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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

INSURANCE LAW, EVIDENCE.

INSURER MUST DEMONSTRATE COMPLIANCE WITH 30-DAY NOTICE REQUIREMENT RE: AN INDEPENDENT MEDICAL EXAMINATION (IME).

The First Department, over a dissent, affirmed Supreme Court's denial of plaintiff-insurer's motion for summary judgment which argued the insurer was not obligated to provide no-fault insurance coverage because defendant did not appear for a scheduled independent medical examination (IME). In order to be entitled to summary judgment, the insurer was required to show that it notified defendant of the IME within 30 days of the insurer's receipt of the verification form from the defendant. Plaintiff's papers did not state when the verification form was received by it. Therefore, the plaintiff could not show it complied with the 30-day-notice requirement. The court noted that the issue could be determined as a matter of law and the defect could not be cured in reply papers: "Contrary to the position taken by the dissent, the issue of whether plaintiff has failed to establish that the notices for the IMEs were timely, pursuant to 11 NYCRR 65-3.5(d), presents a question of law which this Court can review. Unlike the dissent, we find that plaintiff was required to submit proof of the timely notice in order to make a prima facie showing of entitlement to judgment as a matter of law. Any belated attempt by plaintiff to cure this deficiency in its prima facie showing by submitting evidence for the first time in reply would have been improper ...".

American Tr. Ins. Co. v Longevity Med. Supply, Inc., 2015 NY Slip Op 06761, 1st Dept 9-15-15

LABOR LAW, PERSONAL INJURY, EVIDENCE.

TESTIMONY WHICH COULD HAVE ADDED RELEVANT EVIDENCE ABOUT THE NATURE OF PLAINTIFF'S WORK (PRE-INJURY) AND THE EFFECTS OF THE INJURIES SHOULD NOT HAVE BEEN EXCLUDED AS "CUMULATIVE."

Plaintiff in a Labor Law 240(1) action was entitled to a new trial because the trial judge should not have excluded the testimony of a co-worker and plaintiff's wife as "cumulative." The court explained: "[A] new trial on damages is necessitated, because we disagree with the court's preclusion of testimony by plaintiff's wife and coworker. Testimony is properly precluded as cumulative when it would neither contradict nor add to that of other witnesses ... . Here, the testimony of plaintiff's wife and his coworker would have added to the testimony of other witnesses. First, the coworker saw plaintiff fall, and his testimony as to the impact to plaintiff's foot could have been highly probative of plaintiff's claim that the continuing pain in his foot was caused by the accident and did not pre-exist it, as defendants argued. Further, the coworker could have testified as to the particular duties carried out by plaintiff as a heavy-construction carpenter, which would have supported plaintiff's position that as a result of his injury he could no longer perform that kind of work. To be sure, plaintiff testified about his job duties, but the coworker's status as a disinterested witness would have given his testimony added value to the jury ... . Nor was the proffered testimony of plaintiff's wife likely to be cumulative, notwithstanding her not having asserted a derivative claim. The wife had a unique perspective on her husband's condition before and after the accident, and could have assisted the jury in further understanding the extent of his disability and of his pain and suffering."

Segota v Tishman Constr. Corp. of N.Y., 2015 NY Slip Op 06764, 1st Dept 9-15-15

SECOND DEPARTMENT

CIVIL PROCEDURE.

REJECTION OF ANSWER BASED UPON A DEFECTIVE VERIFICATION WAS INEFFECTIVE BECAUSE THE REASON FOR REJECTION WAS NOT ADEQUATELY EXPLAINED, SUPREME COURT PROPERLY IGNORED THE DEFECT BECAUSE IT CAUSED NO PREJUDICE.

The Second Department affirmed the denial of plaintiffs' motion to enter a judgment on the ground defendant failed to appear in the action. The plaintiffs had rejected defendant's answer because the verification was defective. The Second Department noted (1) the rejection of the answer was not effective because it was not accompanied by an adequate explanation of the nature of the alleged defect and (2), because plaintiffs suffered no prejudice, Supreme Court properly ignored the defect: " 'Pursuant to CPLR 3022, when a pleading is required to be verified, the recipient of an unverified or defectively verified pleading may treat it as a nullity provided that the recipient with due diligence returns the [pleading] with noti-

fication of the reason(s) for deeming the verification defective' ... . Here, at the outset, the plaintiffs' rejection of the defendant's answer was ineffective, as it failed to specify the reasons or objections with sufficient specificity ... . Moreover, as the Supreme Court properly found, the plaintiffs suffered no prejudice. Accordingly, the complained-of defect was properly 'ignored' by the Supreme Court ...". **Gaffey v Shah, 2015 NY Slip Op 06779, 2nd Dept 9-16-15**

CIVIL PROCEDURE.

"DUE DILIGENCE" DEMONSTRATED, "NAIL AND MAIL" SERVICE APPROPRIATE.

In a foreclosure action, plaintiff bank demonstrated "due diligence" in attempting personal service on the homeowner, such that the "nail and mail" service was appropriate: "Service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with due diligence (see CPLR 308[4] ...). The term 'due diligence,' which is not defined by statute, has been interpreted and applied on a case-by-case basis ... . Indeed, the Court of Appeals has stated that 'in determining the question of whether due diligence has been exercised, no rigid rule could properly be prescribed' ... . As a general matter, the 'due diligence' requirement may be met with 'a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times' ... . Here, the affidavit of the process server demonstrated that three visits were made to the homeowner's residence on three different occasions and at different times, when the homeowner could reasonably have been expected to be found at that location ... . The process server also described in detail his unsuccessful attempt to obtain an employment address for the homeowner ... . Contrary to the homeowner's contention, under these circumstances, the due diligence requirement was satisfied ...". **Wells Fargo Bank, NA v Besemer, 2015 NY Slip Op 06806, 2nd Dept 9-16-15**

CIVIL RIGHTS LAW, CIVIL PROCEDURE.

LAW OF PLAINTIFF'S RESIDENCE APPLIED TO ACTION ALLEGING INJURY FROM USE OF PLAINTIFF'S IMAGE AND VOICE (VIDEO CLIP) ON A TELEVISION SHOW.

New York law, not California law, applied to plaintiff's complaint alleging injury stemming from the use of a video clip, in which plaintiff appeared, on a television show. The plaintiff resided in New York, and the video clip was edited in California. The complaint alleged violation of California law. The Second Department explained why New York law applied and further determined that the video clip did not violate New York's Civil Rights Law (sections 50 and 51) because the clip was not used for advertising. With respect to the conflict of laws issue, the court wrote: "New York uses an interest analysis, under which 'the law of the jurisdiction having the greatest interest in resolving the particular issue' is given controlling effect ... . Pursuant to the interest analysis, '[a] distinction [is made] between laws that regulate primary conduct (such as standards of care) and those that allocate losses after the tort occurs' ... . If the conflicting laws regulate conduct, the law of the place of the tort 'almost invariably obtains' because 'that jurisdiction has the greatest interest in regulating behavior within its borders' ... . '[W]here the plaintiff and defendant are domiciled in different states, the applicable law in an action where civil remedies are sought for tortious conduct is that of the situs of the injury' ... . Applying these principles, the law of New York, where the alleged injury or damage occurred, applies. Although the alleged tortious conduct, the editing of the video clip, occurred in California, the plaintiff's alleged injury occurred in New York, where he is domiciled and resides. Moreover, New York is the state with the greater interest in protecting the plaintiff, its citizen and resident." **Sondik v Kimmel, 2015 NY Slip Op 06803, 2nd Dept 9-16-15**

CRIMINAL LAW.

FAILURE TO PROVIDE REASON FOR DENIAL OF YOUTHFUL OFFENDER STATUS REQUIRED REMITTAL.

The Second Department remitted the matter to Supreme Court because Supreme Court did not place on the record its reasons for denying youthful offender status to the defendant, and there was no indication that Supreme Court considered whether to afford defendant youthful offender status. **People v T.E., 2015 NY Slip Op 06827, 2nd Dept 9-16-15**

CRIMINAL LAW.

SEVERAL SIMILAR THEFTS FROM THE SAME STORE CONSTITUTED A SINGLE, CONTINUING CRIME.

Defendant, who stole items from a store on a series of separate occasions, had committed a continuing crime and therefore was properly prosecuted for stealing merchandise worth more than $1,000: "The evidence presented at trial demonstrated that the defendant took similar expensive electronic merchandise from the same store on each occasion, under virtually the same circumstances, and with the assistance of the driver of the minivan. Contrary to the position of our dissenting colleague, we find that this evidence sufficiently established that the defendant stole merchandise 'with a single [ongoing] intent, carried out in successive stages' …". **People v Malcolm, 2015 NY Slip Op 06829, 2nd Dept 9-16-15**

CRIMINAL LAW.

THE UNJUSTIFIED DENIAL OF DEFENSE COUNSEL'S REQUEST TO WITHDRAW A PEREMPTORY CHALLENGE WAS, UNDER THE FACTS, SUBJECT TO A HARMLESS ERROR ANALYSIS.

The trial court erred when it denied defense counsel's request to withdraw a peremptory challenge to a juror. However, the error was deemed harmless because of the nature of the evidence against the defendant. On appeal the Second Department primarily addressed whether the harmless error analysis applied to the withdrawal of a peremptory challenge: "The defendant contends that the Supreme Court's improper denial of his request to withdraw his peremptory challenge is not subject to harmless error analysis, since the error deprived him of his constitutional right to a jury in whose selection he had a voice ... . We disagree. While peremptory challenges 'are a mainstay in a litigant's strategic arsenal,' they are 'not a trial tool of constitutional magnitude' ... . The right to exercise peremptory challenges 'is protected by the Criminal Procedure Law, which provides that each party must be allowed an equal number of peremptory challenges and that a court must exclude any juror challenged, ... Therefore, 'the unjustified denial of a peremptory challenge violates CPL 270.25(2) and requires reversal without regard to harmless error' ... . However, there is no statutory right to withdraw a peremptory challenge. Further, the instant case does not involve a situation in which the People attempted to peremptorily challenge a juror who had been accepted by the defense in violation of CPL 270.15(2), inasmuch as the People did not object to the defendant's request to withdraw the peremptory challenge ... . Moreover, the defendant was not prejudiced by the loss of the peremptory challenge since, at the conclusion of jury selection, defense counsel had exercised only 9 of his 15 peremptory challenges ... . Accordingly, under the circumstances of this case, the error was harmless." **People v Marshall, 2015 NY Slip Op 06830, 2nd Dept 9-16-15**

FAMILY LAW.

CONTROVERTED CUSTODY-RELATED ISSUES CAN NOT BE DECIDED BASED UPON "IN CHAMBERS" CONFERENCES, A FULL HEARING IS REQUIRED.

A new trial on all custody issues was necessary because Supreme Court refused to allow testimony on certain controverted allegations (parental alienation and use of corporal punishment). Supreme Court erroneously relied upon extensive "in camera" discussions which, Supreme Court determined, had revealed the issues to be "sporadic and inconsequential." The Second Department noted that all controverted custody issues should be decided only after the issues are addressed in a hearing: " '[A]s a general rule, it is error to make an order respecting custody based upon controverted allegations without the benefit of a full hearing' ... . Here, the Supreme Court, after holding 'extensive' in camera discussions with counsel on the issues of excessive corporal punishment and parental alienation, refused to allow testimony on these controverted issues, stating that they were 'sporadic and inconsequential.' Instead, the Supreme Court directed that only 'positive' aspects of the parties' parenting be presented on the record. This was error, since the court cannot base a significant portion of its decision on off-the-record conferences ...". **Minjin Lee v Jianchuang Xu, 2015 NY Slip Op 06784, 2nd Dept 9-16-15**

FORECLOSURE, CIVIL PROCEDURE.

LACK OF STANDING IS NOT A JURISDICTIONAL DEFECT, SUA SPONTE DISMISSAL OF COMPLAINT NOT WARRANTED.

The Second Department, in reversing Supreme Court's sua sponte dismissal of a foreclosure action on "lack of standing" grounds, noted that the "lack of standing" defense was waived by the defendants (not raised in answer), sua sponte dismissal was an abuse of discretion, and "lack of standing" is not a jurisdictional defect. The court explained: "The Supreme Court abused its discretion in, sua sponte, directing the dismissal of the complaint for lack of standing. 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, the Supreme Court was not presented with extraordinary circumstances warranting the sua sponte dismissal of the complaint. Since the defendants … did not answer the complaint, and did not make a pre-answer motion to dismiss the complaint, they waived the defense of lack of standing ... . Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint ...". **FCDB FF1 2008-1 Trust v Videjus, 2015 NY Slip Op 06777, 2nd Dept 9-16-15**

LABOR LAW, PERSONAL INJURY.

TREE REMOVAL WAS FIRST STEP IN MAKING STRUCTURAL REPAIRS, INJURY DURING TREE REMOVAL COVERED UNDER LABOR LAW 240(1) AND 241(6).

Removal of a tree which had fallen on a house, causing structural damage, was the first step in repairing the structure. Therefore, plaintiff, who fell while attempting to remove the tree, was engaged in an activity covered by Labor Law 240(1) and 241(6): "[T]he protections of Labor Law § 240(1) are to be afforded to tree removal when undertaken during the repair of a structure ... . * * * Since the plaintiff was engaged in activities ancillary to the repair of the building from which he fell, the provisions of Labor Law § 241(6) are also applicable to the facts of this case." **Moreira v Osvaldo J. Ponzo, 2015 NY Slip Op 06792, 2nd Dept. 9-16-15**

LABOR LAW, PERSONAL INJURY.

HOMEOWNER'S EXCEPTION DID NOT APPLY TO A HORSE BARN USED FOR COMMERCIAL PURPOSES DESPITE PRESENCE OF AN APARTMENT IN THE BARN.

The "homeowner's exception" to the applicability of the Labor Law did not apply to a barn used to house horses for commercial purposes, even though the barn included an apartment used by one of the horse farm's shareholders. The court also noted that the "recalcitrant worker" affirmative defense should not have been dismissed "sua sponte" in the absence of a motion to dismiss it. With respect to the homeowner's exception, the court explained: "[T]he plaintiff met his prima facie burden of demonstrating that he was not performing work at a residence within the meaning of the homeowner's exemption under Labor Law §§ 240(1) and 241(6) ... . Among other things, the plaintiff demonstrated that the defendant described itself as 'essentially . . . a business for keeping horses,' its owners were extensively involved in both keeping and racing horses, and approximately eight horses were boarded at the subject property at the time of the accident. The plaintiff's submissions also established that when the defendant corporation originally purchased the subject property, the large barn was in a state of disrepair. The defendant renovated the large barn and added many improvements to the property, including multiple paddocks, an additional barn, and an 'Equicisor,' a '72-foot circular automated horse exercising machine.' One of the defendant's shareholders described the apartment in the rear of the barn as a part-time 'office residence' where he might stay a 'few days' per week, although the amount of time he stayed varied depending on the season and the horse racing schedule. Under these circumstances, the plaintiff established, prima facie, that the defendant's boarding stable, which was used primarily for commercial purposes, did not constitute a residence within the meaning of the homeowner's exemption ...". **Rossi v Flying Horse Farm, Inc., 2015 NY Slip Op 06798, 2nd Dept 9-16-15**

LIEN LAW, CONTRACT LAW.

ALTHOUGH PLAINTIFF COULD NOT ESTABLISH A VALID MECHANIC'S LIEN, SUPREME COURT SHOULD HAVE ALLOWED THE ACTION TO PROCEED AS IF IT WERE BROUGHT AS A BREACH OF CONTRACT.

Plaintiff's complaint seeking foreclosure of a mechanic's lien (re: work done pursuant to a contract) should not have been dismissed on the ground the notice of pendency (of the mechanic's lien) had expired. Because the complaint alleged the existence of a contract, performance of plaintiff's obligation thereunder, the amount unpaid balance, and sought a personal judgment for any deficiency after the foreclosure sale, plaintiff's action should have been allowed to proceed: "[U]nder the plain language of the Lien Law, the Supreme Court had the authority to retain the action and award a money judgment even though the lien had expired ... . Section 17 of the Lien Law provides that the 'failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person.' The same rule applies where, as here, the notice of pendency expired during the pendency of the plaintiff's action ... . Section 54 of the Lien Law provides that if 'the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action.' The complaint in this action alleged the existence of the contract, the plaintiff's performance of its obligation thereunder, and the unpaid balance of the agreed price. Additionally, the ad damnum clause included a request for a personal judgment against the defendants for any deficiency remaining after a foreclosure sale. These allegations were sufficient to support an award of a personal judgment against the defendants even if the mechanic's lien was defective ...". **Aluminum House Corp. v Demetriou, 2015 NY Slip Op 06767, 2nd Dept 9-16-15**

PERSONAL INJURY, EVIDENCE.

SOURCE OF INFORMATION IN POLICE REPORT UNKNOWN, REVERSIBLE ERROR TO ADMIT HEARSAY IN THE REPORT.

A new trial was necessary in this pedestrian-injury case because defendant was allowed to place inadmissible hearsay, contained within a police report, in evidence. Plaintiff alleged she was struck by defendants' car when she was crossing the street in a crosswalk with the light in her favor. Defendants alleged plaintiff was riding a bicycle and darted out between two cars. The police report supported defendants' version. However, the officer who wrote the report testified he had no recollection of the source of the information in the report. The Second Department explained why none of the exceptions to the hearsay rule applied to the information in the report: " 'Facts stated in a police report that are hearsay are not admissible unless they constitute an exception to the hearsay rule' ... . Pursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties ... . If information contained in a police accident report was not based upon the police officer's personal observations, it may nevertheless be admissible as a business record 'if the person giving the police officer the information contained in the report was under a business duty to relate the facts to him [or her]' ... . If the person giving the police officer the information was not under a business duty to give the statement to the police officer, such information 'may be proved by a business record only if the statement qualifies [under some other] hearsay exception, such as an admission' ... . In other words, 'each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting

within the course of regular business conduct or the declaration must meet the test of some other hearsay exception' ... . 'The proponent of hearsay evidence must establish the applicability of a hearsay-rule exception' ...". **Memenza v Cole, 2015 NY Slip Op 06789, 2nd Dept 9-16-15**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN REAR-END COLLISION CASE, PLAINTIFF'S STATEMENTS IN HOSPITAL RECORDS CONSTITUTED INADMISSIBLE HEARSAY.

Plaintiff was entitled to summary judgment on liability in a rear-end collision case. Plaintiff was driving 30 miles an hour when her car was struck from behind, indicating defendant-driver did not maintain a safe distance between the two cars. The court noted that statements made by the plaintiff which were memorialized in a hospital record were inadmissible because the statements were not necessary for diagnostic purposes and were not admissions. With respect to the hearsay in the hospital records, the court explained: "[T]he defendants could not rely on certain statements in the plaintiff's hospital records to raise a triable issue of fact, since, under the circumstances presented here, the details of how the plaintiff sustained particular injuries and how the accident occurred in this matter were not useful for purposes of her medical diagnosis or treatment and, accordingly, a medical chart entry containing such hearsay statements could not be considered to have been prepared in the regular course of the hospital's business ... . Accordingly, the statements contained in the chart entry are not admissible under the business records exception to the hearsay rule. Moreover, the entry was not inconsistent with the plaintiff's description of the accident, as provided in her affidavit. Consequently, the entry was not admissible as an admission by the plaintiff ...". **Service v McCoy, 2015 NY Slip Op 06801, 2nd Dept 9-16-15**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFF RAISED A TRIABLE ISSUE OF FACT UNDER THE DOCTRINE OF RES IPSA LOQUITUR, PLAINTIFF ALLEGED A BONE WAS FRACTURED DURING SURGERY.

Plaintiff raised a triable issue fact in a medical malpractice action under the doctrine of res ipsa loquitur. The complaint alleged that, during surgery on her shoulder, a bone was fractured. The court explained the analytical criteria: " '[R]es ipsa loquitur [is] available in a narrow category of factually simple medical malpractice cases requir[ing] no expert to enable the jury to reasonably conclude that the accident would not happen without negligence' … . The doctrine is available when (1) the event is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) the event is caused by an agent or instrumentality within the exclusive control of the defendant; and (3) the event was not caused by any voluntary action or contribution on the part of the plaintiff ... . 'The doctrine is generally available to establish a prima facie case when an unexplained injury in an area which is remote from the treatment site occurs while the patient is anesthetized' ... . 'In a multiple defendant action in which a plaintiff relies on the theory of res ipsa loquitur, a plaintiff is not required to identify the negligent actor [and] [t]hat rule is particularly appropriate in a medical malpractice case . . . in which the plaintiff has been anesthetized' ... . 'To rely on res ipsa loquitur a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not that the injury was caused by [the] defendant's negligence. Stated otherwise, all that is required is that the likelihood of other possible causes of the injury be so reduced that the greater probability lies at defendant's door' ...". **Swoboda v Fontanetta, 2015 NY Slip Op 06804, 2nd Dept 9-16-15**

PERSONAL INJURY, MUNICIPAL LAW, EDUCATION-SCHOOL LAW.

LEAVE TO FILE LATE NOTICE OF CLAIM IN NEGLIGENT SUPERVISION CASE SHOULD HAVE BEEN GRANTED.

Supreme Court should have granted leave to file a late notice of claim in an action stemming from an assault by students against plaintiff (also a student). Plaintiff had been confronted and threatened by two students. Plaintiff's mother informed the school and asked for a meeting with the two students' parents. Nothing was done by the school. One week later, the plaintiff was beaten by the two students. Plaintiff sought to file a notice of claim a month after the 90-day deadline. The court explained: "Because the [defendants] acquired timely knowledge of the essential facts constituting the petitioners' claim, the petitioners met their initial burden of showing a lack of prejudice ... . The [defendants'] conclusory assertions of prejudice, based solely on the petitioners' one-month delay in serving the notice of claim, were insufficient to rebut the petitioners' showing ...". **Matter of Regan v City of New York, 2015 NY Slip Op 06826, 2nd Dept 9-16-15**

PERSONAL INJURY, NEGLIGENT SUPERVISION, EDUCATION-SCHOOL LAW.

SCHOOL DISTRICT NOT ON NOTICE SUCH THAT THE ASSAULT BY ANOTHER STUDENT WAS FORESEEABLE.

Defendant school district's motion for summary judgment in a student's "negligent supervision" action was properly granted. The student was grabbed by another student and had been the subject of bullying. The school was not on notice such that the act complained of was foreseeable: "To establish a breach of the duty to provide adequate supervision in a case involving injuries caused by the acts of fellow students, a plaintiff must demonstrate that school authorities 'had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could

reasonably have been anticipated' ... . Actual or constructive notice of prior similar conduct is generally required, and injury caused by the 'impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act ... . Here, the defendant established, prima facie, that the alleged assault by a student in the cafeteria was an unforseeable act and that it had no actual or constructive notice of prior conduct similar to the incident in the cafeteria ...". **Maldari v Mount Pleasant Cent. Sch. Dist., 2015 NY Slip Op 06788, 2nd Dept 9-16-15**

WORKERS' COMPENSATION LAW

SPECIAL EMPLOYEE, WHO HAD BEEN PAID WORKERS' COMPENSATION BENEFITS BY HIS EMPLOYER (A STAFFING AGENCY), COULD NOT RECOVER FROM SPECIAL EMPLOYER.

Plaintiff was defendant's special employee and recovery from defendant was therefore barred by the exclusivity provisions of the Workers' Compensation Law. Plaintiff worked for a staffing agency and was assigned to work for defendant. After plaintiff was injured working for defendant, he was paid Workers' Compensation benefits by the staffing agency. Because of the exclusivity provisions of the Workers' Compensation Law, plaintiff could not recover from the defendant, his special employer: "Here, the defendant established, prima facie, that this action was barred by the exclusivity provisions of the Workers' Compensation Law. Evidence submitted in support of the motion demonstrated, prima facie, that the defendant controlled and directed the manner, details, and ultimate result of the plaintiff's work, and that the defendant was the plaintiff's special employer ...". **Wilson v A.H. Harris & Sons, Inc., 2015 NY Slip Op 06808, 2nd Dept 9-16-15**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER'S FAILURE TO ASCERTAIN WHY A WITNESS CALLED BY THE INMATE-PETITIONER REFUSED TO TESTIFY REQUIRED ANNULMENT OF THE DISCIPLINARY DETERMINATION.

The inmate-petitioner's disciplinary determination was annulled because the inmate was effectively denied his right to call a witness. The Third Department explained: "[T]he determination must be annulled because petitioner was denied his right to call a witness ... . After petitioner requested that his cellmate at the time of the cell search be called to testify, the Hearing Officer sent two correction officers to retrieve him; the officers returned and merely reported that the prospective witness had refused to testify because 'he didn't want to come out.' One of the officers signed a witness refusal to testify form that provided no reason for the refusal and indicated that the prospective witness had refused to sign the form. As the Hearing Officer made no attempt to verify the witness's refusal or ascertain his reasons for refusing to testify, despite petitioner's repeated requests, petitioner's right to call witnesses was violated ...". Matter of Figueroa v Prack, 2015 NY Slip Op 06846, 3rd Dept 9-17-15

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