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FIRST DEPARTMENT

CIVIL PROCEDURE.

SIX MONTHS WITHIN WHICH TO RECOMMENCE AN ACTION IN STATE COURT AFTER DISMISSAL IN FEDERAL COURT RUNS FROM THE DETERMINATION OF THE FEDERAL RECONSIDERATION MOTION, NOT FROM THE INITIAL FEDERAL DISMISSAL.

The First Department, reversing Supreme Court, determined the six-months within which plaintiff was required to file his state action after dismissal in federal court (CPLR 205(a)) ran from the federal court's ruling on plaintiff's reconsideration motion, not from the initial dismissal in federal court: "Plaintiff was not required to commence a defamation action in state court while the reconsideration motion was pending, or to file a notice of appeal in federal court, in order to gain the benefit of the six-month extension ... ; were our decision otherwise, the result would waste judicial resources by forcing a party to commence either a federal appeal or a new state court action while his or her case was still ongoing in federal court." ***Arty v. New York City Health & Hosps. Corp.*, 2017 N.Y. Slip Op. 01626, 1st Dept 3-2-17**

CONTRACT LAW.

IMPLIED COVENANT OF GOOD FAITH DOES NOT APPLY WHERE THE CONTRACT ALLOWS REFUSAL OF LOANS FOR ANY REASON, EVEN THOUGH THE REFUSAL MAY HAVE BEEN INTENTIONALLY AIMED AT PUTTING PLAINTIFF OUT OF BUSINESS.

The First Department, in a full-fledged opinion by Justice Saxe, modifying (reversing) Supreme Court, determined that a contract provision which allowed defendant (Capital One) to deny loans to plaintiff (TFA) for any reason trumped any implied covenant of good faith and fair dealing, even though defendant's actions put plaintiff out of business: "Although '[i]n New York, all contracts imply a covenant of good faith and fair dealing in the course of performance' ... , the existence of the covenant cannot be relied on as grounds for TFA's action. The covenant of good faith and fair dealing cannot negate express provisions of the agreement ... , nor is it violated where the contract terms unambiguously afford Capital One the right to exercise its absolute discretion to withhold the necessary approval ... . Where a contract allows one party to terminate the contract in 'its sole discretion' and for 'any reason whatsoever,' the covenant of good faith and fair dealing cannot serve to negate that provision ... . Notably, where the parties intended to limit either party's rights under the loan agreement so that they could only be exercised 'in good faith,' they specifically included such language; for example, section 1.1 of the agreement allows Capital One to establish a valuation methodology 'in its sole and absolute discretion exercised in good faith.' In contrast, the provision of section 2.1 authorizing Capital One to decline any request for an advance 'in its sole and absolute discretion' lacks any such limitation requiring Capital One to act in good faith when doing so. Because Capital One's complained-of conduct consists entirely of acts it was authorized to do by the contract, its alleged motivation for doing so is irrelevant. Simply put, an intent to put TFA out of business cannot justify a lawsuit for a claimed breach of the covenant where the express provisions of the agreement allowed Capital One to act as it did." ***Transit Funding Assoc., LLC v. Capital One Equip. Fin. Corp.*, 2017 N.Y. Slip Op. 01525**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, MUNICIPAL LAW.

TERMINATION OF TEACHER BASED ON HER SUBMISSION OF INACCURATE TIME SHEETS, UNDER THE CIRCUMSTANCES, SHOCKS THE CONSCIENCE.

The First Department, over a two-justice dissent, determined the termination of a teacher for submitting inaccurate time sheets was not warranted. The teacher had an unblemished record and the misconduct was precipitated by Hurricane Sandy, which flooded her home and the home of her disabled student: "Petitioner filled out the time sheets in question in advance of the dates to which those time sheets pertained. Although she did not, in fact, proceed to provide instruction to the disabled student on the days set forth in those time sheets, she submitted the time sheets without correction on a subsequent date. Because petitioner instructed other students on each of the dates in question, she would have received the same salary regardless of how many students she had instructed or how many hours she had spent with them, and thus derived no benefit from her actions. Petitioner's misconduct is more a matter of lax bookkeeping than implementation of any venal scheme. There was no scheme to defraud or theft of services on petitioner's part, and the harm to the public and

to the DOE was mitigated. * * * At the hearing, petitioner admitted that she was guilty of submitting reports stating that she had provided instruction to the disabled student on certain dates when she had not done so and that she had reported to various schools and libraries on certain dates when she had not done so. As petitioner acknowledges, her misconduct warrants punishment, since the disabled student was deprived of the services of a teacher for two months. Petitioner does not seek to set aside the findings of misconduct contained in the hearing officer's opinion, but only to modify the penalty imposed on her. She has acknowledged her error in judgment and has pledged to change her practices and never to repeat the error. There is no evidence that 'petitioner could not remedy her behavior' ...". ***Matter of Beatty v. City of New York*, 2017 N.Y. Slip Op. 01628, 1st Dept 3-2-17**

FAMILY LAW.

ALTHOUGH THE CHILD HAD NOT BEEN HARMED, MOTHER'S MENTAL ILLNESS JUSTIFIED THE NEGLECT FINDING.

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissenting opinion, determined Family Court properly found mother had neglected her child. The child was not harmed by the mother. There was evidence the mother suffered from delusions: "A neglected child is one whose 'physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care' ... . It is well settled that '[a] respondent's mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child[]' ... . In this case, the mother presented a risk of harm to her child through her unfounded fears that her daughter had been raped, since these fears resulted in the mother on different occasions 'testing' the child to see if she was raped, by checking her diaper and by sticking a Q-tip inside her, and making an unnecessary trip to the hospital ... . Further, the mother displayed a 'lack of insight' into her illness by refusing to agree that she had any mental health condition, despite her diagnoses, and by repeatedly refusing to comply with her medication regimen ... . Significantly, lack of evidence as to actual injury to the child is inconsequential. 'A showing that [the child was] impaired by [the mother's] failure to exercise a minimum degree of care is not required for an adjudication of neglect; it is sufficient that [the child was] in imminent danger of becoming impaired' ... . Indeed, the imminent danger standard exists specifically to protect children who have not yet been harmed and to prevent impairment ...". ***Matter of Ruth Joanna O.O. (Melissa O.)*, 2017 N.Y. Slip Op. 01524, 1st Dept 2-28-17**

FAMILY LAW, APPEALS.

VIOLATION OF A TEMPORARY ORDER OF PROTECTION IS A VALID GROUND FOR ISSUANCE OF A FINAL ORDER OF PROTECTION; EXPIRATION OF AN ORDER OF PROTECTION DOES NOT RENDER AN APPEAL MOOT.

The First Department, over an extensive dissent, determined Family Court properly issued a final order of protection after respondent's violation of a temporary order of protection. The court noted that the expiration of the order of protection did not render the appeal moot because the order "still imposes significant enduring consequences upon respondent...". The dissent argued that a final order of protection cannot be issued unless a family offense has been committed: "Here, the Family Court found, on the record after a hearing, that respondent had willfully violated the temporary order of protection with his April 3, 2014 emails containing statements clearly intended to harass petitioner. As a result of this determination, the Family Court conducted a dispositional hearing on respondent's violation of the temporary order of protection, and thereafter issued a new order of protection. The Family Court adhered to the prescribed procedure and did not exceed its jurisdiction by issuing this final order of protection. * * * ... [W]e read Family Court Act § 846-a as prescribing the remedies available to the court when a respondent violates a temporary order of protection, which is what is at issue here." ***Matter of Lisa T. v. King E.T.*, 2017 N.Y. Slip Op. 01487, 1st Dept 2-28-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LABOR LAW § 241(6) CAUSES OF ACTION SHOULD SURVIVE SUMMARY JUDGMENT BECAUSE THE ITEMS PLAINTIFF TRIPPED OVER WERE NOT INTEGRAL TO THE WORK BEING DONE BY PLAINTIFF AT THE TIME HE FELL.

The First Department determined Labor Law § 241(6) causes action based on the allegation plaintiff tripped on discarded concrete and rebar should survive summary judgment because plaintiff demonstrated the concrete and rebar were not integral to his work: "Plaintiffs established that the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site ... . Plaintiff did not work with concrete and concrete was not a part of his responsibilities in constructing the tables and forms used to hold the rebar and other ironwork in place. Similarly, the rebar on which plaintiff tripped was not integral to the work he was performing, and defendants' motion for summary judgment dismissing the claim predicated on 12 NYCRR 23-1.7(e)(2) was correctly denied ,,, . Plaintiff presented evidence that he did not work with rebar and that rebar was not integral to any work being done on the day of the accident." ***Pereira v. New School*, 2017 N.Y. Slip Op. 01627, 1st Dept 3-2-17**

PERSONAL INJURY.

PLAINTIFF'S ALLEGATION SHE SAW A DENT IN A WAXY SUBSTANCE MADE BY HER SHOE AS SHE FELL WAS SUFFICIENT TO DEFEAT DEFENDANT'S SUMMARY JUDGMENT MOTION, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, over a two-justice dissent, determined defendant should not have been granted summary judgment in this slip and fall case. Plaintiff alleged she slipped on a waxy substance on a marble floor and alleged she saw a "dent" in the substance made by her shoe when she fell. Defendant submitted evidence that the floor was never waxed: "Here, there is a triable issue of fact as to whether there was a slippery substance on the bathroom floor that caused plaintiff to fall notwithstanding defendant's assertion that it never used wax in that particular bathroom. Contrary to the motion court's findings, plaintiff's proof was not speculative and was sufficient to defeat the motion, because she set forth a specific reason for the slippery condition on the floor, namely a build-up of wax ... . Indeed, as noted above, she 'saw a big line, the dent of my shoe in the wax all the way that I fell,' suggesting that her shoe gouged out some of the waxy substance where she fell. This was more than just leaving a streak ... , which would happen regardless of the condition of the floor. *Villa v. Property Resources Corp.* (137 AD3d 454 [1st Dept 2016]), recently decided by this Court, is also not dispositive. There, plaintiff merely felt a wetness on her pants and hands that smelled like wax or ammonia, while here, plaintiff saw the dent of her shoe in the waxy substance ...". ***De Paris v. Women's Natl. Republican Club, Inc.*, 2017 N.Y. Slip Op. 01625, 1st Dept 3-2-17**

PERSONAL INJURY, MUNICIPAL LAW.

COMMON CARRIERS DO NOT HAVE A DUTY TO KEEP BUS STEPS FREE OF SNOW TRACKED IN DUE TO A RECENT STORM.

The First Department, reversing Supreme Court, determined defendant transit authority's motion for summary judgment should have been granted. Plaintiff slipped on snow on a step as she got off a bus: "Plaintiff testified that she slipped and fell as she was exiting a bus owned and operated by defendants because the step was covered with a slushy condition. She and the bus driver both stated that there was snow all over the ground from a storm that had ended earlier that day, and certified meteorological records submitted by defendants demonstrated that a snow storm that started the previous night and ended earlier in the day of the accident had left about six inches of snow on the ground. The bus driver also testified that passengers tracked snow onto the bus on their shoes and boots as they boarded. Common carriers are not obligated to provide a 'constant remedy' for the tracking of water onto a bus during an ongoing storm or for a reasonable time thereafter ... . Similarly, when the ground is covered with snow left by a recent storm, 'it would be unreasonable to expect the [defendants] to constantly clean the front steps of the subject bus' ... . Plaintiff's argument that defendants failed to show lack of notice of the slushy condition is irrelevant, since they did not breach any duty of care under the existing weather conditions." ***Harbison v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 01503, 1st Dept 2-28-17**

PRODUCTS LIABILITY, TOXIC TORTS, PERSONAL INJURY.

PLAINTIFF'S VERDICT IN THIS ASBESTOS CASE PROPERLY SET ASIDE, INSUFFICIENT PROOF PLAINTIFF WAS EXPOSED TO DANGEROUS LEVELS OF ASBESTOS EMANATING FROM DEFENDANT'S PRODUCTS.

The First Department, in a full-fledged opinion by Justice Saxe, over a two-justice dissenting opinion, determined the plaintiff's verdict in this asbestos/mesothelioma case was properly set aside by the trial court. The First Department held the plaintiff's experts did not present sufficient proof plaintiff's decedent was exposed to dangerous levels of asbestos emanating from defendant's products while working as an auto mechanic: "... [T]he fact that asbestos, or chrysotile, has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant; a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin from the defendant's products to have caused his disease ... . Even if it is not possible to quantify a plaintiff's exposure, causation from exposure to toxins in a defendant's product must be established through some scientific method, such as mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies ... . The evidence presented by plaintiff here was insufficient because it failed to establish that the decedent's mesothelioma was a result of his exposure to a sufficient quantity of asbestos in friction products sold or distributed by defendant Ford Motor Company. Plaintiff's experts effectively testified only in terms of an increased risk and association between asbestos and mesothelioma ... , but failed to either quantify the decedent's exposure levels or otherwise provide any scientific expression of his exposure level with respect to Ford's products ...". ***Matter of New York City Asbestos Litig.*, 2017 N.Y. Slip Op. 01523, 1st Dept 2-28-17**

SECURITIES, FRAUD.

PLAINTIFF'S LOSS WAS DUE TO THE MARKET COLLAPSE OF RESIDENTIAL-BACKED MORTGAGE SECURITIES, LOSS CAUSATION ELEMENT OF FRAUD CAUSE OF ACTION THEREFORE NOT DEMONSTRATED.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Kapnick, determined defendant TCW's motion for summary judgment in this residential-backed mortgage securities (RBMS) fraud action should have been granted. TCW represented it could select less risky RBMS's and plaintiff invested $27,000,000. The market subsequently col-

lapsed. The First Department found the proof of "loss causation" lacking: " 'Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff' ... . To establish loss causation a plaintiff must prove that the 'subject of the fraudulent statement or omission was the cause of the actual loss suffered' ... . Moreover, 'when the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases', and a plaintiff's claim fails when it has not . . . proven . . . that its loss was caused by the alleged misstatements as opposed to intervening events' ... . Indeed, when an investor suffers an investment loss due to a 'market crash [] of such dramatic proportions that [the] losses would have occurred at the same time and to the same extent regardless of the alleged fraud,' loss causation is lacking ...". ***Basis PAC-Rim Opportunity Fund (Master) v. TCW Asset Mgt. Co.*, 2017 N.Y. Slip Op. 01644, 1st Dept 3-2-17**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

UNWARNED STATEMENT PRECEDED MIRANDIZED STATEMENT BY TEN MINUTES, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Second Department determined defendant's motion to suppress his statements should have been granted: "At the suppression hearing, a police detective testified that while the defendant was in custody, he administered Miranda warnings ... and took the defendant's written statement. On cross-examination, the detective admitted that 10 minutes prior to taking the defendant's Mirandized written statement, he questioned the defendant without administering Miranda warnings. The written statement itself refers to incriminating statements made by the defendant during the earlier, pre-Miranda questioning. The Supreme Court denied suppression. '[W]here an improper, unwarned statement gives rise to a subsequent Mirandized statement as part of a single continuous chain of events,' there is inadequate assurance that the Miranda warnings were effective in protecting a defendant's rights, and the warned statement must also be suppressed' ... . Here, the improper unwarned statements made by the defendant gave rise to a subsequent Mirandized written statement as part of a single continuous chain of events. Accordingly, both the oral statement and the written statement should have been suppressed." ***People v. Ghee*, 2017 N.Y. Slip Op. 01564, 2nd Dept 3-1-17**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF KNOWING POSSESSION OF A CONTROLLED SUBSTANCE WAS SUFFICIENT TO SUPPORT AN INDICTMENT, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the evidence before the grand jury was sufficient to demonstrate defendant's knowledge he possessed cocaine. The defendant received a package containing cocaine addressed to a name (not his name) he used to sign for it and the package was addressed to a location which was not where defendant resided. The defendant was arrested before the package was opened: " 'Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted—and deferring all questions as to the weight or quality of the evidence—would warrant conviction; ... . ' Legally sufficient evidence' means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof' ... . ' In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt' ... . 'The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts, supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference' ...". ***People v. Jimenez*, 2017 N.Y. Slip Op. 01566, 2nd Dept 3-1-17**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

A CONVICTION BY GUILTY PLEA MAY BE SET ASIDE ON ACTUAL INNOCENCE GROUNDS, DEFENDANT ENTITLED TO A HEARING ON HER ACTUAL INNOCENCE CLAIM AND ON HER INEFFECTIVE ASSISTANCE CLAIM.

The Second Department, in a full-fledged opinion by Justice Leventhal, reversing County Court, determined a conviction by guilty plea can be challenged on actual innocence grounds. The defendant was entitled to a hearing on her motion to set aside her conviction both on her actual innocence claim and her ineffective assistance of counsel claim. Defendant was a nurse who bathed a profoundly disabled child. After the bath blisters appeared on the child's skin. At the time she stated she didn't think the water was hot. In her motion to set aside, she alleged that she was convinced during interrogation that the water must have been too hot and pled guilty for that reason. Expert evidence indicates the blisters may not have been burns, but rather were a reaction to antibiotics. A biopsy was consistent with an allergic reaction: "Having determined that a defendant's plea of guilty does not absolutely bar that defendant from maintaining a freestanding actual innocence claim

pursuant to CPL 440.10(1)(h), we address whether the County Court properly denied, without a hearing, that branch of the defendant's motion which was to vacate the judgment based on actual innocence. Contrary to the People's contention, the defendant is entitled to a hearing on her actual innocence claim. 'A prima facie showing of actual innocence is made out when there is 'a sufficient showing of possible merit to warrant a fuller exploration' by the court' ... . Here, by submitting her affidavit, [defendant's expert's] affirmation, and other material, such as the skin biopsy pathology report, the defendant made the requisite prima facie showing ... . We also note that subsequent to the entry of the defendant's plea of guilty, the civil action against the defendant and her former employer resulted in a jury verdict in their favor. We are mindful that the burden of proof in a civil trial is different than that in a criminal trial and that the evidence presented at each may differ. However, in the civil trial, the jury found that the defendant's care was not a proximate cause of the child's injuries, despite the fact that the defendant and her former employer were collaterally estopped from contesting liability." ***People v. Tiger*, 2017 N.Y. Slip Op. 01575, 2nd Dept 3-1-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), ATTORNEYS.

INSUFFICIENT INQUIRY INTO SEX OFFENDER'S REQUEST TO REPRESENT HIMSELF.

The Second Department determined the judge did not make a sufficient inquiry before allowing the sex offender to represent himself in this SORA proceeding: "Where a defendant makes a timely and unequivocal request to waive the right to counsel and represent herself or himself, 'the trial court is obligated to conduct a searching inquiry' to ensure that the defendant's waiver is knowing, intelligent, and voluntary' ... . 'A waiver is voluntarily made when the trial court advises the defendant and can be certain that the dangers and disadvantages of giving up the fundamental right to counsel have been impressed upon the defendant' ... . ' 'A searching inquiry' does not have to be made in a formulaic manner, . . . although it is better practice to ask the defendant about [her or] his age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' ... . [W]e conclude that the Supreme Court failed to conduct the requisite searching inquiry to ensure that the defendant's waiver of the right to counsel was unequivocal, voluntary, and intelligent ... . The court made only minimal inquiry into the defendant's age, experience, intelligence, education, and exposure to the legal system, and did not explain the risk inherent in proceeding pro se or the advantages of representation by counsel. The court's failure to conduct a searching inquiry renders the defendant's waiver of the right to counsel invalid and requires reversal ...". ***People v. Griffin*, 2017 N.Y. Slip Op. 01577, 2nd Dept 3-1-17**

FORECLOSURE, CIVIL PROCEDURE.

LENDER DID NOT NEGOTIATE A MORTGAGE MODIFICATION IN GOOD FAITH AND WAS PROPERLY SANCTIONED.

The Second Department determined plaintiff-lender did not negotiate a mortgage modification in good faith and was properly sanctioned by the tolling of interest, costs and attorney's fees accrued during the four years of negotiations: "Pursuant to CPLR 3408(f), the parties at a mandatory foreclosure settlement conference are required to negotiate in good faith to reach a mutually agreeable resolution ... . 'The purpose of the good faith requirement . . . is to ensure that both plaintiff and defendant are prepared to participate in a meaningful effort at the settlement conference to reach resolution' ... . Compliance with the good faith requirement is measured by the totality of the circumstances and whether the party's conduct demonstrates a meaningful effort at reaching a resolution ... . Here, the totality of the circumstances supports the finding that the plaintiff failed to negotiate in good faith. The hearing evidence demonstrated that the plaintiff, among other things, engaged in dilatory conduct by making piecemeal document requests, providing contradictory information, and repeatedly requesting documents that had already been provided ...". ***Aurora Loan Servs., LLC v. Diakite*, 2017 N.Y. Slip Op. 01528, 2nd Dept 3-1-17**

INSURANCE LAW.

EVEN AN INNOCENT MATERIAL MISTAKE ON AN INSURANCE APPLICATION RENDERS THE POLICY UNENFORCEABLE.

The Second Department determined the trial court property granted the insurer's motion for a judgment as a matter of law. The insured acknowledged that the property was configured as a three-family home, but that he indicated it was a two-family home on the application for insurance. Even an innocent material misrepresentation renders the policy unenforceable: "In order to establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy ... . A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented ... . Here, the plaintiff's own testimony established that his house was structurally configured as a three-family dwelling, and thus, the statement on his insurance application indicating that it was a two-family dwelling was a misrepresentation ... . Although the plaintiff testified that he believed his house was a legal two-family dwelling, an insurer may rescind a policy if the insured made a material misrepresentation of fact even if the misrepresentation was innocently or unintentionally made ... . Further, the defendant established that the plaintiff's misrepresentation was material through the uncontroverted testimony of its witnesses and documentary evidence, includ-

ing its underwriting guidelines, which established that the defendant did not insure three-family dwellings, and would not have issued the subject policy if the plaintiff and his wife had disclosed that the house contained three dwelling units ...". ***Estate of Gen Yee Chu v. Otsego Mut. Fire Ins. Co.*, 2017 N.Y. Slip Op. 01536, 2nd Dept 3-1-17**

MENTAL HYGIENE LAW.

PURPORTED WAIVER OF JURY TRIAL NOT VALID, NOTHING ON THE RECORD.

The Second Department determined the sex offender did not validly waive his right to a jury trial. Although there was evidence he intended to waive a jury trial (emails) there was no on-the-record waiver: "The State moves to enlarge the record on appeal to include emails from the appellant's trial counsel which, the State contends, demonstrate that the appellant validly waived his right to a jury trial. However, in *Matter of State of New York v. Ted B.* (132 AD3d 28), we held that a respondent in a Mental Hygiene article 10 proceeding may validly waive the right to a jury trial only where an on-the-record colloquy shows that the respondent made a knowing and voluntary waiver of such right, after an opportunity for consultation with his or her attorney. As an alternative to a personal appearance in court, a respondent may participate in such a colloquy via video conferencing ... . While the State urges us to find a valid waiver based on emails from the appellant's trial counsel, such off-the-record communications, regardless of content, are insufficient to ensure that a respondent's decision to 'forgo his [or her] state constitutional and statutory right to a jury trial is the product of an informed and intelligent judgment and, thereby, protect the important liberty interests at stake in article 10 proceedings' ...". ***Matter of State of New York v. Jesus M.*, 2017 N.Y. Slip Op. 01557, 2nd Dept 3-1-17**

THIRD DEPARTMENT

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

ANOMALY IN GUIDELINES MAY RESULT IN AN OVERESTIMATION OF THE CHILD-PORNOGRAPHY-BASED RISK, CASE REMITTED FOR FINDINGS.

The Third Department noted an acknowledged anomaly in the risk assessment guidelines for child pornography that may result in the overestimation of the risk. Because the SORA court did not make any findings about the possible overestimation, the case was remitted: "The Court of Appeals has found that an anomaly exists in assessing points to child pornography offenders under risk factor 7 in the RAI, in that the absence of a previous relationship between the offender and children pictured in pornographic images may not normally heighten the risk that the offender presents to the community, whereas a situation in which 'the offender and the children are acquainted would seem to present a greater threat to the community, not a lesser one' ... . The Court further concluded that such an anomaly may result in an overestimation of a child pornography offender's risk of reoffense and danger to the public ... . While the Court concluded that, despite the anomaly, the plain language of the guidelines of the Board of Examiners of Sex Offenders authorizes the assessment of points against child pornography offenders under risk factor 7, it further stated that, 'in deciding a child pornography offender's application for a downward departure, a [Sex Offender Registration Act] court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score and without departing downward might lead to an excessive level of registration' ... . In denying the request for a downward departure, County Court found that points were properly assessed under risk factor 7, but did not take into consideration the potential overestimation of defendant's risk of reoffense and the danger to the public created by the assessment of those points. Accordingly, the matter must be remitted for the court to determine whether such an overestimation was created and whether a downward departure is therefore warranted ...". ***People v. Kemp*, 2017 N.Y. Slip Op. 01618, 3rd Dept 3-2-17**

DISCIPLINARY HEARINGS (INMATES).

NO PROOF INMATE WAS PROPERLY INFORMED OF THE CONSEQUENCES OF HIS NOT ATTENDING THE HEARING AT THE TIME OF HIS PURPORTED REFUSAL TO ATTEND, DETERMINATION ANNULLED.

The Third Department annulled the determination because there was no proof the proper information was provided to the inmate at the time the inmate purported refused to attend the hearing: "... [T]he only indication in the record that petitioner refused to attend the hearing is the form signed by the Hearing Officer and an employee witness attesting that petitioner refused to attend the hearing. Although the form includes instructions to inform an inmate about the nature of the hearing, the charges against him or her and the fact that the hearing will be conducted in the refusing inmate's absence, the record reflects no information regarding the steps taken to ascertain the legitimacy of petitioner's refusal or to inform him of his right to attend the hearing and the consequences of his failure to do so ...". ***Matter of Wilson v. Annucci*, 2017 N.Y. Slip Op. 01617, 3rd Dept 3-2-17**

FAMILY LAW, EVIDENCE.

ALTHOUGH NONE OF THE THREE CHILDREN TESTIFIED IN THIS NEGLECT CASE, THE STATEMENTS ATTRIBUTED TO THEM CROSS-CORROBORATED ONE ANOTHER AND WERE THEREFORE ADMISSIBLE.

The Third Department determined that, although none of the three children testified in this child neglect case, the children's statements about the domestic violence witnessed by them were admissible because the statements were cross-corroborated: " 'While the mere repetition of an accusation by a child is insufficient to corroborate the child's prior account of abuse or neglect' ... , 'independent statements by children requiring corroboration may corroborate each other' ... . * * * ... [W]e find that, although none of the children testified, their out-of-court statements sufficiently cross-corroborated one another ...". ***Matter of Annarae I. (Jennifer K.)*, 2017 N.Y. Slip Op. 01605, 3rd Dept 3-2-17**

MEDICAL MALPRACTICE, PERSONAL INJURY.

CERTIFICATE OF MERIT INADEQUATE, COMPLAINT DISMISSED.

The Third Department determined the certificate of merit filed in this medical malpractice action was inadequate. The complaint alleged malpractice by a surgeon. The certificate was based on the affidavit of plaintiff's (Calcagno's) physical therapist: "A certificate of merit 'merely ensures that counsel has satisfied himself or herself that there is a reasonable basis for the commencement of an action' ... . The statute requires counsel to submit a certificate of merit declaring that he or she has consulted with at least one licensed physician who is knowledgeable regarding the relevant issues in the action, has reviewed the facts of the case, and has thus concluded that such a reasonable basis exists ... . We agree with Supreme Court that the certificate proffered by plaintiffs is inadequate. The allegations of malpractice arise from defendants' diagnosis and surgical treatment, and the certificate of merit is based upon an affidavit of Calcagno's physical therapist, who opined, 'as a physical therapist,' that defendants' actions were 'departures from good and accepted medical practice.' However, by definition, a physical therapist cannot diagnose and is incompetent to attest to the standard of care applicable to physicians and surgeons ... . Moreover, we find no merit in plaintiffs' contention that the certificate of merit should be deemed adequate, as it was also based on certain medical reports, Calcagno's testimony, and the pleadings. Review of these documents, standing alone, cannot suffice. Expert analysis is required to establish whether there was any departure from established standards of care, and whether any such departure was the proximate cause of injury to Calcagno ...". ***Calcagno v. Orthopedic Assoc. of Dutchess County, PC*, 2017 N.Y. Slip Op. 01616, 3rd Dept 3-2-17**

REAL PROPERTY.

MINERAL RIGHTS INCLUDE THE RIGHT TO REMOVE SAND AND GRAVEL.

The Third Department explained the meaning of mineral rights (as opposed to surface rights) as that term appeared in a 1917 deed. The court held that the term encompassed all inorganic material, including sand and gravel: "Supreme Court correctly determined as a matter of law that those mineral rights that plaintiffs owned and that were originally derived from a 1917 deed from a grantor, who was the common grantor of plaintiffs' mineral rights and at least certain of [defendant's] surface rights, included the right to extract and remove sand and gravel. The Court of Appeals has directly passed on the meaning of the term 'minerals' as used in a conveyance and concluded that the term 'will include all inorganic substances [that] can be taken from the land' where the term's meaning is not restricted 'b[y] qualifying words, or language, evidencing that the parties contemplated something less general than all substances legally cognizable as minerals' ... . Thus, unless qualifying and restrictive language related to the term minerals renders the term ambiguous in any particular conveyance, the meaning of minerals is determinable as a matter of law and is not subject to extrinsic proof ... . The 1917 deed conveyed a minerals estate that included 'all . . . minerals in, under and upon' the specified properties together with the right to 'dig, mine and remove' those minerals from the land free from any liability for damage. Accordingly, given that the language in the 1917 deed does not qualify or restrict the term minerals, the Court of Appeals' interpretation controls. Therefore, as sand and gravel are 'inorganic substances [that] can be taken from the land,' they fall within the mineral rights conveyed by the 1917 deed ...". ***Champlain Gas & Oil, LLC v. People of The State of New York*, 2017 N.Y. Slip Op. 01610, 3rd Dept 3-2-17**

TOXIC TORTS, PERSONAL INJURY.

LEAD POISONING, STATUTE OF LIMITATIONS RUNS FROM WHEN THE SYMPTOMS ARE FIRST DISCOVERED, NOT WHEN THE CAUSE OF THE SYMPTOMS IS LEARNED.

The Third Department determined an action by a 28-year-old woman alleging lead paint poisoning was time-barred. Plaintiff was first diagnosed with high levels of lead in 1990. The statute of limitations runs from when the symptoms are first discovered, not when the cause of the symptoms is learned: "... [D]efendants' submissions were sufficient to demonstrate that plaintiff was cognizant of her claimed injuries, or, at a minimum, reasonably should have been, such that the action is barred by the statute of limitations. Although CPLR 214-c (2) permits an action to proceed within three years from the 'discovery of the injury,' this means the 'discover[y of] the primary condition on which the claim is based' ... , or, put differently, 'the discovery of the manifestations or symptoms of the latent disease that the harmful substance produced' ... . Here, accepting that lead was the causative harmful substance, plaintiff was aware of her injuries, which first manifested when she started public education in 1990 and, according to plaintiff, continued throughout her school years. Although plaintiff argues that

her action is timely because she first discovered that she suffered lead poisoning when her attorney sent a solicitation letter to her mother in 2012, we disagree. Where, as here, a plaintiff is seeking the benefit of the discovery rule applicable to toxic torts, the statute runs from the date the condition or symptom is discovered or reasonably should have been discovered, not the discovery of the specific cause of the condition or symptom ...". ***Vasilatos v. Dzamba*, 2017 N.Y. Slip Op. 01615, 3rd Dept 3-2-17**

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