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FIRST DEPARTMENT

CIVIL PROCEDURE, CIVIL RIGHTS LAW, CRIMINAL LAW.

IN THIS CIVIL RIGHTS ACTION, PRIOR APPELLATE RULING THAT THE SEARCH WARRANT WAS INVALID BECAME THE LAW OF THE CASE; TRIAL COURT'S FINDING THE WARRANT VALID AND GRANTING A DIRECTED VERDICT IN FAVOR OF THE POLICE REVERSED.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Acosta, over a two-justice dissent, determined the First Department's prior ruling that a search warrant was invalid was the law of the case. The trial court had ruled new evidence demonstrated the validity of the warrant and granted a directed verdict in favor of the defendants (the city and police officers who procured and executed the search warrant). The plaintiffs, who had been pushed to the floor at gunpoint, handcuffed, and held for three hours while their apartment was searched (and trashed), sued alleging the violation of their civil rights: "This case gives us the opportunity to emphasize that when an issue is specifically decided on a motion for summary judgment, that determination is the law of the case. As such, the trial court, as well as the parties, are bound by it 'absent a showing of subsequent evidence or change of law'... . Applying this rule to the case at hand, we specifically found in *Delgado v. City of New York* (86 AD3d 502, 508 [1st Dept 2011] [*Delgado I*]), that the no-knock search warrant at issue was not valid. Thus, the trial court was bound by that determination absent the introduction of subsequent evidence to show otherwise. The evidence that was introduced at trial on the validity of the warrant, however, was not significantly different from what was previously before the court on the motion for summary judgment. Accordingly, the trial court erred in deeming the warrant valid and granting defendants' motion for a directed verdict in their favor. ***Delgado v. City of New York*, 2016 N.Y. Slip Op. 06185, 1st Dept 9-27-16**

CRIMINAL LAW.

A VERDICT FINDING DEFENDANT GUILTY OF GRAND LARCENY BUT NOT GUILTY OF POSSESSION OF STOLEN PROPERTY WOULD NOT BE REPUGNANT; INSTRUCTING THE JURY OTHERWISE WAS REVERSIBLE ERROR.

The First Department determined the jury was erroneously instructed they could not find the defendant guilty of grand larceny but not guilty of possession of stolen property. A new trial was ordered. The court explained the analytical criteria for a repugnant verdict: "The repugnancy test is 'essentially a variant of the theoretical impossibility' test that is applied in the realm of lesser included offenses' ... . Notwithstanding the overwhelming evidence as to both submitted counts in this case, and notwithstanding the practical remoteness of the possibility that a person who commits grand larceny will not also be guilty of criminal possession of the property he or she steals, our examination of the elements of the two crimes persuades us that it is theoretically possible for a person to possess the mental state required for guilt of grand larceny in the third degree, and at the same time lack the mental state necessary for guilt of criminal possession of stolen property in the third degree. Accordingly, the mixed verdict contemplated in the challenged instruction would not have been a repugnant verdict, and the court therefore erred in instructing the jury that it was 'not a legally permissible verdict.' " ***People v. Simmons*, 2016 N.Y. Slip Op. 06175, 1st Dept 9-28-16**

CRIMINAL LAW.

NO RECORD DEMONSTRATING THE TRIAL JUDGE READ THE NOTES FROM THE JURY TO THE PARTIES VERBATIM PRIOR TO DISCUSSING RESPONSES; THAT WAS A MODE OF PROCEEDINGS ERROR REQUIRING REVERSAL DESPITE LACK OF PRESERVATION.

The First Department, in a full-fledged opinion by Justice Kapnick, reversed defendant's conviction because there was no record that the trial judge read the notes from the jury to the parties verbatim prior to discussing the appropriate responses: " 'Where a trial transcript does not show compliance with O'Rama's procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to' ... . Here, the court's response to the jury regarding the fourth note does include a limited reference to how the 'parties' wished to respond to the jury's request, suggesting that an off-the-record conference may have occurred with respect to the fourth note. Even assuming, without deciding, that this reference would suffice to remedy the O'Rama violation with respect to the fourth note, there is no such reference to the parties' agreement in the trial court's response to the jury regarding the fifth note. Therefore, the

court's handling of the fifth note constitutes a clear departure from the O'Rama procedure and a mode of proceedings error for which preservation is not required ...". ***People v. Robinson*, 2016 N.Y. Slip Op. 06266, 1st Dept 9-29-16**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

TERMINATION OF TENURED TEACHER WAS TOO SEVERE A SANCTION FOR INAPPROPRIATE BEHAVIOR WHICH DID NOT VIOLATE ANY RULE.

The First Department, over a dissent, determined termination of a tenured teacher for inappropriate behavior which did not violate any rule was too severe a sanction. It was alleged, inter alia, the teacher asked his eighth-grade female students about their older sisters and accepted the phone number of one 23-year-old sister: "Based on all the circumstances of the case, including the lack of any prior allegations of misconduct against petitioner during 13 years of service and the fact that the misconduct does not violate any specific rule or regulation, we find the penalty of termination sufficiently disproportionate to the offenses to shock the conscience ... . Moreover, petitioner had never been warned or reprimanded regarding the conduct at issue, and, contrary to the conclusion of the Hearing Officer, there is no evidence that a warning or reprimand or other penalty short of termination would not have caused petitioner to cease the objectionable conduct immediately. While we share some of our dissenting colleague's concern regarding petitioner's behavior and his failure to express any deeper understanding of the inappropriate nature of his actions, we do not agree that the law supports petitioner's termination at this time." ***Matter of Williams v. City of New York*, 2016 N.Y. Slip Op. 06184, 1st Dept 9-27-16**

PERSONAL INJURY.

PLAINTIFF FAILED TO SATISFY HIS BURDEN TO PROVE HIS INJURIES WERE CAUSED BY A PARTICULAR TRAIN AND THE OPERATOR OF THE TRAIN WAS NEGLIGENT; GRANT OF MOTION TO SET ASIDE THE PLAINTIFF'S VERDICT AFFIRMED.

The First Department, over a two-justice dissent, determined the NYC Transit Authority's motion to set aside the verdict was properly granted. Plaintiff, who had no memory of the incident, claimed he was struck by defendant's train due to the defendant train-operator's (Lopez's) negligence. The First Department found the evidence of both causation and negligence was speculative. With respect to the proof of the operator's (Lopez's) negligence, the court wrote: "... [A]ssuming arguendo that Lopez's train caused plaintiff's injury, plaintiff failed to make a prima facie showing that Lopez could have avoided injuring plaintiff if he had activated the train's emergency brake upon observing plaintiff's sneakers ... . * * * The Court of Appeals has explained that a train operator 'may be found negligent if he or she sees a person on the tracks from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person' (*Soto v. New York City Tr. Auth.*, 6 NY3d 487, 493 [2006] ...). Contrary to the dissent's arguments that our holding here 'eviscerate[s]' *Soto*, this Court and our colleagues in the Second Department have explained that *Soto* does not relieve a plaintiff of the burden to introduce competent evidence, nor does it allow a plaintiff to rely solely on conclusory assertions and mere speculation ...". ***Obey v. City of New York*, 2016 N.Y. Slip Op. 06183. 1st Dept 9-27-16**

SECOND DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE.

AN AGGRIEVED PARTY NEED NOT SHOW PECUNIARY LOSS TO WARRANT AN AWARD OF SANCTIONS OR ATTORNEY'S FEES FOR FRIVOLOUS CONDUCT.

The Second Department affirmed the sanctions/attorney's fees awarded for frivolous conduct. The court noted that an aggrieved party need not demonstrate pecuniary loss to warrant an award and an attorney who represents himself defending against frivolous conduct is entitled to an award: "A court may award a party 'costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct' (22 NYCRR 130-1.1[a]). 'In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct' (22 NYCRR 130-1.1[a]). The decision whether to impose costs or sanctions against a party for frivolous conduct, and the amount of any such costs or sanctions, is generally entrusted to the court's sound discretion ... . * * * While compensatory sanctions should correspond at least to some degree to the amount of damages, the aggrieved party is not always required to show 'actual pecuniary loss'... . ... An attorney ... , who represents himself, may recover fees for 'the professional time, knowledge and experience . . . which he would otherwise have to pay an attorney for rendering' ...". ***Board of Mgrs. of Foundry at Wash. Park Condominium v. Foundry Dev. Co., Inc.*, 2016 N.Y. Slip Op. 06189, 2nd Dept 9-28-16**

ELECTION LAW.

FAILURE TO INCLUDE YEAR IN THE DATES OF THE SIGNATURES REQUIRED INVALIDATION OF THE DESIGNATING PETITION.

The Second Department, over a dissent, determined strict compliance with the Election Law required that 29 signatures on a designating petition be invalidated. The dates opposite the signatures included the day and month but not the year: "Two statutory provisions are directly relevant to the disposition of this appeal. First, Election Law § 6-130 provides that '[t]he sheets of a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed.' Second, Election Law § 6-132(1) requires that the 'day and year' be 'placed opposite' the signature of each signer on a designating petition (Election Law § 6-132[1]). * * * The requirement that the date—the 'day and year'—accompany those signatures is a matter of prescribed content, not form ... . 'While substantial compliance is acceptable as to details of form, there must be strict compliance with statutory commands as to matters of prescribed content' ...". ***Matter of Avella v. Johnson*, 2016 N.Y. Slip Op. 06141, 2nd Dept 9-26-16**

FAMILY LAW, ATTORNEYS.

APPELLANT WAS NOT APPRISED OF AND DID NOT WAIVE HER RIGHT TO COUNSEL; ORDERS OF PROTECTION REVERSED.

The Second Department determined the appellant was deprived of her right to counsel. The orders of protection were reversed: "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]), but may waive that right provided that he or she does so knowingly, voluntarily, and intelligently ... . In order to determine whether a party is validly waiving the statutory right to counsel, the Family Court must conduct a 'searching inquiry' to ensure that the waiver is knowing, voluntary, and intelligent ... . A waiver is valid where the party was aware of the dangers and disadvantages of proceeding without counsel ... . The deprivation of a party's right to counsel guaranteed by Family Court Act § 262 requires reversal, without regard to the merits of the unrepresented party's position ... . Here, the record supports the appellant's contention that she was not advised of her right to counsel in accordance with Family Court Act § 262(a). Further, there is no indication on the record that she waived her right to counsel. Under these circumstances, the appellant was deprived of her statutory right to counsel ...". ***Matter of Osorio v. Osorio*, 2016 N.Y. Slip Op. 06219, 2nd Dept 9-28-16**

MUNICIPAL LAW.

FAILURE TO STRICTLY COMPLY WITH SIGNATURE REQUIREMENTS IN THE VILLAGE LAW REQUIRED INVALIDATION OF REFERENDUM PETITION.

The Second Department determined failure to strictly comply with the signature requirements in the Village Law invalidated a referendum concerning the elimination of paid fireman positions: "Village Law § 9-902(8) states: 'Petition shall be made upon white paper containing the signatures of qualified electors of the village. The sheets of such a petition shall be numbered consecutively beginning with number one at the foot of each sheet. Such petition must set forth in every instance the correct date of signing, the full name of the signer, his present residence, the ward if any and the village election district if any. A signer need not himself fill in the date, residence, ward, or election district' ... . The respondents/defendants do not dispute that their referendum petitions failed to set forth the village election district for all but 5 of the 4,254 signatories. * * * The Court of Appeals has held that, '[w]hile substantial compliance is acceptable as to details of form, there must be strict compliance with statutory commands as to matters of prescribed content' ... . Here, the prescribed content includes the village election district, which is a matter of substance, not form ...". ***Matter of Pilla v. Karnsomtob*, 2016 N.Y. Slip Op. 06142, 2nd Dept 9-26-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

FALLING SHEETROCK DID NOT SUPPORT A LABOR LAW 240(1) CAUSE OF ACTION.

The Second Department determined defendants' motion for summary judgment on the Labor Law 240(1) cause of action, alleging injury from a falling piece of sheetrock, was properly granted. The sheetrock in question was stored against a wall and was not being hoisted at the time of the incident. [The extensive decision demonstrates the complexity of Labor Law actions as it addresses Labor Law 241(6) and Labor Law 200 causes of action, indemnification issues and the liability of agents and general contractors.] With respect to the Labor Law 240(1) cause of action, the court wrote: "…Labor Law § 240(1) 'does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected' ... . Here, the sheetrock, which was being stored against a wall, was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell ... , nor was it expected, under the circumstances of this case, that the sheetrock would require securing for the purposes of the undertaking at the time it fell ...". ***Seales v. Trident Structural Corp.*, 2016 N.Y. Slip Op. 06204, 2nd Dept 9-28-16**

PERSONAL INJURY, LABOR-CONSTRUCTION LAW, EMPLOYMENT LAW.

PROPERTY OWNER'S [EMPLOYER'S] COMMON LAW DUTY TO PROVIDE SAFE PLACE TO WORK NOT TRIGGERED BY INJURY WHEN DRAWING UP AN ESTIMATE.

The Second Department, reversing Supreme Court, determined defendant property-owner was not entitled to summary judgment. Plaintiff was on the property to provide an estimate of the cost of repair of defendant's porch when the porch collapsed. Defendant argued she could not be liable because the injury occurred when plaintiff was doing work he was hired to do. However, the plaintiff had not been hired to repair the porch: "Employers have a common-law duty to provide their employees with a safe place to work ... . The duty, however, does not extend to hazards that are part of, or inherent in, the very work the employee is to perform or defects the employee is hired to repair ... . Here, the defendant failed to establish her prima facie entitlement to judgment as a matter of law, as the evidence submitted in support of her motion showed that the plaintiff merely went to the premises to prepare an estimate to repair the back porch. The plaintiff had not been hired to repair the back porch and he was not engaged in any repair work when the incident allegedly occurred...". ***Arcabascio v. Bentivegna*, 2016 N.Y. Slip Op. 06187, 2nd Dept 9-28-16**

ZONING.

ZONING BOARD'S DENIAL OF APPLICATION TO RENEW A VARIANCE PREVIOUSLY ALLOWED WAS NOT ARBITRARY AND CAPRICIOUS.

The Second Department, reversing Supreme Court, determined the zoning board of appeals (ZBA) did not act arbitrarily and capriciously when it denied petitioner's application to renew a variance previously granted by the board. The Second Department held the board had adequately explained the reasons for the denial: "The ZBA's determination denying the petitioner's applications to renew the use variance previously issued in 2007, and for a new use variance, was not illegal, arbitrary, or an abuse of discretion. With respect to renewal of the 2007 variance, contrary to the Supreme Court's determination, the ZBA's findings of fact dated December 4, 2013, provided a rational basis for denying the petitioner's application. The ZBA found, among other things, that the petitioner failed to demonstrate 'unnecessary hardship' in accordance with Town Law § 267-b(2)(b). The fact that the ZBA previously temporarily approved the same application in 2007 did not relieve the petitioner of its evidentiary burdens in demonstrating 'unnecessary hardship' for purposes of renewal of the use variance, or for purposes of seeking an additional use variance. As the ZBA determined, the petitioner failed to show, based on competent financial evidence, i.e., by dollars and cents proof, that it cannot yield a reasonable rate of return absent the requested use variances ...". ***Matter of Monte Carlo 1, LLC v. Weiss*, 2016 N.Y. Slip Op. 06217, 2nd Dept 9-28-16**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE, MUNICIPAL LAW.

CITY HOUSING AUTHORITY OUTREACH WORKER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined an outreach worker/field supervisor who, pursuant to a grant, worked for the Niagara Falls Housing Authority was an employee entitled to unemployment insurance benefits: "Prior to being hired, claimant filled out an application and was required to submit a résumé, after which he was interviewed by a panel, which included two officials from the Housing Authority, that determined to hire him ... . Upon being hired, claimant was required to attend training ... . The rate of pay for claimant, who was required to work 35 hours per week, was not subject to negotiation ... , and claimant was required to fill out and submit weekly time sheets that would have to be approved and signed by his supervisor before receiving remuneration from the Housing Authority ... . While claimant did not receive benefits, he was reimbursed for expenses related to the costs of a cell phone, gas, tolls, food and office supplies ... , and the Housing Authority also provided claimant with office space to use in one of its buildings. While performing his duties as an outreach worker, claimant was required to wear a jacket or shirt, as well as a hat, identifying him as part of the SNUG [violence reduction] program ... and was required to maintain a certain number of clients and to meet with those clients. Claimant was also not allowed to subcontract his work or employ a substitute to perform his work ... , and his work in the community was reviewed periodically and subject to oversight by his supervisors ...". ***Matter of Cole (Niagara Falls Hous. Auth.--Commissioner of Labor)*, 2016 N.Y. Slip Op. 06281, 3rd Dept 9-29-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

EVIDENCE SEIZED FROM DEFENDANT'S PERSON BEFORE THERE WAS PROBABLE CAUSE TO ARREST SHOULD HAVE BEEN SUPPRESSED; HOWEVER EVIDENCE COLLECTED AFTER THERE WAS PROBABLE CAUSE WAS NOT THE FRUIT OF THE POISONOUS TREE.

The Fourth Department determined items seized from defendant's person at the time he was detained should have been suppressed. However, a subsequent show-up identification, statements, and items found where defendant was initially seized were not fruit of the poisonous tree: "We agree with defendant that the items seized from his person should have been suppressed because the police did not have probable cause at that time to arrest him and conduct a search incident to an arrest. We conclude that the police had reasonable suspicion to pursue defendant and detain him for the purpose of the showup identification ... . But although the police were permitted at that time to conduct a pat frisk of defendant ... , they were not permitted to search him. We reject defendant's contention, however, insofar as he asserts that the remaining evidence must be suppressed as fruit of the poisonous tree. It is well settled that 'only evidence which is the fruit of the poisonous tree' should be excluded' ... . In other words, 'only evidence which has been come at by exploitation of that illegality should be suppressed' … . Here, defendant did not meet his burden of establishing that the showup identification of him, his statements to the police, and the items seized in the courtyard, were causally related to his unlawful arrest prior to the showup identification procedure ... , i.e., that such evidence was 'obtained by exploitation' of the illegal arrest ...". ***People v. Ashford*, 2016 N.Y. Slip Op. 06365, 4th Dept 9-30-16**

CRIMINAL LAW, ATTORNEYS.

REVERSIBLE ERROR TO ALLOW DEFENDANT TO SELECT JUROR, A SELECTION WITH WHICH DEFENSE COUNSEL APPARENTLY DISAGREED.

The Fourth Department, over a two-justice dissent, determined the selection of a juror by the defendant, a selection with which defense counsel apparently disagreed, deprived defendant of his right to counsel: " 'It is well established that a defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case such as whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal, ... 'The selection of particular jurors falls within the category of tactical decisions entrusted to counsel, and defendants do not retain a personal veto power over counsel's exercise of professional judgments' ... . Here, during the part of the jury selection process when the attorneys were exercising peremptory challenges, defense counsel stated '[f]or the record, my client is insisting over my objection to keep juror number 21. So, jurors 20 and 21 will be on the jury.' We agree with defendant that, contrary to the People's contention, defense counsel 'never acceded' or acquies[ed]' to defendant's decision' ... . Consequently, the court denied defendant the 'expert judgment of counsel to which the Sixth Amendment entitles him,' and 'we cannot say that the error here was harmless beyond a reasonable doubt' ...". ***People v. Mckenzie*, 2016 N.Y. Slip Op. 06288, 4th Dept 9-30-16**

CRIMINAL LAW, EVIDENCE.

NO FOUNDATION FOR RECANTATION EVIDENCE COULD BE LAID BECAUSE THE ALLEGED VICTIM REFUSED TO TESTIFY; TRIAL COURT SHOULD NOT HAVE ALLOWED VICTIM'S TESTIMONY FROM THE FIRST TRIAL TO BE ADMITTED WITHOUT EXPLORING WHETHER THE TESTIMONY SHOULD BE STRUCK BECAUSE IT WAS CENTRAL TO THE PROSECUTION'S CASE; TRIAL COURT ACTED VINDICTIVELY BY IMPOSING A HARSHER SENTENCE AFTER RETRIAL.

The Fourth Department, reversing defendant's conviction, determined that allowing the alleged victim's testimony from the first trial to be read into evidence in the second trial violated the defendant's right to confrontation. After the first trial, the victim recanted and told defense counsel and the prosecutor someone else committed the offense. At defendant's second trial, the victim refused to testify, exercising her 5th amendment right to remain silent. Because the victim could not be asked about her recantation, and therefore no foundation for the recantation evidence could be laid, the victim's testimony from the first trial was deemed admissible. However, under the facts, the victim's assertion of her 5th amendment rights required the trial judge to explore whether her testimony in the first trial should be struck because her testimony was central to the prosecution's case. In addition, the Fourth Department determined the trial judge acted vindictively when a greater sentence was imposed after the second trial. ***People v. Hicks*, 2016 N.Y. Slip Op. 06334, 4th Dept 9-30-16**

DEFAMATION.

SERIOUS-CRIME DEFAMATION CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Fourth Department determined the "serious crime" defamation per se cause of action should have been dismissed. The defamation action stemmed from a letter written to a federal judge by the defendant, in connection with plaintiff-corporation's pleading guilty to a violation of the Clean Water Act: "Supreme Court erred in denying that part of her pre-answer

motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) insofar as the complaint alleged that defendant committed defamation per se by 'charging plaintiff[s] with a serious crime' ... . We conclude that certain statements in the letter alleging criminal conduct on the part of plaintiffs do not constitute defamation per se because 'reference to extrinsic facts is necessary to give them a defamatory import' ... , and that other statements, e.g., accusing plaintiffs of terrorism, do not constitute defamation per se because they are 'likely to be perceived as rhetorical hyperbole [or] a vigorous epithet' ...". ***Crane-Hogan Structural Sys., Inc. v. Belding*, 2016 N.Y. Slip Op. 06376, 4th Dept 9-30-16**

FAMILY LAW, ATTORNEYS.

FORCING DEFENDANT MOTHER TO GO TO TRIAL IN A CUSTODY SUIT WITHOUT AN ATTORNEY, AFTER HER ATTORNEY WITHDREW FOR NONPAYMENT ON THE MORNING OF THE TRIAL, REQUIRED REVERSAL.

The Fourth Department determined Supreme Court's failure to grant an adjournment to allow mother to find another attorney, after her attorney withdrew on the morning of the custody trial, required reversal: "We conclude that the court abused its discretion in denying defendant's request for an adjournment ... . The record establishes that defendant's request was not a delay tactic and did not result from her lack of diligence ... . We also agree with defendant that the court's refusal to grant defendant an adjournment to obtain new counsel resulted in the absence of a full and complete record upon which the court could render an adequate and informed decision. 'The custody determination of the trial court generally is entitled to great deference . . . , but [s]uch deference is not warranted . . . where the custody determination lacks a sound and substantial basis in the record' ...". ***Zhu v. Ye Cheng*, 2016 N.Y. Slip Op. 06358, 4th Dept 9-30-16**

INSURANCE LAW.

ANTISUBROGATION RULE DID NOT PRECLUDE RECOVERY TO THE EXTENT RECOVERY EXCEEDED THE LIMITS OF THE RELEVANT POLICY.

The Fourth Department determined the antisubrogation rule prohibited the insurer from recovering under the relevant $1,000,000 policy. But there was no showing that recovery under a $25,000,000 umbrella policy was prohibited by the antisubrogation rule. Therefore recovery to the extent recovery exceeded $1,000,000 was not precluded by the rule: "... [U]nder the antisubrogation rule, 'an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered . . . even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived' ... . Conversely, where 'the monetary limit of the insurance provided by the . . . policy is for a lesser sum than that sought by the plaintiff as damages, the motion [for summary judgment dismissing] the third-party complaint should have been granted only up to the applicable limits of that policy' ... , because '[i]t is black letter law that New York law does not bar insurance companies from seeking indemnification for settlements or judgments that exceed the limits of an insurance policy' ...". ***Mitchell v. NRG Energy, Inc.*, 2016 N.Y. Slip Op. 06359, 4th Dept 9-30-16**

INSURANCE LAW, ATTORNEYS.

INSURED NOT ENTITLED TO ATTORNEY'S FEES IN AN AFFIRMATIVE ACTION TO SETTLE THE INSURED'S RIGHTS UNDER THE POLICY.

The Fourth Department, reversing Supreme Court, determined that the plaintiff (the insured) was not entitled to attorney's fees in an action brought to settle its rights under a policy: "This case is governed by the general rule that attorneys' fees and other litigation expenses are 'incidents of litigation' that the prevailing party may not collect 'from the loser unless an award is authorized by agreement between the parties or by statute or court rule' ... . Indeed, it is well established that 'an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy' ... . Here, there is nothing in the insurance policy that obligates defendant to reimburse or indemnify plaintiff for attorneys' fees incurred by it in prosecuting an action to enforce the property coverage provisions of the policy, nor does plaintiff refer to any statute or a court rule authorizing its recovery of attorneys' fees from defendant." ***Zelasko Constr., Inc. v. Merchants Mut. Ins. Co.*, 2016 N.Y. Slip Op. 06328, 4th Dept 9-30-16**

MENTAL HYGIENE LAW.

TO JUSTIFY CIVIL CONFINEMENT, THE DISEASE OR DISORDER ATTRIBUTED TO A SEX OFFENDER NEED NOT BE A SEXUAL DISORDER; SEX OFFENDER'S MOTION FOR A DIRECTED VERDICT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the evidence that the sex offender suffered from a mental abnormality as defined in the Mental Hygiene Law was sufficient to survive petitioner's motion for a directed verdict. The court noted that the disease or disorder attributed to the petitioner need not be a sexual disorder: "Here, the court relied on *Matter of State of New York v. Donald DD.* (24 NY3d 174) in concluding that, while petitioner's antisocial personality disorder (ASPD) and psychopathic traits predisposed him to the commission of conduct constituting a sex offense, such disorder and traits, alone or in combination, are not sexual disorders and thus as a matter of law do not constitute a mental abnormality within the meaning of the Mental Hygiene Law. We conclude, however, that the court erred in granting petitioner's motion for a directed verdict inasmuch as "*Donald DD.* did not engraft upon the 'condition, disease, or disorder' prong a require-

ment that the 'condition, disease or disorder' must constitute a sexual disorder' " ...". ***Matter of Suggs v. State of New York*, 2016 N.Y. Slip Op. 06289, 4th Dept 9-30-16**

PERSONAL INJURY, ANIMAL LAW, CIVIL PROCEDURE.

INFANT CAN BE LIABLE FOR INJURY CAUSED BY A DOG OWNED BY HIS FATHER; PUNITIVE DAMAGES CLAIM PROPERLY SURVIVED MOTION FOR SUMMARY JUDGMENT.

The Fourth Department determined a 17-year-old (Taquilo) could be liable for a dog bite, despite the fact that the dog was owned by his father (Rogelio). The court further determined the punitive damages claim against Taquilo properly survived the motion for summary judgment: "We reject defendants' contention that Taquilo is relieved of potential liability for the child's injuries based upon Taquilo's age at the time of the incident. 'It is elementary in this State that an infant may be held civilly liable for damages caused by his [or her] tortious acts' ... , and defendants cite no authority to support their contention that an infant cannot be subject to strict liability for harm caused by an animal. Nor is it dispositive that the dog was owned by Taquilo's father, Rogelio. 'Strict liability can . . . be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensit[ies]' ... . Here, defendants' own submissions raise issues of fact whether Taquilo harbored the dog … , and whether he knew or should have known of the dog's vicious propensities ...". ***Cruz v. Stachowski*, 2016 N.Y. Slip Op. 06327, 4th Dept 9-30-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

EXPERT'S INABILITY TO QUANTIFY THE EXTENT TO WHICH DEFENDANTS' CONDUCT DIMINISHED PLAINTIFF'S DECEDENT'S CHANCE OF A BETTER OUTCOME DID NOT JUSTIFY GRANTING DEFENDANTS' MOTION FOR A JUDGMENT AS A MATTER OF LAW.

The Fourth Department, reversing Supreme Court, determined defendants' motion for a judgment as a matter of law (on the issue of causation) should not have been granted. Plaintiff alleged the delay in diagnosing or failure to diagnose plaintiff's decedent's condition diminished plaintiff's decedent's chance of a better outcome. Plaintiff's expert's inability to quantify the extent to which defendants' conduct diminished the chance of a better outcome did not render the proof insufficient: "In order to establish proximate causation, the plaintiff must demonstrate that the defendant's deviation from the standard of care 'was a substantial factor in bringing about the injury' (PJI 2:70...). Where, as here, the plaintiff alleges that the defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury to the patient may be predicated on the theory that the defendant thereby 'diminished [the patient's] chance of a better outcome,' in this case, survival ... . In that instance, the plaintiff must present evidence from which a rational jury could infer that there was a 'substantial possibility' that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care ... . However, '[a] plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the [patient's] chance of a better outcome . . . , as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the [patient's] chance of a better outcome' ...". ***Clune v. Moore*, 2016 N.Y. Slip Op. 06331, 4th Dept 9-30-16**

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