CasePrepPlus

March 15, 2017

An advance sheet service summarizing recent and significant New York appellate cases

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FIRST DEPARTMENT

PERSONAL INJURY, EVIDENCE.

REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON RES IPSA LOQUITUR AND MULTIPLE DWELLING LAW LIABILITY IN THIS ELEVATOR ACCIDENT CASE.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing Supreme Court and ordering a new trial, determined the trial judge should have instructed the jury on res ipsa loquitur and Multiple Dwelling Law 78 in this elevator accident case. Plaintiff alleged the elevator door closed on her causing her to fall to the floor. There was evidence the door had malfunctioned the day before and a building representative was made aware of the malfunction. There was evidence the door would not have struck plaintiff absent a malfunction, and there was a log of incidents with the elevator which was erroneously excluded from evidence: "Res ipsa loquitur is an evidentiary doctrine which 'permits the inference of negligence to be drawn from the circumstances of the occurrence' when a plaintiff can establish that (1) the event is of a kind that ordinarily does not occur in the absence of negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of defendant; and (3) the event was not caused by the plaintiff's actions ... . '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' ... .The doctrine of res ipsa loquitur has frequently been applied in cases involving elevator malfunctions, including those involving doors which unexpectedly closed upon and injured plaintiffs while attempting to enter and exit an elevator ... . * * * The trial court erred in refusing to instruct the jury regarding the owner's nondelegable duty under Multiple Dwelling Law § 78. A building owner's duty under the statute extends to elevator maintenance and repair ... . The court's refusal to charge section 78 erroneously led the jury to believe that the owner's negligence could only be predicated on its actual or constructive notice of an elevator problem. ***Barkley v. Plaza Realty Invs. Inc.*, 2017 N.Y. Slip Op. 01664, 1st Dept 3-7-17**

RETIREMENT AND SOCIAL SECURITY LAW.

POLICE OFFICER DID NOT DEMONSTRATE HIS PULMONARY HYPERTENSION WAS RELATED TO HIS SERVICE AT THE WORLD TRADE CENTER ON 9-11.

The First Department, in an extensive decision, determined petitioner, a police officer who worked over 100 hours at the World Trade Center (WTC) beginning on September 11, 2001, was not entitled to accident disability retirement benefits (ADR) based upon pulmonary hypertension. There was no showing the pulmonary hypertension was related to the time spent at the WTC: "The record establishes that, long before the events of September 11, 2001, petitioner suffered from a number of medical conditions that are risk factors for the development of pulmonary hypertension. * * * The record is devoid of any medical study linking exposure to WTC site contaminants to pulmonary hypertension, nor does it contain any evidence that other WTC site responders have been diagnosed with this condition in numbers greater than would be predicted from general epidemiological experience." ***Matter of Stavropoulos v. Bratton*, 2017 N.Y. Slip Op. 01779, 1st Dept 3-9-17**

SECURITIES, CONTRACT LAW.

PUTBACK ACTION STEMMING FROM THE PURCHASE OF RESIDENTIAL MORTGAGE BACKED SECURITIES SURVIVED MOTIONS TO DISMISS.

The First Department, in a full-fledged opinion by Justice Renwick, determined the action alleging breach of warranties and representations in connection with the purchase of residential mortgage backed securities (RMBS) properly survived motions to dismiss. The opinion is fact-specific and turns on the terms of the contracts. The issues, all of which survived the dismissal motions, were summarized by the court as follows: "This appeal stems from a transaction involving residential mortgage backed securities (RMBS). Plaintiff, the administrator of the securitized trust, seeks to enforce the loan repurchase rights, more commonly referred to as putback rights, against defendant sponsor of the securitized transaction for breach of the representations and warranties defendant made regarding the quality of the mortgage loans. This action raises a number of issues that regularly recur in putback actions, including whether the action was timely commenced, whether or not the action is unripe for failing to comply with a condition precedent to commencement of the action, and whether plaintiff

adequately pleaded a cause of action for breach of the representations and warranties. This action also raises an issue of first impression of whether enforcement of putback rights is within the exclusive domain of a RMBS's trustee so as to deny plaintiff Securities Administrator standing to commence this action." ***Natixis Real Estate Capital Trust 2007-HE2 v. Natixis Real Estate Holdings, LLC*, 2017 N.Y. Slip Op. 01796, 1st Dept 3-9-17**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

DESPITE CONFLICTING EVIDENCE, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE IN THIS MANSLAUGHTER-ASSAULT CASE, DEFENDANT, WHO PROVIDED THE GUN TO THE SHOOTER, WAS DEEMED TO SHARE THE SHOOTER'S INTENT.

The Second Department, in an extensive decision with an equally extensive dissent, determined defendant was entitled to a new trial on manslaughter and assault charges because the trial judge did not instruct the jury on the justification defense. Defendant was not the shooter. Defendant provided the gun to the shooter (Martinez-Mendoza) during a confrontation with a group of people outside a bar, where defendant had been beaten up. Because it was alleged defendant shared the shooter's intent, and because it was possible (despite conflicting evidence) the shooter feared the use of deadly force when he fired, defendant was entitled to the justification jury charge: "At the outset, we note that whether the defendant intended for Martinez-Mendoza to use the gun he provided or knew that he would use the gun does not preclude a defense of justification ... . [H]ere, some evidence contradicted the defendant's testimony. However, the record also included evidence, including testimony from Martinez-Mendoza, that, when viewed in the light most favorable to the defendant and drawing all reasonable permissible inferences in his favor, indicated the propriety of charging the justification defense requested by the defendant. Indeed, a justification defense was found to be appropriate in cases where part of a defendant's testimony was inconsistent with a justification defense ... , where a defendant's testimony was in conflict with that of other witnesses ... , and even where there was 'strong' evidence to negate a defendant's testimony relating to justification ... . Furthermore, we disagree with the conclusion drawn by our dissenting colleague that the defendant could not have reasonably believed that there was no ability to safely retreat, as demonstrated by the fact that the defendant, along with his female companions, were able to get to the car without incident a few minutes earlier. The use of lethal defensive force is limited to circumstances when the defender cannot 'with complete personal safety, to oneself and others,' 'avoid the necessity of so doing by retreating' ... . However, the duty to retreat does not arise until the defendant forms a reasonable belief that another person 'is using or about to use deadly physical force' ...". ***People v. Sanchez*, 2017 N.Y. Slip Op. 01718. 2nd Dept 3-8-17**

FAMILY LAW, EVIDENCE.

NOT NECSSARY TO PROVE WHICH OF TWO CARETAKERS WITH ACCESS TO THE CHILD ACTUALLY INJURED THE CHILD.

The Second Department determined Family Court properly found both mother and caretaker responsible for child abuse. It was not necessary to prove which of the two caused injury to the child: "The Family Court Act defines an abused child, inter alia, as a child whose parent, or other person legally responsible for his or her care, '(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ or (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause [such injury]' ... . Family Court Act § 1046(a)(ii) provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child that would ordinarily not occur absent an act or omission of the respondents, and (2) that the respondents were the caretakers of the child at the time the injury occurred ... . 'A parent who stands by while others inflict harm may be found responsible for that harm' ... . Section 1046(a)(ii) 'authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur' ... . The statute also permits findings of abuse against more than one caretaker where multiple individuals had access to the child in the period in which the injury occurred ... . In such cases, the petitioner is not required to establish which caregiver actually inflicted the injury or whether they did so together ...". ***Matter of Zoey D. (Simona D.)*, 2017 N.Y. Slip Op. 01689, 2nd Dept 3-8-17**

FAMILY LAW, EVIDENCE.

CHILD'S STATEMENTS ABOUT RESPONDENT PROPERLY EXCLUDED FROM NEGLECT PROCEEDING INVOLVING A DIFFERENT CHILD, NO SHOWING RESPONDENT WAS LEGALLY RESPONSIBLE FOR THE CHILD WHO MADE THE STATEMENTS.

The Second Department determined Family Court properly dismissed the neglect petition without prejudice. The petitioner failed to establish the respondent father was legally responsible for the child whose statements petitioner sought to use as evidence. (The neglect proceedings did not involve the child who made the statements): "Here, the petitioner failed to

establish by a preponderance of the evidence ... . At the fact-finding hearing, the petitioner presented a caseworker as its only witness and documentation of the father's criminal offenses. The caseworker testified to previous statements allegedly made to her by a child complainant in one of the respondent's prior criminal cases. Family Court Act § 1046(a)(vi) provides that 'previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence' (Family Ct Act § 1046[a][vi]). Such statements are admissible in a child protective proceeding, even when the child is not the subject of the proceeding ... . However, child protective proceedings encompass only abuse or neglect by a person who is a parent or other person legally responsible for the child's care ... , and the sections regarding admissibility of previous statements of an abused or neglected child refer to a child in the care of the respondent ... . A person legally responsible includes a custodian of the child, which 'may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child' ... . In determining whether a respondent is such a custodian, the court should consider the particular circumstances, including 'the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s)'... . A person legally responsible is not a caregiver who has fleeting or temporary care of a child, such as a supervisor of a play date … . Here, the petitioner failed to establish that the respondent was a person legally responsible for the child whose statements it wished to introduce through the testimony of the caseworker ...". ***Matter of Kaliia F. (Jason F.)*, 2017 N.Y. Slip Op. 01691, 2nd Dept 3-8-17**

FAMILY LAW, EVIDENCE.

CHIDREN WERE HEALTHY AND WELL CARED FOR, NEGLECT PETITION BASED UPON MOTHER'S MENTAL ILLNESS PROPERLY DISMISSED.

The Second Department determined Family Court properly dismissed the neglect petition against mother which was based upon mother's alleged mental illness: "Although a finding of neglect may be predicated upon proof that a child's mental, physical, or emotional condition is in imminent danger of becoming impaired as a result of a parent's mental illness, 'proof of mental illness alone will not support a finding of neglect' ... . Here, the petitioner failed to sustain its burden of proving by a preponderance of the evidence that the children's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of the mother's mental illness ... . The evidence showed that the children were healthy and well cared for by the mother ...". ***Matter of Jaurelious G. (Gwendolyn J.)*, 2017 N.Y. Slip Op. 01692, 2nd Dept 3-8-17**

PERSONAL INJURY.

WRONGFUL DEATH VERDICT AWARDING ZERO DAMAGES FOR LOSS OF PARENTAL GUIDANCE NOT AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department determined the jury verdict in this wrongful death case which awarded zero damages for loss of parental guidance was not against the weight of the evidence: " 'In a wrongful death action, an award of damages is limited to the fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought' .... 'In the case of a decedent who was not a wage earner, pecuniary injuries may be calculated, in part, from the increased expenditures required to continue the services she [or he] provided, as well as the compensable losses of a personal nature, such as loss of guidance' ... . 'The determination of pecuniary damages in a wrongful death action is peculiarly within the province of the jury' ... . Here, we find that the evidence on the issue of the loss of the decedent's parental guidance did not so preponderate in favor of the plaintiff such that the verdict could not have been reached on any fair interpretation of the evidence ...". ***Estevez v. Tam*, 2017 N.Y. Slip Op. 01675, 2nd Dept 3-8-17**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

THERE WAS NO GOOD REASON TO DENY PETITIONER'S REQUEST FOR A WITNESS, DETERMINATION ANNULLED AND EXPUNGED.

The Third Department determined the hearing officer improperly and without good cause refused to call a witness requested by the petitioner. The determination was therefore annulled and expunged: "Among petitioner's many contentions is that he was improperly denied his right to call certain witnesses at the hearing. Notably, his defense that he did not act in the manner alleged in the misbehavior report was very much dependent on the testimony of witnesses, correction officers and inmates alike, who were present in the mess hall and who may have observed his actions. In this regard, petitioner asserts that he was improperly denied the right to call the correction officer who was stationed in the gas booth overseeing the mess hall at the time of the incident. The Hearing Officer denied this witness on the basis that 'the staff in the gas booth have the entire messhalls . . . to watch and would not be expected to know the details of each incident.' Petitioner objected, stating at the hearing that 'the guy in the gas booth would be able to honestly see this incident and give the perfect testimony . . . of what transpired because he's the guy that controls the gas and if it was a bigger incident tha[n] what it was he'd have to

drop the gas.' ... Respondent, however, urges that remittal for a new hearing is the appropriate remedy. Under the particular circumstances presented here, we disagree. Although the Hearing Officer articulated a reason for the denial, the legitimacy of that reason is suspect given that the gas booth officer was in the mess hall for the very purpose of watching the activities of the inmates and responding to problems. There is no support in the record for the Hearing Officer's baseless conclusion that the officer on duty did not have knowledge of the incident involving petitioner." ***Matter of Balkum v. Annucci*, 2017 N.Y. Slip Op. 01741, 3rd Dept 3-9-17**

PERSONAL INJURY, WORKERS' COMPENSATION LAW, EMPLOYMENT LAW.

ALTHOUGH PLAINTIFF INJURED BY CO-WORKER, QUESTION OF FACT WHETHER DEFENDANT'S ACTIONS WERE GROSSLY NEGLIGENT AND THEREFORE NOT WITHIN THE SCOPE OF EMPLOYMENT, ALSO A QUESTION OF FACT WHETHER EMPLOYER CONDONED DEFENDANT'S ACTIONS, PLAINTIFF'S SUIT NOT PRECLUDED BY WORKERS' COMPENSATION LAW.

The Third Department determined plaintiff could sue in negligence, despite the fact that defendant was a co-worker. Defendant struck plaintiff with a golf club inflicting an injury that required the removal of a testicle. There was a question of fact whether defendant's actions were grossly negligent or reckless and there not within the scope of defendant's employment. There was also a question of fact whether the employer condoned defendant's actions: "There is no dispute that plaintiff and defendant were coemployees, that plaintiff was injured in the course of his employment and that he collected workers' compensation benefits for his injuries. Pursuant to Workers' Compensation Law § 29 (6), these benefits are the exclusive remedy for an employee injured 'by the negligence or wrong of another in the same employ.' Having the same employer is not synonymous with being 'in the same employ' and, to be shielded from liability, a defendant 'must himself [or herself] have been acting within the scope of his [or her] employment and not have been engaged in a willful or intentional tort' ... . Here, there is no indication that plaintiff was involved in any horseplay ... . The differing versions of the event presented by the parties, as well as the two club employees who supported plaintiff's version, raise genuine questions of fact as to whether defendant intended to strike plaintiff and did so in an excessive manner given the sensitive area of impact. Although defendant was not directly disciplined by the club and resigned to take a new position a few months after the incident, a question of fact also remains as to whether the club condoned defendant's actions. As such, we conclude that Supreme Court properly determined that questions of fact existed as to whether defendant acted in a 'grossly negligent and/or reckless' manner when he swung the golf club shaft and struck plaintiff, as alleged in the complaint ...". ***Montgomery v. Hackenburg*, 2017 N.Y. Slip Op. 01744, 3rd Dept 3-9-17**

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