. Further, substantial evidence supports the determination denying petitioner benefits. Pursuant to General Municipal Law § 207-c, correction officers are entitled to benefits when they are injured in the performance of [their] duties ... , so long as they can establish the existence of a direct causal relationship between job duties and the resulting illness or injury ... . This Court will uphold a determination regarding a correction officer's eligibility for benefits if such decision is supported by substantial evidence ... , i.e., such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact, [which] is less than a preponderance of the evidence ... . Notably, credibility determinations are within the sole province of the Hearing Officer ...". [internal quotation marks omitted] **Matter of Jackson v Barber, 2015 NY Slip Op 08025, 3rd Dept 11-5-15**

PERSONAL INJURY.

PLAINTIFF-PEDESTRIAN'S ACTS CONSTITUTED SOLE PROXIMATE CAUSE.

Defendants were entitled to summary judgment dismissing the complaint because plaintiff's acts constituted the sole proximate cause of his injuries. Plaintiff stepped out between two cars in an attempt to cross the street: "Under the circumstances presented here, the ... defendants established their entitlement to judgment as a matter of law by demonstrating that the conduct of the plaintiff in crossing the street at a location other than at an intersection, while emerging from between stopped cars, was the sole proximate cause of the accident, and that [defendant] was free from fault despite the plaintiff's allegation that she failed to avoid a collision with the plaintiff ...". **Balliet v North Amityville Fire Dept., 2015 NY Slip Op 07943, 2nd Dept. 11-4-15**

PERSONAL INJURY.

DRIVER IN MIDDLE CAR OF CHAIN REACTION ACCIDENT ENTITLED TO SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined summary judgment should have been granted to the driver of the middle car in a chain reaction accident. The evidence demonstrated the driver had stopped behind the lead car and was propelled into the lead car when struck from behind: "In a multi-vehicle, chain reaction accident, when the operator of a vehicle that was propelled into another vehicle by a following vehicle presents evidence that he or she was able to safely bring his or her vehicle to a stop behind the lead vehicle before being struck in the rear by a following vehicle, that operator has established his or her prima facie entitlement to judgment as a matter of law ... . Thus, '[i]n chain collision accidents, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that

the middle vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle' ...". **Niosi v Jones, 2015 NY Slip Op 07957, 2nd Dept 11-4-15**

REAL PROPERTY.

PRE-2008 CRITERIA FOR ADVERSE POSSESSION EXPLAINED.
Applying the law of adverse possession as it was in 2002 (the legislature changed the law in 2008), the Second Department determined plaintiffs had demonstrated they acquired land enclosed by a fence by adverse possession: "In 2008, the Legislature enacted changes to the adverse possession statutes ... . Here, however, since title to the disputed property allegedly vested in the plaintiffs by adverse possession in 2002 at the latest, the law in effect prior to the amendments is applicable ... . Accordingly, the plaintiffs were required to demonstrate that their possession was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period of 10 years ... . Additionally, under the former version of RPAPL 522 that was in effect at the relevant time, the plaintiffs were required to establish that the disputed area was either usually cultivated or improved or protected by a substantial inclosure ... . Since adverse possession is disfavored as a means of gaining title to land, all elements of an adverse possession claim must be proved by clear and convincing evidence ...". [internal quotation marks omitted] **Warren v Carreras, 2015 NY Slip Op 07967, 2nd Dept 11-4-15**

THIRD DEPARTMENT

CONTRACT LAW, DEBTOR-CREDITOR.

TRANSFER OF ASSETS TO QUALIFY FOR MEDICAID CONSTITUTED A BREACH OF DEFENDANTS' CONTRACT WITH PLAINTIFF CONTINUING CARE RETIREMENT COMMUNITY.
The Third Department, in a full-fledged opinion by Justice Lynch, determined the defendants' (the Yezzis') transfer of funds in order to qualify for Medicaid constituted a breach of the contract with the plaintiff (GSV), a continuing care retirement community (CCRC), as well as a fraudulent transfer under the Debtor-Creditor Law: "[T]he essence of the CCRC financial model requires a tradeoff between the resident and the facility, in which the resident must disclose and spend his or her assets for the services provided, while the facility must continue to provide those services for the duration of the resident's lifetime even after private funds are exhausted and Medicaid becomes the only source of payment. With this long-term commitment, the facility necessarily must evaluate the financial feasibility of accepting a resident in the first instance. Pertinent here, the contract provided that the Yezzis could not transfer assets represented as available in [their] application to be a [r]esident of [GSV] for less than fair market value, unless the transfer [would] not impair [their] ability to pay [their] financial obligations to [GSV]. The contract further required the Yezzis to make every reasonable effort to meet [their] financial obligations to GSV and prohibited them from making any transfers or gifts after actual occupancy, which would substantially impair [their] ability or the ability of [their] estate to satisfy [their] financial obligations to [GSV]. Further, the contract specifies that the financial information disclosed with their application was a material part of this [contract], . . . [that was] incorporated as a part of this [contract]. Although, as defendants correctly contend, the contract does not affirmatively state that the Yezzis must expend the private resources identified with their application, it does expressly preclude the transfer of such resources without fair consideration." [internal quotation marks omitted] **Good Shepherd Vil. at Endwell, Inc. v Yezzi, 2015 NY Slip Op 08031, 3rd Dept 11-5-15**

FREEDOM OF INFORMATION LAW (FOIL), EDUCATION-SCHOOL LAW.

AUDIT PROCEDURES, DISCLOSURE OF WHICH COULD IMPEDE INVESTIGATIONS, ARE EXEMPT FROM DISCLOSURE.
The Third Department noted that documents reflecting audit procedures used by the Department of Education are exempt from a FOIL request if they would facilitate attempts to circumvent the law, even though the documents were not directly related to law enforcement proceedings: "FOIL is based on a presumption of access to the records, and an agency . . . carries the burden of demonstrating that the exemption applies to the FOIL request ... . The Department here relied upon Public Officers Law § 87 (2) (e) in providing redacted records and, specifically, a provision that exempts records from disclosure that are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings (Public Officers Law § 87 [2] [e] [i]). Respondents asserted that the redactions were necessary because disclosure of the unredacted documents would reveal auditing techniques that would enable the providers of preschool special education programs to conceal their financial misdeeds more effectively. The Department was directed to prepare the audit guidelines in the wake of audits conducted by the Comptroller that found a pattern of mismanagement, waste and even fraud by numerous private providers of preschool special education ... . … As such, while the guidelines and related documents did not arise from a specific law enforcement investigation, they were nevertheless compiled with law enforcement purposes in mind, and are exempt from disclosure if their release would enable individuals to frustrate

pending or prospective investigations or to use that information to impede a prosecution...". [internal quotation marks omitted] **Matter of Madeiros v New York State Educ. Dept., 2015 NY Slip Op 08028, 3rd Dept 11-5-15**

PERSONAL INJURY.

SIDEWALK DROPOFF WAS A TRIVIAL DEFECT.

The Third Department determined the sidewalk defect which allegedly caused plaintiff to fall was trivial and, therefore, not actionable: "An owner will not be liable . . . for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, which may cause a pedestrian [to] merely stumble, stub his [or her] toes, or trip over a raised projection ... . * * * There is no set point at which a height differential on a sidewalk will rise above the level of triviality and become a dangerous condition ... . Instead, [w]hether a defect is so trivial to preclude liability depends on the particular facts of each case and requires consideration of such relevant factors as the dimensions of the alleged defect and the circumstances surrounding the injury ...". [internal quotation marks omitted] **Medina v State of New York, 2015 NY Slip Op 08019, 3rd Dept 11-5-15**

PERSONAL INJURY.

UMPIRE ASSUMED THE RISK OF BEING STRUCK BY A BAT THROWN BY BATTER.

An umpire assumed the risk of being struck by a bat thrown by a batter as he ran toward first base. Had the bat been thrown intentionally or recklessly, the assumption of risk doctrine would not apply. There was no admissible evidence the bat was thrown recklessly (in anger): "Under the primary assumption of risk doctrine, a participant, including an umpire, in a sport such as softball consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation ... . Such risks include getting hit with a ball or a bat during a baseball game, particularly for an experienced participant ... . That said, participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others ... . … [W]e find unpersuasive plaintiffs' claim that getting hit with a bat is not an inherent risk in a slow pitch, 65-year-old and older softball game. Neither the age of the players nor the velocity of the pitch negates the readily apparent risk of a batter releasing the bat after a swing. The record shows that [plaintiff] has extensive experience as an umpire and no claim is made that defendant intentionally threw the bat at him. The issue distills to whether defendant recklessly threw the bat, creating a risk over and above the usual dangers that are inherent in the sport ...". [internal quotation marks omitted] **Morrisey v Haskell, 2015 NY Slip Op 08021, 3rd Dept 11-5-15**

UNEMPLOYMENT INSURANCE.

CLAIMANT WHO CANNOT AFFORD CHILD CARE IS UNAVAILABLE FOR WORK AND IS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined the claimant, who stopped working to care for her child, was not "available for work" under the Labor Law and was not, therefore, entitled to unemployment insurance benefits: "Pursuant to Labor Law § 591 (2), a claimant will not be deemed eligible to receive unemployment insurance benefits if he or she is not ready, willing and able to work in his [or her] usual employment or in any other for which he [or she] is reasonably fitted by training and experience. A claimant who is unable to work due to the lack of child-care arrangements may be considered to be unavailable for work for purposes of receiving unemployment insurance benefits ... . Here, it is undisputed that claimant left her job to care for her son and she testified that, after she did so, her mother-in-law moved away and her husband took a job with long hours that precluded her from relying upon them for childcare. She further stated that she could not afford to put her son in day care and that he could not be placed in a Head Start program until he was three years old. In view of the foregoing, substantial evidence supports the Board's finding that claimant was ineligible to receive benefits because she was unavailable for work." [internal quotation marks omitted] **Matter of Peek (Commissioner of Labor), 2015 NY Slip Op 08029, 3rd Dept 11-5-15**

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