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COURT OF APPEALS

CRIMINAL LAW.

A SUPERIOR COURT INFORMATION (SCI) FILED AFTER INDICTMENT IS A NULLITY.

The Court of Appeals noted that a superior court information (SCI) filed after indictment is a nullity: "A defendant may waive their constitutional right to grand jury presentment and indictment and proceed by SCI in accordance with the strict technical requirements of CPL 195.10 (2). Here, the SCI was filed after the grand jury indicted defendant and thus the SCI failed to comply with the statutory prerequisites. Accordingly, the SCI is a nullity and was properly dismissed (see CPL 195.10 [2] ...)." ***People v. Solomon*, 2023 N.Y. Slip Op. 02030, CtApp 4-20-23**

CRIMINAL LAW, EVIDENCE.

TEXT EXCHANGES WITH AND PHOTOGRAPHS OF THE RAPE AND SEXUAL-ABUSE VICTIM DELETED BY DEFENDANT FROM HIS CELL PHONE AND SUBSEQUENTLY RECOVERED DO NOT CONSTITUTE "NEWLY DISCOVERED" EVIDENCE WHICH WILL SUPPORT A MOTION TO VACATE THE CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, determined defendant's motion to vacate his conviction based on newly discovered evidence was properly denied without a hearing. Defendant was convicted of multiple counts of rape and sexual abuse of the fifteen-year-old victim. The newly discovered evidence was deleted by the defendant and subsequently recovered on defendant's cell phone: "[T]he evidence proffered is far from newly discovered—it is evidence the defendant knew about, was involved in the creation of, and believed he destroyed well before trial in an effort to conceal criminal activity. As defendant affirmed, he 'deleted the photographs and/or text messages because [he] did not want anyone to see them.' This is unsurprising given that the material, including nude photographs he took of the victim, was compelling evidence of his sexual contact with a minor. Defendant cannot now claim that because certain 'technology' was not available to recover the incriminating texts and photographs that he attempted to destroy, that material, now recovered, somehow qualifies as 'newly discovered evidence.' Nor has defendant met CPL 440.10 (g)'s due diligence prong, which requires that defendant show that the evidence could not have been produced at the trial even with due diligence on the part of defendant. Nowhere in defendant's conclusory submissions is there any showing that the evidence was inaccessible before trial, or any indication that defendant tried to obtain it." ***People v. Hartle*, 2023 N.Y. Slip Op. 02029, CtApp 4-20-23**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, MUNICIPAL LAW, EMPLOYMENT LAW.

A FIRE DISTRICT CANNOT BE HELD VICARIOUSLY LIABLE UNDER A NEGLIGENCE STANDARD FOR THE ACTIONS OF A VOLUNTEER FIREFIGHTER DRIVING A FIRETRUCK WHERE THE DRIVER DOES NOT VIOLATE THE RECKLESS-DISREGARD STANDARD FOR EMERGENCY VEHICLES.

The Court of Appeals, reversing the appellate division, over a two-judge dissent, in a full-fledged opinion by Judge Cannatoro, determined a municipality cannot be held vicariously liable under a negligence standard for the actions of a volunteer firefighter driving a firetruck where the driver is protected by the higher reckless-disregard standard for emergency vehicles under the Vehicle and Traffic Law: "Based on undisputed testimony that the firefighter was responding to an alarm of fire, had activated the fire truck's lights and sirens, stopped the fire truck before entering the intersection, and proceeded slowly through the red light, Supreme Court held that the firefighter had 'established prima facie entitlement to the exemption in Vehicle and Traffic Law § 1104,' and that plaintiff had failed to raise a triable issue in opposition as to whether the firefighter acted with reckless disregard. The court therefore granted summary judgment to the firefighter. However, the court reached a different result with respect to the vicarious liability of the District. Relying on General Municipal Law § 205-b, 'which states, in part, that 'fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters,' the court concluded that questions of fact existed regarding whether the firefighter 'was negligent in failing to see plaintiff's vehicle approaching,' and, thus, the District was not entitled to summary judgment. * * * ... [S]ection 1104 does more than simply immunize firefighters from negligence liability for otherwise privileged conduct ... . It modifies their underlying duties in the defined contexts by (i) permitting categories of conduct which would violate other drivers' ordinary duty of care, (ii) specifying particular safety precautions which must be observed when engaging in such conduct, and (iii) requiring emergency vehicle drivers to avoid recklessness even when engaged in the privileged conduct. When a volunteer firefighter's actions satisfy all of these conditions and thus are privileged, there is simply no breach of duty or negligence which can be imputed to a fire district under General Municipal Law § 205-b." ***Anderson v. Commack Fire Dist.*, 2023 N.Y. Slip Op. 02028, CtApp 4-20-23**

FIRST DEPARTMENT

CIVIL PROCEDURE.

A DISMISSAL FOR FAILURE TO STATE A CLAIM IS NOT ON THE MERITS AND HAS NO RES JUDICATA EFFECT.

The First Department noted that a dismissal for failure to state a claim is not on the merits and therefore does not have res judicata effect: "To the extent defendants rely on the doctrine of res judicata, this reliance is misplaced because a dismissal under CPLR 3211(a)(7) for failure to state a claim is not a dismissal on the merits with res judicata effect …". ***Wilder v. Fresenius Med. Care Holdings, Inc.*, 2023 N.Y. Slip Op. 01978, First Dept 4-18-23**

CIVIL PROCEDURE, TRUSTS AND ESTATES, MARITIME LAW, EMPLOYMENT LAW, TOXIC TORTS.

UNDER THE JONES ACT OHIO HAD JURISDICTION TO APPOINT ADMINISTRATORS OF THE ESTATE OF DECEDENT WHO ALLEGEDLY DIED OF EXPOSURE TO ASBESTOS ON MERCHANT MARINE SHIPS; THE NEW YORK EXECUTOR OF THE ESTATE WAS TIMELY AND PROPERLY SUBSTITUTED FOR THE OHIO ADMINISTRATORS.

The First Department, over a dissent, in a complex decision which cannot be fairly summarized here, determined: (1) under the Jones Act Ohio had jurisdiction to appoint administrators for decedent who allegedly died from asbestos exposure on merchant marine ships where he was employed; and (2) substitution of a New York personal representative, executor of the estate, was proper and timely: "[T]he Jones Act provides that when a seaman dies from an employment injury 'the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer' (46 USC § 30104). The Jones Act grants a right of action to the personal representative 'without other description' … . The Act does not require that the personal representative be either 'a domiciliary or ancillary administrator' … . A domiciliary administrator has standing to file a Jones Act or FELA [Federal Employers' Liability Act] lawsuit in another state … . However, nothing 'explicitly clothes a domiciliary administrator with the exclusive right to maintain such an action' because such a requirement is inconsistent with 'the remedial nature' of FELA and the 'representative character' of such a suit … . Notably, the personal representative's authority under the Jones Act derives from 'a federal statutory right and power given to carry out the policy of the federal statutes' and 'is not limited to the confines of the State where he was appointed but is co-extensive with general federal jurisdiction' …". ***Bartel v. Maersk Line, Ltd.*, 2023 N.Y. Slip Op. 02058, First Dept 4-20-23**

See companion decision: ***Bartel v. Farrell Lines*, 2023 N.Y. Slip Op. 02057, First Dept 4-20-23**

CRIMINAL LAW, FAMILY LAW.

WHEN A JUVENILE PLEADS GUILTY TO AN OFFENSE FOR WHICH HE CANNOT BE HELD CRIMINALLY RESPONSIBLE, THE CONVICTION MUST BE VACATED AND DISMISSED.

The First Department, vacating defendant's conviction by guilty plea, determined that because defendant, a juvenile, cannot be held criminally responsible for the crime to which he pled guilty, the conviction must be vacated rather than sent to Family Court: "The People are correct that where a juvenile is charged with a crime for which he may not be criminally responsible, as well as others for which he may be criminally responsible, Supreme Court may assume jurisdiction over the case … . However, if convicted of a crime for which he cannot be criminally responsible, Supreme Court then 'must order that the verdict be deemed vacated and replaced by a juvenile delinquency fact determination,' and remove the matter to Family Court … . Here … defendant was convicted, by a plea of guilty to a crime to which he cannot be criminally responsible. This was not a case where a jury returned a verdict of guilty to the charge of criminal possession of a weapon in the second degree, thus requiring Supreme Court to transfer the case to Family Court for disposition … . Rather, the People specifically requested that in addition to the charge of attempted murder in the second degree, defendant enter a plea of guilty to the fifth count charging criminal possession of a weapon in the second degree, a crime for which the People now concede that defendant cannot be held criminally responsible. Given this, defendant's conviction for criminal possession of a weapon in the second degree must be vacated and that charge dismissed." ***People v. Raul A.*, 2023 N.Y. Slip Op. 01970, First Dept 4-18-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, COURT OF CLAIMS, NEGLIGENCE, EMPLOYMENT LAW.

ALTHOUGH THE REQUIREMENTS FOR THE CONTENTS OF A CLAIM AGAINST THE STATE IN COURT OF CLAIMS ACT SECTION 11 ARE STRICT AND JURISDICTIONAL, THE CLAIMANT IS NOT REQUIRED TO ALLEGE EVIDENTIARY FACTS.

The Second Department, reversing the Court of Claims, determined the claim in this Child Victims Act proceeding sufficiently stated the nature of the claim. The claimant alleged he was sexually abused in state-run foster homes every week for two years (1994–1996}. The claim alleged negligent hiring, retention or supervision: "The only reason identified by the Court of Claims in the order appealed from, and by the defendant on appeal, for concluding that the claim failed to state the nature of the claim is that, while the claim included an allegation that the defendant had actual or constructive notice of the alleged sexual abuse, it did not supply any 'details' as to how the defendant received notice of the alleged abuse. Although the requirements of Court of Claims Act § 11(b) are strict, and jurisdictional in nature, the fact remains that the claim is a pleading, the contents of which are merely allegations. As the defendant correctly contends, '[a] necessary element of a cause of

action to recover damages for negligent hiring, retention, or supervision is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury' ... . Nonetheless, '[c]auses of action alleging negligence based upon negligent hiring, retention, or supervision are not statutorily required to be pleaded with specificity' … . The manner in which the defendant acquired actual or constructive notice of the alleged abuse is an evidentiary fact, to be proved by the claimant at trial. In a pleading, 'the plaintiff need not allege his [or her] evidence' ...". ***Martinez v. State of New York*, 2023 N.Y. Slip Op. 01990, Second Dept 4-19-23**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

PLAINTIFF'S FAILURE TO FILE AN APPLICATION FOR AN ORDER OF REFERENCE IN THIS FORECLOSURE ACTION WAS NOT A GROUND FOR DISMISSAL OF THE COMPLAINT SUA SPONTE.

The Second Department, reversing Supreme Court in this foreclosure action, determined the plaintiff's failure to comply with a directive to apply for an order of reference was not an appropriate ground for dismissing the complaint sua sponte: " 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, the plaintiff's failure to comply with the directive to file an application for an order of reference was not a sufficient ground upon which to direct dismissal of the complaint ... . Accordingly, the Supreme Court should have granted the plaintiff's motion to vacate order ... and to restore the action to the active calendar." ***U.S. Bank N.A. v. Turner*, 2023 N.Y. Slip Op. 02023, Second Dept 4-19-23**

CIVIL PROCEDURE, NEGLIGENCE.

NEW YORK HAS LONG-ARM JURISDICTION OVER A SINGLE ALLEGED ACT OF SEXUAL ABUSE WHICH OCCURRED IN NEW YORK IN 1975 OR 1976 WHEN PLAINTIFF WAS ON A FIELD TRIP; THE ACTION WAS BROUGHT BY A CONNECTICUT RESIDENT AGAINST A CONNECTICUT DEFENDANT AND ALLEGED SEVERAL OTHER ACTS OF ABUSE WHICH TOOK PLACE IN CONNECTICUT; BECAUSE THE ALLEGED TORT TOOK PLACE IN NEW YORK, THE CONNECTICUT PLAINTIFF CAN TAKE ADVANTAGE OF THE EXTENDED STATUTE OF LIMITATIONS IN NEW YORK'S CHILD VICTIMS ACT.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Christopher, determined a single alleged act of sexual abuse which took place during a field trip to New York from Connecticut, involving a Connecticut-resident plaintiff and a Connecticut defendant, was sufficient for long-arm jurisdiction in New York. Plaintiff alleged defendant Boys and Girls Club of Greenwich, Inc failed to properly supervise club activities and, as a result, plaintiff was abused on several occasions by a member of the club. Only one of the alleged instances of abuse took place in New York. Although plaintiff is a Connecticut resident, the court ruled plaintiff could take advantage of the extended statute of limitations in New York's Child Victims Act because the alleged tort took place in New York. "Where, as here, the plaintiff has established the requisite minimum contacts, as previously set forth, we must then engage in the second part of the due process inquiry; that is, whether defending a suit in New York comports with 'traditional notions of fair play and substantial justice' ... . Here, the Club has failed to present a 'compelling case' that some other consideration would render jurisdiction unreasonable ... . [T]he exercise of jurisdiction over the Club in New York would 'comport with 'fair play and substantial justice' ... . * * * With regard to CPLR 214-g, the revival statute, enacted under the Child Victims Act, *S.H. v Diocese of Brooklyn* (205 AD3d 180), does not preclude determining that it is appropriate for New York to exercise long-arm jurisdiction in this case. While *S.H.* discussed the legislative history of the revival statute and found that the history supports the proposition that the statute was enacted for the benefit of New York residents, this was in the context of the facts of *S.H.*, wherein the alleged acts of abuse occurred in Florida. In *S.H.* we held, 'that under the circumstances of this case, CPLR 214-g is not available to nonresident plaintiffs where the alleged acts of abuse occurred outside New York' ... . In the instant case, while the plaintiff is not a New York resident, unlike the situation in *S.H.*, the alleged abuse occurred in New York. We note that our finding that the Club is subject to personal jurisdiction pursuant to CPLR 302(a)(2) is limited to the one act of sexual abuse alleged to have occurred in New York." ***WCVAW-CK-Doe v. Boys & Girls Club of Greenwich, Inc.*, 2023 N.Y. Slip Op. 02026, Second Dept 4-19-23**

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

A SEX OFFENDER MAY PETITION ANNUALLY FOR A MODIFICATION OF THE RISK LEVEL CLASSIFICATION; SUCH A PETITION IS NOT PRECLUDED BY PRIOR PETITIONS WITHIN A YEAR SEEKING OTHER RELIEF UNDER THE CORRECTION LAW.

The Second Department, reversing Supreme Court, noted that a sex offender can petitioner annually for a modification of the risk level classification, notwithstanding prior petitions within a year seeking other relief: "[T]he petition ... sought a downward modification of the defendant's risk level classification. Pursuant to Correction Law § 168-o(2), any sex offender required to register or verify under SORA may petition annually for modification of his or her risk level classification ... . As the defendant had not petitioned for a modification of his risk level classification within the prior year, he was not procedurally barred from seeking such relief in the instant petition. Therefore, upon receipt of the petition, the court should have followed the procedures set forth in Correction Law § 168-o(4) and conducted a hearing on the petition." ***People v. Ghose*, 2023 N.Y. Slip Op. 02021, Second Dept 4-19-23**

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

THE PROVISION OF MENTAL HYGIENE LAW SECTION 10 THAT ALLOWS A COURT TO DETERMINE WHETHER THERE IS PROBABLE CAUSE TO BELIEVE PETITIONER, WHO HAD BEEN RELEASED TO A STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) REGIMEN, IS A DANGEROUS SEX OFFENDER REQUIRING CONFINEMENT IS NOT UNCONSTITUTIONAL.

The Second Department, reversing (modifying) Supreme Court in this habeas corpus proceeding, determined the "provision of Mental Hygiene Law § 10.11(d)(4) that directs the court to determine whether there is probable cause to believe that a respondent in a proceeding pursuant to Mental Hygiene Law article 10 is a dangerous sex offender requiring confinement based upon a review of the allegations in a petition for confinement and any accompanying papers does not violate that respondent's federal or state rights to due process." The court further determined the issue raised here might recur so the appeal was not rendered moot by the petitioner's release "to a regimen of strict and intensive supervision and treatment (... SIST): "Mental Hygiene Law § 10.11 permits the court to revoke a regimen of SIST upon a violation of SIST conditions and sets forth the required procedures for such a revocation ... . The statute provides, as relevant here, that if a parole officer has 'reasonable cause to believe' that a sex offender requiring SIST has violated a condition thereof, the offender can be taken into custody for five days for an evaluation by a psychiatric examiner, and the attorney general and the Mental Hygiene Legal Service (hereinafter MHLS) are to be promptly notified ... . The attorney general may then file a petition for confinement within five days after the offender is taken into custody, which petition must be served promptly on MHLS, and counsel must be appointed for the offender ... . If a petition for confinement is filed, 'the court shall promptly review the petition and, based on the allegations in the petition and any accompanying papers, determine whether there is probable cause to believe that the [offender] is a dangerous sex offender requiring confinement' ... . There is no provision permitting the offender an opportunity to be heard prior to the probable cause determination. Once the probable cause determination is made, the offender may be retained pending the conclusion of the proceeding ... . 'Within thirty days after a petition for confinement is filed . . . , the court shall conduct a hearing' to make a final determination, but the failure to commence the hearing within that time period does not result in dismissal of the petition or 'affect the validity of the hearing or the determination' ...". ***People ex rel. Neville v. Toulon*, 2023 N.Y. Slip Op. 02015, Second Dept 4-19-23**

ENVIRONMENTAL LAW, ZONING.

THE TOWN PLANNING BOARD COMPLIED WITH THE "HARD LOOK" REQUIREMENTS OF SEQRA AND PROPERLY GRANTED A SPECIAL USE PERMIT, CRITERIA EXPLAINED IN SOME DETAIL.

The Second Department, reversing Supreme Court, determined the town planning board complied with the State Environmental Quality Review Act (SEQRA) and properly considered the criteria for a special use permit when it approved a project: "[T]he Planning Board identified groundwater resources, noise, and scenic resources as relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its negative determination of significance. * * * ... [T]he record demonstrates that the Planning Board complied with Zoning Code § 143-117(A)(6) and (9), which required it to assess the '[a]dequacy of water supply and sewage disposal facilities,' and to provide the protection of 'neighboring properties against noise, glare, unsightliness or other objectionable features.' Lastly, '[a] use permitted by a special use permit is a use that has been found by the local legislative body to be appropriate for the zoning district and 'in harmony with the general zoning plan and will not adversely affect the neighborhood' ... . Although the Planning Board 'does not have the authority to waive or modify any conditions set forth in the ordinance' ... , '[t]he permit must be granted if the application satisfies the criteria set forth in the zoning law' ...". ***Matter of Tampone v. Town of Red Hook Planning Bd.*, 2023 N.Y. Slip Op. 02011, Second Dept 4-19-23**

FALSE ARREST, FALSE IMPRISONMENT, MALICIOUS PROSECUTION, MUNICIPAL LAW.

PETITIONER DID NOT DEMONSTRATE THE COUNTY HAD TIMELY KNOWLEDGE OF THE FACTS UNDERLYING THE FALSE IMPRISONMENT AND MALICIOUS PROSECUTION CAUSES OF ACTION; THEREFORE, PETITIONER SHOULD NOT HAVE BEEN GRANTED LEAVE TO FILE A LATE NOTICE OF CLAIM.

The Second Department, reversing Supreme Court, determined petitioner should not have been granted leave to serve a late notice of claim in this false imprisonment/malicious prosecution action because petitioner did not demonstrate the municipality had timely notice of the potential lawsuit: "[T]he petitioner failed to establish that the respondents acquired actual knowledge of the essential facts constituting his claims within 90 day after the claims arose or a reasonable time thereafter ... . Moreover, the petitioner's ignorance of the law was not a reasonable excuse for his failure to serve a timely notice of claim ... . Finally, the petitioner failed to come forward with 'some evidence or plausible argument' that the respondents will not be substantially prejudiced in maintaining a defense ... . The conclusory assertion of the petitioner's counsel in an affirmation in support of the petition that the respondents were 'not prejudiced in any manner by this delay' was inadequate to satisfy the petitioner's minimal initial burden with respect to this factor ...". ***Matter of Pil-Yong Yoo v. County of Suffolk*, 2023 N.Y. Slip Op. 02008, Second Dept 4-19-23**

FAMILY LAW, JUDGES.

THE CUSTODY RULING SHOULD NOT HAVE BEEN MADE WITHOUT A BEST INTERESTS HEARING; FATHER'S PARENTAL ACCESS SHOULD NOT HAVE BEEN CONDITIONED ON COMPLIANCE WITH TREATMENT.

The Second Department, reversing Family Court, held the custody determination should not have been made without a best interests hearing and father's parental access should not have been conditioned on compliance with treatment: " 'Custody determinations should generally be made only after a full and plenary hearing and inquiry' ... . 'This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child' ... . 'A court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision' ... . 'Similarly, visitation determinations should generally be made after a full evidentiary hearing to ascertain the best interests of the child' ... .. Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the parties' child ... . Moreover, the court failed to articulate the factors and evidence material to its determination ... . The Supreme Court also erred in suspending the father's parental access without determining the best interests of the child ... . Furthermore, the court improperly conditioned the father's future parental access or reapplication for parental access rights upon his compliance with treatment ...". ***Matter of Baez-Delgadillo v. Moya*, 2023 N.Y. Slip Op. 01994, Second Dept 4-19-23**

FAMILY LAW, JUDGES.

FATHER'S PARENTAL ACCESS SHOULD NOT HAVE BEEN CONDITIONED UPON HIS PARTICIPATION IN COUNSELING OR TREATMENT.

The Second Department, reversing (modifying) Family Court, determined father's access to the child should not have been conditioned upon his participation in counseling or treatment: " 'A court deciding a custody proceeding may direct a party to submit to counseling or treatment as a component of a [parental access] or custody order' ... . However, a court may not direct that a parent undergo counseling or treatment as a condition of future parental access or reapplication for parental access rights ... . Here, the Family Court erred in conditioning the filing of any future parental access petitions by the father upon his completion of a parenting class, and we modify the order ... , so as to eliminate that condition ...". ***Matter of Coley v. Steiz*, 2023 N.Y. Slip Op. 01995, Second Dept 4-19-23**

FORECLOSURE, EVIDENCE.

IN THIS FORECLOSURE ACTION, THE BUSINESS RECORDS UPON WHICH THE REFEREE'S CALCULATIONS WERE BASED WERE NOT ATTACHED TO THE REFEREE'S AFFIDAVIT, RENDERING THE AFFIDAVIT HEARSAY.

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been accepted because the business records upon which the calculations were based were not attached to the affidavit: "[A] referee's computations based on the 'review of unidentified and unproduced business records . . . constitute[ ] inadmissible hearsay and lack[ ] probative value' ... . Here, the referee based his calculations upon documentary evidence submitted by the plaintiff, including the note and mortgage, as well as an affidavit of amount due and owing, submitted in support of the motion to confirm the referee's report. However, the affidavit of amount due and owing does not identify the business records upon which the affiant relied in order to compute the total amount due on the mortgage, and there are no such records annexed thereto. Consequently, the referee's findings in that regard were not substantially supported by the record ...". ***M&T Bank v. Bonilla*, 2023 N.Y. Slip Op. 01989, Second Dept 4-19-23**

INSURANCE LAW, NEGLIGENCE, ARBITRATION.

THE INSURER DID NOT EXPLAIN ITS FAILURE TO TIMELY REQUEST THAT THE INSURED UNDERGO A PHYSICAL EXAM AND AN EXAMINATION UNDER OATH; THE STAY OF ARBITRATION IN THIS UNINSURED MOTORIST BENEFITS DISPUTE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the insurer, GEICO, should not have been granted a stay of arbitration in this uninsured-motorist-benefits dispute with its insured, Eser. GEICO did not explain its failure to timely request a physical exam and an examination under oath (EUO): "GEICO had ample time after being notified of Eser's claim to seek a medical examination and an examination under oath, but failed to do so. Moreover, it denied the claim, apparently concluding that the medical records were sufficient to determine that Eser did not sustain a serious injury. GEICO offered no excuse for its failure to request a physical examination and an examination under oath. Instead, GEICO represented to the Supreme Court that it had requested the examinations, pointing to [three letters]. Contrary to GEICO's assertion, however, it did not request examinations in those letters, but, rather, merely advised Eser that if it ultimately determined that the other vehicle was uninsured, it 'may require [her] to submit to physical examinations and/or Examination(s) Under Oath' ... . Since GEICO had ample time to seek this discovery of Eser, but unjustifiably failed to do so, it was not entitled to a stay of arbitration in order to conduct the examinations ...". ***Matter of Government Empls. Ins. Co. v. Eser*, 2023 N.Y. Slip Op. 01999, Second Dept 4-19-23**

LEGAL MALPRACTICE, ATTORNEYS.

ALTHOUGH THE ATTORNEYS IN THIS LEGAL MALPRACTICE ACTION MISSED THE STATUTE OF LIMITATIONS, THE COMPLAINT DID NOT ALLEGE SUFFICIENT FACTS TO DEMONSTRATE THE UNDERLYING LAWSUITS WOULD HAVE SUCCEEDED HAD THEY BEEN TIMELY BROUGHT.

The Second Department, reversing Supreme Court, determined the legal malpractice action should have been dismissed because the complaint did not contain the "but for" allegations. It is not enough to allege defendants missed the statute of limitations, the complaint must also allege facts demonstrating the underlying lawsuits would have succeeded had they been timely brought: "[T]he plaintiffs alleged that the decedent died after a brief admission to a drug and behavioral treatment facility, that the defendants agreed to represent the plaintiffs in an underlying action against the treatment facility and the medical providers who treated the decedent, that the defendants committed legal malpractice by failing to timely complete service of process in an action commenced in state court and by failing to commence a wrongful death cause of action in federal court before the applicable statute of limitations expired, and that the defendants' failures resulted in the plaintiffs being unable to recover on their wrongful death causes of action. Absent from the complaint are any factual allegations relating to the basis for the plaintiffs' purported wrongful death causes of action against the treatment facility or medical providers. Accepting the facts alleged in the complaint as true, and according the plaintiffs the benefit of every possible favorable inference, the complaint failed to set forth facts sufficient to allege that [defendants'] purported negligence proximately caused the plaintiffs to sustain actual and ascertainable damages ... . Even when considered with the documents submitted by the plaintiffs in opposition to the motion, the complaint failed to allege any facts tending to show that, but for [defendants'] alleged negligence in failing to timely serve process in the state court action and in failing to timely commence an action in federal court, the plaintiffs would have achieved a more favorable outcome on their wrongful death causes of action ...". ***Buchanan v. Law Offs. of Sheldon E. Green, P.C.*, 2023 N.Y. Slip Op. 01979, Second Dept 4-19-23**

See the companion decision: ***Buchanan v. Law Offs. of Sheldon E. Green, P.C.***, 2023 N.Y. Slip Op. 01980, Second Dept 4-19-23

WORKERS' COMPENSATION LAW, EMPLOYMENT LAW, NEGLIGENCE, LABOR LAW-CONSTRUCTION LAW.

IF THE WORKER'S COMPENSATION BOARD FINDS A DEFENDANT IN A CONSTRUCTION-ACCIDENT ACTION WAS PLAINTIFF'S EMPLOYER, PLAINTIFF'S RECOVERY AGAINST THE EMPLOYER IS RESTRICTED TO WORKER'S COMPENSATION BENEFITS AND OTHER DEFENDANTS CANNOT MAINTAIN ACTIONS FOR CONTRIBUTION OR INDEMNIFICATION AGAINST THAT EMPLOYER.

The Second Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Wan, determined the employees were restricted to worker's compensation benefits in this construction-accident action against their employers and the other defendants were precluded from seeking contribution and indemnification from the employers: "Workers' Compensation Law § 11(1) precludes recovery by 'any third person' against '[a]n employer' for contribution or indemnity 'for injuries sustained by an employee acting within the scope of his or her employment' unless the employee 'has sustained a 'grave injury' or there is a 'written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant.' Despite this clear directive, the Supreme Court, relying on this Court's decision in *Baten v Northfork Bancorporation, Inc.* (85 AD3d 697), permitted cross-claims sounding in contribution and indemnity to survive against an entity on the ground that triable issues of fact existed with respect to whether that entity was an employer, regardless of a Workers' Compensation Board determination on this issue. Here, we clarify that, notwithstanding our prior decision in Baten, no claim for indemnity or contribution may be maintained against an entity determined to be an employer by the Workers' Compensation Board except in the limited circumstances specified in Workers' Compensation Law § 11.* * * ... [W]e hold that Workers' Compensation Law § 11 precludes recovery by any third party for contribution and indemnity against an entity determined by the WCB [Workers' Compensation Board] to be the plaintiff's employer except where the injured employee has suffered a grave injury or where the employer has expressly agreed in writing to contribute or indemnify." ***Velazquez-Guadalupe v. Ideal Bldrs. & Constr. Servs., Inc.*, 2023 N.Y. Slip Op. 02025, Second Dept 4-19-23**

THIRD DEPARTMENT

CRIMINAL LAW, CIVIL PROCEDURE, CONTRACT LAW, JUDGES.

THE BRAKES FAILED ON A LIMOUSINE OWNED BY PETITIONER AND 20 PEOPLE DIED; PETITIONER PLED TO 20 COUNTS OF CRIMINALLY NEGLIGENT HOMICIDE AND, PURSUANT TO A PLEA AGREEMENT, WAS SENTENCED TO PROBATION AND COMMUNITY SERVICE; BECAUSE OF A TECHNICAL DEFECT IN THE SENTENCE, PETITIONER APPEARED FOR RESENTENCING BEFORE A DIFFERENT JUDGE WHO DECIDED TO IMPOSE PRISON TIME; PETITIONER WITHDREW HIS PLEA, THE MATTER WAS SET FOR TRIAL AND PETITIONER BROUGHT THIS ARTICLE 78 PROCEEDING TO REINSTATE THE ORIGINAL SENTENCE; THE PETITION WAS DENIED OVER A DISSENT.

The Third Department, in a full-fledged opinion by Justice Ceresia, over a dissent. denied the petition to reinstate the original sentence in the prosecution of the owner of a limousine service. The brakes failed on one of petitioner's limousines and the driver, 17 passengers and two pedestrians were killed. Petitioner pled guilty to 20 counts of criminally negligent homicide and was sentenced to two years of interim probation, community service, followed by a period of probation. When it was discovered that the two-year interim probation was illegal, petitioner appeared before a different judge for resentencing, the respondent in this proceeding. The respondent refused to abide by the plea agreement and informed the petitioner he would impose a prison sentence. Petitioner withdrew his plea and the case was set down for

trial. Petitioner then brought this Article 78 petition seeking a writ of mandamus, a writ of prohibition and specific performance of the plea agreement. In a complex ruling too detailed to fairly summarize here, the relief was denied. The dissenter argued petitioner was entitled to specific performance of the plea agreement: "Mandamus to compel is an extraordinary remedy, commanding 'an officer or body to perform a specified ministerial act that is required by law to be performed. It does not lie to enforce a duty that is discretionary' ... . * * * '... [I]mposing a criminal sentence is never ministerial' ... . * * * ... [A] review of the merits leads us to conclude that the issuance of a writ [of prohibition] is unwarranted ... . A 'defendant [is not] entitled to specific performance of [a] plea bargain unless he [or she has] been placed in a 'no-return position' in reliance on the plea agreement' ...". ***Matter of Hussain v. Lynch*, 2023 N.Y. Slip Op. 02049, Third Dept 4-20-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

BURGLARY AS A SEXUALLY MOTIVATED FELONY IS NOT A REGISTRABLE OFFENSE UNDER SORA; THE JUDGMENT REQUIRING DEFENDANT TO REGISTER AS A SEX OFFENDER VACATED.

The Third Department determined burglary as a sexually motivated felony is not a registrable offense under SORA: "[W]e agree with defendant, as well as the People's concession, that burglary in the second degree as a sexually motivated felony is not a registerable offense under SORA because it is not expressly identified as a '[s]ex offense' pursuant to Correction Law § 168-a (2) (a) ... . [T]he judgment is modified, on the law, by vacating the provisions thereof certifying defendant as a sex offender pursuant to the Sex Offender Registration Act and requiring him to register as a sex offender and pay the related sex offender registration fee ...". ***People v. Vakhoula*, 2023 N.Y. Slip Op. 02034, Third Dept 4-20-23**

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