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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

Court of Appeals Holds Plaintiff's Proof Failed to Meet Causation Test in Asbestos Case

Reaffirms That Plaintiff Must Establish Sufficient Exposure to a Toxin Through Expert Testimony

Nemeth v. Brenntag N. Am., 2022 N.Y. Slip Op. 02769 (April 26, 2022), addresses the sufficiency of evidence presented at an asbestos trial. The plaintiff sued myriad defendants that manufactured and distributed products allegedly containing asbestos. He claimed that his wife was exposed to them, causing her to contract peritoneal mesothelioma and to eventually pass away. Plaintiff settled with all defendants except Whittaker, which supplied talc contaminated with asbestos used in commercial talcum powder.

After trial, the jury returned a verdict of $15 million to the estate and $1.5 million to the plaintiff for loss of consortium. The parties later stipulated to a reduced award (in response to a trial court ruling), but Whittaker moved for judgment notwithstanding the verdict, on the ground that it was not supported by legally sufficient evidence as to causation. The trial court denied the motion, and the Appellate Division affirmed on the liability issues with one dissent.

In a 5-1 decision, the Court of Appeals reversed, finding that the "plaintiff's proof failed as a matter of law to meet our test for proving causation in toxic tort cases." *Id.* at *6. Referring back to its decision in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006), the Court sought to "reaffirm" its requirements in such a case:

> We acknowledged that, because there are times that "a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value," "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community." We noted that there may be several ways that an expert might demonstrate causation, for example by using mathematical modeling, but that any method used must be "generally accepted as reliable in the scientific community" (citations omitted).

Nemeth, 2022 N.Y. Slip Op. 02769 at *7.

The Court has repeatedly rejected as insufficient expert testimony that exposure to a toxin is "excessive" or "far more" than others or "testimony that merely links a toxin to a disease or 'work[s] backwards from reported symptoms to divine an otherwise unknown concentration' of a toxin to prove causation (citation omitted)." *Id.* at *8. In a significant footnote, the Court cautioned that "[a]ny reliance on the Appellate Division's holding in *Lustenring v AC & S Inc.* to support a theory that 'working in dust laden with asbestos generated from products containing asbestos,' along with 'expert testimony that dust raised from manipulating asbestos products "necessarily" contains enough asbestos to cause mesothelioma,' is incorrect. Such an approach is incompatible with *Parker* and its progeny (citations omitted)." *Id.* at *9 n.3.

In the case at hand, the Court found that the plaintiffs' expert's opinion did not meet these requirements, describing it as "plainly insufficient":

> Dr. Moline asserted that "brief or low level exposures of asbestos" could cause the disease, but that "there are some exposures to asbestos that are trivial and don't increase a person's risk of developing mesothelioma" and that exposure to twice the amount of asbestos in ambient air would not cause mesothelioma. She also testified that mesothelioma may develop idiopathically—that is, without a known cause (citations omitted).

Id. at *9–10.

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In addition, the Court criticized the studies or scientific literature cited to or relied upon by plaintiff's expert, as providing no quantification, no estimation of minimum levels of exposure, and thus no foundational basis for her opinion. It also reiterated that standards promulgated by regulatory agencies, like OSHA's "permissible exposure limits" to asbestos, are inadequate to establish legal causation. Significantly, the plaintiff did not introduce evidence or estimates from an industrial hygienist as to inhalation levels known to cause peritoneal mesothelioma. Finally, the majority took issue with the dissent's characterization of the Court's standard as being "impossible" for plaintiffs to meet, finding plaintiff's proof, not its standard, at fault:

> We must, as always, strike a balance between the need to exclude "unreliable or speculative information" as to causation with our obligation to ensure that we have not set "an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court." The requirement that plaintiff establish, using expert testimony based on generally accepted methodologies, sufficient exposure to a toxin to cause the claimed illness strikes the appropriate balance (citations omitted).

Id. at *14–15.

The lone dissenter, Judge Rivera, asserted that the majority's reversal was improperly based on the weight, not the sufficiency, of the evidence; that the plaintiff's proof was sufficient at trial; that the plaintiff, through his experts, established both general and specific causation; that a valid line of reasoning supported the verdict; and that "[a]s with most tort actions, including toxic torts, this litigation turned on a battle of the experts. Dr. Moline and Mr. Fitzgerald relied on methodologies and studies that are generally accepted in the scientific community, and Dr. Moline provided her opinion—her scientific expression—that the asbestos to which Flo was exposed through inhalation was sufficient to be a significant cause of Flo's cancer." *Id*. at *44.

Court of Appeals Determines That Issue Presented on Appeal Was Moot

And Refuses to Apply Exception

Matter of Mental Hygiene, Legal Serv. v. Delaney, 2022 N.Y. Slip Op. 02578 (April 21, 2022), deals with the fundamental principle of mootness, which prohibits courts from deciding academic, hypothetical, moot or otherwise abstract questions. *Hearst Corp. v. Clyne*, 50 N.Y.2d 707 (1980).

In *Matter of Mental Hygiene*, a 16-year-old with developmental disabilities became unmanageable at her school, resulting in her admission to a local hospital's emergency room. When she did not require medical or psychiatric care, the hospital sought to discharge her. However, her mother refused to take her home, citing concerns for the safety of the child's sibling. The child's school district and the New York State Office for People with Developmental Disabilities (OPWDD) made multiple unsuccessful attempts to find a residential school or temporary residential placement at a suitable facility, respectively. OPWDD also increased the funds allotted to the child, and sought additional in-home services, but the mother was unable to find qualified local providers. For several weeks, while further efforts were made to find a placement or a provider of in-home services, the child remained in the emergency room.

Mental Hygiene Legal Services commenced a combined CPLR articles 70 and 78 proceeding on behalf of the child seeking, among other things, her "immediate discharge from the emergency room" and "a safe discharge plan upon her release" and alleging that OPWDD's "service model and programs for children were inadequate."

The child was subsequently discharged from the hospital and put in a temporary placement at a residential facility while the matter was before the trial court. Petitioner sought entry of a final order dismissing the proceeding, evincing a desire to appeal from the trial court's earlier order finding that the statutory obligation to place minors in residential schools rested exclusively upon school districts and that OPWDD had no authority to place children outside of their homes. During the pendency of the appeal to the Appellate Division, the child's placement became "unconditional." The Appellate Division determined that the matter was moot, but nevertheless applied an exception to the mootness doctrine, that is, permitting review of the order for "important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable." 176 A.D.3d 24, 30 (3d Dep't 2019). The Appellate Division then rejected the appeal on the merits.

On appeal, the Court of Appeals applied the mootness doctrine, and refused to apply an exception, resulting in the dismissal of the case. It reasoned that OPWDD and DOH had established that, since the time the suit had been brought, services were now available for similarly situated children throughout the state "and particularly in the region where the child resided," reducing the likelihood that these issues would recur. "Given the intervening material alterations of the service programs challenged in the petition, we decline to invoke the exception to the mootness doctrine under the unique circumstances of this case (citation omitted)." 2022 N.Y. Slip Op. 02578 at *5.

The lone dissenter, Judge Rivera, disagreed with the majority that the mootness exception did not apply because of intervening material alterations to the relevant service programs, as

> respondents have failed to establish that these actions have closed the alleged service gap and eliminated lengthy hospital confinements, such that a decision on this appeal would have no real-world effect. Notably, respondents' mootness argument has consistently depended on judicial acceptance of their allegations that services are now seamlessly provided, even while they concede the shortage of resources within their existing service model.

Id. at *28.

Divided Court of Appeals Holds New York's Congressional and Senate Maps to Be Void

Finds Partisan Gerrymandering and Approves Special Master to Clean Things Up

In *Matter of Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 02833 (April 27, 2022), a narrow majority of the Court of Appeals declared that New York's congressional and senate maps were void, requiring future judicial oversight.

As the majority noted, every 10 years and following the federal census, reapportionment of the New York State senate, assembly, and congressional districts needs to be done to take into account shifts in the population and possible changes in the allocated number of congressional representatives. Historically, such redistricting has been fraught with stalemates and allegations of partisan gerrymandering, "that is, one political party manipulating district lines in order to disproportionately increase its advantage in the upcoming elections, disenfranchising voters of the opposing party." *Id*. at *3–4.

The 2014 constitutional amendments were intended to create an era of "bipartisanship and transparency through the creation of an independent redistricting commission [IRC] and the adoption of additional limitations on legislative discretion in redistricting, including explicit prohibitions on partisan and racial gerrymandering." *Id*. at *4. To further that goal, under a constitutionally mandated timeline, the IRC is required to draw up the redistricting maps that are to be submitted, without amendment, for a vote to the legislature. Significantly for the purposes of this case, if the first set of maps is rejected, the IRC must submit a second set, without amendment, for a legislative vote. If the second set is then rejected, only then can the legislature offer amendments to the IRC proposed maps with the added restriction that such legislative alterations cannot affect more than two percent of the population in any district.

According to the Court's majority, the fatal flaw here was that the IRC never presented a second plan to the legislature and the Democrats then composed and enacted new maps without consulting the Republican Party. The majority noted that redistricting legislation will be declared unconstitutional only if it is shown beyond a reasonable doubt that it conflicts with the Constitution; "it is evident that the legislature and the IRC deviated from the constitutionally mandated procedure" (*Id*. at *15); the Constitution's plain language required the IRC to submit a second plan and only then upon its rejection could there be "'amendments' to such plan, not the wholesale drawing of entirely new maps"; the legislative record reflects that "the IRC's fulfillment of its constitutional obligations" was "a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting" (*Id*. at *22–23; and compliance with the IRC process is "enshrined in the Constitution," which provides for the exclusive method of redistricting, leaving no room for legislative discretion as to its implementation.

Having found a procedural violation, the Court then turned to the substantive partisan gerrymandering claim. The majority held that the lower courts properly found that the congressional map was substantively unconstitutional and was drawn with impermissible partisan purpose. Finally, the Court focused on the proper remedy for this constitutional violation. It rejected the respondent's entreaty to use the unconstitutional maps for the upcoming 2022 congressional and senate elections, deferring the remedy to a future election. The majority therefore endorsed the trial court's proposed procedure to "'order the adoption of . . . a redistricting plan' with the assistance of a neutral expert, designated a special master, following submissions from the parties, the legislature, and any interested stakeholders who wish to be heard (citation omitted)." *Id*. at *36.

There were three separate written dissenting opinions. Judge Troutman agreed that the redistricting plans were not enacted in compliance with the constitutional process. She disagreed, however, as to the majority's "advisory opinion" on the substantive gerrymandering issue and the remedy. Judge Troutman criticized the majority for giving no guidance on the development of a new congressional map and for placing the ultimate decision-making authority in the hands of a "single trial court judge." Her remedy was that the legislature be ordered "to adopt one of the IRC-approved plans on a strict timetable, with limited opportunity to make amendments," with the two percent restriction noted above.

Judge Wilson agreed with Judge Troutman that the matter should not be referred to a special master and her proposed solution. However, he also concurred in Judge Rivera's separate opinion finding that "the petitioners failed to establish that the legislature violated the state's redistricting procedures or constitutional mandates." Judge Wilson believed, like Judge Rivera, that the Constitution leaves the redistricting authority in the legislature's hands and that the petitioners did not establish that there was gerrymandering.

The Court of Appeals and Labor Law § 240(1)

On a single day, the Court of Appeals recently issued three decisions involving Labor Law § 240(1). That section mandates that certain property owners and contractors provide adequate safety protections to workers performing construction, demolition or repair work with respect to a building or structure.

Court Holds Earlier Interlocutory Order Did Not Necessarily Affect the Final Judgment

Thus, Court Could Not Review It

As we have previously noted, unlike federal practice, New York permits *virtually all* interlocutory appeals. Those who choose not to take that route, but who wait, can have an interlocutory order reviewed on appeal from a final judgment, but only if it is a nonfinal order that "necessarily affects" the final judgment. CPLR 5501(a)(1). Thus, there is a potential danger in not appealing an interlocutory order immediately that may *not* be reviewable on appeal from a final judgment.

In *Bonczar v. American Multi-Cinema, Inc.*, 2022 N.Y. Slip Op. 02835 (April 28, 2022), plaintiff moved for partial summary judgment on his Labor Law § 240(1) claim. He alleged that he was injured when he fell from a ladder that shifted and wobbled. The trial court granted the motion, but the Appellate Division, in a 2018 order, reversed, finding an issue of fact as to whether there was a statutory violation and whether plaintiff's own acts or omissions were the sole proximate cause of his injury.

The Labor Law § 240(1) claim was then tried before a jury, and the plaintiff moved for a directed verdict. After the court reserved judgment, the jury found no statutory violation and that the sole proximate cause was the plaintiff's failure to position the ladder. The trial court denied plaintiff's motion to set aside the verdict, and the Appellate Division affirmed in 2020.

On appeal to the Court of Appeals, the plaintiff sought review of both the 2018 and 2020 orders. The Court acknowl-

edged that it has not provided a definition of general applicability concerning the "necessary affects" requirement. Instead, it referred to two separate approaches:

> [W]here the prior order "str[uck] at the foundation on which the final judgment was predicated" we have inquired whether "reversal would inescapably have led to a vacatur of the judgment." This is not such a case. In other cases, we have asked whether the nonfinal order "necessarily removed [a] legal issue from the case" so that "there was no further opportunity during the litigation to raise the question decided by the prior non-final order" (citations omitted).

Id. at *3.

In this case, the Court ruled that the Appellate Division 2018 nonfinal order denying plaintiff's summary judgment motion "did not remove any issues from the case. Rather, the question of proximate cause and liability was left undecided. The parties had further opportunity to litigate those issues and in fact did so during the jury trial." *Id.* at *3–4. Thus, that order did not "necessarily affect" the final judgment, making it unreviewable.

Court Concludes Work Performed Was "Routine"

Thus, Plaintiff Was Not Entitled to Partial Summary Judgment

To recover on a Labor Law § 240(1) claim, a plaintiff must establish that he or she was engaged in one of the statute's enumerated activities, including "cleaning." In *Soto v. J. Crew Inc.*, 21 N.Y.3d 562 (2013), the Court of Appeals set forth a four-factor test to determine if an activity should be characterized as cleaning under the statute. The first factor "considers whether the work is 'routine, in the sense that it is the *type* of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of *commercial premises*.'" *Healy v. EST Downtown, LLC*, 2022 N.Y. Slip Op. 02836 (April 28, 2022), at *1.

In *Healy,* the plaintiff was a maintenance-and-repair technician employed by a building's property manager. He was asked to remove a bird's nest lodged in one of the building's gutters above a tenant's entryway. While attempting to remove the bird's nest, plaintiff fell from an unsecured ladder that moved when a bird flew out of the nest.

The trial court granted plaintiff's motion for partial summary judgment on liability on his Labor Law § 240(1) claim, and a split Appellate Division affirmed. The majority held that removing the nest was not routine, emphasizing the "atypical nature of the work and its attendant elevated-related risks." In addition, the court noted that while working on the premises, the plaintiff had never before been given such a task; the plaintiff's supervisor had characterized the nest removal as nonroutine cleaning; and the task "necessarily involved elevation-related risks that are not generally associated with typical household cleaning." 191 A.D.3d 1274, 1275–76 (4th Dep't 2021). The Appellate Division dissent concluded that cleaning gutters over retail storefront entrances "is the type of routine maintenance that occurs on a relatively frequent basis on a commercial portion of a mixed use property" (citation omitted). *Id.* at 1279.

The Court of Appeals reversed, concluding like the dissent below, that the work was routine "which therefore weighs against concluding that he was 'cleaning.' '[V]iewed in totality,' the *Soto* factors do not 'militate in favor of placing the task' in the category of 'cleaning' (citation omitted)." 2022 N.Y. Slip Op. 02836 at *2.

Divided Court Finds There To Be Issues of Fact as to Whether Ladder Accident Constituted Violation of Labor Law § 240(1)

Dissent Believes This Case Is "Prototypical Example" of Statutory Claim

In *Cutaia v. Bd. of Mgrs. of the 160/170 Varick St. Condo*, 2022 N.Y. Slip Op. 02834 (April 28, 2022), the plaintiff was directed to move sinks in a bathroom on a building renovation project. He cut and relocated some ceiling pipes situated near electrical wiring. Because of space limitations, he had to lean the A-frame ladder he was using against the wall in a closed and unlocked position. While attempting to connect two pipes, he received an electric shock, knocking him off the ladder. The plaintiff sustained electrical burns to his body and left hand and injuries to his spine and shoulders. The trial court denied the plaintiff's partial summary judgment motion on his Labor Law § 240(1) claim, but the Appellate Division reversed.

A divided Court of Appeals reversed. The majority noted that an accident alone does not establish a Labor Law § 240(1) violation or causation, and the statute is designed to protect against "harm directly flowing from the application of the force of gravity to an object or person (citation omitted)." *Id.* at *2. Here, the Court found issues of fact as to "whether 'the ladder failed to provide proper protection,' whether 'plaintiff should have been provided with additional safety devices,' and whether the ladder's purported inadequacy or the absence of additional safety devices was a proximate cause of plaintiff's accident" (citations omitted). *Id.*

The dissent, written by Judge Wilson, and joined by Judges Rivera and Troutman, concluded that the plaintiff's case "is a prototypical example of the situations the legislature sought to remedy through Labor Law § 240(1): he was provided an inadequate ladder for his job, and that inadequate ladder was a proximate cause of his fall-related injuries." *Id.* at *4. In finding that there were no questions of fact, the dissent emphasized that the ladder provided to the plaintiff was an A-frame, which must be fully opened and locked for safe usage. Yet, in order to perform the assigned work, the plaintiff had to use that ladder in an unsafe manner, with it being folded and leaning against a wall. In fact, plaintiff's expert opined that had the ladder been anchored to the ground or wall, it would have remained stable when the plaintiff was shocked, and the plaintiff should have been provided with a more stable device.

The dissent stressed that the electric shock was a "red herring" because *a* proximate cause of the plaintiff's injuries was the inadequate ladder; the electric shock, while being a "precipitating event," was not the *sole* proximate cause; and the electric shock was not "an independent intervening act that became a superseding cause of Mr. Cutaia's injuries that removed the inadequate ladder as a proximate cause." *Id.* at *11.

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