

NEW YORK COURT OF APPEALS ROUNDUP

CONFESSIONS AND POLICE DECEPTION; RARE REVERSAL IN 'K2'

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In this month's column, we discuss a criminal matter in which the Court of Appeals ruled that a confession obtained as a result of police deception of the defendant was inadmissible. We also address two insurance cases, one of which represents a rare reversal by the court on reargument of a decision that it rendered last year.

Confessions

People v. Thomas presented two significant issues that have received the continued attention of the criminal bar: (1) the inducement of involuntary confessions or admissions from criminal suspects by deceptive interrogation techniques used by law enforcement, and (2) the range of admissible expert testimony in a criminal case concerning the voluntariness of false confessions or admissions impacted by interrogation techniques. Because the court unanimously found, in an opinion by Chief Judge Jonathan Lippman, that Adrian Thomas' confession should not have been received in evidence, the second issue was never reached. Thomas was convicted at trial of second degree depraved indifference murder of his son and sentenced to 25 years to life.

What must be stated at the beginning of any discussion of this case is the extraordinary fact that Thomas was interrogated for a total of approximately 9½ hours, broken into segments of 2 and 7½ hours, all of which were videotaped by his police interrogators, and at the end of which Thomas demonstrated to the police how he threw the infant victim from over his head to a low-lying mattress. The videotape was the only evidence that Thomas had caused his son's death.

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In the face of the confession and other medical evidence presented by the prosecution one can understand how a jury convicted and the Appellate Division affirmed Thomas' conviction. On the other hand, from the detailed review of the videotape seen by the court, it is clear why the confession could not stand. As "a question for another day," the case clearly raises the issue of whether video interrogations should be required in all cases.

Thomas lived with his wife Wilhelmina and seven children, the youngest of whom was his 4-month-old son Matthew. On the morning of Sept. 21, 2008, Wilhelmina awoke to find Matthew in distress. He was rushed to the hospital in Troy, and later placed in intensive care. Because of a tentative conclusion of child abuse, including that of the infant's treating physician that he was a victim of blunt force trauma and had been "murdered," the other six children were removed from Thomas' home where he had been caring for them while his wife remained with Matthew at the hospital. Later in the day, Thomas was taken by the police to an interrogation room at the police headquarters where the police read Thomas his rights and began the interrogation.

The court's opinion provides an exhaustive treatment of the interrogation, but highlights certain techniques used by the police which can be seen as capable of provoking the innocent to confess to criminal acts. These techniques show that the police functioned under principles which permitted them to state outright falsehoods to the person under interrogation in order to obtain a confession as though anything is "fair game" to get those whom the police believe are guilty to confess. As the court stated: "[T]he premise of the interrogation was that an adult within the [Thomas] household must have inflicted traumatic head injuries on the infant."

Those parts of the videotaped interrogation, among others, that persuaded the court that Thomas' confession was not voluntary were:

a) The threat that if Thomas continued to deny responsibility for his son's injury, his wife would be arrested and taken from Matthew's bedside at the hospital: While the court acknowledged that this threat could be seen as reasonable, and was perceived as such by the prosecution and the Appellate Division, it was impermissible to use to pressure Thomas to make him speak "against his penal interest."

b) The representations by the police to Thomas, made 21 times during the interrogation, that Matthew was still alive and that it would assist the infant's treating doctors at the hospital in their efforts to save his life to know how his injury occurred: These false representations, the court observed, as did the Appellate Division, were of a character to cause any caring parent to provide even incriminating information if it could be helpful in saving the infant's life.

c) The suggestion by the police that what happened could be seen as an accident and that if Thomas made full disclosure, he would not be arrested and could go home: The court pointed to the many times the record showed these false assurances were given.

Given the techniques used by the police to induce the confession, the court concluded that the confession should be suppressed and Thomas be tried again, and it was the videotape, in particular, that provided the basis upon which the court could reach this conclusion.

Court Reverses Itself in 'K2'

In a rare decision, the court in *K2 Investment Group, LLC. v. American Guarantee & Liability Insurance Company* ruled, on reargument, that its previous decision in the case was incorrect and failed to take into account controlling precedent. The court accordingly vacated its earlier decision from June 2013 and held that an insurer may still rely on policy exclusions to deny coverage even where it has breached a duty to defend the underlying claim.

This case arose out of a legal malpractice action brought against a lawyer named Daniels. Plaintiffs in the underlying malpractice action were two limited liability companies who made approximately \$2.8 million in loans to another limited liability company named Goldan, LLC. When Goldan failed to repay the loan, the lenders sued Goldan and its principals – one of whom was Daniels. Among other claims, the lenders asserted that Daniels had represented them in connection with the loan to Goldan and committed malpractice by failing to record the mortgages securing the loans. Daniels notified his malpractice carrier, American Guarantee & Liability Insurance Company, which refused to provide a defense and rejected a settlement demand tendered by Daniels.

Daniels defaulted and judgment was entered against him as to the malpractice claims. After entry of judgment, Daniels assigned to plaintiffs his rights against American Guarantee. Plaintiffs then commenced an action in the Supreme Court against American Guarantee for breach of contract and bad faith. On cross-motions for summary judgment, the Supreme Court dismissed the bad faith claim and granted plaintiffs summary judgment on the breach of contract claim. The First Department affirmed, finding that the policy exclusions relied upon by American Guarantee were inapplicable. Two justices dissented and found that there was a question of material fact as to the application of the exclusions. American Guarantee appealed as of right to the court.

In a June 11, 2013, decision, joined by all judges except for Judge Sheila Abdus-Salaam who took no part in the decision, Judge Robert S. Smith affirmed the summary judgment in favor of plaintiffs. Smith noted that American Guarantee did not contest that it breached its duty to defend and that there was no claim of collusion among plaintiffs and the insured. Accordingly, the court ruled that by breaching its duty to defend, American Guarantee lost its right to rely on any policy exclusions in litigation over its indemnity obligations. 21 NY3d 384, 389.

American Guarantee moved for reargument, and, in a decision applauded by insurers, the court reversed itself in a 4-2 decision written by Judge Smith. (Judge Abdus-Salaam again took no part in the decision.) The court found that it had failed to consider its own controlling precedent in *Servidone Construction Corp. v. Security Insurance Co. of Hartford*, 64 NY2d 419 (1985), in which it determined that an insurer that breached its duty to defend was not precluded from relying on policy exclusions to contest indemnity claims.

Smith noted that there were good reasons supporting the court's initial decision against American Guarantee but that there were also good reasons to support a contrary rule and ultimately concluded that "to decide this case we must either overrule *Servidone* or follow it. We choose to follow it." He went on to conclude that the application of the policy exclusions relied upon by American Guarantee did raise issues of material fact that were sufficient to defeat summary judgment and accordingly reversed the decision of the First Department and denied plaintiffs' summary judgment motion.

In a dissent joined by Judge Eugene Pigott, Judge Victoria Graffeo described the strong policy reasons supporting a rule that breach of an insurer's duty to defend prohibits it from relying on policy exclusions to avoid satisfying a third-party judgment against its insured. Graffeo suggested that *Servidone* may have intended to make a distinction between situations where a loss would fall within the ambit of a policy's coverage but for policy exclusions and situations in which the policy does not contemplate coverage at all. She acknowledged that *Servidone* did refer specifically to an insurer's continued ability to rely on policy exclusions despite its breach of a duty to defend. Nevertheless, she asserted that *Servidone* should be applied more narrowly to prevent a breaching insurer from avoiding indemnification on the basis of policy exclusions but not from arguing that there was never coverage for the loss in the first place.

Liability of Insurance Brokers

In *Deborah Voss v. The Netherlands Insurance Company*, the court considered another insurance dispute in which it found that there were material questions of fact preventing the grant of summary judgment in favor of an insured who was suing her

insurance broker for a negligent failure to procure sufficient business interruption coverage. In doing so, the court clarified the requirements for establishing a "special relationship" between an insured and an insurance broker that would support a departure from the general rule that insurance brokers do not have a duty to advise a client as to the appropriate amount of insurance coverage.

Deborah Voss operated a number of businesses in Liverpool, N.Y. In 2004, she met with a representative of CH Insurance Brokerage Services Co., Inc. to discuss insurance coverage relating to her businesses. The CH representative requested information concerning the businesses so that he could calculate the appropriate level of business interruption coverage and, according to Voss, he represented that CH would continue to reassess the coverage needs as Voss' businesses expanded.

CH eventually recommended a policy with a predecessor of The Netherlands Insurance Company that included \$75,000 in per-incident business interruption coverage. In March 2007, Voss discovered that the building in which she operated her businesses had suffered roof leaks that disrupted her operations. Around the same time, Voss met with CH again to discuss coverage, and CH proposed reducing the business interruption coverage from \$75,000 to \$30,000. Voss questioned this but ultimately renewed her Netherlands policy in April 2007 with the \$30,000 coverage limit.

In February 2008, the roof failed, resulting in substantial damage to the building and further disruption of Voss' businesses. Voss sued CH, Netherlands and her roofing contractor. She alleged that she had a special relationship with CH and that CH negligently secured inadequate levels of business interruption coverage. CH moved for summary judgment arguing, inter alia, that there was no special relationship so it could not be held liable for failing to obtain higher coverage limits in the absence of a specific request for coverage that it did not fulfill.

The Supreme Court granted summary judgment on the basis of this and other arguments. The Appellate Division, Fourth Department, affirmed. The Fourth Department found that CH had not met its burden of establishing the absence of a special relationship, but it nevertheless affirmed the grant of summary judgment on other grounds. The court granted leave to appeal.

In a decision by Judge Graffeo in which Chief Judge Lippman and Judges Jenny Rivera and Abdus-Salaam concurred, the court found that there were at least questions of fact that precluded entry of a summary judgment in favor of CH on the grounds that there was no special relationship but rather an ordinary broker-client relationship with Voss. Graffeo explained that ordinarily a client can only prevail in a claim against an insurance broker for a failure to obtain sufficient coverage when the client can establish that it made a specific request and the broker failed to procure that coverage.

Where a special relationship exists between the broker and client, however, a broker can be liable for failing to advise the client to obtain sufficient coverage even in the absence of a specific request. This is an exceptional situation that can arise when: i) the broker received compensation for the advice apart from its share of the insurance premiums; ii) there was some interaction regarding a question of coverage and the client relied on the broker's expertise; or iii) the parties' course of dealing over an extended period of time would have put an objectively reasonable insurance broker on notice that the client was seeking and relying on the broker's advice.

The court found that the proof submitted by CH did not satisfy its burden of establishing the absence of a material fact as to the existence of a special relationship with Voss. The court noted, however, that the ultimate burden at trial will be on Voss to establish the existence of a special relationship in which she relied on CH's expertise. Judge Smith dissented and, with Judges Susan Phillips Read and Pigott concurring, found that there might have been some question as to the existence of a special relationship during the initial consultations between Voss and CH but that there was no evidence of reliance on CH's advice at the time the new coverage was obtained.

Despite a 4-3 disagreement on the application of the "special relationship" standard to the facts of this particular case, the members of the court appear to be in agreement as to the nature of that standard and as to the fact that plaintiff will face a significant burden in meeting that standard at trial.

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