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**NOTE:** Fourth Department case summaries from the July 5, 2017 issue are now available.

# FIRST DEPARTMENT

## ARBITRATION, CONTRACT LAW, ATTORNEYS.

ARBITRATION AWARD IN DISPUTE OVER TELEVISION BROADCAST FEES FOR MAJOR LEAGUE BASEBALL PROPERLY VACATED BASED UPON COUNSEL'S CONFLICTS OF INTEREST, SECOND ARBITRATION SHOULD NOT BE MOVED TO A DIFFERENT FORUM.

The First Department, in an opinion consisting of a two-justice concurrence, a separate one-justice concurrence and a two-justice partial dissent, determined that the arbitration of a dispute concerning the television broadcast fees for Major League Baseball was tainted by counsel's conflicts of interest (and the award was properly vacated on that ground). The bulk of the opinions dealt with whether the court should order that the second arbitration be held in a different forum. The majority concluded it should not: "Pursuant to the negotiated terms of the parties' written agreement, the subject arbitration, governed by the Federal Arbitration Act (FAA) (9 USC § 1 et seq.), was initiated before the Revenue Sharing Definitions Committee (RSDC) of Major League Baseball (MLB), to resolve a contractual dispute over telecast rights fees between TCR Sports Broadcasting Holding, LLP d/b/a the Mid-Atlantic Sports Network (MASN) and the Baltimore Orioles, and the Washington Nationals. For the reasons stated herein, we find that the arbitration award issued by the RSDC on June 30, 2014 was correctly vacated based on 'evident partiality' (9 USC § 10[a][2]) arising out of the Nationals' counsel's unrelated representations at various times of virtually every participant in the arbitration except for MASN and the Orioles, and the failure of MLB and the RSDC, despite repeated protests, to provide MASN and the Orioles with full disclosure or to remedy the conflict before the arbitration hearing was held. However, even if this Court has the inherent power to disqualify an arbitration forum in an exceptional case, on the record before us there is no basis, in law or in fact, to direct that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected in their agreement to resolve this particular dispute, fully aware of the role MLB would play in the arbitration process. Contrary to the view of the dissent, there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC, and the Nationals will use new counsel at the second arbitration. Speculation that MLB will dictate the outcome of the second arbitration by exerting pressure on the new members of the RSDC does not suffice to establish that they will not exercise their independent judgment or carry out their duties impartially, or that the proceedings will be fundamentally unfair." ***Matter of TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2017 N.Y. Slip Op. 05689, 1st Dept 7-13-17**

## CIVIL RIGHTS LAW (SHIELD LAW), CONSTITUTIONAL LAW, CIVIL PROCEDURE.

SHIELD LAW PROTECTS RESPONDENT FROM PRE-ACTION DISCLOSURE OF THE IDENTITIES OF THE SOURCES OF PUBLISHED INFORMATION, RESPONDENT PROVIDES INFORMATION ABOUT DEBT-DISTRESSED COMPANIES TO A SMALL GROUP OF SUBSCRIBERS WHO SIGN A CONFIDENTIALITY AGREEMENT.

The First Department, reversing Supreme Court, determined the petition seeking pre-action disclosure by respondent of the identities of persons who allegedly violated a confidentiality agreement should not have been granted. Respondent provides information about debt-distressed companies to a small audience at high prices. The First Department concluded that respondent operated a news service and the pre-action disclosure was precluded by the Civil Rights Law (Shield Law) which protects sources of news stories: "... [R]espondent established that its editorial staff is solely responsible for deciding what to report on and that it does not accept compensation for writing about specific topics or permit its subscribers to dictate the content of its reporting. Other courts have found the extent of a publication's independence and editorial control to be important in determining whether to apply the Shield Law ... . We concur. Extending protection to respondent under the Shield Law is consistent with New York's 'long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press' - protection that has been recognized as 'the strongest in the nation' ... . To condition coverage on a fact-intensive inquiry analyzing a publication's number of subscribers, subscription fees, and the extent to which it allows further dissemination of information is unworkable and would create substantial prospective uncertainty, leading to a potential 'chilling' effect." ***Matter of Murray Energy Corp. v. Reorg Research, Inc.*, 2017 N.Y. Slip Op. 05688, 1st Dept 7-13-17**

### CONTRACT LAW, ATTORNEYS.

EMAIL FROM ATTORNEY CONSTITUTED A BINDING SETTLEMENT AGREEMENT, SUPREME COURT REVERSED.
The First Department, reversing Supreme Court, determined an email from an attorney constituted a binding settlement agreement: "The email communications between plaintiffs' counsel and defendants' counsel sufficiently set forth an enforceable agreement to settle plaintiffs' personal injury claims, including that of plaintiff Morales ... . Plaintiffs' counsel, who had authority to bind Morales, accepted defendants' offer ... . Furthermore, counsel typed his name at the end of the email accepting defendants' offer, which satisfied CPLR 2104's requirement that settlement agreements be in a 'writing subscribed by him or his attorney' in order to be enforceable ... , thus creating a binding settlement agreement." ***Jimenez v. Yanne*, 2017 N.Y. Slip Op. 05677, 1st Dept 7-13-17**

### CRIMINAL LAW, ATTORNEYS.

DEFENDANT SHOULD HAVE BEEN GRANTED A HEARING ON HIS MOTION TO VACATE HIS CONVICTION, DEFENDANT ALLEGED COUNSEL'S ADVICE ON THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA WAS ERRONEOUS.
The First Department, reversing Supreme Court, determined defendant was entitled to a hearing on his motion to vacate his conviction because of counsel's (alleged) advice on the deportation consequences of his guilty plea: "Defendant alleged in support of his CPL 440.10 motion that counsel at his plea affirmatively misadvised him ... that he 'could' be deported, but 'maybe' could avoid deportation if he stayed out of further trouble. However, since defendant pleaded guilty to an aggravated felony under federal law, deportation was mandatory irrespective of subsequent good behavior ... . Defendant also alleged that, although he was innocent, he accepted what he thought was a favorable plea because it involved a sentence of probation, whereas, had he known that deportation was mandatory, he would have asked counsel to negotiate a disposition with less onerous deportation consequences or would have proceeded to trial, in light of the fact that he has family here. Defendant raised sufficient questions of fact concerning the effectiveness of counsel's assistance to warrant a hearing on the content of counsel's immigration advice, and whether defendant was prejudiced ... ". ***People v. Candel*, 2017 N.Y. Slip Op. 05680, 1st Dept 7-13-17**

### DEBTOR-CREDITOR, FRAUD.

PLAINTIFF DID NOT DEMONSTRATE FRAUD CAUSE OF ACTION WOULD SUCCEED ON ITS MERITS, WARRANT OF ATTACHMENT SHOULD NOT HAVE BEEN GRANTED.
The First Department, reversing Supreme Court, determined the warrant of attachment should not have been granted. Plaintiff did not demonstrate the fraud cause of action would succeed on its merits: "... [S]tating a cause of action does not equate to a probability of success on the merits. In her moving papers, plaintiff submitted no affidavit or written evidence that [defendant] had committed fraud. Rather, she relied solely on the fact that partial summary judgment had been granted against three other defendants. However, '[t]o sustain a warrant of attachment against the property of a defendant, the moving papers must establish both a cause of action and a ground of attachment as to that particular defendant' ... ". ***Genger v. Genger*, 2017 N.Y. Slip Op. 05687, 1st Dept 7-13-17**

## SECOND DEPARTMENT

### ARBITRATION, CONTRACT LAW, CORPORATION LAW.

OFFICERS AND EMPLOYEES OF DEFENDANT CORPORATION, ALTHOUGH NON-SIGNATORIES, CAN ENFORCE THE ARBITRATION PROVISION OF THE CONTRACT BETWEEN PLAINTIFF AND THE CORPORATION.
The Second Department, reversing Supreme Court, determined individual defendants, who were officers and/or employees of defendant corporation McGowan Builders, Inc, could enforce the agreement to arbitrate made between plaintiff and the corporation: "Here, the alleged misconduct attributed to the individual defendants in the complaint related to their behavior as employees and officers of McGowan Builders. Since 'a corporation can only act through its officers and employees' ... , any breach of the agreement would necessarily have to occur as a result of some action or inaction attributable to an officer or employee of McGowan Builders. As the Court of Appeals has recognized under similar circumstances, a rule allowing corporate officers and employees to enforce arbitration agreements entered into by their corporation 'is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement' ... . Under the circumstances of this case, the individual defendants were entitled to enforce the arbitration provision contained in the subcontract agreement between McGowan Builders and the plaintiff ... . Accordingly, the Supreme Court should have granted that branch of the motion of the moving defendants, including the individual defendants, which was to compel arbitration of the causes of action alleging conversion, unfair competition, and tortious interference insofar as asserted against them." ***Degraw Constr. Group, Inc. v. McGowan Bldrs., Inc.*, 2017 N.Y. Slip Op. 05580, 2nd Dept 7-12-17**

## CIVIL PROCEDURE LAW, CORRECTIONS LAW, ATTORNEYS.

UNDER THE EQUAL ACCESS TO JUSTICE ACT, PETITIONER, AN INMATE WHO WAS INITIALLY DENIED ENTRY INTO A PRISON NURSERY PROGRAM FOR HER AND HER CHILD, WAS NOT ENTITLED TO ATTORNEYS' FEES FOR THE REVERSAL OF THE DENIAL.

The Second Department that petitioner's request for attorneys' fees pursuant to the Equal Access to Justice Act (EAJA) was properly denied. Although petitioner's application to participate in the prison's nursery program was improperly denied and she and her child were subsequently admitted to the program by Supreme Court, the facts did not justify the award of attorneys' fees: "Under the EAJA, 'a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust' (CPLR 8601[a]). An award of attorneys' fees under the EAJA is generally left to the sound discretion of the Supreme Court ... . 'The determination of whether the State's position was substantially justified is committed to the sound discretion of the court of first instance and is reviewable as an exercise of judicial discretion' ... . Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in concluding that the respondents' position was substantially justified, notwithstanding the court's underlying conclusion that the respondents' determination to deny the petitioner's application for admission to the Nursery Program should be annulled ... . In particular, the evidence in support of the respondents' position would satisfy a reasonable person that it was not 'desirable for the welfare of [the] child' to remain with the petitioner for purposes of the EAJA ... . Contrary to the petitioner's contention, although the court found that the respondents failed to consider certain factors, including the petitioner's current achievements and the supervised nature of the Nursery Program, there was no evidence in the record that the respondents 'willfully ignored' those factors. Moreover, this is not a case where the respondents failed to conduct any assessment as to whether the subject child's welfare would best be served by remaining with the petitioner ... ". ***Matter of Losurdo v. New York State Dept. of Corr. & Community Supervision*, 2017 N.Y. Slip Op. 05603, 2nd Dept 7-12-17**

## CRIMINAL LAW, MENTAL HYGIENE LAW.

INSUFFICIENT PROOF DEFENDANT SUFFERED FROM A DANGEROUS MENTAL DISORDER WITHIN THE MEANING OF THE CRIMINAL PROCEDURE LAW.

The Second Department, reversing County Court, determined the evidence at this civil commitment hearing supported a finding defendant was not suffering from a 'dangerous mental disorder,' but rather was 'mentally ill,' within the meaning of the Criminal Procedure Law (CPL) 330.20: "... County Court accepted the appellant's plea of not responsible by reason of mental disease or defect to the charge of strangulation in the second degree. After the court issued an examination order pursuant to CPL 330.20(3), the appellant was remanded to Mid-Hudson Forensic Psychiatric ... , where he was evaluated by three psychiatric examiners. Two of the examiners found him to be suffering from a dangerous mental disorder, while the third determined that he was mentally ill. * * * The opinions expressed by the People's experts were based, in large part, upon speculation and an overly narrow focus on the appellant's conduct during the relatively brief period of time between the instant offense and the time when the appellant began taking medication. As evidenced by the unrebutted testimony of the appellant's experts, the appellant has had no history of relapses into violent behavior. Moreover, he had no notable history of substance or alcohol abuse, had always been compliant with treatment, both during the 18-month period he was released on bail and during his subsequent time at Mid-Hudson, and had a positive support system. Therefore, the preponderance of the record evidence did not support the conclusion of the People's experts that the appellant suffered from a dangerous mental disorder ... Contrary to the County Court's determination, the preponderance of the evidence adduced at the hearing demonstrated only that the appellant was mentally ill ... . Accordingly, the County Court's findings of fact must be vacated and the matter remitted to the County Court, Orange County, for the entry of a finding that the appellant is mentally ill pursuant to CPL 330.20(1)(d), and the issuance of such further orders as may be appropriate under the Mental Hygiene Law and CPL 330.20(7)." ***Matter of Eric F.*, 2017 N.Y. Slip Op. 05594, 2nd Dept 7-12-1**

## FAMILY LAW.

PUTATIVE FATHER'S REQUEST FOR A DNA PATERNITY TEST SHOULD NOT HAVE BEEN DENIED.

The Second Department, reversing Family Court, determined putative father's request for a DNA paternity test should not have been denied: "... [T]he Orange County Department of Social Services filed a paternity petition against the appellant on behalf of the mother of the subject child, alleging him to be the father of the child, who was born in 2007. The appellant requested a genetic marker test, commonly known as a DNA test. After a hearing, the Family Court determined that the appellant was estopped from contesting paternity, in effect, denied his application for a DNA test, and entered an order of filiation adjudicating the appellant to be the father of the child. Contrary to the Family Court's determination, the appellant should not have been estopped from contesting his paternity of the child. Considering the lack of a relationship between the appellant and the child, there was no evidence that 'the child would suffer irreparable loss of status, destruction of her family image, or other harm to her physical or emotional well-being' if the DNA test were administered and it was ultimately shown that the appellant was not the biological father of the child ... . Accordingly, we cannot conclude that a genetic

marker test of the appellant's and the child's DNA would be contrary to the best interests of the child." ***Commissioner of Social Servs. v. Dorian E.L.*, 2017 N.Y. Slip Op. 05590, 2nd Dept 7-12-17**

## FAMILY LAW.

EVEN ONE INSTANCE OF EXCESSIVE CORPORAL PUNISHMENT IS SUFFICIENT TO SUPPORT A NEGLECT FINDING.

The Second Department, affirming Family Court, noted that even one instance of excessive corporal punishment is sufficient support for a neglect finding: " 'Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect' ... Even 'a single incident of excessive corporal punishment is sufficient to support a finding of neglect' ... . Here, contrary to the father's contention, a preponderance of the evidence supported the Family Court's finding that the father neglected the subject child by inflicting excessive corporal punishment ... . The father admitted that on June 17, 2014, he hit the child once with a wooden ruler, and other credible evidence established that the child sustained visible marks and swelling on his left forearm as a result, and that this was not an isolated incident ...". ***Matter of Tarelle J. (Walter J.)*, 2017 N.Y. Slip Op. 05600, 2nd Dept 7-12-17**

## FAMILY LAW, CRIMINAL LAW, EVIDENCE.

EVIDENCE OF ACCESSORIAL LIABILITY INSUFFICIENT IN THIS JUVENILE DELINQUENCY PROCEEDING, PRESENCE IS NOT ENOUGH.

The Second Department, under a weight of the evidence analysis, determined the evidence of the appellant's liability as an accomplice in this juvenile delinquency proceeding was insufficient. The complainant testified appellant was present during the assault and theft by another. Presence is not enough: "A determination premised upon accessorial liability requires proof beyond a reasonable doubt that the accused acted with the mental culpability necessary to commit the act charged and that, in furtherance thereof, he solicited, requested, commanded, importuned, or intentionally aided the principal to commit such act... . 'A person's mere presence at the scene of the crime, even with knowledge of its perpetration, cannot render him or her accessorially liable for the underlying criminal conduct' ... . Here, we agree with the appellant that the Family Court's finding of accessorial liability was against the weight of the credible evidence. The appellant is alleged to have been an accomplice with another youth who punched the complainant in the face and took his iPhone. However, at the fact-finding hearing, when asked about the appellant's actions at the time of the assault and robbery, the complainant testified that the appellant was standing near the perpetrator and watched the incident occur. The presentment agency's evidence with respect to the crimes of robbery in the second degree, robbery in the third degree, grand larceny in the fourth degree, and attempted assault in the third degree established only that the appellant was present at the scene of the offense... . Accordingly, the determination of the Family Court with respect to those crimes was against the weight of the evidence, and the order of disposition must be modified accordingly." ***Matter of Justin M.*, 2017 N.Y. Slip Op. 05605, 2nd Dept 7-12-17**

## FORECLOSURE, EVIDENCE.

STATUTORY NOTICE REQUIREMENTS NOT PROVEN, BANK'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not present sufficient proof that the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 were met: "... [W]here, as here, the plaintiff in a residential foreclosure action alleges in its complaint that it has served an RPAPL 1304 notice on the borrowers, a plaintiff moving for summary judgment must 'prove its allegation by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304' ... . Here, in moving for summary judgment, the plaintiff failed to submit an affidavit of service or proof of mailing by the post office evincing that it properly served the defendant pursuant to RPAPL 1304 ... . Moreover, contrary to the plaintiff's contention, the unsubstantiated and conclusory statement of a vice president of the plaintiff that 'a 90-day default letter was sent in accordance with [ ] RPAPL 1304" was insufficient to establish that the required notice was mailed to the defendant by first-class and certified mail... . Since the plaintiff failed to satisfy its prima facie burden with respect to RPAPL 1304, its motion for summary judgment should have been denied regardless of the sufficiency of the defendant's opposition papers ... ". ***M&T Bank v. Joseph*, 2017 N.Y. Slip Op. 05587, 2nd Dept 7-12-17**

## PERSONAL INJURY.

DEFENDANTS DID NOT DEMONSTRATE THE CONFIGURATION AT THE TOP OF THE STAIRS AND THE ABSENCE OF A HANDRAIL WERE NOT DANGEROUS CONDITIONS WHICH PROXIMATELY CAUSED PLAINTIFF'S FALL, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant property owners did not establish the configuration of the area at the top of the basement stairs and the absence of a handrail were not dangerous conditions and were not

proximate causes of plaintiff's fall down the stairs. Defendants' summary judgment motion should not have been granted: "The plaintiff alleged that the size and the configuration of the landing at the top of the basement staircase constituted a dangerous condition since there was insufficient room to safely close the bedroom door. The plaintiff further alleged that the defendants were negligent in failing to provide a handrail on either side of the staircase. The defendants moved for summary judgment dismissing the complaint, arguing that a dangerous condition did not exist and that, in any event, the negligence alleged in the complaint was not a proximate cause of the accident. In support of their motion, the defendants submitted, inter alia, their own deposition testimony and that of the plaintiff. ... The owner of property has a duty to maintain his or her property 'in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' ... . '[An] owner, however, has no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous' ... . 'The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury ...". ***Lee v. Acevedo*, 2017 N.Y. Slip Op. 05586, 2nd Dept 7-12-17**

# THIRD DEPARTMENT

## CIVIL PROCEDURE.

FAILURE TO INCLUDE A RETURN DATE IN A NOTICE OF PETITION IS NO LONGER A JURISDICTIONAL DEFECT AND CAN BE CORRECTED IF THERE IS NO PREJUDICE.

The Third Department, in a full-fledged opinion by Justice Aarons, determined, because of a change in the Civil Procedure Law and Rules (CPLR), the failure to include a return date in a notice of petition is no longer a jurisdictional defect and can be corrected if there is no prejudice: "... [A] court may allow a petitioner to correct any mistake, omission, defect or irregularity in the filing process upon such terms as may be just ... . CPLR 2001 also states that the court shall disregard any such mistake, omission, defect or irregularity if the right of a party is not substantially prejudiced. '[T]he primary purpose of a petition is to give notice to the respondent that the petitioner seeks a judgment against [a] respondent so that it may take such steps as may be advisable to defend the claim' ... . A return date accomplishes this purpose by notifying the responding party when responsive papers must be served and when the petition will be heard ... . Here, the record reflects that respondents had sufficient notice of the petition. Indeed, respondents' counsel conceded at oral argument before Supreme Court that they had 'plenty of time to respond' and, on appeal, they do not contend that they suffered any prejudice. As such, the omission of a return date should have been disregarded as a mere technical infirmity ...". ***Matter of Oneida Pub. Lib. Dist. v. Town Bd. of The Town of Verona*, 2017 N.Y. Slip Op. 05659, 3rd Dept 7-13-17**

## CRIMINAL LAW, APPEALS.

COUNTY COURT DID NOT ENSURE DEFENDANT WAS AWARE OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, PLEA VACATED IN THE INTEREST OF JUSTICE.

The Third Department, vacating the guilty plea in the interest of justice, determined the judge did not adequately ensure defendant was aware of the rights he was giving up: " 'While there is no mandatory catechism required of a pleading defendant, there must be an affirmative showing on the record that the defendant waived his or her constitutional rights'... . During the plea allocution, County Court merely asked whether defendant understood 'what the attorneys have told me about you waiving your rights and entering pleas of guilty to a felony, violation of probation and all of that stuff' and whether defendant had '[a]ny questions at all regarding you giving up your rights to a jury trial, your rights to presumption of innocence, your rights to a violation of probation hearing, anything like that.' County Court further failed to ascertain whether defendant had discussed with counsel the trial-related rights being waiving by a guilty plea or its constitutional consequences. Rather, County Court simply inquired whether defendant '[had] the time, and did you talk to [counsel] regarding this case, the disposition, and anything else that is important to you, with respect to these charges' ... . Additionally, County Court did not advise defendant of his rights or the consequences regarding an admission to violating probation ... , including that he understood that he was entitled to a hearing on the issue and that he was waiving that right ... . 'With no affirmative showing on the record that defendant understood and waived his constitutional rights when he entered the guilty plea, the plea was invalid and must be vacated' ...". ***People v. Aubain*, 2017 N.Y. Slip Op. 05632, 3rd Dept 7-13-17**

## CRIMINAL LAW, EVIDENCE.

INSUFFICIENT PROOF OF CRIMINAL POSSESSION OF A WEAPON UNDER AN ACCESSORIAL LIABILITY THEORY.

The Third Department determined there was insufficient proof of defendant's criminal possession of a weapon under an accessorial liability theory: "... [A]s for defendant's convictions of criminal possession of a weapon in the second degree, the conclusion that defendant was an accessory to Anderson or Bost [co-defendants] in their unlawful possession of weapons is against the weight of the evidence ... . There was no proof presented during the trial that defendant ever personally possessed one of the handguns or in any way encouraged or intentionally aided Anderson or Bost in their possession of the

handguns ... .. Accordingly, as 'there was no evidence that . . . defendant solicited, requested, commanded, importuned, or intentionally aided another individual to possess the firearm' ... , we reverse defendant's convictions of counts 3 and 4 of the indictment for criminal possession of a weapon in the second degree and dismiss said counts." ***People v. Spencer*, 2017 N.Y. Slip Op. 05631, 3rd Dept 7-13-17**

## EDUCATION-SCHOOL LAW.

SKIDMORE COLLEGE STUDENT REINSTATED AFTER EXPULSION, SCHOOL DID NOT FOLLOW ITS OWN PROCEDURES IN THE SEXUAL MISCONDUCT INVESTIGATION, SEVERELY PREJUDICING THE STUDENT.

The Third Department, reversing Supreme Court, reinstated the petitioner as a student at Skidmore College and expunged from his school record any reference to the sexual misconduct allegations and findings which led to his expulsion. The court noted that, as a private college, the due process requirements imposed upon a state school were not applicable. However, the Third Department concluded the school's failure to follow its own procedures severely prejudiced petitioner. The decision is too detailed to fully summarize here. The following quotation illustrates the nature of the court's criticism of the way the college handled this matter: "Petitioner ... contends that respondent failed to follow its own procedures in implementing the disciplinary process. Where, as here, no hearing is required by law, a court reviewing a private university's disciplinary determination must determine 'whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious' ... . The determination must be annulled only where there has been a lack of substantial compliance, or where the determination lacks a rational basis ... . Perfect adherence to every procedural requirement is not necessary to demonstrate substantial compliance ... . Nevertheless, we find that there were multiple failures that here, taken together, demonstrated a lack of substantial compliance. Respondent's first such failure occurred at the outset of the investigation. Section XI of respondent's 2015-2016 policy provides that an accused student must be given notice through a '[f]ormal [c]omplaint,' which must 'includ[e] the date, time, location and factual allegations concerning a violation' ... . The complaint provided to petitioner stated the date, time and location of the incident, but included no factual allegations identifying the specific actions that were alleged to be policy violations. Instead, it merely provided the text of the two policy provisions that petitioner was accused of violating — and nothing more. Thus, the complaint provided petitioner with no notice of the specific conduct that formed the basis of the alleged violations. Contrary to respondent's argument, this failure was not remedied by the fact that the complaint recited the text of the provisions. Both provisions include such a broad range of actions that it would be impossible for an accused student to discern what particular conduct he or she was alleged to have committed." ***Matter of Doe v. Skidmore Coll.*, 2017 N.Y. Slip Op. 05654, 3rd Dept 7-13-17**

## INSURANCE LAW, CONTRACT LAW.

QUESTION OF FACT WHETHER PLAINTIFF WAS A RESIDENT OF THE HOME WHICH WAS DAMAGED BY FIRE WITHIN THE MEANING OF THE POLICY LANGUAGE, DESPITE PLAINTIFF'S ADMISSION SHE PRIMARILY RESIDED IN ANOTHER HOME TEN MINUTES AWAY.

The Third Department, reversing Supreme Court, determined there were questions of fact whether plaintiff was a resident of the home where the fire occurred within the meaning of the policy language. Although plaintiff had moved to a house 10 minutes away and plaintiff's daughter lived in the damaged house, there was evidence that plaintiff never completely moved and frequented the house to care for her grandchildren: "The policy at issue defines the 'insured location' as the 'resident premises.' Relevant here, the term 'resident premises' is defined as '[t]he one family dwelling where [the insured] reside[s].' As the party seeking to disclaim coverage, defendant bore the burden of 'establishing that the exclusions or exemptions apply . . . and that they are subject to no other reasonable interpretation'... . If a term is ambiguous, it should be construed against the insurer ... . * * * In our view, it is 'arguable that the reasonable expectation of the average insured' is that plaintiff's occupancy of the premises, coupled with her claim that she never fully left the premises, was enough to permit coverage pursuant to the terms of the policy ... . We do not agree that plaintiff's evidence constituted a feigned attempt to create a question of fact ... . We are mindful that she signed a statement prepared by the adjuster on the morning of the fire that destroyed the home she had built with her husband for their family. That statement confirmed that she resided [in another home], but did not deny that she also resided at the premises for purposes of insurance coverage." ***Craft v. New York Cent. Mut. Fire Ins. Co.*, 2017 N.Y. Slip Op. 05655, 3rd Dept 7-13-17**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PRIME CONTRACTOR WAS A STATUTORY AGENT OF THE OWNER, LABOR LAW §§ 200 AND 241(6) CAUSES OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT, PLAINTIFF TRIPPED OVER EXTENSION CORDS ON THE FLOOR.

The Third Department determined defendant prime contractor was a statutory agent of the owner such that liability under the Labor Law could be imposed. Plaintiff (Mitchell) tripped over extension cords on the floor. Labor Law §§ 200 and 241(6) causes of action survived summary judgment: "Labor Law § 200 'codifies the common-law duty of an owner or employer to provide employees with a safe place to work' ... . Liability, however, will only be imposed upon a showing that the party charged with the duty to provide a safe work place had 'the authority to control the activity bringing about the injury to en-

able it to avoid or correct an unsafe condition'... . In a case, such as this, where the injury is caused by a dangerous condition at the work site, the prerequisite of control necessary to impose liability requires 'control of the place of injury and actual or constructive notice of the unsafe condition'... . ... A statutory agency relationship is created where the owner or contractor delegates the work giving rise to the Labor Law § 241 (6) duties to a third party, at which point 'that third party then obtains the concomitant authority to supervise and control that work'... . While prime contractors are immune from liability pursuant to Labor Law § 241 (6) where they lack contractual privity with the injured plaintiff's employer and have 'no authority to supervise or control the work being performed at the time of the injury' ... , the record establishes that defendant was in contractual privity with TBS [plaintiff's employer] and that the owner had delegated all mechanical work to defendant by hiring it as the sole mechanical contractor for the project, thereby demonstrating the owner's intent to delegate supervisory control over TBS's work to defendant as its statutory agent ... ". ***Mitchell v. T. McElligott, Inc.*, 2017 N.Y. Slip Op. 05653, 3rd Dept 7-13-17**

## MENTAL HYGIENE LAW, ATTORNEYS.

COUNSEL FOR A CIVILLY COMMITTED SEX OFFENDER WAS NOT ENTITLED TO ATTEND MEETINGS ABOUT APPROPRIATE TREATMENT FOR THE SEX OFFENDER.

The Third Department, in a full-fledged opinion by Justice Devine, over a two-justice dissent, determined that counsel for a civilly committed sex offender (D.J.) was not entitled to attend meetings about the appropriate treatment of the sex offender: "Having been adjudicated 'a dangerous sex offender requiring confinement' (Mental Hygiene Law § 10.10 [a]), petitioner D.J. was committed to the St. Lawrence Psychiatric Center and enrolled in the Sex Offender Treatment Program. Respondent Commissioner of Mental Health is required to 'develop and implement a treatment plan' for D.J. and others in his position (Mental Hygiene Law § 10.10 [b]; see Mental Hygiene Law § 29.13 [a]) and, '[i]n causing such a plan to be prepared or . . . revised,' the patient and specified individuals must be 'interviewed and provided an opportunity to actively participate' (Mental Hygiene Law § 29.13 [b]). In 2016, D.J. asked that his counsel in the Mental Hygiene Law article 10 proceeding, assigned through petitioner Mental Hygiene Legal Service (hereinafter MHLS), accompany him to treatment planning meetings ... * * * Counsel from MHLS ... comes from an agency whose 'statutory mission is to provide legal assistance to the residents of certain facilities' such as D.J., and legal advocacy may easily conflict with crafting an appropriate treatment plan if the medically advisable treatment conflicts with the client's legal goals ...". ***Matter of Mental Hygiene Legal Serv. v. Sullivan*, 2017 N.Y. Slip Op. 05656, 3rd Dept 7-13-17**

## PERSONAL INJURY.

QUESTION OF FACT RE DEFENDANT'S COMPARATIVE FAULT IN THIS INTERSECTION COLLISION CASE, DESPITE PLAINTIFF'S PLEADING GUILTY TO FAILURE TO YIELD THE RIGHT OF WAY.

The Third Department, reversing Supreme Court, determined plaintiff had raised a question of fact about defendant's (North's) comparative fault in this intersection collision case, despite plaintiff's pleading guilty to failure to yield the right of way. Therefore North's motion for summary judgment should not have been granted: "In light of the conflicting accounts as to how the accident occurred, we conclude that Supreme Court erred in granting summary judgment in favor of North ... . Furthermore, although plaintiff failed to yield the right-of-way and was convicted of violating Vehicle and Traffic Law § 1141, such finding 'does not preclude the existence of a fact issue as to [North's] comparative fault' .... Given plaintiff's testimony regarding North's distance from the subject intersection, the absence of other cars in front of North as she approached plaintiff and the evidence that North was 'coming fast,' a question of fact exists regarding North's comparative fault and whether she could have used reasonable care to avoid the collision ... . Accordingly, viewing the evidence in a light most favorable to plaintiff, summary judgment in favor of North on the issue of liability should have been denied." ***London v. North*, 2017 N.Y. Slip Op. 05636, 3rd Dept 7-13-17**

## PERSONAL INJURY.

PLAINTIFF'S USE OF AN AREA AS A WALKWAY WAS NOT FORESEEABLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Third Department, affirming the grant of defendant property owner's motion for summary judgment in this slip and fall case, determined the area where plaintiff tripped on a piece of pipe was not demonstrated to be an area used as a walkway. Therefore plaintiff's use of the area as a walkway was not foreseeable: '"A landowner has a duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition'... . To that end, 'the scope of a landowner's duty is measured in terms of foreseeability' ... Because '[t]he risk reasonably to be perceived defines the duty to be obeyed'... , the issue distills to whether it was foreseeable that plaintiff, despite being provided with established and alternative avenues of ingress and egress from defendant's firehouse, would instead exit the rear of the structure at night and traverse a sloped, unlit strip of land — located between the firehouse and a row of trees/shrubbery — in order to reach the front parking lot of the firehouse and retrieve his vehicle. Upon reviewing the record as a whole, we are satisfied that defendant met its burden of establishing, as a matter of law, that plaintiff's means of egress was not reasonably foreseeable and, further,

that plaintiff failed to raise a triable issue of fact on this point." ***Kirby v. Summitville Fire Dist.*, 2017 N.Y. Slip Op. 05652, 3rd Dept 7-13-17**

## REAL PROPERTY.

QUESTIONS OF FACT ABOUT EASEMENT BY NECESSITY CLAIM AND LOCATION OF EASEMENT APPURTENANT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined defendants had raised questions of fact about the location of plaintiff's (Finster's) easement over defendants' land. Summary judgment should not have been granted to Finster: '... Multiple longtime neighborhood residents provided sworn statements claiming that no roadway ever existed at the location of the disputed driveway prior to Finster's ownership of 70 Middle Road. Further, one neighbor contradicted [pllaintiff's] claim that the quarry property can only be accessed by the disputed driveway by claiming that it had historically been accessed by a different road. Hence, defendants' submissions raised material issues of fact as to whether Finster's easement appurtenant included the disputed driveway or, otherwise, whether the quarry parcel was landlocked, proof of which is essential to plaintiffs' easement by necessity claim ...". ***Finster Inc. v. Albin*, 2017 N.Y. Slip Op. 05651, 3rd Dept 7-13-17**

## WORKERS' COMPENSATION LAW.

COMPENSATION FOR CARE BY CLAIMANT'S FAMILY MEMBER MUST BE PAID TO THE CLAIMANT, NOT THE FAMILY MEMBER.

The Third Department, reversing the Workers' Compensation Board, determined compensation paid directly to claimant's wife for her care of claimant should have been paid to claimant: "This Court has previously held 'that payment of the reimbursement of the costs for [a spouse's] services must be made to [the] claimant, not to the spouse' ... . The Board's interpretation and reliance on Matter of Perrin v. Builders Resource, Inc. (116 AD3d 1208 [2014]) to reach a different conclusion is misplaced. The issue in Matter of Perrin was whether the claimant was aggrieved by the pay rate set for the home health aide services provided by the claimant's sister. In concluding that the appeal therein must be dismissed because the claimant was not aggrieved, this Court did not, as found by the Board, tacitly overrule any prior decisions of this Court with regard to whom reimbursement of payments is to be made with regard to home health care services provided by a spouse or family member. As we find no basis to depart from this Court's prior case law that, under such circumstances, '[t]he amount of the award . . . must be paid only to the claimant,' the Board's decision must be reversed ...". ***Matter of Buckner v. Buckner & Kourofsky, LLP*, 2017 N.Y. Slip Op. 05650, 3rd Dept, 7-13-17**

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