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FIRST DEPARTMENT

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, APPEALS, EVIDENCE.

RESPONDENT STATE COLLEGE WITHHELD EXCULPATORY EVIDENCE IN THIS COLLEGE MISCONDUCT PROCEEDING WHICH RESULTED IN PETITIONER-STUDENT'S EXPULSION; THE EXPULSION PENALTY WAS VACATED AND THE STUDENT WAS REINSTATED IN GOOD STANDING.

The First Department, reversing the expulsion of petitioner-student and reinstating the student in good standing, determined the respondent state college had withheld exculpatory evidence which indicated petitioner did not carve a racial epithet on an elevator door. Two students claimed to have seen petitioner carve the epithet. Another student sent an email stating he had seen the epithet on the door before students arrived for the semester. That email was never disclosed to the petitioner: "Article III of Section 4 of respondent's Code of Conduct enumerates the due process rights of students charged with violations. In addition to the right to a fair hearing, a charged student 'has the right to copies of written reports pertinent to the case . . .' Respondent's failure to turn over exculpatory evidence in its possession prior to the hearing violated its own policies and procedures, thereby violating petitioner's due process rights ... . Now, in hindsight, it cannot be said that petitioner received a fair hearing where evidence tending to prove his innocence was withheld. Accordingly, after our independent review of the record as a whole, we now find that this exculpatory evidence, the extensive alibi evidence as well as other objective evidence of petitioner's innocence render the charges unsupportable as a matter of law thus warranting vacatur of the expulsion penalty, expungement of all references to the underlying charges contained in petitioner's academic record and his reinstatement as a student in good standing ...". ***Matter of Mozdziak v. State Univ. of N.Y. Mar. Coll.*, 2022 N.Y. Slip Op. 06759, First Dept 11-29-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT ADDRESS OR CONTROVERT THE DEFENDANT'S EXPERT'S OPINION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's expert's affidavit did not address or controvert the defendant's expert's opinion. Plaintiff alleged her "foot drop" was caused by prescribed medication: Defendant's expert opined the foot drop could not have been caused by the medication plaintiff took: "Defendant made a prima facie case of summary judgment through its expert who stated that there was no medical evidence that methotrexate, a drug in use since 1947, causes peripheral neuropathy or a foot drop, either alone or in combination with one of plaintiff's other medications, and opined that foot drop would not have manifested at the single low dose of methotrexate consumed by plaintiff over the course of one day; the short period that elapsed between this consumption of the drug and the emergence of foot drop, was atypical for a drug-induced peripheral neuropathy; if plaintiff's condition were a drug induced peripheral neuropathy, it would have resolved within weeks of the discontinuance of methotrexate and the fact that plaintiff's condition persisted for years and did not resolve upon discontinuing methotrexate, was a presentation atypical for drug-induced peripheral neuropathy; and plaintiff's presumed diagnosis of sarcoidosis, could be an explanation for her condition. In opposition to defendants' prima facie showing, plaintiff's expert failed to demonstrate the existence of triable issues of fact by demonstrating that defendants' prescription of the drug methotrexate was a 'substantial factor' in causing her claimed injury of 'foot drop' ... . The expert failed to address or controvert many of the points made by defendants' expert. He did not address or controvert defendant's expert's opinion that 5mg of methotrexate taken in one day could not cause foot drop, or, if it did, why the foot drop did not resolve within weeks of discontinuation of the medication. Plaintiff's expert also failed to address defendant's expert's opinion that the more likely culprit for plaintiff's foot drop was her presumed diagnosis of neuro-sarcoidosis, as indicated in the medical records." ***Camacho v. Pintauro*, 2022 N.Y. Slip Op. 06743, First Dept 11-29-22**

PERSONAL INJURY.

THE ATTEMPT TO HOLD DEFENDANT PLUMBING COMPANY LIABLE FOR THE LEAK WHICH CAUSED PLAINTIFF'S SLIP AND FALL RELIED ON PURE SPECULATION; THE DOCTRINE OF RES IPSA LOQUITUR FAILS BECAUSE DEFENDANT DID NOT HAVE EXCLUSIVE CONTROL OVER THE BUILDING'S PLUMBING.

The First Department, reversing Supreme Court, determined defendant plumbing company's motion for summary judgment in this slip and fall case should have been granted. The First Department held the attempt to connect the pipe-repair to the leak which caused the slip and fall was pure speculation: "Plaintiff slipped and fell on water that spilled out of a garbage bin positioned to catch a leak from a pipe in the ceiling

of the basement storeroom in a building owned by plaintiff's employer. About two months before plaintiff's accident, defendant had repaired a sanitary waste line pipe in a basement corridor outside the storeroom in which the accident occurred. Upon these undisputed facts established by the record, defendant should have been granted summary judgment, as there is nothing but speculation to connect defendant's work on the waste pipe in the corridor with the leak from the water pipe in the storeroom that appeared two months later and caused plaintiff's mishap. We note that plaintiff cannot rely upon the doctrine of res ipsa loquitur, because he has not established that the pipes were within defendant's exclusive control ... . Defendant made a showing, which plaintiff failed to rebut, that defendant was part of a rotation of plumbers who made only emergency repairs at the hospital, and that plaintiff's employer employed in-house plumbers." ***Taitt v. Riehm Plumbing Corp.*, 2022 N.Y. Slip Op. 06775, First Dept 11-29-22**

PERSONAL INJURY.

DEFENDANT IN THIS REAR-END TRAFFIC ACCIDENT CASE DID NOT RAISE A QUESTION OF FACT ABOUT A NON-NEGLIGENT EXPLANATION FOR DEFENDANT'S ACTIONS OR PLAINTIFF'S COMPARATIVE NEGLIGENCE.

The First Department, reversing Supreme Court in this rear-end traffic accident case, determined defendant's allegation that the plaintiff "stopped short" did not raise a question of fact: "The court should have granted plaintiff for summary judgment on liability. Plaintiff established prima facie that defendant was negligent by submitting his affidavit that defendant's vehicle rear-ended his vehicle as he slowed down or stopped to accommodate another vehicle that was merging in from his right, and defendant failed to provide a nonnegligent explanation for the collision ... Defendant claimed only that defendant [plaintiff?] stopped short, which, by itself, was insufficient to rebut the presumption of negligence ... . Contrary to the motion court's finding, plaintiff was not required to establish absence of comparative negligence on his part to be entitled to summary judgment on liability ... . In view of plaintiff's affidavit establishing his own lack of fault and his seatbelt usage, and the absence of any proof to the contrary, the affirmative defenses of comparative negligence and failure to wear a seatbelt, as well as the irrelevant defense of assumption of risk, are also dismissed ...". ***Vasquez v. Strickland*, 2022 N.Y. Slip Op. 06876, First Dept 12-1-22**

PERSONAL INJURY.

THE CLUB'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE DRAM SHOP ACT CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined the club's ("Copacabana") motion for summary judgment dismissing the Dram Shop Act cause of action should not have been granted. Because the subsequent accident did not occur on the club's premises, the common law negligence cause of action was properly dismissed: "Copacabana was not entitled to summary judgment dismissing the claim alleging violation of the Dram Shop Act (General Obligations Law § 11-101; Alcohol Beverage Control Law § 65 [2]), as it did not satisfy its initial burden of negating the possibility that it served alcohol to a visibly intoxicated person ... . While Copacabana relied on defendant Anslem Trotman's deposition testimony that he arrived to the establishment after having only one beer, and that he did not recall anyone from Copacabana serving him drinks, Trotman's testimony was insufficient to rule out the possibility that he was served alcohol by Copacabana waitstaff while he was visibly intoxicated. Trotman had also testified that he was drunk and could not remember large portions of the night, and his testimony was equivocal as to whether Copacabana waitstaff served him drinks or whether he purchased additional alcohol beyond what came with his party package. ... Plaintiff's common-law negligence was properly dismissed, as the accident that resulted in plaintiff's injuries occurred off Copacabana's premises ... . The claim for punitive damages was also properly dismissed, as there is no independent cause of action for punitive damages ... and plaintiff failed to establish a basis for such damages." ***Denenberg v. 268 W. 47th Rest., Inc.*, 2022 N.Y. Slip Op. 06866, First Dept 12-1-22**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE DEFENDANT INTERPOSED COUNTERCLAIMS OF AN EQUITABLE NATURE AND THEREBY WAIVED A JURY TRIAL ON ALL CAUSES OF ACTION.

The Second Department, reversing Supreme Court, determined the defendant's making equitable counterclaims waived a jury trial on all causes of action: "Where, as here, a defendant interposes counterclaims of an equitable nature related to a cause of action asserted in the complaint, the defendant waives a jury trial on all causes of action, whether legal or equitable in nature ... . Accordingly, the Supreme Court should have granted the plaintiff's motion to strike the defendant's demand for a jury trial. ...". ***Conwell Props., Inc. v. DAG Rte. Six, LLC*, 2022 N.Y. Slip Op. 06785, Second Dept 11-30-22**

CIVIL PROCEDURE, ATTORNEYS, JUDGES, NEGLIGENCE.

PLAINTIFF'S DISCOVERY-RELATED ACTIONS WERE NOT WILLFUL AND CONTUMACIOUS SUCH THAT THE COMPLAINT SHOULD HAVE BEEN DISMISSED; HOWEVER, PLAINTIFF'S DISCOVERY DELAYS WARRANTED VACATING THE NOTE OF ISSUE AND PAYMENT OF $3000 TO DEFENDANTS' ATTORNEY.

The Second Department, reversing (modifying) Supreme Court, determined the complaint in this traffic accident case should not have been dismissed as a discovery sanction. But defendant's motion to vacate the note of issue due to plaintiff's delay in disclosing prior relevant injuries should have been granted. In addition, the appellate court ordered plaintiff's attorney to pay defendants' attorney $3000: "Supreme Court im-

providently exercised its discretion in granting the defendants' motion to the extent of directing dismissal of the complaint pursuant to CPLR 3126(3). Although the plaintiff initially failed to provide authorizations for the release of medical records relating to pertinent injuries which pre-date the subject accident, the plaintiff did provide date-restricted authorizations for the release of medical records relating to pertinent injuries approximately one week after the defendants requested them. ... [D]efendants did not clearly demonstrate that the plaintiff's discovery-related conduct was willful and contumacious ... However, in light of the plaintiff's delay in disclosing information about prior injuries that bear on the controversy and would assist preparation for trial ... . the Supreme Court should have granted the defendants' motion to the extent of vacating the note of issue ... , directing the plaintiff to provide the defendants with authorizations permitting the release of medical records relating to pertinent injuries which pre-date the subject accident, and directing the plaintiff's attorney to pay the sum of $3,000 to the defendants' attorney...". ***Lopez v. Maggies Paratransit Corp.*, 2022 N.Y. Slip Op. 06793, Second Dept 11-30-22**

DEFAMATION, PRIVILEGE.

THE ALLEGEDLY DEFAMATORY STATEMENTS MADE IN A KOREAN-LANGUAGE CHAT ROOM WERE PROTECTED BY QUALIFIED PRIVILEGE, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the statements alleged to be defamatory were protected by qualified privilege. Plaintiff is an organization established to act as a liaison between the Korean American community and the NYC Police Department. The statements were made in a Korean language chat group where the management of the organization was discussed.: "The defendant established, prima facie, that his alleged statements are subject to a qualified privilege. Qualified privilege applies to a statement 'when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned' ... . Application of the privilege depends on whether 'the relation of the parties [is] such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others' ... . Here, the alleged statements were made in a password-controlled, members-only chat group, and involved the management of the members' organization. Such circumstances fall within the scope of the qualified privilege ... . A plaintiff may defeat the qualified privilege with a showing of either common-law malice (spite or ill will), or actual malice (knowledge of the falsity of the statement or reckless disregard for the truth) ... . Here, the plaintiffs failed to submit any evidence that the defendant was motivated by malice alone in making the alleged statements ... . They similarly failed to submit any evidence that the defendant knew the alleged statements were false or acted with a reckless disregard for their truth …". ***Joo Tae Yoo v. Choi*, 2022 N.Y. Slip Op. 06791, Second Dept 11-30-22**

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

THE PROPERTY OWNER, MCWHITE, HAD BEEN DISMISSED FROM THE ORIGINAL FORECLOSURE ACTION AND HER INTEREST IN THE PROPERTY HAD NOT BEEN EXTINGUISHED BY THE JUDGMENT OF FORECLOSURE WHICH FALSELY NAMED HER AS A DEFENDANT; THE REFEREE'S DEED-HOLDER DID NOT STATE A CAUSE OF ACTION FOR REFORECLOSURE AGAINST MCWHITE AND MCWHITE WAS ENTITLED TO SUMMARY JUDGMENT ON HER QUIET TITLE CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined the referee's deed-holder's (I & I's) complaint failed to state a cause of action for reforeclosure (RPAPL 1503, 1523) against McWhite, the owner of the subject property. McWhite had been dismissed from the original foreclosure action because plaintiff never moved for a default judgment. The foreclosure plaintiff was aware McWhite was not included in the foreclosure when it filed its judgment, which falsely indicated McWhite's interest in the property had been extinguished. McWhite was entitled to summary judgment on her quiet title action: "Under the circumstances of this case, I & I failed to state a cause of action against McWhite for reforeclosure because the defect in the foreclosure action was due to the willful neglect of the foreclosure plaintiff as a matter of law. The underlying objective of foreclosure actions is 'to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale' ... . The defect in the underlying foreclosure action was that McWhite's interest was not validly extinguished in the judgment of foreclosure and sale due to her effective dismissal from the action. ... [T]he foreclosure plaintiff here knew that McWhite had been effectively dismissed from the action and that the judgment of foreclosure and sale could not validly extinguish her interest in the premises. The foreclosure plaintiff nevertheless made a conscious decision to proceed to judgment and sale without validly extinguishing McWhite's known interest ... . * * * Here, the judgment of foreclosure and sale was void as to McWhite and the foreclosure sale did not transfer her interest in the premises to I & I. Moreover, McWhite established, prima facie, that the foreclosure action accelerated the mortgage debt, that the foreclosure action was dismissed as abandoned pursuant to CPLR 3215(c), and the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations (see CPLR 213[4] ...). In opposition, I & I failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of McWhite's motion which was for summary judgment on the complaint in the quiet title action." ***McWhite v. I & I Realty Group, LLC*, 2022 N.Y. Slip Op. 06795, Second Dept 11-30-22**

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, CIVIL PROCEDURE.

THE COMPLAINT STATED A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST THE DIOCESE; PURSUANT TO THE CHILD VICTIMS ACT, PLAINTIFF ALLEGED HE WAS SEXUALLY ABUSED BY A PRIEST WHEN HE WAS 15 TO 16.

The Second Department, reversing Supreme Court, determined the defendant Diocese's motion to dismiss the intentional infliction of emotional distress cause of action should not have been granted. Plaintiff, pursuant to the Child Victims Act, alleged he was sexually abused by a

priest when he was 15 to 15 years old: " 'The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress' ... . Here, treating as true the plaintiff's allegations in the second amended complaint, that the defendants had knowledge of the priest's sexual abuse of the plaintiff and other children, yet concealed the abuse and permitted it to continue, and according the plaintiff the benefit of every possible favorable inference, the alleged conduct was sufficiently outrageous in character and extreme in degree to set forth a cause of action for intentional infliction of emotional distress ... . The plaintiff also sufficiently alleged a causal connection between the defendants' alleged outrageous conduct and the plaintiff's injuries ... . Moreover, this cause of action is not duplicative of the cause of action seeking to recover damages for negligence ...". ***Eskridge v. Diocese of Brooklyn*, 2022 N.Y. Slip Op. 06788, Second Dept 11-30-22**

PERSONAL INJURY.

WHETHER THE SIDEWALK DEFECT WHICH CAUSED PLAINTIFF'S SLIP AND FALL WAS NONACTIONABLE AS "TRIVIAL" IS A QUESTION OF FACT FOR THE JURY; IN OTHER WORDS, DEFENDANT DID NOT DEMONSTRATE THE DEFECT WAS TRIVIAL AS A MATTER OF LAW.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment asserting the sidewalk defect which caused plaintiff's slip and fall was trivial should not have been granted: "[P]laintiff allegedly was injured when she tripped and fell due to a height differential between two sidewalk slabs abutting premises owned by the defendant ... . 'Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury' ... . 'A defendant seeking dismissal of a complaint on the basis that [an] alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact' ... . In determining whether a defect is trivial, the court must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury' ... . There is no 'minimal dimension test' or 'per se rule' that the condition must be of a certain height or depth in order to be actionable ...". ***Butera v. Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 2022 N.Y. Slip Op. 06783, Second Dept 11-30-22**

PERSONAL INJURY, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

PLAINTIFF ALLEGED HE WAS SEXUALLY ABUSED BY A PRIEST WHILE ATTENDING DEFENDANT'S SCHOOL; THE COMPLAINT STATED CAUSES OF ACTION FOR NEGLIGENT HIRING, NEGLIGENT SUPERVISION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The Second Department, reversing Supreme Court, determined plaintiff in this Child Victims Act action alleging sexual abuse by a priest while plaintiff was attending defendant's parish school stated causes of action for negligent hiring, negligent supervision and intentional infliction of emotional distress. "The complaint alleged .* * * the priest ... was an employee and/or an agent of the defendant, that the defendant had knowledge that the priest was abusing students, including the plaintiff, or that he had the propensity to abuse, and that the sexual abuse of the plaintiff occurred during school activities and during times at which the plaintiff was under the defendant's supervision and care, custody, and control": "An employer can be held liable under theories of negligent hiring, retention, and supervision where the complaint alleges that 'the employer knew or should have known of the employee's propensity for the conduct which caused the injury' ... . Causes of action alleging negligence based upon negligent hiring, retention, or supervision are not statutorily required to be pleaded with specificity ... . [A] school 'has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' ... . 'The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians' ... . [T]reating the allegations in the complaint as true, including that the defendant had knowledge of the priest's sexual abuse of the plaintiff and other children and concealed that abuse, and giving the plaintiff the benefit of every possible favorable inference, the alleged conduct would be sufficiently outrageous in character and extreme in degree to set forth a cause of action for intentional infliction of emotional distress ...". ***Novak v. Sisters of the Heart of Mary*, 2022 N.Y. Slip Op. 06814, Second Dept 11-30-22**

THIRD DEPARTMENT

WORKERS' COMPENSATION LAW.

PETITIONER CHIROPRACTOR ACKNOWLEDGED RECEIVING PAYMENTS DIRECTLY FROM A MEDICAL EQUIPMENT PROVIDER IN VIOLATION OF THE WORKERS' COMPENSATION LAW; BECAUSE THERE WERE NO CONTESTED FACTS, THE WORKERS' COMPENSATION BOARD HAD THE POWER TO REMOVE PETITIONER FROM THE LIST OF AUTHORIZED MEDICAL PROVIDERS WITHOUT HOLDING A HEARING.

The Third Department, in a full-fledged opinion by Justice Lynch (too detailed to fully summarize here), determined petitioner chiropractor was not entitled to a hearing before the Workers' Compensation Board removed petitioner from the list of authorized medical providers. Petitioner acknowledged taking payments directly from a supplier of medical equipment, which is a violation of the Workers' Compensation Law. Petitioner's only argument on appeal was his entitlement to a hearing before removal from the list. After analyzing the applicable statutes, the Third Department determined, absent any contested facts about the statutory violation, petitioner was not entitled to a hearing: "[W]e agree

with respondent that the chair [Workers' Compensation Board] has authority independent of the CPC [chiropractic practice committee] to conduct an investigation, find that the provider is disqualified from rendering care under the Workers' Compensation Law for statutorily specified acts of misconduct and, upon such a finding, remove the provider from the list of authorized chiropractors (see Workers' Compensation Law § 13-l [10], [12]; see also Workers' Compensation Law § 13-l [10] [g]). * * * In an instance where questions of fact attend the asserted charges of professional misconduct or incompetency, a hearing would be in order. Here, however, petitioner has admitted and documented his receipt of payments from [the medical equipment supplier] for treatment rendered to workers' compensation claimants in direct violation of Workers' Compensation Law § 13-l (10) (g). Under these circumstances, no hearing was warranted and respondent's decision to remove petitioner from the list of authorized providers was not arbitrary and capricious." ***Matter of Levi v. New York State Workers' Compensation Bd.*, 2022 N.Y. Slip Op. 06850, Third Dept 12-1-22**

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