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FIRST DEPARTMENT

ATTORNEYS, PRIVILEGE, CONTRACT LAW.

COMMUNICATIONS BETWEEN PLAINTIFFS' FINANCIAL ADVISOR AND COUNSEL DURING THE SALE OF PLAINTIFFS' BUSINESS TO DEFENDANT ARE PRIVILEGED,

The First Department, reversing Supreme Court, determined communications between plaintiffs' financial advisor (KDC) and plaintiffs' counsel in connection with the sale of plaintiffs' company to defendant were privileged: "It is true that KDC was not retained to assist plaintiffs' counsel in providing legal advice. However, the unrebutted evidence reflects that KDC spent some portion of its time helping counsel to understand various aspects of the transaction for that purpose. As such, KDC's presence was necessary to enable attorney-client communication ... . Plaintiffs also had a reasonable expectation that the confidentiality of communications between their counsel and KDC would be maintained. Plaintiffs' counsel attested that KDC promised to keep all such communications confidential. The governing Purchase and Sale Agreement also specified that all privileged documents related to the transaction would remain protected from disclosure to defendant even after closing ... . Contrary to defendant's contention, the Cooperation Clause in KDC's engagement letter did not undermine the reasonableness of this expectation of confidentiality, as it only required 'reasonabl[e]' assistance to the Company (now owned by defendant), and should thus not be read to require KDC to turn over privileged documents ...". ***Spicer v. Garda-World Consulting (UK) Ltd.*, 2020 N.Y. Slip Op. 01448, First Dept 3-3-20**

CIVIL PROCEDURE, CONTRACT LAW, ACCOUNT STATED, DEBTOR-CREDITOR, EVIDENCE.

MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED BECAUSE REFERENCE TO EXTRINSIC EVIDENCE WAS REQUIRED; STATUTE OF FRAUDS DID NOT REQUIRE DISMISSAL BECAUSE IT WAS ALLEGED THERE WAS NEW CONSIDERATION FOR THE PROMISE TO PAY THE DEBT OF ANOTHER.

The First Department, reversing (modifying) Supreme Court, determined the invoices submitted by plaintiff do not qualify for CPLR 3213 relief on the account stated cause of action because reference to extrinsic evidence was required, and defendants were not were not entitled to dismissal based upon the statute of frauds because there was new consideration flowing from plaintiff to defendants: "Plaintiff's motion for summary judgment in lieu of complaint should have been denied. The invoices do not qualify for CPLR 3213 relief because it is necessary to consult extrinsic evidence aside from the invoices and proof of nonpayment in order for plaintiff to establish its entitlement to summary judgment on its account stated claim ... . Plaintiff has failed to establish, based on the invoices themselves, that defendants, as opposed to nonparty Impact Sports, are liable based on an account stated claim. Defendants are not entitled to dismissal of the action based on the statute of frauds (GOL § 5-701[a][2]) as plaintiff has sufficiently alleged that there was new consideration flowing from plaintiff to defendants, which is an exception to the requirement that a promise to pay the debt for another be in writing ...". ***Peter R. Ginsberg Law, LLC v. J&J Sports Agency, LLC*, 2020 N.Y. Slip Op. 01468, First Dept 3-3-20**

CORPORATION LAW, COOPERATIVES, FIDUCIARY DUTY.

A CORPORATION DOES NOT OWE A FIDUCIARY DUTY TO ITS MEMBERS OR SHAREHOLDERS.

The First Department, dismissing the complaint, noted that the breach-of-a-fiduciary-duty action was brought solely against the corporation, which does not owe its members or shareholders a fiduciary duty: " '[I]t is well settled that a corporation does not owe fiduciary duties to its members or shareholders' ... . Here, while the complaint alleges that defendant's board of directors breached its fiduciary duty to plaintiff in refusing to approve the sale of certain units in the cooperative market to plaintiff, plaintiff brought this action solely against the cooperative corporation and thus, the complaint is dismissed." ***C & J Bros., Inc. v. Hunts Point Term. Produce Coop. Assn., Inc.*, 2020 N.Y. Slip Op. 01454, First Dept 3-3-20**

FRAUD, CIVIL CONSPIRACY, CIVIL PROCEDURE.

PLAINTIFFS STATED A CAUSE OF ACTION FOR FRAUD AND PROPERLY ALLEGED A CIVIL CONSPIRACY.

The First Department, reversing Supreme Court, determined plaintiffs had, inter alia, stated a cause of action for fraud and properly alleged a related civil conspiracy. Plaintiffs are owners of commercial buildings and defendants included an em-

ployee of one of the plaintiffs and several contractors who did work for the plaintiffs. Plaintiffs alleged invoices for work were inflated and the excess payments were split among defendants. With respect to the fraud and civil conspiracy causes of action, the First Department wrote: "To state a cause of action for fraud, a plaintiff must allege 'a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages' ... . Such a claim must be pleaded with particularity (CPLR 3016[b] ...). '[A]ctual knowledge[, however,] need only be pleaded generally, [given], particularly at the prediscovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind' ... . Here, we find that plaintiffs sufficiently pleaded fraud causes of action with the information available to them in a pre-discovery posture ... . They alleged the creation and presentation for payment to plaintiffs of false, forged or inflated purchase orders; that defendants 'knew that the work described on the bogus purchase orders or invoices and other contract forms was either falsely stated, overcharged or not provided, and knew that Plaintiffs would rely on these falsified or doctored purchase orders to make unwarranted payments'; that plaintiffs 'relied on these purchase orders, invoices and other contract forms in making unnecessary payments to . . . defendants' to their detriment; that such reliance was 'justifiable' and 'reasonable'; and that plaintiffs were damaged as a result of defendants' fraud. After discovery, plaintiffs can amplify their pleadings and defendants can renew their motions. But at this stage, plaintiffs should be allowed to probe defendants' knowledge of the alleged fraudulent scheme. ... Although New York does not recognize an independent cause of action for civil conspiracy, allegations of civil conspiracy are permitted 'to connect the actions of separate defendants with an otherwise actionable tort' ... . To establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury ... . Plaintiffs pleaded the underlying fraud against defendants ..., as well as an agreement that '[d]efendants acted in concert and conspired to defraud [p]laintiffs' business.' As a result, plaintiffs were damaged because they paid monies to the defendants 'for non-existent, unnecessary, and/or overpriced construction and maintenance services.' " ***Cohen Bros. Realty Corp. v. Mapes*, 2020 N.Y. Slip Op. 01440, First Dept 3-3-20**

INSURANCE LAW, ARBITRATION.

RESPONDENT'S FAILURE TO ATTEND INDEPENDENT MEDICAL EXAMS RENDERED THE NO-FAULT INSURANCE POLICY VOID AB INITIO.

The First Department, vacating the arbitrator's award, determined the no-fault policy was void because respondent failed to attend independent medical examinations: "The master arbitrator's award was arbitrary in that it irrationally ignored well-established precedent that 'the no-fault policy issued by petitioner was void ab initio due to respondent's assignor's failure to attend duly scheduled independent medical exams' ...". ***Matter of Global Liberty Ins. Co. of N.Y. v. Capital Chiropractic, P.C.*, 2020 N.Y. Slip Op. 01466, First Dept 3-3-20**

INSURANCE LAW, CONTRACT LAW.

THE LANGUAGE OF THE POLICY IS NOT AMBIGUOUS AND CAN NOT BE INTERPRETED TO MEAN THE POLICY COVERED A PREMISES AT WHICH THE INSURED DID NOT RESIDE.

The First Department, reversing Supreme Court, determined the language of the policy was not ambiguous and could not be interpreted to mean the policy covered a premises at which the insured did not reside: "Plaintiff demonstrated, via defendant's admission in a statement to its investigator and the investigator's inspection of the insured premises, that defendant did not reside at the premises and was therefore not covered by the policy ... . Contrary to defendant's argument, the policy endorsement that amends the definition of 'residence premises' — previously, '[t]he one-family dwelling ... where you reside' — to include three- and four-family dwellings without repeating the phrase 'where you reside' is not ambiguous. The endorsement also states that '[a]ll other provisions of this policy apply,' which gives effect to those portions of the policy that define 'residence premises' as the place 'where [the insured] reside[s]' ...". ***MIC Gen. Ins. Corp. v. Campbell*, 2020 N.Y. Slip Op. 01465, First Dept 3-3-20**

PERSONAL INJURY.

$10.5 MILLION VERDICT FOR CONSCIOUS PAIN AND SUFFERING DEEMED EXCESSIVE IN THIS PEDESTRIAN TRAFFIC ACCIDENT CASE; PLAINTIFF ASKED TO STIPULATE TO $3 MILLION.

The First Department, in a decision which does not discuss the relevant facts, determined the $10.5 million verdict for conscious pain and suffering was excessive and ordered a new trial unless plaintiff stipulates to $3 million. Plaintiff's decedent was crossing the street when she was struck by defendant's van: "The jury's finding that defendant was solely at fault for the decedent's death is supported by legally sufficient evidence and is not against the weight of the evidence ... . Plaintiff's evidence established that the decedent was crossing the street with the right-of-way when she was struck by a van operated by defendant's employee making a left turn. Defendant presented no evidence to rebut plaintiff's evidence. Its argument that the decedent may have been crossing the street outside of the crosswalk is speculative, given that its employee did not see the decedent until after the accident ... . '[T]he position of [the decedent's] body after impact is not probative as to whether she was walking in the cross-walk prior to being struck' ... . In light of this determination, we do not reach defendant's

arguments about the propriety of testimony elicited, and statements made by plaintiff's counsel, about its hiring practices generally and its hiring of the driver involved in the accident specifically. We find the award for the decedent's conscious pain and suffering excessive to the extent indicated ...". ***Martinez v. Premium Laundry Corp.*, 2020 N.Y. Slip Op. 01557, First Dept 3-5-20**

PERSONAL INJURY, EVIDENCE.

A WORN MARBLE STEP IS NOT AN ACTIONABLE DEFECT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's slip and fall action should have been dismissed. The cause of the fall was alleged to be a worn marble step, which is not actionable: "Defendants established their entitlement to judgment as a matter of law in this action where plaintiff was injured when, while descending interior stairs in defendants' building, she slipped and fell on a marble step that had a worn tread. A worn marble tread, without more, is not an actionable defect ... In opposition, plaintiff failed to raise a triable issue of fact. Having abandoned her claim that defendants were negligent in keeping the stairs free of moisture, plaintiff cannot now argue that the existence of moisture on the stairs would be an actionable condition. Nor did plaintiff's experts establish that in addition to the worn marble stair treads, they lacked adequate slip resistance, as the coefficient of friction value that the experts used as a standard value was not shown to be an accepted industry standard ... . Nor did the experts' affidavits raise a triable issue of fact, since the opinions concerning the cause of plaintiff's slip were speculative ...". ***DeCarbo v. Omonia Realty Corp.*, 2020 N.Y. Slip Op. 01555, First Dept 3-5-20**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW.

ICE ON SIDEWALK MAY HAVE PRE-EXISTED RECENT SNOW; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the ice on which plaintiff slipped and fell pre-existed the recent snow fall. Plaintiff slipped and fell at around 7:30 am and, pursuant to the New York City Administrative Code, defendant had until 11 am to clear the recent snow (storm in progress rule): "Because it snowed overnight, defendant had until 11 a.m. to clear any fresh snow and ice ... . However, an issue of fact exists regarding whether the ice on which plaintiff slipped was preexisting. Plaintiff testified and submitted witness affidavits to the effect that the ice was dirty and trod upon, and had been present for days ... . Moreover, while defendant submitted certified climatological records from Central Park in reply and in opposition to plaintiff's cross motion, defendant cannot remedy a fundamental deficiency in its moving papers with evidence submitted in reply ... , although they may be considered in opposition to plaintiff's cross motion. In any event, the records show that the temperatures remained below or only slightly above freezing during much of the six days after defendant asserts that the last snow fall occurred, and defendant offers only speculation that such temperatures would have melted previous accumulations of snow and ice." ***Ruland v. 130 FG, LLC*, 2020 N.Y. Slip Op. 01558, First Dept 3-5-20**

PERSONAL INJURY, LANDLORD-TENANT.

PLAINTIFF ALLEGED THE LANDLORD'S FAILURE TO REPAIR SHOWER-CURTAIN BRACKETS CREATED THE DANGEROUS WATER-ON-THE-FLOOR CONDITION WHICH CAUSED THE SLIP AND FALL; AN OPEN AND OBVIOUS CONDITION CAN STILL BE A DANGEROUS CONDITION; LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant landlord's motion for summary judgment in this wet-bathroom-floor slip and fall case should not have been granted. Plaintiff alleged the landlord failed to repair brackets for the shower curtain. The fact that the water on the floor was an open and obvious condition relieved landlord of the duty to warn, but not the duty to keep the property safe: "Supreme Court erred in granting summary judgment to defendants on the basis that plaintiff failed to identify the condition of water on the floor before he slipped and fell. Supreme Court incorrectly found that any conclusion that plaintiff slipped and fell because of water accumulation would be based on speculation. Plaintiff argues correctly that, even if in his deposition testimony he did not explicitly state that he noticed water on the floor before he stepped out of the shower, a jury could reasonably infer that he slipped and fell on water on the floor due to the absence of a shower curtain ... . Defendants' proof failed to negate this reasonable inference ... . '[E]ven if a hazard qualifies as open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition' ... . Defendants argue that the broken brackets were not an inherently dangerous condition but rather a benign condition. However, as plaintiff correctly observes, the purpose of the shower brackets was to hold up the shower curtain, and the purpose of a shower curtain is to prevent the accumulation of water when the shower is in use." ***Matos v. Azure Holdings II, L.P.*, 2020 N.Y. Slip Op. 01441, First Dept 3-3-20**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

LINEUP IDENTIFICATION WAS UNDULY SUGGESTIVE, CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the lineup identification procedure was unduly suggestive: "... [W]e agree with the defendant's contention that the hearing court erred in finding that the pretrial identification procedure, a lineup, was not unduly suggestive. The defendant was the only person in the lineup with dreadlocks, and dreadlocks featured prominently in the description of one of the assailants that the complainant gave to the police. In addition, the dreadlocks were distinctive and visible despite the fact that the defendant and the fillers all wore hats ... . Accordingly, the lineup identification should have been suppressed. The error was not harmless as it cannot be said that there is no reasonable possibility that the error might have contributed to the defendant's conviction ... . Therefore, we reverse the judgment of conviction and order a new trial." ***People v. Colsen*, 2020 N.Y. Slip Op. 01514, Second Dept 3-4-20**

FORECLOSURE, CIVIL PROCEDURE.

THE BANK'S MOTION TO RESTORE THE 2009 FORECLOSURE ACTION WHICH HAD BEEN ADMINISTRATIVELY, BUT NOT FORMALLY, DISMISSED SHOULD HAVE BEEN GRANTED; THE BANK HAD PREVIOUSLY STATED ITS INTENTION TO DISCONTINUE THE 2009 FORECLOSURE BUT THE MOTION TO RESTORE WAS NOT PRECLUDED BY THE JUDICIAL ESTOPPEL DOCTRINE.

The Second Department, reversing Supreme Court, determined plaintiff bank should have been allowed to restore a 2009 foreclosure action which had been administratively, but not formally, dismissed. The court noted that the bank's prior statement of its intention to discontinue the 2009 action did not trigger the judicial estoppel doctrine: "While, in an effort to successfully prosecute the 2015 foreclosure action, the Bank represented that it would seek to discontinue the 2009 action, it is not judicially estopped from changing its position. ' [A] party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed' ... . The Bank did not obtain a favorable judgment in the 2015 foreclosure action. The Supreme Court should have granted that branch of the Bank's motion which was to restore the 2009 action to the active calendar. The 2009 action was never formally dismissed, as the marking-off procedures of CPLR 3404 do not apply to pre-note of issue actions such as this one ... . Since the 2009 action could not properly be marked off pursuant to CPLR 3404, the Bank was not required to move to restore within any specified time frame and was not obligated to demonstrate a reasonable excuse and a potentially meritorious claim ... . Further, there was neither a 90-day notice pursuant to CPLR 3216 ... , nor an order dismissing the complaint pursuant to 22 NYCRR 202.27 ... . Finally, [defendant] does not contend that the 2009 action was dismissed pursuant to CPLR 3215(c)." ***Deutsche Bank Natl. Trust Co. v. Gambino*, 2020 N.Y. Slip Op. 01476, Second Dept 3-4-20**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF APPARENTLY SLIPPED AND FELL BECAUSE OF LEAVES ON THE STAIRWAY; THE CONDITION WAS NOT BOTH "OPEN AND OBVIOUS" AND "NOT INHERENTLY DANGEROUS" AS A MATTER OF LAW; PLAINTIFF'S NEGLIGENCE IN DESCENDING THE STAIRWAY FURNISHED THE OCCASION FOR THE ACCIDENT, BUT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT.

The Second Department determined the verdict in this slip and fall case was not contrary to the weight of the evidence. Plaintiff descended a stairway which had leaves on it: "The plaintiff's testimony sufficiently identified the condition that caused her to fall ... . The evidence at trial failed to establish, as a matter of law, that the condition at issue was both open and obvious and not inherently dangerous": " 'A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' ... . Here, the jury could have reasonably concluded that the plaintiff was negligent in choosing to descend the stairway despite the presence of leaves, but that her negligence merely furnished the occasion for the accident ... . Accordingly, the jury's determination that the plaintiff's conduct was not a substantial factor in causing the accident was not contrary to the weight of the evidence." ***Brennan v. Gormley*, 2020 N.Y. Slip Op. 01473, Second Dept 3-4-20**

WORKERS' COMPENSATION, NEGLIGENCE, EMPLOYMENT LAW.

PLAINTIFF'S SOLE REMEDY FOR HIS ON THE JOB INJURY IS WORKERS' COMPENSATION; PLAINTIFF WAS NOT GRAVELY INJURED AND THERE WAS NO AGREEMENT WITH HIS EMPLOYER TO CONTRIBUTE, INDEMNIFY OR INSURE; THE EMPLOYER'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant-employer's motion for summary judgment should have been granted. Plaintiff was injured while acting within the scope of his employment. Workers' Compensation,

therefore, was his exclusive remedy unless he was gravely injured or there was agreement with the employer: "Workers' Compensation Law § 11 prohibits third-party claims for contribution or indemnification against an employer unless the employee has sustained a 'grave injury' or there is a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the third-party claimant ... . Here, in support of its motion, A.B.C. Tank established, prima facie, that there was no written agreement between the parties that required it to contribute, indemnify, or procure insurance ... . Further, A.B.C. Tank established, prima facie, that the plaintiff was injured in the course of his employment and that the plaintiff's injuries did not constitute a 'grave injury' within the meaning of Workers' Compensation Law § 11 ...". ***McIntosh v. Ronit Realty, LLC*, 2020 N.Y. Slip Op. 01485, Second Dept 3-4-20**

THIRD DEPARTMENT

CRIMINAL LAW.

THE USE OF THE TERM "VICTIM" TO REFER TO THE COMPLAINING WITNESS AT TRIAL WHERE THE WITNESS'S CREDIBILITY IS IN ISSUE SHOULD BE AVOIDED.

The Third Department noted that referring to the complaining witness using the term "victim" should be avoided at trial where the witness's credibility is in issue, but found no error in the way the trial judge handled the matter in this sexual-offense case: "In [a] motion in limine, defense counsel sought to preclude references to the 'victim,' arguing that they would dilute the presumption of innocence and deprive defendant of a fair trial. Several New York courts have examined this issue in the specific context of jury instructions and have held that it is improper for a trial court to refer to a complainant as the 'victim' in a jury charge, but that reversal is not required unless, taken as a whole, the charge does not otherwise convey the proper standards to the jury ... . It does not appear that any New York court has analyzed the issue outside the context of jury instructions, but several courts in other jurisdictions have held that the use of the term 'victim' by the prosecution or its witnesses should be avoided where, as here, the credibility of the complaining witness is in issue, and that facts such as the context and frequency of the references and the strength of other evidence should be taken into account in determining whether use of the term is reversible error ... . Here, although Supreme Court denied defendant's application, it also agreed that his concern was 'well-grounded' and warned counsel to use caution, stating that '[i]t might call the attorneys over' if a witness repeatedly used terms like 'victim' or 'assailant,' and that police witnesses should not use such terms in such a way as to have an emotional impact on the jury. While we agree with defendant that references to the complaining witness as the 'victim' at trial should be avoided when his or her credibility is in issue, we find no error in the court's treatment of the issue under the circumstances presented here." ***People v. Horton*, 2020 N.Y. Slip Op. 01530, Third Dept 3-5-20**

CRIMINAL LAW, EVIDENCE.

A REVOLVER WHICH COULD NOT BE CONNECTED TO THE SHOOTING SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ERROR HARMLESS HOWEVER.

The Third Department determined the admission into evidence of a revolver which could not be connected to the shooting at issue was (harmless) error: "Defendant next argues that County Court erred in admitting into evidence an operable .38-caliber revolver, containing five spent rounds, that was recovered from a nearby rooftop a few days after the shooting. Testing could not conclusively show that the revolver was used in the shooting or that it had been handled by defendant, but it remained relevant given the circumstances of its recovery and the fact that it could not be ruled out as the one used by the shooter ... . The revolver was accordingly admissible unless its probative value was 'substantially outweighed by the danger that it [would] unfairly prejudice the other side or mislead the jury,' and County Court attempted to reduce that danger by telling the jury why the revolver was being admitted into evidence and urging it to give the revolver whatever weight it deemed appropriate ... . County Court's ameliorative efforts arguably fell short but, in our view, any resulting error was harmless 'in light of the overwhelming testimony identifying defendant as [the] assailant' ...". ***People v. Banks*, 2020 N.Y. Slip Op. 01525, Third Dept 3-5-20**

PRODUCTS LIABILITY, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT DID NOT PRESENT ANY EVIDENCE DEMONSTRATING THE REMOTELY OPERATED CRANE COULD FEASIBLY BE MADE SAFER; THEREFORE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS PRODUCTS LIABILITY CASE WAS PROPERLY GRANTED.

The Third Department determined plaintiff's expert did not raise a question of fact in this products liability case. Plaintiff's decedent was killed by a crane operated remotely by plaintiff's decedent. Defendants' experts attributed the accident to plaintiff's decedent's acts of leaning into the path of the crane and bending over with the remote attached to his hip, causing the crane to be activated inadvertently. Both leaning into the path of the crane and bending over with the remote attached were known to be dangerous and plaintiff's decedent had trained others accordingly. Although plaintiff's expert averred that a dead man's switch would have prevented the accident, he did not present any supporting evidence: " 'An expert's

[Darby's] affidavit — offered as the only evidence to defeat summary judgment — must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation, and would, if offered alone at trial, support a verdict in the proponent's favor' ... . Initially, although Derby alleged that he inspected the remote, his affidavit was not supported by facts of his own independent testing of the device; rather, he relied on deposition testimony of other witnesses to explain the functions of the remote ... . Furthermore, although Derby averred that the remote could be made safer by adding a dead man's switch or by implementing joysticks, he offered no proposed designs that could feasibly be installed ... , and, moreover, he pointed to no industry standards or data to support his conclusion that the absence of a dead man's switch rendered the remote unsafe ... . After all, '[a] factual issue regarding design defect is not established merely by pointing to efforts within the industry to make a safer product, without providing some detail as to how the current product is not reasonably safe and how a feasible alternative would be safer' ... . Given Derby's failure to elaborate, and mindful of the testimony of multiple witnesses for defendants who averred that they were not aware of any remote controls in the industry that use a dead man's switch for crane operations, plaintiff's proof was insufficient to raise a triable issue regarding design defect ...". ***Darrow v. Hetronic Deutschland GMBH*, 2020 N.Y. Slip Op. 01543, Third Dept 3-5-20**

WORKERS' COMPENSATION.

BENEFICIARY OF DECEASED CLAIMANT IS ENTITLED TO THE REMAINING WEEKS OF CLAIMANT'S NONSCHEDULE PERMANENT DISABILITY AWARD WHERE CLAIMANT'S DEATH WAS NOT RELATED TO THE COMPENSATED INJURY.

The First Department, in a full-fledged opinion by Justice Colangelo, reversing the Workers' Compensation Board, in a matter of first impression, determined that claimant's surviving child was entitled to the weeks of the nonschedule permanent disability award which remained upon claimant's death, where claimant's death was not related to the compensated injury: " 'With respect to schedule injuries, SLU [schedule loss of use] awards are made to compensate for the loss of earning power or capacity that is presumed to result, as a matter of law, from permanent impairments to statutorily-enumerated body members' ... . 'By contrast, compensation for a permanent partial disability that arises from a nonschedule injury, i.e., an injury to a body member not specifically enumerated in subsections (a)-(u) [of Workers' Compensation Law § 15 (3)], is based on a factual determination of the effect that the disability has on the [worker's] future wage-earning capacity' ... . In that regard, whereas an SLU award 'is not allocable to any particular period of disability and is independent of any time that the [worker] might lose from work' ... , a nonschedule permanent partial disability award under Workers' Compensation Law § 15 (3) (w) requires a calculation of a worker's weekly rate of compensation using the worker's average weekly wages and wage-earning capacity and 'specifies the [duration or maximum] number of weeks the worker will receive that weekly sum[] based upon the [worker's] percentage of lost wage-earning capacity' ... . * * * Until now, we have not had the occasion to address whether any remaining portion or weeks of a nonschedule permanent partial disability award is payable to the beneficiaries identified in Workers' Compensation Law § 15 (4) upon a claimant's death 'arising from causes other than the [established] injury'... . Subdivision (3) includes both SLU [schedule loss of use] and nonschedule permanent partial disability awards ... , and the unqualified language of subdivision (4) — which pertains to '[a]n award made to a claimant under subdivision three' ... — neither distinguishes SLU awards from nonschedule permanent partial disability awards, nor contains any limiting language excepting nonschedule permanent partial disability awards from its scope. Given the unambiguous and unqualified language of subdivision (4) ... , we see no basis to distinguish SLU and nonschedule awards where the plain language of subdivision (4) applies to any and all awards made under Workers' Compensation Law § 15 (3). Accordingly, the language employed in Workers' Compensation Law § 15 (4) reflects that the Legislature intended this subdivision to apply to all permanent partial disability awards made pursuant to subdivision (3) — that is, both SLU and nonschedule permanent partial disability awards ...". ***Matter of Green v. Dutchess County BOCES*, 2020 N.Y. Slip Op. 01546, Third Dept 3-5-20**

WORKERS' COMPENSATION.

EMPLOYER'S ANSWER TO A QUESTION ON ITS APPLICATION FOR A BOARD REVIEW OF A WORKERS' COMPENSATION LAW JUDGE'S AWARD OF BENEFITS WAS ADEQUATE AND SHOULD NOT HAVE BEEN THE BASIS OF THE BOARD'S DENIAL OF THE APPLICATION; THE QUESTION CONCERNED WHEN THE EMPLOYER'S OBJECTION TO THE RULING WAS MADE.

The Third Department, reversing the Workers' Compensation Board, determined the employer's answer to a question in its application for Board review of the Workers' Compensation Law Judge's award of benefits was adequate and did not warrant denial of the application. The question concerned when the objection to the ruling was made: "When the employer filed its application for Board review on March 2, 2018, question number 15 on that form, as well as the accompanying instructions in effect at that time, requested that it '[s]pecify the objection or exception interposed to the ruling and when the objection or exception was interposed as required by 12 NYCRR 300.13 (b) (2) (ii)' ... . In response to question number 15, the employer stated, 'Upon information and belief an exception/objection was noted prior to the conclusion of the hearing.' The Board found that the employer's response was incomplete because the employer 'failed to identify the date it interposed an objection on the record in response to [question number] 15' … . Although the Board has consistently found that

listing the hearing date at which the objection or exception was made constitutes a complete response to question number 15, the regulation only requires the applicant to state when the objection or exception occurred ... . Here, the employer's response to question number 15 stated when the objection was made, that is, at 'the conclusion of the hearing,' at which time the employer stated, 'A protective exception, please, your Honor.' In our view, the employer's response stated when the objection occurred, ... and, therefore, the response was complete and complied with the Board's regulatory formatting requirements ... . We recognize that, in Subject No. 046-1119, the Board announced that 'the [hearing] date when the objection or exception was interposed must be listed' in response to question number 15 on the RB-89 form ... . However, Subject No. 046-1119 — as well as the Board's other November 2018 documents providing clarification of its formatting requirements ... postdate the instant March 2018 application for Board review and are, therefore, of no import here ...". ***Matter of Granica v. Town of Hamburg*, 2020 N.Y. Slip Op. 01542, Third Dept 3-5-20**

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