May 24, 2019

CasePrepPlus

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

CRIMINAL LAW.

DEFENDANT'S FOR CAUSE CHALLENGE TO A PROSPECTIVE JUROR WHO SAID HE WAS 'NOT SURE' HE COULD BE IMPARTIAL SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined defendant's for cause challenge to a prospective juror should have been granted: "The challenged panelist made a statement reflecting a state of mind likely to preclude the rendering of an impartial verdict (see CPL 270.20[1][b]), and the court did not elicit an unequivocal assurance that in rendering a verdict based on the evidence, the panelist could set aside any bias ... . The juror expressly stated that he was 'not sure' he could be impartial in a case involving a registered sex offender. His general statement about needing to hear the facts did not address his ability to overcome the specific bias he had expressed. 'If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another' ...". ***People v. Rodriguez*, 2019 N.Y. Slip Op. 03734, First Dept 5-14-19**

CRIMINAL LAW, CONSTITUTIONAL LAW, JUDGES, CIVIL PROCEDURE.

MOLINEUX/SANDOVAL HEARING IN THE HARVEY WEINSTEIN SEXUAL MISCONDUCT PROSECUTION WAS PROPERLY CLOSED TO THE PUBLIC AND THE RECORD OF THE HEARING WAS PROPERLY SEALED, NEWS-MEDIA COMPANIES' PETITION TO UNSEAL THE RECORD DENIED.

The First Department denied the Article 78 petition brought by news-media companies seeking to unseal the Molineux/Sandoval hearing transcript in the felony sexual misconduct prosecution of Harvey Weinstein. The presiding judge had closed the hearing to the public and sealed the record of it: "While the First Amendment guarantees the public and the press a qualified right of access to criminal trials … , this right of access may be limited where courtroom closure is necessitated by a compelling state governmental interest, and where the closure is narrowly tailored to serve that interest ... . Such compelling interests may include the defendant's right to a fair trial, including the right to 'fundamental fairness in the jury selection process' ... . Proceedings cannot be closed unless specific findings are made on the record, demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest' ... . Where the interest asserted is the right of the accused to a fair trial, specific findings must be made demonstrating that, 'there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent,' and 'reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights' ... . The subject matter of the Molineux /Sandoval hearing - allegations of prior uncharged sexual offenses by the defendant, the admissibilty of which is disputed - was likely to be prejudicial and inflammatory. Further, some or all of the allegations may have been determined to be inadmissible at trial, or may not be offered at trial even if found potentially admissible. Contrary to petitioners' suggestion, the People have represented that some of the information has not yet been made public." ***Matter of New York Times Co. v. Burke*, 2019 N.Y. Slip Op. 03903, First Dept 5-16-19**

SECOND DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE, JUDGES, PERSONAL INJURY.

PLAINTIFF'S MOTION TO SET ASIDE THE JURY VERDICT IN THE INTEREST OF JUSTICE SHOULD NOT HAVE BEEN GRANTED, THE COURT GRANTED THE MOTION BASED UPON REMARKS MADE BY DEFENSE COUNSEL DURING SUMMATION, REMARKS TO WHICH NO OBJECTION HAD BEEN MADE.

The Second Department, reversing Supreme Court, determined plaintiff's motion pursuant to CPLR 4404 (a) to set aside the jury verdict in this personal injury case should not have been granted. The jury found that plaintiff did not suffer a serious injury within the meaning of the no-fault law (Insurance Law § 5102(d)), and awarded plaintiff $50,000 for lost wages, reduced by $25,000 for failure to wear a seatbelt. The trial judge granted the motion in the interest of justice primarily based upon comments made by defense counsel during summation, comments to which no objection was made: "[T]he Supreme Court identified eight specific statements made by defense counsel in his closing that the court characterized as improper, in addition to the remarks quoted above. However, none of these statements were objected to. We recognize that common

courtesy requires that an attorney allow opposing counsel the opportunity to argue his or her case to the jury without undue or repetitive interruptions. Nevertheless, where counsel, in summing up, exceeds the bounds of legal propriety, it is the duty of the opposing counsel to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any improper remarks, and to admonish counsel from repetition of improper remarks ... . Where objection is not, or cannot appropriately be, interposed during summation, counsel should, upon the conclusion of the summation, make appropriate objections, seek curative instructions, or request a mistrial ... . Where no objection is interposed, a new trial may be directed only where the remarks are so prejudicial as to have caused a gross injustice, and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party of a fair trial ... . This standard was not met in this case. We stress that the plaintiff's counsel made no complaint regarding the allegedly prejudicial nature of the defendant's closing statement until after an adverse verdict was rendered. The verdict that the plaintiff did not sustain a serious injury was supported by the evidence, and the jury had ample reason to reject the plaintiff's claims and accept the arguments of the defendants. Accordingly, we reverse the order insofar as appealed from, deny the branch of the plaintiff's motion which was pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages in the interest of justice and for a new trial on the issue of damages, and reinstate the jury verdict." ***Kleiber v. Fichtel*, 2019 N.Y. Slip Op. 03778, Second Dept 5-15-19**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT PLED GUILTY TO THE CHARGES IN TWO INDICTMENTS, WITH RESPECT TO ONE OF THE INDICTMENTS, COUNSEL WHO NEGOTIATED THE PLEA OFFER HAD BEEN RELIEVED AS DEFENSE COUNSEL BECAUSE OF A CONFLICT OF INTEREST, CONVICTIONS REVERSED.

The Second Department reversed defendant's convictions because defense counsel had a conflict of interest: "The defendant was charged under Indictment No. 13-00668 with murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree. The defendant was later charged under Indictment No. 14-00627 with assault in the second degree and assault in the third degree. Following a pretrial hearing on Indictment No. 13-00668, the defendant's counsel (hereinafter the attorney), who represented the defendant on the charges under both Indictment Nos. 13-00668 and 14-00627, learned that he had a conflict of interest with the defendant, as the attorney's law office also represented, on unrelated charges, the prosecution's principal witness in the case under Indictment No. 13-00668. The witness was to testify that he saw the defendant shoot and kill the unarmed victim. The County Court granted the attorney's motion to be relieved as defense counsel in the case under Indictment No. 13-00668. However, the attorney remained as the defendant's counsel on the charges under Indictment No. 14-00627. The defendant ultimately pleaded guilty to certain charges on both indictments in exchange for a reduced sentence. ... The defendant was denied his right to effective assistance of counsel when the attorney, who had been relieved as the defendant's counsel on Indictment No. 13-00668 because of a conflict of interest with the prosecution's principal witness, made a plea offer with respect to that indictment . The defendant failed to receive representation that was conflict-free and singlemindedly devoted to his best interests as required by both the Constitution of the United States and the New York State Constitution ...". ***People v. Hill*, 2019 N.Y. Slip Op. 03810, Second Dept 6-15-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S PHONE CONVERSATION WITH HIS MOTHER SHOULD NOT HAVE BEEN ADMITTED AS AN ADOPTIVE ADMISSION, SENTENCE FOR CRIMINAL POSSESSION OF A WEAPON SHOULD HAVE BEEN CONCURRENT WITH THE SENTENCE FOR MURDER.

The Second Department determined a recording of defendant's phone conversation with his mother, made when defendant was in jail, should not have been admitted as an adoptive admission. The error was deemed harmless however. The Second Department further determined that the sentences for criminal possession of a weapon should be concurrent with the sentence for murder. There was no evidence the weapon was possessed for an unlawful purpose other than the shooting: "The defendant contends that the Supreme Court should not have permitted the People to introduce into evidence, as an adoptive admission of guilt, a recording of a telephone call that he made to his mother while he was incarcerated at Rikers Island Correctional Facility. We agree. 'Generally, an adoptive admission is allowed when a party acknowledges and assents to something already uttered by another person, which thus becomes effectively the party's own admission' . Here, the People failed to establish that the defendant assented to the statements uttered by his mother during the telephone call ... . The evidence adduced at trial failed to establish that the defendant possessed the gun for an unlawful purpose unrelated to shooting at the intended victim, resulting in the death of the victim (see Penal Law § 265.03[1][b]...), or that his possession of a gun was separate and distinct from his shooting of the victim (see Penal Law § 265.03[3] ...). Accordingly, the terms of imprisonment imposed upon the defendant's convictions of criminal possession of a weapon in the second degree should run concurrently with the sentence imposed upon his conviction of murder in the second degree." ***People v. King*, 2019 N.Y. Slip Op. 03813, Second Dept 5-15-19**

CRIMINAL LAW, EVIDENCE.

PROBABLE CAUSE FOR THE SEARCH OF AN APARTMENT DEPENDED UPON INFORMATION FROM THE CONFIDENTIAL INFORMANT, A *DARDEN* HEARING WAS THEREFORE NECESSARY, MATTER REMITTED FOR THE HEARING.

The Second Department determined Supreme Court should have held a *Darden* hearing because the detective observed the confidential informant (CI) enter the building but did not observe the CI go to the apartment where the drugs were allegedly purchased. Therefore probable cause for the search of the apartment depended upon the CI's information. The appeal was held in abeyance and the matter was remitted for the hearing: "The Court of Appeals has held that a Darden hearing is necessary where there is insufficient evidence to establish probable cause without information provided by a confidential informant ... . '[A] Darden rule is necessary in order to fulfill the underlying purpose of Darden: insuring that the confidential informant both exists and gave the police information sufficient to establish probable cause, while protecting the informant's identity. The surest way to accomplish this task is to produce the informant for an in camera examination' ... . This procedure is 'designed to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him [or her] entirely fabricated' ... . '[T]he court should conduct an in camera inquiry outside the presence of defendant and his [or her] counsel, and make a summary report regarding the existence of the informer and communications made by the CI to the police, taking precautions to protect the anonymity of the CI to the maximum extent possible' ...". ***People v. Nettles*, 2019 N.Y. Slip Op. 03816, Second Dept 5-15-19**

CRIMINAL LAW, EVIDENCE.

CELL SITE LOCATION INFORMATION (CSLI) SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE BECAUSE IT WAS PROCURED WITHOUT A WARRANT, ERROR HARMLESS HOWEVER, SENTENCES FOR CRIMINAL SEXUAL ACT AND CRIMINAL IMPERSONATION SHOULD HAVE BEEN CONCURRENT.

The Second Department determined the cell site location information (CSLI) should not have been admitted because the information was procured without a warrant. The error was deemed harmless. The Second Department further determined the sentences for criminal sexual act and criminal impersonation should have been concurrent: "The defendant contends that the People violated his federal constitutional right against unreasonable searches and seizures (see US Const Amend IV) by obtaining his historical cell site location information (hereinafter CSLI) without first obtaining a warrant. Although the defendant did not object on this ground to the admission of the CSLI at trial, his contention has merit and should be considered in light of the United States Supreme Court's recent holding in Carpenter v. United States (_____ US _____, 138 S Ct 2206). Contrary to the People's contention, under the circumstances, the trial court's order requiring release of the CSLI under the Stored Communications Act (18 USC § 2703[d]), which order made no express finding of probable cause, was not effectively a warrant supported by probable cause ... . As the People correctly concede, because criminal sexual act in the first degree (Penal Law § 130.50[1]) constituted one of the offenses and a material element of the other offense, criminal impersonation in the first degree (Penal Law § 190.26[1]), the trial court should not have imposed consecutive sentences on these convictions ...". ***People v. Taylor*, 2019 N.Y. Slip Op. 03823, Second Dept 5-15-19**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

INCLUSORY CONCURRENT COUNTS OF THE AGGRAVATED VEHICULAR HOMICIDE CONVICTIONS SHOULD HAVE BEEN DISMISSED.

The Second Department dismissed the inclusory concurrent counts of the aggravated vehicular homicide convictions: "As the People correctly concede, the defendant's convictions of vehicular manslaughter in the first degree (Penal Law § 125.13[3], [4]), vehicular manslaughter in the second degree (Penal Law § 125.12[1]), reckless driving (Vehicle and Traffic Law § 1212), and operating a motor vehicle while under the influence of drugs (Vehicle and Traffic Law § 1192[4]) must be vacated and those counts of the indictment must be dismissed as inclusory concurrent counts of the convictions of aggravated vehicular homicide (see CPL 300.40[3][b]; Penal Law § 125.14[3], [4]...)." ***People v. Aniano*, 2019 N.Y. Slip Op. 03797, Second Dept 5-15-19**

DEFAMATION.

PLAINTIFF DEMONSTRATED STATEMENTS MADE BY DEFENDANT TO MANAGEMENT COULD BE INTERPRETED TO CLAIM THAT PLAINTIFF FILED A FALSE TAX RETURN USING DEFENDANT'S SOCIAL SECURITY NUMBER AND THAT PLAINTIFF STOLE FUNDS FROM THE COMPANY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS DEFAMATION ACTION SHOULD HAVE BEEN GRANTED, DECISION INCLUDES A SUBSTANTIVE DISCUSSION OF THE ELEMENTS OF DEFAMATION.

The Second Department, reversing Supreme Court, determined that the statements made by defendant about plaintiff constituted actionable defamation and plaintiff's motion for summary judgment should have been granted. The decision includes substantive explanations of the elements of defamation which are too detailed to fairly summarize here. In essence, defendant made statements which could be fairly interpreted to claim that plaintiff filed a false tax return using defendant's

social security number and plaintiff stole money from the company they both worked for. The statements were made in emails and in phone calls to the payroll administrator, the president and general manager of the company: "The precise meaning of the defendant's statements that 'someone tried to file a 2014 tax return using [her] name, [her] info and . . . [her social security number]" and that she "[had] reason to believe [the plaintiff] is responsible for this attack on [her] credit, [her] finances and [her] LIFE!' is that the plaintiff used the defendant's social security number to file a fraudulent tax return ... . The statements can readily be proven true or false and, given the tone and overall context in which the statements were made, signaled to the average reader or listener that the defendant was conveying facts about the plaintiff ... . This includes the defendant's statement that she had 'learned of the story of [the plaintiff] stealing funds, for her deposit from [Skyline's] accounts to purchase her condo in 2013.' Alternatively, the challenged statements are mixed opinion, which is actionable, as a reasonable reader may infer that the defendant had knowledge of facts, unknown to the audience, which support the assertions she made ,,, . The plaintiff also established, prima facie, that the statements were defamatory per se since they charged the plaintiff with the commission of a serious crime and would tend to injure the plaintiff in her profession by imputing 'fraud, dishonesty, misconduct, or unfitness in conducting [her] profession' ...". ***Kasavana v. Vela*, 2019 N.Y. Slip Op. 03777, Second Dept 5-15-19**

DEFAMATION.

STATEMENT MADE BY BANK EMPLOYEE TO THE EFFECT THE BANK WAS CLOSING THE ACCOUNT BECAUSE OF CONCERNS ABOUT MONEY LAUNDERING WAS NON-ACTIONABLE OPINION, THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS DEFAMATION CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this defamation action, determined that defendant-bank's (Capital One's) motion for summary judgment should have been granted. The statement at issue, made by a bank employee named Mukhi, was deemed to be non-actionable opinion: "The plaintiff is a shareholder of a nursing home business, Parkview Care and Rehabilitation Center, Inc. (hereinafter Parkview), that maintained a bank account at the defendant, Capital One ... . Ann Gottlieb, who provided administrative and back-office services to Parkview, received a letter from Capital One indicating that Parkview's account would soon be closed. When Gottlieb contacted Capital One about the closure, Sanjay Mukhi, a Capital One employee, told her that if Parkview removed the plaintiff as a signatory on the bank account, the account would not be closed. ... The complaint alleges that Mukhi stated to Gottlieb that the issue was one of corporate compliance and that, as to 'anyone who was a signatory on an account with Western Union or a pawn shop or check cashing business, they [Capital One] did not know who they were dealing with and [the plaintiff] was working with a check cashing business and they [Capital One] were therefore concerned that [the plaintiff] was engaged in money laundering' * * * The allegedly defamatory statement was made in the context of Mukhi's explanation for the closure of Parkview's account due to a corporate compliance issue. The overall content of the communication suggested that Capital One would be 'concerned' about money laundering whenever 'anyone' was a signatory on an account with a check cashing business, not that Capital One was actually accusing the plaintiff of this crime. Based upon the content of the communication and the overall context in which it was made, the average listener would take the statement to be one of opinion ... . Moreover, contrary to the plaintiff's contention, the allegedly defamatory statement was not one of actionable mixed opinion. Instead, it was 'a statement of opinion which is accompanied by a recitation of the facts upon which it is based' ... . There was no implication that Mukhi knew 'certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person' being discussed' ...". ***Landa v. Capital One Bank (USA), N.A.*, 2019 N.Y. Slip Op. 03779, Second Dept 5-15-19**

FAMILY LAW, IMMIGRATION LAW, APPEALS.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), PARENTAL NEGLECT AND DANGER FROM GANGS IN HONDURAS WAS DEMONSTRATED, APPELLATE COURT CAN MAKE ITS OWN FACTUAL FINDINGS ON A SUFFICIENT RECORD.

The Second Department, reversing Family Court, determined the child's motion for findings enabling him to petition for Special Immigrant Juvenile Status (SIJS) should have been granted: " 'This Court's power to review the evidence is as broad as that of the hearing court, and where, as here, the record is sufficiently complete to make our own factual determinations, we may do so' ... . Based upon our independent factual review, we conclude that the record supports a finding that reunification of the child with one or both of his parents is not a viable option based upon parental neglect ... . The record reflects that the child's parents did not provide him with adequate supervision or medical care, and that they failed to meet the child's educational needs. Furthermore, the record also supports a finding that it would not be in the best interests of the child to return to Honduras, his previous country of nationality or country of last habitual residence. The child indicated that he was assaulted by gang members in Honduras on multiple occasions, once leaving him with a broken rib and a scar on his head, and that he had witnessed a drive-by shooting at his school which resulted in the death of his schoolmate. In addition, the child stated that the gang members tried to recruit him, but he refused to join, and that the gang members were 'killing people if they didn't want to join.' The child stated that he 'felt scared all the time and could no longer live a

normal life,' and that he 'basically stayed inside [his] house all the time' out of fear that he 'was going to be attacked again' ...". ***Matter of Victor R. C. O. v. Canales*, 2019 N.Y. Slip Op. 03789, Second Dept 5-15-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

SUMMARY JUDGMENT IS NOT APPROPRIATE IN A MEDICAL MALPRACTICE ACTION WHERE THERE ARE CONFLICTING MEDICAL EXPERT OPINIONS ABOUT A DEPARTURE FROM ACCEPTED STANDARDS OF CARE, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court in this medical malpractice action, determined plaintiff's expert affidavit raised questions of fact about whether defendant's treatment of plaintiff's decedent departed from accepted standards of practice. Granting summary judgment to defendants is not appropriate where there are conflicting medical expert opinions: "[V]ascular surgeon Jon Kirwin from Kings County Hospital surgically created an arteriovenous fistula (hereinafter AVF) in the decedent's upper left arm as an access site for dialysis treatments. ... [D]uring one of the decedent's scheduled dialysis visits ... , a nurse examined the decedent and, believing that the AVF was infected, conferred with ... [the] attending nephrologist, who directed that the decedent be transferred to Kings County Hospital's emergency room for evaluation. The decedent presented to Kings County Hospital where he was evaluated by Kirwin, who cleared him for dialysis. The decedent underwent dialysis at Kings County Hospital without incident that day, and two days later reported to Utica for his scheduled dialysis treatment. The decedent underwent dialysis at Utica on August 27, 2010, and August 30, 2010, without incident. On August 31, 2010, the decedent was found unconscious at home and died on the way to the hospital. The cause of death was a rupture of the AVF. * * * ... [I]n support of their separate motions for summary judgment dismissing the complaint insofar as asserted against each of them, the moving defendants submitted expert affirmations that established, prima facie, that none of them departed from good and accepted standards of medical practice in their treatment of the decedent and that no alleged departure was the proximate cause of the plaintiff's injuries ... . However, in opposition, the plaintiff raised triable issues of fact through her expert affirmations as to whether the defendants departed from accepted standards of practice by continuing with dialysis on an AVF that presented with infection and aneurysmal dilatation and whether the continued dialysis caused the AVF to rupture. 'Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury' ...". ***Hutchinson v. New York City Health & Hosps. Corp.*, 2019 N.Y. Slip Op. 03775, Second Dept 5-15-19**

PERSONAL INJURY, BATTERY.

DEFENDANT DID NOT STRIKE PLAINTIFF AND WAS UNDER NO DUTY TO PROTECT PLAINTIFF FROM AN ASSAULT BY OTHERS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS BAR-FIGHT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant's motion for summary judgment in this third-party assault bar-fight case should have been granted. Defendant did not strike the plaintiff and was not under a duty to protect plaintiff from the conduct of others: "The plaintiff commenced this action, inter alia, to recover damages for personal injuries he sustained on January 7, 2013, at premises owned by the defendant Bulldog Grille, when he allegedly was physically assaulted by the defendants John Heinbuch, John Doe #1, and/or John Doe #2, who were patrons of the Bulldog Grille. ... 'Generally, there is no duty to control the conduct of third persons to prevent them from causing injury to others' ... . Here, Heinbuch established his prima facie entitlement to judgment as a matter of law by demonstrating that he did not strike the plaintiff and that he had no duty to control the conduct of the persons who assaulted the plaintiff ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether Heinbuch created the situation which led to the assault, or acted tortiously pursuant to a tacit agreement to assault or batter the plaintiff ...". ***Lanfranchi v. Grille*, 2019 N.Y. Slip Op. 03780, Second Dept 5-15-19**

PERSONAL INJURY.

DEFENDANT ASSERTED SHE THOUGHT PLAINTIFF'S CAR WOULD GO THROUGH THE YELLOW LIGHT AT AN INTERSECTION AND DEFENDANT RAN INTO THE REAR OF PLAINTIFF'S CAR WHEN IT CAME TO A SUDDEN STOP, DEFENDANT'S ASSERTION DID NOT CONSTITUTE A NON-NEGLIGENT EXPLANATION FOR THE REAR-END COLLISION, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Second Department determined defendant, in this traffic accident case, failed to raise a question of fact about a non-negligent explanation for the rear-end collision. Defendant asserted that it "appeared" the lead vehicle and plaintiff's vehicle (behind the lead vehicle) were going to go through the yellow light at the intersection. Defendant further asserted that the lead vehicle came to a sudden stop, plaintiff's vehicle struck the lead vehicle, and then defendant's vehicle struck the plaintiff's. The court held that defendant should have anticipated the sudden stop because of the yellow light: "The defendant driver's assertion that the plaintiff's vehicle came to a sudden stop, standing alone, was insufficient to raise a triable issue of fact as to whether there was a nonnegligent explanation for the collision between the plaintiff's vehicle and the defendants' vehicle ... . Even if, as the defendant driver asserted, the plaintiff had come to a sudden stop at the traffic light, the defendant

driver should have anticipated that the plaintiff's vehicle might come to a stop at the intersection, especially where, according to the defendant driver's own affidavit, the traffic light already turned yellow ... . The defendant driver was under a duty to maintain a safe distance between her vehicle and the plaintiff's vehicle, notwithstanding that it 'appeared' to her that the lead vehicle and the plaintiff's vehicle were 'going to attempt to beat the light' ... . Therefore, in opposition to the plaintiff's prima facie showing, the defendants failed to raise a triable issue of fact." ***Catanzaro v. Edery*, 2019 N.Y. Slip Op. 03762, Second Dept 5-15-19**

PERSONAL INJURY, CONTRACT LAW, EVIDENCE, CIVIL PROCEDURE, LANDLORD-TENANT.

ALTHOUGH NO ESPINAL FACTORS WERE ALLEGED BY PLAINTIFF IN THIS SLIP AND FALL CASE, QUESTIONS OF FACT WHETHER DEFENDANT'S ORAL CONTRACT WITH THE PROPERTY OWNER TO REMOVE ICE AND SNOW ENTIRELY REPLACED THE PROPERTY OWNER'S DUTY, AND WHETHER DEFENDANT HAD CONSTRUCTIVE NOTICE OF A RECURRENT ICY CONDITION, PRECLUDED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. The plaintiff leased the ground floor apartment and defendant, the plaintiff's mother, leased the second floor apartment. Plaintiff slipped and fell on ice on the exterior front steps of the two-family house. Defendant demonstrated she had a contractual arrangement with the property owner to remove ice and snow and, because plaintiff was not a party to the agreement, no duty of care was owed plaintiff (no *Espinal* factors were alleged by the plaintiff). But defendant raised questions of fact in oppostion: " '[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party' ... . However, the Court of Appeals has recognized three exceptions to the general rule: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely' ... . Here, the defendant established ... entitlement to judgment as a matter of law by demonstrating that she did not owe a duty of care to the plaintiff, since the plaintiff was not a party to the oral agreement between the defendant and the property owner ... . Since the plaintiff did not allege facts in her pleadings that would establish the possible applicability of any of the Espinal exceptions, the defendant ... was not required to affirmatively establish that these exceptions did not apply However, in opposition ... , the plaintiff raised a triable issue of fact as to whether ... . defendant's oral agreement with the property owner regarding maintenance was comprehensive and exclusive so as to entirely displace the property owner's duty to maintain ... the exterior front steps and the gutter ... . Additionally, the plaintiff raised a triable issue of fact as to whether the defendant had actual notice of an alleged recurrent dangerous condition regarding ice formation on the steps due to the leaky gutter, and was thus chargeable with constructive notice of each specific occurrence of the condition ...". ***Sampaiolopes v. Lopes*, 2019 N.Y. Slip Op. 03835, Second Dept 6-15-19**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

PLAINTIFF-STUDENT WAS WATCHING FOOTBALL PRACTICE FROM THE SIDELINES WHEN A BLOCKING SLED, PUSHED BY SEVERAL PLAYERS, VEERED OFF TO THE SIDE AND RAN OVER PLAINTIFF'S FOOT, THE ASSUMPTION OF THE RISK DOCTRINE APPLIES TO SPECTATORS, THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this negligent supervision action, determined plaintiff-student assumed the risk of injury from a blocking sled during football practice. Plaintiff was not feeling well and was on the sidelines watching practice. He was not paying attention when a blocking sled, pushed by several players, veered toward him and ran over his foot. The court noted that the assumption of risk doctrine applies to bystanders and spectators: "The doctrine of primary assumption of the risk applies not only to participants in a qualified activity, but also to bystanders or spectators who have placed themselves in close proximity to it, 'particularly where the record shows that the plaintiff had viable alternatives to [his or] her own location' ... . '[T]he spectator at a sporting event, no less than the participant, accepts the dangers that inhere in it so far as they are obvious and necessary'... . Here, the defendant established its prima facie entitlement to judgment as a matter of law. The defendant submitted evidence that the plaintiff fully comprehended the risks inherent in the sport of football, specifically, that a blocking sled could veer to the left or the right while it was being used in a drill ...". ***M.F. v. Jericho Union Free Sch. Dist.*, 2019 N.Y. Slip Op. 03781, Second Dept 5-15-19**

PERSONAL INJURY, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, CIVIL PROCEDURE.

GRANDMOTHER WAS IN THE ZONE OF DANGER WHEN PIECES OF THE FACADE OF A BUILDING FELL AND KILLED HER TWO-YEAR-OLD GRANDCHILD, BECAUSE GRANDMOTHER IS NOT 'IMMEDIATE FAMILY' SHE CANNOT RECOVER UNDER A NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS THEORY, THE MOTION TO AMEND THE COMPLAINT TO ADD THAT THEORY SHOULD NOT HAVE BEEN GRANTED.

The Second Department, over an extensive two-justice dissent, determined the grandmother of a two-year-old child who witnessed the child's death was not a member of the child's "immediate family" and therefore could not recover for negligent infliction of emotional distress, despite the grandmother's being in the zone of danger when the child was struck by

falling pieces of a building-facade. The motion to amend the complaint to add the negligent infliction of emotional distress cause of action should not have been granted: "[I]n Trombetta v. Conkling (82 NY2d 549, 551), the Court of Appeals held that a niece could not recover damages for negligent infliction of emotional distress for witnessing the death of her aunt, despite the fact that the niece's mother had died when the niece was 11 years old, and the aunt had allegedly been the maternal figure in the niece's life. At the time of the accident, the plaintiff was 37 years old and her aunt was 59 years old (see id. at 551). In rendering its determination, the Court of Appeals stated: 'On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond' (id. at 553). In Jun Chi Guan v. Tuscan Dairy Farms (24 AD3d 725), this Court held that the relationship of grandparent and grandchild does not constitute 'immediate family' so as to permit recovery for negligent infliction of emotional distress. In Jun Chi Guan, the plaintiff grandmother was pushing her infant grandson in a stroller, when a truck owned and operated by the defendants struck the stroller, killing the infant (see id. at 725). This Court rejected the grandmother's argument that she should be considered immediate family because she was the family member who spent the most time with the infant during his waking hours (see id. at 726). Further, this Court held that 'it is not appropriate for this Court to expand the class [of persons constituting immediate family] absent further direction from the Court of Appeals or the New York State Legislature' (id.)." ***Greene v. Esplanade Venture Partnership*, 2019 N.Y. Slip Op. 03771, Second Dept 5-15-19**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

PAROLE OFFICER'S SEARCH OF PAROLEE'S APARTMENT, BASED UPON A TIP FROM A PERSON KNOWN TO THE PAROLE OFFICER, WAS SUPPORTED BY REASONABLE SUSPICION, TWO-JUSTICE DISSENT.

The Third Department, reversing Supreme Court, over a two-justice dissent, determined that the parole officer's, Rosa's, search of defendant-parolee's apartment, which was based on a tip from a person known to the parole officer, was supported by reasonable suspicion: "Although a parolee does 'not surrender his [or her] constitutional rights against unreasonable searches and seizures[,] . . . what may be unreasonable with respect to an individual who is not on parole may be reasonable with respect to one who is' ... . Accordingly, a search of a parolee undertaken by a parole officer is constitutional if 'the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty . . . [and was] substantially related to the performance of duty in the particular circumstances' ... . A parole officer's duty is twofold and sometimes inconsistent in nature because a parole officer not only 'has an obligation to detect and to prevent parole violations for the protection of the public from the commission of further crimes[, but] he [or she] also has a responsibility to the parolee to prevent violations of parole and to assist [the parolee] to a proper reintegration into [the parolee's] community' ... . Here, there can be little doubt that Rosa's search of defendant's residence due to the informant's tip was reasonably related to Rosa's duties as a parole officer ... . Therefore, the key inquiry is whether Rosa, based upon the information provided by the informant, had reasonable suspicion to conduct the search ... . Rosa's testimony at the suppression hearing revealed that the information was not from an anonymous tipster (compare People v. Burry, 52 AD3d at 858), but rather was from another parolee with whom Rosa was familiar and with whom he had interacted prior to receiving the information. Rosa testified that the informant indicated that he or she had firsthand knowledge of the drug activity at defendant's residence. Therefore, based upon the circumstances of this case — including that defendant had been on parole for less than a month and therefore had no proven track record of compliance with parole rules — Rosa's search of defendant's residence was founded on reasonable suspicion and, as such, was lawful ...". ***People v. Wade*, 2019 N.Y. Slip Op. 03851. Third Dept 5-16-19**

CRIMINAL LAW, EVIDENCE.

AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT APPLIES TO PARKED UNOCCUPIED CARS, SMELL OF MARIHUANA (FROM OUTSIDE THE CLOSED UNOCCUPIED CAR) PROVIDED PROBABLE CAUSE TO SEARCH THE CAR, OFFICER'S SUBJECTIVE INTENT TO SEARCH THE CAR BEFORE HE SMELLED THE MARIHUANA IS IRRELEVANT.

The Third Department determined the warrantless search of defendant's car, which was parked outside the apartment where defendant had been arrested, was valid under the automobile exception to the warrant requirement. The officer who opened the car door with keys taken from the defendant, testified that he smelled marihuana as he approached the car, and that he intended to search the car before he smelled the marijuana. The Third Department held that the officer's subjective intent to search before he smelled the marihuana did not invalidate the search, and the officer's claim he could smell marihuana outside a closed car was a credibility issue resolved by County Court: "The automobile exception to the warrant requirement is not based solely upon the mobility of vehicles, but also on the 'reduced expectation of privacy in an automobile' ... . Thus, the automobile exception is not limited to vehicles that are moving or occupied when observed by police and may also be applied when, as here, a vehicle is parked in 'a public place where access [is] not meaningfully restricted' ... . The warrantless search was permissible under the automobile exception. '[I]t is well established that the odor of marihuana

emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle' ... . [P]robable cause analysis is based upon reasonableness, and a search or seizure is permissible where, as here, 'the circumstances, viewed objectively, justify the action' ... . As the smell of marihuana outside the vehicle objectively provided probable cause for the warrantless search, the lieutenant's subjective intentions are irrelevant." ***People v. Hines*, 2019 N.Y. Slip Op. 03853, Third Dept 5-16-19**

WORKERS' COMPENSATION, SOCIAL SERVICES LAW, EMPLOYMENT LAW.

THE PUBLIC ASSISTANCE BENEFIT RECEIVED BY CLAIMANT DURING PARTICIPATION IN A WORK EXPERIENCE PROGRAM (WEP) CONSTITUTED WAGES FOR THE PURPOSE OF CALCULATING WORKERS' COMPENSATION BENEFITS FOR ON THE JOB INJURY.

The Third Department, in a matter of first impression, determined that the public assistance benefit received by claimant when he participated in the work experience program (WEP) constituted wages for the purpose of calculation the workers' compensation benefit for injury on the job: "Wages are defined as 'the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident' (Workers' Compensation Law § 2 [9]). A recipient of public assistance may be required to participate in work activities, including work experience in the public sector (see Social Services Law §§ 331, 336 [1] [d]) ... . The amount of assistance that a participant in a WEP receives is not determined by the number of hours worked; rather, the number of hours that a recipient of public assistance is required to participate in a WEP is determined by dividing the amount of assistance received by the higher of the federal or state minimum wage (see Social Services Law § 336-c [2] [b]). Significantly, the benefits of a recipient who fails to participate in a required WEP without good cause are subject to reduction or forfeiture (see Social Services Law § 342). The fact that recipients of public assistance must participate in a WEP to receive benefits without reduction means that the public assistance paid to WEP participants directly serves as compensation for the work performed ... . Accordingly, we conclude that public assistance benefits paid to WEP participants are wages as defined in the Workers' Compensation Law. We note that our conclusion is consistent with the Court of Appeals' observation that that the 'rate and method of payment of WEP workers' is determined by the Social Services Law ... ". ***Matter of Covert v. Niagara County*, 2019 N.Y. Slip Op. 03870, Third Dept 5-16-19**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.