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COURT OF APPEALS.

CONTRACT LAW.

THE PLAINTIFF, AFTER ASSIGNING HIS RIGHTS TO A STRUCTURED SETTLEMENT IN RETURN FOR LUMP SUM PAYMENTS, COULD NOT SUE THE INSURER PAYING THE SETTLEMENT ANNUITY FOR FAILING TO OBJECT TO THE ASSIGNMENT, WHICH WAS PROHIBITED BY THE SETTLEMENT AGREEMENT; PLAINTIFF UNSUCCESSFULLY ARGUED THE INSURER'S FAILURE TO OBJECT TO HIS ASSIGNMENT OF THE SETTLEMENT PAYMENTS CONSTITUTED A BREACH OF AN IMPLIED COVENANT OF GOOD FAITH.

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive dissent, determined that the plaintiff, Cordera, who had received a settlement award for lead poisoning, could not sue the insurer for failing to stop him from "selling" the rights to his 30-years-of-monthly-settlement-payments worth about $950,000 for about $270,000. The transactions were approved by a Florida court. Plaintiff unsuccessfully argued the defendant insurer's failure to enforce the non-assignment provision of the settlement agreement (which prohibited the assignment of the settlement proceeds) was a breach of an implied covenant of good faith: "The United States Court of Appeals for the Eleventh Circuit certified to this Court a question requiring us to consider whether a plaintiff sufficiently pleads a cause of action for breach of the implied covenant of good faith and fair dealing under New York law by alleging that, during a Structured Settlement Protection Act proceeding, defendants (i.e., the structured settlement obligor and the issuer of an annuity funding the settlement) failed to enforce the anti-assignment provisions contained in structured settlement and qualified assignment agreements. Based on our reformulation of the question, we conclude that such allegations do not state a cognizable cause of action for breach of the implied covenant. * * * Cordero claims that the anti-assignment provisions provide that reasonable expectation because they can be read to require issuers and obligors to protect plaintiffs from their own actions by objecting to their attempts to make further assignments. This theory is, of course, dependent on the view that the anti-assignment provisions in structured settlement and qualified assignment agreements are, at least in part, for a plaintiff's benefit. Even assuming that is true, however, a reasonable person in the position of such a plaintiff would not be justified in believing, at the time the agreements were made, that the anti-assignment provisions required the issuer and obligor to object to any attempt the plaintiff made to execute prohibited assignments as part of [a] proceeding in which the court is charged with determining whether the transfer is 'in the best interest of the payee' ...". ***Cordero v. Transamerica Annuity Serv. Corp.*, 2023 N.Y. Slip Op. 02091, CtApp 4-25-23**

CONTRACT LAW, ARBITRATION.

IN A DISPUTE INVOLVING THE TELECAST RIGHTS FOR TWO MAJOR LEAGUE BASEBALL TEAMS, THE ARBITRATOR EXCEEDED ITS POWERS, WHICH WERE SPELLED OUT IN THE SETTLEMENT AGREEMENT BY IMPOSING A MONEY JUDGMENT; THE ARBITRATOR'S RULING WAS AFFIRMED BUT THE MONEY JUDGMENT WAS VACATED.

The Court of Appeals, in a full-fledged opinion by Justice Singas, determined that the settlement agreement controlled the limits of the arbitrator's powers in this dispute between two major league baseball team and their co-owned sports network about the value of telecast rights. Pursuant to the settlement agreement the arbitrator had the power to decide the fees associated with the telecast rights, but did not have the power to impose a money judgment: "New York's well-established rules of contract law, which apply to arbitration agreements, provide that courts will enforce a commercial contract between sophisticated and counseled parties according to the contract's terms. In this case, two Major League Baseball (MLB) teams and their co-owned regional sports network are in a dispute regarding the fair market value of certain telecast rights. By affirming the confirmation of the second arbitration award and directing that the money judgment be vacated, we hold the highly sophisticated parties to the terms of their agreement. * * * Although the courts below correctly confirmed the second arbitration award, the order appealed from must be modified because Supreme Court erred by awarding the Nationals prejudgment interest and rendering a money judgment in the Nationals' favor. The settlement agreement grants the RSDC [the arbitrator] the power only to determine 'the fair market value' of the telecast rights fees. The parties did not agree that the RSDC could resolve disputes over nonpayment of such fees. Instead, remedies for ... nonpayment of those fees are governed by a different provision of the settlement agreement, which sets forth certain requirements, including a cure period. Only after that cure period expires do the Nationals 'have a right to seek money damages.' Further, disputes over nonpayment of the fees appear to be governed by the settlement agreement's more general dispute resolution provisions." ***Matter of TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2023 N.Y. Slip Op. 02090, CtApp 4-25-23**

MUNICIPAL LAW, ADMINISTRATIVE LAW, CONTRACT LAW, CONSUMER LAW.

IN THIS SUIT BY YELLOW CAB MEDALLION OWNERS AGAINST THE NYC TAXI AND LIMOUSINE COMMISSION, PLAINTIFFS DID NOT STATE A CLAIM FOR BREACH OF AN IMPLIED COVENANT AND GOOD FAITH OR DECEPTIVE BUSINESS PRACTICES; PLAINTIFFS' CLAIMS WERE BASED UPON DEFENDANTS' ALLEGED FAILURE TO REGULATE COMPETING SERVICES LIKE UBER AND LYFT.

The Court of Appeals determined the lawsuit against the NYC Taxi and Limousine Commission (TLC) and New York City by taxi services which purchased yellow cab medallions at an auction in 2013 failed to state a claim. The plaintiffs argued defendants breached an implied covenant of good faith by failing to regulate competing services like Uber and Lyft and engaged in deceptive business practices under General Business Law § 349: "[T]he covenant cannot be used to 'imply obligations inconsistent with other terms of the contractual relationship,' and encompasses only those 'promises which a reasonable person in the position of the promisee would be justified in understanding were included' ... . * * * ... [P]laintiffs acknowledged in the bid forms that defendants made no representations or warranties 'as to the present or future value of a taxicab medallion.' As plaintiffs concede on this appeal, that language is flatly inconsistent with any suggestion that defendants guaranteed the value of their medallions. ... [P]laintiffs acknowledged in the bid forms that defendants made no representations or warranties 'as to the present or future application or provisions of the rules of the [TLC] or applicable law.' The plain language of that disclaimer put plaintiffs on notice that they—not defendants—bore the risk that either TLC's rules or its 'application' thereof might change after the sale of the medallions. * * * Section 349 prohibits '[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state' (General Business Law § 349 [a] ...). .... [T]he government's issuance of a taxicab license is not a consumer-oriented transaction protected by section 349 ...". ***Singh v. City of New York*, 2023 N.Y. Slip Op. 02141, CtApp 4-25-23**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

THE COURT OF APPEALS UPHELD THE VIABILITY OF THE ASSUMPTION OF THE RISK DOCTRINE AS IT APPLIES TO SCHOOL SPORTS; AN EXTENSIVE DISSENT ARGUED THE DOCTRINE SHOULD BE ABANDONED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over two dissenting opinions, one of which argued the implied assumption of risk doctrine should be abandoned, determined the dismissal of one of the school-sports-assumption-of-risk cases before it (*Secky*) should be affirmed and the dismissal of the other (*Grady*) should be reversed because it raised unresolved questions of fact: "In *Secky*, the primary assumption of risk doctrine applies, and we affirm the Appellate Division order granting defendants' motion for summary judgment. Plaintiff, who had played basketball at the highest amateur student level, was injured during a drill in which the players competed to retrieve a rebound. Plaintiff's coach had explained that the boundary lines of the court would not apply during the drill and that only major fouls would be called. At the time of the drill, bleachers stationed near the court were retracted. Plaintiff was injured when, pursuing a loose ball from the top of the key towards the bleachers, another player collided with him, causing plaintiff to fall into the bleachers and sustain an injury to his right shoulder. Plaintiff, through his mother, sued the coach and the school district, and defendants moved for summary judgment. * * * ... [P]laintiff's injury is one inherent in the sport of basketball and so he assumed the risk of the injury he sustained. ... In *Grady*, by contrast, material issues of fact remain to be resolved by a jury. Plaintiff, a senior on the Chenango Valley High School varsity baseball team, was injured during his participation in a fast-moving, intricate drill. The drill involved two coaches hitting balls to players stationed in the infield, with one coach hitting to the third baseman, who would then throw to first base, while another coach hit to the shortstop, who would throw to the second baseman who would, in turn, throw to a player at 'short first base,' positioned a few feet from regulation first base. Because the drill required baseballs from two parts of the infield to be thrown to two players in the same area by first base, the coaches had positioned a protective screen, measuring seven by seven, between the regulation first baseman and the short first baseman. Plaintiff, in the group of players assigned to first base, was injured when an errant ball, intended for the short first baseman, bypassed the short first baseman and the protective screen and hit him on the right side of his face, causing serious injury to his eye including significant vision loss. ... ... [P]laintiff has raised triable questions of fact regarding whether the drill, as conducted here and with the use of the seven-by-seven-foot screen, 'was unique and created a dangerous condition over and above the usual dangers that are inherent' in baseball … , and whether plaintiff's awareness of the risks inherent in both the game of baseball and the practices that are a necessary part of participation in organized sports encompassed the risks arising from involvement in the drill performed here." ***Grady v. Chenango Val. Cent. Sch. Dist.*, 2023 N.Y. Slip Op. 02142, CtApp 4-27-23**

TRUSTS AND ESTATES.

THE TRANSFER OF REAL PROPERTY TO DECEDENT'S CHILDREN WAS A VALID EXERCISE OF THE POWER OF ATTORNEY; THE TRANSFER WAS COMPENSATION FOR CARE, NOT A GIFT; THE DISSENT ARGUED THERE WAS A QUESTION OF FACT WHETHER THE TRANSFER WAS A GIFT AND THE POWER OF ATTORNEY DID NOT AUTHORIZE GIFTS.

The Court of Appeals, over a dissent, determined that the transfer of real property to decedent's children as compensation for the care given decedent was allowed under the operative power of attorney. The power of attorney did not include the power to make gifts. The dissent argued there was a question of fact whether the property transfer was a gift. ***Matter of Maika*, 2023 N.Y. Slip Op. 02092, CtApp 4-25-23**

FIRST DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S COUNSEL SHOULD NOT HAVE BEEN DISQUALIFIED; HER TESTIMONY ABOUT HER ALLEGED CONDUCT AT THE INDEPENDENT MEDICAL EXAMINATION (IME) WOULD HAVE BEEN CUMULATIVE AND DEFENDANTS COULD NOT SHOW THE IME WAS COMPROMISED IN ANY WAY.

The First Department, reversing Supreme Court, determined plaintiff's counsel should not have been disqualification based upon her alleged interference with the independent medical examination (IME). Defendants did not demonstrate counsel's testimony concerning the IME was necessary, given the plaintiff's and physician's ability to testify: "[D]isqualification is required 'only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests' ... . Although defendants maintain that they have a right to call plaintiff's counsel as a witness based on the knowledge she obtained at the IME, and therefore her disqualification under Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.7 is required, defendants have not established that counsel's testimony would be necessary to their defense and not cumulative of the testimony that could be provided by the examining physician and plaintiff herself ... . The examining physician completed a 'meaningful examination' of plaintiff at the IME, reflected by the IME report in which he was able to opine with a reasonable degree of medical certainty as to the genesis of plaintiff's symptoms, and defendants have not established that they were prejudiced by the contents of the report based on counsel's alleged intrusions … . To the extent that further information is required to prepare a defense, the remedy is not disqualification of opposing counsel but rather to permit defendants to seek further discovery to obtain that information ...". ***Domingo v. 541 Operating Corp.*, 2023 N.Y. Slip Op. 02175, First Dept 4-27-23**

CIVIL PROCEDURE, ADMINISTRATIVE LAW, DEBTOR-CREDITOR.

IN THIS SUIT BY A NEW JERSEY CASINO TO RECOVER DEFENDANT'S GAMBLING DEBT, DEFENDANT RAISED AFFIRMATIVE DEFENSES ALLEGING PLAINTIFF CASINO VIOLATED PROVISIONS OF NEW JERSEY'S CASINO CONTROL ACT (CCA); THE CONTROLLING AGENCY, THE CASINO CONTROL COMMISSION (CCC), HAS PRIMARY JURISDICTION OVER THOSE COMPLAINTS; THE COMPLAINTS MUST BE RULED ON BEFORE THE COURT CAN CONSIDER PLAINTIFF'S SUMMARY JUDGMENT MOTION.

The First Department, in a full-fledged opinion by Justice Kapnick, determined the plaintiff, a New Jersey casino (Golden Nugget), was not entitled to summary judgment this action seeking to recover defendant's (Chan's) $200,000 gambling debt. Defendant had raised affirmative defenses based upon complaints alleging the dice used by the casino violated the Casino Control Act (CCA) which defendant filed with the New Jersey Division of Gaming Enforcement (DGE). The Casino Control Commission has primary jurisdiction over those complaints. Therefore the complaints must be ruled upon before summary judgment can be considered by the court: "Supreme Court's granting of summary judgment to plaintiff was premature. The motion court should instead have deferred any decision until receipt of DGE's ruling on Chan's 'patron complaint' based on the same violations, since that grievance was filed prior to the commencement of plaintiff's litigation and remained pending at the time of its decision. While DGE has ruled that the same scribing violations against another casino do not violate the CCA, there has been no ruling by DGE in any matter concerning defendant's allegations of 'non-transparent dice.' Accordingly, the motion for summary judgment is denied, with leave to renew upon a ruling by DGE on the 'patron complaint,' or after six months if DGE has failed to resolve this issue despite sufficient notice to DGE by the parties ...". ***Golden Nugget Atl. City LLC v. Chan*, 2023 N.Y. Slip Op. 02176, First Dept 4-27-23**

PERSONAL INJURY, LANDLORD-TENANT, CONTRACT LAW.

HERE THE LEASE MADE THE OUT-OF-POSSESSION LANDLORD RESPONSIBLE FOR STRUCTURAL REPAIRS AND MADE THE TENANT RESPONSIBLE FOR ALL NON-STRUCTURAL REPAIRS; THE CRACKED STEP WAS NOT A STRUCTURAL DEFECT; THE FACT THAT THE LANDLORD WAS AWARE OF THE DEFECT WAS IRRELEVANT.

The First Department, reversing Supreme Court, determined defendant out-of-possession landlord's motion for summary judgment in this slip and fall case should have been granted. The court noted that if, due to the provisions of the lease, an out-of-possession landlord is not responsible for the repair of a defect, the fact that the landlord had notice of the defect is irrelevant: " 'An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it '(1) is contractually obligated to make repairs or maintain the premises or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision' ... .Here, defendant established that it was an out of possession landlord with no contractual obligation to make repairs or maintain the restaurant premises. Pursuant to Paragraph 4 of the lease agreement, all non-structural repairs to the premises were to be made by the tenant restaurant at its sole cost and expense. Moreover, the cracked step at issue was not a significant structural or design defect that is contrary to a specific statutory safety provision ... . In response, plaintiff failed to raise a triable issue of fact sufficient to defeat defendant's motion. Plaintiff's assertion that there is an issue of fact as to whether defendant had actual notice of the cracked step on which plaintiff fell is without merit. An out of possession landlord may not be held liable even if it had notice of the defective condition prior to the accident ...". ***Padilla v. Holrod Assoc. LLC*, 2023 N.Y. Slip Op. 02082, First Dept 4-25-23**

SECOND DEPARTMENT

ARBITRATION, ATTORNEYS.

THE ARBITRATOR'S AWARD OF EXCESSIVE ATTORNEY'S FEES WAS IRRATIONAL AND WARRANTED VACATION OF THE ENTIRE ARBITRATION AWARD.

The Second Department, reversing Supreme Court, determined the attorney's fee awarded by the arbitrator was excessive and warranted vacation of the entire arbitration award: "[T]he arbitrator's excessive award of attorneys' fees in the sum of $11,307 was irrational because it was not supported by any proof. The arbitrator issued an award in the petitioner's favor upon a finding that Surgery Center defaulted in answering the demand for arbitration. After awarding the petitioner damages in the principal sum of $22,614.89, plus interest, the arbitrator proceeded to award attorneys' fees in the sum of $11,307, which is equal to 50% of the damages award. On the issue of attorneys' fees, the petitioner submitted only the service agreements, which contained identical provisions stating that '[i]f [the petitioner] prevails in any litigation or arbitration between the parties, [Surgery Center] shall pay [the petitioner's] legal fees,' and a letter of engagement between the petitioner and its counsel, which stated that the petitioner's 'collection matters will be handled on a contingency basis of one third of all amounts recovered or whatever legal fees are awarded, whichever is greater.' The petitioner's counsel did not submit, and the arbitrator did not consider, any evidence as to the hours of legal work by the petitioner's counsel or the hourly rate. Although the arbitrator stated that he was awarding the sum of $11,307 in attorneys' fees 'as provided for in the agreement between the parties,' there was no proof that Surgery Center agreed to unlimited or unreasonable fees, and no proof that Surgery Center agreed to the fee arrangement that the petitioner made with its counsel. Moreover, the award of attorneys' fees was contrary to the petitioner's agreement with its counsel. As such, the arbitrator's award of attorneys' fees was irrational ... . Further, the arbitrator's award of attorneys' fees violates the strong public policy against excessive fees, e.g., fee arrangements 'where the amount becomes large enough to be out of all proportion to the value of the professional services rendered' ... . Under the circumstances present here, where the award of attorneys' fees was clearly irrational and contrary to public policy, vacatur of the entire arbitration award is warranted ...". ***Matter of Briscoe Protective, LLC v. North Fork Surgery Ctr., LLC*, 2023 N.Y. Slip Op. 02120, Second Dept 4-26-23**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE ASSAULT SECOND CONVICTION WAS REVERSED BECAUSE PROOF A BAMBOO STICK WAS A "DANGEROUS INSTRUMENT" WAS LEGALLY INSUFFICIENT; ASSAULT THIRD CONVICTION VACATED AS AN INCLUSORY CONCURRENT COUNT OF ASSAULT SECOND.

The Second Department determined the assault second conviction was not supported by legally sufficient evidence that a bamboo stick was a "dangerous instrument": "The defendant ... contends that the evidence was legally insufficient to support her convictions of assault in the second degree pursuant to Penal Law § 120.05(2) ... and criminal possession of a weapon in the fourth degree based on the People's theory that a bamboo stick the defendant used to discipline the child was a dangerous instrument. Although the defendant's contention is unpreserved for appellate review (see CPL 470.05[2]), we reach the issue in the exercise our interest of justice jurisdiction (see id. § 470.15[6][a]). A 'dangerous instrument' is defined as 'any instrument . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury' (Penal Law § 10.00[13]). 'Serious physical injury' is defined as 'physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ' (Penal Law § 10.00[10]). Here, viewing the evidence in the light most favorable to the prosecution, it was legally insufficient to establish that the bamboo stick, which was not produced at trial, 'was readily capable of killing or maiming [the child], or of causing any of the other severe harms described in Penal Law § 10.00(10)' ... . Further, the defendant's conviction of assault in the third degree pursuant to Penal Law § 120.00(1) must be vacated, and that count of the indictment dismissed, as an inclusory concurrent count of assault in the second degree pursuant to Penal Law § 120.05(9) ...". ***People v. Weng*, 2023 N.Y. Slip Op. 02134, Second Dept 4-26-23**

FAMILY LAW, CRIMINAL LAW, JUDGES, APPEALS, CIVIL PROCEDURE.

THIS FAMILY OFFENSE PROCEEDING WAS REMITTED TO FAMILY COURT; APPELLATE REVIEW WAS NOT POSSIBLE IN THE ABSENCE OF FINDINGS OF FACT ADDRESSING CONFLICTING EVIDENCE AND THE CREDIBILITY OF WITNESSES.

The Second Department, remitting the matter to Family Court in this family offense proceeding, noted that appellate review was impossible without findings of fact: "The determination of whether a family offense was committed is a factual issue to be resolved by the hearing court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal unless clearly unsupported by the record ... . Effective appellate review requires that appropriate factual findings be made by the hearing court since it is the court best able to measure the credibility of the witnesses ... . In granting or denying a petition for an order of protection, the Family Court must state the facts deemed essential to its determination (see CPLR 4213[b] ...). Remittal is not necessary, however, where the record is sufficient for this Court to conduct an independent review of the evidence ... . Here, the Family Court, which was presented with sharply conflicting accounts by the parties regarding their allegations, issued mutual orders of protection without setting forth any findings with respect to the credibility of the parties or the facts deemed essential to its determinations (see CPLR 4213[b]). Since the record presents factual issues, including questions of

credibility, and in light of the conflicting allegations made by the parties against each other, resolution thereof is best left to the court of first instance ...". ***Matter of Sealy v. Peart*, 2023 N.Y. Slip Op. 02128, Second Dept 4-26-23**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

ALTHOUGH DEFENDANT DID NOT SIGN THE NOTE, HE WAS A TITLE-HOLDER AND WAS LISTED AS A BORROWER ON THE MORTGAGE; THEREFORE DEFENDANT WAS ENTITLED TO THE NOTICE OF FORECLOSURE IN ACCORDANCE WITH RPAPL 1304.

The Second Department, reversing Supreme Court, determined defendant Kalenborn was entitled to the RPAL 1304 notice of foreclosure even though he did not sign the note. Kalenborn held title to the property and was listed as a "borrower" on the mortgage: "[D]efendants established that the plaintiff failed to serve Douglas Kalenborn with notice pursuant to RPAPL 1304, and, contrary to the plaintiff's contention, Douglas Kalenborn was entitled to such notice as a 'borrower' within the meaning of that statute. Although Douglas Kalenborn did not sign the note, the plaintiff conceded that both of the defendants were title owners of the subject property and both executed the mortgage as a 'borrower.' 'Where, as here, a homeowner defendant is referred to as a 'borrower' in the mortgage instrument and, in that capacity, agrees to pay amounts due under the note, that defendant is a 'borrower' for the purposes of RPAPL 1304, notwithstanding . . . any ambiguity created by a provision in the mortgage instrument to the effect that parties who did not sign the underlying note are not personally obligated to pay the sums secured' ... . Since Douglas Kalenborn 'signed the mortgage as a 'borrower' and, in that capacity, agreed to pay the amounts due under the note, [he] was entitled to notice pursuant to RPAPL 1304' ...". ***HSBC Bank USA, N.A. v. Kalenborn*, 2023 N.Y. Slip Op. 02109, Second Dept 4-26-23**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE.

PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE THE NOTICE OF FORECLOSURE WAS MAILED TO DEFENDANT IN ACCORDANCE WITH THE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined plaintiff in this foreclosure action did not demonstrate the notice of foreclosure was mailed to defendant in accordance with the requirements of RPAPL 1304: "[T]he plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304 ... . The plaintiff did not submit proof of actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures. Further, the plaintiff failed to present sufficient proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, including 'how the mail was transmitted to the postal service' ...". ***Freedom Mtge. Corp. v. King*, 2023 N.Y. Slip Op. 02105, Second Dept 4-26-23**

MUNICIPAL LAW, MEDICAL MALPRACTICE, NEGLIGENCE.

MEDICAL RECORDS DEMONSTRATED THE NEGLIGENT FAILURE TO DIAGNOSE A SEVERED NERVE; THEREFORE THE MEDICAL FACILITY WAS DEEMED TO HAVE HAD TIMELY NOTICE OF THE NATURE OF THE MALPRACTICE CLAIM; THE PETITION FOR LEAVE TO FILE AND SERVE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the petition to file a late notice of claim in this medical malpractice action should have been granted. The medical facilities' (NHCC's) failure to diagnose a severed nerve was apparent from the medical records. Therefore NHCC had timely notice of the nature of the claim: "Medical records can establish actual knowledge of the essential facts constituting a claim where they 'evince that the medical staff, by its acts or omissions, inflicted an[ ] injury on plaintiff' ... . 'While expert opinion may be helpful to this showing, it is not required where 'the basic facts underlying the malpractice claims [can] be gleaned from the . . . medical records' ... . Here, NHCC acquired actual knowledge of the essential facts constituting the petitioners' claim, since its employees participated in the acts or omissions giving rise to the claim and prepared medical records from which it could be readily inferred that NHCC negligently failed to timely diagnose and treat the injured petitioner's nerve injury ... . Further, under the circumstances of this case, the petitioners demonstrated a reasonable excuse for the delay in serving a notice of claim based upon, inter alia, the injured petitioner not learning of the nerve injury until his surgery on March 11, 2021, followed by his recovery time from the surgery and inability to consult with an attorney until after he was fully vaccinated for COVID-19 due to preexisting health conditions ... . Moreover, the petitioners presented a 'plausible argument' that NHCC could conduct an adequate investigation of the claim despite the delay, and thus, NHCC would not be substantially prejudiced by the late notice of claim ...". ***Matter of Cleary v. Nassau Health Care Corp.*, 2023 N.Y. Slip Op. 02121, Second Dept 4-26-23**

THIRD DEPARTMENT

CRIMINAL LAW, JUDGES.

THE JUDGE IMPROPERLY DISMISSED A JUROR WHEN SHE DIDN'T APPEAR WITHOUT MAKING AN INQUIRY; NEW TRIAL ORDERED.

The Third Department, reversing defendant's conviction and ordering a new trial, over a concurrence, determined judge improperly dismissed a juror in the absence of an adequate inquiry: "After juror No. 1 was selected and sworn in, but before jury selection had concluded, County Court made a record that juror No. 1 'needed to go home due to some health issues' but was advised, and agreed, to return the next day at 9:00 a.m. However, as of 9:28 a.m. the next morning, the court noted that juror No. 1 had not returned and, because the juror had left ill the

prior day, the court found it 'necessary to just replace her with the first alternate at this point.' Defense counsel then registered an exception to the court's replacement of juror No. 1 ... . Thereafter, County Court failed to conduct any inquiry regarding the absence of juror No. 1. When asked whether the court had received any notification from the juror, the court responded, 'No. Basically, I don't have juror number one. She's just plain not here. She left early yesterday ill . . . . So, we are going to replace juror number one.' Although replacement of a juror is generally left to the court's discretion, '[w]ithout a reasonably thorough inquiry, . . . the exercise of the court's discretion on the ultimate issue of whether or not to replace the juror [was] uninformed' ... . County Court was certainly not required to wait two hours before substituting juror No. 1, but, on the record before us, it impermissibly presumed that she was 'unavailable for continued service without conducting the requisite reasonably thorough inquiry and determining that [the] juror [was] not likely to appear within two hours' ...". ***People v. Watts*, 2023 N.Y. Slip Op. 02144, Third Dept 4-27-23**

REAL PROPERTY TAX LAW, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE.

IN THIS TAX FORECLOSURE PROCEEDING, THE COUNTY MUST PROVE IT COMPLIED WITH THE NOTICE REQUIREMENTS OF RPAPL 1125; EVEN THOUGH THE COUNTY PROVED IT MAILED THE NOTICE AND THE LETTERS WERE NOT RETURNED, PLAINTIFFS RAISED A QUESTION OF FACT ABOUT WHETHER THE COUNTY COMPLIED WITH RPAPL 1125 BY OTHER PROOF INDICATING NOTICE WAS NOT RECEIVED.

The Third Department, reversing its prior decision after a reversal by the Court of Appeals, over a two-justice dissent, determined that the plaintiff had raised questions of fact about whether it was notified of the tax foreclosure proceeding by defendant county. The Court of Appeals had ruled that, although the county proved the notice was mailed the letters were not returned, plaintiffs could prove the notice was not received by other evidence: "... '[A]lthough the statute contains no requirement of actual notice and evidence of the failure to receive notice is,by itself, insufficient to demonstrate noncompliance, an interested party may create a factual issue as to whether the taxing authority has complied with the requirements of RPTL 1125 (1) (b) by other relevant proof, despite the taxing authority's submission of the 'affidavit[s] of mailing' mandated by section 1125 (3) (a) and evidence that no mailings were returned' ... . Although we are aware that, on its own, failure to receive notice is insufficient to defeat summary judgment ... , such failure, when combined with other evidence, can support a reasonable inference that defendants failed to comply with the mailing requirements of RPTL 1125 (1) (b) (i). ... [I]f the notices were not received, there are only two real possibilities — either the procedure used by defendant County ... failed to comply with RPTL 1125 (1) (b) (i) inasmuch as the wrong address was affixed, or the United States Postal Service made an error. When viewed in conjunction with the further facts that the certified mail tracking history indicated an unknown address and that the return receipt was unstamped, it is reasonable to infer, together with the additional evidence of nonreceipt, that the notices were not correctly mailed and that the County failed to comply with the requirements of RPTL 1125 (1) (b) (i)." ***James B. Nutter & Co. v. County of Saratoga*, 2023 N.Y. Slip Op. 02148, Third Dept 4-27-23**

WORKERS' COMPENSATION.

EXPOSURE TO AND CONTRACTION OF COVID-19 IN THE WORKPLACE IS AN UNUSUAL HAZARD WHICH IS COMPENSABLE UNDER THE WORKERS' COMPENSATION LAW; HOWEVER HERE THERE WAS NO PROOF DECEDENT CONTRACTED COVID-19 AT HIS WORKPLACE.

The Third Department noted that contracting COVID-19 in the workplace qualifies as an unusual hazard which is compensable under the Workers' Compensation Law. Here the claimant's husband last worked on March 11, 2020, experienced COVID-10 symptoms on March 13 and died on March 29, 2020. But there was no evidence decedent was exposed to COVID-19 in the workplace: "... '[T]he contraction of COVID-19 in the workplace reasonably qualifies as an unusual hazard, not the natural and unavoidable result of employment and, thus, is compensable under the Workers' Compensation Law' ... . Nevertheless, whether a compensable accident has occurred is a question of fact to be resolved by the Board, and its determination in this regard will not be disturbed where supported by substantial evidence ... . To this end, 'the claimant bears the burden of establishing that the subject injury arose out of and in the course of his or her employment' ... . Claimant offered no evidence or testimony of decedent's specific exposure to COVID-19 in his workplace. Further, no evidence was presented indicating any cases of COVID-19 among those living or working in the group home where decedent was house manager, or among other employees with whom decedent may have had contact, prior to or contemporaneous with his onset of symptoms. In fact, the employer's witness testified that decedent was the first known COVID-19 infection in his workplace. Although another worker at the same group home later contracted COVID-19 and succumbed to the disease, the employer's witness testified that the other worker tested positive two weeks after decedent's positive test. Moreover, claimant did not know the extent to which, if at all, decedent personally interacted with others at the group home where he worked. In view of the foregoing, substantial evidence supports the Board's conclusion that claimant failed to meet her burden to demonstrate that decedent contracted COVID-19 in the course of his employment ...". ***Matter of Holder v. Office for People with Dev. Disabilities*, 2023 N.Y. Slip Op. 02156, Third Dept 4-27-23**

FOURTH DEPARTMENT

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

DEFENDANT'S "PROMOTING A SEXUAL PERFORMANCE BY A CHILD" CONVICTION WAS REVERSED ON THE LAW; THE DEFENDANT CANNOT BE CLASSIFIED AS A "SEX OFFENDER."

The Fourth Department noted that if the underlying conviction has been reversed and the indictment dismissed it can no longer be the basis for classifying the defendant as a "sex offender": "While this appeal was pending, this Court reversed the judgment convicting defendant of eight counts of promoting a sexual performance by a child as a sexually motivated felony (Penal Law §§ 130.91, 263.15) on the law and dismissed the indictment ... . A 'sex offender' includes a person who is convicted of an offense described in Correction Law § 168-a (2) or (3). However '[a]ny [such] conviction set aside pursuant to law is not a conviction' for purposes of the statute (§ 168-a [1]; see § 168-d [1] [a]). Inasmuch as defendant's judgment of conviction has been 'set aside pursuant to law' (§ 168-a [1]) by reversal of this Court ..., defendant does not qualify as a 'sex offender' within the meaning of SORA, and the risk level determination must be vacated ...'. ***People v. Congdon*, 2023 N.Y. Slip Op. 02228, Fourth Dept 4-28-23**

FAMILY LAW, CRIMINAL LAW, EVIDENCE.

THE EVIDENCE SUPPORTED HARASSMENT AS A FAMILY OFFENSE BUT DID NOT SUPPORT AGGRAVATED HARASSMENT OR DISORDERLY CONDUCT.

The Fourth Department, reversing (modifying) Family Court in this family offense proceeding, determined harassment was supported by the evidence but disorderly conduct and aggravated harassment were not: "The undisputed evidence at the fact-finding hearing established that the parties had dated more than a decade earlier and that, after petitioner terminated the relationship, respondent continued to contact her, prompting petitioner to obtain at least two orders of protection against him. After years of not seeing each other, respondent went to petitioner's house uninvited on October 28, 2021 and rang the doorbell. When petitioner answered the door, respondent said that she owed him a conversation. Petitioner responded that she did not want to talk to him and repeatedly asked him to leave. Respondent refused to leave, prompting petitioner to call the police. Respondent eventually left before the police arrived. Approximately six weeks later, respondent again went to petitioner's house uninvited and demanded to speak to her. Petitioner asked him to leave at least a dozen times, but respondent ignored those requests and entered her garage where she was standing. The police arrived shortly thereafter and took respondent into custody, charging him with trespass. In our view, Family Court properly determined that respondent committed the family offense of harassment in the second degree by engaging in a course of conduct or repeatedly committing acts that alarmed or seriously annoyed petitioner while having the intent to harass, annoy or alarm petitioner (see Penal Law § 240.26 [3] ...). We agree with respondent, however, that petitioner failed to meet her burden of establishing by a fair preponderance of the evidence that respondent committed the family offenses of disorderly conduct (§ 240.20) or aggravated harassment in the second degree (§ 240.30 [1])." ***Matter of Ohler v. Bartkovich*, 2023 N.Y. Slip Op. 02256, Fourth Dept 4-29-23**

FAMILY LAW, EVIDENCE, JUDGES.

JOINT LEGAL CUSTODY TO MOTHER AND FATHER AND PRIMARY CUSTODY TO FATHER WERE NOT SUPPORTED BY THE EVIDENCE.

The Fourth Department, reversing (modifying) Supreme Court in this divorce proceeding, determined the award of joint legal custody and the award of primary custody to father were not supported by the evidence. The hostility between father and mother and father's violent behavior were not given proper consideration: "'Entrusting the custody of young children to their parents jointly, especially where the shared responsibility and control includes alternating physical custody, is insupportable when parents are severely antagonistic and embattled' ... . In determining whether joint legal custody is appropriate, 'the question of fault is beside the point' ... . [T]he court failed to give adequate weight to the father's extensive history of domestic violence or his continued minimization of his actions and denial of the nature and extent of his mental illness. The evidence established that the father engaged in multiple acts of domestic violence against the mother in the presence of the children. Despite having been convicted of and serving a jail sentence for one of those acts, the father continued to deny that he had ever engaged in domestic violence. Further, although the father has been diagnosed, by more than one provider, with a bipolar disorder, he testified at trial that he could not recall ever having been given such a diagnosis. Both the mother and the father testified that the father had discontinued the use of his prescribed medications without discussing it with his treatment providers. The father had also threatened to commit suicide on more than one occasion, prompting calls to the police that resulted in brief hospitalizations for which the father blamed the mother. At the time of the trial, the evidence established that the father's current medication regimen was inappropriate for Bipolar Disorder treatment and that the father was not currently engaged in any regular mental health counseling." ***Crofoot v. Crofoot*, 2023 N.Y. Slip Op. 02205, Fourth Dept 4-28-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE FIRST, THIRD AND FOURTH DEPARTMENTS HAVE HELD THAT THE VIOLATION OF THE INDUSTRIAL CODE PROVISION 12 N.Y.C.R.R. § 23-4.2(k) WILL NOT SUPPORT A LABOR LAW § 241(6) CAUSE OF ACTION BECAUSE IT IS NOT SUFFICIENTLY SPECIFIC; THE SECOND DEPARTMENT HAS HELD THE VIOLATION OF THAT SAME PROVISION SUPPORTS A LABOR LAW § 241(6) CAUSE OF ACTION.

The Fourth Department, reversing (modifying) Supreme Court in this Labor Law § 241(6) construction-accident action, determined that the violation of the Industrial Code provision 12 N.Y.C.R.R. § 23-4.2(k) will not support a Labor Law § 241(6) cause of action. The court noted the split of authority on this issue: "[T]he court erred in denying the moving defendants' motion with respect to the Labor Law § 241 (6) claim against [defendant] insofar as it was based on the alleged violation of 12 NYCRR 23-4.2 (k). We have repeatedly held that 12 NYCRR 23-4.2 (k) is not sufficiently specific to support a Labor Law § 241 (6) claim ... . Inasmuch as the First and Third Departments have held similarly ... , we decline to adopt contrary precedent in the Second Department ...". ***Vicki v. City of Niagara Falls*, 2023 N.Y. Slip Op. 02260, Fourth Dept 4-28-23**

MUNICIPAL LAW, PERSONAL INJURY, EMPLOYMENT LAW, CIVIL PROCEDURE, ADMINISTRATIVE LAW.

PETITIONER, A CORRECTION OFFICER WHO WAS INJURED MOVING LAUNDRY BAGS BLOCKING A HALLWAY IN THE JAIL, WAS ENTITLED TO GENERAL MUNICIPAL LAW § 207-c BENEFITS; ALTHOUGH SUPREME COURT SHOULD NOT HAVE TRANSFERRED THE ARTICLE 78 TO THE APPELLATE DIVISION, THE FOURTH DEPARTMENT CONSIDERED THE MERITS.

The Fourth Department, reversing the denial of General Municipal Law § 207-a benefits in this Article 78 proceeding, determined petitioner, a correction officer, was injured performing her duties when she attempted to move laundry bags blocking the hallway in the jail housing unit. The Fourth Department noted that Supreme Court should not have transferred the Article 78 proceeding to the appellate division because the determination was not based upon a hearing at which evidence was taken "pursuant to direction by law": "... Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804 (g) on the ground that the petition raised a substantial evidence issue. Respondent's determination 'was not 'made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law' (CPLR 7803 [4]). Rather, the determination was the result of a hearing conducted pursuant to the terms of [an] agreement' between petitioner's union and respondent ... . Nevertheless, in the interest of judicial economy, we consider the merits of the petition .... Petitioner testified at the hearing that she thought the laundry bags outside the main entrance door were a 'safety issue,' particularly because they would block other officers from moving through the hallway quickly and because persons using the hallway may get hurt. She further testified that her training and job responsibilities required her to address safety concerns. Petitioner also submitted documentary evidence that correction officers were under the duty to ensure that laundry bags are not placed on the housing unit floor at any time. Moreover, it is undisputed that there was no policy prohibiting correction officers from moving laundry bags. Although respondent submitted testimony that correction officers should order inmates to move laundry bags, that testimony did not address the location of the laundry bags and the safety hazard posed by laundry bags left in a hallway. We therefore conclude that the determination to deny petitioner's application for section 207-c benefits was arbitrary and capricious ...". ***Matter of Williams v. County of Onondaga*, 2023 N.Y. Slip Op. 02262, Fourth Dept 4-28-23**

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