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REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS
AND IN SPECIAL SITUATIONS OF OTHER COURTS

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LEGAL MALPRACTICE DAMAGES

IN CRIMINAL JUST AS IN CIVIL CASES, MALPRACTICE OF LAWYER DOES NOT SUPPORT NONPECUNIARY DAMAGES

So rules a unanimous Court of Appeals in *Dombrowski v. Bulson*, 19 N.Y.3d 347, 948 N.Y.S.2d 208 (May 31, 2012).

Citing appellate division decisions, the Court observes that New York does not recognize a plaintiff's claim for nonpecuniary damages arising from representation in civil proceedings – damages for such things as emotional pain and suffering, or psychological injury. In an opinion by Chief Judge Lippman, the Court now holds the same for representation in criminal proceedings.

In 2000, plaintiff was convicted in a New York court of attempted rape and endangering the welfare of a child. His motion to vacate the conviction based on the "ineffective assistance of counsel" was denied by the county court without a hearing. The court found counsel's representation of Dombrowski "meaningful". A magistrate disagreed, however, when Dombrowski then brought a habeas corpus proceeding in federal court. There the issue of competent representation was given a hearing and led to the magistrate's conclusion that

> [the] errors by defense counsel made it difficult for the jury to make a reliable assessment of the 'critical issue' of the victim's credibility.

The habeas petition was granted conditionally, the condition being that further prosecution be brought by the state within 60 days. It wasn't, and the indictment was dismissed.

Now, in this malpractice action against the lawyer, Dombrowski seeks damages that include the nonpecuniary ones. He alleged that he had already been incarcerated for more than five years and was then subjected to postrelease supervision, which terminated only after the federal habeas petition was granted.

The appellate division in the present action, acknowledging that nonmoney damages are not available when the underlying proceedings were civil, held that they do become available when

the proceedings were criminal. Disagreeing, and reversing, the Court of Appeals holds that the criminal must be treated the same as the civil. It holds that nonpecuniary damages may not be allowed for legal malpractice in either category.

The Court rejects the appellate division's analogy to civil actions like false imprisonment and malicious prosecution. Loss of liberty is a compensable element in those actions, but the Court explains that those are intentional torts, noting that a malicious prosecution claim even has to show actual malice on the defendant's part. Such a showing is not required on a claim for legal malpractice, where the alleged misconduct, however wrongful, is not of an intentional nature.

> It makes sense [says the Court] that the scope of recovery for deliberate torts is broader than for torts based on the failure to exercise skill or care.

The Court also stresses the "negative and ... devastating consequences" the criminal justice system would face with a different rule, which would have a

> chilling effect on the willingness of the already strapped defense bar to represent indigent accused. Further, it would put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions.

OTHER DECISIONS

N.Y.C. LOFT LAW

Nine Years Occupancy Without Rent Continues for Tenant Because of Landlord's Failure to Conform to Loft Law

Article 7-C of the Multiple Dwelling Law (§§ 280-287), commonly known as the "Loft Law", is addressed to the "Legalization of Interim Multiple Dwellings", a three-word phrase that describes units carved out of formerly commercial (including industrial) buildings for conversion into residential occupancy. There have been many such conversions – or attempted conversions – but a number of them were shown to be illegal. This prompted the enactment in 1982 of the Loft Law, described by the Court of Appeals in *Chazon, LLC v. Margaret Maugenest*, 19 N.Y.3d 410, 948 N.Y.S.2d 571 (June 7, 2012), "as a means of bringing them within the law".

Section 301(1) of the MDL states that "[n]o multiple dwelling shall be occupied" until a residential certificate of occupancy has been issued for it. Section 302(1)(b) then recites that in the absence of such a certificate

> [n]o rent shall be recovered by the owner ... and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.

Steps required for the legalization of these units have in many instances apparently not been taken or completed, presenting to the courts a progression of cases in which residential tenancies nevertheless exist – and here are the landlords seeking rent for them (or eviction in the alternative). Situations of prolonged occupancy by tenants who have been paying no rent at all have struck some appellate divisions as unfair – or "undesirable", as the Court of Appeals

describes it in the *Chazon* case – and produced less rigorous interpretations of the statute, granting the landlord relief.

The Court sees no room for this relaxed construction. Quoting § 302(1)(b) in an opinion by Judge Smith, the Court declares that the MDL allows recovery only for a landlord "in compliance with" the Loft Law, and compliance was not shown in the *Chazon* case. "In other words", says the Court, "the statutes leave these parties in their present stalemate until compliance has been achieved".

Instead of bringing a summary proceeding to collect the rent, this landlord brought an action of ejectment to oust the tenant for the nonpayment, and sought to distinguish his case on that ground. There's no distinction, responds the Court; the statute clearly bars both routes, action or special proceeding, until compliance is had.

The requirements that have to be met in order for the landlord to be in "compliance" with the Loft Law are not discussed in the case, and certainly not detailed in *Chazon* or in the other decisions the Court cites. Whatever they are, however, the point is crystal clear now as it obviously wasn't before (or the appellate divisions would not have had room for their more liberal applications): until there is full compliance, there can be no rent collected.

"If that is an undesirable result," the Court sums up, "the problem is one to be addressed by the Legislature."

TERMINATING PARENTAL RIGHTS

After Termination of Parental Rights for Permanent Neglect, Court Can't Direct Continuing Contact with Biological Parent

The Court of Appeals reaches this conclusion under § 384-b of the Social Services Law after reviewing a number of appellate division decisions and noting a conflict on the issue among them. In *Matter of Hailey ZZ.*, 19 N.Y.3d 422, 948 N.Y.S.2d 846 (June 7, 2012; 6-1 decision), the Court resolves the conflict. It holds that courts can't direct "continuing contact between parent and child once parental rights have been terminated" under the statute.

It may be otherwise if the termination of parental rights was voluntary, but not when it was the product of an adversary hearing brought at the behest of a social services department, in which the parent has been found guilty of permanent neglect, which is the present case.

One of the main things the courts look for in deciding if there has been permanent abandonment is whether the parent has been planning for the child's future. The father in this case was not. He was in prison under a sentence of 5 to 15 years. Even given that obvious impediment, the Court notes from the record that there was

> no evidence of any emotional or lasting connection between Hailey and father; indeed, they had spent only about 72 hours together in two years' time, or the equivalent of 3 out of 730 days.

The imprisonment is not per se a factor that cancels the parent's obligation. In this case the father had no acceptable suggestion except to keep the child in foster care, or give her over to other unsuitable nominees.

Among its own cases, the Court's 1989 *Gregory* decision (Digest 359) is the principal precedent that guides it here. *Gregory* held that an incarcerated parent who offers no plan for the child's future except foster care can't prevent adoption. The Court here in *Hailey* remarks how the very possibility of adoption is made more remote if would-be adopters are be required to submit to court-ordered continuation of visitation with the natural parents.

In an opinion by Judge Read, the Court stresses the difference between § 384-b and § 384-c of the Social Services Law. Under § 384-c, the surrender of the child by the natural parent is voluntary, but in § 384-b it is not. There the legislature

> has not sanctioned judicial imposition of posttermination contact where parental rights are terminated after a contested proceeding.

The adoptive parents are free to allow contacts with the biological parent, but that's up to them. Under the statute, the courts can't compel it; it would threaten "the integrity of the adoptive family unit".

The Court has no occasion to consider the application of the best-interests-of-the-child test because the test becomes relevant only when it's open to the courts to consider the allowance of visitation; it's off the screen when a statute, as it does here, forecloses such an adjustment altogether.

Judge Pigott in dissent finds the statute more flexible, offering discretion to a court to order the visitation. Even as a matter of policy, he says,

> it makes little sense to prohibit a court from ordering visitation *when that would be in a child's best interests*, simply because the person seeking visitation contested the issue of his or her parental rights.

FREEDOM OF INFORMATION LAW (FOIL)

No Invasion of Privacy Occurs in Disclosing Interview Records Made More Than Half Century Earlier, But Revelation Is Barred If Interviewee Was Explicitly Promised Confidentiality

In the absence of a confidentiality promise, the Court of Appeals applies a balancing test when considering the privacy exceptions of the FOIL contained in §§ 87(2)(b) and 89(2) of the Public Officers Law.

The test was formulated by the Court in its 2005 decision in *New York Times Co. v. City of New York Fire Department* (Digest 546), in which a newspaper's FOIL application sought fire department records relating to 911 calls received during the 9/11 Trade Center disaster that had occurred a few months earlier. (The "9/11" and "911" are just a coincidence.)

The families of eight of the men killed in the 9/11 attack were the applicants seeking the records, and for those eight privacy objections would not apply, ruled the Court. But the families of the other numerous victims may have privacy objections, explained the Court, and to protect those interests the Court adopted a test to balance the private interest in secrecy with the public interest in disclosure. The Court then found in the *Fire Department* case that

> the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private.

A similar test comes into play in *Harbatkin v. New York City Dep't of Records etc.*, 19 N.Y.3d 373, 948 N.Y.S.2d 220 (June 5, 2012), but in a more limited way. In contrast with the recency of the events in the *Fire Department* case, *Harbatkin* involves records made more than half a century earlier, mainly during the 1950s: the records the city made of interviews with teachers about Communist Party membership – interviews in which questioning also embraced what the interviewees knew of Communist affiliations of others. (The older among our readers will remember more sharply the on-going and highly publicized investigations of that era.)

On the petition of an historian who also had a personal interest in the records of those times (both her parents were targeted by the investigation), the city's response in *Harbatkin* included a number of redactions. (The Court includes some samples.) The issue then boiled down to whether the redactions are supportable by the privacy exemptions.

For most of the records sought, the Court concludes in an opinion by Judge Smith that

> today, more than half a century after the interviews took place, the disclosure of the deleted information would not be an unwarranted invasion of personal privacy.

Noting that the "Communist" label carries "far less emotional power" today than it did in the 1950s, the Court says that at this stage "the diminished claims of privacy must be weighed against the claims of history". Accepting that "historians are better equipped" to perform their function "when they can work from uncensored records", the Court rejects the redactions, but with an important exception:

> Many of those interviewed had been explicitly promised confidentiality. For them the Court finds the redactions of names and identifying features justified. "Perhaps there will be a time when the promise [of confidentiality] ... is so ancient that its enforcement would be pointless," concludes the Court, "but that time is not yet."

ASSUMPTION OF RISK

College Pitcher Struck by Line Drive During Indoor Practice Assumed Risk and Can't Recover from School

The Court of Appeals reviewed the assumption of risk doctrine in the sports area in a quartet of cases that we built a lead note around in Digest No. 454 in October of 1997. The subject comes up again in *Bukowski v. Clarkson Univ.*, 19 N.Y.3d 353, 948 N.Y.S.2d 568 (June 5, 2012), in

which the Court rejects the damages claim of a college freshman pitching at an indoor facility at the school. He was hit in the jaw by a line drive and suffered a broken tooth.

In an opinion by Chief Judge Lippman, a unanimous Court holds that the accident was an inherent potential of the sport and that the plaintiff assumed the risk of it.

The facts are akin to those in the Court's 1989 *Benitez* decision, in which it held that a senior high school star assumed the risk of his sport – in that case football – and had no claim against a city for a paralyzing injury sustained at one of its facilities. The Court in *Bukowski* cites *Benitez* for the proposition that

> [a]n educational institution organizing a team sporting activity must exercise ordinary reasonable care to protect student athletes voluntarily participating in organized athletics from unassumed, concealed, or enhanced risks[,]

but there were no such risks in *Bukowski*, which involved only the ordinary perils "inherent" in the sport of baseball.

The plaintiff pitched to the batter, who hit a line drive right back at him. The plaintiff was not using an "L-screen", a metal frame with a strung net that might have protected him, but he had seen others pitching "live" without the screen and hence did not use it himself. (The Court does not indicate any obligation of the school or its coaches to insist that the player use the device.)

Morgan, one of the four cases on which the Digest 454 lead note was based, is also relied on by the Court. Quoting from it, the Court says that the assumption of risk doctrine applies

> where a consenting participant in sporting and amusement activities "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks".

That's this case, the Court holds. The plaintiff raised additional points about the lighting conditions in the indoor gym, and the coloring of backdrops (alleged to affect the visibility of the ball coming off the bat), but the Court stresses that the plaintiff had the "opportunity" to observe these conditions and decided "to go along with how the coach set up practice".

The Court distinguishes the facts of the *Siegel* case, also part of the previously treated quartet, because there "the plaintiff did not assume the risk of tripping on a torn tennis net", which caused the accident in that case. The risk of "playing with a torn net is not inherent to the sport of tennis", the Court said.

Assumption of risk cases have been a parade in the Court of Appeals for a long time. Another that the Court now calls on in addition to *Benitez* is its more recent (2010) *Trupia* decision (Digest 607), describing the purpose of the assumption of risk doctrine in sports contexts: it "facilitat[es] free and vigorous participation in athletic activities" while at the same time shielding college athletics from potentially crushing liability.

WRONGFUL DISCHARGE

Fired Hedge Fund Compliance Officer's Employment Was At Will and He Thus Can't Claim Wrongful Discharge

If the employment is at will, a change of will on either side suffices to terminate the employment, whatever the factors that may motivate the termination. As stated by the Court of Appeals in earlier decisions, exceptions have been carved out for firings based on grounds that violate the constitution or the clear instruction of a statute, but with only such exceptions the general rule adheres: an employer can fire an at-will employee without assigning any reason at all. The Court has been tenacious in adhering to that rule.

Its tenacity was shown in its 2003 *Horn* decision (Digest 520), and is manifest once again in *Sullivan v. Harnisch*, 19 N.Y.3d 259, 946 N.Y.S.2d 540 (May 8, 2012; 5-2 decision).

The Court in *Horn* gave much weight to its still earlier (1983) *Murphy* decision (Digest 282). *Murphy* is perhaps the Court's most resolute adherence to the rule, a commitment plain again in the *Sullivan* decision here.

Citing *Murphy* as the main authority on point, the Court dismisses the claim of the plaintiff, a compliance officer at a hedge firm. He was suing one M (among others), the majority shareholder who controlled the firm. M was alleged to have fired the plaintiff for complaining about M's "front-running", an activity described by the Court as selling shares of stock "in anticipation of transactions by the firm's clients" and making the sales for the benefit of M's personal account instead of for the benefit of the clients.

Murphy's may be described as a no-nonsense approach to what the courts' function should be in this realm: to apply the general rule of the common law as it is and leave it to the legislature to alter it. *Sullivan* adheres to that, reciting in the opening paragraph of Judge Smith's majority opinion that it declines "to make an exception to that rule for the compliance officer of a hedge fund".

The plaintiff had relied on the one exception the Court did make, which was in its 1992 *Wieder* decision (Digest 397), in which it held that a law firm does face liability for firing an associate – an at-will employee – merely because he reported a colleague for violating a rule of ethics. Plaintiff argued that compliance with securities laws was part of his function in *Sullivan* "in the same way that ethical behavior as a lawyer was central" in *Wieder*. The majority rejects the analogy but it has cogency for the dissent.

Written by Chief Judge Lippman, the dissent notes that it was the plaintiff's responsibility in *Sullivan* "to make certain that [the firm] engaged in the lawful and ethical provision of investment adviser services", making it "comparable to that of the plaintiff lawyer in *Wieder*".

The majority had noted that the plaintiff had several functions at the firm, of which compliance officer was only one. But that, protests the dissent, "is not a logical basis upon which to justify" *Wieder*'s different treatment, because, if it were, then an "unscrupulous employer wishing to avoid" the application of the *Wieder* exception could

shield itself by giving any person potentially subject to the exception additional job titles and/or functions. Nothing in *Wieder* suggests that we intended to create such a loophole.

WORKERS' COMPENSATION

Inference That Claimant's Later Lost Wages Is Attributable to Prior On-the-Job Injury May Be Drawn Only by Board, Not Court

So holds a divided Court of Appeals in *Zamora v. New York Neurologic Associates*, 19 N.Y.3d 186, 947 N.Y.S.2d 788 (May 1, 2012; 4-3 decision), reversing the Third Department.

The majority finds that in many of its prior decisions, the Third Department "correctly" held that "a claimant's work-related permanent partial disability *allows* an inference that a subsequent loss of wages is attributable" to a prior employment's injuries. The Court adds, however, that later Third Department cases treated similar scenarios as having changed the inference into something "required, or presumed, rather than merely permitted". That, the Court now holds, was error, because its effect was to convert the inference from a permissible step for the Workers' Compensation Board to take into a mandatory one that could be compelled by a court.

Here the board failed to draw the inference, and it was error for the appellate division to reverse the board and draw the inference itself. The matter comes down, in other words, to whether the board, empowered to call the shot, had substantial evidence to support its call, which the majority says it had.

While the claimant was working as a phlebotomist for her employer – phlebotomy is defined as the therapeutic practice of opening a vein to draw blood – a computer monitor fell off a shelf and injured her back. She worked for a few months after that but then left the job because she said she didn't feel well enough to perform her duties. She received workers' compensation benefits for a while.

In an opinion by Judge Pigott, the Court observes that the claimant was afterwards employed "on and off" in part-time work, had spinal surgery, returned to her full-time phlebotomist's job for about a year, but then stopped in December 2007 because of "various health issues". An apparently significant factor to the majority is that after that, in listing work that she sought in a resume on job-search websites, she included the phlebotomy position – which suggests an ability to perform it.

The board, which had classified her on-the-job injury as producing a "permanent partial disability", denied her compensation benefits for the period after December 2007.

The three-judge dissent, written by Chief Judge Lippman, says that the majority position "lacks statutory support and runs counter to the ... Workers' Compensation Law"; that an inference that loss in earning capacity is traceable to the disability arises where the claimant leaves the job because of the disability (citing Third Department cases again). The employer or its carrier can rebut the inference with proof "that something other than the disability was the sole cause of claimant's reduced earning capacity after retirement", but the dissent sees no successful rebuttal

here because there was no evidence that the claimant "either affirmatively refused work that she could do or voluntarily left any job".

(To those readers not in workers' compensation practice, the reason for the prominent role played by Third Department cases is that workers' compensation appeals go not to the appellate division of the department involved, but to the Third Department Appellate Division regardless of the department involved. And note that it goes there directly from the board, by-passing supreme court review. See Workers' Compensation Law § 23.)