NEW YORK APPELLATE DIGEST, LLS

Weekly Reversal Report
5-30-33 – 6-3-33

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CIVIL PROCEDURE, LONG-ARM JURISDICTION.

PLAINTIFF, A TEXAS RESIDENT WHO WAS A FLIGHT ATTENDANT FOR 30 YEARS WITH MONTHLY STAY-OVERS IN NEW YORK, DEMONSTRATED NEW YORK HAD LONG-ARM JURISDICTION OVER THE NEW JERSEY COMPANY WHICH MANUFACTURED AND DISTRIBUTED TALCUM POWDER PLAINTIFF USED; THE TALCUM POWDER ALLEGEDLY CAUSED PLAINTIFF'S MESOTHELIOMA (FIRST DEPT).

The First Department determined New York had specific long-arm jurisdiction of defendant Shulton, the manufacturer and distributor of talcum powder alleged to have cause plaintiff's peritoneal mesothelioma. Plaintiff (English) was a fight attendant for 30 years who used the talcum powder when she stayed in New York. Shulton has its principal place of business in New Jersey but has an office in New York and markets the product in New York:

English, a Texas resident, was employed as a flight attendant for 33 years, from 1966 to 1999. During a substantial part of that time, she used Desert Flower on a daily basis after showering. From 1966 to 1984, English was regularly assigned to flights into New York and flew into this state two to four times a month. She usually remained in New York on two- or three-day layovers. When English travelled, she packed Desert Flower in her luggage, so she would have it available

for use when she showered. There is no claim that the Desert Flower English used in New York was purchased in New York.

Shulton is incorporated in New Jersey, where it had its principal place of business during the time that English claims to have used Desert Flower. Shulton never manufactured Desert Flower in New York, and in the mid-1970s the manufacture of its talc products shifted from Tennessee to New Jersey. Desert Flower was marketed nationally, including in New York. During the relevant period of time, Shulton maintained a New York office from which it conducted its marketing activities for its Cosmetics and Toiletries Division. The New York office was also headquarters for its International Division. * * * Shulton's maintenance of its own New York office satisfies the first prong under CPLR 302(a)(1). * * * Desert Flower was marketed and sold nationally, and English used Desert Flower when she travelled to and while she stayed in New York. Shulton's activities and contacts with New York and the allegedly hazardous talcum powder used by English are sufficient to support an assertion of specific jurisdiction over Shulton…. . English v Avon Prods., Inc., 2022 NY Slip Op 03571, First Dept 6-2-22

Practice Point: Even though plaintiff was a Texas resident and the company she was suing was based in New Jersey, she was able to sue using New York courts. Plaintiff was a flight attendant for 30 years with monthly stay-overs in New York. Defendant had an office in New York and marketed the talcum powder which allegedly cause plaintiff's mesothelioma nationwide.

CIVIL PROCEDURE, RES JUDICATA.

HERE THE DOCTRINE OF RES JUDICATA PRECLUDED PLAINTIFF'S FRAUDULENT CONVEYANCE ACTION; THE CAUSE OF ACTION COULD HAVE BEEN RAISED IN THE PRIOR ACTION WHICH WAS DISMISSED (FIRST DEPT).

The Frist Department, reversing Supreme Court, determined the fraudulent conveyance cause of action was precluded by the doctrine of res judicata. Although

the fraudulent conveyance claim was not alleged in the prior action, which was dismissed, it could have been raised in the prior action:

In 2016, plaintiff sued NBC, NBF, and PIM, alleging — as she does in the instant action — that NBC and NBF were PIM's alter egos. In August 2018, Supreme Court (Gerald Lebovits, J.) granted NBC and NBF's motion to dismiss that action.

While the prior action did not allege fraudulent conveyance, the doctrine of res judicata bars plaintiff from raising that claim here because she could have raised it in the prior action … . Plaintiff learned on or about May 9, 2017 that nonparty Conquest Capital Group had repurchased the equity it had previously sold to PIM. She filed an amended complaint in the prior action on May 26, 2017. Although plaintiff alleges that she did not discover the price at which Conquest repurchased its equity until November 2018, she could have learned this fact earlier by making inquiries … . Aboelnaga v National Bank of Can., 2022 NY Slip Op 03467, First Dept 5-31-22

Practice Point: The doctrine of res judicata precludes causes of action which could have been investigated and raised in a prior action.

CIVIL PROCEDURE, CONTRACT LAW, INSURANCE LAW, PUNITIVE DAMAGES.

PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IN THIS BREACH OF AN INSURANCE CONTRACT ACTION SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the punitive damages claim against defendant insurer should have been dismissed. Plaintiff was struck by a vehicle when she was in a cross-walk. She settled with the driver's insurer, with her insurer's consent, for $25,000. She the brought this breach of contract action against defendant insurer for $225,000, plus punitive damages for a bad-faith breach of the insurance contract:

The elements required to state a claim for punitive damages when the claim arises from a breach of contract are: (1) the defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in Walker v Sheldon [10 NY2d 401]; (3) the egregious conduct must be directed to the plaintiff; and (4) it must be part of a pattern directed at the public generally. Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for a court considering a defendant's motion to dismiss a demand for punitive damages is to identify a tort independent of the contract … .

… [T]he plaintiff failed to allege an independent tort. There is no separate tort for bad faith refusal to comply with an insurance contract … . While an insurer may be held liable for damages to its insured for the bad faith refusal of a settlement offer … , the plaintiff here failed to state such a cause of action. …

The plaintiff has not alleged any facts from which an inference can be drawn that the defendant's conduct constituted a gross disregard of the plaintiff's interests. …

The plaintiff failed to allege any facts from which an inference can be drawn that the defendant's conduct was of an egregious nature as set forth in Walker v Sheldon, such that it was morally reprehensible and of such wanton dishonesty as to imply a criminal indifference to civil obligations … . Schlusselberg v New York Cent. Mut. Fire Ins. Co., 2022 NY Slip Op 03539, Second Dept 6-1-22

Practice Point: The criteria for punitive damages for breach of contract are difficult to meet. The defendant's conduct must amount to an independent tort, be morally reprehensible, wantonly dishonest, and criminally indifferent to civil obligations. Here, those criteria were not met by the allegations of breach of an insurance contract.

CIVIL PROCEDURE, EXPERT DISCLOSURE, TREATING PHYSICIAN, THIRD DEPARTMENT'S UNIQUE REQUIREMENTS.

CLAIMANT'S ATTORNEY WAS NOT AWARE OF THE THIRD DEPARTMENT'S UNIQUE REQUIREMENT OF FULL EXPERT-WITNESS DISCLOSURE FOR A TREATING PHYSICIAN; THAT WAS AN ADEQUATE EXCUSE FOR AN UNTIMELY DISCLOSURE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined claimant's treating physician (Hopson) in this personal injury case should have been allowed to testify as an expert, despite the failure to comply with full expert disclosure pursuant to CPLR 3101. The Third Department is the only department which requires such full expert disclosure by a treating physician and claimant's attorney had not practiced in the Third Department:

There is no dispute that claimant failed to comply with the expert disclosure requirements of CPLR 3101 (d) (1) (i) in identifying Hopson as a witness. Nevertheless, we disagree with the Court of Claims' finding that claimant's excuse was unreasonable. The situation here mirrors that in Schmitt v Oneonta City Sch. Dist. (151 AD3d 1254), where we accepted the explanation of the plaintiffs' attorney that he was "unaware of this Court's interpretation of CPLR 3101 (d) (1) (i) and the corresponding need to file an expert disclosure for a treating physician, and the record [was] otherwise devoid of any indication that counsel's failure to file such disclosure was willful" … . The same holds true here, as claimant's attorney revealed that she practices law in a different judicial department and candidly conceded that she was unaware of this Court's interpretation that the statute requires expert disclosure for treating physicians. There is nothing in the record calling into question the veracity of counsel's representations and no basis to conclude that the noncompliance with CPLR 3101 (d) (1) (i) was willful. As such, the court erred in precluding Hopson's testimony as an expert witness…. . Freeman v State of New York, 2022 NY Slip Op 03559, Third Dept 6-2-22

Practice Point: Only the Third Department requires full expert-witness disclosure for a treating physician.

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW, REAL PROPERTY LAW, DEFAULT, LIS PENDENS.

THE LLC'S FAILURE TO CHANGE THE ADDRESS ON FILE WITH THE SECRETARY OF STATE IS NOT A SUFFICIENT EXCUSE FOR A DEFAULT; PARTIES TO WHICH THE SUBJECT PROPERTY WAS TRANSFERRED AFTER THE LIS PENDENS WAS FILED ARE NOT NECESSARY PARTIES BECAUSE THEY ARE BOUND BY THE RESULT IN THIS ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined (1) defendant E&A did not show a reasonable excuse for its default, and (2) the parties to which the property was transferred after the lis pendens was filed were not necessary parties because they are bound by the result of the instant action:

E&A asserted that it did not receive the summons and complaint, which had been served on the Secretary of State, because it had failed to keep its address updated. However, where a defendant does not receive service of process because it failed to keep a current address on file with the Secretary of State, courts will not find a reasonable excuse for a default … . …

Supreme Court should have denied E&A's cross motion insofar as it sought to join as defendants Yuanqing Liu (who purchased the property from E&A) and NYC Happy Housing LLC (which purchased the property from Liu), as Liu and NYC Happy Housing are not necessary parties. On the contrary, Liu and NYC Happy Housing need not be joined to accord complete relief or to avoid an inequitable effect (CPLR 1001[a]); rather, they are "bound by all proceedings taken in the action . . . to the same extent as a party" because their conveyances were recorded after the filing of the notice of pendency (CPLR 6501 …). Majada Inc. v E&A RE Capital Corp., 2022 NY Slip Op 03476, First Dept 5-31-22

Practice Point: A limited liability corporation's (LLC's) failure to change the address on file with the Secretary of State is not an acceptable excuse for a default. Because a lis pendens was filed against the defendant's property here, the parties to which the property was subsequently transferred are bound by the result of this action and are not, therefore, necessary parties.

CIVIL PROCEDURE, REAL PROPERTY LAW, JOINT VENTURE, LIS PENDENS.

PLAINTIFF WAS SEEKING THE PROCEEDS OF A JOINT VENTURE, WHICH, UNDER PARTNERSHIP LAW, INVOLVES PERSONAL PROPERTY, NOT REAL PROPERTY; PLAINTIFF HAD NO INTEREST IN THE REAL PROPERTY WHICH WAS TO BE USED AS AN INN OPERATED AS A JOINT VENTURE; THERFORE THE LIS PENDENS FILED BY PLAINTIFF SHOULD HAVE BEEN CANCELLED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined there was no relationship between plaintiff's action seeking the assets of a joint venture and the ownership of the real property associated with the joint venture (to be used as an inn). Therefore defendants' motion to cancel the lis pendens should have been granted:

"A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). Because the provisional remedy of a notice of pendency is an " 'extraordinary privilege' " … , the Court of Appeals has held that to be entitled to that remedy, there must be a "direct relationship" between the relief sought in the complaint and the title to or possession of the disputed property … . In making that determination, a court must use "a narrow interpretation," and its "analysis is to be limited to the pleading's face" … . …

Supreme Court erred in denying their motion insofar as it sought to cancel the notice of pendency because there was no direct relationship between title to or possession of the property and the relief sought by plaintiff. We therefore modify the order accordingly. Reviewing the complaint on its face, we conclude that plaintiff seeks merely to enforce her purported 50% share in the joint venture and does not assert an interest in the property itself. Indeed, the complaint alleges that title to the property was, at all relevant times, held by Properties LLC, of which plaintiff was not a member. It is well settled that " 'the legal consequences of a joint venture are equivalent to those of a partnership' " … , and thus a joint venturer's interest in a joint venture constitutes an interest in only personal

property, not real property, thereby precluding recourse to a notice of pendency … . Renfro v Herrald, 2022 NY Slip Op 03593, Fourth Dept 6-3-22

Practice Point: Partnership law applies to joint ventures. Here the joint venture was the operation of an inn. Plaintiff sought the assets of the joint venture, which involves only personal property, not real property. Plaintiff had no interest in the real property (the inn). Therefore the lis pendens filed by the plaintiff should have been cancelled.

CONSTITUTIONAL LAW, LOBBYING ACT, GRASSROOTS LOBBYING, CHILD VICTIMS ACT.

PLAINTIFFS' ACTION ALLEGING THE LOBBYING ACT IS UNCONSTITUTIONAL AS APPLIED TO THEM SHOULD HAVE BEEN ALLOWED TO PROCEED; PLAINTIFFS ENGAGED IN "GRASSROOTS LOBBYING" IN SUPPORT OF PASSAGE OF THE CHILD VICTIMS ACT (CVA) (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Pritzker, determined plaintiffs' action alleging the Lobbying Act was unconstitutional as applied to them (First Amendment) should have been allowed to proceed. The opinion is too comprehensive to fairly summarize here. Plaintiffs engaged in publicity aimed at passage of the Child Victims Act (CVA), which extends the statute of limitations for civil and criminal actions stemming from the sexual abuse of children. Although the NYS Joint Commission of Public Ethics (JCOPE) did not end up enforcing the registration and reporting requirements of the Lobbying Act with respect to the plaintiffs' past activities, it indicated future enforcement if plaintiffs continued with their "grassroots lobbying" efforts:

Plaintiff Katherine C. Sullivan, a resident of Florida, supported the CVA and expressed that support, among other ways, through a website that explained that Sullivan was a survivor of child sexual assault that she was subjected to while attending a school in the City of Troy, Rensselaer County, but that she was barred from seeking legal recourse by then-applicable statutes of limitations. A list of

state senators who opposed the CVA was provided, along with a script and postcard template for website visitors to contact state senators to voice support for the CVA. Sullivan also rented digital billboard space in this state that displayed a rotating set of screens, one of which purportedly read, “NY Pass the Child Victims Act,” and another that displayed photographs of state senators next to text asking why they did not support the CVA. Some of the screens also purportedly displayed Sullivan’s website address; all of the screens indicated that they were paid for by plaintiff Kat Sullivan LLC (hereinafter the LLC). Sullivan later arranged for an airplane to circle the Capitol and the school in Troy towing banners that displayed, among other things, the address of her aforementioned website and the hashtag #NYPASSCVA. Sullivan v New York State Joint Commn. on Pub. Ethics, 2022 NY Slip Op 03553, Third Dept 6-2-22

Practice Point: Here the plaintiffs challenged whether the Lobbying Act, which requires lobbyists to register and report, was constitutional as applied to their “grassroots” efforts to garner support for the passage of the Child Victims Act. Supreme Court had dismissed the action. The Third Department partially reinstated it.

CRIMINAL LAW, ACCOMPLICE LIABILITY.

THERE WAS NO EVIDENCE DEFENDANT SHARED THE ATTACKERS’ INTENT TO ROB THE VICTIM; DEFENDANT’S ROBBERY CONVICTIONS UNDER AN ACCOMPLICE-LIABILITY THEORY REVERSED (THIRD DEPT).

The Third Department, reversing defendant’s robbery convictions, determined the evidence defendant shared the attackers’ intent to rob the victim was legally insufficient. Defendant had set up a drug purchase from the victim. When the victim arrived, he was attacked and robbed by four masked men. Although the victim testified defendant was one of the masked men, there was strong evidence to the contrary:

The People … did not have any direct evidence demonstrating that defendant knew of or shared an intent to forcibly steal property from the victim … . Indeed, there

was no evidence that defendant had prior knowledge of a plan to rob the victim … . People v Smith, 2022 NY Slip Op 03547, Third Dept 6-2-22

Practice Point: Although the defendant sent the victim to the address where the victim was to sell marijuana to a buyer, there was no evidence defendant was aware the buyer intended to attack and rob the victim. Therefore, there was no evidence defendant shared the robbers intent and his robbery convictions under an accomplice-liability theory were reversed.

CRIMINAL LAW, DEPRAVED INDIFFERENCE MURDER, PLEA COLLOQUY.

THE PLEA COLLOQUY IN WHICH DEFENDANT STATED HE CARED FOR THE THREE-YEAR-OLD VICTIM NEGATED AN ESSENTIAL ELEMENT OF DEPRAVED INDIFFERENCE MURDER; PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's plea to depraved indifference murder, determined the plea colloquy negated an essential element of the offense:

… [W]e agree with defendant that, although his admissions during the plea allocution established the mens rea element of recklessness … , his recitation of the facts underlying the charge of murder in the second degree pursuant to Penal Law § 125.25 (2) "cast significant doubt upon his guilt insofar as it negated the [second mens rea] element of depraved indifference" … . In response to the court's question whether defendant did not care if harm happened to the victim or how the risk to the victim turned out, defendant stated through defense counsel that "[h]e did care for [the victim]." We conclude that defendant's statement negated the element of depraved indifference because the second mens rea element of the crime required that defendant "did not care whether [the] victim lived or died" … or, in other words, that he did "not care how the risk turn[ed] out" … . Defendant, however, conveyed during the factual recitation the exact opposite of the requisite mental state, i.e., that he did, in fact, care for the victim. People v Bovio, 2022 NY Slip Op 03591, Fourth Dept 6-3-22

Practice Point: The defendant, during the plea colloquy for depraved indifference murder, stated that he cared for the three-year-old victim. That statement negated

the element of depraved indifference murder which requires that the defendant "not care if the victim lived or died." The plea was vacated.

CRIMINAL LAW, INEFFECTIVE ASSISTANCE.

DEFENDANT PLED GUILTY TO ATTEMPTED GANG ASSAULT, WHICH IS A LEGAL IMPOSSIBILITY AT TRIAL; DEFENDANT WAS ENTITLED TO A HEARING ON WHETHER HIS PLEA WAS RENDERED INVOLUNTARY BY COUNSEL'S INACCURATE ADVICE ABOUT THE POSSIBILITY OF CONVICTION; MATTER REMITTED (FOURTH DEPT).

The Fourth Department determined there should be a hearing on whether defendant's plea to attempted gang assault was involuntary. Defendant contended the plea was based on inaccurate advice from counsel. "Attempted gang assault" is a legal impossibility for trial purposes:

… [W]e agree with defendant that "attempted gang assault in the second degree is a legal impossibility for trial purposes. . . , as 'there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended' " … . Based on that law and our review of the record, we further agree with defendant that the advice of defense counsel regarding the possibility of a conviction at trial of attempted gang assault in the second degree was erroneous.

Nevertheless, "[i]t is well settled that permission to withdraw a guilty plea rests largely within the court's discretion" … . "Whether a plea was knowing, intelligent and voluntary is dependent upon a number of factors 'including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused' . . . That the defendant allegedly received inaccurate information regarding [the possibility of a conviction at trial and the resulting impact upon] his possible sentence exposure is another factor which must be considered by the court, but it is not, in and of itself, dispositive" … . "Where . . . the record raises a legitimate question as to the voluntariness of the plea, an evidentiary hearing is required" … . People v Davis, 2022 NY Slip Op 03610, Fourth Dept 6-3-22

Practice Point: "Attempted gang assault" is a legal impossibility at trial. Here defendant was entitled to a hearing on whether his plea to attempted gang assault was involuntary because of counsel's inaccurate advice about the possibility of conviction at trial.

CRIMINAL LAW, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILURE TO INTERVIEW A POTENTIALLY EXCULPATORY WITNESS; MOTION TO VACATE THE MURDER CONVICTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Defense counsel did not interview a witness who, based on the witness's testimony at the hearing on the motion to vacate, would have testified defendant was not at the scene of the shooting:

… [W]e conclude that defendant met his burden of establishing that defense counsel's failure to interview the potentially exculpatory witness constituted ineffective assistance of counsel, inasmuch as the record before us reflects "the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" … . The failure by defendant's trial counsel to interview the witness cannot be characterized as a legitimate strategic decision because, "without collecting that information, [defense] counsel could not make an informed decision as to whether the witness['s] evidence might be helpful at trial" … . To the extent that the defense team deemed the witness not credible due to his criminal record or history, that alone "does not excuse trial counsel's failure to investigate since a witness's unsavory background[ ] does not render his or her testimony incredible as a matter of law" … . Further, we conclude that, "even if the witness['s] criminal record[] provided a strategic basis for choosing not to present [his] testimony, it does not provide an excuse for [defense] counsel's failure to investigate [him] as [a] possible witness[ ]" … . Moreover, the witness's testimony at the CPL article 440 hearing was wholly consistent with the theory pursued by trial counsel, namely that defendant was not present at the shooting and that the crime was instead committed by an individual seeking to rob the victims'

residence, and the proposed witness would have provided the only eyewitness testimony at trial as to the shooting. People v Williams, 2022 NY Slip Op 03625, Fourth Dept 6-3-22

Practice Point: Here defense counsel was made aware of a potentially exculpatory witness and did not interview him. The fact that defense counsel felt the witness was not credible did not excuse the failure to investigate. Defendant's motion to vacate his conviction on ineffective assistance grounds was granted by the appellate court.

CRIMINAL LAW, BURGLARY, PARTIAL FINGERPRINT, APPEALS.

THERE WAS NO EVIDENCE LINKING DEFENDANT TO A BURGLARY EXCEPT A PARTIAL FINGERPRINT FOUND AT THE SCENE WHICH ONLY MATCHED 15 TO 22.5% OF THE CHARACTERISTICS OF DEFENDANT'S INKED PRINT; THE BURGLARY CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's burglary conviction, determined the evidence that a partial fingerprint from the burglary scene matched the defendant was too weak to support the conviction. The conviction was therefore against the weight of the evidence:

On cross-examination, the fingerprint examiner agreed that her opinion is subjective, that two examiners may reach different opinions when examining the same set of prints, and that verification by a second examiner, particularly blind verification, significantly increases the accuracy of fingerprint analysis. She further testified that every individual fingerprint has approximately 80 to 120 classifiable characteristics, and that every characteristic between two prints must be identical for them to be considered a match. Here, because of the limited nature of the partial print, she was only able to match 18 characteristics, meaning that it matched 15% to 22.5% of the characteristics of defendant's inked print. Further, there was no evidence presented at trial that a second examiner had made a positive verification that the partial print was made by defendant. No other evidence was

introduced at trial linking defendant to the crime. People v Jones, 2022 NY Slip Op 03590, Fourth Dept 6-3-22

Practice Point: Here a partial fingerprint matched only 15 to 22.5% of the characteristics of defendant's inked print and the "match" was not verified by a second examiner conducting a blind verification. There was no other evidence linking defendant to the burglary. The conviction was deemed against the weight of the evidence.

CRIMINAL LAW, CONSTRUCTIVE POSSESSION.

THE PROOF DEFENDANT CONSTRUCTIVELY POSSESSED A FIREARM FOUND IN THE CEILING OF A HOUSE WHERE DEFENDANT WAS A GUEST WAS LEGALLY INSUFFICIENT; DNA EVIDENCE MAY HAVE DEMONSTRATED DEFENDANT POSSESSED THE FIREARM AT SOME POINT IN TIME, BUT IT DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION AT THE TIME THE FIREARM WAS SEIZED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, over a dissent, determined the proof defendant constructively possessed a firearm was legally insufficient. The firearm was in the drop ceiling of a living room in which defendant was present as a guest. DNA evidence may have demonstrated defendant possessed the firearm at a point in time, but did not demonstrate constructive possession at the time the firearm was seized:

A defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession, and it is undisputed here that defendant had no connection to the apartment other than being there for a brief period of time for the purpose of gambling … . Further, the People failed to establish that defendant "exercised dominion or control over the [handgun] by a sufficient level of control over the area in which [it was] found" … .

… [D]efendant's contemporaneous text messages did not evince defendant's consciousness of guilt and, in any event, "mere knowledge of the presence of the handgun would not establish constructive possession" … . Further, although

evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that other individuals in the apartment were excluded as contributors thereto would support an inference that defendant physically possessed the gun at some point in time … , we conclude that it was not sufficient to support an inference that defendant had constructive possession of the weapon at the time that it was discovered … . People v King, 2022 NY Slip Op 03606, Fourth Dept 6-3-22

Practice Point: Here DNA evidence suggested the defendant possessed the firearm at some point. But defendant's presence as a guest in the room where the firearm was found was not sufficient evidence of constructive possession of the firearm. Conviction reversed.

CRIMINAL LAW, HARVEY WEINSTEIN.

HARVEY WEINSTEIN'S CRIMINAL SEXUAL ACT AND RAPE CONVICTIONS AFFIRMED (FIRST DEPT).

The Frist Department, affirming Harvey Weinstein's criminal sexual act and rape convictions, in a full-fledged opinion by Justice Mazzarelli, determined the expert testimony about rape trauma was admissible, the Molineux evidence was properly admitted on the issue of intent, and the Sandoval ruling was proper. The opinion is fact-specific and much too detailed to fully summarize here:

… [W]e find that the trial court properly permitted Dr. Ziv to testify. … [D]efendant has presented us with no authority suggesting that rape trauma syndrome has been discredited as a scientific phenomenon … . And because the syndrome is shrouded by certain rape "myths," we can think of no more appropriate area where a jury requires the elucidation that can be facilitated by an expert witness. In other words, where there was a risk that the jury would be "puzzled" by some of the behaviors of the complainants during and after their sexual encounters with defendant, it was appropriate to admit "evidence of psychological syndromes" that would eliminate that confusion … . After all, defendant made clear that his defense would be based on those behaviors, which he would argue to the jury were inconsistent with how a victim of sexual assault would behave. * * *

From the People's perspective, there was a significant risk that the jury would have concluded that defendant did not intend to compel the women to have sex with him. By introducing the Molineux evidence, the People were able to counter defendant's narrative, by showing that the offenses against Haley and Mann were simply more elaborate manifestations of his practice of baiting women with opportunities for career advancement, and then taking advantage, all the while being completely uninterested in whether the women welcomed his advances, and being determined to go forward whether or not they did. Of course, the People could have attempted to prove defendant's guilt merely by relying on the testimony of Haley, Mann and Sciorra, but that is an insufficient reason to preclude Molineux evidence … . * * *

The amount of Sandoval material is unquestionably large, and, at first blush, perhaps appears to be troublingly so. Nevertheless, in considering the propriety of whether to admit Sandoval material, and how much, the Court of Appeals has plainly stated that "the determination rests largely within the reviewable discretion of the trial court, to be exercised in light of the facts and circumstances of the particular case before it" (People v Hayes, 97 NY2d 203, 208 [2002]). While we acknowledge the sheer size of the impeachment material that the court allowed, we have analyzed that decision within the larger context of all of the circumstances presented by this case, and have concluded that the court providently exercised its discretion…. . People v Weinstein, 2022 NY Slip Op 03576, First Dept 6-2-22

Practice Point: The First Department found that the expert testimony about rape trauma syndrome, the extensive Molineux evidence, and the extensive Sandoval evidence were properly admitted in the Harvey Weinstein trial.

CRIMINAL LAW, JUDGES, ATTORNEYS, CONFLICT OF INTEREST.

THE JUDGE'S LAW CLERK WAS THE DISTRICT ATTORNEY WHO PROSECUTED DEFENDANT; THE JUDGE SHOULD NOT HAVE DECIDED DEFENDANT'S MOTION TO VACATE HIS CONVICTION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction should not have been considered by the judge whose law clerk was the District Attorney at the time of defendant's conviction:

As one of the grounds raised in his CPL article 440 motion, defendant argued that he was deprived of his right to appear before the grand jury due to the actions of the District Attorney. The parties do not dispute that, at the time that defendant's CPL article 440 motion was decided, the judge's law clerk was the former District Attorney who had prosecuted defendant. That said, defendant contends that the judge should have recused himself from deciding defendant's motion. We agree. "Not only must judges actually be neutral, they must appear so as well" … . In view of the law clerk's direct involvement in defendant's case during her tenure as the District Attorney and the allegations made in the CPL article 440 motion about her conduct while she was prosecuting him, as well as taking into account the need to maintain the appearance of impartiality, it was an improvident exercise of discretion for the judge to decide defendant's motion … . People v Roshia, 2022 NY Slip Op 03546, Third Dept 6-2-22

Practice Point: The judge should not have decided defendant's motion to vacate his conviction because the judge's law clerk was the DA who prosecuted defendant.

CRIMINAL LAW, JUDGES, JURY INSTRUCTIONS, JUSTIFICATION DEFENSE, APPEALS.

THE JURY WAS NOT INSTRUCTED TO STOP DELIBERATIONS IF IT FOUND THE JUSTIFICATION DEFENSE APPLIED TO THE TOP COUNT (MURDER); DEFENDANT'S MANSLAUGHTER CONVICTION REVERSED IN THE INTEREST OF JUSTICE (THE ISSUE WAS NOT PRESERVED) (THIRD DEPT).

The Third Department, reversing defendant's manslaughter conviction in the interest of justice, determined the jury instruction on the justification defense was flawed. The instruction did not explain that if the justification defense was the basis for acquittal on the top count (murder here) the jury must not consider the lesser counts:

… Supreme Court inadequately charged the jury regarding his justification defense. Although this issue is unpreserved inasmuch as defendant failed to raise it during the charge conference and did not object to the final charge … , we nevertheless find it appropriate to exercise our interest of justice jurisdiction to take corrective action and reverse defendant's conviction … .

Where … a defendant raises a claim of self-defense, the trial court commits reversible error if it fails to "instruct the jury that, if it finds the defendant not guilty of a greater charge on the basis of justification, it is not to consider any lesser counts" … . This error was compounded by the verdict sheet, which directed the jury to consider manslaughter in the first degree if the jury found defendant not guilty of murder in the second degree; the verdict sheet did not contain a qualifier if the acquittal of murder was based on the defense of justification … . Even though … "the jury may have acquitted on the top charge[] without relying on defendant's justification defense, it is nevertheless impossible to discern whether acquittal of the top count[] was based on the jury's finding of justification so as to mandate acquittal on the lesser count[] to which justification also applied" … .People v Harris, 2022 NY Slip Op 03548, Third Dept 6-2-22

Practice Point: If the justification defense is to be considered by the jury, the jury must be instructed to stop any further deliberations (re: the lesser counts) if the justification defense is deemed to apply to to the top count. Here the issue was not

preserved by an objection to the jury instruction, but the Third Department reversed in the interest of justice.

CRIMINAL LAW, JUDGES, PLEA COLLOQUY.

DEFENDANT'S PLEA COLLOQUY NEGATED AN ESSENTIAL ELEMENT (JURAT) OF HIS PERJURY CONVICTIONS; PLEA VACATED (THIRD DEPT).

The Third Department, vacating the plea to perjury, determined defendant's plea colloquy negated an essential element of the crime:

… [W]e conclude that defendant is entitled to challenge the plea because he made statements during the colloquy that negated an essential element of the crime … . "A person is guilty of perjury in the third degree when he [or she] swears falsely" … . "A person 'swears falsely' when he [or she] intentionally makes a false statement which he [or she] does not believe to be true . . . under oath in a subscribed written instrument" … . An "'[o]ath' includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated" … . The document in question was captioned as an "Affidavit of Financial Information." The preamble begins with the representation that defendant, "being duly sworn, deposes and says the following under penalty of perjury." The following statement is included above defendant's signature: "I have carefully read the foregoing statements contained in this Affidavit of Financial Information. They are true and correct." The document includes defendant's signature and a jurat completed by defendant's attorney in July 2017 … . The same is true for the amended affidavit signed in August 2017.

During the plea allocution, defendant explained that he received the affidavit from his attorney by e-mail "and then [he] filled it out on e-mail as well and sent it right back to him." No statement was made that the attorney actually administered an oath to defendant before he signed the affidavits. Given defendant's limited explanation of the affidavit sequence, County Court was obligated to further inquire as to the oath element before accepting the plea … . People v Marone, 2022 NY Slip Op 03543, Third Dept 6-2-22

Practice Point: Here the defendant's plea colloquy negated an essential element of the crime.. The judge should have inquired further before accepting the plea. Plea vacated.

CRIMINAL LAW, JUDGES, PRONOUNCE SENTENCE.

THE SENTENCING JUDGE DID NOT SEPARATELY PRONOUNCE A SENTENCE FOR EACH CONVICTION; MATTER REMITTED (THIRD DEPT).

The Third Department, remitting the matter for resentencing, noted sentencing judge did not pronounce sentence separately for the two counts:

… [W]e are … obliged to remit for resentencing. The sentencing transcript reflects that County Court imposed a single sentence upon defendant and "failed to pronounce sentence separately on each of the two counts [of] which [she was convicted], as required by CPL 380.20" … . As a result, the matter must be remitted so that County Court can pronounce sentence on each count … . People v Robbins, 2022 NY Slip Op 03549, Third Dept 6-2-22

Practice Point: A sentencing judge must pronounce a sentence separately for each conviction.

CRIMINAL LAW, MOLINEUX EVIDENCE NOT NEEDED TO PROVE INTENT.

MOLINEUX EVIDENCE OF A PRIOR BURGLARY OF THE ROBBERY-VICTIM'S HOME TO SHOW THE INTENT TO COMMIT ROBBERY AND GRAND LARCENY SHOULD NOT HAVE BEEN ADMITTED; THE INTENT TO COMMIT ROBBERY AND GRAND LARCENY WAS DEMONSTRATED BY THE VICTIM'S TESTIMONY RENDERING EVIDENCE OF THE PRIOR BURGLARY TOO PREJUDICIAL (FOURTH DEPT).

The Fourth Department, reversing defendant's robbery and grand larceny convictions, determined Molineux evidence of a burglary of the robbery-victim's

home three days before the robbery should not have been admitted to show intent. The intent to rob was demonstrated by the victim's testimony, rendering proof of the prior burglary more prejudicial than probative:

… [E]vidence that defendant may have been involved in an earlier burglary of the victim's home was not necessary for the jury to infer that, three days later, defendant had the intent to rob the victim. Rather, defendant's intent to forcibly steal property can be inferred from the victim's testimony that defendant, while wielding a baseball bat, directed him to comply with the demands of an unidentified masked gunman to turn over money and property. Under those circumstances, any probative value of the evidence of the prior burglary "is outweighed by its potential for prejudice" … . For the same reason, defendant's "intent to deprive another of property" … as required for a conviction of grand larceny in the fourth degree (§ 155.30 [1], [5]), or intent "to place another person in reasonable fear of physical injury, serious physical injury or death" as required for a conviction of menacing in the second degree (§ 120.14 [1]) could likewise be easily inferred from the victim's testimony describing defendant's conduct during the alleged crimes. People v Dejesus, 2022 NY Slip Op 03584, Fourth Dept 6-3-22

Practice Point: Evidence of defendant's commission of an uncharged crime (Molineux evidence) to show defendant's intent to commit the charged offenses will be deemed too prejudicial if the intent element of the charged offenses is demonstrated by the victim's testimony.

CRIMINAL LAW, TRAFFIC STOPS.

THE POLICE DID NOT HAVE PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED OR WAS COMMITTING A CRIME WHEN THEY BLOCKED DEFENDANT'S VEHICLE WITH THE POLICE VEHICLE, WHICH CONSTITUTES A SEIZURE; PLEA VACATED AND SUPPRESSION MOTION GRANTED (FOURTH DEPT).

The Fourth Department, vacating defendant's plea and granting defendant's suppression motion, determined the police did not have probable cause to seize defendant's vehicle by blocking its exit with the police vehicle:

Police officer testimony at the suppression hearing established that, at the time the officers stopped their vehicle in front of defendant's vehicle, they had observed defendant's presence in a vehicle at 1:00 p.m. in the parking lot of an apartment complex known for drug activity and where officers believed defendant did not reside, and they were aware that defendant had a history of drug-related convictions. Such evidence does not provide a reasonable suspicion that defendant had committed, was committing, or was about to commit a crime … . People v King, 2022 NY Slip Op 03595, Fourth Dept 6-3-22

Practice Point: Blocking defendant's vehicle with a police vehicle is a seizure which requires probable cause to believe defendant has committed or is committing a crime.

EDUCATION-SCHOOL LAW, TRANSPORTATION TO PRIVATE SCHOOLS.

THE EDUCATION LAW PERMITS, BUT DOES NOT REQUIRE, SCHOOL DISTRICTS TO PROVIDE TRANSPORTATION TO STUDENTS ATTENDING NONPUBLIC SCHOOLS WHEN THE PUBLIC SCHOOLS ARE NOT IN SESSION (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Ceresia, determined that Education Law 3635 should not be interpreted to require school districts to provide transportation to nonpublic schools when public schools are not in session:

As is relevant here, Education Law § 3635 (1) (a) states that "[s]ufficient transportation facilities . . . shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children." * * *

We reject Supreme Court's broad view of the statute not only because it runs afoul of the legislative history, but also because it would lead to unreasonable results … . To be sure, the Legislature could not have intended to require school districts to transport nonpublic school students in the summer, on weekends, on state or

federal holidays, or on days when public schools are closed for weather-related or other emergency reasons, none of which would be foreclosed by Supreme Court's interpretation. … [W]e hold that Education Law § 3635 (1) (a) permits, but does not require, school districts outside New York City to transport nonpublic school students to and from school on days when the public schools are closed. Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville Cent. Sch. Dist., 2022 NY Slip Op 03566, Third Dept 6-2-22

Practice Point: Here the legislative history of Education Law 3635 was consulted to determine that school districts are permitted, but not required, to provide transportation to nonpublic-school students went the public schools are not in session.

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S CAUSES OF ACTION FOR CONSTRUCTIVE DISCHARGE AND HOSTILE WORK ENVIRONMENT SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined plaintiff's causes of action for constructive discharge and hostile work environment should have been dismissed. The court laid out the criteria for those causes of action:

"An employee is constructively discharged when her or his employer, rather than discharging the plaintiff directly, deliberately created working conditions so intolerable that a reasonable person in the plaintiff's position would have felt compelled to resign" … . Here, the defendants established, prima facie, that the plaintiff's complaints were insufficient to show an intolerable work environment that would lead a reasonable person in that position to feel compelled to resign … . …

A hostile environment claim "involves repeated conduct," not "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" … . Here, the two discrete acts alleged by the plaintiff were insufficient to create a hostile

work environment … . Blackman v Metropolitan Tr. Auth., 2022 NY Slip Op 03490, Second Dept 6-1-22

Practice Point: A "constructive discharge" employment-discrimination cause of action requires the deliberate creation of intolerable working conditions designed to force the plaintiff to quit (not demonstrated here). A "hostile work environment" employment-discrimination cause of action requires "repeated conduct" which is not demonstrated discrete acts such as termination, failure to promote, denial of transfer or refusal to hire.

FAMILY LAW, ATTORNEYS, APPEALS.

ALTHOUGH FATHER FAILED TO APPEAR, HIS COUNSEL APPEARED AND FATHER WAS THEREFORE NOT IN DEFAULT; BECAUSE FATHER WAS NOT IN DEFAULT, APPEAL IS NOT PRECLUDED (FOURTH DEPT).

The Fourth Department, vacating the portions of the order entered on default, determined father's failure to appear was not a default because his counsel appeared. Because father was not in default, appeal is not precluded:

We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father "was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" … . Matter of Akol v Afet, 2022 NY Slip Op 03641, Fourth Dept 6-3-22

Practice Point: When counsel appears in Family Court, the party represented by counsel is not in default. An appeal is available to a party not in default.

FAMILY LAW, JUVENILE DELINQUENCY.

THIS JUVENILE DELINQUENCY PROCEEDING STEMMED FROM ALLEGATIONS RESPONDENT COMMITTED VIOLENT ACTS AGAINST THE MOTHER OF HIS CHILD; THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED “IN FURTHERANCE OF JUSTICE;” CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Family Court, determined this juvenile delinquency proceeding should not have been dismissed “in furtherance of justice.” The respondent was charged with acts of violence against the mother of his child:

Dismissal in the furtherance of justice is an extraordinary remedy that must be employed “sparingly, that is, only in those rare cases where there is a compelling factor which clearly demonstrates that prosecution . . . would be an injustice” … . In determining such a motion, the statutory factors which must be considered, individually and collectively, are as follows: “(a) the seriousness and circumstances of the crime; (b) the extent of harm caused by the crime; (c) any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition; (d) the history, character and condition of the respondent; (e) the needs and best interest of the respondent; (f) the need for protection of the community; and (g) any other relevant fact indicating that a finding would serve no useful purpose” … . “At least one of these factors must be readily identifiable and sufficiently compelling to support the dismissal” …

According to the sworn statement of the victim — the mother of respondent’s child — respondent became verbally abusive toward her when she got pregnant, and physically abusive after their child was born, including pinching, punching and slapping her, once when she was holding the child. On the date in question, respondent threw a full, eight-ounce baby bottle at the victim, which hit her in the face, when she asked him to feed the child, who was crying. The victim stated that, although she was bleeding heavily, respondent and his father discouraged her from seeking medical attention. When she eventually did go to the hospital the next day, a cut on her face was glued shut by a doctor and she was told to return for X rays after the swelling had abated. The victim indicated that she felt unsafe living with

the child in the home of respondent and his father. Matter of James JJ., 2022 NY Slip Op 03555, Third Dept 6-2-22

Practice Point: The allegations of violence in this juvenile delinquency proceeding were deemed too serious to warrant dismissal of the juvenile delinquency proceeding "in furtherance of justice." This remedy should be used sparingly and at least one of the statutory factors for dismissal in furtherance of justice must be readily identifiable.

FAMILY LAW, JUDGES, CUSTODY MODIFICATION.

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined the court should have held a hearing on father's petition for a modification of custody:

… [T]he father alleged … that, since the prior order, he has relocated to a small, quiet apartment but now has a lengthy commute each way to exercise his parenting time, the child wishes to spend more time with him and the prior order provides him with a limited amount of a parenting time when considering the progress he has made to care for the child. Family Court sua sponte dismissed the father's petition without prejudice, finding that the father failed to allege a sufficient change in circumstances. The father appeals.

Family Court erred in dismissing the petition without holding a hearing. "A parent seeking to modify a prior order of custody and visitation is required to demonstrate that a change in circumstances has occurred since entry thereof that then warrants the court engaging in an analysis as to the best interests of the child" … . "While not every petition in a Family Ct Act article 6 proceeding is automatically entitled to a hearing" … , "[g]enerally, where a facially sufficient petition has been filed, modification of a Family Ct Act article 6 custody order requires a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard" … . Matter of Neil VV. v Joanne WW., 2022 NY Slip Op 03557, Third Dept 6-2-22

Practice Point: Where, as here, a facially sufficient petition for a modification of custody had been filed, petitioner is entitled to a hearing.

INSURANCE LAW, ABORTION, CONSTITUTIONAL LAW, RELIGION.

A RECENT US SUPREME COURT RULING DOES NOT AFFECT THE NYS COURT OF APPEALS RULING THAT REGULATIONS REQUIRING HEALTH INSURANCE POLICIES TO COVER "MEDICALLY NECESSARY ABORTIONS" BUT WHICH EXEMPT POLICIES PROVIDED BY "RELIGIOUS EMPLOYERS" DO NOT IMPAIR THE FREE EXERCISE OF RELIGION (THIRD DEPT).

The Third Department, on remand from the US Supreme Court, determined the Supreme Court's recent ruling in Fulton v Philadelphia [141 S Ct 1868] did not overturn the NYS Court of Appeals ruling in Catholic Charities of Diocese of Albany [7 NY3d 510]. In Catholic Charities the Court of Appeals held the requirement that health insurance policies cover "medically necessary abortions" but which exempts policies provided by "religious employers" did not impair the free exercise of religion:

… Catholic Charities "is not directly inconsistent with the rationale employed by the United States Supreme Court in any subsequent case, and is thus binding on us as an intermediate appellate court" … .Roman Catholic Diocese of Albany v Vullo, 2022 NY Slip Op 03550, Third Dept 6-2-22

Practice Point: The NYS Court of Appeals ruling In Catholic Charitie [7 NY3d 510] approving the requirement that health insurance policies cover "medically necessary abortions" (with an exemption for "religious employers") was not affected by the recent ruling by the US Supreme Court in Fulton v Philadelphia [141 S Ct 1868].

LABOR LAW-CONSTRUCTION LAW, INJURY LIFTING A HEAVY OBJECT FOUR OR FIVE INCHES.

PLAINTIFF FELT HIS ARM SNAP WHEN ATTEMPTING TO LIFT A 400 POUND ELEVATOR PLATFORM FOUR OR FIVE INCHES TO PLACE A PALLET JACK UNDER IT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this Labor Law 240(1) action should have been granted. The pallet jack, which was deemed a safety device, wasn't long enough to fully lift the 400 pound elevator platform. Plaintiff was lifting the end of the platform which was not supported by the pallet jack (in order to place another pallet jack under it) when he felt his arm snap:

Plaintiff … was injured as he was attempting to move a 400-pound elevator platform from the front of a flatbed truck to the tailgate. The platform, which was about seven feet long, rested on a pallet jack that was too small to allow the platform to rest properly on it, causing the platform to dip and touch the flatbed. As plaintiff lifted the platform about four or five inches off the pallet jack in order to place a second pallet underneath to facilitate moving the platform, he felt a snap in his left arm.

The pallet jack was a safety device that was insufficient to allow plaintiff to move the platform from the front of the flatbed truck to the tailgate. In view of the weight of the platform and the amount of force it was able to generate, even in falling a relatively short distance, plaintiff's injury resulted from a failure to provide adequate protection, required by Labor Law § 240(1), against a risk arising from a significant elevation differential … . Schoendorf v 589 Fifth TIC I LLC, 2022 NY Slip Op 03580, First Dept 6-2-22

Practice Point: Even a height-differential of four or five inches can support a Labor Law 240(1) cause of action. Here plaintiff was attempting to lift a 400 pound elevator platform a few inches in order to place a pallet jack under it when he injured his arm.

NEGLIGENCE, SLIP AND FALL, EMPLOYMENT LAW, INDEMNITY, CONTRIBUTION.

PLAINTIFF'S EMPLOYER'S MOTIONS FOR SUMMARY JUDGMENT ON DEFENDANT'S CONTRACTUAL INDEMNITY, COMMON-LAW INDEMNITY AND CONTRIBUTION CAUSES OF ACTION SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant property-owner's indemnity claims against plaintiff's employer (Sodexo) in this slip and fall case should have been dismissed. Defendant, as the property-owner, was responsible for the structural maintenance of the stairwell where plaintiff fell. The fall was not caused by debris on the stairwell, which was Sodexo's only responsibility under its contract with defendant:

While defendant argued … that Sodexo's responsibility to "provide basic housekeeping to all areas of operation during the course of the operating day" included the subject stairs, it is clear from the incident report and post incident/accident root cause analysis form that the staircase was clear of obstructions, objects, substances and debris of any sort. Accordingly, defendant failed to raise a triable issue of fact regarding whether [the] accident was caused by Sodexo's sole negligence, so Sodexo was entitled to summary judgment dismissing defendant's cause of action for contractual indemnity. * * *

Defendant has not alleged any scenario under which it could be held vicariously or statutorily liable for any negligence of Sodexo. Accordingly, Sodexo was entitled to summary judgment dismissing defendant's cause of action for common-law indemnification … .

… Inasmuch as defendant failed to raise an issue of fact as to Sodexo's negligence, defendant is not entitled to contribution from Sodexo, and Sodexo's motion for summary judgment dismissing defendant's contribution cause of action should have been granted. O'Toole v Marist Coll., 2022 NY Slip Op 03560, Third Dept 6-2-22

Practice Point: Defendant property owner's actions against plaintiff's employer for contractual and common law indemnity and contribution should have been dismissed because plaintiff's slip and fall was not the result of any act or omission on plaintiff's employer's part. The criteria for indemnity and contribution causes of action are explained.

NEGLIGENCE, SLIP AND FALL, PROOF OF CAUSE.

DESPITE THE FACT THAT PLAINTIFF COULD NOT SAY WHICH OF TWO CRACKS IN THE PAVEMENT CAUSED HIS FALL, THE CAUSE OF THE FALL WAS SUFFICIENTLY IDENTIFIED TO WITHSTAND SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted on the ground plaintiff could not identify the cause of his fall. Plaintiff alleged that one of two cracks in the pavement caused the fall:

Plaintiff testified that, on the day of the incident, the weather was clear and there was no snow or debris on the surface of the parking lot. He had parked his car in the parking lot and was approaching the front door of the store when his foot suddenly "hit something along the pavement and . . . stopped," causing him to fall to the ground. An individual who was walking behind plaintiff came to his aid, helping plaintiff up off the ground and assisting him back to his vehicle. At the time of his fall, plaintiff did not look at the ground to determine the cause. However, he recalled that, after being helped back to his vehicle, he looked back and noticed a cracked area of the pavement where he had fallen. Plaintiff was shown photographs of the parking lot and identified the location of his fall by circling in one of the photographs an uneven area of the pavement with two cracks in close proximity to one another. Upon further questioning, plaintiff was unable to identify which of the two cracks caused the fall, but repeatedly testified that he knew it was one of those two cracks based upon where he landed when he fell.

… Although plaintiff's statements were not without some inconsistencies, he was steadfast in his testimony that he tripped on one of the two identified cracks in the

pavement of the parking lot. Despite Supreme Court's suggestion to the contrary, plaintiff was not required to state for certain which particular crack caused him to fall in order to withstand summary judgment … . Bovee v Posniewski Enters., Inc., 2022 NY Slip Op 03561, Third Dept 6-2-22

Practice Point: Plaintiff was able to testify that one of two cracks in the pavement was the cause of his fall. The cause was sufficiently identified to withstand summary judgment.

NEGLIGENCE, TRAFFIC ACCIDENTS, MUNICIPAL LAW.

IN THIS Y-INTERSECTION TRAFFIC ACCIDENT CASE, (1) THE TOWN DEMONSTRATED IT DID NOT HAVE THE REQUIRED WRITTEN NOTICE THAT OVERGROWN FOLIAGE BLOCKED LINES OF SIGHT; (2) QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON THE CAUSES OF ACTION ALLEGING INADQUATE SIGNAGE AND NEGLIGENT ROADWAY DESIGN (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court Y-intersection traffic accident case, determined:(1) the cause of action against the town alleging overgrown foliage blocked drivers' line of sight should have been dismissed because the town demonstrated it did not have written notice of the condition; (2) the written-notice requirement does not apply to the causes of action alleging inadequate signage and negligent design, which properly survived summary judgment:

By its submission of the affidavits of its Town Clerk and Superintendent of Highways who both averred that, after review of the pertinent records, no written notice was received pertaining to any alleged defective or dangerous condition caused by or from overgrown trees … , the Town successfully shifted the burden to plaintiffs to establish an issue of fact as to prior written notice, which plaintiffs failed to do … .

As to plaintiffs' claims pertaining to inadequate signage and negligent design of the intersection, we agree that prior written notice requirements do not apply to these alleged defects … . * * *

… [T]he record demonstrates that, at the very least, at some point in the modern era the roads were paved and signage was installed. The Town has provided no proof as to when or how often these activities have been undertaken or that they were completed in compliance with the standards in place at the time … .

We further agree that Supreme Court properly rejected the Town's contention that plaintiffs' allegations of negligence by the Town were negated by [the drivers'] familiarity with the intersection. … … [I]t cannot be said that this Y intersection was reasonably safe as a matter of law, nor did the Town conclusively demonstrate that placing the stop sign in a different location would have resulted in the same conduct by [the drivers]. … [T]riable issues of fact exist as to whether the signage at the intersection was a proximate cause of the accident … . Read v Bell, 2022 NY Slip Op 03563, Third Dept 6-2-22

Practice Point: In a traffic accident case, a municipality will not be liable for overgrown foliage which blocks lines of sight if the town has not been provided with written notice of the condition. The written-notice requirement does not apply to causes of action alleging the accident was caused by inadequate signage or negligent roadway design.

NEGLIGENCE, SLIP AND FALL, EMPLOYMENT LAW, WORKERS' COMPENSATION.

DEFENDANT PROPERTY OWNER FAILED TO DEMONSTRATE IT WAS THE ALTER EGO OF PLAINTIFF'S EMPLOYER OR THAT PLAINTIFF WAS DEFENDANT'S SPECIAL EMPLOYEE; THEREFORE PLAINTIFF'S PERSONAL INJURY ACTION WAS NOT PRECLUDED BY THE EXCLUSIVE REMEDY ASPECT OF THE WORKERS' COMPENSATION LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant Zorn Realties, the owner of the property, did not demonstrate it was the alter ego of

plaintiff's employer, Zorn Poultry Farm, and did not demonstrate plaintiff was a special employee of Zorn Realties. Therefore, the negligence action stemming from plaintiff's fall through a chute or a hole on defendant's property was not precluded by the exclusive-remedy aspect of the Workers' Compensation Law:

"'A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer'" … . "A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" … . However, "a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" … .

… Although the defendant presented evidence that the two entities were related inasmuch as they shared an address and a liability insurance policy, the defendant failed to establish that the entities shared officers or had identical owners. Additionally, the evidence showed that the entities served different purposes, had separate bank accounts, filed separate tax returns, and did not have a shared workers' compensation policy … . …

"Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive . . . Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business . . . The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work'" … .

… [T]he defendant failed to establish … that the plaintiff was its special employee at the time of the accident because it did not submit sufficient evidence to establish, inter alia, that it controlled and directed the manner, details, and ultimate result of the plaintiff's work, nor did it establish that the plaintiff had knowledge of and consented to a special employment relationship … . Mauro v Zorn Realties, Inc., 2022 NY Slip Op 03509, Second Dept 6-1-22

Practice Point: Here the defendant property owner was not able to take advantage of the exclusive-remedy aspect of the Workers' Compensation Law in this personal injury action. Plaintiff's employer was not the alter ego of defendant and plaintiff was not defendant's special employee.

PRODUCTS LIABILITY, ROUTER, SEVERED THUMB.

IN THIS PRODUCTS LIABILITY ACTION WHERE A ROUTER SEVERED PLAINTIFF'S THUMB, THE FAILURE-TO-WARN CAUSE OF ACTION BASED ON THE MANUAL SHOULD HAVE BEEN DISMISSED BECAUSE PLANTIFF NEVER READ IT; THE GENERALIZED FAILURE-TO-WARN CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; DISAGREEING WITH THE SECOND DEPARTMENT, THE DESIGN-DEFECT CAUSE OF ACTION BASED ON THE LACK OF AN INTERLOCK DEVICE PROPERLY SURVIVED SUMMARY JUDGMENT (FIRST DEPT).

The First Department, modifying Supreme Court in this products liability case where plaintiff severed his thumb using a router, determined: (1) the failure-to-warn cause of action based upon the product manual should have been dismissed because plaintiff testified he never read it; (2) the generalized failure-to-warn cause of cause properly survived summary judgment; and (3) the design defect cause of action alleging the router should have had an interlock device which would shut it down properly survived summary judgment. Whether plaintiff was familiar with the risk of amputation such that the defendant was relieved of the duty to warn is a question of fact. And whether the lack of an interlock device is a design defect is a question of fact (disagreeing with decisions from the Second Department):

… [T]he record contains evidence that plaintiff had knowledge of power tools other than the router and the general hazards associated with cutting devices. Plaintiff also had used the router on one prior occasion at the premises before the accident. However, it is for a jury, not the court, to determine whether, based on the evidence and testimony presented, plaintiff had sufficient knowledge of the specific hazards from the use of the router to relieve defendants of their duty to

warn of them. Further, whether the router presented an open and obvious danger is also a jury issue. * * *

The branch of defendants' motion for summary judgment dismissing the design defect claim based on the lack of an interlock was also properly denied. We recognize that the Second Department has held that such a claim is per se unviable in Chavez v Delta Intl. Mach. Corp. (130 AD3d 667 [2d Dept 2015]), Patino v Lockformer Co. (303 AD2d 731 [2d Dept 2003]), and Giunta v Delta Intl. Mach. (300 AD2d 350 [2d Dept 2002]). Chavez (at 669), the most recent of these cases, cited Patino and Giunta for this proposition, and in Giunta (at 351), the Second Department held that a theory of liability that a "table saw should have been designed with an interlock which would have prevented the motor from starting if the blade guard was off. . . . was explicitly rejected as a matter of law in David v Makita U.S.A. (233 AD2d 145 [1st Dept 1996]), and implicitly rejected in Banks v Makita, U.S.A. (226 AD2d 659 [2d Dept 1996], lv denied 89 NY2d 805 [1996])."

However, we read neither David nor Banks as supporting Giunta's conclusion. Vasquez v Ridge Tool Pattern Co., 2022 NY Slip Op 03488, First Dept 5-31-22

Practice Point: In this products liability case where plaintiff lost a thumb using a router, there was a question of fact whether plaintiff was familiar enough with the danger of amputation that the defendant should be relieved of liability for the failure to warn. Here the First Department, disagreeing with the Second Department, determined the absence of an interlock device which would shut the router down raised a question of fact on the design-defect cause of action.

SECURITIES, CIVIL PROCEDURE.

PLAINTIFFS STATED CAUSES OF ACTION FOR VIOLATIONS OF THE SECURITIES ACT BASED UPON ALLEGEDLY MISLEADING INFORMATION IN THE SECONDARY PUBLIC OFFERING (SPO) (FIRST DEPT).

The First Department determined plaintiffs, who purchased securities based upon allegedly inaccurate information in defendants' secondary public offering (SPO), stated causes of action for violations of the Securities Act. The court noted that the heightened pleading requirements of CPLR 3015(b) do not apply to the Securities Act violations alleged in the complaint:

… [C]laims for violations of sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (15 USC §§ 77k, 77l[a][2], and 77o) are not subject to the heightened pleading requirements of CPLR 3016(b) … .

… [T]he alleged misstatements in the SPO cannot be deemed forward-looking or mere puffery as a matter of law because the complaint alleges that defendants knew at the time of the SPO that present facts rendered statements in the SPO misleading or false. The generic, boilerplate risk warnings in the offering documents do not shield defendants from liability … .

… [P]laintiff adequately]alleges that, once [defendant] spoke about its "significant exposure to emerging markets in Asia," it was obligated to disclose the "whole truth," namely that its mobile solutions business in China was actually experiencing a sharp decline at the time of the SPO … . Erie County Empls.' Retirement Sys. v NN, Inc., 2022 NY Slip Op 03473, First Dept 5-31-22

Practice Point: The heightened pleading requirements for fraud (CPLR 3016) do not apply to the causes of action here alleging violations of the Securities Act—allegedly misleading information in a secondary public offering (SPO).

TRUSTS AND ESTATES, FOREIGN WILLS, DOMICILE.

IF GERMANY WAS DECEDENT'S DOMICILE, NEW YORK MAY RECOGNIZE THE GERMAN HOLOGRAPHIC WILL; MATTER SENT BACK TO SURROGATE'S COURT TO DEVELOP A RECORD ON THE DOMICILE ISSUE (THIRD DEPT).

The Third Department, reversing Surrogate's Court, determined a hearing should be held to determine decedent's domicile. Decedent was a world traveler who owned property in Germany and executed a holographic will in Germany. If Germany was his domicile, New York may recognize the holographic will:

… [D]ecedent was initially domiciled in New Jersey before he left the United States in 2014 … . Since decedent's domicile had been established, "unlike mere physical residency, [domicile] is presumed to continue until a new one is acquired and is controlled by the subjective intent of the party claiming domicile" … . This determination generally involves questions of both fact and law "and is based upon 'conduct manifesting an intent to establish a permanent home with permanent associations in a given location'" … . Where there are particularly unique facts, like here with decedent being a perpetual world traveler, domicile is often "a question of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals" … .

Domicile is particularly important where, like here, there is a petition to probate a holographic will. Although there are limited circumstances where a holographic will may be validly executed in New York (see EPTL 3-2.2), New York courts may nevertheless accept holographic wills that are "executed and attested in accordance with the local law of . . . [t]he jurisdiction in which the testator was domiciled, either at the time of execution or of death" (EPTL 3-5.1 [c] [3] …). In doing so, New York courts may take judicial notice of the laws of other countries and, as a matter of comity, may accept the findings of foreign courts (see CPLR 4511 [b] …).

… [T]he record was incomplete and must be further developed as it relates to the proceedings in Germany. Specifically, we are concerned over the omission of the certificate of inheritance — which petitioner argues established decedent's

domicile in Germany — as such document may, if afforded comity, be dispositive … . Matter of Noichl, 2022 NY Slip Op 03558, Third Dept 6-2-22

Practice Point: Determination of a person's domicile is a question of law and fact, depending in part on the person's intent. Here, if Germany was decedent's domicile at the time the holographic German will was executed, or at the time of death, New York may recognize the German holographic will. Matter sent back to develop a factual record on the domicile issue.

TRUSTS AND ESTATES, TRANSFER OF HOME TO DECEDENT'S CAREGIVERS.

THE TRANSFER OF DECEDENT'S HOME TO THE TWO CHILDREN WHO WERE CARING FOR HIM WAS COMPENSATION FOR THE CAREGIVERS PURSUANT TO AN AGREEMENT, NOT A GIFT (WHICH WOULD NOT HAVE BEEN AUTHORIZED BY THE POWER OF ATTORNEY) (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the transfer of decedent's home to the two children who were caring for decedent was demonstrated to be compensation for the caregivers pursuant to an agreement, not a gift (the power of attorney did not authorize agents to make major gifts):

The court concluded that the transfer was an improper gift, relying on the presumption that "where parties are related, . . . services were rendered in consideration of love and affection, without expectation of payment" … . Even assuming, arguendo, that the presumption applies to the inter vivos transfer at issue here … , we conclude that respondents supported their motion with "clear, convincing and satisfactory evidence[] that there was an agreement . . that the services would be compensated" … . Matter of Maik, 2022 NY Slip Op 03589, Fourth Dept 6-3-22

Practice Point: Here there was an agreement that the children who cared for the disabled decedent would be compensated. The transfer of decedent's home to the caregivers was compensation for their services, not a gift (which would not have been authorized by the power of attorney).

WORKERS' COMPENSATION, SCHEDULE LOSS OF USE (SLU).

THE WORKERS' COMPENSATION BOARD MISINTERPRETED SPECIAL CONSIDERATION 4 TO LIMIT SCHEDULE LOSS OF USE (SLU) OF PLAINTIFF'S LEG TO 10% (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined "special consideration 4" of the Workers' Compensation Guidelines for Determining Impairment was not properly interpreted, resulting in a schedule lose of use (SLU) for claimant's leg that is inappropriately low (10%):

Claimant argues that the Board's interpretation of special consideration 4 and the instructions regarding its application is irrational and runs afoul of the purpose of Workers' Compensation Law § 15 (3). We agree. "SLU awards are not given for particular injuries, but they are made to compensate an injured worker for his or her loss of earning power or capacity that is presumed to result, as a matter of law, from the residual permanent physical and functional impairments to statutorily-enumerated body members" … . * * *

Relying on the plain language of the 2018 guidelines, the Board reads special consideration 4 as making no provision for additional values due to flexion or extension deficits, reasoning that the enumerated SLU range already takes into account range of motion deficits…. . …

Although special consideration 4 may arguably be said to rationally limit an SLU value when it is based upon only a finding of chondromalacia patella, the Board's interpretation of the foregoing instructions results in the obvious inequity identified by claimant and cannot be upheld. To accept the Board's interpretation would be to sanction an application of the 2018 guidelines that results in claimants with only meniscus tears routinely receiving SLU awards far greater than 7½ to 10% based upon their range of motion deficits … . Matter of Blue v New York State Off. Of Children & Family Servs., 2022 NY Slip Op 03565, Third Dept 6-2-22

Practice Point: In determining the schedule loss of use (SLU) for claimant's leg, the Workers' Compensation Board misinterpreted "special consideration 4" resulting in an inappropriately low SLE percentage.

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