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Editor: **Bruce Freeman**

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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

AN INDICATION THE DEFENDANT'S VEHICLE HAD BEEN IMPOUNDED, REVEALED WHEN THE TROOPER RAN THE PLATES, DID NOT SUPPORT THE TRAFFIC STOP; THE WEAPON AND DRUGS FOUND IN THE VEHICLE SHOULD HAVE BEEN SUPPRESSED; APPELLATE DIVISION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a concurring opinion and an extensive dissenting opinion, reversing the Appellate Division, determined the state trooper did not have probable cause or reasonable suspicion to support the traffic stop. The weapon and drugs found in a search of defendant's (Mr. Hinshaw's) car should have been suppressed. The stop was based entirely on an indication the car had been impounded revealed when the officer ran the plates. The notice explicitly stated it "should not be treated as a stolen vehicle hit:" "The trooper here did not observe any violations of the Vehicle and Traffic Law and 'everything looked good.' Putting aside the result of the license plate inquiry, '[t]he trooper candidly testified that he had had no reason to stop defendant' ... . The result of the license plate check provided neither probable cause to conclude a traffic infraction had occurred nor any basis for an objectively reasonable belief that criminal behavior had occurred or was afoot. Although the People and our dissenting colleague argue that the trooper understood the 'generic' impound notification to require further investigation as to its cause, the trooper's speculation that the car could have been impounded for 'registration . . . problems,' the 'plates could have been suspended,' 'insurance could have been suspended,' or the vehicle could have been stolen was just that — pure speculation ... . * * * Because 'there was not even a suggestion that the conduct of the defendant or his companions had been furtive in character before the police interfered with their car's progress,' and 'the record here is bare of any objective evidence of criminal activity as of the time of the stop' ... , the stop of Mr. Hinshaw's vehicle was invalid." ***People v. Hinshaw*, 2020 N.Y. Slip Op. 04816, CtApp 9-1-20**

FIRST DEPARTMENT

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER A PERMANENTLY AFFIXED LADDER VIBRATED CAUSING PLAINTIFF TO FALL; PLAINTIFF WAS ENGAGED IN REPAIR NOT ROUTINE MAINTENANCE; NO SHOWING PLAINTIFF WAS AWARE HE SHOULD WEAR A HARNESS AND FAILURE TO DO SO WOULD CONSTITUTE COMPARATIVE NEGLIGENCE WHICH IS NOT A BAR TO RECOVERY.

The First Department, reversing (modifying) Supreme Court, determined defendants' motion for summary judgment on the Labor Law § 240(1) cause of action should not have been granted. Plaintiff alleged a permanently affixed ladder in an elevator shaft vibrated causing him to fall to the floor of the shaft: "... [W]hile an unsecured ladder that moves or shifts constitutes a prima facie violation of Labor Law § 240(1) ... , the ladder from which plaintiff fell was secured to the structure, and, other than allegedly vibrating, it did not move, shift or sway. Under the circumstances, an issue of fact exists whether the secured, permanently affixed ladder that allegedly vibrated provided proper protection for plaintiff. The record demonstrates, contrary to defendants' contention, that at the time of his accident plaintiff was performing not routine maintenance but repair work, which falls within the protective ambit of Labor Law § 240(1) ... . The work in which plaintiff was engaged occurred over the course of weeks, if not longer, and its purpose was to correct the unguarded condition of traveling cables that caused the cables to strike other objects within the elevator shafts ... . Defendants failed to establish that plaintiff was the sole proximate cause of his accident, as they submitted no evidence that plaintiff knew that he was supposed to use a harness for climbing ladders or that he disregarded 'specific instructions' to do so . Further, to the extent the ladder failed to provide proper protection, plaintiff's failure to use a harness amounts at most to comparative negligence, which is not a defense to a Labor Law § 240(1) claim ...". ***Kehoe v. 61 Broadway Owner LLC*, 2020 N.Y. Slip Op. 04900, First Dept 9-3-20**

SECOND DEPARTMENT

CRIMINAL LAW.

THE FEDERAL FELONY DID NOT QUALIFY AS A NEW YORK PREDICATE FELONY, DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER.

The Second Department, reversing Supreme Court, determined defendant should not have been sentenced as a second felony offender because the federal conviction did not qualify as the equivalent of the New York felony: "... [T]he defendant was improperly adjudicated a second felony offender on the basis of a prior federal conviction for possession of a firearm with an obliterated serial number (see 18 USC § 922[k]). 'An out-of-state felony conviction qualifies as a predicate felony under Penal Law § 70.06 only if it is for a crime whose elements are equivalent to those of a felony in New York' ... . Here, the defendant's predicate crime does not require as one of its elements that the firearm be operable (see 18 USC § 922[k] ...) and, thus, does not constitute a felony in New York for the purpose of enhanced sentencing ...". ***People v. Dyce*, 2020 N.Y. Slip Op. 04853, Second Dept 9-2-20**

CRIMINAL LAW, APPEALS.

THE WAIVER OF APPEAL WAS NOT KNOWINGLY AND VOLUNTARILY EXECUTED; NO MENTION OF THE WAIVER WAS MADE UNTIL AFTER THE GUILTY PLEA AND THE EXPLANATION OF THE RIGHTS AT STAKE WAS INSUFFICIENT.

The Second Department determined the waiver of appeal was invalid because it was first mentioned after the guilty plea and the explanation of the purportedly waived appellate rights was insufficient: "... [T]he appeal waiver was not mentioned by the Supreme Court prior to the defendant's plea of guilty, but only afterward. Accordingly, 'the defendant received no material benefit from his appeal waiver, as the court had already accepted the defendant's plea and made its sentence promise' ... . Under such circumstances and in the absence of a request by the People, 'the court's insistence upon the execution of an appeal waiver was a gratuitous, after-the-fact additional demand asserted after the bargain had already been struck' ... . In addition, the court's colloquy on this issue, conducted after the plea had already been accepted, 'mischaracterized the appellate rights waived as encompassing an absolute bar to the taking of a direct appeal' ... . Contrary to the People's contention, 'these defects were not cured by the terms of the standard written appeal waiver form, which not only lacked detail and repeated many of the mischaracterizations contained in the court's colloquy, but further misstated that the defendant was giving up the right to all postconviction relief separate from the direct appeal' ...". ***People v. Eduardo S.*, 2020 N.Y. Slip Op. 04873, Second Dept 9-2-20**

CRIMINAL LAW, EVIDENCE.

THE SENTENCES FOR ASSAULT AND POSSESSION OF A WEAPON SHOULD NOT HAVE BEEN IMPOSED CONSECUTIVELY.

The Second Department, reversing (modifying) Supreme Court, determined the evidence did not support consecutive sentences for assault second and criminal possession of a weapon second: "... [T]he sentence imposed on the conviction of assault in the second degree should not run consecutively to the sentence imposed on the conviction of attempted criminal possession of a weapon in the second degree. There were no facts adduced at the defendant's plea allocution to establish that the defendant attempted to possess 'a loaded firearm before forming the intent to cause a crime with that weapon' ...". ***People v. Goodman*, 2020 N.Y. Slip Op. 04857, Second Dept 9-2-20**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH HARMLESS, IT WAS ERROR TO ADMIT THE CONTENT OF SOCIAL MEDIA ACCOUNTS WITHOUT AUTHENTICATING THE ACCOUNTS, PHOTOGRAPHS AND STATEMENTS.

The Second Department determined it was (harmless) error to admit in evidence the content of social media accounts which was not authenticated: "We disagree ... with the Supreme Court's determination admitting into evidence certain content from various social media accounts ... . The People failed to present sufficient evidence that the subject social media accounts belonged to the defendant, that the photographs on the accounts were accurate and authentic, or that the statements found on one of the accounts were made by the defendant ...". ***People v. Upson*, 2020 N.Y. Slip Op. 04876, Second Dept 9-2-2020**

CRIMINAL LAW, IMMIGRATION LAW.

THE APPELLATE COURT, OVER A TWO-JUSTICE DISSENT, REFUSED TO LOWER DEFENDANT'S SENTENCE BY ONE DAY TO AVOID DEPORTATION.

The Second Department, over a two-justice dissent, determined defendant's one-year sentence for assault, which had already been served at the time of the appeal, should not be reduced by one-day to avoid the immigration consequences of the one-year sentence (deportation): "On this record, even taking into specific consideration the potential immigration consequences of the jury's verdict and the court's sentence thereon, and recognizing that the trial judge has the best first-hand

knowledge of the case and of the defendant, it cannot be said that the definite term of imprisonment of one year was unduly was harsh or excessive, or that any reduction of one day is warranted to further the interest of justice. ... We have rejected requests for one-day sentence reductions in cases with immigration consequences where the defendants used physical force or violence in the commission of their crimes against others ... . Here, the defendant's conduct involved violence against two assault victims, so that a one-day sentence reduction would be an outlier measured against our existing precedents. In any event, to reduce the defendant's sentence by one day for the purpose of circumventing the normal application of U.S. immigration laws and procedures, in an appeal involving a) physical violence, b) against duly authorized peace officers, c) working in the line of duty, d) causing permanent physical injury to one of the officers, e) and inconsistent with this Court's prior precedents, builds a bridge that is too far for us to traverse." ***People v. Janvier*, 2020 N.Y. Slip Op. 04861, Second Dept 9-2-20**

CRIMINAL LAW, JUDGES, ATTORNEYS.

ONCE SUPREME COURT FOUND DEFENDANT'S COUNSEL INEFFECTIVE IT WAS REQUIRED TO VACATE THE CONVICTION; DEFENDANT MOVED TO VACATE HIS GUILTY PLEA BECAUSE HE REJECTED A PLEA OFFER WITHOUT BEING INFORMED HE COULD BE SUBJECT TO LIFE IN PRISON AS A PERSISTENT FELONY OFFENDER AFTER TRIAL; SUPREME COURT SHOULD NOT HAVE REINSTATED THE ORIGINAL SENTENCE AFTER FINDING DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE.

The Second Department, reversing Supreme Court, determined, once the motion court found defendant's counsel ineffective for failing to inform defendant he risked being sentenced to life in prison as a persistent felony offender after trial, the motion court could not reinstate the original sentence. Defendant had been offered a plea offer with a sentence of 4-1/2 to 9 years which he rejected and moved to vacate the guilty plea pursuant to CPL § 440.10. The statute does not authorize reinstating the original sentence after granting the motion to vacate: "CPL 440.10(4) provides that '[i]f the court grants [a defendant's motion pursuant to CPL 440], it *must*, except as provided in subdivision five or six of this section, *vacate the judgment, and must* dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances' (emphasis added). Contrary to the Supreme Court's determination, the plain language of CPL 440.10(4) requires that, upon a finding that a defendant's CPL 440 motion is meritorious, a court must, in the first instance (absent the exceptions in subdivisions five or six of CPL 440.10 which are not relevant here), vacate the judgment ... , and upon so doing, must then select one of three options: (1) 'dismiss the accusatory instrument,' (2) 'order a new trial,' or (3) 'take such other action as is appropriate in the circumstances' (CPL 440.10[4]). Since the court found that the defendant received ineffective assistance of counsel, it should have granted the defendant's CPL 440.10 motion by vacating the judgment of conviction prior to directing the People to reoffer the plea agreement ...". ***People v. Brown*, 2020 N.Y. Slip Op. 04849, Second Dept 9-2-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

AN AUTOMATIC OVERRIDE ALLOWING A LEVEL THREE RISK ASSESSMENT WAS PROPERLY APPLIED TO A PSYCHOLOGICAL ABNORMALITY NOT SPECIFICALLY MENTIONED IN THE SORA RISK LEVEL GUIDELINES.

The Second Department, in a full-fledged opinion by Justice Maltese, determined the automatic override justifying a level three risk level was properly based upon a psychological abnormality not specifically mentioned in the risk assessment guidelines, but included in the Diagnostic and Statistical Manual of Mental Disorders: "In the Guidelines, the Board explained that it 'chose to require a clinical assessment of an abnormality so that loose language in a pre-sentence report would not become the basis for an override. Examples of a clinical assessment that would support an override are pedophilia and sexual sadism' (Guidelines at 19 ...). The Guidelines do not contain any language limiting the application of the fourth override to these two examples, and there is no requirement that a psychological abnormality must be inherently sex-related in order for the fourth override to apply ... . * * * The People submitted, among other things, a psychologist's report in which the psychologist concluded, based on a clinical assessment, that the defendant suffered from schizoaffective disorder, that he experienced 'periods of agitation and disorganized behavior,' and 'presents as hypersexual with low impulse control when decompensated.' The psychologist further concluded that the nature of the defendant's illness placed him at an elevated risk of violence, which would likely take the form of inappropriate sexual conduct. This evidence established that there has been a clinical assessment that the defendant has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior." ***People v. Odiari*, 2020 N.Y. Slip Op. 04882, Second Dept 9-2-20**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

THE TERMINATED SCHOOL EMPLOYEE'S PETITION FOR REINSTATEMENT WAS PROPERLY DISMISSED FOR FAILURE TO TIMELY SERVE A NOTICE OF CLAIM AS REQUIRED BY THE EDUCATION LAW; ALTHOUGH PETITIONER NOTIFIED THE SCHOOL DISTRICT'S SUPERINTENDENT AND THE BOARD OF EDUCATION WAS AWARE OF THE ACTION, FAILURE TO SERVE THE BOARD WAS A FATAL DEFECT.

The Second Department determined the terminated school-district employee's petition seeking reinstatement was properly dismissed because notice of the action was served on the school district's superintendent, not the board of education as required by the Education Law: "... [T]he petitioner failed to present his purported notice of claim to the governing body,

namely, the Board (see Education Law § 3813[1] ...). The letter that the petitioner contends constituted his notice of claim was sent to the School District's Superintendent, which did 'not constitute service upon the Board' ... . The petitioner did not submit an affidavit of service or any other evidence to demonstrate that he had in fact served or presented his letter to the governing body ... . That the Board ultimately obtained actual knowledge of the letter from the Superintendent's office was of no moment ... . The petitioner's failure to present his purported notice of claim to the governing body was 'a fatal defect ...". ***Matter of Jovasevic v. Mount Vernon City Sch. Dist.*, 2020 N.Y. Slip Op. 04839, Second Dept 9-2-20**

EVIDENCE, INSURANCE LAW.

THE POLICE REPORT WHICH INCLUDED THE LICENSE PLATE NUMBER OF THE CAR ALLEGED TO HAVE FLED THE SCENE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE HEARSAY; HOWEVER, OTHER EVIDENCE, INCLUDING THE TESTIMONY OF THE DRIVER OF THE CAR WHICH WAS STRUCK, SUFFICIENTLY IDENTIFIED THE LICENSE PLATE NUMBER AND THE CAR.

The Second Department determined the uninsured motorist carrier's petitions to permanently stay arbitration in this car-accident case were properly granted because the identity of the owner of the car which fled the scene (Zeno) was adequately demonstrated. Although the police report which included the license plate number of the car alleged to have fled the scene was inadmissible hearsay, the eyewitness testimony at the framed issue hearing by the driver (Welder) of the car which was struck was sufficient: "Here, the information in the police report was not derived from the personal observations of the police officer, who did not observe the accident (see CPLR 4518[a] ...). Because the source of the information in the police report regarding the license plate number of the Hyundai cannot be identified, the police report was inadmissible ... . [T]he Supreme Court's determination that Zeno's vehicle was involved in the subject accident is supported by the evidence presented at the hearing, excluding the police report ... . Welker testified that he clearly observed the color, make, style, and license plate number of the offending vehicle, recorded the license plate number, and provided that information to the police officer who responded to the accident. Welker also testified that the license plate number that corresponded to Zeno's vehicle was identical to the license plate number he provided to the police officer. Further, the police officer testified that he routinely takes a statement from the operator of a vehicle at the scene of an accident, and it is common practice for this information to be written in the police accident report. While Zeno stated that there was no pre-existing damage to his vehicle prior to the accident and that no repairs were made to the front of the vehicle, photographs of his vehicle that were admitted at the hearing show that, when compared to the front of the vehicle on the passenger's side, the front of the vehicle on the driver's side has different, replacement, or missing parts." ***Country-Wide Ins. Co. v. Lobello*, 2020 N.Y. Slip Op. 04836, Second Dept 9-2-20**

FORECLOSURE, CIVIL PROCEDURE.

A 2009 AMENDED COMPLAINT SERVED WITHOUT THE REQUIRED LEAVE OF COURT, ALTHOUGH INVALID AS A PLEADING, RE-ACCELERATED THE MORTGAGE DEBT IN THIS FORECLOSURE ACTION, RENDERING THE ACTION TIME-BARRED.

The Second Department, reversing Supreme Court, determined the mortgage debt had been re-accelerated by an amended complaint in 2009, rendering the instant foreclosure action time-barred: "... [T]he defendants also submitted the supplemental summons and amended complaint filed on July 13, 2009, in the 2005 action. In the amended complaint, PCG elected to re-accelerate the debt, which started the running of a new six-year period. The supplemental summons and amended complaint were filed without the required leave of court (see CPLR 3025[b]). However, PCG's counsel, in an affirmation dated October 9, 2013, submitted with a stipulation to discontinue the 2005 action and a stipulation cancelling the notice of pendency, agreed that the amended complaint, 'while arguably insufficient as a pleading, provided that the loan was again accelerated,' and stated that '[t]hus, the loan remains accelerated from July 22, 2009, the date the amended complaint was served up and delivered to [the defendants], as per the corresponding affidavits of service.' By the submission of these documents, the defendants established that the time in which to sue expired on July 22, 2015, six years after the service of the supplemental summons and amended complaint (see CPLR 213[4]), PCG's counsel having conceded that the loan was accelerated as of that time." ***Goshen Mtge., LLC v. DePalma*, 2020 N.Y. Slip Op. 04830, Second Dept 9-2-20**

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

THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 WERE NOT PROVEN; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 in this foreclosure action: "... [T]he plaintiff submitted, inter alia, the affidavit of Sherry W. McManus, a Vice President of Loan Documentation for the plaintiff. Although McManus stated in her affidavit that the RPAPL 1304 notice was mailed by regular and certified mail, and attached copies of the notice, the plaintiff failed to attach, as exhibits to the motion, any documents establishing that the notice was

actually mailed ... . Specifically, the plaintiff failed to submit a copy of any United States Post Office document indicating that the notice was sent by registered or certified mail as required by the statute ... . Further, although McManus attested that she had personal knowledge of the plaintiff's mailing practices, the substance of her affidavit was contradicted by the documents attached to it that purportedly evidenced the plaintiff's compliance with RPAPL 1304, and her averments were contradicted by those made in another affidavit submitted by the plaintiff in support of its motion ... . Since the plaintiff failed to provide evidence of the actual mailing, or reliable evidence of a standard office mailing procedure designed to ensure that the items were properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 ...". ***Wells Fargo Bank, N.A. v. Bedell*, 2020 N.Y. Slip Op. 04891, Second Dept 9-2-2020**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE, ATTORNEYS, EVIDENCE.

SUPREME COURT PROPERLY LIMITED THE DEPOSITION QUESTIONING OF A DOCTOR IN THIS MEDICAL MALPRACTICE ACTION AND PROPERLY ORDERED THAT THE DEPOSITION BE SUPERVISED BECAUSE OF MISCONDUCT ON BOTH SIDES DURING A PRIOR DEPOSITION.

The Second Department, over an extensive dissent, determined Supreme Court properly issued a protective order limiting the deposition questioning of a doctor (Brem) in this medical malpractice action and properly ordered that the deposition be supervised. Both sides had engaged in misconduct at the prior deposition: "... [T]he Supreme Court providently exercised its discretion in granting those branches of Winthrop's [the hospital's] motion which were for a protective order to the extent of limiting further questioning of Brem solely to his observations and treatment of decubitis ulcers sustained by Slapo [plaintiff's decedent] and to direct that Brem's continued deposition be supervised by a special referee. While we agree with the court's characterization of the improper conduct of Slapo's attorney at Brem's deposition, we observe that the defense attorneys violated 22 NYCRR 221.1 by making numerous objections and making speaking objections. We further note that Brem violated 22 NYCRR 221.2 by refusing to answer questions. Given the obstructive conduct by the defense attorneys and Brem in violation of 22 NYCRR part 221, and the improper conduct of Slapo's attorney during the deposition, we agree with the court that appropriate supervision of the balance of Brem's deposition is necessary. Because both sides have engaged in arguably sanctionable conduct during the course of Brem's deposition ... , it was inappropriate to compel the plaintiff to solely bear the cost of supervision thereof. Further, without the consent of all the parties, the court may not compel a party to pay for or contribute to the cost of an outside referee (see CPLR 3104[b] ...). Accordingly, we modify the order so as to direct that Brem's continued deposition be supervised by a court-employed special referee ... , a judicial hearing officer, or a court attorney referee." ***Slapo v. Winthrop Univ. Hosp.*, 2020 N.Y. Slip Op. 04887, Second Dept 9-2-20**

MENTAL HYGIENE LAW (SEX OFFENDERS).

ALTHOUGH KERRY K WAS ORDERED RELEASED UNDER STRICT AND INTENSIVE SUPERVISION AND TREATMENT PURSUANT TO THE FIRST MENTAL HYGIENE LAW CIVIL COMMITMENT TRIAL, AFTER KERRY K'S SUCCESSFUL APPEAL HE WAS PROPERLY ORDERED RE-CONFINED PENDING THE SECOND TRIAL.

The Second Department, in a full-fledged opinion by Justice Chambers, determined Kerry K was properly ordered re-confined pending a retrial in this Mental Hygiene Law civil commitment proceeding. In the first trial Kerry K was not found to be a dangerous sex offender and was ordered released under strict and intensive supervision and treatment (SIST). Kerry K appealed the finding that he suffered from a mental abnormality. The Second Department reversed and ordered and new trial. The issue here was whether Kerry K could be re-confined while awaiting re-trial: "On appeal, Kerry K. contends that since the Supreme Court has already found, after a dispositional hearing held in 2015, that he was not a 'dangerous sex offender requiring confinement' (Mental Hygiene Law §§ 10.03[e]; 10.07[f]), there is no statutory requirement—and no logical reason—for him to be re-confined pending his retrial based on the stale 2013 probable cause determination, and that he is, in effect, being punished for having successfully prosecuted his prior appeal. Alternatively, to the extent pretrial confinement is statutorily mandated, Kerry K. contends that the statute, as applied to him, violates his constitutional right to due process of law. The State counters that Mental Hygiene Law § 10.06(k) requires pretrial detention upon a finding of probable cause, and since this Court's decision on the prior appeal merely reversed the June 25, 2015 order and underlying finding of mental abnormality and ordered a new trial, without disturbing the Supreme Court's 2013 probable cause finding, it follows that Kerry K. must be re-confined pending retrial. Moreover, the State contends that Kerry K.'s claim that the pretrial detention provision of the Mental Hygiene Law is unconstitutional as applied to him lacks merit ... . We find that the State's contentions have merit." ***Matter of State of New York v. Kerry K.*,2020 N.Y. Slip Op. 04844, Second Dept 9-2-20**

MENTAL HYGIENE LAW (SEX OFFENDERS), EVIDENCE.

TWO PSYCHOLOGICAL DIAGNOSES INTRODUCED IN EVIDENCE IN APPELLANT'S MENTAL HYGIENE LAW CIVIL COMMITMENT TRIAL HAVE NOT BEEN ACCEPTED BY THE PSYCHOLOGICAL COMMUNITY; NEW TRIAL ORDERED.

The Second Department, ordering a new trial in this Mental Hygiene Law civil commitment proceeding, determined two unreliable diagnoses were admitted in evidence. The matter had been sent back for a *Frye* hearing and Supreme Court issued a report finding the diagnoses are not accepted in the psychological community: "In June 2013, the State of New York commenced this proceeding pursuant to Mental Hygiene Law article 10 for the civil management of the appellant. Two psychologists evaluated the appellant at the State's request and issued reports and testified that they diagnosed the appellant as suffering from, among other things, paraphilia not otherwise specified (nonconsent) (hereinafter PNOS [nonconsent]) and other specified paraphilic disorder (biastophilia or nonconsent), with sexually sadistic traits in a controlled environment (hereinafter OSPD [biastophilia or nonconsent] with sexually sadistic traits). * * * ... [T]he record supports the Supreme Court's conclusion that the State failed to establish that the diagnoses of PNOS (nonconsent) and its successor diagnosis, OSPD (nonconsent), are generally accepted in the psychiatric and psychological communities. The evidence at the Frye hearing established that the diagnoses were repeatedly rejected for inclusion in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM), and that no consensus on the validity of the diagnoses had been reached subsequent to the publication of the latest edition of the DSM in 2013. There was no clear definition or criteria for the diagnoses. Accordingly, the court erred in admitting evidence of the PNOS (nonconsent) and OSPD (nonconsent) diagnoses at the appellant's trial." ***Matter of State of New York v. Ronald S.*, 2020 N.Y. Slip Op. 04845, Second Deptp 9-2-20**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S TREATING PHYSICIAN SHOULD HAVE BEEN MADE AVAILABLE FOR CROSS-EXAMINATION BY THE DEFENDANT IN THIS INQUEST ON DAMAGES; ALTHOUGH DEFENDANT DEFAULTED ON LIABILITY IN THIS PERSONAL INJURY ACTION, DEFENDANT APPEARED FOR THE INQUEST.

The Second Department, reversing Supreme Court, determined the injured plaintiff's (Castaldini's) treating physician should have been made available for cross-examination by defendant at the inquest on damages. Defendant had defaulted on liability but appeared at the inquest. Supreme Court accepted an affidavit from the doctor to prove damages. The court noted that causation of the damages is not considered in an inquest: "... [W]e disagree with the Supreme Court's determination to admit into evidence the written sworn statement of Castaldini's treating physician without making the physician available for cross-examination. At an inquest to ascertain damages upon a defendant's default, the plaintiff may submit proof by written sworn statements of the witnesses (see CPLR 3215[b]; 22 NYCRR 202.46[b]). However, where, as here, the defaulting defendant gives notice that he or she will appear at the inquest, the plaintiff must make the witnesses available for cross-examination (see CPLR 3215[b] ...). Since Walsh did not make the physician available for cross-examination, the court should not have admitted into evidence the physician's written sworn statement over Walsh's objection. Further, since the court relied on the physician's statement in making its findings of fact on damages, we remit the matter to the Supreme Court, Suffolk County, for a new inquest on the issue of damages ...". ***Castaldini v. Walsh*, 2020 N.Y. Slip Op. 04822, First Dept 9-2-20**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE, JUDGES.

INSTRUCTING THE JURY ON THE BURDEN OF PROOF IN THIS DAMAGES-ONLY PERSONAL INJURY TRIAL SHIFTED THE BURDEN OF PROOF; $5,500,000 VERDICT SET ASIDE AND NEW TRIAL ORDERED.

The Second Department, ordering a new trial in this personal injury action which had resulted in a $5,500,000 verdict, determined the "burden of proof" jury instruction should not have been given in this damages-only trial: "... [T]he defendants contend ... that the verdict and judgment must be set aside on the ground that they were deprived of a fair trial by the Supreme Court's improper jury instruction on the law. Specifically, the defendants contend that the court erroneously charged the jury with respect to the burden of proof. 'A trial court is required to state the law relevant to the particular facts in issue, and a set of instructions that confuses or incompletely conveys the germane legal principles to be applied in a case requires a new trial'... . Here, we agree with the defendants that under the facts of this case, the Supreme Court's determination to charge Pattern Jury Instructions 1:60 was improper in the context of a trial limited to the issue of damages only and was prejudicial to the defendants in that it shifted the burden of proof. In light of the court's error in the charge, substantial justice was not done since the jury was not instructed with the germane legal principles to be applied ...". ***Gorokhova v. Consolidated Edison of N.Y., Inc.*, 2020 N.Y. Slip Op. 04828, Second Dept 9-2-20**

PERSONAL INJURY, MUNICIPAL LAW.

A COUNTY SHERIFF WAS INVOLVED IN THE TRAFFIC ACCIDENT FOR WHICH PETITIONER SOUGHT LEAVE TO FILE A LATE NOTICE OF CLAIM; BECAUSE THE COUNTY WAS AWARE OF THE POTENTIAL ACTION FROM THE OUTSET, LEAVE WAS PROPERLY GRANTED.

Petitioner state trooper was involved in a traffic accident with a county sheriff and sought to file a late notice of claim against the county. The county was aware of the potential claim from the outset, because a county employee was involved. Therefore leave to file a late notice of claim was properly granted: "Although a police report regarding an automobile accident does not, in and of itself, constitute notice of a claim to a municipality, where the municipality's employee was involved in the accident and the report or investigation reflects that the municipality had knowledge that its employee committed a potentially actionable wrong, the municipality can be found to have actual notice ... . In this case, the subject motor vehicle accident involved an Orange County Sheriff's vehicle and employee. Numerous officers from the Orange County Sheriff's office responded to the scene of the accident. Further, the police accident report prepared by a state police officer who responded to the scene contained the injured petitioner's account of how the accident occurred. Specifically, the police report indicated that the County committed a potentially actionable wrong when its employee allegedly failed to yield the right of way to the injured petitioner's vehicle even though the injured petitioner's vehicle's lights and sirens were activated. The police accident report also indicated that the injured petitioner was allegedly injured in the accident. Moreover, upon submitting a request to the County pursuant to the Freedom of Information Law for documents related to this accident, the County produced the police accident report, photographs taken of the vehicles and the accident scene, unit activity logs for the vehicles, and the Orange County Sheriff's report regarding the accident. Thus, the County acquired timely actual knowledge of the essential facts constituting the petitioners' claim ... . Moreover, as the County acquired timely knowledge of the essential facts constituting the petitioners' claim, the petitioners met their initial burden of showing that the County would not be prejudiced by the late notice of claim ...". ***Matter of McVea v. County of Orange*, 2020 N.Y. Slip Op. 04840, Second Dept 9-2-20**

TRUSTS AND ESTATES, CIVIL PROCEDURE, ATTORNEYS.

MOTIONS TO QUASH SUBPOENAS ISSUED IN SUPPORT OF OBJECTIONS TO AN ACCOUNTING OF A TRUST SHOULD NOT HAVE BEEN GRANTED; COUNSEL'S SUBMISSION OF EMAILS DEMONSTRATING A GOOD FAITH EFFORT TO SETTLE WERE SUFFICIENT.

The Second Department, reversing Surrogate's Court, determined the motions to quash subpoenas issued by appellants who objected to an accounting of a trust should not have been granted and the appellants' counsel's submissions demonstrating a good faith effort to settle the matter (22 N.Y.C.R.R. § 202.7) were sufficient: "In a proceeding pursuant to article 22 of the Surrogate's Court Procedure Act to settle an account of a trust, a party filing objections is 'entitled to all rights granted under article thirty-one of the civil practice law and rules with respect to . . . discovery' (SCPA 2211[2]). CPLR 3101(a), which provides for 'full disclosure of all matter material and necessary in the prosecution or defense of an action,' is to be liberally construed 'to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' ... . A 'party or nonparty moving to vacate the subpoena has the initial burden of establishing either that the requested [information] is utterly irrelevant' to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious' ...". ***Matter of Cheryl LaBella Hoppenstein 2005 Trust*, 2020 N.Y. Slip Op. 04846, Second Dept 9-2-20**

THIRD DEPARTMENT

CIVIL RIGHTS LAW.

PRISON INMATE'S COMPLAINT ALLEGING DENIAL OF ACCESS TO THE COURTS IN VIOLATION OF 42 U.S.C. § 1983 DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION; PLAINTIFF ALLEGED THE FAILURE TO PRESERVE CERTAIN VIDEO RECORDINGS BUT DID NOT ALLEGE HOW SAID FAILURE HINDERED HIS ACCESS TO THE COURTS.

The Third Department determined plaintiff, a prison inmate, did not state a cause of action under 42 U.S.C. § 1983 alleging denial of his right to access to the courts. Defendant had requested video recordings concerning the law library and the delivery of legal mail: " 'In order to establish a violation of a right of access to courts, a plaintiff must demonstrate that a defendant caused 'actual injury,' . . . i.e., took or was responsible for actions that 'hindered [a plaintiff's] efforts to pursue a legal claim' ... . In his complaint, plaintiff merely alleges that defendant refused to preserve video recordings of the facility law library on May 2, 2015 and of the mail delivery on May 18, 2015. Plaintiff does not describe what the recordings would show, what legal mail was involved or how defendant's alleged actions in preventing the preservation of the videos from those two days hindered his opportunity to pursue a legal claim. In light of defendant's vague and conclusory allegations regarding any actual injury, he has failed to state a cause of action for being denied access to the courts and dismissal of his claim on this ground is proper ...". ***Johnson v. Bernier*, 2020 N.Y. Slip Op. 04894, Third Dept 9-3-20**

WORKERS' COMPENSATION.

THE APPLICATION FOR REVIEW OF THE WORKERS' COMPENSATION LAW JUDGE'S DECISION WAS PROPERLY DENIED BECAUSE THE APPLICATION DID NOT SPECIFY WHEN THE OBJECTIONS TO THE DECISION WERE MADE.

The Third Department determined the Workers' Compensation Board properly refused review of the award of benefits sought by the carrier. The application form (requesting Board review) did not specify when the objections to the contested decision by the Workers' Compensation Law Judge (WCLJ) were made: "... [B]oth the application (form RB-89) and the instructions in effect at the time that it was filed required the carrier to 'specify the objection or exception that was interposed to the ruling, and when the objection or exception was interposed' ... . This information was to be supplied by the carrier in question number 15 of the application. In response to this question, the carrier stated, 'Objections were noted during the course of the hearing and at the conclusion of the hearing regarding the [WCLJ's] finding that no additional development of the record was necessary on the issue of attachment to the labor market prior to directing awards based solely on the amendment to [s]ection 15 (3) (w) that took effect 04/10/17.' Significantly, the carrier failed to identify the hearing at which the objection was raised, and the record discloses that there was more than one hearing at which claimant's labor market attachment was addressed. As the carrier failed to provide the temporal information required by the regulations, we cannot conclude that the Board abused its discretion in finding the application to be incomplete and declining to review the WCLJ's decision ...". ***Matter of Demarco v. Trans Care Ambulance*, 2020 N.Y. Slip Op. 04895, Third Dept 9-3-20**

WORKERS' COMPENSATION, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT THE FINDING CLAIMANT'S INJURY WAS WORK-RELATED.

The Third Department, reversing the Workers' Compensation Board, determined the evidence that claimant suffered a meniscus tear at work was insufficient: " 'The Board is empowered to determine the factual issue of whether a causal relationship exists based upon the record, and its determination will not be disturbed when supported by substantial evidence' ... . Although the medical opinion evidence relied upon by the Board to demonstrate the existence of a causal relationship does not need to be expressed with absolute or reasonable medical certainty, 'it must signify a probability of the underlying cause that is supported by a rational basis and not be based upon a general expression of possibility' ... . Bruce Greene, claimant's treating orthopedic surgeon, testified that it was difficult to determine when the meniscus tear occurred. He further testified that there is 'a strong possibility [that] there was an acute or chronic tear of [the] meniscus' and that it is 'very reasonable that something could have happened at work that exacerbated a chronic [condition].' The Board, finding that the medical testimony expressing that it was "highly possible" that the injury was causally related to work, falls short of the reasonable probability that is required to establish a causal relationship between claimant's employment and his injury." ***Matter of Johnson v. Borg Warner, Inc.*, 2020 N.Y. Slip Op. 04897, Third Dept 9-3-20**

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