June 10, 2015

CasePrepPlus

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COURT OF APPEALS

FAMILY LAW. JUVENILE DELINQUENCY. CRIMINAL LAW. SUPPRESSION OF STATEMENT. CUSTODIAL INTERROGATION. MIRANDA WARNINGS. JUSTIFICATION DEFENSE. HARMLESS ERROR.

The Appellate Division properly found that the "unwarned" statement made by 11-year-old Delroy should have been suppressed. The statement was made in Delroy's apartment when a police officer asked him "what happened?" Under the circumstances, "a reasonable 11 year old would not have felt free to leave" at the time the question was asked. Therefore the question amounted to "custodial interrogation" in the absence of the Miranda warnings. The Court of Appeals, disagreeing with the Appellate Division, ruled the error was not harmless because the statement undermined Delroy's defense of justification. There was no question Delroy stabbed the 12-year-old complainant. But questions were raised by the trial testimony whether the stabbing was in self-defense. The court explained the proof burdens for "harmless error" and the justification defense. **Matter of Delroy S., 2015 NY Slip Op 04676, CtApp 6-4-15**

MORTGAGE FORECLOSURE. DEFICIENCY JUDGMENTS. FAIR MARKET VALUE. REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

Supreme Court properly failed to award a post-foreclosure-sale deficiency judgment to the bank because the bank's proof of the fair market value of the foreclosed property, although uncontested, was insufficient. However, Supreme Court should have allowed the bank to present additional proof establishing the fair market value: "It is … within the court's discretion to elucidate the type of proof it requires so it can render a proper determination as to fair market value. The court may … order a hearing if it deems one necessary. … Lenders seeking deficiency judgments, however, must always strive to provide the court with all the necessary information in their first application." **Flushing Sav. Bank, FSB v Bitar, 2015 NY Slip Op 04678, CtApp 6-4-15**

TRUSTS AND ESTATES. WILLS. REVOCATION BY DESTRUCTION.

There was an open question whether a 1996 will had been revoked. No will was found upon decedent's death in 2010 and letters of administration were issued to decedent's parents. Petitioner sought to revoke the letters and admit to probate a 1996 will which was drawn up when decedent was married to petitioner's son. (Petitioner had been named executor in the 1996 will.) The 1996 will left all of decedent's property to her then-husband (petitioner's son). Decedent and petitioner's son divorced in 2007. Based upon the testimony of decedent's ex-husband (petitioner's son), the majority concluded it was possible there were four "duplicate original" 1996 wills, one of which had been in the possession of the decedent at her Clayton, New York, residence. Because that will was not found after a thorough search, a presumption arose that the 1996 will had been destroyed by the decedent and thereby revoked. The open questions concerning whether decedent was in possession of a "duplicate original" 1996 will (as opposed to merely a copy), and whether that will was revoked by destruction, should have been resolved before admitting the 1996 will to probate. The matter was remitted to Surrogate's Court to settle the open questions. **Matter of Lewis, 2015 NY Slip Op 04674, CtApp 6-4-15**

FIRST DEPARTMENT

ADMINISTRATIVE LAW. NEW YORK CITY TAXI AND LIMOUSINE COMMISSION (TLC). AGENCY'S EXCEEDING ITS AUTHORITY.

The New York City Taxi and Limousine Commission (TLC) exceeded its authority and acted arbitrarily and capriciously when it promulgated "Health Care Rules" and determined six cents per taxi-fare could be deducted for the purpose of providing healthcare services and disability coverage for "medallion" taxi cab drivers: "First, the record demonstrates that, in its attempt to establish a cost-effective structure for promoting driver health, TLC, motivated by broad 'economic and social concerns,' was making policy, and therefore was 'operating outside of its proper sphere of authority" ... . Second, TLC manufactured a 'comprehensive set of rules without benefit of legislative guidance' ... . TLC has certain delineated powers

to ensure that drivers are capable of driving safely (see New York City Charter § 2300; Administrative Code of City of NY §§ 19-505[b][3], [d], [h], [l]; 19-512.1[a]). However, nothing in the Charter or the enabling Code provisions contemplates the establishment and outsourcing of a miniature health insurance navigation and disability insurance department. Third, no expertise in the field of health care services or disability insurance was involved in the development of the rule (indeed, this is not TLC's area of expertise), a fact highlighted by the lack of technical discussion at the hearings on the proposed rule amendments ..." . **Matter of Ahmed v City of New York, 2015 NY Slip Op 04733, 1st Dept, 6-4-15**

CRIMINAL LAW. SHOW-UP IDENTIFICATION.

The show-up identification of the defendants was unduly suggestive and should have been suppressed. While none of the "suggestive" factors alone would have been sufficient to invalidate the identification, the cumulative effect of all the factors rendered the identification inadmissible. The defendants were handcuffed and standing together in a well-lit garage, surrounded by police officers. The driver of the police car carrying the complainant, who had been assaulted an hour before by "three or four black teens," shown the car's headlights and "takedown" lights on the defendants. The defendants, none of whom were "teens," and one of whom was light-skinned, were covered in soot. The complainant looked at the defendants through the police car's mesh divider and windshield. In addition, there were no "exigent circumstances" mandating the show-up procedure. **People v Cruz, 2015 NY Slip Op 04597, 1st Dept 6-2-15**

NEGLIGENCE. FORESEEABILITY. OVERBOOKED THEATER. CROWD-RELATED INJURY ("STAMPEDE").

The First Department determined there was a question of fact whether it was foreseeable that overbooking a movie theater would result in crowd-related problems. Here plaintiff alleged she was injured in a "stampede" which occurred when she and the group she was with were told to turn around and go back downstairs. **Sachar v Columbia Pictures Indus., Inc., 2015 NY Slip Op 04717, 1st Dept 6-4-15**

SECOND DEPARTMENT

ATTORNEYS. LICENSE TO PRACTICE LAW. IMMIGRATION LAW. UNDOCUMENTED IMMIGRANTS. DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA). JUDICIARY LAW. TENTH AMENDMENT.

The State of New York can issue a license to practice law to an undocumented immigrant who is qualified for admission to the bar. The court wrote: "We are called upon to determine whether an undocumented immigrant, who is authorized to be present in the United States under the auspices of the Deferred Action for Childhood Arrivals policy of the federal government, and who meets the statutory eligibility requirements and the rules of court governing admission to the practice of law in the State of New York, may satisfy the standard of good character and general fitness necessary for admission. We are further called upon to determine whether such an individual is barred from admission to the practice of law by a federal statute, 8 USC § 1621, which generally prohibits the issuance of state professional licenses to undocumented immigrants unless an individual state has enacted legislation affirmatively authorizing the issuance of such licenses. This presents an issue of first impression in New York and, in terms of the applicability of 8 USC § 1621 and its compatibility with the Tenth Amendment of the United States Constitution, an issue of first impression nationwide. * * * … [W]e answer the first question in the affirmative and the second question in the negative." **Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York., 2015 NY Slip Op 04657, 2nd Dept 6-3-15**

CIVIL PROCEDURE. AMENDMENT OF PLEADINGS TO CONFORM TO THE PROOF. CONTRACT LAW. NEGLIGENCE.

Plaintiffs should have been allowed to amend the pleadings to conform to the proof at trial. The complaint alleged breach of contract and negligence re: the installation of foam insulation. The contract called for the installation to conform to the manufacturer's specifications. The negligence cause of action alleged the work was not done in a good and workmanlike manner. Because amendment would not have prejudiced the defendant, Supreme Court should have allowed plaintiffs to amend the breach of contract cause of action to allege the work was not done in a good and workmanlike manner. Plaintiffs' motion pursuant to CPLR 4404(b) for judgment in their favor on the breach of contract cause of action should have been granted. The negligence cause of action, which essentially duplicated the breach of contract cause of action, should have been dismissed. **Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc., 2015 NY Slip Op 04615, 2nd Dept 6-3-15**

CIVIL PROCEDURE. PRESUMPTION OF PROPER MAILING AND RECEIPT OF SUMMONS AND COMPLAINT.

Defendant's claims he was out of the country when the summons and complaint were mailed and never received them were insufficient to overcome the presumption of receipt based upon proof of proper mailing by ordinary mail. **Williamson v Marlou Cab Corp., 2015 NY Slip Op 04636, 2nd Dept 6-3-15**

CIVIL PROCEDURE. VENUE. CONSOLIDATED ACTIONS.

In a medical malpractice case, the Second Department determined Supreme Court properly exercised its discretion re: the venue of the consolidated actions. Although the venue of the initial action (Queens County) should usually serve as the venue of the consolidated actions, here the medical treatment was rendered at a hospital in Nassau County, many individual defendants resided in Nassau County, and the plaintiffs themselves resided in Nassau County at the time each action was commenced—making Nassau County the best venue for the proceedings. **Castro v Durban, 2015 NY Slip Op 04600, 2nd Dept 6-3-15**

CONTRACT LAW. DOCTRINE OF DEFINITENESS. UNJUST ENRICHMENT.

Supreme Court properly granted the motion to dismiss the breach of contract cause of action because, pursuant to the "doctrine of definiteness," the terms of the purported contract were too indefinite and uncertain to be enforceable. However, Supreme Court should not have dismissed the unjust enrichment cause of action. The court noted that unjust enrichment, or quasi contract, only applies in the absence of an express agreement and is really not a contract, but rather an equitable obligation. Here plaintiff alleged that defendant took possession of millions of dollars worth of watches and refused to pay for them. Therefore, the complaint alleged the elements of unjust enrichment—(1) defendant was enriched at (2) plaintiff's expense and (3) it is against equity to allow the defendant to keep what is sought to be recovered. **UETA Latinamerica, Inc. v Zafir, 2015 NY Slip Op 04633, 2nd Dept 6-3-15**

EMPLOYMENT DISCRIMINATION. RETALIATION FOR OPPOSITION TO EMPLOYMENT DISCRIMINATION. EMPLOYMENT LAW. EXECUTIVE LAW. 42 USC 1981, 1983.

In determining the employer's (State of New York's) motion for summary judgment was properly granted, the Second Department succinctly explained the elements of an action for discrimination in employment and an action for retaliation for an employee's opposition to discriminatory practices. Re: discrimination in employment: "A plaintiff alleging discrimination in employment has the initial burden to establish a prima facie case of discrimination ... . To meet this burden, the plaintiff must show that (1) he or she is a member of a protected class; (2) he or she was qualified to hold the position; (3) he or she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination ... . The burden then shifts to the employer 'to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision' ... . To succeed on the claim, 'the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason. ... ". Re: retaliation: "In order to make out a claim for retaliation, a plaintiff must show that (1) he or she has engaged in protected activity; (2) his or her employer was aware of such activity; (3) he or she suffered an adverse employment action based upon the protected activity; and (4) there is a causal connection between the protected activity and the adverse action ... ". **Cotterell v State of New York, 2015 NY Slip Op 04601, 2nd Dept 6-3-15**

FREEDOM OF INFORMATION LAW (FOIL). PUBLIC OFFICERS LAW. MUGSHOTS. ARRESTEE IDENTIFICATION.

Petitioner sought mugshots and other identifying information re: arrestees from the NYC Department of Corrections (DOC) for posting on his website. Petitioner charged a fee for removing a photo from the site. DOC denied the request. Supreme Court denied the Article 78 petition seeking reversal of the DOC's denial. The Second Department determined DOC did not meet its burden of demonstrating the applicability of any of the statutory exemptions from disclosure in the Public Officers Law (DOC's assertions were "conclusory"), but went on to determine release of the photos and information would constitute an unwarranted invasion of privacy and may endanger the life or safety of the arrestees. **Matter of Prall v New York City Dept. of Corrections, 2015 NY Slip Op 04653, 2nd Dept 6-3-15**

INSURANCE LAW. BREACH OF FIDUCIARY DUTY. "SPECIAL DUTY." BROKER-CLIENT RELATIONSHIP.

In determining defendants' motion to dismiss the "breach of fiduciary duty" cause of action was properly granted, the Second Department explained that an insurance broker can be liable to a client for breach of a fiduciary duty only when a "special relationship" over and above the ordinary broker-client relationship exists. Here, the plaintiffs failed to allege the existence of a "special relationship." The court explained: "The Court of Appeals has identified three 'exceptional situations' which may give rise to such a special relationship: '(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on'… ". **Waters Edge @ Jude Thaddeus Landing, Inc. v B & G Group, Inc., 2015 NY Slip Op 04634, 2nd Dept 6-3-15**

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. MUNICIPAL LAW.

The Second Department noted that, as a matter of public policy, an intentional infliction of emotional distress cause of action cannot be brought against a governmental entity. Since the respondents were sued only in their official capacities, the cause of action was properly dismissed. **Matter of Gottlieb v City of New York, 2015 NY Slip Op 04645, 2nd Dept 6-3-15**

LABOR LAW. PERSONAL INJURY. THREE-AND-ONE-HALF-FOOT FALL.

The Second Department determined plaintiff's Labor Law 240(1) cause of action should not have been dismissed. Plaintiff climbed up scaffolding to access a platform and, as he attempted to climb over the three-and-a-half-foot platform railing, plaintiff fell to the platform and was injured. Plaintiff was not instructed to access the platform any other way, so plaintiff's failure to use a ladder located 25 to 30 feet away could not be considered the sole proximate cause of the accident. In addition, the Second Department noted that the Labor Law 241(6) cause of action should not have been dismissed. Plaintiff's failure to state the particular provision of the Industrial Code alleged to have been violated in the complaint or bill of particulars was not fatal to the cause of action. The belated identification of the relevant code provision involved no new factual allegations and no new theories of liability. The Second Department also held the Labor Law 200 cause of action should not have been dismissed, explaining the elements. **Doto v Astoria Energy II, LLC, 2015 NY Slip Op 04605, 2nd Dept 6-3-15**

MORTGAGE FORECLOSURE. STANDING.

The Second Department determined plaintiff-bank did not demonstrate it had possession of the note at the time the action was commenced, and therefore the bank did not have standing to bring the foreclosure action. **Flagstar Bank, FSB v Anderson, 2015 NY Slip Op 04606, 2nd Dept 6-3-15**

NEGLIGENCE. LEGAL MALPRACTICE. ATTORNEYS. CRIMINAL LAW.

Defendant-attorney's motion for summary judgment dismissing the legal malpractice complaint should have been granted. Plaintiff, when represented by defendant-attorney, was convicted of sex offenses. The conviction was overturned on "ineffective assistance of counsel" grounds. Plaintiff was acquitted upon retrial. In the legal malpractice action, the plaintiff was unable to prove the element of causation. Defendant-attorney demonstrated plaintiff's conviction was not due solely to defendant-attorney's conduct, but was based in part on plaintiff's "guilt," in that her children provided graphic testimony alleging sexual abuse. To succeed in a legal malpractice action stemming from a criminal matter, the plaintiff must at least have a colorable claim of actual innocence. In addition, the nonpecuniary damages sought by the plaintiff (psychological injury due to her incarceration) are not recoverable in a legal malpractice action. **Dawson v Schoenberg, 2015 NY Slip Op 04603, 2nd Dept 6-3-15**

NEGLIGENCE. PERSONAL INJURY. MEDICAL MALPRACTICE. DUTY OF ON-CALL PHYSICIAN WHO DID NOT TREAT PLAINTIFF. IMPLIED PHYSICIAN-PATIENT RELATIONSHIP. MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION. SUMMARY JUDGMENT.

Plaintiff alleged that the defendant on-call plastic surgeon should have treated infant plaintiff whose facial lacerations were sutured by a physician's assistant (resulting in excess pain and scarring). The defendant on-call plastic surgeon, after being notified of plaintiff's condition by phone, informed hospital personnel his services were not needed to treat the plaintiff. The surgeon brought a motion to dismiss for failure to state a cause of action, and a motion for summary judgment, on the ground that he did not treat the plaintiff and, therefore, there existed no physician-patient relationship giving rise to a duty on his part. The Second Department, after explaining the criteria for both types of motions, determined the motions were properly denied. Although the surgeon did not treat the plaintiff, a question was raised whether an "implied physician-patient relationship" existed by virtue of the surgeon's communication with hospital personnel indicating his services were not needed for the plaintiff's wounds. **Pizzo-Juliano v Southside Hosp., 2015 NY Slip Op 04626, 2nd Dept 6-3-15**

NEGLIGENCE. PERSONAL INJURY. OPEN AND OBVIOUS CONDITION.

Plaintiff was injured when he stepped on a dock from a boat. Plaintiff alleged the dock was slippery. The Second Department determined Supreme Court should have granted defendant's motion for summary judgment because a landowner has no duty to protect against an open and obvious condition. **Mossberg v Crow's Nest Mar. of Oceanside, 2015 NY Slip Op 04618, 2nd Dept 6-3-15**

NEGLIGENCE. PERSONAL INJURY. TREE WELLS. SIDEWALKS.

The Second Department noted that, pursuant to the New York City Administrative Code, abutting property owners are not responsible for falls within city-owned tree wells (within sidewalks). Defendant's motion for summary judgment should have been granted. **Newkirk v City of New York, 2015 NY Slip Op 04620, 2nd Dept 6-3-15**

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The plaintiffs alleged defendants defrauded them in connection with a deed which purported to transfer plaintiffs' property and the related mortgages to a third party. In addition to the action to quiet title pursuant to Real Property Actions and Proceedings Law, the plaintiffs alleged causes of action for negligent and intentional infliction of emotional distress (among several others). The Second Department determined those causes of action were properly dismissed and explained the pleading defects, notably (1) the absence of a duty which could give rise to tort liability, (2) the failure to allege plaintiffs' "physical safety" was endangered (negligent infliction of emotional distress), and (3) the failure to allege sufficiently extreme and outrageous conduct (intentional infliction of emotional distress). **Pirrelli v OCWEN Loan Servicing, LLC, 2015 NY Slip Op 04625, 2nd Dept 6-3-15**

THIRD DEPARTMENT

ADMINISTRATIVE LAW. EDUCATION-SCHOOL LAW. DEPARTMENT OF EDUCATION'S FAILURE TO FOLLOW ITS OWN REGULATIONS RENDERED ITS RULING "ARBITRARY AND CAPRICIOUS."

The NYS Education Department did not follow its own regulations in calculating the amounts due petitioner for special education services for preschool children with disabilities. Failure to follow the regulations rendered the calculation "arbitrary and capricious." The Education Department ignored petitioner's audited Consolidated Fiscal Report and relied upon unaudited information from the relevant municipalities. "Consistent with its own regulations, [the Education Department] cannot simply reject audited information by reason of the existence of less reliable information without some articulable rational basis." **Matter of Mid Is. Therapy Assoc., LLC v New York State Educ. Dept., 2015 NY Slip Op 04707, 3rd Dept 6-4-15**

ADMINISTRATIVE LAW. CIVIL SERVICE LAW. AGENCY'S EXCEEDING ITS AUTHORITY.

Notwithstanding a statutory provision prohibiting judicial review when the employee elects to appeal to the Civil Service Commission (before seeking judicial review), the courts have the power to review the agency's determination when the agency has acted in excess of its jurisdiction. Here, the petitioner asserted her employment was terminated based on charges brought after the statute of limitations on those charges had passed. The Third Department agreed. Although there is an exception to the application of the one-year statute of limitations when the charges constitute crimes, here the allegations of misconduct did not include the requisite *mens rea* for the crime of official misconduct (intent to gain a benefit and knowledge the conduct was unauthorized). Therefore the one-year statute of limitations applied. **Matter of De Guzman v State of New York Civ. Serv. Commn., 2015 NY Slip Op 04712, 3rd Dept 6-4-15**

ARBITRATION. EMPLOYMENT LAW. PUBLIC EMPLOYEES. CIVIL SERVICE. COLLECTIVE BARGAINING AGREEMENTS. UNIONS. MUNICIPAL LAW. COUNTY LAW.

Reversing Supreme Court, the Third Department determined the grievance concerning the length of the probationary period for new employees was arbitrable. The union contended the county had imposed a longer period of probation on a new employee than the 26 weeks allowed by the collective bargaining agreement (CBA). The county civil service commission, prior to the execution of the CBA, had adopted a resolution describing the period of probation for new employees as ranging from eight to 52 to weeks. The Third Department determined there was no statutory, constitutional or public policy prohibition to arbitration of the grievance. And the broad arbitration clause in the CBA covered the grievance at issue. **Matter of County of Greene (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO, Greene County Unit 7000, Greene County Local 820), 2015 NY Slip Op 04709, 3rd Dept 6-4-15**

CIVIL PROCEDURE. "PREMATURE" MOTION FOR SUMMARY JUDGMENT.

In the course of a decision concerning an easement and land ownership, the Third Department explained the proof requirements for a claim that a summary judgment motion should be dismissed as "premature" and determined there was no basis for such a dismissal here. The essence of the "premature" argument is that material facts are within the exclusive knowledge and possession of the moving party. The argument, to succeed, must be supported by an evidentiary showing. Here, defendant argued that plaintiff failed to respond to certain discovery demands, but did not take the next step and demonstrate how the failure to respond deprived him of material information in plaintiff's exclusive possession. **Bailey v Dimick, 2015 NY Slip Op 04704, 3rd Dept 6-4-15**

CRIMINAL LAW. PLEA ALLOCUTION. VOLUNTARINESS OF PLEA. WAIVER OF APPEAL. APPEALS.

Defendant's guilty plea must be vacated, despite a failure to preserve the error and a waiver of appeal. During the plea allocution, defendant denied elements of the offense to which he was pleading guilty (strangulation in the second degree).

Defendant denied that the victim experienced a loss of consciousness or any injury, and denied he had the intent to impede the breathing of the victim. The guilty plea, therefore, was not knowing, intelligent and voluntary (constituting an exception to the "preservation of error" requirement). **People v Mcmillan, 2015 NY Slip Op 04680, 3rd Dept 6-4-15**

CRIMINAL LAW. WAIVER OF APPEAL. INTEREST OF JUSTICE APPELLATE JURISDICTION. APPEALS.

Defendant's waiver of his right to appeal was invalid and his guilty plea was therefore vacated (in the interest of justice), despite the failure to preserve the error: "[A] trial court is neither required 'to specifically enumerate all the rights to which the defendant was entitled [or] to elicit . . . detailed waivers before accepting [a] guilty plea' ..., nor engage in 'a uniform mandatory catechism of pleading defendants' ... . There must, however, 'be "an affirmative showing on the record" that the defendant waived his [or her] constitutional rights' ... . County Court made no effort to explain the rights that defendant was giving up by pleading guilty, making nothing more than a passing reference to them when asking if defendant had 'any questions.' County Court further failed to establish that 'defendant consulted with his attorney about the constitutional consequences of a guilty plea,' instead making a vague inquiry into whether defendant had spoken to defense counsel regarding 'the plea bargain' and 'the case'...". **People v Klinger, 2015 NY Slip Op 04682, 3rd Dept 6-4-15**

EDUCATION-SCHOOL LAW. INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA). STATUTORY INTERPRETATION. PRIVATE RIGHT OF ACTION BY LOCAL EDUCATONAL AGENCIES (LEA'S).

The Individuals with Disabilities Education Act (IDEA) does not give local educational agencies (LEAs) (here a local school district) a private right of action to challenge a ruling by the State Education Department (SED). Here the SED found that the LEA's dispute resolution practices violated state laws and regulations promulgated in accordance with the IDEA and ordered corrective measures. The LEA then challenged the SED's rulings in an Article 78 action. The Third Department noted that the IDEA does not expressly confer a right of private action on LEAs in this context and therefore whether such a right exists depends upon congressional intent. Because the IDEA confers a private right of action upon a specialized class, i.e., "any party aggrieved" by IDEA-related administrative proceedings which involve due process afforded a particular child, it follows that Congress did not intend to confer such a right upon LEAs. **Matter of East Ramapo Cent. Sch. Dist. v King, 2015 NY Slip Op 04703, 3rd Dept 6-4-15**

FAMILY LAW. FAMILY COURT ACT. JUVENILE DELINQUECY. INITIAL APPEARANCE, TIMING OF. RIGHT TO SPEEDY FACT-FINDING HEARING.

The failure to conduct an initial appearance within 10 days of the filing of the juvenile delinquency petition (charging the equivalent of assault and criminal possession of a weapon) did not require dismissal of the petition. The court attempted to conduct the initial appearance within 10 days but respondent failed to appear and no timeliness objection was raised when the initial appearance was conducted five days later. The 10-day "initial appearance" requirement is flexible, but the requirement that a fact-finding hearing be conducted within 60 days of the initial appearance is mandatory (Family Court Act 320.2, 320.4, 340.1). **Matter of Daniel B., 2015 NY Slip Op 04698, 3rd Dept 6-4-15**

LABOR LAW. PERSONAL INJURY.

Plaintiff was injured when a component of scaffolding fell about two feet and struck him. The Third Department determined the incident was not the result of a circumstance covered by Labor Law 240(1) (the absence of statutorily-required safety equipment), even though the incident was "gravity-related." However, the Labor Law 246(1) cause of action, alleging a violation of a provision of the Industrial Code, and the Labor Law 200 cause of action against the general contractor which supervised and controlled the work, should not have been dismissed. **Christiansen v Bonacio Constr., Inc., 2015 NY Slip Op 04700, 3rd Dept 6-4-15**

MORTGAGES. NOTES. DEBTOR-CREDITOR. STATUTE OF LIMITATIONS.

The Third Department, reversing Supreme Court, determined a Consolidation, Extension and Modification Agreement (CEMA) did not extinguish a note which was extended and consolidated under the agreement (and therefore did not start the statute of limitations "clock" for action on the note): " 'It is well established that a subsequent note does not discharge the original indebtedness secured unless there is an express agreement between the parties.' " **Bechard v Monty's Bay Recreation, Inc., 2015 NY Slip Op 04711, 3rd Dept 6-4-15**

MORTGAGE FORECLOSURE. STANDING.

The Third Department determined plaintiff-bank did not demonstrate it had possession of the note at the time the action was commenced, and therefore the bank did not have standing to bring the foreclosure action. **Bank of Am., N.A. v Kyle, 2015 NY Slip Op 04705, 3rd Dept 6-4-15**

NEGLIGENCE. LEGAL MALPRACTICE. TRUSTS AND ESTATES. ATTORNEYS. PRIVITY.

The Third Department determined the plaintiff-beneficiary of an estate represented by defendants-attorneys in medical malpractice and wrongful death actions could not bring a legal malpractice action against the attorneys (based upon the medical malpractice and wrongful death actions) because no attorney-client relationship existed. Absent fraud or collusion, the absence of privity between the beneficiary and the attorneys precluded the legal malpractice action. **Sutch v Sutch-Lenz, 2015 NY Slip Op 04692, 3rd Dept 6-4-15**

NEGLIGENCE. PERSONAL INJURY. PRODUCTS LIABILITY. DEFECTIVE DESIGN.

The Third Department determined questions of fact had been raised about whether a machine was defectively designed. Plaintiff was injured when he attempted to make adjustments while the machine was running. There was evidence the adjustments could have been made safely using another access point. The court provided a good explanation of the elements of a defective-design cause of action: "Liability for a defectively designed product 'attaches when the product, as designed, presents an unreasonable risk of harm to the user' ... . A successful cause of action for defective design exists where a plaintiff is able to establish 'that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury' ... . To demonstrate a product was not 'reasonably safe,' the injured party must demonstrate both that there was a substantial likelihood of harm and that 'it was feasible to design the product in a safer manner' … . A claim may be defeated where a defendant demonstrates that the product's 'utility outweighs its risks [because] the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost' ... . This 'risk-utility analysis' requires consideration of '(1) the product's utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) the availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safety-related design changes'... . Generally, the risk/utility analysis presents a factual question for a jury ... ". **Barclay v Techno-Design, Inc., 2015 NY Slip Op 04708, 3rd Dept 6-4-15**

REAL PROPERTY. ADVERSE POSSESSION.

Reversing Supreme Court's grant of summary judgment to the plaintiffs on their adverse-possession claim, the Third Department determined a question of fact had been raised about whether plaintiffs' use of the disputed land was with the defendants' permission, which would defeat the "hostility" element of adverse possession. The Third Department offered a detailed fact-based analysis which provides an excellent lesson on the law of adverse possession. The court noted, on the issue of exclusivity, the claim that defendants occasionally maintained the disputed property during the plaintiffs' absence was not enough to raise a question of fact about the plaintiffs' exclusive use of the property. **Bergmann v Spallane, 2015 NY Slip Op 04713, 3rd Dept 6-4-15**

WORKERS' COMPENSATION LAW. ADMINISTRATIVE LAW. STATUTORY CONSTRUCTION.

In the context of a "conciliation process" pursuant to Workers' Compensation Law 25, the Third Department explained the court's role in reviewing the determination of an agency when statutory construction is the sole issue. Unlike the factual determinations of an agency, to which courts must defer, no such deference is afforded an agency's construction of a statute. Reversing the Workers' Compensation Board, the Third Department held that the statute unambiguously entitled claimant to a penalty imposed upon the employer for failure to timely make compensation payments. **Matter of Liberius v New York City Health & Hosps. Corp., 2015 NY Slip Op 04706, 3rd Dept 6-4-15**

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