CasePrepPlus

February 21, 2020

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COURT OF APPEALS

CRIMINAL LAW.

INFORMATION CHARGING OBSTRUCTING GOVERNMENT ADMINISTRATION DID NOT INCLUDE FACTUAL ALLEGATIONS DESCRIBING THE OFFICIAL FUNCTION WHICH WAS OBSTRUCTED AND WAS THEREFORE JURISDICTIONALLY DEFECTIVE.

The Court of Appeals, reversing the Appellate Term, determined the accusatory information (information) charging defendant with obstructing government administration was jurisdictionally defective because it did not include factual allegations of the official function alleged to have been obstructed: "Defendant was convicted of obstructing governmental administration in the second degree for backing his vehicle away from police officers who were attempting to execute a warrant to search the vehicle. Prior to trial, defendant moved to dismiss the accusatory instrument, arguing that it was facially insufficient because it failed to put him on notice of the 'official function' with which he was alleged to have interfered (Penal Law § 195.05). Specifically, defendant asserted that the accusatory instrument was defective because it lacked any reference to the search warrant and alleged in a conclusory fashion that defendant's actions were intentionally taken to prevent the police officers from 'effecting a proper vehicle stop.' ... [W]ith regard to the 'official function' element of the obstruction charge, the accusatory instrument lacked factual allegations providing defendant with notice of the official function with which he was charged with interfering—namely, a police stop of defendant in his vehicle in order to execute a search warrant (Penal Law § 195.05). Defendant therefore lacked sufficient notice to prepare his defense, rendering the information jurisdictionally defective ...". ***People v. Wheeler*, 2020 N.Y. Slip Op. 00998, CtApp 2-13-20**

CRIMINAL LAW, APPEALS.

DEFENDANT MAY NOT APPEAL OR COLLATERALLY ATTACK AN "ILLEGALLY LENIENT" SENTENCE BECAUSE THE SENTENCE DID NOT ADVERSELY AFFECT THE DEFENDANT.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined that the defendant may not appeal from an "illegally lenient" sentence because the sentence did not adversely affect the defendant. The defendant was attempting to have prior sentences declared illegal to avoid a subsequent "persistent felony offender" classification. Defendant had used aliases and had been given "illegally lenient" sentences because the sentencing court was unaware of the prior conviction(s): "The Appellate Division [held] that it could not consider the merits of defendant's appeal because denial of the motion — leaving in place defendant's illegally lenient sentence — had not 'adversely affected' defendant within the meaning of CPL 470.15 ... . When a defendant moves to vacate a sentence on the ground that it is illegally lenient, denial of such a motion is not reviewable because any purported 'error or defect in the criminal court proceedings' has not 'adversely affected' the defendant (CPL 470.15 [1]). Accordingly, we affirm. Defendant's criminal history consists of at least four felony convictions over a fifteen-year period. During this time, it appears that he repeatedly attempted to conceal that history, primarily through the use of aliases. To a remarkable degree, though a recidivist, he avoided enhanced punishment required by statute. Instead, he obtained sentences that were 'illegally lenient' given his actual status as a predicate felon. However, in 1997, the court, based on the evidence of defendant's prior convictions, sentenced him to a term of twenty-three years to life in prison as a persistent violent felony offender (see Penal Law § 70.08). Since then, by direct appeal and collateral attack, defendant has tried to overturn the illegally lenient sentences that were previously imposed based on his incomplete criminal history, with the ultimate goal of invalidating his 1997 persistent violent felony offender sentence." ***People v. Francis*, 2020 N.Y. Slip Op. 00996, CtApp 2-13-20**

LABOR LAW-CONSTRUCTION LAW.

DECEDENT'S WORK AS A WELDER NOT A COVERED ACTIVITY UNDER LABOR LAW § 240(1).

The Court of Appeals, in a one-sentence memorandum, determined the plaintiff was not engaged in an activity covered by Labor Law § 240(1) when he was injured: "Decedent's work as a welder during the 'normal manufacturing process' of fabricating rotor components for air preheaters did not involve 'erection, demolition, repairing, altering, painting, cleaning or pointing' of a building or structure (Jock v. Fien , 80 NY2d 965, 968 [1992]; Labor Law § 240 [1])." ***Preston v. APCH, Inc.*, 2020 N.Y. Slip Op. 01000, Ct App 2-13-20**

RETIREMENT AND SOCIAL SECURITY LAW, ADMINISTRATIVE LAW.

INCREASES IN PAY TO PORT AUTHORITY EXECUTIVE EMPLOYEES, AIMED AT RETAINING THOSE EMPLOYEES IN THE WAKE OF THE 9/11 ATTACKS, SHOULD NOT BE TREATED AS SALARY IN THE CALCULATION OF THOSE EMPLOYEES' RETIREMENT BENEFITS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined certain increases in pay to executive employees of the Port Authority, aimed at retaining those employees in the wake of the 9/11 attacks, should not be treated as salary in the calculation of those employees' retirement benefits: " ... Retirement and Social Security Law § 431 provides that '[i]n any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include . . . *any additional compensation paid in anticipation of retirement*' (Retirement and Social Security Law § 431 [3] [emphasis added]).' ... [W]e must ... ask whether there is substantial evidence in the record to support the Comptroller's determination that the Port Authority's compensation adjustment program constituted 'additional compensation paid in anticipation of retirement' (Retirement and Social Security Law § 431 [3]). Under this standard, where substantial evidence exists to support the administrative agency's determination, a court may not substitute its judgment for that of the agency, even if there is evidence supporting a contrary conclusion ... . In order to determine whether the purpose of the compensation was 'to circumvent the provisions of Retirement and Social Security Law § 431,' courts 'must look to the substance of the transaction and not to what the parties may label it' ... . Here, the record contains substantial evidence supporting the Comptroller's determination that the Port Authority provided the compensation adjustments to artificially increase the executive employees' final average salaries so that, upon retirement, they would receive pension increases roughly equivalent to those they would have received under the retirement incentive program. Indeed, the letter agreements signed by petitioner employees directly referred to a program 'designed to provide a limited number of staff members with a parity' benefit' to make their 'pension calculation[s] . . . roughly equivalent to the calculation[s] if [they] had been eligible to retire'with the incentive.' Plainly, substantial evidence supports the conclusion that the compensation, by design, was made in anticipation of petitioner employees' retirement within the meaning of the statute." ***Matter of Bohlen v. DiNapoli*, 2020 N.Y. Slip Op. 00997, CtApp 2-13-20**

SOCIAL SERVICES LAW, ADMINISTRATIVE LAW

ALTHOUGH TWO OF MOTHER'S FIVE CHILDREN, AS FULL-TIME COLLEGE STUDENTS, WERE INELIGIBLE FOR THE SNAP (FOOD STAMP) PROGRAM, THE ENTIRE AMOUNT OF FATHER'S CHILD SUPPORT PAYMENTS MUST BE CONSIDERED AS HOUSEHOLD INCOME, RENDERING THE FAMILY INELIGIBLE FOR THE SNAP PROGRAM.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined that the child support payments made by father constituted income to mother (Ms Leggio), not to the children. Therefore, although two of the children are full-time college students and ineligible for the SNAP (food stamp) program, the full amount of the child support must be considered in determining the family's eligibility for the SNAP program. Applying the full amount of the child support to the mother's income rendered the family ineligible: "... [I]f Ms. Leggio's two eldest children are the owners of their pro rata shares of the child support she receives, the household would be eligible for SNAP benefits ... . Conversely, if child support funds are considered income of the custodial parent who received them (here, Ms. Leggio) they are household income not subject to any exclusion, and Ms. Leggio's household's income would be too high to receive SNAP benefits. Although the consequences of allocating the income are clear, the threshold question, whether child support is income of the recipient-parent or of the beneficiary-child for purposes of determining eligibility for SNAP benefits, is unresolved by any federal or state statute or regulation or decision of this Court. We conclude that OTDA's [Office of Temporary and Disability Assistance's] interpretation of the federal statutes it administers was not irrational and is entitled to deference and thus, for the purposes of SNAP, child support directly received by a parent is household income, even if it is used for the benefit of an ineligible college student living at home." ***Matter of Leggio v. Devine*, 2020 N.Y. Slip Op. 00999, Ct App 2-13-20**

FIRST DEPARTMENT

CONTRACT LAW, DEBTOR-CREDITOR, EVIDENCE.

ALTHOUGH DOCUMENTARY EVIDENCE IS ADMISSIBLE NOTWITHSTANDING THE DEAD MAN'S STATUTE, HERE THE DECEDENT'S SIGNATURE ON THE GUARANTY WAS NOT AUTHENTICATED BY SOMEONE OTHER THAN AN INTERESTED WITNESS; THEREFORE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE GUARANTY SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined the personal guaranty signed by decedent was not authenticated. Therefore plaintiff was not entitled to summary judgment on the guaranty: "We modify, however, with respect to the cause of action under the personal guaranty purportedly signed by the decedent, because although documentary evidence is admissible notwithstanding the dead man's statute, it must be 'authenticated by a source other than an interested witness's testimony' ... . Having failed to authenticate the guaranty through 'a source other than an interested

witness's testimony,' plaintiff was not entitled to summary judgment on the guaranty." ***Galpern v. Air Chefs, L.L.C.*, 2020 N.Y. Slip Op. 01021, First Dept 2-13-20**

CRIMINAL LAW.

DEFENDANT'S FAMILY MEMBERS SHOULD NOT HAVE BEEN EXCLUDED FROM THE COURTROOM DURING THE TESTIMONY BY THE UNDERCOVER OFFICERS, CONVICTIONS REVERSED.

The First Department, reversing defendant's conviction, determined the trial court should not have excluded defendant's family members from the trial during the testimony of the undercover officers: "Following a *Hinton* hearing at which there was no testimony that defendant or any member of his family threatened or otherwise posed a threat to either of two testifying undercover officers, defense counsel requested that family members be permitted to attend the officers' trial testimony. Although the prosecutor made no argument in opposition to this application, the court denied it, without making any supporting findings. This was error. '[A]n order of closure that does not make an exception for family members will be considered overbroad, unless the prosecution can show specific reasons why the family members must be excluded' ... . We reject the People's argument that the defense was obligated to identify specific family members who might attend the proceedings, in the absence of any request by the prosecutor or the court that it do so, as incompatible with the 'presumption of openness' that applies in this context ... . Moreover the court did not ask any questions to clarify which family members wanted to attend before issuing the closure order." ***People v. Rivera*, 2020 N.Y. Slip Op. 01035, First Dept 2-13-20**

CRIMINAL LAW.

UNDERCOVER OFFICER'S DISTRESS SIGNAL, A GROUP OF MEN NEAR THE UNDERCOVER OFFICER YELLING, DEFENDANT'S STRUGGLING WITH THE UNDERCOVER OFFICER, DEFENDANT'S BREAKING FREE OF AN OFFICER'S RESTRAINT AND RUNNING, DEFENDANT'S FORCIBLY TAKING PROPERTY FROM THE UNDERCOVER OFFICER, AND THE FELLOW OFFICER RULE, COMBINED TO JUSTIFY THE SEIZURE AND SEARCH OF DEFENDANT; THE MOTION COURT PROPERLY REOPENED THE SUPPRESSION HEARING TO ALLOW THE PEOPLE TO SUBMIT ADDITIONAL TESTIMONY.

The First Department, in a full-fledged opinion by Justice Webber, determined that the police had probable cause to arrest defendant at the time defendant was seized and searched. Therefore defendant's suppression motion was properly denied. The court noted that the distress signal made by the undercover officer together with the observation by Officer Regina of a group of men near the undercover officer yelling provided reasonable suspicion. Seeing defendant struggling with the undercover officer and the defendant's breaking free and running when an officer attempted to restrain him provided probable cause for arrest. The First Department further determined the suppression hearing was properly reopened to allow the People to present additional testimony. The evidence at the reopened hearing provided another lawful basis for defendant's arrest (the defendant had forcibly taken property from the undercover officer--probable cause imputed to the arresting officer by the fellow officer rule): "While Regina's testimony established the requisite probable cause to arrest defendant, the court providently exercised its discretion in granting the People's motion to reopen the suppression hearing before rendering a decision in order to permit the People to call an officer with additional information tending to establish reasonable suspicion ... .The court had not made any ruling, and the circumstances did not pose a risk of tailored testimony. Upon granting the People's motion to present additional evidence, the court expressly stated that it had not yet rendered a decision ... . Despite defendant's arguments to the contrary, there is nothing in the hearing transcript to suggest that the court previously forecasted its decision or provided guidance to the People. The court's very brief remark at the end of the initial hearing about an aspect of the facts cannot be viewed as 'direction from the court' ... , and was highly unlikely to result in tailored testimony ... . The evidence adduced at the reopened hearing established another lawful basis for defendant's arrest. The undercover officer testified that, as he was attempting to buy drugs from another person, defendant interfered and forcibly took property from the officer. This gave the undercover officer probable cause to arrest defendant for robbery, which may be imputed to the arresting officer by way of the fellow officer rule ... . The combination of the undercover officer's distress signal, the field team officers' observation of defendant in a struggle with the undercover officer, and the undercover officer's act of chasing defendant satisfied the requirement that the arresting officer act on 'direction of' or 'communication with' a fellow officer ... . The court's general finding of probable cause can be reasonably interpreted as encompassing this theory ...". ***People v. Fraser*, 2020 N.Y. Slip Op. 01037, First Dept 2-13-20**

DEBTOR-CREDITOR, CIVIL PROCEDURE.

ACCELERATION OF A DEBT DOES NOT AFFECT THOSE INSTALLMENT PAYMENTS DUE MORE THAN SIX YEARS BEFORE THE ACTION ON THE NOTES WAS COMMENCED, ACTION ON THOSE PAYMENTS IS TIME-BARRED.

The First Department, reversing Supreme Court, determined that installment payments due prior to six years before the action on the notes could not be recovered despite the allegation that the debt had been accelerated: "Acceleration causes those future installment payments that are not yet due and payable to become immediately due and payable. It enables a lender to advance the due date for the future installment payments and thus, the statute of limitations runs on the balance of the debt ... . It does not change the due date of those past due installment payments to that of the date of acceleration ... .

Accordingly, plaintiffs demonstrated, prima facie, that defendant breached each of the notes by submitting evidence of the duly executed notes and defendant's failure to make payments in accordance with their payment terms ... . Defendant, however, demonstrated prima facie, that the unpaid installment payments due prior to June 1, 2012 were time-barred." ***Cannell v. Grail Partners, LLC*, 2020 N.Y. Slip Op. 00973, First Dept 2-11-20**

FAMILY LAW, EVIDENCE.

CHILD WAS ASLEEP DURING THE INCIDENT INVOLVING FATHER, NEGLECT FINDING REVERSED.
The First Department, reversing Family Court, determined the evidence did not support finding father had neglected the child. The child was asleep during the incident: "The Family Court's finding that the father neglected the subject child lacks a sound and substantial basis in the record because a preponderance of the evidence does not demonstrate that the child's physical, mental or emotional condition was impaired or in danger of becoming impaired, or that the actual or threatened harm to the child was a consequence of the father's failure to exercise a minimal degree of care in providing her with proper supervision or guardianship during the February 14, 2016 incident ... Although the mother's and the father's fact-finding testimony established that the child was in the home when the incident occurred, petitioner failed to establish a prima facie case of neglect because their testimony also established that the child was sleeping in another room in the apartment and was unaware of what occurred, which testimony was supported by the testimony of the responding police officer ...". ***Matter of K. S. (Dyllin S.)*, 2020 N.Y. Slip Op. 00979, First Dept 2-11-20**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, JUDGES, PERSONAL INJURY.

JUDGE PROPERLY SET ASIDE THE VERDICT AWARDING $0 FOR FUTURE PAIN AND SUFFERING IN THIS LABOR LAW § 240(1) ACTION DESPITE PLAINTIFF'S FAILURE TO OBJECT TO THE VERDICT AS INCONSISTENT.
The First Department determined Supreme Court properly set aside the verdict awarding $0 for pain and suffering in this Labor Law § 240(1) action, despite plaintiff's failure to object to the verdict as inconsistent: "... [P]laintiff's failure to object to the jury's award of $0 for both past and future pain and suffering as inconsistent with the jury's awards for past and future lost earnings and future medical expenses did not preclude the court from deciding whether 'the jury's failure to award damages for pain and suffering [wa]s contrary to a fair interpretation of the evidence and constitute[d] a material deviation from what would be reasonable compensation' ...". ***Natoli v. City of New York*, 2020 N.Y. Slip Op. 00988, First Dept 2-11-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT CONSTRUCTION MANAGER WAS A STATUTORY AGENT OF THE OWNER AND WAS THEREFORE LIABLE FOR PLAINTIFF'S INJURY PURSUANT TO LABOR LAW § 240(1); THE ARTICULATING LIFT USED BY PLAINTIFF WAS A SAFETY DEVICE WHICH FAILED TO ADEQUATELY PROTECT AGAINST AN ELEVATION-RELATED RISK.
The First Department, reversing (modifying) Supreme Court, determined defendant which entered a construction management agreement with the Port Authority was a statutory agent of the Port Authority and was liable for plaintiff's injury pursuant to Labor Law § 240 (1). Plaintiff was injured when he lost control of an articulating lift when backing down a ramp: "Plaintiffs demonstrated that defendants can be held liable as a statutory 'agent' of the Port Authority based on the contract documents that they submitted on the motion. Those documents impose not only the responsibility to coordinate the work but also a broad responsibility for 'overall job site safety,' including the implementation of the Port Authority's Safety Health and Environmental Program, as well as measures to ensure worker safety, thereby granting the construction manager 'the ability to control the activity which brought about the injury' ... . Moreover, plaintiffs are entitled to summary judgment on the Labor Law § 240(1) claim. As the motion court found, plaintiff's testimony established prima facie that the articulating lift was a safety device and that it's failure to protect him from the elevation-related risk that he faced was the proximate cause of his injury." ***Lind v. Tishman Constr. Corp. of N.Y.*, 2020 N.Y. Slip Op. 01026, First Dept 2-13-20**

LABOR LAW-CONSTRUCTION LAW.

INJURY CAUSED BY CEMENT BOARDS FALLING FROM AN A-FRAME CART COVERED UNDER LABOR LAW § 240(1).
The First Department determined injury caused by cement boards falling from an A-frame cart was covered under Labor Law § 240(1): "The evidence shows that plaintiff and his coworkers were moving an A-frame cart, loaded with approximately 16 cement boards measuring 4' x 8' in dimension and weighing approximately 100 pounds each, when its wheel became stuck and the cart would not move. Plaintiff and his coworkers then pushed and pulled the cart to free it, and, in the process, the cart and the boards suddenly tipped, with the boards landing on plaintiff's left leg. Given the weight and height of the cement boards on the A-frame cart, the elevation differential was within the purview of the statute ...". ***Touray v. HFZ 11 Beach St. LLC*, 2020 N.Y. Slip Op. 01029, First Dept 2-13-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE.

CONTINUOUS TREATMENT DOCTRINE NOT AFFECTED BY A YEAR AND THREE MONTH GAP IN TREATMENT, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED IN THIS MEDICAL MALPRACTICE ACTION.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this medical malpractice action should not have been granted. Although the alleged malpractice (the failure to follow up on a detection of a mass) occurred in 2006, the continuous treatment doctrine tolled the statute of limitations. A year and three month gap in treatment did not preclude application of the continuous treatment doctrine: "Plaintiff raised an issue of fact as to whether Dr. Woo continuously treated the decedent for conditions related to renal cell carcinoma. Plaintiff's expert, Dr. Feit, opined that Dr. Woo treated the decedent for symptoms of back pain, hypertension, and insomnia, all of which were symptoms of and related to renal cell carcinoma, a diagnosis that should have been considered given the findings in the 2006 MRI of a renal mass. Plaintiff sufficiently established that such treatment continued through the decedent's hospitalization in July 2012. * * * The one-year-and-three month gap between the April 2011 visit and the July 2012 note does not preclude application of the continuous treatment doctrine ...". ***Dookhie v. Woo*, 2020 N.Y. Slip Op. 00975, First Dept 2-11-20**

MEDICAL MALPRACTICE, NEGLIGENCE, EMPLOYMENT LAW, AGENCY.

QUESTION OF FACT WHETHER THE DOCTRINE OF RES IPSA LOQUITUR APPLIES IN THIS MEDICAL MALPRACTICE CASE; QUESTION OF FACT WHETHER THE MEDICAL CENTER IS LIABLE UNDER THE OSTENSIBLE AGENCY DOCTRINE.

The First Department, reversing (modifying) Supreme Court, determined: (1) there is a question of fact whether the doctrine of res ipsa loquitur applied in this medical malpractice action; (2) the lack of informed consent cause of action should be reinstated; (3) there is a question of fact whether the medical center (NYU Langone) is liable for the anesthesiologist (Coopersmith) who performed the pre-surgery nerve block pursuant to the doctrine of ostensible agency; and (4) the action against the doctor who assisted Dr. Coopersmith was properly dismissed because she didn't exercise any independent judgment in the procedure: "... [W]e agree with plaintiff that she sufficiently established that the doctrine of res ipsa loquitur applies to her cause of action for medical malpractice. The parties' experts disagreed as to whether plaintiff's injury ordinarily occurs in the absence of negligence, raising an issue of fact on that point ... . Plaintiff also established that defendants were in control of all instruments used in the nerve block, and plaintiff's actions did not contribute to her injuries ... . To the extent that defendants' expert opined that post-operative symptoms and image studies were not consistent with needle trauma to a nerve, that opinion did not refute plaintiff's assertion of res ipsa loquitur because it failed to identify any other possible cause of plaintiff's plexopathy, let alone a more probable cause ... . Moreover, defendants' expert did not dispute that plaintiff sus tained nerve damage and did not opine that the nerve damage pre-existed the surgery. ... We agree with defendants that they were entitled to a determination that no actual agency existed between NYU Langone and Dr. Coopersmith because NYU Langone did not employ or otherwise control Dr. Coopersmith. However, we find that an issue of fact exists as to whether NYU Langone could be held liable for Dr. Coopersmith's actions in his treatment of plaintiff through ostensible agency. It is undisputed that plaintiff was treated by Dr. Feldman [the surgeon] because she sought out his care. However, Dr. Feldman testified that he did not choose which anesthesiologist at NYU Langone would perform the nerve block on plaintiff, instead an anesthesiologist was assigned by the Department of Anesthesia. A jury could reasonably infer from this testimony that Dr. Coopersmith was provided by NYU Langone and that plaintiff reasonably believed that Dr. Coopersmith was acting on NYU Langone's behalf ... ". ***Sklarova v. Coopersmith*, 2020 N.Y. Slip Op. 01033, First Dept 2-13-20**

PERSONAL INJURY, CIVIL PROCEDURE.

VERDICT AWARDING $0 DAMAGES FOR FUTURE AND PAIN SUFFERING SHOULD HAVE BEEN SET ASIDE, $100,000 WOULD BE REASONABLE COMPENSATION.

The First Department, reversing Supreme Court, determined the damages verdict awarding $0 for future pain and suffering should have been set aside: "The jury's award of damages for past pain and suffering deviates materially from what would be reasonable compensation (see CPLR 5501[c]). Plaintiff sustained a bimalleolar ankle fracture and underwent two surgeries, the first involving implantation of hardware in the ankle and the second involving arthroscopy and removal of the hardware and some scar tissue. Comparing this matter to similar cases ... , we find that $275,000 is reasonable compensation ... . The award for future damages also deviates materially from what would be reasonable compensation (CPLR 5501[c]). Defendant's expert agreed that plaintiff's injury is permanent and that he has developed arthritis in his left ankle, which may require treatment in the future, including the possibility of an ankle replacement. In light of the foregoing, we find that $100,000 for future pain and suffering is reasonable compensation ...". **Thomas v. New York City Hous. Auth., 2020 N.Y. Slip Op. 01001, First Dept 2-13-20**

PERSONAL INJURY, EVIDENCE.

DESPITE THE BRAKE-FAILURE ALLEGATION IN THIS REAR-END COLLISION CASE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED; DEFENDANT DID NOT PRESENT SUFFICIENT EVIDENCE TO RAISE A QUESTION OF FACT ABOUT BRAKE FAILURE.

The First Department, reversing Supreme Court, determined the plaintiff's motion for summary judgment in this rear-end traffic accident case should have been granted. Defendant did not raise a question of fact about the brake-failure allegation: "[D]efendants' contention that their vehicle's brake failure was the cause of the accident was insufficient to raise a triable issue of fact as to liability. Defendants failed to satisfy the two-pronged showing that the accident was caused by an unanticipated problem with the vehicle's brakes, and that they exercised reasonable care to keep the brakes in good working order ... . Summary judgment in plaintiff's favor is not premature. Both plaintiff and defendant driver had firsthand knowledge of the accident, and submitted affidavits. However, defendants did not submit any evidence concerning maintenance of their vehicle. Defendants only speculate that there may be facts supporting their opposition to plaintiff's motion which exist but cannot yet be stated ...". ***Quiros v. Hawkins*, 2020 N.Y. Slip Op. 01020, First Dept 2-13-20**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE EXCUSE WAS NOT ADEQUATE PETITIONER'S APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED; RESPONDENTS HAD TIMELY NOTICE OF THE INCIDENT AND DEMONSTRATED NO PREJUDICE FROM THE DELAY.

The First Department, reversing Supreme Court, determined petitioner's application for leave to file a late notice of claim should have been granted. Although the excuse was inadequate, the respondents had timely notice of the incident and were not prejudiced by the delay: "In determining whether to grant an extension, the key factors to consider are: (1) 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame'; (2) 'whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter'; and (3) 'whether the delay would substantially prejudice the municipality in its defense' ... . Here, although petitioners failed to offer any reasonable excuse for their failure to timely serve a notice of claim, this failure is not, standing alone, fatal ... . Indeed, petitioners sufficiently demonstrated that respondents acquired actual notice of the event within a reasonable time thereafter, and that respondents would not be substantially prejudiced in their defense by the delay. Specifically, there is a surveillance video of the accident [which] ... the claims administrator ... acknowledged having in its possession approximately six months after the accident. Moreover, the operator of the lift that injured petitioner was employed by respondents. In addition, the correspondence ... suggests that ... only one month after plaintiff's accident, respondents' insurers were aware that the claims administrator anticipated that petitioner would be asserting a claim based on the ... . Our conclusion is further supported by the relatively short delay in petitioners' moving for leave to file a late notice of claim." ***Matter of Sproule v. New York Convention Ctr. Operating Corp.*, 2020 N.Y. Slip Op. 01015, First Dept 2-13-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTIONS FOR SEVERANCE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined defendants' motions for severance should have been granted. The lawsuit was brought by healthcare employers against several insurance brokers to recover assessments levied by the Workers' Compensation Board for a $220 million shortfall in a Workers' Compensation trust: "The Supreme Court improvidently exercised its discretion in denying those branches of the appellants' motions which were pursuant to CPLR 603 to sever the action insofar as asserted against them. While all of the plaintiffs are seeking to recover damages pursuant to the same theories of liability, each separate plaintiff is asserting causes of action only against its respective broker with which it had a client-broker relationship. The appellants have persuasively argued that individual issues predominate, concerning particular circumstances applicable to each plaintiff and to each appellant ... . In addition, a single trial of all the causes of action would prove unwieldy and confuse the trier of fact ... . Accordingly, in the interests of convenience and avoidance of prejudice, the court should have granted ...". ***Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, 2020 N.Y. Slip Op. 01040, Second Dept 2-13-20**

CIVIL PROCEDURE, APPEALS, ATTORNEYS, TRUSTS AND ESTATES

THE APPEAL OF THE DENIAL OF PETITIONER'S REQUEST FOR AN ADJOURNMENT TO OBTAIN COUNSEL WAS NOT MOOT, DESPITE THE FACT THE TRIAL WAS HELD AND COMPLETED IN PETITIONER'S ABSENCE; THE ADJOURNMENT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED.

The Second Department, in a full-fledged opinion by Justice Scheinkman, determined petitioner's motion for an adjournment to obtain new counsel should have been granted and the appeal of the denial of an adjournment was not moot. The

matter was before Surrogate's Court for an accounting in the estate of Oleg Cassini, who died in 2006. At the time of the request for an adjournment three attorneys had withdrawn from the case. The trial went ahead without the presence of petitioner, Oleg Cassini's wife Marrianne, and without counsel for petitioner: "An appeal is not moot '[w]here the case presents a live controversy and enduring consequences potentially flow from the order appealed from' ... . On the other hand, '[a]n appeal is moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment' ... . Here, enduring consequences flow from the order appealed from since, absent a reversal of the order appealed from, the Surrogate's Court's determination after a trial in which Marianne did not participate will bind the parties. * * * The Surrogate was rightly concerned about the lengthy history of delay in this case, just as we are. However, there was no evident urgency that required the trial to start on July 25, 2016, as opposed to 60 days later, and any prejudice to the objectants could have been readily addressed by appropriate orders dealing with the administration of the estate and its assets. In the overall context of this long-running litigation, an adjournment of 60 days to allow Marianne's prospective counsel, McKay, to prepare for the trial should have been granted. Indeed, the failure [*6] to grant it has resulted in additional delay and expense in the conclusion of this estate. Given our preference that matters be determined on their merits, and the absence of any indication on this record that Marianne's motion for an adjournment was made solely for the purpose of delay, the Surrogate's Court should not have rejected the request out of hand." ***Matter of Cassini*, 2020 N.Y. Slip Op. 01056, Second Dept 2-13-20**

CIVIL PROCEDURE, ATTORNEYS, TRUSTS AND ESTATES.

ORDERS ISSUED WHEN THE STAY PURSUANT TO CPLR 321(c) WAS IN EFFECT, DUE TO THE INABILITY OF PETITIONER'S COUNSEL TO CONTINUE FOR MEDICAL REASONS, SHOULD HAVE BEEN VACATED.

The Second Department, in a full-fledged opinion by Justice Scheinkman, reversing Surrogate's Court, determined that orders issued when a stay was in effect pursuant to CPLR 321(c), due to the inability of petitioner's counsel to continue for medical reasons, should have been vacated. The petitioner is Oleg Cassini's (the fashion designer's) wife and the underlying matter is the heavily litigated (to say the least) administration of his estate. The opinion is overwhelming in its detail and cannot be fairly summarized here: "On these appeals, we consider the interplay between CPLR 321(b)(2), which permits the attorney of record for a party to withdraw by order of the court, with the court having the ability to stay proceedings pending substitution of new counsel, and CPLR 321(c), which automatically and effectively suspends all proceedings against a party whose attorney becomes incapacitated until 30 days after notice to appoint another attorney has been served upon that party. In this contentious, complex estate litigation, the Surrogate's Court determined, in the context of a motion by the attorneys for the petitioner to withdraw from representing her, that the attorney primarily responsible for the matter had become unable to continue to represent the petitioner due to health reasons. While the Surrogate's Court relieved counsel and provided for a 30-day stay of proceedings, it failed to require that the adverse parties serve the orders relieving counsel upon the litigant whose counsel was permitted to withdraw. The adverse parties themselves failed to serve the orders and also to serve the petitioner with a notice to appoint new counsel. However, several months later, the petitioner appeared with prospective new counsel at a court conference and was advised by the court that a trial would be conducted some six weeks later, regardless of whether the petitioner was present and regardless of whether the petitioner had representation. This was, under the circumstances, the practical equivalent of more than 30 days' notice to the litigant to appoint new counsel. In conformity with the controlling statutory and decisional authorities, and to protect the litigant's right to legal representation, we conclude that the judicial determinations rendered in between the Surrogate's Court determination of incapacity and its subsequent practical notification of a deadline to appoint counsel should be vacated." ***Matter of Cassini*, 2020 N.Y. Slip Op. 01057, Second Dept 2-13-20**

CIVIL PROCEDURE, EVIDENCE.

NEW YORK DOES NOT RECOGNIZE SPOLIATION OF EVIDENCE AS AN INDEPENDENT TORT, THE COMPLAINT SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined plaintiff's complaint should have been dismissed for failure to state a cause of action. Plaintiff was injured falling off a forklift platform. Plaintiff alleged defendants negligently destroyed or failed to preserve the forklift platform, thereby making it impossible to sue the manufacturer. The Second Department held that there is no such tort: "Here, the plaintiff's sole purported cause of action seeks to recover for the negligent impairment of an employee's right to sue, which is, in effect, an allegation of spoliation ... , and New York does not recognize spoliation of evidence as an independent tort." ***Lopez-Lobo v. U.S. Nonwovens Corp.*, 2020 N.Y. Slip Op. 01053, Second Dept 2-13-20**

CIVIL PROCEDURE, FORECLOSURE.

MOTION TO EXTEND THE TIME TO SERVE DEFENDANT SHOULD HAVE BEEN GRANTED, DESPITE THE FACTS THAT THE FORECLOSURE ACTION HAD BEEN DISMISSED AND THE STATUTE OF LIMITATIONS HAD RUN.

The Second Department, in an extensive opinion by Justice Leventhal, over a two-justice dissent, reversing Supreme Court, determined Supreme Court should have granted plaintiff's motion to extend the time to serve defendant pursuant to CPLR

306-b, despite the facts that the action had been dismissed and the statute of limitations had run. The action had been dismissed after a hearing to determine whether defendant had been served in this foreclosure action. At the time of the hearing the process server had died and plaintiff could not, therefore, meet its burden of proof: "... [W]e agree with the plaintiff that an extension of time to serve the defendant with the summons and complaint was warranted in the interest of justice. The action was timely commenced in December 2009, based on the defendant's alleged default that year in paying his indebtedness that was secured by the mortgage. The statute of limitations, however, had expired by the time the plaintiff moved pursuant to CPLR 306-b to extend the time for service ... . The defendant had actual notice of the controversy. The Supreme Court, in its order dated December 17, 2013, wrote, among other things, that the defendant 'is prepared to say anything and to conceal anything to stave off a foreclosure sale' and that '[i]t is clear that [the defendant] has been well-aware that a foreclosure action was pending. (The day before a previously-scheduled foreclosure sale, [the defendant] filed a Chapter 13 bankruptcy petition).' The plaintiff also demonstrated the existence of a potentially meritorious cause of action, and the lack of identifiable prejudice to the defendant attributable to the delay in service ... . Moreover, as the interest of justice standard permits consideration of 'any other relevant factor' ... , we take into account that the process server's death prior to the hearing on the issue of service hampered the plaintiff's ability to meet its burden of proof at that hearing." ***State of New York Mtge. Agency v. Braun*, 2020 N.Y. Slip Op. 01107, Second Dept 2-13-20**

CIVIL PROCEDURE, MUNICIPAL LAW, EMPLOYMENT LAW, LABOR LAW.

DISMISSAL OF THE ACTION SEEKING OVERTIME PAY IN FEDERAL COURT ON THE GROUND NO NOTICE OF CLAIM WAS FILED DID NOT PRECLUDE, PURSUANT TO THE DOCTRINE OF RES JUDICATA, AN ACTION IN SUPREME COURT SEEKING PERMISSION TO FILE A LATE NOTICE OF CLAIM.

The Second Department, reversing Supreme Court, determined the dismissal of the action concerning overtime pay in federal court, on the ground no notice of claim had been filed, did not preclude the action in Supreme Court seeking leave to file a late notice of claim: "... [T]he federal court dismissed the New York Labor Law claims for failure to file a timely notice of claim (see County Law § 52; General Municipal Law § 50-e). ... [S]o much of the petition as sought leave to deem the late notice of claim timely served nunc pro tunc is not barred by the doctrines of collateral estoppel and res judicata. Although collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue which was raised and decided in a prior action or proceeding ... , the issue of whether the petitioners could obtain leave to deem the late notice of claim timely served nunc pro tunc pursuant to General Municipal Law § 50-e(5) was not litigated or decided by the 2017 federal order. As the issue was not litigated, the petitioners are not precluded from raising it ... . Res judicata also is inapplicable to so much of the petition as sought leave to deem the late notice of claim timely served nunc pro tunc. 'Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding' ... . Since the federal court was without jurisdiction to determine whether the petitioners could obtain leave to deem the late notice of claim timely served nunc pro tunc (see General Municipal Law § 50-e[7]), the petitioners are not precluded by the doctrine of res judicata from seeking a determination of this issue ...". ***Matter of Chodkowski v. County of Nassau*, 2020 N.Y. Slip Op. 01058, Second Dept 2-13-20**

CIVIL PROCEDURE, TRUSTS AND ESTATES, NEGLIGENCE.

WIFE'S MOTION TO BE SUBSTITUTED FOR HER DECEASED HUSBAND TO ENFORCE THE PAYMENT OF THE SETTLEMENT IN HER HUSBAND'S SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff's wife's (Jesenia's) motion pursuant to CPLR 1015 for leave to substitute herself for her deceased husband in this slip and fall case should have been granted. Defendant had settled the case and Jesenia was seeking payment: "Contrary to the Supreme Court's determination, the settlement of the action did not preclude the granting of a motion for substitution (see CPLR 1015[a]; 1021 ...). 'The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a)' ... . Without substitution as a party plaintiff, Jesenia may not seek relief pursuant to CPLR 5003-a. CPLR 5003-a provides that if a settling defendant fails to pay the sum due under a settlement agreement within 21 days of tender of a duly executed release and a stipulation discontinuing the action, the settling plaintiff may, without further notice, pursue the entry of a judgment in the amount of the settlement, plus interest, costs, and disbursements ...". ***Rivera v. Skeen*, 2020 N.Y. Slip Op. 01100, Second Dept 2-13-20**

CRIMINAL LAW.

DEFENDANT, ALTHOUGH CONVICTED OF AN ARMED FELONY, SHOULD HAVE BEEN ACCORDED YOUTHFUL OFFENDER STATUS, CRITERIA EXPLAINED.

The Second Department, reversing County Court, determined defendant should have been accorded youthful offender status, despite the armed felony conviction: "As the defendant was convicted of an armed felony (see CPL 1.20[41]), he was eligible to have this conviction replaced with a youthful offender adjudication only if, inter alia, there were 'mitigating circumstances that [bore] directly upon the manner in which the crime was committed' (CPL 720.10[3][i]). Mitigating

circumstances include '[f]actors directly' flowing from and relating to [the] defendant's personal conduct while committing the crime,' but generally, do not include the 'defendant's age, background, criminal history and drug habit' ... . Here, while there is no question that the defendant stands convicted of a serious crime, no physical harm or injury resulted to the complainant from the incident ... , and the defendant was an 'eligible youth' under CPL 720.10(2) for purposes of youthful offender treatment. Moreover, in the exercise of our discretion, we determine that the defendant should be granted youthful offender treatment ... . In making such a determination, factors to be considered by the court include 'the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life' ... . Here, the evidence demonstrated that the defendant was only 16 years old when he participated in the subject robbery, using a BB gun. The defendant has no prior criminal record or violent history. He has strong family support. The presentence report recommended that the defendant be adjudicated a youthful offender and be sentenced to a term of probation supervision. Indeed, the recommendation in the presentence report was that 'the defendant be given another chance to change his behavior and do better for himself and not let this one bad choice as a 16 year old determine the path for his adult life.' Moreover, the presentence report indicated that the defendant expressed genuine remorse and a sincere desire to make better choices in the future. Under all these circumstances, the interest of justice would be served by 'relieving the defendant from the onus of a criminal record' ...". ***People v. Carlos M.-A.*, 2020 N.Y. Slip Op. 01083, Second Dept 2-13-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

PROSECUTORIAL MISCONDUCT AND IRRELEVANT *MOLINEUX* EVIDENCE REQUIRED REVERSAL.

The Second Department, reversing defendant's conviction, determined that prosecutorial misconduct and the admission of irrelevant evidence of another crime required reversal: " '[O]n summation, a prosecutor may not improperly encourage[ ] inferences of guilt based on facts not in evidence' ... As we determined in People v. Ramirez (150 AD3d at 899-900), the prosecutor here improperly suggested that the jury should disregard the grand jury testimony of one of the People's main witnesses, and invited the jury to speculate that a missing witness would have given supporting testimony if he had been called to testify. ... 'The rule of Molineux is familiar: Evidence of uncharged crimes is inadmissible where its only purpose is to show bad character or propensity towards crime' ... . However, 'evidence of other crimes may be admitted to show motive, intent, the absence of mistake or accident, a common scheme or plan or the identity of the guilty party' ... . 'In addition, evidence of uncharged crimes may be admitted as necessary background material when relevant to a contested issue in the case, or to complete the narrative of the events if such evidence is inextricably interwoven with the crime charged' ... . 'Still, even if technically relevant for one of these or some other legitimate purpose, Molineux evidence will not be admitted if it is actually of slight value when compared to the possible prejudice to the accused' ... . The fact that the defendant allegedly resisted arrest six months after the incident in question after violating an order of protection against him held by one of the complainants was not relevant in this matter. The defendant was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident to be deemed admissible as evidence of consciousness of guilt ...". ***People v. Ramirez*, 2020 N.Y. Slip Op. 01087, Second Dept 2-13-20**

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

ALTHOUGH PLAINTIFF BANK DID NOT PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, THE DEFENDANT DID NOT PROVE PLAINTIFF DID NOT COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department determined that, although plaintiff bank did not prove compliance with the notice requirements of RPAPL 1304, defendant did not prove plaintiff failed to comply with the notice requirements of RPAPL 1304: " 'Even in the face of a plaintiff's failure to establish, prima facie, that a notice was properly mailed on a motion for summary judgment on the complaint, . . . a defendant still has to meet its burden, on a cross motion for summary judgment dismissing the complaint, of establishing that the condition precedent was not fulfilled' ... . [W]hile RPAPL 1304 provides that '[t]he notices required by this section shall be sent . . . to the last known address of the borrower, and to the residence that is the subject of the mortgage' (RPAPL 1304[2]), the defendant did not allege, or provide any evidence, that the lender knew her address had changed." ***Wells Fargo Bank, N.A. v. Tricario*, 2020 N.Y. Slip Op. 01112, Second Dept 2-13-20**

MENTAL HYGIENE LAW, CRIMINAL LAW, EVIDENCE.

EVIDENCE OF VOYEURISTIC DISORDER SHOULD NOT HAVE BEEN CONSIDERED IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING; THE HARE PSYCHOPATHY CHECKLIST-REVISED (PCL-R) WAS PROPERLY RELIED UPON.

The Second Department, affirming the finding that appellant sex offender required civil management, found that the expert's (Charder's) testimony about appellant's voyeuristic-disorder diagnosis should not have been credited. The Second Department further held the *Frye* hearing demonstrated that the Hare Psychopathy Checklist-Revised (PCL-R) is widely accepted and used in the psychological and psychiatric communities: "... [W]e agree with the appellant that Charder's

testimony regarding her diagnosis of a voyeuristic disorder should not have been credited. Charder admitted that her diagnosis of a voyeuristic disorder was inconsistent with the diagnostic criteria contained in section 302.82 of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Although her decision to apply an alternative definition of voyeuristic disorder does not necessarily render this diagnosis insufficient to establish a mental abnormality ... , Charder failed to clearly set forth the diagnostic criteria that she utilized in diagnosing the appellant under this alternative definition of voyeuristic disorder ... , and she otherwise failed to explain the basis of her opinion that certain conduct attributed to the appellant was 'voyeuristic,' thus rendering such testimony conclusory ... . * * * ... [T]he evidence adduced at the Frye hearing demonstrated that the PCL-R has enjoyed long and widespread use within the psychological and psychiatric communities as a tool to measure psychopathy. Even the expert witness called by the appellant to testify at the Frye hearing acknowledged that the PCL-R is generally accepted for this purpose. Although there was evidence adduced at the hearing indicating that the PCL-R has been criticized for a lack of 'inter-rater reliability' and having an 'allegiance effect,' the evidence adduced at the hearing showed that such problems could be effectively mitigated through proper training. Similarly, although there was evidence indicating that the PCL-R was not designed to function as a direct and stand-alone test of whether an individual has a mental abnormality within the meaning of the statute, expert testimony established that it could nevertheless 'contribute to an assessment of the presence of mental abnormality.' " ***Matter of State of New York v. Marcello A.*, 2020 N.Y. Slip Op. 01067, Second Dept 2-13-20**

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