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COURT OF APPEALS

CONSTITUTIONAL LAW, ADMINISTRATIVE LAW.

ELECTRONIC LOGGING DEVICES (ELDs) WHICH KEEP TRACK OF COMMERCIAL TRUCKERS' LOCATION, HOURS OF OPERATION AND MILES DO NOT FACILITATE UNREASONABLE SEARCHES; THE TRUCKING INDUSTRY IS HEAVILY REGULATED AND THE ELDs AIM TO PREVENT DRIVER FATIGUE.

The Court of Appeals, in a full-fledged opinion by Judge Troutman, determined the electronic logging devices (ELDs) which record the location, engine hours and mileage of commercial motor vehicles (CMVs) do not facilitate unreasonable searches, The commercial trucking industry has been regulated for decades to prevent accidents due to drivers' fatigue and the ELDs contribute to that end: "Before us is a facial challenge to the constitutionality of New York regulations adopting a rule promulgated by the Federal Motor Carrier Safety Administration requiring the installation of electronic logging devices in commercial motor vehicles. We hold that the warrantless inspections authorized by the regulations fall within the administrative search exception to the warrant requirement and do not constitute unreasonable searches and seizures under article I, § 12 of the State Constitution. * * * ... [P]etitioners correctly concede that there is a long tradition of commercial trucking being subject to comprehensive regulations. Regulation of commercial trucking, including regulation of 'the maximum hours of service for commercial drivers,' extends back more than eighty years both in New York and on the federal level ... . Those regulations are in keeping with this State's 'vital and compelling interest in safety on the public highways' ... . CMV operators therefore have 'a diminished expectation of privacy in the conduct of that business because of the degree of governmental regulation' ... , and 'may reasonably be deemed to have relinquished a privacy-based objection' to an 'intrusion that will foreseeably occur incident' to applicable regulations ... . More particularly, ... commercial truck drivers have a diminished expectation of privacy in the location of their vehicles because of their participation in a pervasively regulated industry." ***Matter of Owner Operator Ind. Drivers Assn., Inc. v. New York State Dept. of Transp.*, 2023 N.Y. Slip Op. 03184, CtApp 6-13-23**

CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT WAS WEARING A STUN BELT DURING THE TRIAL WITHOUT THE JUDGE'S OR PROSECUTOR'S KNOWLEDGE; THE MAJORITY HELD THIS WAS NOT A MODE OF PROCEEDINGS ERROR; A TWO-JUDGE DISSENT DISAGREED.

The Court of Appeals, over a two-judge dissent, determined the fact that defendant was wearing a stun belt without the knowledge of the judge or the prosecutor was not a mode of proceedings error. However, questions remain about whether defendant received effective assistance of counsel (failure to object) remain and a hearing on the motion to vacate the conviction on that ground is required. The dissent argued the stun-belt-error constituted a mode of proceedings error requiring reversal: "It is undisputed that sheriff officials required defendant to wear a stun belt at trial, that neither the People nor the trial court were aware of that fact, and that defendant failed to preserve any argument concerning the stun belt. Because the trial court did not articulate a particularized need for defendant to wear a stun belt, the use of that restraint was error ... . The courts below thus did not abuse their discretion by summarily denying the portion of defendant's CPL 440.10 motion based on his unpreserved assertion of a Buchanan [13 NY3d 1] error, which could have been raised before the trial court. The courts below erred by summarily denying the portion of defendant's motion concerning his ineffective assistance of counsel claim. Given the conceded Buchanan violation, factual issues exist concerning trial counsel's effectiveness. For instance, County Court should determine if counsel had a legitimate explanation for declining to object. There has been no hearing concerning whether defendant voiced his concerns about wearing the stun belt to his trial attorney as he contends ... . Further, defendant submitted evidence in support of his motion which raises factual questions as to whether he consented to wearing the stun belt at trial ... . Defendant's ineffective assistance claim should be decided under the applicable standard ... on a full record following a hearing ...". ***People v. Bradford*, 2023 N.Y. Slip Op. 03187, CtApp 6-13-23**

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE DID NOT CONDUCT THE REQUIRED "SEARCHING INQUIRY" BEFORE ALLOWING DEFENDANT TO PROCEED PRO SE; NEW TRIAL ORDERED.

The Court of Appeals, reversing defendant's conviction, in a memorandum decision which did not describe the facts, determined the judge did not conduct a "searching inquiry" before allowing defendant to proceed pro se: "The order of the Appellate Division should be reversed, and a new trial ordered. In contrast to ***People v Duarte* (37 NY3d 1218** [2022]), the trial court here recognized defendant as having unequivocally requested to proceed pro se. However, the court failed to conduct the required 'searching inquiry' to ensure that the defendant's waiver

[of the right to counsel] is knowing, intelligent, and voluntary' (***People v Silburn*, 31 NY3d 144**, 150 [2018] ...)." ***People v. Holmes*, 2023 N.Y. Slip Op. 03186, CtApp 6-13-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE STATUTE PROHIBITING SEX OFFENDERS ON PAROLE FROM BEING WITHIN 1000 FEET OF SCHOOL GROUNDS APPLIES TO YOUTHFUL OFFENDERS.

The Court of Appeals, reversing the appellate division, in a full-fledged opinion by Judge Halligan, determined the statute prohibiting a sex offender on parole from being within 1000 feet of school grounds applies to youthful offenders: "The Sexual Assault Reform Act (SARA) imposes a mandatory restriction prohibiting a person who is 'serving a sentence' for an enumerated offense against a minor victim and is released on parole from coming within 1,000 feet of school grounds (see Executive Law § 259-c [14] ...). The question presented in this appeal is whether that restriction applies to youthful offenders. We hold that it does. Petitioner pleaded guilty to the attempted second-degree rape of a 13-year-old victim ... . Petitioner was 18 years old at the time of the offense and was adjudicated a youthful offender ... . He was initially sentenced to a 10-year period of probation, but after violating the terms of his probation, he was resentenced to an indeterminate term of imprisonment. The Board of Parole granted petitioner an open date (that is, the earliest possible release date) of August 2018, subject to numerous conditions of release. As relevant here, petitioner was required to abide by SARA's school grounds condition and thus would not be released until he identified a SARA-compliant residence. Unable to obtain suitable housing, petitioner remained imprisoned. * * * The purpose of the school grounds condition is to bar offenders who pose the 'highest risk to children' from entering school grounds ... . Certainly, someone accorded youthful offender status can fall into this category. While we appreciate that the consequences of imposing the school grounds condition may be severe, the legislature has authorized the imposition of other long-term consequences, such as a lengthy probationary term, on youthful offenders ... . And once the youthful offender serves their sentence, the school grounds condition is lifted and the youthful offender will receive the 'fresh start' provided to them by statute ...". ***People v. Superintendent, Livingston Corr. Facility*, 2023 N.Y. Slip Op. 03298, CtApp 6-15-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

EVEN THOUGH THE SORA RISK LEVEL CAME OUT THE SAME (115 POINTS), THE JUDGE SHOULD NOT HAVE FIRST REMOVED 15 POINTS WHICH WERE BASED ON AN INAPPLICABLE RISK FACTOR AND THEN ADDED 15 POINTS BASED ON A RISK FACTOR NOT INCLUDED IN THE RISK ASSESSMENT; THAT CONSTITUTED AN UPWARD DEPARTURE WITHOUT NOTICE.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, with a three-judge concurrence, reversing the appellate division, determined the judge in the SORA risk-level proceeding should not have departed from the presumptive risk level based on an issue of which the defendant was not given 10 days' notice. The risk assessment included 15 points for refusing sex offender treatment but it was clear defendant did not refuse treatment. Rather, he was prohibited from receiving the treatment because of his prison disciplinary history. The judge agreed the 15 points for refusing treatment should be removed, but then added 15 points based on the defendant's disciplinary record, a risk factor which was not included in the Board's risk assessment: "Here, the proceeding failed to comport with due process because defendant was provided no notice or meaningful opportunity to be heard in response to the District Attorney's request for an upward departure first interposed during the SORA hearing in response to the court's invitation. The Board recommended the court classify defendant as a level three offender based on his risk factor score of 115 points and did not recommend an upward departure or that the court consider defendant's disciplinary history for purposes aside from a factor 13 point allocation. Although the District Attorney agreed with the Board that defendant should be classified as a level three risk, the District Attorney reached that conclusion not on the total point assessment contained in the RAI but rather on an independent basis that defendant's disciplinary history was sufficiently egregious to warrant an upward departure. Once the District Attorney announced its deviation from the reasons supporting the Board's proposed risk level classification, defendant was entitled to a sufficient opportunity to consider and muster evidence in opposition to the request for an upward departure. The record shows that the court decided the issue without an adjournment, without allowing defendant to present rebuttal arguments or collect additional evidence, and without any input from defense counsel. The court erred by proceeding in this manner." ***People v. Worley*, 2023 N.Y. Slip Op. 03300, CtApp 6-15-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

ONCE THE APPELLATE DIVISION DETERMINED A SORA RISK FACTOR DID NOT APPLY, BRINGING DEFENDANT'S RISK ASSESSMENT FROM A LEVEL THREE TO A LEVEL TWO, THE APPELLATE COURT HAD THE AUTHORITY TO REMIT THE MATTER TO COUNTY COURT TO CONSIDER, FOR THE FIRST TIME, WHETHER AN UPWARD DEPARTURE WAS WARRANTED.

The Court of Appeals, in a full-fledged opinion by Judge Halligan, over a dissenting opinion, determined that the appellate division appropriately remitted the matter to County Court after the appellate court reduced the risk assessment by 10 points because the People conceded the absence of forcible compulsion. Eliminating that 10 point assessment resulted in reducing defendant from a level three offender to a level two offender. The remittal was for the purpose of allowing County Court to consider an upward departure, which the court did not consider because defendant had been deemed a presumptive level three offender at the time of the SORA hearing: "Here, the People prevailed before the SORA court on their requested allocation of points under the RAI [risk assessment instrument] and risk level. When the Appellate Division reversed on the allocation of points and the risk level dropped accordingly, it remitted to allow the SORA court to consider a departure request for the first time. Defendant and our dissenting colleague object, contending that because this upward departure request was not made

during the original SORA proceeding, the SORA court made no ruling 'adverse' to the People, and the Appellate Division therefore could not 'review' this 'unpreserved' departure question and order remittal upon reversal. But this argument confuses the question of whether remittal was appropriate corrective action with a question of preservation ... . This is not a case in which a party failed to present an issue to the SORA court and then asked the Appellate Division to nonetheless resolve that same question; the Appellate Division did not rule on the merits of the departure but remitted it for the SORA court to do so in the first instance ... . * * * Curbing the Appellate Division's power to remit for consideration of departure requests when it disagrees with the hearing court's point assessment and changes an offender's presumptive risk level would undermine SORA's objective and unduly constrain the Appellate Division's authority to order appropriate remedial action." ***People v. Weber*, 2023 N.Y. Slip Op. 03301, CtApp 6-15-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S POSITIVE PERFORMANCE IN THE PRISON SEX OFFENDER TREATMENT AND EDUCATIONAL PROGRAMS, GIVEN THE SERIOUSNESS OF HIS OFFENSES, DID NOT WARRANT A DOWNWARD DEPARTURE FROM LEVEL THREE TO LEVEL TWO; TWO-JUDGE DISSENT.

The Court of Appeals, affirming the appellate division, over a two-justice dissent, determined defendant's request for a downward departure in this SORA risk-level proceeding (level three to level two) was properly denied: "In 1988, defendant was convicted after trial of four counts of first-degree rape and four counts of first-degree sodomy, among other crimes, for raping or sexually assaulting five women in their homes at knifepoint during burglaries that occurred over the course of a year. In anticipation of defendant's conditional release from imprisonment in 2020, the Board of Examiners of Sex Offenders assessed defendant 155 points on the risk assessment instrument (RAI), presumptively designating him a level three sexually violent offender for purposes of the Sex Offender Registration Act (SORA). Defendant did not dispute the accuracy of the Board's point assessment, but he requested that the court depart downward to risk level two. To that end, defendant argued that he did not present a high risk of sexual reoffense, as evidenced by his positive performance in sex offender treatment and educational programs while incarcerated (including obtaining his general equivalency diploma and college-level education credits), limited history of disciplinary infractions, age at time of release (51 years old), familial support, and his scores on two alternative risk assessment instruments. Defendant also asserted that he would be subject to supervision regardless of his risk designation as part of the terms of his conditional release, and that a level three designation would make it more difficult for him to locate housing." ***People v. Anthony*, 2023 N.Y. Slip Op. 03303, CtApp 6-15-23**

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

THE STATUTE PROHIBITING SEX OFFENDERS FROM BEING WITHIN 1000 FEET OF SCHOOL GROUNDS AS APPLIED TO SEX OFFENDERS CONVICTED BEFORE THE STATUTE WENT INTO EFFECT DOES NOT VIOLATE THE EX POST FACTO CLAUSE; HERE PETITIONER WAS INCARCERATED PAST HIS PAROLE DATE BECAUSE HOUSING WHICH COMPLIED WITH THE SCHOOL GROUNDS LAW COULD NOT BE FOUND.

The Court of Appeals, in a full-fledged opinion by Judge Singas, three judges dissenting, determined the statute (Executive Law § 259-c(14)) prohibiting sex offenders from being within 1000 feet of school grounds as applied to sex offenders who were convicted before the statute went into effect does not violate the Ex Post Facto Clause of the US Constitution. Here the application of the statute resulted in petitioner remaining incarcerated past his parole release date because housing which met the school-grounds requirement could not be found: "The United States Constitution's Ex Post Facto Clause prohibits states from 'retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts' ... . The ex post facto prohibition 'applies only to penal statutes' and 'where the challenged statute does not seek to impose a punishment, it does not run afoul of the Ex Post Facto Clause' ... . * * * We are unable to conclude from this record that prolonged incarceration is a common result of Executive Law § 259-c (14), rather than an idiosyncratic effect, and the Supreme Court has 'expressly disapproved of evaluating the civil nature of [a statute] by reference to the effect that [statute] has on a single individual' ... . Petitioner has failed to meet the heavy burden of demonstrating, by the clearest proof, that the effects of Executive Law § 259-c (14) are 'so punitive . . . as to negate [the legislature's] intention to deem it civil' ...". ***People ex rel. Rivera v. Superintendent, Woodbourne Corr. Facility*, 2023 N.Y. Slip Op. 03299, CtApp 6-5-23**

DEFAMATION, CIVIL RIGHTS LAW, PRIVILEGE, ATTORNEYS.

IN THIS DEFAMATION ACTION (1) PLAINTIFF WAS DEEMED A LIMITED PUBLIC FIGURE REQUIRING PROOF OF MALICE; (2) SOME STATEMENTS PROTECTED BY LITIGATION PRIVILEGE, QUESTIONS OF FACT WHETHER OTHER STATEMENTS PROTECTED BY PRE-LITIGATION AND FAIR REPORT PRIVILEGES; (3) AMENDMENTS TO THE ANTI-SLAPP STATUTE APPLY ONLY TO CONDUCT AFTER THE AMENDMENTS WENT INTO EFFECT.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a dissent, reversing the appellate division in this defamation action, determined: (1) plaintiff music producer (Gottwald) is a limited public figure who must prove defendant singer-songwriter (Sebert) was motivated by malice when claiming Gottwald raped her; (2) whether 20 alleged statements are subject to the pre-litigation privilege must be determined by the jury; and (3) the amendments to the anti-SLAPP statute which went into effect during the course of the lawsuit apply only to conduct after the amendments went into effect (the amendments allow certain damages and attorney's fees). The opinion is far too comprehensive to fairly summarize here: "[Re: plaintiff's public-figure status:] By 2014, when Gottwald initiated this defamation action, he was, by his own account, a celebrity—an acclaimed music producer who had achieved enormous success in a high-profile career. As self-described in the complaint, he 'has written the most Number One songs of any songwriter ever' and 'was named by Billboard as one of the top ten

producers of the decade in 2009.' ... . * * * [Re: privilege:] Sebert identifies 25 allegedly defamatory statements that she contends cannot serve as the basis for liability because they are protected by one or more of three privileges: the litigation privilege, the pre-litigation privilege, and the statutory fair report privilege under Civil Rights Law § 74. * * * We agree that questions of fact exist as to the application of the pre-litigation and fair report privileges—those issues must go to a jury—but disagree as to application of the absolute litigation privilege. * * * [Re: anti-SLAPP statute:] Because ... five statements fall squarely within the purview of the absolute litigation privilege, they 'cannot serve as the basis for the imposition of liability in a defamation action' ... . * * * Because Gottwald's liability attached, if at all, when he chose to continue the defamation suit after the effective date of the statute, any potential calculation of attorney's fees or other damages begins at the statute's effective date ...". ***Gottwald v. Sebert*, 2023 N.Y. Slip Op. 03183, CtApp 6-13-23**

EMPLOYMENT LAW, NEGLIGENT SUPERVISION.

THE COMPLAINT STATED A CAUSE OF ACTION FOR NEGLIGENT SUPERVISION OF DEFENDANT INVESTMENT BANK'S EMPLOYEE WHO ALLEGEDLY DEFRAUDED PLAINTIFFS OF $25 MILLION TO COVER THE EMPLOYEE'S LOSSES; THE ARGUMENT THAT PLAINTIFFS COULD NOT SUE THE BANK BECAUSE THEY WERE NOT BANK CUSTOMERS WAS REJECTED.

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a two-judge dissent, reversing the appellate division, determined plaintiffs (charitable foundation) stated a cause of action against defendants (investment bank) for negligent supervision of an employee who allegedly defrauded the foundation of $25 million. Plaintiffs were not customers of defendants (investment bank). Rather, plaintiffs were approached by defendants' employee to invest $25 million, allegedly as part of a fraudulent scheme to cover the employee's losses. The argument that plaintiffs could not sue because they were not defendants' customers was rejected by the majority: "[T]he complaint adequately alleged that defendants were on notice of the employee's propensity to commit fraud prior to his interactions with plaintiffs and their resulting losses. * * * When an employer has notice of its employee's propensity to engage in tortious conduct, yet retains and fails to reasonably supervise such employee, the employer may become liable for injuries thereafter proximately caused by its negligent supervision and retention ... . As every Department of the Appellate Division has recognized, a defendant is on notice of an employee's propensity to engage in tortious conduct when it knows or should know of the employee's tendency to engage in such conduct ... . * * * ... [P]laintiffs were not customers of defendants, as that term is typically understood, but plaintiffs alleged that they were prospective customers who were solicited by [defendants' employee] to participate in a financing arrangement related to one of defendants' legitimate business deals, supported by defendants' genuine documentation and information, which he was given access to by defendants as part of his employment. We hold that these allegations support the existence of a duty on the part of defendants to non-negligently supervise [the employee] for plaintiff's benefit ...". ***Moore Charitable Found. v. PJT Partners, Inc.*, 2023 N.Y. Slip Op. 03185, CtApp 6-13-23**

SECURITIES, CONTRACT LAW, TRUSTS AND ESTATES.

IN THESE ACTIONS BY INVESTORS AGAINST TRUSTEES STEMMING FROM THE COLLAPSE OF RESIDENTIAL MORTGAGE-BACKED SECURITIES (RMBS) THE COURT HELD (1) CLAIMS AGAINST TRUSTEES ARE NOT PROHIBITED BY A NO-ACTION CLAUSE (2) THE TRUSTEES WERE NOT REQUIRED TO ENFORCE REPURCHASE OBLIGATIONS AND (3) THE TORT CLAIMS WERE DUPLICATIVE OF THE BREACH OF CONTRACT CLAIMS.

The Court of Appeals, reversing (modifying) the appellate division, over two dissents, in these actions by investors against the trustees stemming from the collapse of residential mortgage-backed securities (RMBS), determined (1) claims against a trustee are not precluded by a "no action" clause, (2) trustees are not required to enforce repurchase obligations, and (3) the tort claims are duplicative of the breach of contract claims: "... RMBS [residential mortgage-backed securities] are financial instruments, popular in the mid-2000s, backed by individual mortgage loans ... The securitization process involves a 'sponsor' who acquires a bundle of loans from banking institutions ('originators') and sells the pooled loans to a 'depositor,' who places the loans into a trust ... . The trust issues certificates purchased by investors, who are entitled to a portion of the revenue stream from the borrowers' payments ... . The mortgage loans in the trust are serviced by a 'servicer,' a party typically affiliated with the sponsor or originator. Each trust has a Trustee which acts on behalf of the Trust and whose responsibilities are prescribed by the securitization trusts' governing agreements. While our previous RMBS cases have been brought by RMBS trustees, investors, or their insurers against RMBS sponsors, depositors, servicers, and originators (collectively, obligated parties) to recover for losses on the certificates, here the investors are suing the RMBS Trustees. * * * ... [C]laims against the trustee . . . cannot be prohibited by a no-action clause" ... . 'Because a standard no-action clause vests in the trustee all of the securityholders' rights to bring suit, making the trustee the only path to a remedy, courts have been unwilling to enforce such clauses when the trustee's conflicts or irrationality bar that path to relief' ... . [t]he Trustee cannot not sue itself ,,, and therefore compliance was not required. * * * Defendants moved to dismiss plaintiffs' claims that they breached the governing agreements by failing to enforce repurchase obligations, arguing that these agreements do not impose such a duty on trustees.... . We ... hold that the governing agreements do not impose on defendants an affirmative duty to enforce repurchase obligations and so those claims should be dismissed. * * * We hold that, to the extent any tort claims remain, they should be dismissed as duplicative of the breach of contract claims. ***IKB Intl., S.A. v. Wells Fargo Bank, N.A.*, 2023 N.Y. Slip Op. 03302, CtApp 6-15-23**

FIRST DEPARTMENT

CIVIL PROCEDURE, FRAUD, DEBTOR-CREDITOR.

THE FRAUDULENT-CONVEYANCE CAUSES OF ACTION INVOLVED CONNECTICUT PROPERTIES AND WERE TIME-BARRED IN CONNECTICUT; NEW YORK'S BORROWING STATUTE RENDERED THE ACTIONS TIME-BARRED IN NEW YORK.

The First Department, reversing Supreme Court, determined the fraudulent-conveyances causes of action should have been dismissed as time-barred under New York's borrowing statute. The properties which were conveyed are in Connecticut and the action is time-barred under Connecticut law: "Plaintiff's claims are time-barred pursuant to CPLR 202, New York's borrowing statute. Under CPLR 202, where a nonresident plaintiff asserts causes of action in a New York court, 'the claim must be timely under both New York and the jurisdiction where the action accrued' ... . 'Consequently, . . . it is the shorter of the two states' statutes of limitations that controls the timeliness of the action' ... . For purposes of CPLR 202, 'a cause of action accrues at the time and in the place of the injury' and '[w]hen an alleged injury is purely economic, the place of injury is usually where the plaintiff resides and sustains the economic impact of the loss' ... . Here, plaintiff is a resident of Connecticut and alleges only economic injury. Moreover, it does not dispute that, under Connecticut law, where the claims accrued for purposes of the borrowing statute, the statute of limitations for the asserted causes of action has expired (see Conn Gen Stat § 52-552j ...)." ***National Auditing Servs. & Consulting, LLC v. Assa*, 2023 N.Y. Slip Op. 03198, First Dept 6-13-23**

CRIMINAL LAW, EVIDENCE.

THE PROOF THAT THE SUBWAY TRACKS WERE USED AS A DANGEROUS INSTRUMENT WAS LEGALLY INSUFFICIENT; DEFENDANT'S ASSAULT SECOND CONVICTION VACATED.

The First Department, vacating the assault second as a hate crime conviction, determined the proof did not support the theory that the subway tracks were used as a dangerous instrument: "The theory supporting this count was not that defendant intended to use the electrified third rail or a moving train as a dangerous instrument, or acted recklessly, but instead that defendant intended that the victim be injured by striking the tracks, alleged to be a 'hard object.' The evidence failed to establish defendant's intent to use the tracks in that manner. The People's evidence, including the victim's testimony and a blurry video, was consistent with the victim merely tripping and falling onto the tracks during an altercation with defendant ... . Moreover, even if defendant merely caused the victim to fall on the tracks, that would not establish the specific intent required for this conviction. For similar reasons, we find that the verdict on this count was against the weight of the evidence." ***People v. Ames*, 2023 N.Y. Slip Op. 03205, First Dept 6-13-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE.

WHERE DEFENDANTS AVER SPECIFIC FACTS WHICH REBUT THE STATEMENTS IN THE PROCESS SERVER'S AFFIDAVIT, AN EVIDENTIARY HEARING ON WHETHER THE DEFENDANTS WERE SERVED WITH THE SUMMONS AND COMPLAINT IS REQUIRED.

The Second Department, reversing Supreme Court, determined the defendants presented sufficient facts to rebut the presumption they were properly served with the summons and complaint, requiring a hearing: " 'Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served' ... Bare and unsubstantiated denials of receipt of the summons and complaint are insufficient to rebut the presumption of service ... . 'However, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit, and necessitates an evidentiary hearing' ... . 'If an issue regarding service turns upon a question of credibility, a hearing should be held to render a determination on this issue'... . Here, the process servers' affidavits of service constituted prima facie evidence of valid service upon the defendants at the subject New York and Florida properties ... . However, since the defendants' sworn denial of receipt of process at both properties contained specific facts to rebut the statements in the process servers' affidavits, the presumption of proper service was rebutted and an evidentiary hearing was required ...". ***Aikens v. Kouchnerova*, 2023 N.Y. Slip Op. 03218, Second Dept 6-14-23**

CRIMINAL LAW, JUDGES.

FAILURE TO INFORM THE DEFENDANT OF THE PERIOD OF POSTRELEASE SUPERVISION TO BE IMPOSED OR THE MAXIMUM POTENTIAL PERIOD OF POSTRELEASE SUPERVISION RENDERED THE GUILTY PLEA INVALID.

The Second Department, vacating defendant's guilty plea, determined the failure to inform defendant of the details of postrelease supervision rendered the plea invalid: "[A]t the plea proceeding, the County Court mentioned that the sentence would include postrelease supervision, but did not specify the period of postrelease supervision to be imposed, nor did the court indicate the maximum potential duration of postrelease supervision that may be imposed. As the People concede, the court's failure to so advise the defendant prevented his plea from being knowing, voluntary, and intelligent ...". ***People v. Pryor*, 2023 N.Y. Slip Op. 03241, Second Dept 6-14-23**

MEDICAL MALPRACTICE, EVIDENCE.

CONFLICTING EXPERT OPINIONS PRECLUDE SUMMARY JUDGMENT IN A MEDICAL MALPRACTICE ACTION; DEFENDANT, IN ITS MOTION FOR SUMMARY JUDGMENT, DID NOT DEMONSTRATE ENTITLEMENT TO SUMMARY JUDGMENT ON PROXIMATE CAUSE; THEREFORE PLAINTIFF, IN OPPOSITION, WAS NOT REQUIRED TO RAISE A QUESTION OF FACT ON THAT ISSUE.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this medical malpractice action should not have been granted. Plaintiff's decedent was diagnosed with a degenerative spine but died hours later of a heart attack: "To prevail on a motion for summary judgment in a medical malpractice action, the defendant has the initial burden of establishing either that there was no departure from accepted community standards of practice or that any alleged departure was not a proximate cause of the plaintiff's injuries ... . 'In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars' ... . 'Once a defendant makes a prima facie showing, 'the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact' as to the elements on which the defendant met the prima facie burden' ... . 'Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions' ... . * * * ... [T]he plaintiff raised triable issues of fact by submitting the affirmation of an expert who opined, based upon his review of, inter alia, the decedent's medical records, among other things, that the decedent exhibited symptoms consistent with a myocardial infarction when he presented to the hospital emergency department, as well as a large scar from a prior cardiac surgery, and that the defendants departed from the accepted standard of medical care by failing to perform a cardiac workup on the decedent at that time ... . Contrary to the defendants' contention, the opinions of the plaintiff's expert were not vague or conclusory ... . Moreover, the plaintiff was not required to raise a triable issue of fact as to the element of proximate cause, as the defendants failed to make a prima facie showing of entitlement to judgment as a matter of law as to that element ...". ***Kielb v. Bascara*, 2023 N.Y. Slip Op. 03226, Second Dept 6-14-23**

Similar issues and result in ***Lopresti v. Alzoobaee***, 2023 N.Y. Slip Op. 03228, Second Dept 6-14-23 (failure to diagnose testicular cancer; inadequate attempt to address proximate cause by submitting an expert affidavit with reply papers).

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

DEFENDANT PEDIATRIC PRACTICE SUBMITTED EXPERT EVIDENCE PLAINTIFF'S ADOLESCENT SCOLIOSIS COULD NOT HAVE BEEN DIAGNOSED UNTIL A YEAR AFTER PLAINTIFF LEFT DEFENDANT'S CARE; PLAINTIFF'S EXPERT AFFIDAVIT DID NOT ADDRESS THAT ISSUE; DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION.

The Second Department, reversing Supreme Court, determined defendant pediatric practice in this medical malpractice action was entitled to summary judgment. Plaintiff alleged the failure to diagnose scoliosis. Defendant submitted evidence that adolescent scoliosis could not have been diagnosed until a year after plaintiff left defendant's care. Plaintiff's expert's affidavit did not address that issue: " … S.V. [defendant pediatric practice] established its prima facie entitlement to judgment as a matter of law by submitting, among other things, an affirmation of a physician board certified in orthopedic surgery. The expert opined that the care and treatment rendered by S.V.'s employees did not deviate from accepted medical practice, and that the injured plaintiff's adolescent idiopathic scoliosis condition could not have been diagnosed until he reached adolescence, which did not occur for at least one year after he left S.V.'s care, during which time the injured plaintiff tested negative for the condition ... . In opposition, the evidence submitted by the plaintiffs, including an affirmation of a physician, failed to raise a triable issue of fact. The plaintiffs' expert failed to address the specific assertion of S.V.'s expert that the injured plaintiff did not develop adolescent idiopathic scoliosis until after he left S.V.'s care, and was otherwise speculative, conclusory, and unsupported by the record ...". ***Lagatta v. Rivera***, 2023 N.Y. Slip Op. 03227, Second Dept 6-14-23

PERSONAL INJURY, EVIDENCE.

AFTER PLAINTIFFS' CAR WAS SERVICED, A TIRE (WHEEL?) FELL OFF, CAUSING AN ACCIDENT; THE PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT ON THE RES IPSA LOQUITUR THEORY OF LIABILITY.

The Second Department, reversing Supreme Court, determined the plaintiffs' motion for summary judgment based upon the res ipsa loquitur theory of liability should have been granted. Plaintiffs' car was inspected by defendant car dealership and the tires (wheels?) were removed and reattached. When plaintiff Kathleen Becchetti drove the car from the dealership one of the tires (wheels?) detached causing an accident: "For the doctrine of res ipsa loquitur to apply, a plaintiff must establish three conditions: '[f]irst, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff' ... . Regarding the second element, exclusive control is not a rigid rule and has been applied in circumstances when 'the accident occurred after the instrumentality left the defendant's control, where it was shown that the defendant had exclusive control at the time of the alleged act of negligence' ... . The plaintiff does not need to eliminate all other causes, but, rather, must show that their likelihood is reduced so that the defendants' conduct is more probably the cause ... . The plaintiff must show that the defendant's control was sufficiently exclusive to fairly rule out some other agency causing the purported defect ... . Once the plaintiff satisfies the burden of proof on these three elements, the doctrine of res ipsa loquitur permits the factfinder to infer negligence ... . Here, the plaintiffs established, prima facie, that a tire detachment, such as the one at issue here, does not occur in the absence of negligence ... . Furthermore, the plaintiffs established, prima facie, that the vehicle was in the defendants' exclusive control at the time of the alleged act of negligence ... and that the plaintiffs did not contribute to the event ... .

[S]ince this is the type of 'rare' and 'exceptional' res ipsa loquitur case 'in which no facts are left for determination' ... , the Supreme Court should have granted the plaintiffs' motion for summary judgment on the issue of liability." ***Bicchetti v. Atlantic Toyota*, 2023 N.Y. Slip Op. 03219, Second Dept 6-14-23**

PERSONAL INJURY, EVIDENCE.

THE LOBBY WAS MOPPED WITH A SOAP-LIKE SUBSTANCE AN HOUR BEFORE PLAINTIFF'S SLIP AND FALL AND PLAINTIFF TESTIFIED SHE NOTICED THE FLOOR WAS WET AND SMELLED OF CLEANING FLUID AFTER SHE FELL; THERE WAS A QUESTION OF FACT WHETHER DEFENDANT BUILDING OWNER CREATED THE DANGEROUS CONDITION.

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant property owner created the dangerous condition which caused plaintiff's slip and fall. The area had been mopped with a soap-like substance an hour before the fall and plaintiff testified she noticed the floor was wet and smelled of cleaning fluid after she fell: "[D]efendant relied upon the deposition testimony of the plaintiff and of the defendant's maintenance employee who was in charge of mopping the lobby. Their testimony demonstrated that the lobby area where the plaintiff fell had been mopped with a soap-like substance sometime during the hour preceding the plaintiff's fall and that, after she fell, the plaintiff noticed that the floor was wet and smelled like a cleaning liquid. Given this evidence, the defendant failed to eliminate all triable issues of fact as to whether it created the condition that caused the plaintiff to fall ... . Contrary to the defendant's contention, its submissions failed to establish that the wet or oily condition of the floor was readily observable by a reasonable use of the plaintiff's senses prior to her fall ...". ***Buestan v. Tiff Real Prop., Inc.*, 2023 N.Y. Slip Op. 03220, Second Dept 6-14-23**

PERSONAL INJURY, EVIDENCE.

THE FLOOR IN THE BATHROOM WHERE PLAINTIFF SLIPPED AND FELL HAD RECENTLY BEEN MOPPED; THE DEFENDANT GROCERY STORE DID NOT PROVE THERE WAS AN ADEQUATE WARNING; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant grocery store's motion for summary judgment in this slip and fall case should not have been granted. The bathroom floor where plaintiff fell had been mopped recently. There were questions of fact whether there was an adequate warning about the condition of the floor: "The evidence submitted by the defendants in support of the motion raised triable issues of fact as to whether Food Parade provided any warning about a potentially hazardous condition in the bathroom and whether any warning that was provided adequately gave notice that there was a hazardous condition inside the bathroom ...". ***Darginsky v. Food Parade, Inc.*, 2023 N.Y. Slip Op. 03222, Second Dept 6-14-23**

PERSONAL INJURY, EVIDENCE.

DEFENDANT PROPERTY OWNER DID NOT PROVE WHEN THE AREA WHERE PLAINTIFF SLIPPED AND FELL ON BLACK ICE WAS LAST INSPECTED OR CLEANED; THEREFORE, DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION.

The Second Department, reversing Supreme Court, determined defendant property owner did not demonstrate it did not have constructive notice of the black ice in the parking lot where plaintiff slipped and fell. Defendant did not submit evidence of when the area was last cleaned or inspected: " 'A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence' ... . Accordingly, a property owner seeking summary judgment in a slip-and-fall case 'has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it' ... . 'To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' ... . Here, the defendant failed to establish, prima facie, that it did not have constructive notice of the alleged ice condition. The defendant provided no evidence regarding any specific inspection of the subject area prior to the plaintiff's fall, and there are triable issues of fact as to whether the alleged ice condition had existed for a sufficient length of time before the accident such that the defendant could have discovered and corrected it ...". ***Edwards v. Genting N.Y., LLC*, 2023 N.Y. Slip Op. 03223, Second Dept 6-14-23**

THIRD DEPARTMENT

ANIMAL LAW, EVIDENCE.

IN THIS DOG-BITE CASE, DEFENDANT DEMONSTRATED SHE WAS NOT AWARE OF HER DOG'S VICIOUS PROPENSITIES; PLAINTIFF'S ALLEGATIONS IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DID NOT RAISE A QUESTION OF FACT ON THAT ISSUE; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined defendant dog-owner's motion for summary judgment in this dog-bite case should have been granted. Defendant made a prima facie showing she was not aware of the dog's vicious propensities. Plaintiff did not raise a question of fact on that issue: "Even when viewing the evidence in the light most favorable to plaintiff, as we must, we find that plaintiff failed

to raise an issue so as to defeat the motion. As to the statement that the dogs were play fighting, the child admitted that she was unfamiliar with dogs and that she assumed because they were growling that they were fighting or at least unhappy with 'what's [going on] around them.' However, '[n]o court has found that a dog's growling at one or two other dogs is sufficient to establish vicious propensities' ... . Growling and barking during play activities among dogs is consistent with normal canine behavior ... . Even if the growling could be considered some indication of vicious propensities, the child never identified the dog that bit her as being the dog that she heard growling. As to the statement that the dog dislikes males, the child testified that defendant's son told me 'something about [the dogs] not liking guys, but as a joke.' This is not proof of an aggressive behavior and, in any event, does not relate to the child because she is a female ... . The mere fact that defendant kenneled the dog, and kept the dog in her bedroom when she was absent from her residence, does not support an inference that defendant was aware the dog might pose a danger, since there was no evidence that this was done due to a concern that the dog would harm someone ... ; instead defendant's son stated that the dogs were kenneled because the puppies might escape. Additionally, it is undisputed that the dog was not confined, gated or tethered while the child was at the residence and in fact the child encouraged the dog to jump up on the bed next to her so she could pet it ...". ***J.S. v. Mott*, 2023 N.Y. Slip Op. 03276, Third Dept 6-15-23**

CIVIL PROCEDURE, JUDGES.

A SUMMARY JUDGMENT MOTION BROUGHT BEFORE ISSUE IS JOINED IS PREMATURE AND SHOULD NOT BE CONSIDERED.

The Third Department, reversing Supreme Court, noted that a summary judgment motion brought before issue is joined should not be considered: "Initially, we discern no error with Supreme Court treating plaintiff's order to show cause, filed two days after commencement of the action, essentially as a motion for summary judgment seeking ultimate relief ... . However, '[a] motion for summary judgment may not be made before issue is joined and the requirement is strictly adhered to' ... . 'Particularly in an action for declaratory judgment, all of the material facts and circumstances should be fully developed before the respective rights of the parties may be adjudicated' ... . Accordingly, rather than reaching the merits, Supreme Court should have determined that plaintiff was barred from seeking summary judgment at the time and denied the motion as premature ... . That defendant answered and issue was joined prior to the return date of the order to show cause does not change this determination ...". ***Sackett v. State Farm Mut. Auto. Ins. Co.*, 2023 N.Y. Slip Op. 03274, Third Dept 6-15-23**

CONTRACT LAW, CIVIL PROCEDURE, TRUSTS AND ESTATES, ATTORNEYS.

THE EMAIL EXCHANGES BETWEEN ATTORNEYS DID NOT CONSTITUTE A VALID SETTLEMENT AGREEMENT AND DID NOT MEET THE STATUTORY REQUIREMENTS OF A STIPULATION OF SETTLEMENT; THE DISSENTERS ARGUED THE EMAIL EXCHANGES EVINCED AN ENFORCEABLE AGREEMENT.

The Third Department, reversing Surrogate's Court, determined: (1) the email exchanges between the parties' attorneys did not constitute a settlement agreement; and (2) to be valid any stipulation of settlement must be placed on the record in open court, reduced to a court order and contained in a writing subscribed by the parties or counsel (not done here). The case concerns a dispute over the distribution of the estate of the deceased between the deceased's daughter and wife. There was a two-justice dissent which argued a valid settlement agreement had been reached. The dissent made no mention of the statutory requirements for a stipulation of settlement: "Surrogate's Court erred in finding that a binding agreement was formed, as the parties did not mutually assent to all material terms. To the extent that the daughter's counsel asserts that the initial email set out an overview of the material terms to which the parties agreed during the ADR session, we note that such verbal out-of-court agreements are insufficient to form the basis for a stipulation of settlement (see CPLR 2104 ...). The initial email and the subsequent correspondence also fail to establish that the parties reached an agreement. * * * We also remind the parties that, to be enforceable, stipulations of settlement require more than just an agreement among the parties. Once the parties to an active litigation reach an agreement, they must (1) place the material terms of such agreement on the record in open court, (2) reduce them to a court order which is then signed and entered or (3) contain them in a writing subscribed by the parties or their counsel (see CPLR 2104 ...)." ***Matter of Eckert*, 2023 N.Y. Slip Op. 03270, Third Dept 6-15-23**

CRIMINAL LAW.

THE INCLUSORY CONCURRENT COUNTS MUST BE DISMISSED AND THE RELATED SENTENCES VACATED.

The Third Department determined the inclusory concurrent counts must dismissed and the related sentences vacated: "Modification of the judgment is required due to defendant's conviction of inclusory concurrent charges. 'With respect to inclusory concurrent counts, a verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted' (... CPL 300.40 [3] [b]). We agree with defendant, and the People correctly concede, that criminal sexual act in the first degree (two counts) must be reversed and dismissed as inclusory concurrent counts of predatory sexual assault against a child ... . Defendant's contention that incest in the third degree must be dismissed as an inclusory concurrent count of incest in the first degree is moot, as this Court has now dismissed the latter count." ***People v. Sharlow*, 2023 N.Y. Slip Op. 03260, Third Dept 6-15-23**

EMPLOYMENT LAW, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, COURT OF CLAIMS.

ALTHOUGH THE CORRECTIONS OFFICERS CONDUCTING A STRIP SEARCH OF CLAIMANT PRISONER WERE PARTIALLY MOTIVATED BY THE INTENT TO HUMILIATE, THEY WERE DEEMED TO BE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT AND THE STATE IS VICARIOUSLY LIABLE FOR THEIR INTENTIONAL TORTS.

The Third Department, in a full-fledged opinion by Justice McShan, determined the state was properly found liable for the actions of corrections officers who conducted a strip search of claimant prisoner. The strip search protocol includes having a male inmate lift his testicles and spread his cheeks. Here the corrections officers repeatedly made claimant touch his genitals and then run his fingers along his gums. The officers made claimant do the same after inserting his finger in his anus. Although the officers were committing intentional torts, their actions were deemed to be within the scope of their employment, making the state vicariously liable: "The law is well established that intentional torts may still fall within the scope of employment, and the motivation for such conduct is not dispositive as to defendant's liability; rather, that factor is but one of several for our consideration pertaining to whether such acts were foreseeable as 'a natural incident of the employment' ... . Said differently, 'where the element of general foreseeability exists, even intentional tort situations have been found to fall within the scope of employment'... . Although the correction officers' actions may have been motivated in part by an intent to humiliate claimant, we disagree with defendant's assertion that such intent was the sole motivation for each of the commands and that such actions were undertaken without any furtherance of defendant's business ... . In this respect, the preponderance of the acts performed during the strip frisk and placement into observation did not significantly deviate from the mandates of the directive and were in fact required prior to claimant's confinement in one-on-one observation. What rendered the incident demeaning, and the reason that claimant has a viable claim, is the product of the sequence in which those acts occurred. Moreover, the potential for such conduct is precisely that which was foreseen in the warnings contained in the directives, which instructed those officers conducting a strip frisk to be mindful of the sensitive nature of the search and to conduct themselves 'in a manner least degrading to all involved.' " ***M.K. v. State of New York*, 2023 N.Y. Slip Op. 03268, Third Dept 6-15-23**

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