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Weekly Reversal Report
June 3 – 7, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts June 3 – 7, 2024, and Posted on the New York Appellate Digest Website on Monday, June 10, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report. Copyright 2024 New York Appellate Digest, LLC

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The Second Department, reversing Supreme Court in this Child Victims Act action, determined the respondeat superior and negligent supervision causes of action against the school alleging sexual abuse of the plaintiff by a teacher should not have been dismissed. Essentially the complaint alleged negligent supervision of both the teacher and the child. The defendant school did not demonstrate a lack of

constructive notice of the abuse which allegedly took place over the course of a year in the same classroom during the school day:

“The employer’s negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring, . . . retention, or supervision of the employee” … .

… “[A] school has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians” … . * * *

… [T]he defendants failed to establish, prima facie, that they lacked constructive notice of the teacher’s alleged abusive propensities and conduct … . “In particular, given the frequency of the alleged abuse, which occurred over” the entirety of a school year, “and always occurred inside the same classroom during the school day, the defendants did not eliminate triable issues of fact as to whether they should have known of the abuse” … .. The defendants similarly failed to demonstrate, prima facie, that their supervision of both the teacher and the plaintiff was not negligent … . Sayegh v City of Yonkers, 2024 NY Slip Op 03065, Second Dept 6-5-24

Practice Point: Here it was alleged plaintiff was sexually abused by a teacher repeatedly over a year during the school day. There were questions of fact whether the school had constructive notice of the abuse which supported causes of action under a respondeat superior theory (negligent supervision of the teacher) and a negligent supervision theory (negligent supervision of the child).

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CIVIL PROCEDURE, BANKRUPTCY, NEGLIGENCE.

PLANTIFF HAD NOT INFORMED THE BANKRUPTCY COURT OF THIS PERSONAL INJURY CAUSE OF ACTION; DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT PURSUANT TO THE DOCTRINE OF JUDICIAL ESTOPPEL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's failure to inform the Bankruptcy Court of this personal injury action triggered the doctrine of judicial estoppel entitling defendants to summary judgment dismissing the complaint:

While a chapter 13 bankruptcy debtor has standing to litigate cases that belong to the estate … , here the "[p]laintiff's prolonged failure to disclose this lawsuit to the [b]ankruptcy [c]ourt renders him judicially estopped from pursuing it" … . The plaintiff took an inconsistent position in the bankruptcy proceeding by, in effect, representing that he did not have the instant legal claim. The characterization of his assets was accepted and endorsed by the bankruptcy court throughout the duration of the bankruptcy proceeding, which included, among other things, confirmation of the plaintiff's plan … .

Based on the defense of judicial estoppel, [defendants] established their prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against each of them … . Cussick v R.L. Baxter Bldg. Corp., 2024 NY Slip Op 03028, Second Dept 6-5-24

Practice Point: Failure to inform the Bankruptcy Court of a cause of action (here a personal-injury suit) triggers the doctrine of judicial estoppel, prohibiting the plaintiff from bringing the suit.

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THE ORDER IMPLEMENTING THE PLAINTIFFS' PLAN FOR THE SEALING OF NYPD'S RECORDS OF FAVORABLY TERMINATED CRIMINAL PROCEEDINGS AMOUNTED TO A PERMANENT INJUNCTION WITHOUT A DETERMINATION ON THE MERITS; MATTER REMITTED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Kern, over a dissenting opinion, determined the order by Supreme Court implementing plaintiffs' plan for sealing the New York City Police Department's (NYPD's) records of criminal prosecutions which are favorably terminated amounted to a permanent injunction issued without a determination on the merits, either by way of a summary judgment motion or a trial:

The New York sealing statutes at issue here, enacted in 1976, require that upon the favorable termination of a criminal proceeding or a noncriminal conviction, unless the government demonstrates to the satisfaction of the court that the interests of justice require otherwise, "arrest information," including photos, palm and fingerprints of arrestees, and official records and papers relating to an arrest or prosecution, will be "sealed and not made available" to any person or public or private agency, subject to six statutorily enumerated exceptions (Criminal Procedure Law §§ 160.50, 160.55 [Sealing Statutes]). * * *

We find that Supreme Court erred by prematurely issuing an overbroad permanent injunction without first making a final determination on the merits of the claim after a trial or summary judgment motion. Contrary to plaintiffs' argument, the Implementing Order is a permanent injunction rather than a preliminary injunction. The purpose of a preliminary injunction "is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" … . Conversely, a permanent injunction is a type of final judgment that is issued on the merits of the claims asserted … . R.C. v City of New York, 2024 NY Slip Op 03017, First Dept 6-4-24

Practice Point: An order which includes no indication it is temporary is a permanent, not a preliminary, injunction which should not issue without a determination on the merits by summary judgment motion or trial.

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CIVIL PROCEDURE, CRIMINAL LAW, NEGLIGENCE, CIVIL RIGHTS LAW.

PLAINTIFF MODEL SUFFICIENTLY ALLEGED PHOTOSHOOTS DONE WHEN SHE WAS 16 AND 17 FOR A SUNTANNING-PRODUCT MARKETING CAMPAIGN CONSTITUTED “SEXUAL PERFORMANCES” TRIGGERING THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Higgitt, determined certain causes of action against the modeling agency which represented plaintiff and the seller of suntanning products which used the photos of plaintiff should not have been dismissed as time-barred under the extended statute of limitations in the Child Victims Act [CVA] (CPLR 214-g). The photoshoots took place when plaintiff was 16 and 17. One of the issues was whether the complaint adequately alleged the photoshoots constituted a “sexual performance” with triggered the applicability of the CVA. After a comprehensive discussion too detailed to summarize here, the First Department held the complaint stated causes of action based on the “sexual performance” criteria in Penal Law 263.05:

At the pleading stage, as to both defendants, we find that a reasonable inference to be drawn from plaintiff’s allegations regarding the photographing of her while she was unclothed is that the resulting photographs may have captured plaintiff’s genitalia, thus satisfying the “sexual conduct” component of a Penal Law § 263.05 sexual performance. It is not merely the allegation of nudity that suffices, but the permissible inference that nudity occasioned the exhibition of genitalia, lewdly, in a photographic performance. We need not and do not reach whether plaintiff will ultimately be successful … , and at this stage, in light of the allegations contained in the complaint and the reasonable inferences to be drawn therefrom, we need not confine our analysis of the allegations to photographs that were ultimately used in Cal Tan’s marketing campaign, as submitted on the appeal. * * *

We … find that a plaintiff’s age at the time of the alleged acts, so long as under 18 years of age, does not prevent application of the CVA to revive claims otherwise meeting CPLR 214-g’s requirements. Thus, plaintiff adequately pleaded that, with respect to her age at the time of the alleged acts, the CVA applies to her. Doe v Wilhelmina Models, Inc., 2024 NY Slip Op 03081, First Dept 6-6-24

Practice Point: Here photoshoots for a suntanning-product marketing campaign were sufficiently alleged to constitute "sexual performances' triggering the extended statute of limitations in the Child Victims Act.

JUNE 6, 2024

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

SUA SPONTE DISMISSAL OF THE COMPLAINT WAS NOT SUPPORTED BY EXTRAORDINARY CIRCUMSTANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were no extraordinary circumstances justifying a sua sponte dismissal of the complaint in this foreclosure action:

A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . Here, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint … . HSBC Bank USA, N.A. v Badalamenti, 2024 NY Slip Op 03034, Second Dept 6-5-24

Practice Point: A sua sponte dismissal of a complaint is rarely upheld on appeal.

JUNE 5, 2024

CIVIL PROCEDURE, JUDGES, NEGLIGENCE, APPEALS, ATTORNEYS.

BECAUSE DEFENDANTS DID NOT MOVE FOR A MISTRIAL BASED UPON PLAINTIFFS' COUNSEL'S CONDUCT, THE JUDGE SHOULD NOT HAVE GRANTED THE MOTION TO SET ASIDE THE VERDICT IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendants' motion to set aside the multimillion dollar verdict in this negligence trial should not have been grated. Plaintiff's 14-year-old daughter was raped by defendants' son during a sleepover at defendants' home. The trial judge set aside the verdict in the interest of justice based upon the conduct of plaintiff's counsel. The Third Department ruled the motion to set aside should not have been granted because no motion for a

mistrial (based on counsel's conduct) had been made. The Third Department further found that counsel's conduct did not rise to the level which would support setting aside the verdict in the interest of justice in the absence of a motion for a mistrial. In addition the Third Department held the apportionment of the fault (90% to the parents, 10% to the son) was not against the weight of the evidence:

Supreme Court erred in setting aside the verdict. Because defendants did not request a mistrial before the jury rendered its verdict, their postverdict motion for an order setting it aside on the ground of misconduct by plaintiff's counsel should have been denied … . Upon our review of the record, we do not find this to be the rare case in which the alleged misconduct of counsel was so wrongful and pervasive as to warrant the exercise of Supreme Court's discretionary power to set aside the verdict in the interest of justice … . * * *

Although some of counsel's comments may have been objectionable, because defendants did not move for a mistrial their "argument respecting these remarks [was] not preserved" … . Nor, in our opinion, have defendants shown this to be "the rare case in which the misconduct of counsel for the prevailing party was so wrongful and pervasive as to constitute a fundamental error and a gross injustice warranting the exercise of the trial court's discretionary power under CPLR 4404 (a) to set aside a verdict in the interest of justice" … . * * *

Inasmuch as there was ample evidence that defendants knew their son posed a risk of harm to children prior to inviting the child upon their premises, including a report to defendants from an official at the son's school that he was a "predator," the jury could have reasonably determined that defendants' conduct was the greater cause of the child's injuries … . Lisa I. v Manikas, 2024 NY Slip Op 03112, Second Dept 6-5-24

Practice Point: Here defendants' failure to move for a mistrial based on plaintiffs' counsel's conduct precluded the judge from discretionary grant of a motion to set aside the verdict in the interest of justice.

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CIVIL PROCEDURE, JUDGES.

WHEN A PRIOR MOTION HAS BEEN DENIED ON PROCEDURAL GOUNDS "WITHOUT PREJUDICE TO RENEW," THE MOTION FOR LEAVE TO RENEW THE PRIOR MOTION DOES NOT HAVE TO BE SUPPORTED BY REASONABLE JUSTIFICATION FOR PRESENTING NEW FACTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for leave to renew its prior motion should not have been denied. The judge had denied the prior motion on procedural grounds "without prejudice to renew:"

… Supreme Court improvidently exercised its discretion in denying, on procedural grounds, the plaintiff's motion for leave to renew its prior motion pursuant to CPLR 5225 … . Since the court had denied the plaintiff's prior motion without prejudice to renew, the plaintiff was not required to demonstrate a reasonable justification for its failure to present alleged new facts on the prior motion … . Key Growth Invest LP v 1499 Fulton Realty, LLC, 2024 NY Slip Op 03036, Second Dept 6-5-24

Practice Point: If a judge denies a motion on procedural grounds "without prejudice to renew," the motion for leave to renew does not have to provide a reasonable justification for the presentation of new facts.

JUNE 5, 2024

CIVIL PROCEDURE, NEGLIGENCE, PUBLIC HEALTH LAW.

ALTHOUGH THE FORMER "EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA)" PROVIDED IMMUNITY TO HEALTHCARE PROVIDERS RE: COVID-19, HERE DEFENDANT NURSING HOME DID NOT DEMONSTRATE THE THREE REQUIREMENTS FOR IMMUNITY WERE MET (SECOND DEPT).

The Second Department reversing Supreme Court, determined defendant nursing home did not demonstrate the three statutory requirements for immunity for COVID-related treatment were met. Plaintiff alleged plaintiff's decedent, during

his admission to defendant's facility in March 2020, was infected with SARS-CoV-2 and COVID-19:

… [T]he EDTPA [Emergency or Disaster Treatment Protection Act] initially provided, with certain exceptions, that a health care facility "shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" as long as three requirements were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law, the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives, and the services were arranged or provided in good faith (Public Health Law former § 3082[1] …).

* * * [W]hile the EDTPA "immunized healthcare facilities from civil liability for certain acts or omissions in the treatment of patients for COVID-19 during the period of the COVID-19 emergency declaration" … , the defendant's submissions did not establish that the three requirements for immunity were satisfied … . Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc., 2024 NY Slip Op 03029, Second Dept 6-5-24

Practice Point: The repeal of the former Emergency or Disaster Treatment Protection Act (EDTPA) does not apply retroactively.

Practice Point: A healthcare provider asserting immunity from COVID-related injury under the former EDTPA must demonstrate the three statutory requirements for immunity have been met.

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CONDOMINIUMS, CONTRACT LAW.

DEFENDANTS' CONDOMINIUM WAS DAMAGED BY FIRE FORCING THEM TO LIVE ELSEWHERE FOR A YEAR; THE ALLEGATION PLAINTIFF DID NOT MAKE TIMELY REPAIRS DID NOT RELIEVE DEFENDANTS OF THEIR CONTRACTUAL OBLIGATION TO PAY THE COMMON CHARGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the fact that defendants' condominium was damaged by fire, forcing defendants to live elsewhere for a year, did not relieve defendants of the obligation to pay the common charges during that time:

… [P]laintiff submitted, inter alia, the declaration of condominium, the condominium bylaws, an affidavit from the president of the plaintiff's management company attesting to the defendants' failure to pay the common charges and related fees, and a ledger for the defendants' account. Thus, the plaintiff established, prima facie, that it was authorized to collect certain assessments of common charges and fees, that the defendants violated the bylaws by failing to pay the monthly common charges, and that it was entitled to recover the unpaid common charges, late fees, and reasonable attorneys fees … .

… [D]efendants failed to raise a triable issue of fact as to whether the common charges had been paid or as to the amount owed. The defendants also failed to raise a triable issue of fact as to whether their nonpayment was excused by the plaintiff's alleged failure to make timely repairs to the unit … . "[A]n individual unit owner cannot withhold payment of common charges and assessments in derogation of the condominium's bylaws based on defective conditions in his or her unit or in the common areas, or a disagreement with actions lawfully taken by the Board of Managers" … . Board of Mgrs. of Villas on the Lake Condominium v Policicchio, 2024 NY Slip Op 03026, Second Dept 6-5-24

Practice Point: A condominium owner cannot withhold payment of common charges based on defective conditions in the condominium or common areas. or based on disagreement with lawful actions by the Board of Managers.

JUNE 5, 2024

COURT OF CLAIMS, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

CLAIMANT INITIALLY BELIEVED THE ROAD WHERE HE STEPPED IN A POTHOLE AND FELL WAS OWNED BY THE VILLAGE, BUT IN FACT IT WAS OWNED BY THE STATE; CLAIMANT'S LATE NOTICE OF CLAIM SHOULD HAVE BEEN ACCEPTED BY THE COURT OF CLAIMS (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined claimant's late notice of claim in this roadway defect case should not have been rejected. Plaintiff alleged he stepped in a depression in the road and fell. Plaintiff initially believed the road was owned by the village, when, in fact, it was owned by the state. The defect in the road was patched within a week of plaintiff's fall:

The delay here was minimal, with defendant having received notice approximately three weeks after the 90-day deadline lapsed … . It is significant that when [claimant] returned to the accident scene … , he discovered that the pothole had been patched with blacktop, as shown in the photographs taken that day. Claimant further averred that the depression was "almost a foot wide and around ten feet long," specifying that it was "about three to four inches deep where [his] foot ended up." Given this postaccident development, claimant's attorney argued that "[w]hile [defendant] may not have obtained notice of the . . . accident within 90 days of its occurrence, it is highly likely that it had notice of the condition of the pavement that caused the accident as it patched it within a week of when the accident happened," emphasizing that defendant's "records should indicate precisely when it was patched as well as when the decision to patch it occurred and why." * * *

"A claim has the appearance of merit so long as it is not patently groundless, frivolous or legally defective, and the record as a whole gives reasonable cause to believe that a valid cause of action exists" … . To hold defendant liable for his injuries, claimant will need to prove that defendant either created the condition itself by affirmative acts of negligence, or had actual or constructive notice of a dangerous condition and failed to remedy such condition, thereby causing claimant's injuries … . Constructive notice exists where a depression in the roadway was "visible and apparent and existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" … . Grasse v State of New York, 2024 NY Slip Op 03110, Third Dept 6-6-24

Practice Point: The criteria for acceptance or rejection of a late notice of claim in the Court of Claims is explained.

JUNE 6, 2024

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW, IMMIGRATION LAW, JUDGES.

DEFENDANT SUFFICIENTLY DEMONSTRATED HE WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA AND HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN SO INFORMED; REVERSED AND REMITTED FOR A HEARING ON THE MOTION TO VACATE THE GUILTY PLEA ON INEFFECTIVE ASSISTANCE GROUNDS (THIRD DEPT).

The Third Department, reversing County Court and ordering a hearing on defendant's motion to vacate his guilty plea on ineffective assistance grounds, determined defendant, a citizen of Haiti, sufficiently demonstrated he had never been informed of the deportation consequences of the guilty plea and he would not have pled guilty if he had been so informed:

… [D]efendant proffered a sworn affidavit wherein he averred that counsel did not inquire as to whether defendant was a citizen, never discussed with defendant his immigration status nor did he advise defendant that he could be deported as a result of his guilty plea. Defendant also asserted that, during the plea proceeding, County Court never inquired about whether he was a United States citizen, his immigration status or advised that a conviction could result in deportation. This assertion is supported by the record, which reveals no mention of citizenship or deportation at any point during defendant's plea or sentencing … . Defendant also averred that he moved to the United States approximately 20 years ago, when he was six years old, and that his entire family resides in this country … . Furthermore, defendant asserted that he would not have pleaded guilty and would have insisted on going to trial if he had been informed that this conviction could result in deportation … . Thus, defendant sufficiently alleged that counsel failed to provide him with any information regarding deportation consequences of his plea and that defendant was prejudiced because he would not have pleaded guilty had he been advised of these consequences, such that a hearing is warranted … . Indeed, given defendant's

affidavit as well as the record of the plea proceeding, there is a genuine concern that, as defendant asserts, he was never advised of the deportation consequences of his plea. Accordingly, this matter must be remitted to County Court for a hearing on defendant's CPL 440.10 motion. People v Philippe, 2024 NY Slip Op 03105, Third Dept 6-6-24

Practice Point: The failure to inform a non-citizen defendant of the deportation consequences of a guilty plea can constitute ineffective assistance.

Practice Point: A non-citizen defendant who shows he was not informed of the deportation consequences of the guilty plea and sufficiently demonstrates he would not have pled guilty if he had been so informed is entitled to a hearing on his motion to vacate the guilty plea.

JUNE 6, 2024

CRIMINAL LAW, EVIDENCE, ATTORNEYS, JUDGES.

A SANDOVAL RULING ADDRESSED THE ADMISSIBILITY OF LIMITED REFERENCE TO DEFENDANT'S PRIOR CONVICTION ON CROSS-EXAMINATION; AT THE TIME OF THE ALLEGED RAPE, THE DEFENDANT TOLD THE VICTIM HE HAD SPENT SEVERAL YEARS IN PRISON; WITHOUT SEEKING A PRIOR VENTIMIGLIA RULING, THE PEOPLE INFORMED THE JURY ABOUT DEFENDANT'S "YEARS IN PRISON" STATEMENT TO THE VICTIM IN THE OPENING; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, ordering a new trial, determined the prosecutor's introduction of a statement defendant made to the victim about his prior incarceration warranted reversal of defendant's rape conviction. The prosecutor had not sought a prior "Ventimiglia" ruling on the admissibility of the statement. The statement was the subject of a prior Sandoval ruling which allowed limited reference to the prior conviction in cross-examination of the defendant. The trial judge, after hearing argument on the "Ventimiglia" issue after the statement had been introduced, determined the statement would have been ruled admissible had a prior request for a ruling been made:

In ruling on the People's proffer, County Court fashioned a Sandoval compromise that limited the scope of questioning to the existence of the conviction and when it occurred, with no information about "the title, the classification, the violent nature under the Penal Law [or] the sentence . .. as well as underlying facts, unless the defense were to open the door with regard to those issues." In spite of that ruling, in their opening statement, the People stated that, during the encounter but prior to any sexual assault, defendant "disclosed something unexpected, something that jarred [the victim]"; specifically, that "he had spent several years in prison." * * *

We find that the People's introduction of the statement referencing defendant's prior incarceration without first seeking an advanced Ventimiglia ruling was improper … . While County Court's Sandoval compromise was limited to the introduction of such evidence on cross-examination, it directly addressed the proof at issue; specifically, the allowable reference to defendant's prior conviction. To this point, the People's contention that the evidence was not subject to a prior ruling as it was part of the criminal conduct itself runs contrary to the fact that the Sandoval proffer on this exact evidence before trial reflected that it was subject to a discretionary determination as to whether the probative value outweighed the risk for real prejudice. Thus, the People effectively deprived defendant of the benefit of such analysis prior to introduction of the evidence by circumventing the Sandoval ruling … . People v Osman, 2024 NY Slip Op 03106, Third Dept 6-6-24

Practice Point: Here, at the time of the alleged rape, defendant told the victim he had spent several years in prison. Although the People sought a Sandoval ruling on the admissibility of evidence of defendant's prior conviction during defendant's cross-examination, the People did not seek a "Ventimiglia" ruling on the admissibility of such evidence in its direct case. The People's reference to defendant's statement in their opening was deemed reversible error.

JUNE 6, 2024

CRIMINAL LAW, JUDGES, ATTORNEYS, APPEALS.

THE TRIAL JUDGE DID NOT PROCEED TO STEP THREE OF THE BATSON ANALYSIS OF THE PEOPLE'S PEREMPTORY CHALLENGE TO A JUROR; MATTER REMITTED FOR THAT PURPOSE (THIRD DEPT).

The Third Department, remitting the matter for findings on the Batson analysis of the People's peremptory challenge to a juror, determined the judge did not follow the three-step procedure mandated by Batson. Defense counsel met the criteria for the initial step by noting that the juror appeared to be the only person of Hispanic descent on the jury (both defendant and the victim were of Hispanic descent) and the prosecutor had not asked the juror a single question. The prosecutor met the criteria for the second step by arguing the juror was laughing and would not take the case seriously. It was up to the judge at that point to evaluate defense counsel's argument that the prosecutor's reason was pretextual. The matter was sent back for the judge's ruling on step three:

This record confirms that the court made only a step one decision, and did not make any determination on the issue of pretext, implicit or otherwise … .

This is a critical error because "[a] trial court that resolves a Batson challenge without proceeding to [the] third step 'falls short of [providing] a meaningful inquiry into the question of discrimination' " … .* * *

The trial court's role in the analysis is particularly important where, as here, the race-neutral reasons proffered by the People were based upon the challenged juror's demeanor — an issue that Supreme Court was in a unique position to verify and which is not clearly established in the appellate record … . Given the failure to abide by the Batson protocol, we withhold decision and remit this case to Supreme Court to enable the trial judge who presided over this matter to determine "whether the race-neutral reason proffered by [the People] was pretextual" … . People v Cruz, 2024 NY Slip Op 03108, Third Dept 6-6-24

Practice Point: Here, the judge's failure to make a finding whether the prosecutor's reason for a peremptory juror-challenge was pretextual (the third step in the Batson protocol) resulted in remittal for that purpose.

JUNE 6, 2024

CRIMINAL LAW, JUDGES.

DEFENDANT WAS CONVICTED OF CRIMINAL POSSESSION OF A WEAPON FIRST DEGREE, THE WEAPON BEING AN IMPROVISED EXPLOSIVE DEVICE (IED); THE ATTEMPTED CRIMINAL POSSESSION OF A WEAPON THIRD DEGREE COUNT IS AN INCLUSORY CONCURRENT COUNT WHICH MUST BE DISMISSED; COUNTY COURT IMPROPERLY RESENTENCED DEFENDANT IN HIS ABSENCE, REQUIRING VACATION OF THE SENTENCE (THIRD DEPT).

The Third Department determined (1) the attempted criminal possession of a weapon third degree must be dismissed as an inclusory concurrent count of criminal possession of a weapon first degree and (2) the judge's resentencing the defendant on the attempted criminal possession of a weapon third conviction in defendant's absence was improper and warranted vacation of the sentence. The defendant was convicted of possessing an improvised explosive device (IED), essentially a bomb:

A person is guilty of attempted criminal possession of a weapon in the third degree "when, with intent to commit a crime, he [or she] engages in conduct" wherein "[s]uch person possesses any explosive or incendiary bomb [or] bombshell" (Penal Law §§ 110.00, 265.02 [2]). The terms explosive substance, explosive and incendiary bomb are not defined in the Penal Law. Explosives are, however, defined in the Labor Law as "gunpowder, powders used for blasting, high explosives, blasting materials, detonating fuses, detonators, pyrotechnics and other detonating agents, fireworks and dangerous fireworks as defined in section 270.00 of the [P]enal [L]aw, smokeless powder and any chemical compound or any mechanical mixture containing any oxidizing and combustible units, or other ingredients in such proportions, quantities, or packing that ignition by fire, friction, concussion, percussion or detonation of any part thereof may cause and is intended to cause an explosion" (Labor Law § 451). The terms explosive or incendiary bomb were added to Penal Law § 265.02 (2) in 1970 to cover Molotov cocktails within the meaning of the statute … . We agree with defendant that it would be impossible to commit the greater crime — criminal possession of a weapon in the first degree — without concomitantly, by the same conduct, committing the lesser crime involving possession of an explosive, incendiary bomb or bombshell. Thus, the conviction for attempted criminal possession of a weapon in the third degree

must be vacated and dismissed as an inclusory concurrent count … . People v Graham, 2024 NY Slip Op 03104, Third Dept 6-6-24

Practice Point: Here the attempted criminal possession of a weapon third degree was dismissed as an inclusory concurrent count of criminal possession of a weapon first degree.

Practice Point: Resentencing the defendant in defendant's absence is a violation of defendant's constitutional and statutory rights to be present and requires vacation of the sentence.

JUNE 6, 2024

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

HERE THE PEOPLE'S FAILURE TO PROVIDE TEN-DAY'S NOTICE THEY WERE SEEKING A HIGHER SORA RISK LEVEL THAN THAT RECOMMENDED BY THE BOARD WARRANTED A REDUCTION FROM LEVEL THREE TO TWO; DEFENSE COUNSEL'S REPLY TO THE LATE NOTICE DID NOT WAIVE THE REQUIREMENT (FIRST DEPT).

The First Department, reducing defendant's SORA risk level from three to two, determined (1) the defendant was not given the requisite 10-day notice of the prosecutor's intent to seek a higher risk level than that recommended by the Board, and (2) defense counsel's reply to the late notice by the prosecutor did not waive the 10-day notice requirement:

We agree with defendant that he was denied due process because the People did not provide written notice of its intent to seek a determination different than that recommended by the Board "at least ten days prior to the determination proceeding" (Correction Law § 168-n[3] …). The People sent defense counsel a letter stating their intent to seek a risk level three adjudication, different from the Board's recommendation of risk level two, less than 10 days in advance of the hearing. … [T]he People indicated in their letter only that they were seeking additional point assessments and did not apprise counsel that they were also requesting an upward departure … . … [T]he People announced their intention to

seek an upward departure for the first time at the court's invitation during the SORA hearing.

Defendant's right to timely notice was not waived by his counsel's letter, in response to the People's, that counsel was willing to go forward with the hearing if the prosecutor delivered to counsel by the next day the evidence that the People intended to use at the hearing. Nothing in the record indicates that the prosecutor complied with this condition. Moreover, because the People did not announce an intention to seek an upward departure, any waiver would not have embraced that request. People v Tookes, 2024 NY Slip Op 03095, First Dept 6-6-24

Practice Point: The People must provide defendant ten-day's notice of their intent to seek a higher SORA risk level than that recommended by the Board.

Practice Point: The People should not wait until the SORA hearing to announce they are seeking an upward departure.

JUNE 6, 2024

EDUCATION-SCHOOL LAW, NEGLIGENCE, CRIMINAL LAW, CIVIL PROCEDURE.

HERE IN THIS CHILD VICTIMS ACT (CVA) CASE, THE ALLEGATIONS OF ABUSE OF PLAINTIFF BY A TEACHER WERE BASED ON HER INABILITY TO CONSENT UNDER THE PENAL LAW; THEREFORE THE SCHOOL COULD ONLY BE LIABLE FOR NEGLIGENT SUPERVISION UNTIL PLAINTIFF TURNED 17; ALTHOUGH THE ABUSE WAS ALLEGED TO HAVE TAKEN PLACE OFF SCHOOL GROUNDS, THE TEACHER, DURING SCHOOL HOURS, ALLEGEDLY MADE PUBLIC COMMENTS ABOUT PLAINTIFF'S APPEARANCE AND MADE ARRANGEMENTS TO MEET HER AFTER SCHOOL; THE NEGLIGENT SUPERVISION CAUSE OF ACTION AGAINST THE SCHOOL SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligent supervision cause of action against the school based upon alleged conduct by a teacher should not have been dismissed, despite the fact the abuse

allegedly took place off school grounds: The abuse was alleged to be conduct which would violate article 130 of the Penal Law. Plaintiff was legally incapable of consent until she turned 17. The school was deemed responsible for supervision only until plaintiff turned 17:

The allegations of criminal conduct against the teacher were based on the plaintiff's inability to consent to sexual conduct due to the plaintiff's age, which ended when the plaintiff turned 17 years old (see Penal Law § 130.05[3][a]). Accordingly, the court properly determined that the CVA did not revive so much of the cause of action alleging negligent supervision of the plaintiff as was related to alleged conduct that occurred after the plaintiff turned 17 years old … .

… The defendants' submissions included … the transcript of the plaintiff's deposition testimony, wherein the plaintiff testified that all of the sexual abuse occurred off school property and outside of school hours … . In opposition, however, the plaintiff … averred that the teacher singled her out for attention, made extended eye contact with her, winked at her, and complimented her appearance in front of other staff in school. According to the plaintiff, the teacher made comments directly to other staff and in the presence of other students about the plaintiff's appearance, and the teacher made arrangements with the plaintiff during school hours and on school grounds to meet after school where the alleged abuse took place … . Fain v Berry, 2024 NY Slip Op 03032, Second Dept 6-5-24

Practice Point: Allegations of violations of Penal Law article 130 based upon the legal incapacity to consent apply only until the victim turns 17.

Practice Point: Although the alleged abuse by a teacher took place off school grounds, the teacher, during school hours, made public comments about plaintiff's appearance and arranged to meet her after school. There the negligent supervision cause of action against the school should not have been dismissed.

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FAMILY LAW, CRIMINAL LAW, JUDGES.

ABSENT MOTHER'S ADMISSION TO THE ALLEGED FAMILY OFFENSE OR CONSENT TO AN ORDER OF PROTECTION, THE COURT SHOULD NOT HAVE ISSUED A PERMANENT (TWO-YEAR) ORDER OF PROTECTION WITHOUT HOLDING A FACT-FINDING HEARING; MATTER REMITTED (SECOND DEPT).

The Second Department, reversing Family Court and remitting the matter for fact-finding, determent the judge in this family offense proceeding should not have issued a permanent order of protection against mother without a fact-finding hearing. Unless a party admits the family offense or consents to an order of protection, the court may issue only a temporary order pending a fact-finding hearing:

… Family Court improperly issued an order of protection directing the mother, inter alia, to stay away from the father and the child for a period of two years, except for court-ordered parental access with the child. Upon expressing dissatisfaction with the mother's behavior at the September 2023 conference, the court initially signaled an intent to issue a temporary order of protection. It then changed course and chose to issue an order of protection that it described as "permanent" and that would last "two years." However, the court did so without holding a fact-finding hearing to determine whether the mother committed the family offenses alleged in the father's petition. Nor did it obtain an admission from the mother that she committed such family offenses or secure her consent to the issuance of the order of protection. The court therefore failed "to observe the procedural steps set forth in Family Ct Act § 154-c(3)" before issuing that order … . … [S]ince a fact-finding hearing was not held and the court otherwise rendered its determination without receiving any evidence demonstrating that the mother committed the alleged family offenses, the record is not sufficient for this Court to render an independent determination on that question … . Matter of Acker v Teneyck, 2024 NY Slip Op 03043, Second Dept 6-5-24

Practice Point: Although a Family Court judge can issue a temporary order of protection during a family offense proceeding, the judge cannot issue a permanent order of protection unless the opposing party admits the family offense, consents to the order of protection, or the court holds a fact-finding hearing.

JUNE 5, 2024

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

DEFENDANT WAS NOT AN OWNER OR A GENERAL CONTRACTOR AND EXERCISED NO SUPERVISORY AUTHORITY OVER THE INJURED PLAINTIFF'S WORK, THEREFORE THE LABOR LAW CAUSES OF ACTION WERE PROPERLY DISMISSED; HOWEVER DEFENDANT MAY HAVE BEEN RESPONSIBLE FOR CREATING THE ALLEGEDLY DANGEROUS CONDITION DURING PRIOR WORK ON THE PROPERTY; THEREFORE THE COMMON-LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMSSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that, although the Labor Law causes of action were properly dismissed, the common-law negligence cause of action should not have been dismissed. Defendant BHI was not an owner of the property or a general contractor and was not present on site when plaintiff was injured. The injured plaintiff worked for another prime contractor. But BHI had previously done the work which allegedly caused plaintiff's injury. Because BHI was not an owner or a general contractor and had no supervisory authority on the day of the accident, the Labor Law causes of action did not apply. But the common-law negligence cause of action was applicable:

A defendant that is not an owner, general contractor, or agent pursuant to the Labor Law with regard to a plaintiff's work may nonetheless be held liable to the plaintiff under a theory of common-law negligence "where the work" the defendant "performed created the condition that caused the plaintiff's injury" … . "An award of summary judgment in favor of a subcontractor [or prime contractor] dismissing a negligence cause of action is improper where the evidence raises a triable issue of fact as to whether [it] created an unreasonable risk of harm that was the proximate cause of the . . . plaintiff's injuries" … . Delaluz v Walsh, 2024 NY Slip Op 03030, Second Dept 6-5-24

Practice Point: This case illustrates why it is a good idea to allege a common-law negligence cause of action in addition to a Labor Law 200 cause of action.

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