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COURT OF APPEALS

MENTAL HYGIENE LAW, EVIDENCE.

PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED.

The Court of Appeals, in an extensive opinion by Judge Pigott, over a dissent in two of the three cases, determined the evidence presented in Mental Hygiene Law Article 10 proceedings supported civil commitment of the three respondents as sex offenders with mental abnormalities resulting in "serious difficulty in controlling [sexual] conduct." The facts of each case were discussed in detail, and the determination in each case must be considered "fact specific." However, in one case the diagnosis of anti-social personality disorder (ASPD) coupled with paraphilia NOS was deemed sufficient. In the other two cases, the diagnosis of borderline personality disorder coupled with ASPD and evidence of sexual crimes was deemed sufficient. The dissent would have found the proof of borderline personality disorder insufficient. The number of distinct issues discussed, and the depth of those discussions, cannot fairly be summarized here. ***Matter of State of New York v. Dennis K.*, 2016 N.Y. Slip Op. 05330, CtApp 7-5-16**

FIRST DEPARTMENT

CIVIL RIGHTS LAW, PRIVILEGE, CONSTITUTIONAL LAW, CRIMINAL LAW.

PORTIONS OF A REPORTER'S VIDEOTAPED INTERVIEW WITH DEFENDANT NOT PROTECTED BY SHIELD LAW BECAUSE OF RELEVANCE TO A MURDER PROSECUTION.

The First Department determined a reporter's videotaped interview with the defendant in this murder case must be turned over to the prosecution. Although the substance of some of defendant's statements to the reporter was summarized in the portion of the interview which was aired on the news, relevant statements made by the defendant were not aired. The First Department determined the relevant unaired portions of the interview were not protected by qualified privilege under the Shield Law (Civil Rights Law § 79-h): "Here, the outtakes of an interview of defendant taken at a detention center in which he discusses, inter alia, the charges against him and his relationship with the victim, are on their face 'highly material and relevant' (Civil Rights Law § 79-h[c]). In a circumstantial murder case, evidence which, standing alone, might appear innocuous can be deemed critical when viewed in combination with other circumstantial evidence ... . * * * [W]e find that the People have made the 'clear and specific showing' required to overcome News 12's qualified privilege as to nonconfidential journalistic material under article I, section 8 of New York's Constitution and the Shield Law only as to those portions of the unaired News 12 footage of its interview with defendant in which defendant makes any statement concerning killing Ms. Moore, and discusses their relationship and his impressions and observations of her, including her conduct as a tenant ...". People v. Bonie, 2016 N.Y. Slip Op. 05331, 1st Dept 7-5-16

CRIMINAL LAW, EVIDENCE.

FIVE-AND-A-HALF-YEAR DELAY BEFORE INDICTMENT ADEQUATELY EXPLAINED; HEARSAY EVIDENCE OF THIRD-PARTY CULPABILITY PROPERLY EXCLUDED AS UNRELIABLE.

The First Department determined the People offered an adequate explanation of the five-and-a-half-year delay between when defendant's DNA was matched to evidence collected from the victims and the indictment. The court further determined the hearsay evidence of third-party culpability was properly excluded as unreliable: "In the intervening years, the prosecution had sought to obtain evidence to strengthen their case, which was based on circumstantial evidence, and the investigative delays were satisfactorily explained ... . Furthermore, the resulting prejudice, if any, was minimal. While one potential witness, of questionable reliability, told police that two other men had committed the crimes, and that witness died during the period of delay at issue, the jury nevertheless heard testimony that one of those men had been arrested early in the case. Moreover, 'a determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant' ... . The court properly exercised its discretion in denying, on the ground of lack of sufficient indicia of reliability, defendant's motion to admit hearsay evidence of third-party culpability ... . The declarant, the above-discussed man who died during the pendency of the investigation,

contradicted himself in numerous statements ... . Moreover, other evidence in the case directly undermined the reliability of his statements." ***People v. Fleming*, 2016 N.Y. Slip Op. 05334, 1st Dept 7-5-16**

EMINENT DOMAIN, MUNICIPAL LAW.

THREE-YEAR TIME LIMIT FOR STARTING EMINENT DOMAIN PROCEEDINGS AFTER A COURT CHALLENGE STARTS TO RUN WHEN THE COURT OF APPEALS DISMISSES THE APPEAL FROM THE APPELLATE DIVISION DECISION.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined the three-year time limit within which a municipality must commence eminent domain proceedings begins to run when the Court of Appeals dismisses the appeal: "EDPL 401, entitled 'Time for acquisition,' prescribes the time during which a condemnor may commence proceedings 'to acquire the property necessary for the proposed public project' (EDPL 401[A]). Specifically, section 401(A) provides that the condemnor may commence such proceedings 'up to three years' after the latest of '(1) publication of its determination and findings pursuant to [EDPL 204], or (2) the date of the order or completion of [an exemption procedure under EDPL 206], or (3) entry of the final order or judgment on judicial review pursuant to [EDPL 207]' (EDPL 401[A][1]-[3]). Section 401(B) provides that if the condemnor does not commence EDPL article 4 proceedings within the specified time, 'the project shall be deemed abandoned, and thereafter, before commencing [EDPL article 4 proceedings,] the condemnor must again comply with the provisions of article two' (EDPL 401[B]). The plain and common-sense interpretation of the statute is that 'the final order or judgment on judicial review' is the final order or judgment disposing of any EDPL 207 challenge and terminating judicial review. Our October 12, 2010 decision did not finally terminate judicial review, as the challengers filed a notice of appeal which entailed further review by the Court of Appeals. The decision of the Court of Appeals could not be known until such time as it issued its order dismissing the appeal." ***Matter of City of New York v. 2305-07 Third Ave., LLC*, 2016 N.Y. Slip Op. 05352, 1st Dept 7-5-16**

PERSONAL INJURY.

QUESTION OF FACT WHETHER SKIER ACTED RECKLESSLY, THEREBY RENDERING THE ASSUMPTION OF RISK DOCTRINE INAPPLICABLE.

The First Department determined there was a question of fact whether plaintiff assumed the risk of being struck by defendant skier because defendant acted recklessly. Plaintiff was standing at the bottom of the ski slope when defendant collided with her: "Plaintiff snowboarder was injured when, while standing at the base of a beginner ski slope and speaking with a friend, defendant struck her while skiing at approximately 20 to 30 kilometers per hour. Although there are inherent risks in the sports of skiing and snowboarding, 'participants do not consent to conduct that is reckless, intentional or so negligent as to create an unreasonably increased risk' ... . Here, the record presents triable issues as to whether defendant had engaged in reckless conduct as he skied into a crowded area at the base of a beginner's slope, which was at or near a marked safety zone, and that he did so despite his awareness of his limited abilities to safely handle such speed under the snow surface conditions presented. Furthermore, in view of the significant injuries sustained by plaintiff, reasonable inferences may be drawn that she endured a violent collision, which raises an issue as to whether the speed at which defendant was skiing was reckless under the circumstances ...". ***Horowitz v. Chen*, 2016 N.Y. Slip Op. 05335, 1st Dept 7-5-16**

PERSONAL INJURY.

BAR AT ENTRANCE TO A SHOPPING-CART CORRAL WAS A TRIVIAL DEFECT.

The First Department, reversing Supreme Court, determined defendant was entitled to summary judgment in this slip and fall case because the alleged defect was trivial. Plaintiff alleged tripped over a 3/8-inch-high bar at the entrance to an enclosure for shopping carts (cart corral): "The submissions on the motion establish that 'the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses' ... . [Defendant] presented photographs taken by plaintiff's photographer, which show that the metal bar was only three-eighths of an inch above the surface of the parking lot. Those photographs, and others in the record that were shown to plaintiff at her deposition, establish that the bar was not hidden or covered in any way and did not constitute a trap." ***Myles v. Spring Val. Marketplace, LLC*, 2016 N.Y. Slip Op. 05351, 1st Dept 7-5-16**

PERSONAL INJURY.

QUESTION OF FACT WHETHER PARKED TRUCK WAS A PROXIMATE CAUSE OF A BICYCLIST'S INJURIES.

The First Department determined there was question of fact whether the UPS truck parked in a no-standing zone was a proximate cause of plaintiff-bicyclist's injuries. Plaintiff alleged the protrusion of the UPS into the lane of travel forced him to swerve toward a bus and then jump from his bicycle: "Defendant UPS argues that, although its truck was parked in a no-standing zone in violation of 34 RCNY 4-08(a)(3) at the time of the accident involving plaintiff's bicycle and defendant MTA's bus, its truck was not a proximate cause of the accident. However, the record presents issues of fact as to how far the UPS truck was protruding into the lane of travel, whether plaintiff swerved toward the bus in an effort to avoid the UPS truck, and whether plaintiff was forced to jump from his bicycle in order to avoid being slammed into the UPS truck as

his bicycle was being dragged by the bus. Since a reasonable factfinder could conclude that the accident was a foreseeable consequence of UPS's illegal parking, summary judgment was properly denied ...". ***Santana v. MTA Bus Co.*, 2016 N.Y. Slip Op. 05450, 1st Dept 7-7-16**

PERSONAL INJURY.

IN A REAR-END COLLISION, INNOCENT PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S LACK OF FAULT, BUT CONFLICTING FACTS PRECLUDED SUMMARY JUDGMENT AGAINST ONE OR BOTH DEFENDANTS.

The First Department, in a full-fledged opinion by Justice Renwick clarifying the precedents, found that plaintiff, an innocent driver struck from behind, was entitled to summary judgment only on the issue of his lack of culpability in the accident. Because plaintiff submitted the depositions of the two defendant drivers which presented conflicting evidence about their culpability, plaintiff was not entitled to summary judgment against one or both defendants: "Plaintiff has established his lack of culpable conduct as an undisputed innocent driver, which entitles him to summary judgment on lack of fault pursuant to CPLR 3212(g) ... . However . . . plaintiff has not established entitlement to summary judgment on liability against either defendant driver because of the conflicting and unresolved facts concerning the accident and which vehicle was responsible for the accident." ***Oluwatayo v. Dulinayan*, 2016 N.Y. Slip Op. 05455, 1st Dept 7-7-16**

PERSONAL INJURY, LABOR/CONSTRUCTION LAW.

QUESTION OF FACT WHETHER ACCIDENT WAS GRAVITY-RELATED; MOTORIZED WHEELBARROW SLID DOWN HILL.

The First Department determined there was a question of fact whether the accident was related to a gravity-related risk or merely part of the usual dangers of construction work. Plaintiff was operating a motorized wheelbarrow and was stopped near the top of a hill when it slid down the hill: "Issues of fact exist here as to whether plaintiff's accident was the result of a gravity-related risk or part of the usual and ordinary dangers of the work site ... . Hence partial summary judgment on plaintiff's Labor Law § 240(1) claim should have been denied, and summary dismissal of plaintiff's Labor Law § 200 and common law negligence claims was properly denied." ***Ankers v. Horizon Group, LLC*, 2016 N.Y. Slip Op. 05342, 1st Dept 7-5-16**

SECOND DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

PROSECUTORIAL MISCONDUCT WARRANTED REVERSAL IN THE INTEREST OF JUSTICE.

The Second Department reversed defendant's conviction in the interest of justice because of the prosecutor's misconduct. The decision went into great detail describing the substance of the misconduct (not summarized here): "[T]he judgment of conviction must be reversed and a new trial ordered as a result of pervasive prosecutorial misconduct. During opening statements as well as on summation, the prosecutor repeatedly engaged in improper conduct, including misstating the evidence, vouching for the credibility of witnesses with regard to significant aspects of the People's case, calling for speculation by the jury, seeking to inflame the jury and arouse its sympathy, and improperly denigrating the defense ... . Although objections to some of the remarks below were sustained, we nevertheless include them in order to provide a more complete picture of the pervasiveness of the misconduct at issue on this appeal." ***People v. Redd*, 2016 N.Y. Slip Op. 05392, 2nd Dept 7-6-16**

CRIMINAL LAW, EVIDENCE.

PEOPLE REBUTTED PRESUMPTION UNPRESERVED PHOTO ARRAY WAS UNDULY SUGGESTIVE.

The Second Department determined the People had rebutted the presumption that unpreserved photo arrays were unduly suggestive: "[A]lthough the People's failure to preserve the photographic arrays displayed through the use of the photo manager system gives rise to a presumption of suggestiveness, the People nevertheless rebutted that presumption and sustained their initial burden of production through the testimony of the police officer who administered the photo identification procedure. The officer testified that the complainant's daughter was shown computer-generated photo arrays shortly after the attack occurred. The officer further testified as to the specific information that was entered into the photo manager system, which included the perpetrator's race and approximate age, height, and weight ... . The officer testified that approximately 230 photographs fit the search criteria that was entered into the photo manager system and that these photographs were displayed in arrays consisting of six photographs at a time. Under the circumstances, the People sustained their initial burden of demonstrating the reasonableness of the police conduct and the lack of any undue suggestiveness ... . Furthermore, upon our review of the record of the hearing, we conclude that the defendant failed to sustain his ultimate burden of proving that the photo identification procedure was unduly suggestive ...". ***People v. Busano*, 2016 N.Y. Slip Op. 05385, 2nd Dept 7-6-16**

CRIMINAL LAW, EVIDENCE.

SEPARATE COUNTS FOR A CONTINUING OFFENSE RENDERED INDICTMENT MULTIPLICITOUS.

The Second Department determined criminal contempt charges rendered the indictment multiplicitous. The charge offense was a continuing offense and there was no interruption in the course of conduct: "An indictment is multiplicitous 'when a single offense is charged in more than one count' ... . In addition, '[a]n indictment cannot charge a defendant with more than one count of a crime that can be characterized as a continuing offense unless there has been an interruption in the course of conduct' ... . Here, counts 4, 5, 6, 7, 8, 9, 10, and 11 of the indictment are multiplicitous of count three since those counts allege a continuous offense consisting of the defendant's repeated telephone calls, over a nine-month period, with the intent to harass, annoy, threaten, or alarm the victim (*see* Penal Law § 215.51[b][iv]). The dates used by the prosecution to divide the counts did not establish that there was an interruption in the course of conduct ...". ***People v. Young*, 2016 N.Y. Slip Op. 05395, 2nd Dept 7-6-16**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE GRANTED A PETITION SEEKING AN ORDER FOR FINDINGS REQUIRED FOR SPECIAL IMMIGRANT RESIDENT STATUS.

The Second Department, reversing Family Court, determined the petition for an order making specific findings which would lead to special immigrant resident status (SIJS) should have been granted: "Pursuant to 8 USC § 1101(a)(27)(J) . . . and 8 CFR 204.11, a special immigrant is a resident alien who, inter alia, is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not possible due to parental abuse, neglect, abandonment, or a similar basis found under state law . . . , and that it would not be in the juvenile's best interest to be returned to his or her previous country of nationality or country of last habitual residence ... . Based upon our independent factual review, the record establishes that the child's father is deceased, and therefore, reunification of the child with the father is not possible ... . Further, the Family Court erred with respect to its recital of the best interest element. The law does not require a finding that 'it is in [the child's] best interest to remain in the United States,' but that 'it would not be in the [child's] best interest to be returned to [his or her] previous country of nationality or country of last habitual residence' (8 USC § 1101[a][27][J][ii]). Here, the record reflects that it would not be in the child's best interest to be returned to El Salvador, her previous country of nationality and last habitual residence." ***Matter of Carlos A.M. v. Maria T.M.*, 2016 N.Y. Slip Op. 05374, 2nd Dept 7-6-16**

INSURANCE LAW, CONTRACT LAW.

INSURER FAILED TO GIVE ADEQUATE NOTICE OF A CHANGE IN THE COVERAGE OF THE UNDERLYING AUTO LIABILITY POLICY REQUIRED BY ITS UMBRELLA POLICY, UMBRELLA POLICY REFORMED TO RESTORE THE RESULTING GAP IN COVERAGE.

The Second Department, in a full-fledged opinion by Justice Cohen, determined defendant insurer failed to notify plaintiff of an elimination of coverage as required by Insurance Law § 3425. The insurance contract was reformed to include the eliminated coverage. Plaintiff had a $1 million umbrella auto insurance policy with the defendant insurer (Allstate). When plaintiff purchased the umbrella policy it required $100,000/$300,000 coverage in the underlying policy. Although the limit of the umbrella policy did not change, the requirements for the underlying policy were increased to $250,000/$500,000. After an accident, Allstate paid the excess over $250,000, but refused to pay the difference between the $100,000 actual coverage of the underlying policy and the $250,000 required coverage: "[W]e find that the notice requirement of Insurance Law § 3425(d)(1) applies where, as here, an insurer issues an umbrella policy providing the policyholder with additional coverage above the limits of his or her automobile coverage, and then increases the amount of underlying automobile liability insurance the policyholder must maintain before the additional coverage provided by the umbrella policy becomes available. We further find that an insurer's failure to comply with Insurance Law § 3425(d)(1) provides a basis for reformation of the subject policy." ***Gotkin v. Allstate Ins. Co.*, 2016 N.Y. Slip Op. 05359, 2nd Dept 7-6-16**

THIRD DEPARTMENT

CONTRACT LAW.

ALLEGED ORAL MODIFICATION OF A CONTRACT WHICH REQUIRED WRITTEN NOTICE UNENFORCEABLE.

The Third Department, reversing Supreme Court, determined the alleged oral modification of a contract which required written notice was not enforceable: "[I]f an oral modification has not 'been acted upon to completion' in a manner that 'demonstrate[s], objectively, the nature and extent of the modification' . . . , it will be enforceable only upon a showing 'of either partial performance . . . , which must be unequivocally referable to the oral modification, or equitable estoppel, based upon conduct which is not otherwise compatible with the agreement as written' ... . * * * The performance of the parties

under [the] purported [oral] arrangement, in other words, was identical to that required under a renewed sales agreement. It cannot, as a result, be said that 'there was [any] performance on [plaintiff's] part that was unequivocally referable to the existence of an oral contract' ... . Likewise, inasmuch as the behavior of the parties was 'compatible with the agreement as written,' and given the absence of written notice of nonrenewal, there is no basis for estopping defendant from relying upon the agreement as written ...". ***J. Triple S., Inc. v. Aero Star Petroleum, Inc.*, 2016 N.Y. Slip Op. 05414, 3rd Dept 7-7-16**

CRIMINAL LAW.

GENERAL CONSTRUCTION LAW EXTENDS THE SIX-MONTH SPEEDY TRIAL DEADLINE IF THE LAST DAY FALLS ON A SATURDAY, SUNDAY OR A HOLIDAY.

The Third Department, in a full-fledged opinion by Justice Garry, clarified the application of General Construction Law § 25-a to the six-month speedy trial time limit for felonies: "At issue here is the deadline by which the People must declare readiness when a defendant is charged with a felony. It has also been held that for General Construction Law § 25-a to apply in any factual circumstance, 'there must be an initially ascertainable certain day from which reckoning may be made' ... . CPL 30.30 (1) (a) specifies such an ascertainable day — that is, the commencement of a criminal action — from which the six-month period within which the People are required to declare readiness for trial is to be computed. Thus, we find that when the last day of the six-month period specified by CPL 30.30 (1) (a) falls upon a Saturday, Sunday or legal holiday, the expiration of the period in which the People must declare readiness is extended to the next succeeding business day pursuant to General Construction Law § 25-a. Here, the People's second declaration of readiness was made on the next succeeding business day following the legal holiday upon which the six-month period expired; it was therefore timely and effective, and dismissal of the indictment was not required." ***People v. Mandela*, 2016 N.Y. Slip Op. 05401, 3rd Dept 7-7-16**

CRIMINAL LAW, EVIDENCE.

EVIDENCE COLLECTED AFTER REQUEST FOR COUNSEL SHOULD HAVE BEEN SUPPRESSED, NEW TRIAL ORDERED.

The Third Department determined statements made by and evidence collected from defendant after his request for counsel should have been suppressed in this vehicular homicide case. A new trial was ordered: "The People further conceded at oral argument that defendant invoked his constitutional and limited statutory right to counsel in response to those warnings and that, under the circumstances of this case, valid grounds existed to suppress his post-invocation statements and evidence related to the DRE [drug recognition evaluation], second breathalyzer and blood tests ... . The erroneous admission of this evidence is reviewed under the harmless error doctrine, and such an error is considered harmless 'when, in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict' ... . The admissible evidence at trial established that defendant took twice his prescribed dosage of Clonazepam the morning of the accident and that he failed field sobriety tests administered at the scene. Nevertheless, inasmuch as defendant's inadmissible statements, the recording of the DRE test and the evidence of the inadmissible test results themselves may well have contributed to the conviction, it cannot be said that the erroneous admission of that evidence was harmless ...". ***People v. Green*, 2016 N.Y. Slip Op. 05399, 3rd Dept 7-7-16**

CRIMINAL LAW, EVIDENCE.

NO JUSTIFICATION FOR FORCIBLE DETENTION, CONVICTION FOR ASSAULT OF ARRESTING OFFICER REVERSED.

The Third Department reversed, in the interest of justice, defendant's conviction for assault of a police officer (Smith) because the officer did not have reasonable suspicion defendant had committed a crime at the time defendant was detained. Defendant was involved in an argument with someone when the police approached and did not answer the officer's questions: "Viewing the evidence in the light most favorable to the People . . . , we find no valid line of reasoning and permissible inferences from which a rational jury could have concluded that Smith possessed the requisite reasonable suspicion of criminality necessary to forcibly detain defendant. As defendant's subsequent conduct in assaulting Smith 'cannot validate an encounter that was not justified at its inception' . . . , the evidence was legally insufficient to establish that Smith was injured while undertaking a lawful duty, and defendant's conviction must be reversed ...". ***People v. Tucker*, 2016 N.Y. Slip Op. 05400, 3rd Dept 7-7-16**

FAMILY LAW.

FATHER'S MOTION TO DISMISS MOTHER'S PETITION FOR CUSTODY MODIFICATION SHOULD NOT HAVE BEEN GRANTED, FURTHER INQUIRY REQUIRED.

The Third Department determined mother presented sufficient evidence of a change in circumstances to survive father's motion to dismiss her petition for a custody modification: "Viewed as a whole and accepted as true for this purpose, despite the existence of some apparent contrary evidence, the mother's proof regarding physical discipline in the father's household, together with the alleged improvement and stabilization of the mother's living situation, constituted a change in circumstances sufficient to overcome a motion to dismiss ... . The mother thus satisfied her initial burden, and a further

and more complete inquiry as to whether a modification of custody is in the best interests of the children is warranted ... . Accordingly, we find that Family Court erred in granting the father's motion to dismiss on this ground." ***Matter of Mary BB. v. George CC.*, 2016 N.Y. Slip Op. 05406, 3rd Dept 7-7-16**

FAMILY LAW.

SEVERE ABUSE PETITION AGAINST MOTHER SHOULD NOT HAVE BEEN DISMISSED.

The Third Department determined the severe abuse petition against mother (respondent) should not have been dismissed by Family Court. The abuse was apparently inflicted by mother's boyfriend in her absence and resulted in the child's death: "Respondent demonstrated reckless judgment and disregard for the safety and well-being of the older child by allowing the boyfriend — who she had dated for only a very brief period of time and knew went out at night to procure illegal drugs — to care for her children and, significantly, by permitting him to continue to care for her children and inflict further abuse after the older child had sustained serious and an abnormal degree of bruising, which she unreasonably attributed to accidental causes and the explanations provided by the boyfriend ... . To that end, respondent was aware, or should have been aware, of the older child's numerous injuries indicative of extensive, repeated and accumulating abuse. Equally troubling is respondent's failure to seek professional medical treatment for the older child notwithstanding her knowledge of numerous visible injuries." ***Matter of Mason F. (Katlin G. — Louis F.)*, 2016 N.Y. Slip Op. 05408, 3rd Dept 7-7-16**

FAMILY LAW.

MOTHER'S PRO SE PETITION FOR CUSTODY MODIFICATION SHOULD NOT HAVE BEEN DISMISSED SUA SPONTE BY FAMILY COURT WITHOUT A HEARING.

The Third Department determined Family Court should not have, sua sponte, dismissed mother's pro se petition for custody modification without a hearing: " 'In any modification proceeding, the threshold issue is whether there has been a change in circumstances since the prior custody order significant enough to warrant a review of the issue of custody to ensure the continued best interests of the child[]' ... . While an evidentiary hearing is not required in every case, a hearing is generally 'necessary and should be conducted unless the party seeking the modification fails to make a sufficient evidentiary showing to warrant a hearing or no hearing is requested and the court has sufficient information to undertake a comprehensive independent review of the child[]'s best interests' ... . In determining whether a pro se petitioner made a sufficient evidentiary showing to warrant a hearing, we construe the pleadings liberally and afford the petitioner the benefit of every favorable inference ... . In her pro se petition, the mother alleged that she had moved into an apartment with the child's maternal grandmother, had enrolled as a full-time student and was attending '[a]lcohol counseling.' Inasmuch as the mother's alcohol abuse was a primary factor in Family Court's January 2015 custody determination, the mother's factual allegations of improvement, construed liberally and if established after a hearing, could afford a basis for awarding the mother increased parenting time, unsupervised parenting time and/or access to the child's medical and educational records. Accordingly, we find that Family Court erred in dismissing the mother's petition without a hearing ...". ***Matter of Miller v. Bush*, 2016 N.Y. Slip Op. 05413, 3rd Dept 7-7-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL NOT LIABLE FOR STUDENT'S FALL ON SNOW-COVERED, ICY PLAYGROUND, STUDENTS TOLD TO STAY OFF PLAYGROUND.

The Third Department determined the complaint against the school district stemming from infant plaintiff's fall on the school playground should have been completely dismissed. The students were told to stay on the blacktop area adjacent to the playground because the playground had ice and snow on it: "Where, as here, the underlying accident 'occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate [cause] of the injury and summary judgment in favor of the school defendant is warranted' ... . * * * We reach a similar conclusion with regard to plaintiff's premises liability claim. To prevail on its motion for summary judgment, defendant was required to 'establish as a matter of law that it maintained the [playground] in question in a reasonably safe condition and that it neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof' ... . * * * ... [D]efendant's expert opined that there was 'no requirement or obligation for [defendant] to clean snow and ice off of the playground surface' — a task that would have been 'nearly impossible' due to the rubberized surface material. With respect to the playground equipment itself, defendant's expert concluded that, inasmuch as plaintiff and her classmates were instructed not to use such equipment, defendant was not required to clear the equipment of snow and ice ... . Such proof was, in our view, sufficient to discharge defendant's initial burden on its motion for summary judgment." ***Elbadwi v Saugerties Cent. Sch. Dist.*, 2016 N.Y. Slip Op. 05421, 3rd Dept 7-7-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

NEGLIGENT SUPERVISION CAUSE OF ACTION STEMMING FROM HARASSMENT AND BULLYING BY FELLOW STUDENTS SHOULD NOT HAVE BEEN DISMISSED.

The Third Department, reversing Supreme Court, determined infant plaintiff raised a question of fact whether the school was liable for negligent supervision stemming from harassment and bullying by fellow students. The Third Department further determined the Dignity for All Students Act (Education Law section 10) does not create a private right of action. With respect to negligent supervision, the court wrote: " 'Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' ... . 'In that regard, a school district is held to the same degree of care as would a reasonably prudent parent placed in comparable circumstances'... . 'In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated' ... . Furthermore, the injuries sustained by a plaintiff must be proximately caused by the school's breach of its duty to provide adequate supervision ... . Such issues regarding adequate supervision and proximate cause are generally questions left to the trier of fact to resolve ...". ***Motta v Eldred Cent. Sch. Dist.*, 2016 N.Y. Slip Op. 05424, 3rd Dept 7-7-16**

RETIREMENT AND SOCIAL SECURITY LAW.

FIREFIGHTER'S INJURY FROM TOXIC FUMES UNRELATED TO A FIRE CONSTITUTED AN ACCIDENT ENTITLING FIREFIGHTER TO DISABILITY BENEFITS.

The Third Department, reversing the denial of accidental disability retirement benefits to a firefighter, over a two-justice dissent, determined injury caused by odorless toxic fumes (unrelated to a fire) was an accident within the meaning of the Retirement and Social Security Law. Petitioner-firefighter responded to an emergency at a supermarket where two people were unconscious. It was only after the fact that the presence of carbon monoxide and cyanogen chloride was discovered: "It is well settled that for purposes of the Retirement and Social Security Law, an accident is defined as 'a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' ... . 'Significantly, it must result from an activity that is not undertaken in the performance of ordinary job duties and that is not an inherent risk of such job duties' ... . Petitioner bears the burden of establishing that the event producing the injury was an accident, and respondent's determination will be upheld where it is supported by substantial evidence ... . * * * We have 'held that exposure to toxic fumes while fighting fires is an inherent risk of a firefighter's regular duties' ... . Here, however, unlike our prior cases involving exposure to toxic gases or smoke, petitioner was not responding to a fire that presented the inherent and foreseeable risk of inhaling toxic gases ... . The record evidence further reflects that petitioner was neither aware that the air within the supermarket contained toxic chemical gases . . . , nor did he have any information that could reasonably have led him to anticipate, expect or foresee the precise hazard when responding to the medical emergency at the supermarket ...". ***Matter of Sica v. DiNapoli*, 2016 N.Y. Slip Op. 05420, 3rd Dept 7-7-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

GEORGIA BURGLARY STATUTE DOES NOT INCLUDE A KNOWLEDGE ELEMENT WHICH IS INCLUDED IN THE NEW YORK BURGLARY STATUTE; THE GEORGIA STATUTE CANNOT, THEREFORE, SERVE AS A PREDICATE FELONY.

The Fourth Department, over an extensive dissent, reversing County Court, determined defendant's Georgia burglary conviction could not serve as a predicate felony in New York. The corresponding New York burglary statute required that a defendant *knowingly* enter or remain in a building with the intent to commit a crime. The knowledge element was not part of the Georgia statute: "Defendant pleaded guilty to burglary in 1999, at which time the Georgia burglary statute provided that '[a] person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another' (Ga Code Ann former § 16-7-1 [a]). The equivalent New York burglary statute provides that '[a] person is guilty of burglary . . . when he *knowingly* enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . [t]he building is a dwelling' (Penal Law § 140.25 [2] [emphasis added]). Thus, on its face, the Georgia statute is lacking an essential element—*knowledge* that the entry or decision to remain is unlawful. Because New York law requires proof of an element that Georgia law does not, defendant's Georgia conviction cannot serve as a predicate ...". ***People v. Helms*, 2016 N.Y. Slip Op. 05463, 4th Dept 7-8-16**

CRIMINAL LAW.

DEFENDANT, DESPITE BEING IN CUSTODY AT THE TIME, VALIDLY CONSENTED TO THE SEARCH OF THE PREMISES AND A DUFFEL BAG FOUND IN A CLOSET.

The Fourth Department, over an extensive, two-justice dissent, determined defendant, when he was in custody, consented to the search of the premises and a duffel bag in a closet: "Testimony at the suppression hearing established that, although defendant was in custody at the time he gave consent, he cooperated with the police and assisted them in gaining entry by indicating which of his keys opened the front door ... . Once inside the home, the police observed marihuana in plain view and immediately read defendant his Miranda rights. After defendant waived those rights, he voluntarily consented, both verbally and in writing, to a search of the premises. We reject defendant's further contention that any voluntary consent he may have given did not encompass a search of a duffel bag inside of his closet. 'The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?' ... . Where an officer informs a suspect of the specific items the officer is searching for, '[t]he scope of a search is generally defined by its expressed object' ... . Here, defendant responded affirmatively when the officer asked him whether he 'could have permission to search both the room and the house for drugs or any other weapons or illegal contraband in the house.' Additionally, defendant signed a written consent that included the 'premises' and his 'personal property.' " People v. Freeman, 2016 N.Y. Slip Op. 05472, 4th Dept 7-8-16

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

RISK LEVEL REDUCED FROM THREE TO TWO; DEFENDANT AND VICTIM WERE CLOSE IN AGE AND THE LACK OF CONSENT WAS SOLELY BY VIRTUE OF THE VICTIM'S AGE.

The Fourth Department reduced defendant sex offender's risk level from three to two, finding that the assessment of 25 points for sexual contact with the victim overassessed the defendant's risk to public safety. Defendant and the victim were close in age and the victim's lack of consent was solely due to her age: "In light of the totality of the circumstances, particularly the relatively slight age difference between defendant and the victim, as well as the undisputed evidence that the victim's lack of consent was premised only on her inability to consent by virtue of her age, we conclude in the exercise of our own discretion that the assessment of 25 points under the second risk factor, for sexual contact with the victim, results in an overassessment of defendant's risk to public safety ...". ***People v. George*, 2016 N.Y. Slip Op. 05482, 4th Dept 7-8-16**

FAMILY LAW, ATTORNEYS.

CHILDREN DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN NEGLECT PROCEEDINGS.

The Fourth Department, reversing Family Court, determined the children in the neglect proceeding did not receive effective assistance of counsel from the attorney for the child (AFC). The AFC took positions contrary to the wishes of two of the children (Brian and Alyssa): "The Rules of the Chief Judge provide that an AFC 'must zealously advocate the child's position' (22 NYCRR 7.2 [d]), even if the AFC 'believes that what the child wants is not in the child's best interests' ... . There are two exceptions to this rule: (1) where the AFC is convinced that the 'child lacks the capacity for knowing, voluntary and considered judgment'; or (2) where the AFC is convinced that 'following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child' ... . Here, there is no dispute that the trial AFC took a position contrary to the position of two of the subject children ... . * * * Inasmuch as the trial AFC failed to advocate Brian and Alyssa's position at the fact-finding hearing, he was required to determine that one of the two exceptions to the Rules of the Chief Judge applied, as well as '[to] inform the court of the child[ren]'s articulated wishes' ... . Here, the trial AFC did not fulfill either obligation ... . Indeed, the record establishes that neither of the two exceptions applied." ***Matter of Brian S. (Scott S.)*, 2016 N.Y. Slip Op. 05464, 4th Dept 7-8-16**

PERSONAL INJURY, EMPLOYMENT LAW, MUNICIPAL LAW.

NEGLIGENT RETENTION CAUSE OF ACTION PROPERLY DISMISSED.

The Fourth Department, over an extensive dissent, determined plaintiffs' negligent hiring/retention cause of action against the city and city police department was properly dismissed. The action stemmed from incidents of sexual abuse by a police officer (O'Shei). It was alleged the officer should not have been retained after suffering brain injury: "Plaintiffs contend that the City defendants failed to do an appropriate evaluation of O'Shei's neuropsychological status after the second motor vehicle accident. Recovery on a negligent retention theory 'requires a showing that the employer was on notice of the relevant tortious propensit[y] of the wrongdoing employee' . . . , i.e., 'that the employer knew or should have known of the employee's propensity for the conduct which caused the injury' ... . Thus, contrary to plaintiffs' contention, the City defendants were under no common-law duty to institute specific procedures for supervising or retaining O'Shei inasmuch as they did not know of facts that would lead a reasonably prudent person to investigate the employee ... . * * * ...[T]his is a retention case, and it is well settled that the common-law duty for retention does not require as high a degree of care as does hiring ...". ***Pater v. City of Buffalo*, 2016 N.Y. Slip Op. 05462, 4th Dept 7-8-16**

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