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FIRST DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

DEFENDANTS DID NOT FOLLOW THE PROCEDURES FOR ELECTRONICALLY FILING A VIDEO; THEREFORE THE VIDEO WAS NOT AVAILABLE TO THE COURT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

The First Department, reversing Supreme Court, determined the video evidence relied upon by defendants' expert in this elevator-malfunction personal-injury case was not properly electronically filed and therefore was unavailable for review. Because of the unavailability of the evidence defendants' motion for summary judgment should have been denied: "Defendants failed to establish prima facie that plaintiff was the sole proximate cause of the injuries she sustained when the manual freight elevator that she was operating suddenly stopped moving ... . Defendants submitted an affidavit by an expert professional engineer who opined — based on his review of the surveillance footage of plaintiff's accident and still images purportedly extracted therefrom — that plaintiff failed to fully close the elevator car's scissor gate, which then opened while the elevator car was in flight, triggering the elevator's sudden stop. However, they failed to submit the video footage on which their expert relied. Instead, in this electronically filed case, defendants submitted a sheet of paper that read, 'Copy of the video to be provided upon the Court's request.' The New York County e-filing protocol required parties who wished to submit exhibits 'that cannot practically be e-filed,' such as videos, to file NYSCEF Form EF 21 and consult with the County Clerk about how best to submit such exhibits ... . Because defendants failed to comply with these procedures, the video never became part of the record and thus cannot be reviewed by this Court. Absent the video, the record evidence does not establish that plaintiff was the sole proximate cause of her injuries." ***Amezquita v. RCPI Landmark Props., LLC*, 2021 N.Y. Slip Op. 02979, First Dept 5-11-21**

CRIMINAL LAW.

THE SUPERIOR COURT INFORMATION (SCI) WAS JURISICTIONALLY DEFECTIVE BECAUSE IT INCLUDED OFFENSES FOR WHICH DEFENDANT WAS NOT HELD FOR GRAND JURY ACTION.

The First Department, reversing Supreme Court, determined the superior court information (SCI) was jurisdictionally defective because it included offenses for which defendant was not held for grand jury action: "The initial felony complaint charged defendant with two counts of criminal contempt in the first degree, and one count each of assault in the third degree and harassment in the second degree. Defendant subsequently agreed to waive prosecution by indictment and plead guilty to one count of aggravated criminal contempt, an offense greater than that charged in the original felony complaint. Because the only offense contained in the superior court information was not an offense for which defendant was held for grand jury action, or a lesser included offense, the superior court information was jurisdictionally defective ... . The fact that the felony complaint was amended to include a charge for aggravated criminal contempt does not require a different result. The superior court information is still defective because it included higher offenses for which defendant was not held for grand jury action (see CPL 195.20)." ***People v. Angel*, 2021 N.Y. Slip Op. 03001, First Dept 5-11-21**

CRIMINAL LAW, CIVIL PROCEDURE.

THE PEOPLE FAILED TO TIMELY REDUCE THE BOND OBLIGATION TO A JUDGMENT, THEREFORE THE SURETY'S MOTION TO VACATE THE JUDGMENT FORFEITING THE $100,000 BAIL SHOULD HAVE BEEN GRANTED.

The First Department, in a full-fledged opinion by Justice Renwick, determined the surety's motion to vacate a judgment forfeiting $100,000 bail should have been granted. Although the surety's (Empire's) motion was untimely, the People had failed to timely reduce the bond obligation to a judgment. The opinion is too detailed to fairly summarize here: "In this special proceeding brought pursuant to CPLR 5015 by a surety of a defendant in a criminal case, the dispositive question is whether a surety is procedurally precluded from moving to vacate a judgment of bail forfeiture as untimely made. The People argue that the application is precluded because the surety did not move within the one-year time limit applicable to a motion for remission of the forfeiture, which, as set forth in CPL 540.30(2), 'must be made within one year after the forfeiture of bail is declared.' We answer the question in the negative because the People must first comply with the statutory mandate of CPL 540.10(2) before they can raise the one-year statute of limitations of CPL 540.30(2). The People did not comply with

CPLR 540.10(2), which requires the People to reduce a bond obligation to a judgment within 120 days after the forfeiture is declared by the court." ***People v. Empire Bonding & Ins. Co.*, 2021 N.Y. Slip Op. 03120, First Dept 5-13-21**

INSURANCE LAW, CONTRACT LAW.

DEFENDANT DOCTOR'S FAILURE TO APPEAR FOR THE NO-FAULT EXAMINATION UNDER OATH (EUO) REQUESTED BY THE INSURER JUSTIFIED THE DENIAL OF DEFENDANT'S CLAIMS FOR BENEFITS.

The First Department, reversing Supreme Court, determined the surgeon's failure to appear for the no-fault examination under oath (EUO) requested by the insurer voided the insurance policy: "Plaintiff sent defendant a timely request for an examination under oath (EUO) with respect to a claim for benefits in the amount of $6,106.56, for shoulder surgery performed by defendant on an individual that was a passenger in a vehicle involved in an accident, covered by a no-fault insurance policy issued by plaintiff. Defendant failed to appear and plaintiff denied all claims for benefits made by defendant. The failure to appear for an EUO that was requested in a timely fashion by the insurer is a breach of a condition precedent to coverage and voids the policy ab initio ... . The coverage defense applies to any claim and is not determined on a bill by bill basis ... . The EUO was timely requested as to the second claim for benefits for the shoulder surgery, accordingly, defendant's failure to appear at that EUO voided the policy ab initio as to all claims, and plaintiff's cross motion for summary judgment should have been granted in its entirety." ***Unitrin Advantage Ins. Co. v. Dowd*, 2021 N.Y. Slip Op. 03012, First Dept 5-11-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF INJURED HIS BACK WHEN HE LIFTED A HEAVY PIECE OF LUMBER TO ALLOW THE BLADES OF A FORKLIFT TO MOVE UNDER THE LUMBER; THERE WERE QUESTIONS OF FACT WHETHER LABOR LAW § 240(1) WAS APPLICABLE.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should not have been granted (but did not explain why). Plaintiff injured his back when he lifted a heavy object to allow the blades of a forklift to be moved under it: "There are issues of fact as to 'whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' ... . It appears that plaintiff was placed in a position that required him to lift an extremely heavy piece of lumber without any safety devices such as those listed in Labor Law § 240(1) in order to get the assistance of a forklift. We note, in this regard, that any action on plaintiff's part in lifting the beam goes to the issue of comparative negligence, which is not a defense to a Labor Law § 240(1) claim, because the statute imposes absolute liability once a violation is shown ... . Moreover, plaintiff was under no duty to demand an alternate safety device on his own because '[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place' ... . 'Indeed, workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work' ...". ***Greene v. Raynors Lane Prop. LLC*, 2021 N.Y. Slip Op. 03114, First Dept 5-13-21**

LANDLORD-TENANT, ADMINISTRATIVE LAW.

THE NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) PROPERLY HELD THE APARTMENT WAS RENT-STABILIZED, BUT DID NOT PROPERLY CALCULATE THE RENT OVERCHARGE.

The First Department, reversing (modifying) Supreme Court, determined the NYS Division of Housing and Community Renewal (DHCR) properly found the apartment in question was rent-stabilized, but used the wrong formula to calculate the rent overcharge. The decision is too detailed to fairly summarize here: "Supreme Court correctly denied AEJ's petition insofar as it seeks reversal of DHCR's determination that the apartment is rent-stabilized. DHCR's examination of the apartment's rental history to determine its regulated status had a rational basis ... . DHCR erred, however, in establishing the base date rent by using the last registered rent from 1990 and then adding subsequent rent-stabilized rent increases to bring it up to date as of March 2010. The rent history of the apartment beyond the four year look back should not have been examined to determine the base rent for overcharge purposes ... . Rather the base date rent is what [the tenant] actually paid four years prior to the date when [the landlord] filed its request for administrative determination (AD request) with DHCR." ***Matter of AEJ 534 E. 88th, LLC v. New York State Div. of Hous. & Community Renewal*, 2021 N.Y. Slip Op. 02977, First Dept 5-11-21**

PERSONAL INJURY, MUNICIPAL LAW.

THERE IS A QUESTION OF FACT WHETHER A 16-YEAR-OLD SOFTBALL PLAYER ASSUMED THE RISK OF STEPPING IN A HOLE ON THE FIELD.

The First Department, reversing Supreme Court, determined there was a question of fact whether a 16-year-old softball player assumed the risk of stepping into a hole on the softball field: "Plaintiff, an experienced 16-year-old softball player was playing softball on an outdoor artificial turf field owned by defendant City of New York (the City). Plaintiff maintained that she sustained injures to her left knee when she stepped into a hole on the turf that had been placed over existing turf. The City contends that the hole was an open and obvious condition and that plaintiff assume the risk of injury. We disagree.

The photographs in the record appear to depict a tear or seam in the turf that may have caused a concealed depression relative to the surrounding playing surface. Accordingly, issues of fact exist whether the City was negligent in maintaining the field in a reasonably safe condition. Although a participant in an athletic activity is deemed to have assumed 'those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation,' there remain issues of fact as to whether plaintiff's injuries resulted from concealed or unreasonably increased risks ...". ***A.S. v. City of New York*, 2021 N.Y. Slip Op. 02975, First Dept 5-11-21**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE POLICE ACTED ILLEGALLY IN DIRECTING DEFENDANT TO GET OUT OF HIS VEHICLE; HOWEVER THE DEFENDANT'S SUBSEQUENT INDEPENDENT ACT OF RUNNING OVER THE POLICE OFFICER DISSIPATED THE ILLEGALITY OF THE POLICE CONDUCT; THEREFORE DEFENDANT'S MOTION TO SUPPRESS CERTAIN TESTIMONY ABOUT THE ENCOUNTER WITH THE POLICE WAS PROPERLY DENIED.

The Second Department determined defendant's motion to suppress testimony about an encounter with police was properly denied. Although the police acted illegally in directing defendant to get out of his car and in trying to physically remove defendant from his car, the subsequent criminal act by the defendant, running over the police officer, dissipated the taint of the illegal police conduct: " 'Where, like here, a vehicle is lawfully parked on the street and neither it nor its occupant is under any restraint, and the police have no grounds to suspect the occupant of criminality at that point, requesting the occupant to step out of the vehicle creates a new, unauthorized restraint' ... . 'Under the attenuation exception to the exclusionary rule, '[t]he question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was [obtained] 'by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint' ... . When determining whether an action taken by a defendant following an impermissible seizure dissipated the taint of the illegality, '[t]he test to be applied is whether defendant's action . . . was spontaneous and precipitated by the illegality or whether it was a calculated act not provoked by the unlawful police activity and thus attenuated from it' ... . Here, the defendant's action in running over Officer Manzella's legs and ankles with the vehicle constituted a calculated, independent criminal act, which broke the chain of events and dissipated the taint of the initial unlawful police conduct ...". ***People v. Contreras*, 2021 N.Y. Slip Op. 03048, Second Dept 5-12-21**

ELECTION LAW.

INCONSEQUENTIAL VIOLATIONS OF THE ELECTION LAW DID NOT INVALIDATE THE DESIGNATING PETITION.

The Second Department, reversing Supreme Court, determined the inclusion of extraneous district numbers under the names of the candidates did not invalidate the designating petition: "Election Law § 6-134, setting forth rules for designating petitions, states that its provisions 'shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud' ... . Further, an error in the required information for a designating petition is not grounds for invalidation when the designating petition is sufficiently informative to preclude confusion or deception of the signers or the BOE [NYC Board of Elections] ... . Thus, when an innocent and inconsequential violation of a technical rule of the Election Law pertaining to designating petitions is involved, by which a candidate has nothing to gain, and the violation creates no difficulty in reviewing the designating petition for its validity and accuracy and presents no potential for fraud or prejudice, said violation must be deemed inconsequential and the designating petition should be said to have complied with the requirements of the Election Law ... . Applying this standard to the circumstances presented herein, we find that the extraneous inclusion in the designating petition pages of election district numbers is inconsequential ...". ***Matter of Wagner v. Elasser*, 2021 N.Y. Slip Op. 03135, Second Dept 5-12-21**

FAMILY LAW.

IN A COMPLEX MARITAL-PROPERTY, MAINTENANCE AND CHILD-SUPPORT ANALYSIS TOO DETAILED AND COMPREHENSIVE TO SUMMARIZE HERE, THE COURT NOTED THAT, ABSENT A VOLUNTARY AGREEMENT, A PARENT MAY NOT BE DIRECTED TO SUPPORT A CHILD AFTER THE AGE OF 21.

The Second Department, in an extensive marital-property, maintenance and child-support decision too detailed and comprehensive to fairly summarize here, noted that a parent is not obligated to support a child over the age of 21: "The defendant ... contends that the Supreme Court improperly directed him to pay basic child-support and add-on expenses for the child after she reaches the age of 21. A parent has no legal obligation to provide for or contribute to the support of a child over the age of 21 ... . 'In the absence of a voluntary agreement, a parent may not be directed to pay support or to contribute to the college education of a child who has attained the age of 21 years, and has no obligation to continue the support of a child after the child reaches the age of 21 years' ... . Here, there was no voluntary agreement, and accordingly, the court should not have directed the defendant to pay basic child support and add-on expenses for the child after she reaches the age of 21." ***Sinnott v. Sinnott*, 2021 N.Y. Slip Op. 03073, Second Dept 5-12-21**

FAMILY LAW, CIVIL PROCEDURE.

NEW YORK DID NOT HAVE JURISDICTION OVER THE FLORIDA CHILD SUPPORT ORDER, EVEN THOUGH FATHER'S CHILD SUPPORT OBLIGATION HAD TERMINATED BY THE TERMS OF THE ORDER.

The Second Department, reversing Family Court, determined Florida, which issued the child support order and where father resides, continued to have jurisdiction over the child support order, even though the child support obligation had terminated. Therefore the New York child support order was not a "de novo" order. Rather, it was a modification of the Florida order over which New York did not have jurisdiction: "After relocating to New York, the daughter applied for and began receiving public assistance in Nassau County. In July 2019, the Nassau County Department of Social Services (hereinafter DSS) filed the instant petition for support on behalf of the daughter. At a hearing on the petition before a support magistrate, the father moved to dismiss the petition for lack of subject matter jurisdiction pursuant to the Uniform Interstate Family Support Act (hereinafter UIFSA), arguing that Florida retained exclusive jurisdiction over his child support obligation to the daughter, and that under Florida law, his obligation to support the daughter ceased when she turned 18. The Support Magistrate denied the motion, finding that the subject application was not seeking to modify the father's existing child support obligation in Florida, but, instead, was a de novo application for support. ... 'Under the [Full Faith and Credit for Child Support Orders Act] and UIFSA, the state issuing a child support order retains continuing, exclusive jurisdiction over its child support orders so long as an individual contestant continues to reside in the issuing state' (... cf. Family Ct Act § 580-205). 'Accordingly, a state may modify the issuing state's order of child support only when the issuing state has lost continuing, exclusive jurisdiction' ... . Since the father still resides in Florida, that state has continuing, exclusive jurisdiction of the child support order, despite the termination of his obligations under that order, and New York does not have subject matter jurisdiction to modify that order ...". ***Matter of Nassau County Dept. of Social Servs. v. Ablog*, 2021 N.Y. Slip Op. 03035, Second Dept 5-12-21**

FAMILY LAW, CIVIL PROCEDURE.

THE USUAL STRICT CRITERIA FOR VACATING A DEFAULT ORDER ARE RELAXED IN CHILD CUSTODY PROCEEDINGS; MOTHER'S MOTION TO VACATE THE DEFAULT ORDER AWARDING CUSTODY TO FATHER SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Family Court, determined mother's motion to vacate the default order granting custody to father should have been granted. The usual strict criteria for a default order are relaxed in child custody matters: "The determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court ... . 'A party seeking to vacate an order entered upon his or her default is required to demonstrate a reasonable excuse for the default and the existence of a potentially meritorious cause of action or defense' ... . However, 'the law favors resolution on the merits in child custody proceedings,' and thus the 'general rule with respect to opening defaults in civil actions is not to be rigorously applied to cases involving child custody' ...". ***Matter of Williams v. Worthington*, 2021 N.Y. Slip Op. 03040, Second Dept 5-12-21**

FAMILY LAW, CIVIL PROCEDURE, ATTORNEYS.

FATHER'S MOTION TO VACATE THE DEFAULT ORDER TERMINATING HIS PARENTAL RIGHTS SHOULD HAVE BEEN GRANTED; FATHER ATTEMPTED TO ATTEND THE HEARING, BUT WAS LATE; FATHER WAS ENTITLED TO COUNSEL BUT NONE HAD BEEN ASSIGNED; AND THERE WAS EVIDENCE HE DID NOT ABANDON THE CHILD.

The Second Department, reversing Family Court, determined father's motion to vacate the default order terminating his parental rights should have been granted. Father had appeared on the day of the hearing but it had concluded. In addition father was entitled to counsel and there was evidence father had not abandoned the child: "A parent seeking to vacate an order entered upon their default in a termination of parental rights proceeding must establish a reasonable excuse for the default and a potentially meritorious defense to the relief sought in the petition (see CPLR 5015[a][1] ...). Here, the father presented a reasonable excuse for his failure to timely appear at the May 28, 2019 fact-finding hearing. The father did in fact appear in court on the hearing date, but the proceedings had already concluded. This was the father's first appearance in the proceeding, and there is no indication that the father was notified by the Family Court or counsel of the hearing ... . Indeed, the father was unrepresented by counsel at that time, and claims that he was not offered assigned counsel on May 28, 2019. The father had a right to the assistance of counsel in this proceeding, in which he faced a potential termination of his parental rights ... . Parental rights may not be curtailed without a meaningful opportunity to be heard, which includes the assistance of counsel ... . Social Services Law § 384-b(5)(a) provides that 'a child is 'abandoned' by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency.' Abandonment must be proven by clear and convincing evidence ... . Termination of parental rights is authorized by Social Services Law § 384-b(4)(b) when the parent abandoned the child for a period of six months immediately prior to the date of the filing of the petition. Here, the father's allegations regarding his attempts to contact the agency and visit with

the child potentially extend into the relevant six-month period prior to the October 2018 petition." ***Matter of Jonathan N., Jr. (Jonathan N., Sr.)*, 2021 N.Y. Slip Op. 03034, Second Dept 5-12-21**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS WHICH WOULD ALLOW THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS.

The Second Department, reversing Family Court, determined the court should have made findings which would allow the subject child to apply for special immigrant juvenile states (SIJS); "The Family Court erred in failing to make the specific finding that reunification with the father is not viable due to abandonment. Based upon our independent factual review, the record supports the requisite finding that reunification with the child's father is not viable due to parental abandonment ... . The record demonstrates that even though the child's father knew where he lived, the father never visited him. The child has never met his father, his father has never supported him and has never sent gifts or cards, and his father's whereabouts are unknown. Moreover, the record supports a finding that it would not be in the best interests of the child to be returned to Nicaragua, his previous country of nationality and last habitual residence, as there is no one to care for him or protect him in that country ... . The record reflects that it would not be in the child's best interests to return to Nicaragua as he would be separated from his mother who has consistently cared for and supported him. In Nicaragua, there is no one who can care for him or support him; as previously set forth, his father has abandoned him. The child's maternal grandparents, with whom he lived after his mother left Nicaragua, are elderly and began to struggle to care for him and protect him. Moreover, the child faces harm from gang violence in Nicaragua, having been threatened by gang members and been kidnapped by them once for approximately eight days." ***Matter of Rosa M. M.-G. v. Dimas A.*, 2021 N.Y. Slip Op. 03033, Second Dept 5-12-21**

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

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND THE MORTGAGE IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the plaintiff bank did not demonstrate compliance with the notice requirements of RPAPL 1304 and the mortgage. Therefore the bank's motion for summary judgment in this foreclosure action should not have been granted: "... [T]he plaintiff failed to submit proof of the actual mailings, such as the affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure. Instead, the plaintiff relied on the affidavit of an employee of the plaintiff's loan servicer, who did not attest that she had personal knowledge that the notices were mailed, or attest to a standard office mailing procedure designed to ensure that items are properly addressed and mailed ... . Likewise, relying on the same affidavit, the plaintiff failed to establish compliance with the requirements for a notice of default pursuant to sections 15 and 22 of the mortgage agreement. Statements in the employee's affidavit, 'which asserted that the notice of default was sent in accordance with the terms of the mortgage, [were] unsubstantiated and conclusory and . . . , even when considered together with the copy of the notice of default, failed to show that the required notice was in fact mailed by first class mail or actually delivered to the designated address if sent by other means, as required by the subject mortgage' ...". ***U.S. Bank N.A. v. Peykar*, 2021 N.Y. Slip Op. 03077, Second Dept 5-12-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE MEDICAL MALPRACTICE AND LACK OF INFORMED CONSENT CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants should not have been awarded summary judgment on the medical malpractice and lack of informed consent causes of action: "The affidavit of the defendants' expert failed to address and rebut the specific allegations of malpractice set forth in the complaint and bill of particulars ... , and failed to eliminate all triable issues of fact as to whether [defendant doctor] properly performed the transrectal biopsy procedure and properly discharged the plaintiff despite his repeated complaints of bleeding from his rectum, and whether these alleged departures from good and accepted medical practice were a proximate cause of the plaintiff's injuries ... . 'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law' ... . [T]he defendants failed to submit proof sufficient to establish ... that the plaintiff was informed of the reasonably foreseeable risks associated with the treatment, or that a reasonably prudent patient in the same position would have undergone the treatment if he or she had been fully informed ...". ***Huichun Feng v. Accord Physicians, PLLC*, 2021 N.Y. Slip Op. 03024, Second Dept 5-12-21**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE SHOULD HAVE BEEN GRANTED; THE ISSUE OF PLAINTIFF'S COMPARATIVE NEGLIGENCE CAN BE ADDRESSED AT THE SUMMARY JUDGMENT STAGE IF RAISED AS AN AFFIRMATIVE DEFENSE.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this rear-end collision case should have been granted. The court noted that the issue of plaintiff's comparative negligence can be considered at the summary judgment stage if raised as an affirmative defense: "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision ... . To be entitled to summary judgment on the issue of a defendant's liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence ... . Although a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff seeks summary judgment dismissing an affirmative defense alleging comparative negligence ...". ***Diamond v. Comins*, 2021 N.Y. Slip Op. 03019, Second Dept 5-12-21**

THIRD DEPARTMENT

CRIMINAL LAW.

THE SUPERIOR COURT INFORMATION WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE AN OFFENSE CHARGED IN THE FELONY COMPLAINT OR A LESSER INCLUDED OFFENSE.

The Third Department, reversing Supreme Court, determined the superior court information (SCI) was jurisdictionally defective because it did not include an offense charged in the felony complaint or a lesser included offense: "... [D]efendant pleaded guilty, as charged in the SCI, to attempted robbery in the second degree under Penal Law §§ 110.00 and 160.10 (1), a different crime from robbery in the first degree (see Penal Law § 160.15 [2]), which was charged in the felony complaint. To be guilty of the offense charged in the SCI, defendant must have attempted to 'forcibly steal[] property' and done so 'when . . . aided by another person actually present' (Penal Law § 160.10 [1]). However, the crime of robbery in the first degree in the felony complaint charged defendant with 'forcibly steal[ing] property' while 'he or another participant in the crime . . . [i]s armed with a deadly weapon' (Penal Law § 160.15 [2]). 'As charged here, [attempted] robbery in the second degree requires an element not required by robbery in the first degree — namely, that defendant be 'aided by another person actually present' ... . Thus, inasmuch as it is possible to commit the crime charged in the felony complaint — robbery in the first degree — without committing the crime charged in the SCI — attempted robbery in the second degree — the crime charged in the SCI is not a lesser included offense of the former ... . Given that the SCI here did not contain either an offense charged in the underlying felony complaint or a lesser included offense thereof, the SCI upon which defendant's plea was based was jurisdictionally defective ...". ***People v. McCall*, 2021 N.Y. Slip Op. 03083, Third Dept 5-13-21**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

CRITERIA FOR RECLASSIFICATION OF THE SORA RISK-LEVEL EXPLAINED.

The Third Department explained the criteria for an application for risk-level reclassification under SORA: "Turning to the August 2019 order denying defendant's application for reclassification, it was his burden 'to establish by clear and convincing evidence that the requested modification [was] warranted, and the trial court's determination will not be disturbed absent an abuse of discretion' ... . County Court correctly rejected defendant's efforts to relitigate various issues addressed in the 2018 order, as an application for reclassification is not 'a vehicle for reviewing whether [a] defendant's circumstances were properly analyzed in the first instance to arrive at his [or her] risk level' ... . The sole new development pointed to by defendant was his evaluation by a psychiatrist after the issuance of the 2018 order, and he provided a letter in which the psychiatrist made preliminary findings that defendant neither met the diagnostic criteria for pedophilia nor merited a risk level three classification. The psychiatrist's final report was not submitted for review, however, and the limited findings offered in the letter were rendered without a review of the raw data underlying the 2015 report and were based upon an account of defendant's sexual history and offenses that 'markedly differ[ed]' from the one referenced in it. The Board accordingly opposed a modification on the ground that defendant had not met his burden of proof and, under the circumstances presented, County Court did not abuse its discretion in agreeing with that assessment ...". ***People v. Stein*, 2021 N.Y. Slip Op. 03086, Third Dept 5-13-21**

UNEMPLOYMENT INSURANCE, LABOR LAW, CONTRACT LAW.

THE TRANSFER OF CERTAIN ASPECTS OF SELLER'S BUSINESS TO BUYER DID NOT MEET THE CRITERIA IN LABOR LAW § 581; THEREFORE THE TRANSFER DID NOT TRIGGER THE TAKEOVER OF THE SELLER'S UNEMPLOYMENT INSURANCE EXPERIENCE ACCOUNT.

The Third Department, reversing Supreme Court, determined that the HOP's purchase of certain aspects of a competing business, Playground, did not trigger HOP's takeover of Playground's unemployment insurance experience account: "The statute provides that where a business has been transferred from one employer to another, either in whole or in part, the transferee shall take over and continue the unemployment insurance experience account of the transferor (see Labor Law § 581 [4] [a] ...). A transfer, however, will not be deemed to have occurred 'if the transferee has not assumed any of the transferring employer's obligations, has not acquired any of the transferring employer's good[]will, has not continued or resumed the business of the transferring employer either in the same establishment or elsewhere, and has not employed substantially the same employees as those of the transferring employer' ... . To negate a transfer, all four of these requirements must be met ... . [U]ndisputed evidence was presented that, in connection with its purchase of assets from Playground, HOP did not assume any of Playground's obligations, did not continue or resume operation of Playground's screening room ... and did not retain any of Playground's employees. The sole basis upon which the Board concluded that a transfer had occurred was HOP's alleged acquisition of Playground's goodwill. The record, however, does not support the Board's finding in this regard. The asset purchase agreement did not identify goodwill as an asset encompassed by the agreement, nor was it specifically mentioned on the list of property set forth on schedule 2.1 of the agreement." ***Matter of HOP N.Y. Entertainment, LLC (Commissioner of Labor)*, 2021 N.Y. Slip Op. 03093, Third Dept 5-13-21**

WORKERS' COMPENSATION, EVIDENCE.

CLAIMANT SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO CROSS EXAMINE THE CONSULTANTS WHOSE REPORTS WERE THE BASIS FOR THE DENIAL OF CLAIMANT'S REQUEST FOR SURGERY.

The Third Department, reversing (modifying) the Workers' Compensation Board, determined claimant should be afforded the opportunity to cross-examine the consultants (Cash and Storrs) whose reports were the basis for the denial of claimant's request for surgery: "The ... request for surgery was not made until after the WCLJ [Workers' Compensation Law Judge] ordered [the] depositions, but was nevertheless considered by the WCLJ, who upheld the denial even though claimant did not have any opportunity to submit contradictory medical evidence or cross-examine the carrier's consultants." ***Matter of Ozoria v. Advantage Mgt. Assn.*, 2021 N.Y. Slip Op. 03090, Third Dept 5-13-21**

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