LAW OFFICES OF JONATHAN M. COOPER

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Inside This Issue

How Some Schools Say "Enter at Your Own Risk"

After seeing scores, if not hundreds, of cases involving school negligence, you would think that there would be nothing - or almost nothing - that would still surprise you. But, every once in a while a case comes along that forces you to do a double-take because the facts seem so bizarre.

Granted, there are many, many details from this school negligence case that are still missing. And, from the limited information available, it sounds like it was an interesting science experiment. However, as I'm sure most people would also agree, the notion that a high school student would purposely be set on fire as part of a science experiment is certainly troubling, and certainly leads to the perception that some necessary safety precautions either weren't in place in the first instance, or, even if these precautions were on the books, it looks like they weren't followed.

As any "I Love Lucy" fans would attest, this school's got some explaining to do.

Simply put, I cannot conjure any scenario where a parent wouldn't be shocked to learn that their child had been set on fire during class as part of an experiment.

Could you imagine a time where New York's schools entrances would bear the sign: "Enter at Your Own Risk?" It certainly seems like some are already (effectively) doing so.

When a Non-Compete Agreement is Enforceable Under New York Law

The truth is, it can be a bit difficult to predict with absolute certainty what a New York court will do when confronted with a non-compete regarding a senior-level, key employee. That said, New York State's highest court has set forth four (4) criteria that will determine whether the non-compete (a/k/a "restrictive covenant") is reasonable, and therefore, enforceable:

(1) the restriction does not go beyond that which is needed to protect a "legitimate interest of the employer"; (2) the restriction is not overly broad, and therefore manifestly unfair, to the employee; (3) the restriction is not "injurious to the public"; and, (4) the non-compete clause has to be limited - reasonably - both in terms of length of time as well as in geographic scope.

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Parenting 101

Just last night, my wife needed to go away on a short trip, and I was left to fend for myself with my 7 kids.

After returning from the airport and three rounds of carpool, my kids looked up at me, and I almost thought I could hear them thinking: "Daddy's got to handle us on his own. Fresh meat."

So, I knew that when the 3 and 2 year-olds started to act up, I couldn't show any weakness – and actually had to force myself to remain calm and collected; you know, to actually ***parent***.

And, thank G-d, it worked.

In fairness, my older children really made an effort to step up to the plate (at least for the most part) and help poor old Daddy out, which made my job a lot easier. But this experience has crystallized how much better of a parent I can - and must – be.

We strongly encourage the readers of our monthly newsletter to provide feedback about issues they would like to see addressed in our future publications.

To do so, please contact us through our website, www.JMCooperLaw.com or via e-mail at jmcooper@jmcooperlaw.com

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Why It's So Hard to Get Punitive Damages in New York

In the first conversation that I have with prospective clients, particularly within the realm of a potential breach of fiduciary duty case (where they feel betrayed by a confidant, and are terribly and personally offended from the events that unfolded), I am often asked whether the client can recover not only the damages that they actually incurred, but whether the court may also compel the defendant to pay punitive damages because the defendant's conduct was "obviously wrong," and "immoral."

As a general rule, the instances where a plaintiff can recover punitive damages - and actually have it stand up on appeal - are rare indeed.

And the reason for this should be readily understandable from the Court of Appeals' decisions in *Dupree v. Giugliano*, 20 N.Y.3d 921, 958 N.Y.S.2d 312 (Nov. 29, 2012), citing and quoting from its earlier (1993) *Prozeralik* decision wherein it said that for an award of punitive damages there must be

> "[A]ggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton."

As you can certainly surmise, this standard is not easily met, because even if the Court or jury finds that the defendant acted deliberately, the claim for punitive damages will still fail unless the defendant's conduct rises to the level of sparking "outrage."

Indeed, in the Court of Appeals' recent holding in *Marinaccio v. Town of Clarence*, 20 N.Y.3d 506, ... N.Y.S.2d .... (March 21, 2013), the Court overturned a lower court's award of punitive damages precisely because the plaintiff failed to meet this daunting evidentiary standard, as the Court held that the mere fact that the defendants had acted deliberately was insufficient to support a punitive damages award, as there wasn't evidence that the defendants acted with "malice or gross indifference."

Happy Birthday, Sweetheart

We recently were privileged to celebrate the bat mitzvah of my daughter, Hannah.

Granted, we've all heard this refrain before, but wasn't I just changing her diapers a few weeks ago?

I think we all wish we could take more time to appreciate our family, and especially the children while they are really small. The stressors of life intervene, however.

There is a silver lining, though: we get special occasions that force us to stop and smell the proverbial roses. And for that, I am extremely grateful.

When a Non-Compete Agreement is Enforceable Under New York Law

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Admittedly, this list isn't exactly a model of clarity - particularly if you're looking to find out whether your (soon to be) former employer's non-compete clause can be enforced against you. Luckily, the Court of Appeals has gone further, and enumerated some of the factors it will consider in deciding whether to enforce a particular non-compete agreement:

"[N]o restrictions should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment. This includes those techniques which are but 'skillful variations of general processes known to the particular trade.'

On the other hand ... "[T]he courts must also recognize the legitimate interest an employer has in safeguarding that which has made his business successful and to protect himself against deliberate surreptitious commercial piracy."

Doesn't that leave us right back where we started? No; not exactly.

Rather, the courts are obliged to enforce a non-compete (a/k/a a "restrictive covenant") so long as it is needed to keep a former employee from breaching his fiduciary duty and wrongfully disclosing the employer's confidential, proprietary information that it expended time, money and effort to develop. Anything that doesn't satisfy these criteria will likely not be protected, or enforceable.

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***COMMUNICATION POLICY**: As a general rule, Mr. Cooper does not accept unscheduled phone calls. This policy affords Mr. Cooper the ability to pay closer and more focused attention to each case, resulting in more efficient and effective representation for his clients. Moreover, it avoids the endless and needless game of phone tag played by most businesses and law firms. To schedule a phone call or in-person appointment with Mr. Cooper, please call his office at 516.791.5700.*

How a Mere Website Can Render a Product Manufacturer Subject to Being Sued in New York

In the defective products context, many products are manufactured out of state, often overseas. There are cases when you can still get NY jurisdiction over them, however.

A foreign corporation is amenable to suit in New York courts under CPLR 302 (a) (1) if it "transacts any business within the state or contracts anywhere to supply goods or services in the state." Typical business transactions include sales, soliciting customers, contracting, providing services, and shipping products into the state (see e.g. *George Reiner & Co. v. Schwartz*, 41 NY2d 648, 653; *Symenow v. State St. Bank & Trust Co.*, 244 AD2d 880, 880-881).

Interestingly - and importantly - this category has been substantially expanded to include web-based activity, as New York's courts have held as follows:

"[T]he assertion of personal jurisdiction may be reasonable where a party maintains a website that "provides information, permits access to [email] communication, describes the goods or services offered, downloads a printed order form, or allows online sales with the use of a credit card, and sales are, in fact, made . . . in this manner in the forum state." (*Grimaldi v. Guinn*, 72 AD3d 37, 50).

The takeway from the foregoing should be relatively obvious: if you intend to benefit your business by conducting business in New York - even if it is only web-based without any physical "office presence" in New York - chances are you may be subject to being sued in New York.

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