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FIRST DEPARTMENT

CIVIL PROCEDURE, PRIVILEGE, ATTORNEYS.

CRITERIA FOR DETERMINING WHETHER A PROTECTIVE ORDER PROHIBITING THE DEPOSITION OF OPPOSING COUNSEL SHOULD BE GRANTED EXPLAINED, MATTER REMANDED.

The First Department, over a concurring memorandum, defined the procedure for determining whether opposing counsel can be deposed. Counsel had requested a protective order prohibiting the deposition. The matter was remanded for a ruling based upon the criteria described as follows: "... [D]efendants' counsel has made a prima facie showing that the material sought is irrelevant and/or that the process is not calculated to lead to legitimate discovery, whether because the information sought is privileged or because the true purpose of the subpoena is solely to disqualify him. ... ... [W]e remand this matter to the motion court for further proceedings to determine whether plaintiffs have shown that the information they seek in deposing defendants' counsel is material and necessary... , that they have a good faith basis for seeking it ... , and that the information is not available from another source. Should the motion court allow the deposition to proceed, it should be without prejudice to counsel's objection to specific questions to the extent that the answers would reveal information that is privileged or otherwise protected from discovery (CPLR 3101)." ***Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 2018 N.Y. Slip Op. 05624, First Dept 8-2-18**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW.

PLAINTIFF STATED A CAUSE OF ACTION FOR EMPLOYMENT DISCRIMINATION UNDER THE NYC HUMAN RIGHTS LAW, WHICH WAS DEEMED BROADER IN SCOPE THAN THE STATE HUMAN RIGHTS LAW, PLAINTIFF ALLEGED HER SUPERVISOR SQUEEZED HER THIGH AND HER REJECTION OF THAT ADVANCE RESULTED IN HER BEING TREATED LESS WELL THAN OTHER EMPLOYEES THEREAFTER.

The First Department, in a full-fledged opinion by Justice Moulton, over an extensive two-justice dissenting opinion, determined plaintiff had stated a cause of action for gender discrimination under the NYC Human Rights Law, which was deemed broader in scope than the state Human Rights Law. Plaintiff alleged she was treated less well than other employees after she rejected a sexual advance by her supervisor (Cirullo). The supervisor allegedly squeezed plaintiff's thigh when he sat next to her: "In 2005, the City Council passed the Local Civil Rights Restoration Act of 2005 … finding that the provisions of the City Human Rights Law had been 'construed too narrowly to ensure protection of the civil rights of all persons covered by the law.' The Restoration Act revised the City Human Rights Law ... to state: 'The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.' * * * ... [T]o establish a gender discrimination claim under the City Human Rights Law, a plaintiff need only demonstrate 'by a preponderance of the evidence that she has been treated less well than other employees because of her gender' ... . [F]ederal and state law, limiting actionable sexual harassment to 'severe or pervasive' conduct, [is] not appropriate for the broader and more remedial City Human Rights Law ... . … [W]e recognize[] an affirmative defense whereby defendants can avoid liability if the conduct amounted to nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences' ... . * * * The jury must decide whether Cirullo made a sexual overture, and whether Cirullo created a hostile work environment because Suri rebuffed that overture ... . Sexual advances are not always made explicitly. The absence of evidence of a supervisor's direct pressure for sexual favors as a condition of employment does not negate indirect pressure or doom the claim ...". ***Suri v. Grey Global Group, Inc.*, 2018 N.Y. Slip Op. 05627, First Dept 8-2-18**

LANDLORD-TENANT, MUNICIPAL LAW.

THE LOW AND MODERATE INCOME APARTMENT BUILDING WAS SUBJECT TO FEDERAL HUD REGULATION UNTIL THE HUD MORTGAGE WAS PAID OFF IN 2011, AFTER THAT THE BUILDING WAS SUBJECT TO THE NYC RENT STABILIZATION LAW.

The First Department, in this suit against the landlord by the tenant's association, determined the apartment building for low and moderate income tenants was subject to federal Housing and Urban Development (HUD) regulation until the HUD

mortgage was paid off in April, 2011. Once the mortgage was paid off, the building became subject to the Rent Stabilization Law (RSL): "While we find that the RSL was preempted as to the subject building through April 11, 2011, defendant owner is not entitled to a declaration that the RSL is preempted for the duration of the Use Agreement. Owner fails to demonstrate how HUD had the authority to extend preemption of the RSL beyond April 11, 2011, to 2016 and again to 2026. Accordingly, we limit the declaration in defendant owner's favor to April 11, 2011, and declare in plaintiffs' favor that the building was subject to the Rent Stabilization Law as of April 12, 2011. As long as the building was a project financed by a HUD mortgage, it was subject to the HUD Handbook, based on that loan and the terms of the related Regulatory Agreement. However, once the loan was paid off and the Regulatory Agreement terminated, the building ceased to be such a project. Plaintiffs failed to identify any continuing basis for applying the HUD Handbook to a building that had since been regulated pursuant to the terms of the Use Agreement requiring the preservation of low-income housing." ***435 Cent. Park W. Tenant Assn. v. Park Front Apts., LLC*, 2018 N.Y. Slip Op. 05625, First Dept 8-2-18**

SEPULCHER, MUNICIPAL LAW, NEGLIGENCE, IMMUNITY.

CITY WAS IMMUNE FROM SUIT BASED UPON THE HANDLING OF A DECEASED PERSON DURING HURRICANE SANDY AND NO SPECIAL RELATIONSHIP WAS DEMONSTRATED WITH THE CITY.

The First Department determined the city was immune from suit stemming from alleged interference with the right of sepulcher during Hurricane Sandy, which flooded the Bellevue Hospital morgue. The court further determined there was no special relationship between plaintiff and the city: "Contrary to plaintiffs' argument, the right of sepulcher does not, by definition, trump governmental immunity ... acted in its governmental capacity at all relevant times... . The specific act from which plaintiffs' claims arise is the City's treatment of the decedent's body in the context of Hurricane Sandy, i.e., as the hurricane approached, once it had struck, and in its aftermath. Plaintiffs seek to ignore or minimize the significance of that context. However, their claims directly implicate the City's emergency preparations and the decisions it made during and immediately after the unprecedented hurricane, which caused, among other things, unprecedented flooding in the Bellevue Hospital morgue — all quintessential governmental functions. Moreover, these preparations and decisions were discretionary, not ministerial ... . Thus, the record demonstrates the elements of governmental function immunity from liability as a matter of law ... . Plaintiffs failed to establish the special relationship with the City required for holding the City liable for their injury ... . In support of their contention that the City violated a statutory duty enacted for their benefit, they rely on statutes that do not contemplate private rights of action and, in any event, are not relevant to this case, which does not involve autopsy, dissection or unclaimed remains (see Public Health Law § 4215) or individuals fighting for control over the disposition of those remains ... . Nor did plaintiffs establish that, in its treatment of the decedent's body in the wake of Hurricane Sandy, the City voluntarily assumed a duty that generated their justifiable reliance ...". ***Lee v. City of New York*, 2018 N.Y. Slip Op. 05626, First Dept 8-2-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

FAILURE TO USE FEDERAL EXPRESS'S OVERNIGHT DELIVERY RENDERED SERVICE UNTIMELY, EVEN THOUGH SERVICE WOULD HAVE BEEN TIMELY IF THE PAPERS HAD BEEN MAILED.

The Second Department determined Supreme Court should not have deemed service by Federal Express timely. The statute, CPLR 2103(b)(6), states that service is effective when the papers are deposited with Federal Express for overnight delivery. Here the Federal Express weekly delivery service was used: "Contrary to the Supreme Court's determination, CPLR 2103(b)(2) does not apply to render BAC's motion timely since BAC did not attempt service of its motion by using 'the post office or official depository under the exclusive care and custody of the United States Postal Service within the state' (CPLR 2103[f][1]). Rather, BAC utilized Federal Express. CPLR 2103(b)(6) provides that '[s]ervice by overnight delivery service shall be complete upon deposit of the paper . . . into the custody of the overnight delivery service for overnight delivery' … . The record demonstrates that BAC failed to use Federal Express's overnight delivery service, and instead deposited its papers with Federal Express on Friday for weekday delivery on Monday. Accordingly, the court should have denied BAC's motion as untimely." ***Moran v. BAC Field Servs. Corp.*, 2018 N.Y. Slip Op. 05586, Second Dept 8-1-18**

CIVIL PROCEDURE.

COURT PROPERLY REFUSED TO CONSIDER EVIDENCE SUBMITTED WITH REPLY PAPERS.

The Second Department noted that evidence submitted for the first time in reply papers was properly not considered. The context was a motion for leave to file a late notice of claim in a personal injury action. The evidence at issue was a supervisor's report of injury and illness, presumably submitted to show the respondent's awareness of petitioner's injury. ***Matter of Murnane v. New York City Sch. Constr. Auth.*, 2018 N.Y. Slip Op. 05594, Second Dept 8-1-18**

CIVIL PROCEDURE.

NO REASONABLE JUSTIFICATION FOR FAILURE TO PRESENT DOCUMENTS WITH ORIGINAL MOTION, MOTION FOR LEAVE TO RENEW PROPERLY DENIED.

The Second Department determined petitioner's motion for leave to renew was properly denied. The context was an action by a municipal employee, a senior tree pruner, arguing that he was entitled to a hearing before termination because of his status as a member of a volunteer fire department (an "exempt firefighter"). Petitioner's attempt to present evidence of the "exempt firefighter" status in a motion to renew was rejected: " 'In general, a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination' ... . However, '[t]he requirement that a motion for renewal be based on new facts is a flexible one' ... . The new or additional facts presented 'either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion' ... . 'However, in either instance, a reasonable justification' for the failure to present such facts on the original motion must be presented' ... . ' [T]he Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion' ... . A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation... . Here, we agree with the Supreme Court's finding that the petitioner failed to offer a reasonable justification for his failure to present the documents relating to his status as an 'exempt' firefighter in opposition to the original motion to dismiss." ***Matter of Serviss v. Incorporated Vil. of Floral Park*, 2018 N.Y. Slip Op. 05597, Second Dept 8-1-18**

CIVIL PROCEDURE.

CROSS MOTION TO COMPEL ACCEPTANCE OF A LATE ANSWER PROPERLY GRANTED.

The Second Department determined plaintiff in this slip and fall case was not entitled to a default judgment and defendant's cross motion to compel acceptance of a late answer was properly granted: "On July 28, 2015, the plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when she fell down a stairway leading to the basement of premises owned by the defendant. According to an affidavit of service, the defendant was served with the summons and complaint on September 1, 2015, when it was delivered to a person of suitable age and discretion at his residence. The affidavit of service also provided that the summons and complaint were mailed to the defendant's residence on September 2, 2015. On or about March 3, 2016, the defendant served a late answer, which the plaintiff rejected as untimely. The plaintiff subsequently moved pursuant to CPLR 3215(f) for leave to enter a default judgment against the defendant on the issue of liability. The defendant opposed the motion and cross-moved, inter alia, pursuant to CPLR 3012(d) to compel the plaintiff to accept his late answer. The defendant argued that he was not properly served, that his delay in answering the complaint was brief, that he had a potentially meritorious defense, and that the case should proceed on the merits." ***Stavola v. Bodd*. 2018 N.Y. Slip Op. 05617, Second Dept 8-1-18**

CIVIL PROCEDURE, FORECLOSURE.

ALTHOUGH THE LACK OF STANDING DEFENSE TO A FORECLOSURE ACTION IS WAIVED IF NOT ASSERTED IN THE ANSWER OR A PRE-ANSWER MOTION TO DISMISS, IT MAY BE ADDED TO A COMPLAINT AMENDED BY LEAVE OF COURT.

The Second Department, in the context of a foreclosure action, determined that, although the lack of standing defense is waived if not asserted in the answer or a pre-answer motion to dismiss, the defense can be added in to a complaint amended by leave of court: " '[A]n argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)' ... . 'Defenses waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b), as long as the amendment does not cause the other party prejudice or surprise resulting from the delay, and is not palpably insufficient or patently devoid of merit'... . 'The decision of whether to allow an amendment is committed almost entirely to the [motion] court's discretion' ... . Here, in opposition to that branch of the defendant's motion which was for leave to amend his answer to add the affirmative defense of lack of standing, the plaintiff failed to demonstrate the existence of any prejudice or surprise that would result from the amendment, or that the proposed affirmative defense was palpably insufficient or patently devoid of merit ...". ***U.S. Bank Trust, N.A. v. Carter*, 2018 N.Y. Slip Op. 05618, Second Dept 8-1-18**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PERSONAL INJURY.

MOTION TO VACATE AUTOMATIC DISMISSAL OF PLAINTIFFS' MEDICAL MALPRACTICE ACTION AFTER A 12 YEAR DELAY PROPERLY DENIED.

The Second Department determined plaintiffs' motion to vacate the dismissal of their medical malpractice action, which had been automatically dismissed pursuant to CPLR 3404, was properly denied: "The plaintiff ... allegedly was injured at the time of his birth in April 1995, as a result of the defendants' negligence. In 1997, the plaintiffs commenced an action against the defendants ... . It is undisputed that on September 26, 2003, the action was marked off the trial calendar upon the plaintiffs' request so that the plaintiffs' counsel could amplify the bill of particulars based on the injured plaintiff's recent

psychological evaluations. Later, the action was automatically dismissed pursuant to CPLR 3404. By notice of motion dated November 12, 2015, the plaintiffs moved to vacate the dismissal of the action and to restore the action to the trial calendar. * * * Here, the plaintiffs failed to demonstrate a reasonable excuse for their more than 12-year delay in moving to restore the action to the trial calendar. The plaintiffs failed to adequately explain why it took more than 12 years from the time the action was marked off the trial calendar to ascertain the effects of the injuries that the injured plaintiff allegedly sustained at birth ... . Furthermore, in light of the plaintiffs' inactivity regarding the action during the more than 12-year period prior to moving to restore the action to the trial calendar, the plaintiffs failed to rebut the presumption of abandonment that attaches when a matter has been automatically dismissed ... . Moreover, the plaintiffs failed to demonstrate that the defendants would not be prejudiced if the case were to be restored to the trial calendar, given the 20-year and 7-month delay between the date this action accrued and the date of the plaintiffs' motion to restore ...". ***Hagler v. Southampton Hosp.*, 2018 N.Y. Slip Op. 05579, Second Dept 8-1-18**

CRIMINAL LAW.

POSSESSION OF A WEAPON IN THE THIRD DEGREE IS NOT AN ARMED FELONY, DEFENDANT THEREFORE WAS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS WITHOUT ANY FINDING OF MITIGATION.

The Second Department determined the sentencing court erred when it found that defendant was not eligible for youthful offender status. Criminal possession of a weapon in the third degree is not an armed felony: "The Supreme Court denied the defendant's application for youthful offender status based upon its mistaken belief that he had been convicted of an armed felony, which required the court to find either mitigating circumstances that bear directly upon the manner in which the crime was committed or that the defendant was only a minor participant in the crime ... . The People correctly concede that the court erred in finding that the defendant had been convicted of an armed felony, since criminal possession of a weapon in the third degree pursuant to Penal Law 265.02(7) does not require proof that the firearm was loaded... . Thus, the defendant was eligible for youthful offender treatment without any finding of mitigation (see CPL 720.10[2]). Accordingly, we remit the matter to the Supreme Court ..., for a new determination of the defendant's application for youthful offender status and resentencing thereafter." ***People v. Loney*, 2018 N.Y. Slip Op. 05606, Second Dept 8-1-18**

CRIMINAL LAW.

NO EVIDENCE POSSESSION OF A WEAPON AND SHOOTING THE VICTIM WERE SEPARATE AND DISTINCT, SENTENCES SHOULD HAVE BEEN CONCURRENT.

The Second Department determined the criminal possession of a weapon in the second degree was separate and distinct from the shooting of the victim. Therefore the sentences for possession of a weapon and murder should not run consecutively: "... [T]he sentence imposed on the conviction of criminal possession of a weapon in the second degree should not run consecutively to the sentence imposed on the conviction of murder in the second degree. 'No evidence was adduced at trial to establish that the defendant's possession of a gun was separate and distinct from his shooting of the victim' ...". ***People v. Ross*, 2018 N.Y. Slip Op. 05610, Second Dept 8-1-18**

CRIMINAL LAW, EVIDENCE.

(HARMLESS) ERROR TO ALLOW DETECTIVE TO TESTIFY THE PERSON DEPICTED IN A VIDEO WAS THE DEFENDANT.

The Second Department determined it was (harmless) error to allow a detective to testify the person depicted in a video was the defendant: "Generally, 'lay witnesses must testify only to the facts and not to their opinions and conclusions drawn from the facts,' as it is the jury's province 'to draw the appropriate inferences arising from the facts' ... . While, under the proper circumstances, the court has the discretion to allow a lay witness to express his or her opinion that an individual depicted in a surveillance video is the defendant ... , here, there was no basis for concluding that the police detective was more likely than the jury to correctly determine whether the defendant was depicted in the video .... The detective had arrested the defendant more than two weeks after the crime, and, at that time, briefly interviewed the defendant. 'There was no evidence that [the] defendant had changed his appearance prior to trial, and the record is devoid of any other circumstances suggesting that the jury—which had ample opportunity to view [the] defendant—would be any less able than the detective to determine whether [the] defendant was, in fact, the individual depicted in the video' ...". ***People v. Reddick*, 2018 N.Y. Slip Op. 05608, Second Dept 8-1-18**

EMPLOYMENT LAW, CIVIL PROCEDURE, HUMAN RIGHTS LAW, CONTRACT LAW.

COLLATERAL ESTOPPEL DOCTRINE REQUIRED DISMISSAL OF HUMAN RIGHTS LAW CAUSES OF ACTION WHERE THE FACTS ALLEGED WERE THE SAME AS IN A FEDERAL EMPLOYMENT DISCRIMINATION ACTION WHICH WAS DISMISSED, PRE-ANSWER MOTION FOR SUMMARY JUDGMENT PURSUANT TO CPLR 3211(c) PROPERLY DENIED, BREACH OF CONTRACT AND QUANTUM MERUIT CAUSES OF ACTION PROPERLY PLED.

The Second Department determined plaintiff's employment discrimination action was properly dismissed on collateral estoppel grounds. Plaintiff had brought a discrimination action in federal court which was dismissed. The Human Rights Law (NYCHRL) causes of action in state court, alleging the same facts as alleged in the federal case, were therefore properly dismissed. Defendants were not entitled to dismissal of the breach of contract and quantum meruit causes of action. Because the defendants submitted evidence in support of their motion to dismiss pursuant to CPLR 3211(c), the motion court treated it as a motion for summary judgment (before issue was joined). The court noted that defendants did not make out a prima facie case in their motion papers. Therefore the sufficiency of plaintiff's papers need not be considered. The court also explained that where there is a question about the existence of a contract, a quantum meruit cause of action may be brought and the plaintiff is not required to elect his or her remedies: "Here, the factual determinations made by the federal courts with regard to the causes of action alleging discrimination, retaliation, and hostile work environment under Title VII were determinative of the plaintiff's identical claims asserted in this action pursuant to NYCHRL CPLR 3211(c) provides, '[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment.' Although the path the defendants took in moving pursuant to CPLR 3211(c) was procedurally questionable, they charted their own course in this instance. There was no need to give the plaintiff an opportunity to file additional papers because the defendants failed to establish their prima facie entitlement to judgment as a matter of law by failing to tender sufficient evidence to eliminate any issues of fact with respect to those causes of action. Accordingly, the defendants were properly denied summary judgment, without regard to the sufficiency of the opposition papers ...". ***Karimian v. Time Equities, Inc.*, 2018 N.Y. Slip Op. 05583, Second Dept 8-1-18**

INSURANCE LAW, CONTRACT LAW.

ALTHOUGH THE CONDOMINIUM WAS OCCUPIED BY PLAINTIFFS' DAUGHTER WHEN THE PIPE BROKE, THE INSURER WAS ENTITLED TO RESCIND THE POLICY BECAUSE THE PLAINTIFFS REPRESENTED THE CONDOMINIUM WOULD BE OCCUPIED BY THEM.

The Second Department determined the defendant insurer was entitled to rescind the insurance policy because of a material misrepresentation, even if the misrepresentation was innocent or unintentional. Plaintiffs represented to the insurer that the condominium would be occupied by them and that they had no other residences. However, plaintiffs never lived in the condominium, which was occupied by plaintiffs' daughter. The condominium was damaged when a water pipe broke: " 'To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy' ... . 'A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof' ... . 'A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented'... . 'To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application' ... . Otsego Mutual established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiffs' application for insurance contained a material misrepresentation regarding whether the townhouse would be owner-occupied and that it would not have issued the subject policy if the application had disclosed that the townhouse would not be owner-occupied ... . In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs' contention that Otsego Mutual was required to establish that their misrepresentation was willful lacks merit. With limited exception not applicable here, 'a material misrepresentation, even if innocent or unintentional, is sufficient to warrant rescission of an insurance policy' ...". ***Piller v. Otsego Mut. Fire Ins. Co.*, 2018 N.Y. Slip Op. 05615, Second Dept 8-1-18**

MEDICAL MALPRACTICE, PERSONAL INJURY.

RES IPSA LOQUITUR DOCTRINE NOT SHOWN TO BE APPLICABLE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION PROPERLY GRANTED.

The Second Department, affirming the grant of summary judgment to the defendants in this medical malpractice action, explained the criteria for the applicability of the doctrine of res ipsa loquitur in this context: "In opposition to the defendants' motion, the plaintiff relied on the doctrine of res ipsa loquitur. To rely on that doctrine, a plaintiff must show that '(1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the instrumentality that caused

the injury is within the defendants' exclusive control; and (3) the injury is not the result of any voluntary action by the plaintiff' ... . A plaintiff 'need not conclusively eliminate the possibility of all other causes of the injury' ... . A plaintiff must only show that the likelihood of other possible causes of the injury is so reduced 'that the greater probability lies at defendant's door' ... . Here, the redacted and unsigned affirmation of the plaintiff's medical expert was not entitled to consideration ... and, in any event, was insufficient to raise a triable issue of fact. The plaintiff failed to raise a triable issue of fact regarding the applicability of the doctrine of res ipsa loquitur, as she did not demonstrate that the injury is of a kind that ordinarily does not occur in the absence of negligence or that the instrumentality that caused her injury was within the defendants' exclusive control ...". ***Pagano v. Cohen*, 2018 N.Y. Slip Op. 05599, Second Dept 8-1-18**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

INSTRUCTION TO FOLLOW UP IS NOT PART OF A CONTINUING COURSE OF TREATMENT, RELATION BACK DOCTRINE DOES NOT APPLY TO DEFENDANTS DELIBERATELY OMITTED FROM THE ACTION, MEDICAL MALPRACTICE CAUSES OF ACTION TIME-BARRED.

The Second Department determined that the instruction to follow up did not constitute a continuing course of treatment and the statute of limitations, therefore, was not tolled in this medical malpractice action. The court further found that the relation-back doctrine did not apply to defendants who were deliberately omitted from the action: " 'Under the continuous treatment doctrine, the 2½ year [limitations] period does not begin to run until the end of the course of treatment, when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint' ... . Here, the plaintiff has not raised a triable issue of fact as to whether this toll applies. The diagnostic services performed by Buscaglia were discrete and complete, and not part of a course of treatment ... . As to Watkins, the mere statement on the decedent's transfer summary that the decedent should 'follow-up' with 'Dr. Watkins' clinic' as an outpatient in two or three months did not evince a continued course of treatment where no follow-up appointment was actually scheduled, and the decedent thereafter received treatment at other hospitals ... . The plaintiff also failed to raise a triable issue of fact as to the applicability of the relation back doctrine ... . That doctrine requires the plaintiff to demonstrate, among other things, that the new defendants knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been commenced against them as well ... . 'When a plaintiff intentionally decides not to assert a claim against a party known to be potentially liable, there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired' ... . Here, there was no showing of a mistake concerning the defendants' identities, which would have prevented the plaintiff from commencing an action against them before the statute of limitations expired ...". ***Yanez v. Watkins*, 2018 N.Y. Slip Op. 05622, Second Dept 8-1-18**

MEDICAL MALPRACTICE, PERSONAL INJURY, CONTRACT LAW.

RELEASE, WHICH PURPORTED TO COVER FUTURE MALPRACTICE ACTIONS STEMMING FROM THE FIRST ADMISSION TO THE HOSPITAL, DID NOT COVER A MALPRACTICE ACTION STEMMING FROM A SECOND ADMISSION, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined a release, which purported to cover future actions in a medical malpractice suit resulting from a hospital (NSUH) admission, did not preclude a second suit that arose from a second hospital admission: "The parties settled Action No. 1 ... and executed ... a release that released NSUH 'and all . . . related business entities . . . and all . . . employees, physicians, [and] servants, . . . from all past, present and future [*2]claims, demands, obligations, actions, causes of action, wrongful death or bodily or personal injury claims . . . of any kind whatsoever, whether known or unknown, based upon any legal or equitable theory, . . . which the RELEASORS, their heirs, executors, administrators . . . hereafter can, shall, or may now have, or may hereafter accrue or otherwise be acquired, against RELEASEES for, upon, or by reason or any actual or alleged act, omission, transaction, practice, conduct, occurrence, or other matter . . . from the beginning of the world to the day of the date of this RELEASE' (hereinafter the release). * * * Contrary to the Supreme Court's determination, NSUH failed to establish, as a matter of law, that the release executed by the parties settling Action No. 1 was intended to preclude the plaintiff from recovering for claims that allegedly arose during and as a result of the second admission, which were not yet in dispute at the time the release was executed ... . While the plaintiff may have been aware of the incident giving rise to Action No. 2 when she signed the release, any such awareness is insufficient, itself, to establish that the release was intended to cover any potential claims which were not the subject of Action No. 1." ***Chiappone v. North Shore Univ. Hosp.*, 2018 N.Y. Slip Op. 05569, Second Dept 8-1-18**

MENTAL HYGIENE LAW.

EVIDENCE DID NOT SUPPORT THE APPOINTMENT OF MOTHER AS GUARDIAN OF FRITZ, A PERSON SUFFERING FROM SCHIZOPHRENIA, HOWEVER MOTHER IS NOT PRECLUDED FROM SEEKING ANY APPROPRIATE ASSISTANCE FOR FRITZ.

The Second Department, reversing Supreme Court, determined that the petition for an the appointment of a guardian for Fritz, a person suffering from schizophrenia, should not have been granted on the evidence presented: "The Supreme Court

may appoint a guardian for a person if the court determines that the appointment is necessary to provide for the person's personal needs or to manage his or her property and financial affairs, and the person either agrees to the appointment or is incapacitated ... . In determining whether the appointment of a guardian is necessary, the court must consider the report of a court evaluator as well as the sufficiency and reliability of resources that may be available to provide for personal needs or property management absent the appointment of a guardian ... . A determination of incapacity must be based on clear and convincing evidence and must consist of a determination that a person is likely to suffer harm because he or she is unable to provide for personal needs or property management and cannot adequately understand and appreciate the nature and consequences of such inability ... . Moreover, a guardian should be appointed only as a last resort, where no available resources or other alternative will adequately protect the alleged incapacitated person ... . Here, the evidence at the hearing consisted only of the petitioner's (Fritz's mother's) testimony regarding Fritz G.'s mental illness, and a cursory report and testimony of the court evaluator, who had only one brief conversation with Fritz G. by telephone. This evidence failed to establish that Fritz G. was incapacitated. Moreover, the Supreme Court failed to consider less restrictive options than appointment of a guardian. Accordingly, that branch of the petition which was to have the petitioner appointed as the guardian of the person of Fritz G. should have been denied. Nevertheless, it was clear from the petitioner's testimony that Fritz G. is in need of assistance, and the parties' attorneys specifically mentioned the possibility of assisted outpatient treatment to address those needs. The petitioner's failure to establish, on this record, the necessity of Mental Hygiene Law article 81 guardianship does not preclude her from seeking any appropriate assistance for Fritz G." ***Matter of Fritz G.*, 2018 N.Y. Slip Op. 05592, Second Dept 8-1-18**

MUNICIPAL LAW, CIVIL PROCEDURE, NEGLIGENCE.

INFANCY TOLL OF STATUTE OF LIMITATIONS DOES NOT APPLY TO MOTHER'S DERIVATIVE ACTION IN THIS SLIP AND FALL ACTION AGAINST A MUNICIPALITY, PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim should not have been granted. Infant plaintiff was allegedly injured when he tripped and fell over a discarded metal frame on village property. The court noted that the mother's derivative cause of action was time-barred because the infancy toll of the statute of limitations did not apply to her: "... [T]he Supreme Court should have denied that branch of the petition which was for leave to serve a late notice of claim upon the Village on behalf of the mother in her individual capacity, as the statute of limitations for her derivative cause of action had expired at the time the proceeding was commenced ... . The infancy toll (see CPLR 208) is personal to the infant and does not extend to a parent's derivative cause of action ...". ***Matter of R.N. v. Village of New Sq.*, 2018 N.Y. Slip Op. 05595, Second Dept 8-1-18**

MUNICIPAL LAW, PERSONAL INJURY.

POLICE REPORT DID NOT NOTIFY TOWN OF THE ESSENTIAL FACTS OF A CLAIM STEMMING FROM A COLLISION WITH A TOWN SNOW PLOW, PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED.

The Second Department determined that a police report was not sufficient to timely notify the town of the essential facts of potential lawsuit stemming from a collision between petitioner's vehicle and a town snow plow. The petition for leave to file a late notice of claim was properly denied: "... [T]he petitioner failed to demonstrate that the Village obtained timely, actual knowledge of the essential facts constituting the claim. The late notice of claim served upon the Village approximately three months after the 90-day statutory period had elapsed did not provide the Village with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the statutory period ... . Furthermore, the police accident report alone, without any evidence of further investigation by the Village, cannot be considered actual knowledge of the essential facts underlying the claim against the Village ...". ***Matter of Vega v. Incorporated Vil. of Freeport*, 2018 N.Y. Slip Op. 05598, Second Dept 8-1-18**

PERSONAL INJURY.

RAISED PORTION OF A FLOOR MAT WAS NOT A TRIVIAL DEFECT AS A MATTER OF LAW IN THIS SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined the alleged raised area of a floor mat was not trivial as a matter of law: "The plaintiff gave deposition testimony to the effect that she tripped and fell over a raised portion of a rubber mat near the entrance of the supermarket. The plaintiff's husband testified at his deposition that the raised portion of the mat was 'two fat fingers high.' The defendants' store manager testified at his deposition that the bump in the mat was about half an inch high. ... In determining a motion for summary judgment, a court is generally limited to the issues or defenses that are the subject of the motion ... . Here, the Supreme Court should not have granted the motion on the ground that the plaintiff did not know what caused her to fall, since the issue was not raised by the defendants in their motion papers. In any event, the defendants failed to establish, prima facie, that the plaintiff did not know what caused her to fall ... . Here, the evidence submitted by the defendants, including a surveillance footage of the incident, was insufficient to demonstrate,

prima facie, that the condition of the mat was trivial as a matter of law and therefore not actionable ...". ***Green v. Price Chopper, Inc.*, 2018 N.Y. Slip Op. 05578, Second Dept 8-1-18**

PERSONAL INJURY.

VIDEO SHOWED ELEVATOR DOORS OPERATED PROPERLY, PLAINTIFF ALLEGED INJURY FROM DOORS CLOSING ON HER, SUMMARY JUDGMENT GRANTED TO HOTEL AND ELEVATOR MAINTENANCE COMPANY.

The Second Department determined the defendants, a hotel and elevator maintenance company, were entitled to summary judgment in this elevator-injury case. Plaintiff alleged she was injured when the doors of a freight elevator closed on her. A video showed that the doors remained open for the programmed period of time (20 seconds), plaintiff attempted to get off the elevator at the end of the 20 second period, and the doors retracted as soon as they came into contact with the plaintiff: " 'A property owner can be held liable for an elevator-related injury where there is a defect in the elevator, and the property owner has actual or constructive notice of the defect, or where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect' ... . 'An elevator company which agrees to maintain an elevator in safe operating condition can also be held liable to an injured passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found' ... . [The] evidence established that the elevator operated properly and was not defective, and that the defendants lacked actual or constructive notice of any alleged defective condition that caused the plaintiff's injuries ...". ***Hussey v. Hilton Worldwide, Inc.*, 2018 N.Y. Slip Op. 05581, Second Dept 8-1-18**

PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS REAR-END COLLISION CASE PROPERLY DENIED.

The Second Department determined that plaintiff's motion for summary judgment and plaintiff's motion to set aside the verdict in this rear-end collision case were properly denied. Plaintiff was stopped when the rear-end collision occurred. However, defendant demonstrated that he was unable to stop because of slippery conditions: "On his motion for summary judgment, the plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that his vehicle was stopped when it was struck in the rear by the defendant's vehicle... . However, the defendant raised a triable issue of fact as to the existence of a nonnegligent explanation; namely, an unavoidable skidding on a snow-covered road ... . A motion for judgment as a matter of law pursuant to CPLR 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party ... . Here, in light of the defendant's testimony regarding his speed and distance from the plaintiff's vehicle just before the collision and the testimony that he immediately applied the brakes when the plaintiff's brake lights illuminated but nonetheless was caused to skid by snowy road conditions, there was a valid line of reasoning and permissible inferences by which the jury could reach the conclusion that the defendant was not at fault in the happening of the accident ...". ***Miller v. Steinberg*, 2018 N.Y. Slip Op. 05585, Second Dept 8-1-18**

PERSONAL INJURY, LANDLORD-TENANT.

LEASE TRANSFERRED RESPONSIBILITY FOR MAINTENANCE OF ENTIRE PREMISES TO TENANT, DEFENDANT OUT-OF-POSSESSION LANDLORD ENTITLED TO SUMMARY JUDGMENT IN THIS PARKING LOT SLIP AND FALL CASE.

The Second Department determined that defendant out-of-possession landlord's motion for summary judgment in this parking lot slip and fall case was properly granted: " 'An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or course of conduct' ... . A landlord who has transferred possession and control generally is not liable for injuries caused by dangerous conditions on the property ... . In support of its motion for summary judgment dismissing the complaint, the defendant submitted a copy of the lease between it and Cold Spring Hills. The lease provided that the maintenance of the entire premises, including the parking lot, was the responsibility of Cold Spring Hills. The evidence submitted in support of the motion shows that the defendant was an out-of-possession landlord and that Cold Spring Hills performed the maintenance of the entire premises." ***Vicchiarelli v. Cold Spring Hills Realty Co.*, LLC, 2018 N.Y. Slip Op. 05619, Second Dept 8-1-18**

PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT LANDLORD DID NOT DEMONSTRATE IT WAS AN OUT-OF-POSSESSION LANDLORD AND DID NOT DEMONSTRATE A LACK OF NOTICE OF THE ALLEGEDLY DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendant landlord's motion for summary judgment in this slip and fall case was properly denied. Defendant did not demonstrate it was an out-of-possession landlord and did not demonstrate it did not create or have notice of the allegedly dangerous condition: "The lease contained a provision obligating the defendant to maintain the interior and exterior public portions of the building, and required the nonparty tenant to make nonstructural repairs. The lease also provided that the defendant reserved the right to re-enter the premises for purposes of, inter alia, inspecting the premises and making repairs. ... 'An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct'... . 'Even if a defendant is considered an out-of-possession landlord who assumed the obligation to make repairs to its property, it cannot be held liable for injuries caused by a defective condition on the property unless it either created the condition or had actual or constructive notice of it'... . Here, the defendant failed to demonstrate, prima facie, that it was an out-of-possession landlord that did not have a contractual duty under the lease to maintain the subject exterior door, doorway, and stairwell, or to repair the alleged defects therein that caused the plaintiff's accident ... . Moreover, the defendant failed to demonstrate, prima facie, that it did not create the allegedly defective conditions, and that it did not have actual or constructive notice of them ...". ***Washington-Fraser v. Industrial Home for the Blind*, 2018 N.Y. Slip Op. 05620, Second Dept 8-1-18**

TRUSTS AND ESTATES, MENTAL HYGIENE LAW.

SURROGATE'S COURT SHOULD HAVE GRANTED THE PETITION FOR THE APPOINTMENT OF A GUARDIAN TO MANAGE THE AFFAIRS OF A SEVERELY DISABLED PERSON, THE SURROGATE'S COURT PROCEDURE ACT AUTHORIZES THE APPOINTMENT, SURROGATE'S COURT ERRED BY FINDING THE PETITION SHOULD BE BROUGHT UNDER THE MENTAL HYGIENE LAW.

The Second Department, reversing Surrogate's Court, determined that the petition under the Surrogate's Court Procedure Act seeking the appointment of a guardian should have been granted. Petitioner is the sister of a severely disable person, Anna. Petitioner established Anna could not care for herself and the appointment was necessary to manage Anna's affairs. Surrogate's Court erroneous dismissed the petition, finding that it should have been brought under the Mental Hygiene Law: "Pursuant to article 17-A of the Surrogate's Court Procedure Act, 'the court is authorized to appoint a guardian of the person [who is intellectually disabled] . . . if such appointment . . . is in the best interest of the person who is intellectually disabled.' Under the statutory scheme, a person is intellectually disabled if that person has been certified by, among other possibilities, one licensed physician and one licensed psychologist 'as being incapable to manage him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to continue indefinitely' ... . Here, the record establishes that Anna is intellectually disabled within the meaning of Surrogate's Court Procedure Act article 17-A. Further, the record also establishes that it would be in Anna's best interest to have the petitioner appointed as her guardian. The record shows that Anna is incapable of providing for her most basic needs and that in the absence of court-authorized guardianship, the petitioner, Anna's only sibling, is unable to adequately manage Anna's affairs. Nothing in the record suggests that the petitioner is unqualified to act as Anna's guardian. To the contrary, despite the legal limitations she has encountered, the petitioner has been managing Anna's affairs and providing for Anna since their parents' deaths." ***Matter of Anna F.*, 2018 N.Y. Slip Op. 05590, Second Dept 8-1-18**

WORKERS' COMPENSATION, PERSONAL INJURY.

PLAINTIFF WAS A SPECIAL EMPLOYEE, HIS ONLY AVAILABLE REMEDY FOR HIS ON THE JOB INJURY WAS WORKERS' COMPENSATION.

The Second Department determined defendant Mid-Queens demonstrated that plaintiff maintenance worker, although employed by KGA, was a special employee of Mid-Queens. Therefore plaintiff's only remedy for his injury was Workers' Compensation: " 'Workers' Compensation Law §§ 11 and 29(6) restrict an employee from suing his or her employer or coemployee for an accidental injury sustained in the course of employment' ... . '[A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits' ... . 'Although no one factor is determinative, a significant and weighty feature in deciding whether a special employment relationship exists is who controls and directs the manner, details and ultimate result of the employee's work—in other words, who determines all essential, locational and commonly recognizable components of the [employee's] work relationship' ... . 'Other factors include who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business' ... . Here, the moving

defendants made a prima facie showing that Mid-Queens was entitled to summary judgment on the ground that it was the injured plaintiff's special employer. The evidence submitted by the moving defendants established that Mid-Queens controlled and directed the manner, details, and ultimate result of the injured plaintiff's work, the injured plaintiff's work was done in furtherance of Mid-Queens' business, and Mid-Queens had the right to discharge the injured plaintiff ...". ***Spasic v. Cammeby's Mgt. Co.*, 2018 N.Y. Slip Op. 05616, Second Dept 8-1-18**

THIRD DEPARTMENT

CRIMINAL LAW, ADMINISTRATIVE LAW, COURT OF CLAIMS.

NO PRIVATE RIGHT OF ACTION FOR NEGLIGENT PERFORMANCE OF A GOVERNMENTAL FUNCTION AGAINST THE BOARD OF PAROLE.

The Third Department determined the claimant, an inmate, did not have a private right of action for negligent performance of a governmental function against the Board of Parole. Claimant alleged the board did not comply with the Executive Law by promulgating certain written procedures for assessing an inmate's eligibility for parole: "Inasmuch as Executive Law article 12-B, which sets forth the procedures governing parole, does not expressly authorize a private right of action for claimant to recover civil damages for a violation of its provisions, recovery may only be obtained if a private right of action may be implied ... . 'One may be fairly implied when (1) [claimant] is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme' ... . 'If one of these prerequisites is lacking, the claim will fail' ... . We agree with the Court of Claims that a private action may not be fairly implied here. The Legislature provides recourse under CPLR article 78 for inmates to address perceived instances where the Board did not satisfy its statutory obligations in making parole release determinations... . As the Legislature has established procedures for review of parole release decisions, 'it is fair to infer that had it intended to create a private right of action . . ., it would have specifically done so' ... . Accordingly, permitting a private action here would be inconsistent with the legislative scheme ...". ***Franza v. State of New York*, 2018 N.Y. Slip Op. 05641, Third Dept 8-2-18**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

STUDENT PROPERLY DISMISSED FROM A STATE UNIVERSITY FOR VIOLATIONS OF THE STUDENT CODE OF CONDUCT, PROCEDURES AND PROOF REQUIREMENTS EXPLAINED.

The Third Department affirmed the dismissal of a student from the State University of New York for violations of the student code of conduct. The decision is too detailed to fairly summarize here, but it provides a comprehensive explanation of the procedures and proof required of a state university in a disciplinary action against a student: "Although administrative determinations may be based entirely on hearsay evidence as long as 'such evidence is sufficiently relevant and probative or sufficiently reliable and is not otherwise seriously controverted… , the record contains direct evidence against petitioner, as well as hearsay. * * * Generally, due process requires that the accused student in a college disciplinary proceeding be given written notice of the charges prior to a hearing, the names of the witnesses against him or her, an opportunity to hear and confront evidence against him or her and to present a defense and to be advised in writing of the factual findings and discipline imposed… . However, 'there is no general constitutional right to discovery in . . . administrative proceedings' … . … The code does not contain a requirement that a party provide any documents or information that the party does not intend to submit as evidence at the hearing. It is undisputed that the investigator complied with the code's directive by timely providing to the Community Standards Office the names of his proposed witnesses and the evidence he later presented at the hearing, which were provided to petitioner well in advance of the hearing. * * * Pursuant to the code, to obtain relief on an administrative appeal based on new evidence, the student must not only show that the evidence was unavailable at the time of the hearing, but must also provide '[a] summary of the new evidence and its potential impact.' … … [A] student has no right to counsel in disciplinary proceedings … . The code permits a student to have an advisor, but that person may only advise the student and cannot address the Student Conduct Board during the hearing." ***Matter of Agudio v. State Univ. of N.Y.*, 2018 N.Y. Slip Op. 05647, Third Dept 8-2-18**

UNEMPLOYMENT INSURANCE.

TUTOR WAS AN EMPLOYEE OF THE TUTORING SERVICE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined a tutor employed by a tutoring service, Mulberry, was an employee entitled to unemployment insurance benefits: "Once a tutor accepted an assignment, the tutor set up the instructional schedule directly with the student and/or parent and Mulberry did not impose set work hours. A tutor, however, was free to reject an assignment. Although tutors could conduct tutoring sessions at other locations, most sessions occurred at Mulberry's learning center where it had books, supplies, computers and equipment available for the tutors to use even though they typically used

either their own or their students' instructional materials. When tutors worked at Mulberry's learning center, they completed a time sheet or calendar detailing their hours and the students they tutored. Folders that were provided by Mulberry containing student information were maintained at the learning center. Mulberry also provided the tutors with a 'tutoring record' to help them keep track of their hours, the students they instructed and the material covered, as well as a monthly invoice form that the tutors could submit to receive payment, which was tendered regardless of whether Mulberry received payment from its clients. Mulberry did not reimburse tutors for expenses, withhold taxes from their compensation or prohibit them from working for others. However, it sometimes assisted in resolving scheduling issues and intervened in the rare case when there was a problem with a student. Moreover, if a tutor had accepted an assignment and then became unavailable for an extended period of time, Mulberry would find a replacement. Significantly, Mulberry labeled the tutors 'our teachers' and referred to their instruction as 'our lesson plans' in its marketing literature, giving the impression that the tutors were, in fact, Mulberry's employees. In view of the foregoing, we find that Mulberry exercised control over important aspects of the tutors' work notwithstanding its lack of involvement in the actual instruction provided by the tutors. Mulberry was not simply a referral agency, but held itself out as the tutors' employer and acted as such." ***Matter of Eidelson (Mulberry Tree Ctr. LLC--Commissioner of Labor)*, 2018 N.Y. Slip Op. 05645, Third Dept 8-2-18**

UNEMPLOYMENT INSURANCE, ATTORNEYS.

ATTORNEY HIRED FOR DOCUMENT REVIEW WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS, DESPITE THE ATTORNEY'S SIGNING A DOCUMENT INDICATING SHE WAS AN INDEPENDENT CONTRACTOR.

The Third Department determined claimant, an attorney hired to do document review, was an employee of a law firm (Brody) entitled to unemployment insurance benefits, despite the attorney's signing a document indicating she was an independent contractor: "The record reflects that Brody paid claimant an hourly set wage, required her to work at least 10 hours per day, Monday through Friday, and required her to obtain approval to take time off. Claimant was required to undergo training on how to do the work, was provided with a computer and workspace, and was assigned documents to review. She was, moreover, required to document her hours and meet with her supervisor to review her submitted hours and receive updates on the case. Claimant did not have an independent legal practice or business ... . The foregoing constitutes substantial evidence supporting the Board's determination that Brody retained sufficient overall control of claimant's services to establish an employer-employee relationship, notwithstanding evidence in the record that might support a contrary conclusion ... . A different result is not compelled by the facts that claimant signed a written agreement labelling her as an independent contractor and believed that she performed in that capacity ...". ***Matter of Philip (Brody--Commissioner of Labor)*, 2018 N.Y. Slip Op. 05648, Third Dept 8-2-18**

WORKERS' COMPENSATION.

WORKERS' COMPENSATION CARRIER ENTITLED TO REIMBURSEMENT OF BOTH TEMPORARY TOTAL DISABILITY PAYMENTS AND TEMPORARY PARTIAL DISABILITY PAYMENTS.

The Third Department determined the workers' compensation carrier was entitled to reimbursement of both the temporary total disability and temporary partial disability payments in the years preceding the schedule loss of use (SLU) award by the Workers' Compensation Law Judge. Claimant argued that, based on the wording of the statute, the carrier was entitled to only the temporary partial disability payments: "… [W]hile it is true that Workers' Compensation Law § 15 (4-a) 'expressly provides for . . . an offset in the case of an award for [a] temporary total disability [that] is not protracted' and that no corresponding language appears in Workers' Compensation Law § 15 (5), which addresses temporary partial disability awards… , this Court consistently has held that 'the schedule award is not allocable to any particular period of disability' … . … As we discern no basis upon which to treat the carrier's temporary total disability payments and temporary partial disability payments to claimant in a disparate fashion … , and in order to avoid what otherwise would be a significant windfall to claimant, we find that the Board's decision — holding that 'the carrier may take [a] credit for all prior [disability] payments' — to be supported by substantial evidence." ***Matter of Robinson v. Workmen's Circle Home*, 2018 N.Y. Slip Op. 05652, Third Dept 8-2-18**

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