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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CIVIL PROCEDURE, PRIVILEGE, ENVIRONMENTAL LAW.

NEW YORK LAW APPLIES TO DISCOVERY IN THIS SUIT BY THE ATTORNEY GENERAL AGAINST EXXON ALLEGING FRAUD IN CONNECTION WITH EXXON'S KNOWLEDGE OF THE CAUSES AND EFFECTS OF GLOBAL WARMING, NO ACCOUNTANT PRIVILEGE IN NEW YORK.

The First Department determined New York law applies to discovery from PriceWaterhouseCoopers in New York's suit against Exxon alleging fraud in connection with the company's knowledge of the causes and effects of global warming. PriceWaterhouseCoopers argued Texas law applied. Texas has an accountant privilege, New York does not: "In this proceeding arising from an underlying investigation by the NYAG [attorney general] into alleged fraud by respondent Exxon concerning its published climate change information, the motion court properly found that the New York law on privilege, rather than Texas law, applies, and that New York does not recognize an accountant-client privilege. We reject Exxon's argument that an interest-balancing analysis is required to decide which state's choice of law should govern the evidentiary privilege. Our current case law requires that when we are deciding privilege issues, we apply the law of the place where the evidence will be introduced at trial, or the place where the discovery proceeding is located ... . In light of our conclusion that New York law applies, we need not decide how this issue would be decided under Texas law." ***Matter of People of the State of New York v. PriceWaterhouseCoopers, LLP*, 2017 N.Y. Slip Op. 04071, 1st Dept 5-23-17**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT ENTITLED TO A HEARING ON HER MOTION TO SET ASIDE HER CONVICTION, ERRONEOUS ADVICE ABOUT DEPORTATION ALLEGED TO CONSTITUTE INEFFECTIVE ASSISTANCE.

The First Department determined defendant was entitled to a hearing on her motion to set aside her conviction based upon ineffective assistance of counsel. Defendant alleged she was told by her attorney (erroneously) that a guilty plea would not result in deportation: "Defendant said in an affidavit that she informed her plea counsel that she was not a U.S. citizen but was a legal permanent resident and was concerned about maintaining her immigration status and not being deported. Counsel advised her that, if she pleaded guilty to attempted second-degree conspiracy, she would receive five years of probation, with no jail time, and assured her that, by taking the plea and receiving probation, she would not have to fear any deportation proceedings. Defendant, age 26 at the time, had been in jail since her arrest, and wanted to be released as soon as possible, so that she could rejoin her two young children. Accordingly, defendant pleaded guilty, was sentenced as indicated, and successfully completed her probation. However, in 2012, defendant was referred to U.S. Immigration and Customs Enforcement (ICE), and on June 5, 2012, ICE issued her a Notice to Appear. Defendant said that she learned that conspiracy is considered an "aggravated felony" under the immigration law, which leaves her exposed to deportation proceedings, except under limited and difficult-to-meet exceptions under the Convention Against Torture. ... Defendant said that, if she had known that her guilty plea would subject her to a risk of deportation, she 'never would have entered a guilty plea,' but instead 'would have contested the matter, tried to negotiate a better plea or taken the case to trial.' She said that she believed that she 'would have had a good defense as [she] was not involved in any drug activity, did not know that [her] stepfather was involved in drugs and never saw any drugs ... .' " ***People v. Sanchez*, 2017 N.Y. Slip Op. 04200, 1st Dept 5-26-17**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 241(6) CAUSE ACTION, CONTACT WITH A HANGING LIVE ELECTRIC WIRE, DEFENDANTS VICARIOUSLY LIABLE.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 241(6) cause of action. A portion of plaintiff's harness touched an exposed electric wire. Defendants, who were vicariously liable, did not raise a question of fact about plaintiff's comparative negligence: "It is undisputed that violations of Industrial Code (12 NYCRR) § 23-1.13(b)(3) and (4) proximately caused the injuries sustained by plaintiff when a metal part of his safety harness contacted a live electrical wire, known as a BX cable, which was hanging down from a drop ceiling of a building under renovation. Appellants, as owner and general contractor, may be held liable for violation of those provisions, even though they impose

obligations on the employer, since they have a nondelegable duty to provide adequate safety protections ... . Appellants fail to point to any evidence that would support a finding that plaintiff was comparatively negligent, since he was acting pursuant to his foreman's instructions and neither knew nor should have known that the cable was electrified, in the absence of any warnings, caution tape, or other such indications that workers should avoid the area ... . Appellants' assertion that they lacked notice of the presence of the exposed, electrified cable is irrelevant, '[s]ince an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition' ...". ***Rubino v. 330 Madison Co., LLC*, 2017 N.Y. Slip Op. 04210, 1st Dept 5-25-17**

LANDLORD-TENANT.

TAKING IN AIRBNB CUSTOMERS IN A RENT-STABILIZED APARTMENT VIOLATED THE RENT STABILIZATION CODE (NYC), LESSOR ENTITLED TO TERMINATE THE ELDERLY 40-YEAR TENANT'S LEASE.

The First Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff was entitled to terminate defendant's lease of a rent-stabilized cooperative apartment for "subletting" to Airbnb customers. Defendant, an elderly 40-year tenant, took in Airbnb customers on 338 days over an 18-month period, realizing $12,000 more than 10% "profit" allowed for "subletting" under the Rent Stabilization Code: "Defendant's listing on the Airbnb website also provided (1) links for making reservations, (2) 'check-in' and 'check-out' times, (3) the financial penalty for untimely cancellation, and (4) reviews from numerous past guests. "Turning her rent-stabilized apartment into a single-unit tourist hotel in this fashion enabled defendant to earn substantial profits, far in excess of the legally permissible 10% premium. After Airbnb (to which the subtenants paid the rent) deducted its fees, the subletting generated total income of $33,592.00 for defendant. The stabilized rent she paid for the same 338 days (based on the aforementioned per-diem figure of $57.80) was only $19,536.40. Thus, defendant realized a 72% profit from her subletting — about seven times the 10% premium permitted for otherwise lawful sublets of furnished rent-stabilized apartments. Had defendant limited herself to the 10% premium permitted by the RSC, her aggregate revenue would have been $21,490.04 — about $12,000 less than her actual revenue of $33,592.00. Taking into account the lawful 10% premium (and ignoring the fact that the apartment was shared), defendant overcharged her 93 subtenants, in aggregate, by approximately 56% ... ". ***Goldstein v. Lipetz*, 2017 N.Y. Slip Op. 04070, 1st Dept 5-23-17**

LANDLORD-TENANT.

COMPLEX ISSUES ARISE IN RETROACTIVELY DETERMINING THE APPROPRIATE RENTAL AMOUNT FOR A RENT STABILIZED APARTMENT OCCUPIED BY THE SAME TENANTS SINCE 2000.

The First Department, in a full-fledged opinion by Justice Gische, dealt with complex issues relating to the appropriate rental amount for a rent stabilized apartment occupied by the same tenants since 2000: "There are interlocking complex issues framed by this appeal involving plaintiffs' claims that the apartment they have continuously rented for the last 16 years (apartment 5M), was improperly removed from rent stabilization. The overarching issue is whether the apartment should be restored to rent stabilization because defendant 72A Realty Associates L.P. (the Owner) deregulated the apartment pursuant to the luxury decontrol laws while it was simultaneously receiving tax incentives under the City's J-51 program ... . There can be little dispute that following Roberts v. Tishman Speyer Props., L.P., (13 NY3d 270 [2009]) and its progeny applying Roberts retroactively ... the subject apartment must be returned to rent stabilization as of 2000, when the Owner first treated the apartment as exempt. The thornier issues implicated by returning the apartment to rent stabilization concern the setting of the stabilized rent, the base date for, and the statute of limitations applicable to, the setting of such rent, and the possible imposition of treble damages and attorney fees. We agree with Supreme Court that plaintiffs are entitled to a declaration that the apartment was and still is subject to rent stabilization and that they are the rent-stabilized tenants thereof. We also agree with Supreme Court that the issues of the legal rent, as well as the issues of possible overcharge, treble damages and attorneys fees cannot be resolved on a motion for summary judgment. We disagree with Supreme Court only insofar as it held that the increases made to the rent-stabilized rent in 2000, based upon individual apartment improvements (IAIs) before the plaintiffs took occupancy, are subject to challenge on this record." ***Taylor v. 72A Realty Assoc., L.P.*, 2017 N.Y. Slip Op. 04218, 1st Dept 5-25-17**

MUNICIPAL LAW, PERSONAL INJURY.

LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED.

The First Department, over a two-justice dissent, determined Supreme Court should not have granted leave to file a late notice of claim: "Petitioner was injured on July 15, 2015, while working as a bricklayer ... at a job site located at an intermediate school in the Bronx. Petitioner alleges that while lifting 60 to 70 pound buckets, he tripped and fell due to an uneven floor on a makeshift scaffold. He filed a workers' compensation claim on July 29, 2015, but did not file a notice of claim until July 15, 2016, a year later. In the intervening year, he underwent a shoulder and a hip surgery:" "The motion court improvidently exercised its discretion in granting the motion. Petitioner failed to establish any of the relevant statutory factors that would warrant leave to serve a late notice of claim ... . Petitioner's alleged failure to realize the severity of his injuries within 90 days after his accident did not constitute a reasonable excuse for his delay in serving a notice of claim, especially since petitioner filed a workers' compensation claim just weeks after the accident... . Nor did petitioner show that respon-

dents acquired actual knowledge of the essential facts constituting the claim within the statutory period, or a reasonable time thereafter (see General Municipal Law § 50-e[5]). There is no evidence that respondents received petitioner's workers' compensation claim form, which, in any event, makes no mention of the allegations against respondents ... . Absent any knowledge of even a potential Labor Law claim, respondents certainly had no basis to conduct their own investigations ... . * * * ... [T]here is no evidence respondents were aware of an accident even occurring. Petitioner ... does no more than refer to numerous construction records that purportedly could be examined, yet provides no names of actual witnesses nor any reference to specific information in those records." ***Matter of Grajko v. City of New York*, 2017 N.Y. Slip Op. 04203, 1st Dept 5-24-17**

SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE.

DICTA IN A COURT ORDER WAS NOT A FINDING ON THE MERITS AND THEREFORE COULD NOT BE THE BASIS FOR A DISMISSAL FOUNDED UPON DOCUMENTARY EVIDENCE.

The Second Department, reversing Supreme Court, determined that a court order precluding evidence because of a failure to comply with discovery demands was not documentary evidence which utterly refuted the allegations of legal malpractice in the complaint. Therefore, defendants' motion to dismiss should not have been granted. Although the order opined that the evidence, had it been produced would not have demonstrated legal malpractice, that portion of the order was dicta: "... [T]he complaint alleges that the defendants, Anthony P. Gallo, P.C., and Anthony P. Gallo (hereinafter together Gallo), who represented the plaintiff in a prior legal malpractice action against the plaintiff's former attorneys, Demartin & Rizzo, P.C., and Joseph N. Rizzo, Jr. (hereinafter together Rizzo), negligently failed to respond to certain discovery demands by Rizzo, which resulted in the Supreme Court ... precluding the introduction of evidence in the plaintiff's legal malpractice action against Rizzo (... hereinafter the Rizzo order). The complaint further alleges that, as a result of this evidence being precluded, the court which issued the Rizzo order found that the plaintiff had failed to meet its burden of proof as to the element of damages sustained as a result of Rizzo's malpractice. * * * ... [T]he Rizzo order does not utterly refute the allegations in the complaint, nor does it establish a defense as a matter of law. The order concludes, in part, that there was no proof of actual damages presented by the plaintiff, due to the plaintiff's failure to respond to at least two of Rizzo's discovery demands, which resulted in the preclusion of the damages evidence. The Rizzo order then states, referring to the precluded evidence, '[m]oreover, even if, arguendo the [c]ourt were to overlook that deficiency, its probative value is highly suspect' ... . Contrary to the Supreme Court's conclusion, this alternate holding, which constitutes dicta, was not a finding on the merits and did not utterly refute the allegations in the complaint against Gallo ... ". ***4777 Food Servs. Corp. v. Anthony P. Gallo, P.C.*, 2017 N.Y. Slip Op. 04086, 2nd Dept 5-24-17**

CRIMINAL LAW, CONSTITUTIONAL LAW.

SEXUAL ASSAULT REFORM ACT, WHICH PROHIBITED PETITIONER FROM LIVING AND TRAVELING WITHIN 1000 FEET OF A SCHOOL, AS APPLIED TO PETITIONER, WAS NOT SHOWN TO BE SUFFICIENTLY PUNITIVE IN CHARACTER AS TO VIOLATE THE EX POST FACTO CLAUSE.

The Second Department, reversing Supreme Court, determined the Sexual Assault Reform Act (Executive Law 258-c) (hereinafter SARA), as applied to the petitioner, was not shown to be so punitive in nature as to violate the Ex Post Facto Clause. Petitioner was convicted of a sex offense committed in 2000, before SARA was enacted. Upon release petitioner was deemed a Level One sex offender. SARA prohibits petitioner from living within 1000 feet of a school. In seeking a declaratory judgment/writ of prohibition finding SARA unconstitutional, petitioner argued the law virtually prohibits him from living and travelling in Brooklyn, where he had resided with his girlfriend: "The legislative history of SARA as originally enacted in 2000, as well as that of its 2005 amendment, make clear that it was intended to provide protection to children from the risk of recidivism by certain convicted sex offenders, rather than to punish such offenders for a past crime... . Indeed, the Court of Appeals, in analyzing the issue of whether the State has preempted the field of managing registered sex offenders, has stressed that SARA was part of 'a detailed and comprehensive regulatory scheme involving the State's ongoing monitoring, management and treatment of registered sex offenders, which . . . does not end when the sex offender is released from prison' ... . Moreover, the petitioner has not shown by the "clearest proof" that the residency and travel restrictions imposed by SARA, as applied to him, are so punitive in their consequences as to transform the restrictions into punishment ... . Accordingly, the retroactive application of SARA does not violate the Ex Post Facto Clause as applied to the petitioner. Since the petitioner failed to demonstrate 'a clear legal right' to prohibition on that ground ... , the Supreme Court should have denied that branch of the petition/complaint." ***Matter of Devine v. Annucci*, 2017 N.Y. Slip Op. 04114, 2nd Dept 5-24-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SECOND RISK ASSESSMENT PROCEEDING, IN A DIFFERENT COUNTY, BASED UPON THE SAME RISK ASSESSMENT INSTRUMENT, SHOULD NOT HAVE BEEN HELD.

The Second Department determined the second risk assessment hearing should not have been held. Defendant had pled guilty to offenses in two counties and was given concurrent sentences. Using the same risk assessment instrument (RAI) one court (New York County) assessed defendant at level two and the second court (Rockland County) subsequently assessed defendant at level three. The Rockland County proceeding was dismissed: "... [T]he result reached by the County Court in the Rockland County SORA proceeding conflicted with the result reached by the Supreme Court in the New York County SORA proceeding even though the same RAI was utilized in both proceedings. Recently, the Court of Appeals instructed that in order to prevent conflicting conclusions based upon the same RAI, 'one—and only one—sentencing court should render a risk level determination based on all conduct contained in the RAI' ... . Accordingly, the Rockland County SORA proceeding must be dismissed ...". ***People v. Katz*, 2017 N.Y. Slip Op. 04154, 2nd Dept 5-24-17**

FAMILY LAW, APPEALS.

AWARD OF SOLE CUSTODY TO MOTHER NOT SUPPORTED BY THE RECORD, PREFERENCE OF CHILDREN NOT ADEQUATELY CONSIDERED.

The Second Department determined Family Court's award of sole legal and physical custody to mother was not supported by the record. The court noted that the preference of the children was not adequately considered: " 'Since the Family Court's custody determination is largely dependent upon an assessment of the credibility of the witnesses and upon the character, temperament, and sincerity of the parents, its determination should not be disturbed unless it lacks a sound and substantial basis in the record'... . 'However, an appellate court would be seriously remiss if, simply in deference to the finding of a trial judge, it allowed a custody determination to stand where it lacked a sound and substantial basis in the record'... . In this case, the Family Court's determination awarding the mother sole legal and physical custody of the children does not have a sound and substantial basis in the record. Specifically, the court's finding that the mother was 'better equipped to meet the physical, mental and emotional needs of the children' was not supported by the record. The record also fails to support the court's determination that the father did not indicate a willingness to co-parent with the mother. In addition, while a child's expressed preference in a custody proceeding is not determinative, it is some indication of what is in the child's best interests, particularly where, as here, the court's interview with the sons demonstrated their level of maturity and ability to articulate their preferences ... . Here, although the children indicated a preference for living with the father, the court merely indicated that it understood their positions without explaining its reasons for rejecting them ...". ***Matter of Tofalli v. Sarrett*, 2017 N.Y. Slip Op. 04125, 2nd Dept 5-25-17**

INSURANCE LAW.

ANY GROUND FOR A DISCLAIMER NOT MENTIONED IN THE DISCLAIMER LETTER IS WAIVED.

The Second Department determined that the insurer's (Merchant's) disclaimer letter did not identify the basis for the disclaimer relied upon in this declaratory judgment action. Therefore the defense ultimately relied upon was waived: "When an insurer disclaims coverage for death or bodily injury arising out of an accident, "the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" ... . 'An insurer's justification for denying coverage is strictly limited to the ground stated in the notice of disclaimer' ... . 'Thus, an insurer waives any ground for denying coverage that is not specifically asserted in its notice of disclaimer, even if that ground would otherwise have merit' ... . In its disclaimer letter, Merchants stated, in relevant part, that Ability was not named as an additional insured under the insurance policy, a statement that was factually incorrect. Contrary to Merchants' contention, the exclusion upon which Merchants now relies was not mentioned in its disclaimer letter and, therefore, any argument based on that exclusion has been waived ...". ***Ability Transmission, Inc. v. John's Transmission, Inc.*, 2017 N.Y. Slip Op. 04087, 2nd Dept 5-24-17**

INSURANCE LAW.

INSURED'S FAILURE TO TIMELY NOTIFY INSURER OF THE ACTION AGAINST THE INSURED RELIEVED THE INSURER OF ANY OBLIGATION TO SATISFY THE JUDGMENT AGAINST THE INSURED.

The Second Department determined the insured's delay in notifying the insurer of the action against the insured relieved the insurer of the obligation to satisfy the judgment against the insured. The Second Department further noted that the delay in disclaiming coverage was justified by the insurer's need to investigate: "Where an insurance policy requires that notice of an occurrence be given "as soon as practicable," notice must be given within a reasonable time in view of all of the circumstances ... . 'The insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract' .... 'However, circumstances may exist that will excuse or explain the insured's delay in giving notice, such as a reasonable belief in nonliability' ... . It is the insured's burden to demonstrate

the reasonableness of the excuse ... . Here, the defendant Scottsdale Insurance Comp any (hereinafter Scottsdale) established its prima facie entitlement to judgment as a matter of law. Scottsdale demonstrated that its insured knew of the occurrence immediately and received a letter of representation from the plaintiff's attorney in June 2008, but waited until September 25, 2009, to notify Scottsdale ... . Since the subject policy was issued prior to the amendment to Insurance Law § 3420, Scottsdale was not required to show that it was prejudiced by the failure to give timely notice in order to satisfy its prima facie burden ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the insured's delay in notifying Scottsdale was reasonable based upon its good faith belief in nonliability ...". ***Ramlochan v. Scottsdale Ins. Co.*, 2017 N.Y. Slip Op. 04159, 2nd Dept 5-24-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION IRRESPECTIVE OF WHETHER PLYWOOD FELL WHILE HOISTED OR DURING INSTALLATION.

The Second Department determined plaintiff was properly awarded summary judgment on his Labor Law § 240(1) cause of action irrespective of whether the plywood which struck him fell when it was being hoisted or when workers were about to install it: "The single decisive question in determining whether Labor Law § 240(1) is applicable is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential ... . '[F]alling object' liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured ... but also where the plaintiff demonstrates that, at the time the object fell, it 'required securing for the purposes of the undertaking' ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the defendant failed to provide an adequate safety device to protect him and that this failure was a proximate cause of his injuries. This is so whether the sheet of plywood fell as it was being hoisted because it was not properly secured while it was being pulled up to the roof, as testified to by the plaintiff ... , or whether the sheet of plywood fell from the hands of the plaintiff's coworkers on the roof as it was being installed or about to be installed due to a failure to secure it, a theory advanced by the defendant ...". ***Escobar v. Safi*, 2017 N.Y. Slip Op. 04099, 2nd Dept 5-24-17**

PERSONAL INJURY.

DEFENDANT STORE NOT ENTITLED TO SUMMARY JUDGMENT IN THIS TRACKED-IN-WATER SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined defendant store was not entitled to summary judgment in this tracked-in-water slip and fall case. The slip and fall was in the "card aisle" of the store, not at the entrance. The court explained that proof of general cleaning practices, as opposed to when the area was last cleaned or inspected, will not support summary judgment: "While a defendant is not required to cover all of its floors with mats, or to continuously mop up all moisture resulting from tracked-in rain ... , a defendant may be held liable for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action ... . 'To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' ...". ***Hickson v. Walgreen Co.*, 2017 N.Y. Slip Op. 04103, 2nd Dept 5-24-17**

PERSONAL INJURY.

PROOF OF GENERAL CLEANING PRACTICES NOT SUFFICIENT TO DEMONSTRATE A LACK OF NOTICE OF THE WET AREA WHERE PLAINTIFF SLIPPED AND FELL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff slipped on a wet area of a carpeted stairwell. Defendants' evidence of general cleaning practices was not enough to demonstrate a lack of constructive notice of the condition: "Among other things, deposition testimony submitted by the defendants demonstrated that, although the building superintendent and property manager inspected the building on a regular basis, there was no specific schedule for the inspections and there were no records of inspections. Further, there was no cleaning schedule for the stairways and, if someone made a complaint about a dangerous condition on a stairway, the superintendent would not write that down. 'Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice' ...". ***Perez v. Wendell Terrace Owners Corp.*, 2017 N.Y. Slip Op. 04156, 2nd Dept 5-24-17**

PERSONAL INJURY, MUNICIPAL LAW.

CHILD BURNED BY HOT EMBERS IN A CAMPSITE, NEITHER THE LAST OCCUPANT OF THE CAMPSITE NOR THE LANDOWNER (THE COUNTY) WAS ENTITLED TO SUMMARY JUDGMENT.

The Second Department determined the last occupant of a campsite (Reinoso), as well as the county which owned the campgrounds, were not entitled to summary judgment in and action brought by an eight-year-old boy who was burned when he stepped into a pit of hot coals: "... [T]he plaintiffs raised a triable issue of fact as to whether Reinoso was the party who left the hot embers on the ground ... . Further, it has long been the rule in New York that '[l]andowners in general have a duty to act in a reasonable manner to prevent harm to those on their property' ... . 'In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control'... . Here, the evidence submitted by the County defendants in support of their motion for summary judgment failed to eliminate all triable issues of fact as to whether they exercised 'ordinary and reasonable care in maintaining the campgrounds in a reasonably safe condition so as to prevent foreseeable injury' ...". ***Holohan v. County of Suffolk*, 2017 N.Y. Slip Op. 04104, 2nd Dept 5-24-17**

STATUTES.

ABSENCE OF A COMMA, STANDING ALONE, WAS NOT ENOUGH TO DICTATE THE MEANING OF A CODE PROVISION.

The Second Department determined the absence of a comma from a code provision could not be the sole basis for an interpretation of its meaning. The code provision listed a number of activities that required a license: "That Code section provides, 'No person shall . . . engage in . . . a home service business after January first two thousand thirteen . . . unless he [or she] is licensed therefore pursuant to this title.' Section 21-25.1(3) of the Code defines the term 'home service.' It states, in part, that '[h]ome service' shall include, but not be limited to, repair, carpet and floor cleaning, installation of decorative goods, upholstery including repair and cleaning, . . . gutter cleaning, window cleaning, general cleaning, . . . roof and/or house washing, other than power washing and junk/debris/rubbish/estate cleanouts.' * * * '[P]unctuation . . . is subordinate to the text and is never allowed to control its plain meaning, but when the meaning is not plain, resort may be had to those marks . . . in order to make the author's meaning clear' ... . 'Punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity, but not in cases where no real ambiguity exists except what punctuation itself creates' ... . Contrary to the petitioners' contention, the plain meaning of section 21-25.1(3) is that those who are engaged in 'junk/debris/rubbish/estate cleanouts' must be licensed, at least to the extent that they are currently engaged, or have been engaged in such business since January 1, 2013, in Nassau County." ***Matter of Elenson v. Nassau County*, 2017 N.Y. Slip Op. 04116, 2nd Dept 5-24-17**

ZONING, ENVIRONMENTAL LAW.

ZONING BOARD PROPERLY CONDUCTED A SEQRA REVIEW AND PROPERLY ISSUED A SUBSTANTIAL SETBACK VARIANCE, REVIEW CRITERIA EXPLAINED.

The Second Department determined the zoning board of appeals properly issued a negative declaration pursuant to the State Environmental Quality Review Act (SEQRA) and properly issued a substantial setback variance. The court explained its limited role in assessing the propriety of actions taken by zoning boards: " '[I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively' ... . While courts must review the record to determine if the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination ... , '[n]othing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence' ... . … In determining whether to grant an area variance, a zoning board of appeals is required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted ... . A zoning board must also consider '(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance' ... . ***Matter of Beekman Delamater Props., LLC v. Village of Rhinebeck Zoning Bd. of Appeals*, 2017 N.Y. Slip Op. 04112, 2nd Dept 5-24-17**

THIRD DEPARTMENT

ATTORNEYS, WORKERS' COMPENSATION LAW, NEGLIGENCE.

BUT FOR TEST FOR LEGAL MALPRACTICE IS NOT THE SAME AS SOLE PROXIMATE CAUSE, IT IS ENOUGH THAT AN ATTORNEY'S ACTIONS CONSTITUTE A PROXIMATE CAUSE.

The Third Department, in a lawsuit alleging breach of contract, breach of fiduciary duty and fraud (among other causes of action) stemming from the underfunding of a Workers' Compensation benefits trust fund, determined the complaint stated a cause of action for legal malpractice. The lawyer, Gosdeck, argued that the complaint failed to allege his actions were the sole proximate cause of the injury. The Third Department reasoned that the "but for" test for legal malpractice was not the same as "sole proximate cause:" "... [W]e reject Gosdeck's argument that plaintiff was required to allege that he was the sole proximate cause of alleged damages. Rather, '[i]n an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused [the] plaintiff to sustain actual and ascertainable damages'... . 'An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if but for the attorney's negligence the plaintiff . . . would not have sustained actual and ascertainable damages'... . We agree with Supreme Court that, on this motion to dismiss a claim of legal malpractice that is based on negligent legal advice given over a period of time, the 'but for' standard is not synonymous with sole proximate cause and that plaintiff's burden is to prove that Gosdeck's negligence was a proximate cause of damages ...". ***New York State Workers' Compensation Bd. v. Program Risk Mgt., Inc.*, 2017 N.Y. Slip Op. 04184, 3rd Dept 5-25-17**

CRIMINAL LAW.

ALTHOUGH DEFENDANT'S GUILTY PLEA SATISFIED AN UNCHARGED BURGLARY, THE SENTENCING COURT SHOULD NOT HAVE ORDERED RESTITUTION FOR THE UNCHARGED BURGLARY.

The Third Department determined the sentencing court erred when it ordered restitution for an uncharged burglary (on December 18). Although defendant's guilty plea was taken in satisfaction of the uncharged December 18 burglary, that burglary was never included in an accusatory instrument and was not shown to be part of the same criminal transaction to which defendant pled: "Pursuant to Penal Law § 60.27, a trial court may order restitution arising from 'the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense' (Penal Law § 60.27 [4] [a]). Defendant's guilty plea pertained to the December 24, 2014 burglary of the warehouse, and satisfied uncharged burglaries from that warehouse on December 15 and 18, 2014. ... After a hearing, County Court determined that there was insufficient evidence that defendant had committed the December 15 burglary but ordered restitution in the amount of $11,471 for the materials stolen in the December 18 burglary. However, no proof was adduced at the hearing that the December 18 burglary was ever charged in an accusatory instrument and the People did not prove by a preponderance of the evidence that this burglary was part of 'the same criminal transaction' as the December 24 crime of conviction ...". ***People v. Pixley*, 2017 N.Y. Slip Op. 04173, 3rd Dept 5-25-17**

EMPLOYMENT LAW, EVIDENCE, PERSONAL INJURY.

INCONSISTENCIES IN THE RETIREMENT SYSTEM'S EXPERT'S TESTIMONY REQUIRED ANNULMENT OF THE DENIAL OF PETITIONER POLICE OFFICER'S APPLICATION FOR ACCIDENTAL AND PERFORMANCE OF DUTY RETIREMENT BENEFITS.

The Third Department, annulling the determination below, found that petitioner-police officer's application for accidental and performance of duty retirement benefits should not have been denied. Although the comptroller can accept the opinion of one expert over another, in this case the inconsistencies in the retirement system's expert's (Hughes') testimony did not provide substantial evidence for the finding against the petitioner: "On cross-examination, however, Hughes acknowledged that petitioner complained of a number of post-concussion symptoms during his examination and he believed that petitioner was being truthful. When asked if these symptoms would preclude petitioner from performing the specific duties of a police officer, Hughes initially explained that he confined his opinion to 'whether [petitioner's] neck injury and post-concussion syndrome caused by the accident of 3/19/09 resulted in a permanent disability.' Nonetheless, he subsequently confirmed that petitioner's symptoms could impede his ability to use a firearm, carry out complicated directions and perform other police-related tasks. Ultimately, Hughes agreed that petitioner suffered 'an exacerbation or recurrence' of his post-concussion symptoms in July 2010, that would disable him from performing the duties of a police officer. In our view, Hughes' inconsistent testimony on the issue of permanent incapacity and failure to account for the July 2010 incident in rendering his opinion does not constitute a rational and fact-based opinion necessary to support the finding that petitioner was not permanently incapacitated from performing his duties as a police officer. To the contrary, the record contains ample medical evidence and documentation, most significantly Ward's testimony, establishing that petitioner was permanently incapacitated by injuries sustained as a result of the March 19, 2009 incident that were later exacerbated in July 2010.

Accordingly, inasmuch as we find that the Comptroller's determination is not supported by substantial evidence, it must be annulled and the matter remitted for further proceedings ...". ***Matter of Rawson v. DiNapoli*, 2017 N.Y. Slip Op. 04189, 3rd Dept 5-25-17**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

PLAINTIFF ASSUMED THE RISK OF BEING STRUCK BY A BASEBALL DURING TRYOUTS CONDUCTED IN THE GYMNASIUM DUE TO WEATHER.

The Third Department determined defendant school district was entitled to summary judgment in this sports injury case. Plaintiff (Legac) was struck in the face by a baseball during tryouts held in the gymnasium (due to weather). The Third Department held that the school district demonstrated plaintiff had assumed the risk of injury. He was an experienced baseball player and was aware of the way the baseball was being hit by the coach and the way the baseball reacted when striking the gymnasium floor: "While Legac testified that he believed that Potter was hitting the ball "too hard" and that the baseball traveled faster on the gymnasium floor than it would have on a baseball field, such conditions were open and obvious and clearly appreciated by Legac, who had the opportunity to watch the players ahead of him complete the ground ball fielding drill and had observed the ball interact with the flooring over three days of indoor tryouts ... . Inasmuch as the conditions inherent in the indoor ground ball fielding drill were readily apparent to Legac and the risk of being struck by a ball was a reasonably foreseeable consequence of engaging in that drill, we find that defendants established their prima facie entitlement to summary judgment dismissing the complaint ... ". ***Legac v. South Glens Falls Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 04182, 3rd Dept 5-25-17**

PERSONAL INJURY, INSURANCE LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LIABILITY, DEFENDANT CROSSED DOUBLE YELLOW LINE, PLAINTIFF RAISED QUESTIONS OF FACT ABOUT WHETHER HIS PHYSICAL AND PSYCHOLOGICAL INJURIES MET THE NO-FAULT CRITERIA FOR SERIOUS INJURY.

The Third Department, reversing Supreme Court, over a two-justice partial dissent, determined plaintiff was entitled to summary judgment on liability in this traffic accident case and plaintiff had raised questions of fact whether he suffered serious physical and psychological injury within the meaning of the no-fault law. Plaintiff alleged defendant's car struck his after crossing the double yellow line and defendant had pled guilty to crossing the double yellow line. The dissent argued plaintiff did not demonstrate psychological injury and did not meet the 90/180 day no-fault criteria: "This evidence, viewed in the light most favorable to plaintiff ... , raised a triable issue of fact as to whether plaintiff's alleged neck, back and left shoulder injuries constitute a serious injury under the significant limitation of use category ... . As for plaintiff's alleged psychological injuries, '[i]t has been established 'that a causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury'... . * * * ... [P]laintiff proffered the affirmed narrative report of Barry Goldman, his primary care physician. Goldman stated that plaintiff visited his primary care practice more than a dozen times between August 2014 and November 2015 — three of which predated the second motor vehicle accident in September 2014 — for treatment relating to anxiety, stress, insomnia, nightmares, irritability, temperament changes and reliving and experiencing flashbacks of the June 2014 accident. Based on his review of the medical records generated from these visits, as well as his own examinations of plaintiff, Goldman concluded that plaintiff's diagnosis of posttraumatic stress disorder was causally related to the June 2014 motor vehicle accident. He stated that, although the death of plaintiff's wife and the second motor vehicle accident 'may have added to his symptoms, the trauma of his first accident was the cause and directly related to his complaints.' This evidence was sufficient to raise a question of fact as to whether the June 2014 motor vehicle accident caused plaintiff to suffer psychological injuries constituting a significant limitation of use of a body function or system ...". ***Fillette v. Lundberg*, 2017 N.Y. Slip Op. 04180, 3rd Dept 5-24-17**

UNEMPLOYMENT INSURANCE.

DRIVER FOR A MEDICAL DELIVERY SERVICE WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS, NOTWITHSTANDING THE DRIVER'S CONTRACT WITH A THIRD PARTY PAYROLL COMPANY.

The Third Department determined a driver for Medical Delivery Services (MDS), which delivers highly regulated time-sensitive radioactive medication, was an employee of MDS entitled to unemployment insurance benefits, notwithstanding that the driver's contract was with a third-party administrator (SCI): "... MDS placed the advertisement for owner/operator drivers and, when claimant responded, it conducted the initial interview and screening, paid for necessary drug tests and provided claimant with hazardous material training that was required by the Department of Transportation. Although claimant was actually paid by SCI and was designated an independent contractor under the owner/operator agreement, MDS provided SCI with the funds to pay claimant, set claimant's pay rate at 59 cents per mile and dictated other aspects of his compensation, including reimbursement for tolls and fuel surcharges. Significantly, claimant dealt with MDS, not SCI, in the performance of his work duties. In accordance with regulatory and legal requirements, MDS required claimant to adhere to a strict delivery schedule, report each delivery via his cell phone and submit specific invoices to MDS for each delivery. In addition, MDS required claimant to carry certain safety equipment in his vehicle, including a dosimeter, which

MDS monitored to detect radiation levels. MDS also imposed a dress code, providing claimant with polo shirts bearing its logo, and furnished him with an identification badge, lanyard and clipboard advertising its name. Furthermore, in the event that claimant wanted to take time off, he needed to provide MDS with advance notice, and MDS, not claimant, selected the replacement driver. Although much of the control exercised by MDS was occasioned by the highly regulated nature of the work performed, many other aspects of the control that MDS exercised were not. In view of the foregoing, we find that substantial evidence supports the Board's finding of an employment relationship notwithstanding the evidence that would support a contrary conclusion ...". ***Matter of Crystal (Medical Delivery Servs.--Commissioner of Labor)*, 2017 N.Y. Slip Op. 04185, 3rd Dept 5-25-17**

WORKERS' COMPENSATION LAW.

CLAIMANT PROPERLY AWARDED 100% SLU FOR FOUR AMPUTATED FINGERS AND AN ADDITIONAL 100% SLU FOR THE REATTACHED NONFUNCTIONAL THUMB.

The Third Department, over a dissent, determined claimant was properly awarded 100% schedule loss of use (SLU) for the amputation of four fingers on his right hand and an additional 100% SLU for the reattached non-functional thumb on his right hand: "... [T]he Board proportioned the loss of four fingers to the total loss of the hand as required by Workers' Compensation Law § 15 (3) (q), and then separately evaluated the distinct and additional injury to the thumb, to which it awarded a 100% SLU. We defer to the Board's determination to credit the sole proffered medical opinion of Paterson, and the Board's conclusion based thereon that claimant sustained a separate and distinct injury to his thumb, which therefore warranted separate SLU determinations and awards for the thumb and the fingers ... . Such result is supported by the guidelines, which contemplate awards greater than 100% for the loss of a hand (see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity at 17, figure 2.8 [2012]) and provide that the loss of four fingers, excluding the thumb, constitutes a 100% SLU of the hand ... . The guidelines, which address impairments to the thumb separately from fingers (see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity at 12-14 [2012]), provide that '[t]he thumb deserves special consideration; it is the highest valued digit and the most important' (New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity at 17 [2012]). Under these circumstances, the Board's determination to assign a separate SLU to the loss of the thumb and to make a distinct award is supported by the case law and the guidelines, and is not contrary to the statutory language. Therefore, we uphold the Board's determination and affirm the amended decision." ***Matter of Deck v. Dorr*, 2017 N.Y. Slip Op. 04186, 3rd Dept 5-25-17**

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