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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 Resolves Appellate Division Conflict

ICPC Does Not Apply to Out-of-State Noncustodial Parents Seeking Custody

Matter of D.L. v. S.B., 2022 N.Y. Slip Op. 05940 (Oct. 25, 2022), resolved a conflict among the Appellate Division departments regarding the reach of the Interstate Compact on the Placement of Children (ICPC). The ICPC is an agreement among the states (and the District of Columbia and the U.S. Virgin Islands) to follow certain procedures relating to sending children across state borders "for placement in foster care or as a preliminary to a possible adoption." The issue here was whether the ICPC applies where out-of-state noncustodial parents seek custody of their children who are in the custody of New York social services agencies.

Here, the father, who resided in North Carolina, brought these custody proceedings against the mother, a New York resident, and the Department of Social Services (DSS), which had removed their child from the mother's custody and placed the child in foster care. The Family Court dismissed the petitions without conducting a hearing, but ruled that the ICPC applied even though the father was an out-of-state, noncustodial parent, because the child was in the DSS's custody and care. The Appellate Division affirmed, concluding that the dismissal was justified because the relevant North Carolina authority had previously denied the ICPC request, finding the father's home was not suitable for the child.

In reversing the Appellate Division order, the Court of Appeals noted the conflict among the Appellate Division departments. The Second Department has consistently applied the ICPC to out-of-state, noncustodial parents, while the First and Third Departments disagree, concluding that the ICPC limits its application to placements in foster care or adoptive settings. The Court of Appeals agreed with the latter departments and the courts of other states, finding that the ICPC's express language, referring to the "placement" of children "in foster care or as a preliminary to possible adoption"

> unambiguously limits its applicability to cases of placement for foster care or adoption—which are substitutes for parental care that are not implicated when custody of the child is granted to a noncustodial parent. Indeed, applying the ICPC to noncustodial parents would be inconsistent with the statutory requirement that, when a child is placed pursuant to the ICPC, "[t]he sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement" (citation omitted).

Id. at *7.

Here, the out-of-state parent was seeking custody, and the situation did not involve foster care or adoption. The Court maintained that its interpretation was consistent with the legislative history and underlying statutory purpose, which never indicated that the ICPC was meant to apply to any individual other an out-of-state foster or adoptive parent. Furthermore, a contrary interpretation

> would be inconsistent with other components of New York's statutory framework governing child protection, which overwhelmingly reflects "the preeminence of the biological family" and "embrace[s] a policy of keeping biological families together" whenever safely possible. In that regard, this Court has long acknowledged the Legislature's "fundamental social policy choice[,] . . . binding on this Court" to structure New York's foster care scheme around the right of parents "to the care and custody of

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> a child, superior to that of others, unless the parent has abandoned that right or is proven unfit" (citations omitted).

Id. at *10.

The Court noted that the Family Court Act provides other effective ways to assure a child's safety before custody is awarded to an out-of-state parent. Family Court retains jurisdiction over custody proceedings and has a wide range of powers under the Family Court Act to protect the child's safety. For example, "Family Court can hold hearings and request courtesy investigations and reports from the local social service agencies or department of probation in order to make determinations regarding a child's best interests." *Id.* at *12. In addition, Family Court Act § 1052(a) provides that, rather than awarding an out-of-state parent full custody, there are other options, including release to a parent with supervision. Family Court can grant a temporary order of custody or guardianship to a noncustodial parent, "which requires that a parent submit to Family Court's continuing jurisdiction and comply with the terms and conditions of the court's order—which may include making the child available for visits with social services officials." *Id*. In that circumstance "the court maintains jurisdiction over the case until the child is discharged from placement and all orders regarding supervision, protection or services have expired." *Id*.

Exception to Mootness Doctrine Applied

Generally, an appeal will be dismissed as moot or academic where there has been a change in the circumstances of the case after the decision below, so that there is no longer an actual controversy between the parties. There are exceptions to the mootness doctrine, however, including "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Matter of Hearst Corp. v Clyne,* 50 N.Y.2d 707, 714–715 (1980).

In a footnote in *Matter of D.L.,* the Court noted that the appeal was moot because, during the pendency of the appeal, the father had surrendered his parental rights to the child. However, the Court chose to review "the significant issue raised under the exception to the mootness doctrine." *See also* David L. Ferstendig, *Mootness Exception Applies*, 735 N.Y.S.L.D. 3–4 (2022); *Matter of Liu v. Ruiz*, 200 A.D.3d 68 (1st Dep't 2021).

Unaccrued Portion of Workers' Compensation Law Nonschedule Award Does Not Pass to Injured Employee's Beneficiaries

Court Holds Unaccrued Portion Did Not Survive Claimant's Death

In *Matter of Green v. Dutchess County BOCES*, 2022 N.Y. Slip Op. 06028 (Oct. 27, 2022), the Court of Appeals ruled that the unaccrued portion of a nonschedule award under Workers' Compensation Law (WCL) § 15(3)(w) does not pass to the beneficiaries of injured employees who die from causes unrelated to the work injury. Here, the decedent was injured in a work-related accident. He was classified as having a nonschedule, permanent partial disability, receiving an award of $500 per week for no more than 350 weeks. He passed away for unrelated causes after 311.2 weeks, and his minor son sought accrued unpaid amounts of his father's award *and* benefits for the 38.8 weeks remaining under the award.

There was no dispute that the claimant son was entitled to the accrued unpaid portion of the award his father should have received during his lifetime. What was contested and what the Court of Appeals denied recovery for was for the additional 38.8 weeks (at $500 per week). The Court explained that while WCL § 15(4) permits an award to pass to a surviving child under 18, WCL § 15(3) set forth two types of awards for injuries, resulting in permanent partial disability. A "schedule loss of use" (SLU) award "is designed to 'compensate for loss of earning power, rather than the time that an employee actually loses from work or the injury itself.'" On the other hand, a nonschedule award aims to reimburse a claimant for earnings lost due to the injury sustained. The Court concluded that "[t]he nature of nonschedule awards, dependent on an employee's actual earnings and the continuance of the disability, is such that there is no remaining portion of the award that can pass through to a beneficiary." *Id*. at *4.

The Court stressed that the different ways in which schedule and nonschedule awards are calculated reflect their different purposes. Nonschedule awards (1) "require fact-specific, individual calculations based on the impairment of wage-earning capacity," (2) "require 'a causal link between the claimant's disability and reduced earning capacity,'" and (3) "are 'payable during the continuance of such permanent partial disability,' but 'subject to reconsideration of the degree of such impairment by the board.'" On the other hand, schedule awards, "are set at 'sixty-six and two-thirds per centum of the average weekly wages,' and 'shall be paid to the employee' for a fixed, statutorily enumerated period (citation omitted)." *Id.* at *5.

Thus, the statutory language clearly provides that a nonschedule award is subject to reduction and suspension. "Indeed, as we have previously held, a nonschedule award does 'not entitle [claimant] to weekly compensation benefits at a specific rate . . . over a set period,' because 'the rate and duration of benefits awarded by the Board may change from one period to the next' (citation omitted)." *Id*. As a result (and confirmed by historical amendments to the statute), the Court concluded that no unaccrued portion of the nonschedule award "survives the claimant's death."

The Court rejected the Appellate Division's conclusion that, notwithstanding the award differences, the Legislature's intent

> to achieve "parity" between the two types of awards manifested by the 2007 amendments required that the awards also be treated similarly in this context, believing that the alternative holding would '"effectively perpetuate the very unfairness that the [L]egislature sought to eliminate"' in imposing durational cap weeks for nonschedule awards. This reflects a misunderstanding of the legislature's concern when passing the 2007 amendments, which were intended to reduce unfairness arising from the potentially unlimited period for which nonschedule awards could be paid in comparison to the statutorily limited period for which schedule awards are payable. These amendments

did not evince a general legislative intent to eliminate all distinctions between the two forms of awards. Nor does this Court's acknowledgement of the legislative intent to "reduc[e] disparities" between schedule and nonschedule awards require identical treatment of these forms of awards in contravention of the statute's plain text and purpose (citations omitted).

Id. at *7–8.

Update: Court of Appeals Again Addresses Worker's Entitlement to Accidental Disability Retirement Benefits

And Again Rejects Proposed Two-Part Test

In the March 2018 edition of the *Law Digest*, we reported on the Court of Appeals' decision in *Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674 (2018), where a divided Court held that first responders were not entitled to accidental disability retirement benefits. There, and relevant here, a police officer (James J. Kelly), was on duty during Hurricane Sandy, when he was injured when he tried to assist residents of a home who were trapped when a tree had fallen on the home. When Kelly applied for accidental disability retirement benefits, the Hearing Officer found that the injury-causing incident was "an accident" under RSSL § 363 because "[e]ntering that unstable structure was not within [petitioner's] regular and usual duties." *Id.* at 679. However, the respondent Comptroller overruled the Hearing Officer, and the Appellate Division confirmed the determination in an ensuing Article 78 proceeding. A majority of the Court of Appeals noted that its prior precedent established that an injury-causing incident is considered "accidental" when it is "sudden, unexpected and not a risk of the work performed." *Id.* at 681. The Court emphasized that the focus is on the "precipitating cause of injury" and not on "the petitioner's job assignment." *Id.* The dissent insisted that the proper analysis (and two-part test) should begin with determining whether the nature of the hazard was a part of the bargained-for risks of the job and, if it was outside the bargained-for risks, to then assess whether it was "sufficiently out of the ordinary risks of everyday life to constitute an accident." *Id.* at 690.

More recently, in *Matter of Rizzo v. DiNapoli*, 2022 N.Y. Slip Op. 06027 (Oct. 27, 2022), the Court revisited the issue. In *Rizzo,* the petitioner was a police officer employed by the Port Authority who was assigned to a Lincoln Tunnel toll plaza. After responding to a medical emergency involving a passenger on a bus, the petitioner walked towards a heated MTA booth to prepare written reports. As she went through the booth's doorway, a heavy wind blew and closed the door on her, causing injuries to her right hand and shoulder. Significantly, from the majority's perspective, "[p]etitioner conceded that she knew that the heavy metal door slammed automatically and that on the day of the injury her movements were intended to avoid that quick and forceful closure. While the known condition may be a risk of the work site, it cannot be the cause of an accident compensable under Retirement and Social Security Law § 363." *Id.* at *1–2. The majority again rejected the dissent's proposal to adopt a two-part test, as rewriting the statute which "would be 'inconsistent with the legislative policy choice to grant more generous disability benefits to police officers or firefighters injured by stepping into a pothole, or slipping on wet pavement or when getting up from a desk chair'" (quoting *Kelly*). *Id.* at *2.

Update: Summary Judgment Motion Burden With Respect to Prior Written Notice to Municipality of Unsafe Road Condition

Conflict (Apparently) Resolved

In the June 2021 edition of the *Law Digest*, we referred to a conflict among the Appellate Division Departments. This related to the summary judgment motion burden with respect to prior written notice to a municipality of an unsafe road condition. In *Horst v. City of Syracuse,* 191 A.D.3d 1297 (4th Dep't 2021), the issue was the municipality's *initial* burden on summary judgment. The plaintiff claimed that the municipality was required to establish *both* that it did not receive the prior written notice and "because plaintiff so alleged in the pleadings, that it did not create the defect." Plaintiff's position was in line with Second Department authority. *See, e.g., Nigro v. Village of Mamaroneck*, 184 A.D.3d 842, 843 (2d Dep't 2020). The defendant countered that it was only required initially to establish the lack of notice, not that it did not create the defect.

The Fourth Department in *Horst* agreed with the defendant, ruling that

> [w]here, as here, a municipality moves for summary judgment on its defense asserting the lack of written notice as a condition precedent to suit, the municipality sufficiently establishes that statutorily created defense by demonstrating, in the absence of any further requirement under the applicable prior notification law, that it did not receive prior written notice in the manner prescribed by the law. If the municipality establishes its prima facie entitlement to summary judgment based on the lack of prior written notice, "the burden shifts to the plaintiff to come forward with evidentiary proof in admissible form demonstrating 'the existence of material issues of fact which require a trial of the action.'" Such material issues of fact could relate to receipt of the requisite written notice itself or to the applicability of either of the judicially recognized exceptions to the statutory protection afforded to the municipality by the prior notification law (citations omitted).

Horst, 191 A.D.3d at 1298–99.

The First and Third Departments appear to concur with the Fourth Department. *See Correa v. Mana Constr. Group*, 192 A.D.3d 555 (1st Dep't 2021); *Hinkley v. Vill. of Ballston Spa,* 306 A.D.2d 612 (3d Dep't 2003).

That left the Second Department as the sole dissenter. It appears, however, that the Second Department has now joined the fold. In *Smith v. City of New York*, 175 N.Y.S.3d 529 (2d Dep't 2022), the court sought to clear up any of its prior inconsistencies, explaining that

> [w]here a locality has enacted a prior notification law and is alleged to be liable for personal injuries sustained as a result of a defective condition, the locality establish-

> es a defense as a matter of law by demonstrating that it did not receive prior written notice of the defective condition. Under such circumstances, the plaintiff must demonstrate the applicability of an exception to such a defense in order to avoid dismissal.
>
> While these general principles are not in doubt, their application within the procedural framework of a motion for summary judgment has not always been uniform. Given this lack of consistency, we take this opportunity to clarify the correct burden-shifting standard on a motion for summary judgment. Where a locality establishes, prima facie, that it was not provided with prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of an exception to that defense. As set forth more fully below, this burden-shifting standard should be applied even when the complaint affirmatively alleges that an exception is applicable. To the extent that this Court's case law conflicts with these principles, it should no longer be followed.

Id. at *3–4.

In CPLR 202 Analysis, New York's Covid Toll is Not to Be Considered When Assessing New Jersey's "Whole Body" of Statute of Limitations Law

Second Circuit Determines Plaintiff's Claim Was Untimely

CPLR 202 embodies New York's borrowing statute. It provides that where a nonresident sues in New York on a claim accruing outside of New York, the claim must be timely under both New York and the foreign law. Stated differently, the applicable limitation period is the lesser of New York's limitation period and the limitation period of the place where the cause of the action accrued. If the cause of the action accrues in favor of a New York resident, however, New York's limitation period applies. The primary purpose of the borrowing statute is to discourage forum shopping. Significantly, in calculating the respective limitation periods, the court is to consider "the whole body of limitations law of" each state, including *applicable* tolls. *See Weinstein, Korn & Miller*, ¶202.02 (David L. Ferstendig ed., 2022).

In *Afanassieva v. Page Transp., Inc.*, 2022 U.S. App. LEXIS 28462 (2d Cir. Oct. 13, 2022), the plaintiffs were nonresidents and the competing jurisdictions for statute of limitations purposes under the borrowing statute were New York and New Jersey. What made this case intriguing was that evaluating "the whole body of limitations law" involved the COVID-19 extension or toll of the respective states. The Second Circuit remarked that New Jersey's Chief Justice extended New Jersey filing deadlines for 56 days, while New York's executive orders (an issue we have spent quite a bit of time on) tolled the statute of limitations for 228 days. *See* David L. Ferstendig, *We Thought It Was a Toll, We Hoped It Was a Toll,* 728 N.Y.S.L.D. 4 (2021); David L. Ferstendig, *Update and Caution Concerning Scope of Governor's Executive Orders with Respect to CPLR Time Limits*, 720 N.Y.S.L.D. 4 (2020); David L. Ferstendig, *The Scope of the COVID-19 Toll of CPLR Time Limits*, 717 N.Y.S.L.D. 1–4 (2020).

Doing the calculation here, the district court had concluded that New Jersey's two-year limitation period for personal injury claims applied and, with the 56-day extension, plaintiffs' claims were time-barred under CPLR 202. The plaintiffs argued that the court should have applied New York's 228-day toll. The Second Circuit rejected this argument, stressing that New York tolls are applied only with respect to New York limitation periods, not New Jersey's:

> Courts applying C.P.L.R. § 202 have consistently made two separate calculations. First, they look to the foreign state's "whole body of limitations law" and calculate the foreign state's statute of limitations, inclusive of any tolls and extensions. 1 Jack B. Weinstein, Harold L. Korn, Arthur R. Miller, *New York Civil Practice*: CPLR ¶ 202.02 (David L. Ferstendig ed., 2022). Second, they do the same for New York's laws. Plaintiffs must bring their claim within the shorter of the resulting two periods. The district court thus properly applied New York tolling periods only to New York law, not to New Jersey law (citations omitted).

Id. at *4–5.

The Court insisted that applying the shorter limitation period here was consistent with the goals of CPLR 202 to prevent forum shopping and to provide clarity for litigants. "Plaintiffs may not avoid New Jersey's shorter statute of limitations—and its shorter pandemic tolling period—by filing in New York." *Id.* at *5.

The Court stated in a footnote that a recent New Jersey case had ruled that New Jersey's pandemic-related orders *suspended* rather than tolled the statute of limitations. Under either scenario (a suspension or a toll), however, plaintiffs' claims were untimely.

Failure to Retain Expert by Jury Selection Results in Dismissal of Action

Court Finds Law Office Failure Excuse Unpersuasive

Tunell v. Maynard, 209 A.D.3d 515 (1st Dep't 2022), a medical malpractice action, was dismissed on the day jury selection was scheduled to begin, based on the plaintiffs' default in failing to retain an expert witness for trial. The Appellate Division affirmed the trial court's discretion in determining that the plaintiffs did not demonstrate a reasonable excuse for failing to proceed to trial. Significantly, plaintiffs' counsel's affirmation represented that notwithstanding efforts made prior to trial, he was unable to identify and retain an expert to support the plaintiffs' case. The court held that

> [p]laintiffs' claim of law office failure is not persuasive as there is no indication that their counsel's efforts to retain a trial expert were inadequate. Although strong public policy supports resolving cases on the merits, here, plaintiffs had more than enough time to secure an expert witness for trial. Thus, plaintiffs' position that an adjournment or striking the case from the trial calendar would have been more appropriate under these circumstances is not persuasive.

Id. at *1–2.

Wishing each of you a happy and healthy holiday season.

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