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FIRST DEPARTMENT

CIVIL PROCEDURE, HUMAN RIGHTS LAW, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, ATTORNEYS.

PLAINTIFF'S COMPLAINT AGAINST THE DEFAULTING DEFENDANT-ATTORNEY SUFFICIENTLY ALLEGED GENDER DISCRIMINATION AND INFLICTION OF EMOTIONAL DISTRESS BY DEFENDANT-ATTORNEY'S WITHHOLDING REQUESTED LEGAL SERVICES AND ENGAGING IN SEXUAL HARASSMENT.

The First Department, reversing Supreme Court, determined plaintiff's complaint against the defaulting attorney-defendant should not have been dismissed. Plaintiff alleged defendant attorney discriminated against her by depriving her of the legal services she sought in connection with a sexual assault. Plaintiff alleged she was sexually harassed by defendant attorney. The matter was sent back to determine damages: " '[B]y defaulting, a defendant admits all traversable allegations contained in the complaint, and thus concedes liability, although not damages' ... . 'Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action,' but the standard of proof is 'minimal,' 'not stringent' ... . [P]laintiff averred that defendant ... used his position of authority and confidence as an attorney to gain her trust, and then discriminated against her by withholding the legal services she sought in connection with litigation related to a sexual assault of plaintiff and using the pretext of offering such services to harass and subject her to unwelcome sexual conduct and advances. ... Plaintiff established claims under New York State Executive Law § 269(2)(a) (State HRL) that defendant … discriminated against plaintiff based on her gender ... . [P]laintiff also made a prima facie showing that defendant['s] ... discriminatory behavior violated the City HRL ... . [P]laintiff established her claim for intentional infliction of emotional distress by demonstrating that defendant ... engaged in extreme and outrageous conduct through his deliberate and malicious campaign of harassment, while disregarding a substantial probability that doing so would cause severe emotional distress to her, and that his conduct did in fact did cause her severe emotional distress ...". ***Petty v. Law Off. of Robert P. Santoriella, P.C.*, 2021 N.Y. Slip Op. 07527, First Dept 12-28-21**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

PARTICIPATION IN A PRISON SEX OFFENDER TREATMENT PROGRAM WAS NOT ENOUGH TO AVOID A 10-POINT ASSESSMENT FOR FAILURE TO ACCEPT RESPONSIBILITY IN THIS SORA RISK-LEVEL PROCEEDING.

The First Department, in a full-fledged opinion by Justice Higgitt, determined defendant's participation in a prison sex offender treatment program did not preclude the assessment of 10 points for failing to accept responsibility for his misconduct. The additional 10 points raised defendant's risk level from two to three: "Factor 12 of the Sex Offender Registration Act (SORA) Risk Assessment Guidelines allows for the assessment of 10 points for a sex offender if he 'has not accepted responsibility for his sexual misconduct.' This appeal raises the issue of whether (and to what extent) a sex offender's participation in a sex offender treatment program is evidence that he has accepted responsibility for his misconduct. We conclude that a sex offender's participation in a sex offender treatment program is some evidence that the offender has accepted responsibility and that such evidence must be considered in conjunction with any other reliable evidence bearing on the subject (e.g., statements by the sex offender). In light of all of the evidence relevant to the subject of defendant's acceptance of responsibility for his misconduct, including his participation in a sex offender treatment program and his statements minimizing or denying responsibility for his misconduct, the SORA court correctly concluded that the People established, by clear and convincing evidence, that defendant had not genuinely accepted responsibility for his misconduct, and, accordingly, properly assessed defendant 10 points for Factor 12." ***People v. Solomon*, 2021 N.Y. Slip Op. 07519, First Dept 12-28-21**

LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION, EMPLOYMENT LAW, CIVIL PROCEDURE.

DEFENDANT EMPLOYER'S LATE MOTION TO AMEND THE ANSWER IN THIS LABOR LAW § 240(1) ACTION TO ASSERT THAT PLAINTIFF'S EXCLUSIVE REMEDY WAS THE WORKER'S COMPENSATION BENEFITS ALREADY AWARDED SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant employer's (H&M's) motion to amend its answer to allege Workers' Compensation was plaintiff's sole remedy in this Labor Law § 240(1) action should have been granted, despite the lateness of the motion: "H&M's initial failure to submit the proposed amended pleading (CPLR 3025[b]) was a technical defect that the court should have overlooked (see CPLR 2001), particularly since H&M attached the proposed amendment to its reply ... . Plaintiff's arguments that he was prejudiced by the amendment proposed in H&M's cross motion, filed about three years after this action was commenced and two years after the workers' compensation ruling was affirmed, are unavailing ... . It is not dispositive that leave to amend was sought a few months after the note of issue was filed ... . The valid and final decision of a panel of the Workers' Compensation Board, affirming a decision by a Workers' Compensation Law Judge that was based on a finding that H&M was plaintiff's employer at the time of the accident, 'bars [plaintiff] from relitigating the identical issue in this proceeding' ...". ***Chen v. 111 Mott LLC*, 2021 N.Y. Slip Op. 07501, First Dept 12-28-21**

TRUSTS AND ESTATES, ATTORNEYS.

PLAINTIFF'S MOTION TO COMPEL THE DEFENDANT ESTATE TO HIRE AN ATTORNEY OR BE DEEMED IN DEFAULT SHOULD HAVE BEEN GRANTED; WHERE THERE ARE CLAIMS AGAINST AN ESTATE, THE ESTATE CANNOT REPRESENT ITSELF.

The First Department, reversing Supreme Court, determined the plaintiff's motion to require the defendant executor of the estate to hire an attorney for the estate or be deemed in default should have been granted. An estate cannot represent itself: "[T]he motion court should have granted plaintiffs' motion seeking to require Madden to retain licensed counsel to represent the estate. Although CPLR 321(a) does not address whether an estate is permitted to represent itself, courts have concluded that, in matters involving claims brought against an estate, estate representatives cannot act pro se because their own individual liberty or property interests are not involved. Rather, the interests belong to the estate beneficiaries ...". ***Alaina Simone Inc. v. Madden*, 2021 N.Y. Slip Op. 07497, First Dept 12-28-21**

SECOND DEPARTMENT

APPEALS, CIVIL PROCEDURE.

THE ORDER ISSUED AFTER A TRAVERSE HEARING FINDING DEFENDANTS WERE NOT PROPERLY SERVED IS APPEALABLE PURSUANT TO CPLR 5501(c); THE ORDER BRINGS UP FOR APPEAL WHETHER THE TRAVERSE HEARING WAS NECESSARY; THE MAJORITY C0NCLUDED THE HEARING WAS NOT NECESSARY; THERE WAS AN EXTENSIVE DISSENT.

The Second Department, reversing Supreme Court, over an extensive concurrence and an extensive dissent, determined: (1) the order issued after a traverse hearing finding that defendant was not properly served in this foreclosure action was an appealable order pursuant to CPLR 5501(c); (2) the order brings up for review the finding that a traverse hearing was necessary; and (3), defendants' affidavit denying proper services was conclusory and, therefore, a traverse hearing was not required. The central issue in the decision is whether the order directing the traverse hearing had been brought for review by the order dismissing the complaint after the hearing: "[O]ur jurisdiction is premised upon CPLR 5501(c), which directs that this Court 'shall review questions of law and questions of fact on an appeal from a[n] . . . order of a court of original instance,' as well as the consistent line of cases from this Court holding that an appeal from an order granting a motion to dismiss based upon lack of personal jurisdiction—issued after a hearing—also brings up for review the issue of whether a hearing was necessary to determine the motion ... . Since an order directing a hearing to aid in the determination of a motion holds the determination of the motion in abeyance, the subsequent order made after the hearing is 'the proper order to appeal from' ...". ***OneWest Bank FSB v. Perla*, 2021 N.Y. Slip Op. 07550, Second Dept 12-29-21**

CIVIL PROCEDURE, CONSTITUTIONAL LAW, NEGLIGENCE.

WHEN SUBSTITUTING AN ALTERNATE JUROR AFTER DELIBERATIONS HAVE BEGUN, THE JURY MUST BE INSTRUCTED TO START THE DELIBERATIONS OVER AND DISREGARD THE PRIOR DELIBERATIONS; THE OVER $14 MILLION PLAINTIFF'S VERDICT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN SET ASIDE.

The Second Department, reversing the over $14 million judgment and ordering a new trial on damages, in a full-fledged opinion by Justice Barros, determined defendants' motion to set aside the verdict in this traffic accident case should have been granted. An alternate juror was substituted after deliberations began. The jury should have been instructed to begin deliberations anew: "[W]e address whether the 2013 amendments to CPLR 4106, which changed the statute to allow trial

courts to substitute a regular juror with an alternate juror even after deliberations have begun, may be reconciled with the constitutional right to a trial by a six-member jury wherein each juror deliberates on all issues (see NY Const, art I, § 2 ...). We hold that to reconcile CPLR 4106 with the constitutional and statutory requirements for a civil jury verdict, the trial court must, upon substituting an alternate juror in place of a regular juror after deliberations have begun, provide an instruction to the jury directing them, inter alia, to restart their deliberations from the beginning with the substituted juror and disregard and set aside all prior deliberations. Under the circumstances of this case, the Supreme Court's failure to give that instruction resulted in an invalid verdict which, among other things, deprived the defendants of their request to poll each of the jurors whose votes were counted as part of the verdict ... , and their right to 'a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five' ...". ***Caldwell v. New York City Tr. Auth.*, 2021 N.Y. Slip Op. 07537, Second Dept 12-29-21**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

THE JUDGE SHOULD HAVE HELD A HEARING BEFORE GRANTING THE BANK'S MOTION FOR AN ALTERNATIVE METHOD OF SERVICE IN THIS FORECLOSURE ACTION; DEFENDANT AVERRED THE ADDRESS LISTED ON THE MORTGAGE WAS CORRECT.

The Second Department, reversing Supreme Court, determined a hearing should have been held before allowing the bank to use an alternate method of court authorized service on defendant. Defendant's correct address was on the mortgage: "[T]he defendant's submissions 'raised a question of fact as to whether it was impracticable for the plaintiff to serve [him] with the summons and complaint pursuant to CPLR 308(1), (2), or (4), such that the plaintiff was entitled to an alternative method of court-authorized service pursuant to CPLR 308(5)' ... . In particular, the mortgage listed an address for the defendant in Queens and the defendant averred that he lived at that Queens address at the time, and for several years after this action was commenced. Nothing in the plaintiff's submissions established or even addressed whether or why it was impracticable to serve the defendant at the address listed on the mortgage. Under these circumstances, the Supreme Court should not have determined the defendant's motion without holding a hearing ...". ***U.S. Bank N.A. v. Ming Kang Low*, 2021 N.Y. Slip Op. 07572, Second Dept 12-29-21**

CIVIL PROCEDURE, UTILITIES, CONTRACT LAW.

THE CLASS---LONG ISLAND POWER AUTHORITY (LIPA) CUSTOMERS AFFECTED BY POWER OUTAGES CAUSED BY HURRICANE SANDY---SHOULD NOT HAVE BEEN CERTIFIED.

The Second Department, reversing Supreme Court, determined the class, Long Island Power Authority (LIPA) customers affected by Hurricane-Sandy power outages, should not have been certified: "The plaintiffs base their claims against LIPA on an allegation that LIPA failed to fulfill its promise, made in 2006, that it would spend $25 million annually on a 20-year 'storm hardening' project (i.e., $500 million total) intended to render its electric system more durable and resilient in the face of major storms. ... [T]o establish liability, the plaintiffs would have to demonstrate that, had LIPA performed storm hardening work consistent with its promise, their outages would have been shortened or avoided. This is, as LIPA argues, a fact-driven inquiry which is both speculative and hopelessly individual since it would require the factfinder to determine not only what should have been completed ... , but also to speculate whether that work, had it been performed, would have prevented or shortened individual class members' outages. * * * ... [T]he Supreme Court should also have denied class certification on the basis that the plaintiffs cannot state a viable cause of action to recover damages for breach of contract ...". ***Matter of Long Is. Power Auth. Hurricane Sandy Litig. v. Long Is. Power Auth.*, 2021 N.Y. Slip Op. 07545, Second Dept 12-29-21**

CRIMINAL LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE ACCEPTED A PARTIAL VERDICT WITHOUT INTERVIEWING THE JUROR WHO HAD INFORMED THE COURT SHE COULD NOT CONTINUE DELIBERATING BECAUSE SHE WAS SUFFERING ANXIETY ATTACKS; BECAUSE THE JUROR WAS NOT QUESTIONED, IT IS IMPOSSIBLE TO KNOW WHETHER THE PARTIAL VERDICT WAS REACHED BEFORE THE JUROR BECAME UNABLE TO CONTINUE.

The Second Department, reversing defendant's conviction and ordering a new trial, determined the judge should have interviewed a juror who said she was suffering anxiety attacks and could not continue deliberations. The judge did not question the juror and accepted a partial verdict, without knowing whether the partial verdict was reached before the juror became unable to continue: " 'The Court of Appeals, in *People v Buford* (69 NY2d 290, 299), set forth the basic framework to be followed when conduct occurs during a trial that may be the basis for disqualifying a juror. The court should conduct an in camera inquiry of the juror, in which counsel should be permitted to participate if they desire, and evaluate the nature and importance of the information and its impact on the case. In addition, the trial court's reasons for its ruling should be placed on the record . . . [and] the court may not speculate as to possible partiality of the juror' ... . 'Although the Court of Appeals acknowledged that an 'in camera inquiry may not be necessary in the unusual case . . . where the court, the attorneys, and defendant all agree that there is no possibility that the juror's impartiality could be affected and that there is no reason to question the juror,' here, defense counsel wanted the juror to be questioned' ... . The Supreme Court erred

in failing to conduct an in camera 'probing and tactful inquiry' (*People v Buford*, 69 NY2d at 299) of juror number 11 before accepting the partial verdict ... . As a result of the court's failure to make any inquiry of the juror, it is unknown whether the juror became unable to serve before, or after, the jury had reportedly reached a verdict on one of the counts ...". ***People v. Moody*, 2021 N.Y. Slip Op. 07559, Second Dept 12-29-21**

FAMILY LAW, ATTORNEYS, CIVIL PROCEDURE.

PETITIONER'S WAIVER OF HER RIGHT TO COUNSEL IN THIS FAMILY COURT ACT ARTICLE 8 PROCEEDING WAS NOT DEMONSTRATED TO HAVE BEEN VOLUNTARY; THE COURT SHOULD HAVE HELD A HEARING ON WHETHER THE RESPONDENT AND PETITIONER HAD BEEN IN AN INTIMATE RELATIONSHIP (THEREBY AFFORDING THE COURT SUBJECT MATTER JURISDICTION).

The Second Department, reversing Family Court in this Family Court Act article 8 proceeding, determined; (1) petitioner's waiver of her right to counsel was invalid, and (2) the finding that petitioner did not have an intimate relationship with respondent, thereby depriving the court of subject matter jurisdiction, was not supported by the record: "A party in a proceeding pursuant to Family Court Act article 8 has the right to be represented by counsel (see Family Ct Act § 262[a][ii] ...). Although the right to counsel may be waived, the waiver must be knowing, voluntary, and intelligent ... . In order to ensure that a waiver is made knowingly, voluntarily, and intelligently, the court 'must conduct a searching inquiry' ... and the record must reflect, among other things, 'that the party was aware of the dangers and disadvantages of self-representation' ... . Here, the Family Court failed to conduct a searching inquiry of the petitioner to ensure that her waiver of her right to counsel was knowing, intelligent, and voluntary ... . The Family Court also should have conducted a hearing prior to determining that it lacked subject matter jurisdiction on the ground that the parties did not have an intimate relationship within the meaning of Family Court Act § 812(1)(e) ...". ***Matter of Minor v. Birkenmeyer*, 2021 N.Y. Slip Op. 07546, Second Dept 12-29-21**

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

FAMILY COURT SHOULD NOT HAVE DETERMINED, WITHOUT A HEARING, THAT NEW YORK DID NOT HAVE JURISDICTION OVER THIS CUSTODY MATTER OR THAT NEW YORK WAS AN INCONVENIENT FORUM; MOTHER HAD RELOCATED TO HAWAII WITH THE CHILDREN.

The Second Department, reversing Family Court, determined the court should not have summarily, without a hearing: (1) New York did not have jurisdiction over the custody proceeding; and (2) New York was in inconvenient forum. Mother had relocated to Hawaii with the children: "The court made the initial custody determination for the children in conformity with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter UCCJEA) and, therefore, would ordinarily retain exclusive continuing jurisdiction pursuant to Domestic Relations Law § 76-a ... . In order to determine the issue of whether it lacked exclusive continuing jurisdiction pursuant to Domestic Relations Law § 76-a(1)(a), the court should have afforded the parties an opportunity to present evidence as to whether the children had maintained a significant connection with New York, and whether substantial evidence was available in New York concerning the children's 'care, protection, training, and personal relationships' ... . If, upon remittal, the court determines that it does retain exclusive and continuing jurisdiction pursuant to Domestic Relations Law § 76-a, it may exercise that jurisdiction or it may decline to do so if it determines, upon consideration of all of the relevant statutory factors and after allowing the parties to be heard, that New York is an inconvenient forum ...". ***Matter of Sutton v. Rivera*, 2021 N.Y. Slip Op. 07548, Second Dept 12-29-21**

FAMILY LAW, EVIDENCE, JUDGES.

DEFENDANT'S MOTION TO MODIFY THE CUSTODY ARRANGEMENT RAISED DISPUTED FACTS; THE MOTION SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING.

The Second Department, reversing Supreme Court, determined disputed factual issues required a hearing on defendant's motion to modify the custody arrangement: " 'In order to modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances so that modification is required to protect the best interests of the child' ... . 'Custody determinations should generally be made only after a full and plenary hearing' ... . 'A party seeking a change in [parental access] or custody is not automatically entitled to a hearing' ... . However, 'where 'facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute,' a hearing is required' ...". ***Silla v. Silla*, 2021 N.Y. Slip Op. 07571, Second Dept 12-29-21**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), CIVIL PROCEDURE.

THE INCLUSION OF OTHER MATERIAL IN THE ENVELOPE CONTAINING THE RPAPL 1304 NOTICE IN THIS FORECLOSURE ACTION IS A DEFENSE WHICH CAN BE RAISED AT ANY TIME AND WHICH WARRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS,

The Second Department, reversing Supreme Court, determined the plaintiff's failure to comply with RPAPL 1304 is a defense to a foreclosure action which can be raised at any time. Here the inclusion of other material in the envelope containing the RPAPL 1304 warranted summary judgment in favor of defendants: "Although the defendants failed to oppose the plaintiff's motion, inter alia, for summary judgment and for an order of reference on the ground that the plaintiff did not comply with RPAPL 1304, 'failure to comply with RPAPL 1304 is a defense that may be raised at any time prior to the entry of judgment of foreclosure and sale' ... . Here, the issue was raised before the entry of judgment of foreclosure and sale. Thus, the issue of compliance with RPAPL 1304 was properly before the Supreme Court. The defendants established that the plaintiff failed to strictly comply with RPAPL 1304, on the ground that additional material was sent in the same envelope as the 90-day notice required by RPAPL 1304 ...". ***Citimortgage, Inc. v. Dente*, 2021 N.Y. Slip Op. 07538, Second Dept 12-29-21**
Similar issue and result in ***Wells Fargo Bank, N.A. v. DeFeo*, 2021 N.Y. Slip Op. 07577, Second Dept 12-29-21**

FREEDOM OF INFORMATION LAW (FOIL).

BECAUSE THE FOIL REQUESTS REQUIRED THE RESPONDENT TO CREATE NEW DOCUMENTS, THE REQUESTS SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined FOIL requests for information about kosher meals provided by the NYC Department of Corrections (DOC) should have been denied because the requests would have required the creation of new documents: "... '[A]s a general rule, an agency responding to a FOIL request is not required to create any new record or data that is not already possessed and maintained by it as such' ... . The Press requested the following information: (1) how many inmates requested kosher meals in each of the last 10 years?; (2) how many of those requests were granted and how many were denied?; and (3) the reason for any denials. Here, the DOC established that it 'does not track, record or report the amount of Kosher/Halal meals that are requested.' The DOC further established that the number of requests granted or denied and the reasons for the denials are not maintained by the DOC and would call for the creation of new records, which exceeds the scope of the DOC's obligations in response to a FOIL request ...". ***Matter of Jewish Press, Inc. v. New York City Dept. of Corr.*, 2021 N.Y. Slip Op. 07544, Second Dept 12-29-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EMPLOYMENT LAW.

ALTHOUGH THE DOCTORS WHO TREATED PLAINTIFF IN THE EMERGENCY ROOM WERE NOT EMPLOYED BY THE HOSPITAL, THERE WAS A QUESTION OF FACT WHETHER THEY HAD APPARENT OR OSTENSIBLE AGENCY RENDERING THE HOSPITAL VICARIOUSLY LIABLE FOR ANY MALPRACTICE COMMITTED BY THEM.

The Second Department, reversing (modifying) Supreme Court, determined defendant medical center (Peconic Bay) did not demonstrate it was not vicariously liable for any malpractice committed by two doctors (Wackett and McMahon) who treated plaintiff in the emergency room. Although neither doctor was employed by Peconic Bay, there was a question of fact whether they had apparent or ostensible agency of Peconic Bay: "[T]he medical malpractice cause of action asserted against Peconic Bay alleged that the plaintiff twice sought treatment in Peconic Bay's emergency room and was treated by, among others, Wackett and McMahon. In moving for summary judgment, Peconic Bay established that neither Wackett nor McMahon was its employee. Nevertheless, the evidence submitted in support of its motion for summary judgment was insufficient to demonstrate, prima facie, that the plaintiff entered Peconic Bay's emergency room seeking treatment from Wackett or McMahon privately rather than from the hospital itself, and thus, that these physicians did not have apparent or ostensible agency of Peconic Bay ... . Peconic Bay further failed to eliminate any triable issues of fact as to whether Wackett or McMahon was negligent in his care and treatment of the plaintiff ...". ***Sessa v. Peconic Bay Med. Ctr.*, 2021 N.Y. Slip Op. 07570, Second Dept 12-29-21**

THIRD DEPARTMENT

CIVIL PROCEDURE, FAMILY LAW, JUDGES.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO, SUA SPONTE, ADD A PARTY TO THIS PATERNITY PROCEEDING; APPLICABLE LAW EXPLAINED.

The Third Department, reversing Family Court, determined Family Court did not have the authority to, sua sponte, add a person with whom mother had had a relationship, Rory EE, as a party in the paternity proceeding. All involved agreed Rory EE had no involvement with the child and equitable estoppel was not an issue: "[A] court cannot, on its own initiative, add or direct the addition of a party ... . Rather, the court may only summon a person who should be joined, if the court has jurisdiction over the person; if jurisdiction over the person can be obtained only by his or her consent or appearance, the court must determine whether the proceeding should be permitted to proceed in that person's absence (see CPLR 1001 [b] ...). Family Court plainly did not have the authority to make Rory EE. a named party to this proceeding. ... Family Court has also failed to obtain jurisdiction over Rory EE. No petition or summons, or supplemental summons, was filed against or served upon him ... , no party has moved to add him as a necessary party and there has been no stipulation to that end (see

CPLR 1003 ...), and he has not appeared before Family Court or otherwise consented to the court's jurisdiction (see CPLR 320 [b] ...). ... [W]e reverse and remit for further proceedings, at which time the parties remain free to move for or stipulate to Rory EE. being added as a necessary party, or not, and, absent such a motion or stipulation, and if his joinder is deemed to be necessary, the court is limited to directing that reasonable efforts be made to join him as a party or considering whether this matter should proceed in his absence (see CPLR 1001 ...)." ***Matter of Schenectady County Dept. of Social Servs. v. Noah DD.*, 2021 N.Y. Slip Op. 07587, Third Dept 12-30-21**

CRIMINAL LAW, EVIDENCE.

PURSUANT TO A *MOLINEUX* ANALYSIS, THE WEAPON-POSSESSION COUNT SHOULD HAVE BEEN SEVERED FROM THE MENACING AND ASSAULT COUNTS, IN WHICH DISPLAY OF A WEAPON WAS ALLEGED; THE *SIROIS* HEARING DID NOT DEMONSTRATE THE DEFENDANT CAUSED THE VICTIM TO REFUSE TO TESTIFY, THEREFORE THE VICTIM'S GRAND JURY TESTIMONY WAS NOT ADMISSIBLE; NEW TRIAL ORDERED.

The Third Department, reversing defendant's conviction and ordering a new trial, over a partial dissent, determined: (1) the weapon-possession count should have been severed from the assault and menacing counts under a *Molineux* analysis; (2) the *Sirois* hearing did not demonstrate that the alleged victim refused to testify because of intimidation by the defendant, therefore the victim's grand jury testimony should not have been read to the jury; and (3) under *Molineux*, evidence of the defendant's possession of marijuana and defendant's participation in a program related to the police department's "Crime Analysis Center" should not have been admitted: "[B]y refusing to sever the assault and menacing charges from the weapon charge, County Court permitted highly prejudicial evidence to be placed before the jury. Proof that a handgun was recovered from defendant's residence could lend credence to the victim's claim that a handgun — albeit a different one — was displayed during the course of the assault and menacing. Similarly, if the jury credited the victim's grand jury testimony relative to defendant displaying a weapon during her encounter with him, the jury could be more likely to believe that the handgun recovered from defendant's residence did indeed belong to him. * * * Although the proof adduced [at the *Sirois* hearing] certainly established that the victim felt threatened and did not wish to testify, such proof fell short of demonstrating, by clear and convincing evidence, that defendant — or someone acting at his behest — orchestrated the victim's unavailability for trial." ***People v. Bryant*, 2021 N.Y. Slip Op. 07582, Third Dept 12-30-21**

PERSONAL INJURY, INSURANCE LAW, VEHICLE AND TRAFFIC LAW.

DEFENDANT EMPLOYEE DID NOT HAVE HIS EMPLOYER'S PERMISSION TO DRIVE THE TRUCK INVOLVED IN THE ACCIDENT; THEREFORE THE EMPLOYER'S INSURER PROPERLY DISCLAIMED COVERAGE.

The Third Department, reversing Supreme Court, determined the driver, Nichols, did have the permission of his employer (Monro) to drive the truck involved in the accident. Therefore Monro's insurer properly disclaimed coverage: "Under Vehicle and Traffic Law § 388 (1), the negligence of the operator of a motor vehicle may be imputed to the owner of the vehicle who 'operat[ed] the same with the permission, express or implied, of such owner'... . The statute 'creates a presumption that the vehicle is being operated with the owner's consent, but the presumption may be rebutted by substantial evidence showing that the operation was without permission'... . We find that respondents rebutted the presumption of permissive use. Michael Kio, Monro's store manager and Nichols' superior, testified that he advised Nichols on more than one occasion of the company's longstanding policy proscribing an employee's personal use of company vehicles, including the truck. Nichols acknowledged to Kio that he was aware and understood this policy and that he did not have permission to operate the truck for personal use or use outside of business hours, and that it was to be used for store business only. As Nichols stated in his written submission to Supreme Court, 'I knew I was not supposed to be driving the company truck off company time.' The statements of Kio and Nichols regarding company policy and their understanding of that policy proscribing personal use stand uncontradicted. 'Uncontradicted statements by both the vehicle's owner and its driver that the driver was operating the vehicle without the owner's permission will constitute substantial evidence that rebuts the presumption' ...". ***Matter of Progressive Specialty Ins. Co. (Travelers Prop. Cas. Co. of Am.)*, 2021 N.Y. Slip Op. 07598, Third Dept 12-30-21**

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

THE NEW YORK STATE AND LOCAL RETIREMENT SYSTEM DID NOT REBUT THE "WORLD TRADE CENTER PRESUMPTION" THAT PETITIONER'S DEPRESSION WAS AGGRAVATED BY HIS EXPERIENCES ON 9-11; PETITIONER POLICE OFFICER WAS THEREFORE ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS.

The Third Department, reversing the Comptroller, determined that the respondent New York State and Local Retirement System did not rebut the "World Trade Center presumption" that petitioner's depression was aggravated by his experiences on 9-11: "Recognizing that there is no objective laboratory test to diagnose a mental health disorder like depression, if Fayer [respondent's expert] was going to assert as fact that there are definitive biological reasons for petitioner's qualifying condition — and that his depression would have reached the point of disability no matter the circumstances — it was incumbent upon Fayer, or the Retirement System generally, to provide some support for that far-reaching conclusion ... . 'Although the [World Trade Center] presumption is not a per se rule mandating enhanced accidental disability retirement benefits for first responders in all cases' ... . in our view, accepting Fayer's generalized conclusions, on their own, as adequate to rebut

the statutory presumption afforded to petitioner — that his depression was in fact aggravated by his experiences on 9/11 — renders the existence of the presumption illusory. We therefore reverse the Comptroller's finding that the Retirement System rebutted the World Trade Center presumption ... . As a result, petitioner's application for World Trade Center accidental disability retirement benefits must be granted (see Retirement and Social Security Law § 363 [g] [1] [a])." ***Matter of Fragola v. DiNapoli*, 2021 N.Y. Slip Op. 07596, Third Dept 12-30-21**

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