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COURT OF APPEALS

ARBITRATION, EMPLOYMENT LAW, CONTACT LAW, MUNICIPAL LAW.

THE AMOUNT OF GENERAL MUNICIPAL LAW § 207-A COMPENSATION TO WHICH RETIRED PERMANENTLY DISABLED YONKERS FIREFIGHTERS ARE ENTITLED UNTIL RETIREMENT AGE IS SUBJECT TO ARBITRATION UNDER THE COLLECTIVE BARGAINING AGREEMENT (CBA).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the amount of General Municipal Law § 207-a compensation to which retired permanently disable Yonkers firefighters are entitled until reaching retirement age is subject to arbitration under the terms of the collective bargaining agreement (CBA): "If there is a 'reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA,' the matter is arbitrable, leaving the arbitrator to 'make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them' ... . Here, the Union argues that both Appendix C and Article 31 of the CBA demonstrate that the parties agreed to arbitrate the present grievance. Appendix C, which is entitled, 'General Municipal Law Section 207-a Procedure,' contains six pages of detailed terms to which Yonkers and the Union agreed, including very broad provisions granting the arbitrator 'authority to decide, de novo, the claim of entitlement [and continued entitlement] to [section] 207-a benefits.' It further provides that when 'the matter presents a termination of [section] 207-a benefits, the Fire Department shall have the burden of proof by a preponderance of the evidence that the member is no longer eligible for [section] 207-a benefits.' The Union's grievance reasonably relates to these provisions because they provide for the arbitration of disputes over General Municipal Law § 207-a benefits, and the Union contends that Yonkers is attempting to terminate such benefits by withholding special pays." ***Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO***, 2022 N.Y. Slip Op. 07095, CtApp 12-15-22

CRIMINAL LAW

THE DEFENDANT POLICE OFFICER'S THREATS MADE TO HIS FORMER GIRLFRIEND WERE NOT MERELY ANGRY WORDS; THE EVIDENCE SUPPORTED DEFENDANT'S HARASSMENT CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Term, determined the police officer's harassment conviction should stand: "During defendant's phone call with D.D., he accused D.D. and her husband of extorting him. He also made several threats, first that her children would get a bullet in their heads, then that he would firebomb her home, and finally that he would kill the entire family. Contrary to the Appellate Term's conclusion, a rational factfinder could have determined that this was not a mere outburst, but escalating threats of deadly violence targeted at D.D. and her family. The angry tone of the call, defendant's use of profanities to refer to D.D. and her children, and the fact that defendant threatened to use deadly violence all support a finding that the statements were not said in jest. Indeed, the morning after this call defendant admitted to his captain that he said something he should not have—to the effect that he was going to shoot D.D.'s children in the head. A rational factfinder could have concluded that defendant's statements were not just a rant or mere angry words said by someone in an intimate personal relationship gone bad, but rather serious threats of specific ways he would kill D.D. and her family: firebombing the home and shooting the children in the head. Defendant also communicated a motive for his threats: his alleged belief that D.D. had extorted him, and, as he had previously claimed, that she had cheated on him. The threats on the call were specific and unequivocal—the type of statements that a reasonable person in D.D.'s position, knowing that defendant was an armed police officer who was trained in the use of deadly force and who believed her to be unfaithful and an extortionist, would commonly understand as words describing intended violent action and not a crude outburst, puffery, or bluffs." ***People v. Lagano*, 2022 N.Y. Slip Op. 07021, CtApp 12-13-22**

CRIMINAL LAW.

THE DEFENDANT, THINKING THAT THE PERSON TRYING TO BREAK-IN WAS HER ESTRANGED HUSBAND WHO HAD BROKEN IN AND ATTACKED HER BEFORE, FIRED A SINGLE SHOT THROUGH THE METAL DOOR, KILLING THE VICTIM (WHO WAS NOT HER ESTRANGED HUSBAND); BECAUSE HER USE OF THE WEAPON WAS DEEMED DANGEROUS AND RECKLESS, DEFENDANT WAS NOT ENTITLED TO THE TEMPORARY AND LAWFUL USE OF A WEAPON JURY INSTRUCTION.

The Court of Appeals, reversing the appellate division, determined the defendant was not entitled to the temporary and lawful possession of a weapon jury instruction in this murder case. Defendant thought the person trying to get into her house was her estranged husband who had broken in and attacked her before. She fired one shot through the metal door, killing the victim (who was not her estranged husband). Defendant was convicted of criminal possession of a weapon and acquitted of murder and tampering with evidence. The appellate division

reversed, finding defendant was entitled to the temporary and lawful possession of a weapon instruction. The Court of Appeals reversed, finding that the jury instruction was not warranted: "A defendant is entitled to a jury charge on the defense of temporary and lawful possession when there is evidence presented at trial 'showing a legal excuse for . . . possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner' ... . Here, defendant used the weapon in a dangerous manner ... . Although no single fact is dispositive, she fired the gun blindly through a closed, windowless door, endangering anyone who might have been on the other side, striking and killing the victim, and creating a risk that the bullet would ricochet off the metal door and potentially injure her children. Viewing the evidence adduced at trial in the light most favorable to defendant, as we must ... , we conclude that 'no reasonable view of the evidence would support a finding of the tendered defense' of temporary and lawful possession and, thus, County Court was 'under no obligation to submit the question to the jury' ... . Inasmuch as defendant's actions were reckless and dangerous, she was not entitled to the temporary and lawful possession charge." ***People v. Ruiz*, 2022 N.Y. Slip Op. 07092, CtApp 12-15-22**

CRIMINAL LAW, APPEALS.

UPON REMITTAL AFTER THE INITIAL PERSISTENT FELONY OFFENSE SENTENCE WAS OVERTURNED, THE SENTENCING COURT PROPERLY RELIED ON ADDITIONAL INFORMATION TO AGAIN SENTENCE DEFENDANT AS A PERSISTENT FELONY OFFENDER.

The Court of Appeal, reversing the Appellate Division, over an extensive dissent, determined the sentencing court, upon remittal after the initial persistent violent felony offender sentence was overturned on appeal, properly relied on additional information to again sentence defendant as a persistent violent felony offender: "Upon the appeal from defendant's judgment of conviction and original sentence as a persistent violent felony offender in 2013, the People conceded that defendant's prior incarceration dates did not provide sufficient tolling to qualify his 1987 conviction as a requisite predicate offense ... . On remittal, Supreme Court resentenced defendant as a persistent violent felony offender, relying on supplemental evidence of defendant's prior incarceration brought to the court's attention in connection with collateral motion practice. Defendant appealed, and the Appellate Division, with one Justice dissenting, vacated defendant's resentence and remitted for a second time. ... At the time of resentencing, Supreme Court was on notice of the supplemental evidence of defendant's prior incarceration, which conclusively demonstrates that defendant is, in fact, a persistent violent felony offender. ... [T]he Appellate Division did not limit its remittal .... Supreme Court was not precluded from imposing the statutorily required sentence based on the evidence before it, particularly given that court's 'inherent authority to correct illegal sentences' ...". ***People v. Kaval*, 2022 N.Y. Slip Op. 07022, CtApp 12-13-22**

CRIMINAL LAW, APPEALS, CONSTITUTIONAL LAW.

WHEN A DEFENDANT MUST BE RELEASED BECAUSE HE OR SHE IS NOT CHARGED WITH A BAIL-ELIGIBLE OFFENSE, A COMPETENCY EXAMINATION MUST BE CONDUCTED AS AN OUT-PATIENT OR IN A HOSPITAL; THE DEFENDANT CANNOT BE ORDERED TO JAIL PENDING THE EXAMINATION; THE HABEAS CORPUS PETITION WAS PROPERLY GRANTED; THE APPEAL WAS HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined defendant, who was not charged with a bail-eligible offense, could not be ordered to jail for a competency examination. Defendant must either be examined as an out-patient, or, upon a recommendation of a medical official, in a hospital. The writ of habeas corpus was properly granted and the appeal was heard as an exception to the mootness doctrine: "[W]e conclude that Wei Li [defendant] was not 'in custody' during his arraignment ... because he was not charged with a qualifying offense under the bail laws and the court was required to order his release at arraignment (see CPL 510.10 [3]; 530.20 [1] [a]). As its plain text makes clear, subdivision (3) mandates the location for the examination as either (1) the place where the defendant is in custody at the time the court orders the examination, or (2) at a hospital facility, as might be necessary for an effective examination. The statute's use of the phrase 'in custody,' like the phrase 'hospital confinement,' refers, as a practical matter, to where a defendant may be properly examined by psychiatric personnel. Thus, 'in custody,' as used in subdivision (3), does not broadly refer to custodial control over a defendant at a courthouse. ... A court issuing an order for a competency examination [pursuant to CPL 730.20] (1) may direct an examination on an outpatient basis or, (2) upon a medical recommendation of the director, the court may, but need not, order hospital confinement until completion of the examination." ***People v. Warden, Rikers Is.*, 2022 N.Y. Slip Op. 07093, CtApp 12-15-22**

CRIMINAL LAW, EVIDENCE.

THE USE OF PEPPER SPRAY BY JAIL PERSONNEL (AFTER A WARNING) WHEN DEFENDANT REFUSED TO TAKE OFF HIS SHOES WAS NOT "EXCESSIVE FORCE;" THEREFORE DEFENDANT, WHO ASSAULTED THE OFFICER FIVE SECONDS AFTER HE WAS SPRAYED, WAS NOT ENTITLED TO A JURY INSTRUCTION ON THE JUSTIFICATION DEFENSE IN HIS ASSAULT TRIAL.

The Court of Appeals, reversing the appellate division, determined there was no reasonable view of the evidence which would support a jury instruction on the justification defense. At the jail, the defendant was ordered to take off his shoes. When he refused, after being warned, he was sprayed in the face with pepper spray. Five seconds after he was sprayed, defendant charged the officer and punched him in the head: "The Appellate Division concluded that, viewing the evidence in the light most favorable to defendant, there was a 'reasonable view of the evidence that the use of the pepper spray constituted excessive force in this scenario' ... . [T]here is no reasonable view of the evidence that the sergeant's use of pepper spray was excessive or otherwise unlawful. The trial evidence was that defendant was given a lawful command to remove his footwear, that he was given that verbal command several times yet persisted in his refusal, and that he was specifically warned that

he would be pepper sprayed if he did not comply. The officers further testified that the use of pepper spray was considered a 'minimal' use of force compared to using 'hands on' force to remove the footwear." ***People v. Heiserman*, 2022 N.Y. Slip Op. 07024, CtApp 12-12-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

IF A DEFENDANT IS CONVICTED OF A FELONY IN A FOREIGN JURISDICTION WHICH REQUIRES THE DEFENDANT TO REGISTER AS A SEX OFFENDER, THE DEFENDANT WILL BE DESIGNATED A SEXUALLY VIOLENT OFFENDER IN NEW YORK EVEN IF THE FOREIGN FELONY DID NOT INVOLVE VIOLENCE.

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a dissent, determined a defendant who has been convicted in a foreign jurisdiction of a felony for which the defendant was required to register as a sex offender must be designated a sexually violent offender in New York, even if the foreign offense did not involve violence: "The statutory language is clear and unambiguous: 'a felony in any other jurisdiction for which the offender is required to register as a sex offender' therein is, under subdivision (3), a 'sexually violent offense' ... . 'As a general rule, unambiguous language of a statute is alone determinative' ... . * * * Defendant—and the many learned judges, lawyers, and legal scholars—may well be correct that subdivision (3) (b)'s foreign jurisdiction clause contains a legislative drafting error, but that does not give the courts license to ignore it. Courts must not 'legislate under the guise of interpretation' ... . If we were to take it upon ourselves to delete subdivision (3) (b)'s foreign registration clause as the Committee suggested the legislature should do, we would be impinging on the province of the legislature ... . Thus, we are constrained to construe subdivision (3) (b)'s foreign registration clause according to its plain language. If the legislature did err, we unequivocally call upon it to remedy that error ...". ***People v. Talluto*, 2022 N.Y. Slip Op. 07025, CtApp 12-13-22**

MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

RETIRED PERMANENTLY DISABLED YONKERS FIREFIGHTERS ARE ENTITLED TO HAVE HOLIDAY PAY AND CHECK-IN PAY INCLUDED IN THE AMOUNT OF COMPENSATION TO WHICH THEY ARE ENTITLED UNTIL RETIREMENT AGE; NIGHT DIFFERENTIAL PAY, HOWEVER, SHOULD NOT BE INCLUDED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a two-judge dissent, determined retired Yonkers firefighters (Retirees) , who are permanently disabled, are entitled to have holiday pay and check-in pay included in the amount of compensation they receive until reaching retirement age. The retired, disabled firefighters are not entitled to have "night differential" pay included, however: "General Municipal Law § 207-a (2) provides that, for firefighters who are permanently disabled due to work-related injuries and receiving certain benefits from the state, a municipality must make up the difference between those benefits and the firefighter's 'regular salary or wages' until the firefighter reaches the mandatory retirement age. Since at least 1995, the CBAs have provided for holiday pay, check-in pay, and night differential, which collectively the parties refer to as 'special pays.' ... Until 2015, Yonkers included all three of these payments when calculating the Retirees' section 207-a (2) supplements. * * * Unlike check-in and holiday pay, the Retirees have not established whether all firefighters are contractually entitled to receive night differential pay ... . Night differential contains two express conditions: it is earned only by 'firefighters who are regularly scheduled to work rotating tours that include the 6:00 p.m. to 8:00 a.m. night tour, and only to firefighters actually working that night tour.' The restriction of this payment to those firefighters who 'actually work[] the night tour' strongly suggests that night differential must be specially earned, not paid to all, rendering it distinct from 'regular salary or wages,' and the Retirees have not demonstrated that the CBAs [collective bargaining agreements] require all firefighters to work the night tour. Thus, the Retirees have not demonstrated that all firefighters are entitled to earn the night differential such that it should be included in the section 207-a (2) calculation." ***Matter of Borelli v. City of Yonkers*, 2022 N.Y. Slip Op. 07094, CtApp 12-15-22**

FIRST DEPARTMENT

CONTRACT LAW, REAL PROPERTY LAW.

PLAINTIFFS WERE ENTITLED TO LIQUIDATED DAMAGES OF $1000 PER DAY FOR THE TIME PLAINTIFFS WERE UNABLE TO LIVE IN THEIR TOWNHOUSE BECAUSE OF THE DEFENDANTS' RENOVATIONS NEXT DOOR.

The First Department, in a decision addressing many issues not summarized here, determined the plaintiffs were entitled to liquidated damages of $1000 per day for the time plaintiffs were unable to live in their townhouse because of the renovation work undertaken by the defendants next door: "On May 2, 2013, after intensive negotiations guided by legal counsel, Mr. Seymour [plaintiff] and the Hovnanians [defendants] executed a license agreement. The purpose of the license agreement was to grant the Hovnanians 18 months of access to the Seymours' property while simultaneously protecting the Seymours' property from further harm during construction. The license agreement contained a liquidated damages clause providing that if the 'Project Owner failed to obtain a temporary certificate of occupancy (TCO) within Eighteen (18) months from the date of this Agreement, he shall pay liquidated damages to the Adjacent Owner of $1,000 per day for every day thereafter until the TCO is issued.' The Hovnanians never obtained a temporary certificate of occupancy but, 318 days after the expiration of the 18-month license term, they obtained a certificate of occupancy. ... The court correctly awarded plaintiffs $318,000 in liquidated damages, plus interest, comprised of $1,000 per day for the period of November 2, 2014 to September 15, 2015. 'Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract' ... . These provisions 'have value in those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage' ... . Liquidated damages will be sustained if, at the time of the contract, 'the amount liquidated bears a reasonable proportion to the

probable loss and the amount of actual loss is incapable or difficult of precise estimation' ...". ***Seymour v. Hovnanian*, 2022 N.Y. Slip Op. 07172, First Dept 12-15-22**

CRIMINAL LAW, EVIDENCE.

THE PROOF THE VICTIM SUFFERED "SERIOUS OR PROTRACTED DISFIGUREMENT" IN THIS ASSAULT FIRST CASE WAS INSUFFICIENT; CONVICTION REDUCED TO ATTEMPTED ASSAULT FIRST.

The First Department, reversing defendant's assault first conviction and reducing it to attempted assault first, determined the People did not prove the scar on the victim's cheek met the definition of "serious and protracted disfigurement." The People introduced two photos of the scar and the doctor who treated the injury testified. The victim did not testify: "Defendant's convictions were not supported by legally sufficient evidence because the People failed to prove that the victim suffered serious and permanent disfigurement, which was the basis of both counts (see Penal Law §§ 120.10[1], [2]). The People relied solely on two photos of the victim depicting a scar on his cheek, and the scar was briefly described by the doctor who treated the victim on the day of the slashing. Despite the scar's prominent location, neither the photos nor the doctor's testimony warrant an inference that the scar rendered the victim's appearance 'distressing or objectionable' to a reasonable observer ... . The victim did not testify, so the jury had no opportunity to observe the actual scar and evaluate whether it was seriously disfiguring, nor was any other evidence adduced regarding the scar's effects on the victim's appearance, health, and life ...". ***People v. McBride*, 2022 N.Y. Slip Op. 07034, First Dept 12-13-22**

DEFAMATION, CIVIL RIGHTS LAW, ATTORNEYS, CONSUMER LAW.

DEFENDANT'S STATEMENT PLAINTIFFS WERE FACING SUSPENSION OF THEIR LICENSE TO PRACTICE LAW WAS NOT PROTECTED AS FAIR AND TRUE LEGAL REPORTING PURSUANT TO CIVIL RIGHTS LAW § 74; THE COMPLAINT STATED CAUSES OF ACTION FOR DEFAMATION PER SE, DISPARAGEMENT AND VIOLATIONS OF THE LANHAM ACT AND GENERAL BUSINESS LAW § 349.

The First Department, reversing Supreme Court, determined Civil Rights Law § 74 did not protect the statements in defendant's online ad claiming that plaintiffs were facing suspension of their license to practice law because the litigation referred to in the ad did not mention anything about plaintiffs' law license. Civil Rights Law § 74 protects only "fair and true" reports on judicial proceedings. The complaint stated causes of action for defamation per se, disparagement and violations of the Lanham Act and General Business Law § 349: "Civil Rights Law § 74 did not apply to the challenged statements in defendant's online ads that, in linking to a news article about pending litigation against plaintiffs by a former client in California, asserted that plaintiffs were facing suspension of their license to practice law. The news article did not mention that plaintiffs' law license was at risk nor did the complaint against plaintiffs seek suspension of their law license. Accordingly, this statement was not shielded from liability as defendant failed to demonstrate that it was a 'fair and true' report of a judicial proceeding ... . Based on defendant's allegedly false statement that plaintiffs were facing a suspension of their license, plaintiffs sufficiently pleaded a cause of action for defamation per se ... . [T]he factual allegations in the complaint were sufficient to sustain causes of action for disparagement, and violations under the federal Lanham Act and General Business Law § 349, at the pleading stage ...". ***Luo & Assoc. v. NYIS Law Firm, A.P.C.*, 2022 N.Y. Slip Op. 07154, First Dept 12-15-22**

DEFAMATION, EDUCATION-SCHOOL LAW.

THE LETTER CRITICIZING THE FORMER DEAN OF THE FASHION INSTITUTE OF TECHNOLOGY WAS NOT DEFAMATORY ON ITS FACE, BUT THE COMPLAINT STATED A CAUSE OF ACTION FOR DEFAMATION BY IMPLICATION.

The First Department, reversing Supreme Court, determined plaintiff's defamation-by-implication complaint should not have been dismissed: "[P]laintiff, the former Dean of Graduate Studies at defendant Fashion Institute of Technology (FIT), was placed on leave following criticisms over culturally insensitive accessories presented in an FIT-sponsored alumni fashion show. Plaintiff alleges that a letter published by defendants contained defamatory remarks on its face, implied, or both, and impugned plaintiff's reputation ... . [T]he letter implies that plaintiff was responsible for the show and failed to recognize the accessories as insensitive, even though she took no part in managing, directing, or approving the show. The complaint contains references to publications from other sources that interpret the letter as placing the blame on plaintiff and deeming her leadership inexcusable and irresponsible ... . On a CPLR 3211 (a)(7) motion to dismiss, denial is warranted if taking the words used both in their ordinary meaning and in context make them susceptible to a defamatory connotation as occurs in this case ... . The letter also contains statements of mixed opinion, 'While a pure opinion cannot be the subject of a defamation claim, an opinion that 'implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, . . . is a 'mixed opinion' and is actionable' ... . The letter omitted plaintiff's nonparticipation in the production, direction, and management of the fashion show; her unawareness as to the accessories the designers planned to present; the FIT policy precluding academic deans from evaluating, censoring, or approving student and alumni work; and plaintiff's prompt response to student concerns and her proactive approach to address those concerns; and implied that plaintiff was responsible for the show, was aware of the accessories, could approve them, and failed to respond to student concerns." ***Davis v. Brown*, 2022 N.Y. Slip Op. 07147, First Dept 12-15-22**

HUMAN RIGHTS LAW, EDUCATION-SCHOOL LAW, RELIGION, CONSTITUTIONAL LAW, MUNICIPAL LAW.

YESHIVA UNIVERSITY NO LONGER HAS THE REQUISITE CONNECTION TO RELIGION AND THEREFORE IS NOT EXEMPT FROM THE DISCRIMINATION PROHIBITIONS IN THE NYC HUMAN RIGHTS LAW; THE PRIDE ALLIANCE WAS ENTITLED TO RECOGNITION AS AN OFFICIAL STUDENT ORGANIZATION.

The First Department determined a student group (Pride Alliance) at Yeshiva University was entitled to summary judgment pursuant to the NYC Human Rights Law (City HRL) on its claims asserting gender, sexual orientation, and association discrimination. In addition, Pride Alliance was entitled to a permanent injunction requiring Yeshiva to recognize the group as an official student organization. Essentially, Yeshiva argued the university was exempt from the requirements of the City HRL as a religious corporation or institution, but the university no longer had the requisite connection to religion: Yeshiva's constitutional arguments (free exercise of religion, freedom of expression and association) were rejected: "Yeshiva was originally chartered in 1897 under the Membership Corporations Law as the Rabbi Isaac Elchanan Theological Seminary Association (RIETS), with the stated purpose to 'promote the study of Talmud' and prepare Orthodox Jewish rabbis for ministry. Over several decades, the charter was amended to allow numerous secular degrees to be awarded and to change the name of the institution, while RIETS remained part of Yeshiva. In 1967, Yeshiva amended its charter to become incorporated under the Education Law. Two years later it amended the charter to drop Hebrew Literature and Religious Education degrees, since RIETS was being spun off as its own corporation offering those degrees, and to 'clarify the corporate status of the University as a non-denominational institution of higher learning.' While Yeshiva is now comprised of three undergraduate colleges and seven graduate schools, RIETS remains a separate corporate entity housed on one of Yeshiva's campuses." ***YU Pride Alliance v. Yeshiva Univ.*, 2022 N.Y. Slip Op. 07175, First Dept 12-13-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE HOIST WHICH PLAINTIFF WAS OPERATING WAS A SAFETY DEVICE WITHIN THE MEANING OF LABOR LAW § 240(1); WHEN PLAINTIFF OPENED THE EMERGENCY HATCH ON THE HOIST FOR A REPAIRMAN, THE HATCH DOOR SLAMMED BACK DOWN ON HIS HEAD; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT.

The First Department, in a full-fledged opinion by Justice Gonzalez, determined plaintiff was entitled to summary judgment on the Labor Law § 240(1) cause of action. Plaintiff was attempting to aid in the repair of a hoist when he opened the emergency hatch and the hatch door fell back down, striking plaintiff's head. The court ruled that the hoist was a covered safety device and plaintiff was entitled to some form of protection that would prevent the hatch door from falling back down after it was opened: In the alternative, the court noted that the hatch was a falling object which should have been secured: "Plaintiff was injured when the hatch door slammed onto his head as he stood on a ladder with his head protruding above the hatch aperture. We note that, in isolation, a hatch door is not necessarily a safety device ... . Here, however, the hatch door was an essential component of a safety device — the hoist — being employed by plaintiff in an elevation-related capacity. It was foreseeable that the hoist could get stuck; indeed, a purpose of the hatch door was to serve as an emergency egress in such instances. When he was injured, plaintiff was still engaged in an elevation-related activity and attempting to safely remove himself from a height. Under these circumstances, the safety device — the hoist — was inadequate for its purpose of keeping plaintiff safe while engaged in an elevation-related activity. Plaintiff is thus entitled to partial summary judgment on the issue of liability on his claim under Labor Law § 240(1) ...". ***Ladd v. Thor 680 Madison Ave LLC*, 2022 N.Y. Slip Op. 07031, First Dept 12-13-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES.

AFTER DEFENDANT'S DEFAULT AND FOLLOWING AN INQUEST ON DAMAGES PLAINTIFF WAS AWARDED ABOUT $275,000; THE JUDGE ORDERED PLAINTIFF TO SUBMIT A NOTICE OF SETTLEMENT AND A PROPOSED JUDGMENT WITHIN 60 DAYS AS REQUIRED BY 22 N.Y.C.R.R. § 202.48; PLAINTIFF DID NOT DO SO FOR MORE THAN TWO AND A HALF YEARS; THE ORDER GRANTING THE DEFAULT JUDGMENT AND THE DECISION ON THE INQUEST WERE VACATED.

The Second Department, reversing Supreme Court, determined the order granting a default judgment and the decision awarding nearly $275,000 must be vacated because plaintiff did not submit a notice of settlement and a proposed judgment within 60 days as required by 22 N.Y.C.R.R. § 202.48: "Pursuant to 22 NYCRR 202.48(a), '[p]roposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.' 'Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown' (id. § 202.48[b]). Here, it is undisputed that, on January 10, 2017, the plaintiff was directed to settle a judgment on notice. Thus, pursuant to 22 NYCRR 202.48(a), the plaintiff was required to submit a notice of settlement and proposed judgment within 60 days after January 10, 2017 ... . It is also undisputed that the plaintiff failed to submit a notice of settlement and proposed judgment until July 2, 2019, nearly 2½ years after the Supreme Court directed the plaintiff to settle a judgment on notice. Thus, the plaintiff failed to timely settle a judgment pursuant to the requirements of 22 NYCRR 202.48(a). ... [T]he plaintiff failed to show good cause for his lengthy delay in submitting a notice of settlement and proposed judgment in compliance with the Supreme Court's directive ... . Thus, under the particular circumstances of this case, the court should have granted that branch of the

defendant's motion which was pursuant to 22 NYCRR 202.48 to vacate the order dated July 23, 2014. ... [T]he decision rendered after the inquest must also be vacated." ***Cruz v. Pierce*, 2022 N.Y. Slip Op. 07054, Second Dept 12-14-22**

COURT OF CLAIMS, LABOR LAW-CONSTRUCTION LAW.

CLAIMANT IN THIS LABOR LAW §§ 240(1) and 241(6) ACTION AGAINST THE STATE SERVED THE ATTORNEY GENERAL WITH THE NOTICE OF INTENTION TO FILE A CLAIM BUT NOT THE NEW YORK STATE THRUWAY AUTHORITY (NYSTA); ALTHOUGH THE EXCUSE (IGNORANCE OF THE LAW) WAS NOT VALID, THE ACTION HAD MERIT AND THE NYSTA HAD TIMELY KNOWLEDGE OF THE FACTS; THEREFORE, CLAIMANT'S MOTION TO SERVE AND FILE A LATE CLAIM SHOULD HAVE BEEN GRANTED.

The Second Department, reversing the Court of Claims, determined claimant's motion for leave to file a late claim in this Labor Law §§ 240(1) and 241(6) action should have been granted. Claimant was injured working on the Tappan Zee Bridge and served a notice of intention to file a claim on the attorney general but not, as required, on the New York State Thruway Authority (NYSTA). The absence of a valid excuse (ignorance of the law) was not determinative. The action had merit and the NYSTA had timely knowledge of the facts underlying the claim: "Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors set forth therein, to allow a claimant to file a late claim ... . 'In determining whether to permit the filing of a [late] claim . . . the court shall consider, among other factors, [1] whether the delay in filing the claim was excusable; [2] whether the state had notice of the essential facts constituting the claim; [3] whether the state had an opportunity to investigate the circumstances underlying the claim; [4] whether the claim appears to be meritorious; [5] whether the failure to file or serve upon the attorney general a timely claim . . . resulted in substantial prejudice to the state; and [6] whether the claimant has any other available remedy' ... .. 'No one factor is deemed controlling, nor is the presence or absence of any one factor determinative' ...". ***Swart v. State of New York*, 2022 N.Y. Slip Op. 07088, Second Dept 12-14-22**

COURT OF CLAIMS, NEGLIGENCE, DENTAL MALPRACTICE.

STATING THE WRONG DATE FOR THE ALLEGED NEGLIGENCE IN THE NOTICE OF INTENTION TO FILE A CLAIM RENDERED THE NOTICE JURISDICTIONALLY DEFECTIVE; THE NOTICE THEREFORE DID NOT EXTEND THE 90-DAY PERIOD FOR FILING A CLAIM, RENDERING THE CLAIM FILED MORE THAN A YEAR AND A HALF LATER UNTIMELY; THE DENTAL MALPRACTICE ACTION WAS PROPERLY DISMISSED; THERE WAS AN EXTENSIVE DISSENT.

The Second Department, over a dissent, determined the claimant's failure to set forth the correct date of the alleged dental malpractice in the notice of intention to file a claim was a jurisdictional defect, notwithstanding the correct date set forth in the subsequently filed claim: Because the notice of intention was jurisdictionally defective it did not extend the 90-day period for filing a claim rendering the claim filed more than a year and a half later untimely: "The claimant served the defendant with a notice of intention to file a claim dated January 9, 2017, which alleged that the claimant was injured when her mouth and lips were burned during the course of her treatment as a patient at a particular address where the defendant operated a school of dental medicine. The notice of intention to file a claim stated that '[t]he claim arose on or about October 15, 2016, the last date of continuous treatment and prior to said date.' In the subsequent claim, dated October 16, 2018, the claimant stated that she was injured on October 20, 2016, when hot wax was negligently spilled on her face and mouth while an employee of the defendant was attempting to make a wax mold for dentures. * * * Section 10(3) of the Court of Claims Act sets forth time limitations for asserting '[a] claim to recover damages . . . for personal injuries caused by . . . negligence.' Such a claim 'shall be filed and served upon the attorney general within [90] days after the accrual of such claim' (id.). However, if the claimant serves 'a written notice of intention to file a claim' within 90 days after the accrual of the claim, 'the claim shall be filed and served upon the attorney general within two years after the accrual of such claim' ... . * * * Since the claimant's notice of intention to file a claim was substantively deficient (see Court of Claims Act § 11[b]), it did not extend the claimant's time to file and serve a claim beyond the 90-day statutory period ... . Under the circumstances, the claim was untimely (see Court of Claims Act § 10[3] ...). 'The claimant's failure to comply with the filing requirements of the Court of Claims Act deprived the Court of Claims of subject matter jurisdiction' ... . Accordingly, the Court of Claims properly granted the defendant's motion pursuant to CPLR 3211(a)(2) to dismiss the claim for lack of subject matter jurisdiction." ***Sacher v. State of New York*, 2022 N.Y. Slip Op. 07087, Second Dept 12-14-22**

CRIMINAL LAW, EVIDENCE.

PROBABLE CAUSE FOR SEARCH OF DEFENDANT'S VEHICLE UNDER THE AUTOMOBILE EXCEPTION WAS PROVIDED BY THE ODOR AND OBSERVATION OF MARIJUANA; SEIZURE OF A TRANSPARENT BAG OF PILLS WAS NOT JUSTIFIED BY THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT BECAUSE IT WAS NOT IMMEDIATELY APPARENT THE PILLS WERE CONTRABAND AND THERE WAS NO MARIJUANA IN THE BAG.

The Second Department, reversing defendant's conviction stemming from a transparent plastic bag of pills seized from defendant's vehicle after a traffic stop. determined the seizure of the pills was not justified by the plain view exception to the warrant requirement. The court noted that the Penal Law statute prohibiting a probable-cause finding based solely on the odor of marijuana is not applied retroactively and therefore the marijuana odor and the observation of the marijuana provided probable cause for a search pursuant to the automobile exception to the warrant requirement here: "The plain view doctrine is not applicable where the object must be moved or manipulated before its illegality can be determined ... . The movement or manipulation of an object from its original state in a manner that goes beyond the objectives of the original search constitutes an independent search or seizure ... . Such a search or seizure may not be upheld without proof that the officer who moved or manipulated the object had probable cause to believe that the object was evidence or contraband at the time that it was moved or

manipulated ... . Here, Cruz [the officer] testified that he did not know what the pills in the ziploc bag were when he seized them. * * * Since it was obvious that the transparent ziploc bag seized by Cruz did not contain marihuana, and since it was not immediately apparent that the ziploc bag contained any other type of contraband, there was no justification for seizing the bag ...". ***People v. Rodriguez*, 2022 N.Y. Slip Op. 07080, Second Dept 12-14-22**

ELECTION LAW.

THE DEFECT IN THE ABSENTEE BALLOTS, I.E., AN UNSEALED ENVELOPE INSIDE A SEALED ENVELOPE, WAS CURABLE PURSUANT TO THE ELECTION LAW; THEREFORE, THE ABSENTEE BALLOTS SHOULD NOT HAVE BEEN DEEMED INVALID; THE VOTERS SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO CURE THE DEFECT.

The Second Department, reversing Supreme Court, determined the 94 absentee ballots suffered from a curable defect. Therefore, the absentee ballots should not have been deemed invalid. Rather, the voters should have been notified of the defect and given an opportunity to correct it. The defect concerned unsealed envelopes which were inside sealed envelopes: "Here, each of the 94 absentee ballots was received by the Board with an unsealed ballot affirmation envelope inside a completely sealed outer mailing envelope. Therefore, the defects were curable under Election Law § 9-209(3)(b)-(e) (see 9 NYCRR 6210.21[g][2])." ***Matter of Amato v. Sullivan*, 2022 N.Y. Slip Op. 07039, Second Dept 12-14-22**

FAMILY LAW, CIVIL PROCEDURE, CONTRACT LAW.

RESETTLEMENT OF THE JUDGMENT OF DIVORCE WAS PROPER ONLY TO THE EXTENT OF CORRECTING A MISTAKE IN THE JUDGMENT; RESETTLEMENT SHOULD NOT HAVE BEEN USED TO AMEND THE JUDGMENT.

The Second Department, reversing (modifying) Supreme Court, determined the judgment of divorce should have been resettled to the extent that the judgment conform with the stipulation. But the judgment should not have been modified to include a provision which was not in the stipulation. Resettlement cannot be used to amend the judgment, as opposed to correcting a mistake: "Resettlement of a judgment of divorce pursuant to CPLR 5019(a) is an appropriate remedy when the judgment does not accurately incorporate the terms of a stipulation of settlement ... . Here, although the judgment of divorce provided that the defendant was responsible for providing health insurance for the parties' children, that provision was inconsistent with the terms of the stipulation. Specifically, the stipulation contained a provision which set forth that the plaintiff was responsible for providing health insurance for the parties' children through her employer unless she became unemployed, and then the defendant would be responsible for providing health insurance for them through his employer. ... Supreme Court should have denied that branch of the defendant's motion which was to resettle the judgment of divorce to the extent it sought to replace the provision requiring the defendant to provide health insurance for the parties' children with a provision requiring the plaintiff to be solely responsible to provide health insurance for the parties' children ... . The amendment proposed by the defendant failed to comport with the terms of the stipulation regarding the responsibility of the parties as to the health insurance for their children and was a substantive modification beyond the court's inherent authority to correct a mistake, defect, or irregularity in the original judgment 'not affecting a substantial right of a party' (CPLR 5019[a] ...)." ***Ferrigan v. Ferrigan*, 2022 N.Y. Slip Op. 07058, Second Dept 12-14-22**

FORECLOSURE, CIVIL PROCEDURE, JUDGES.

PLAINTIFF BANK MADE A DEFECTIVE MOTION (WHICH WAS REJECTED) FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFENDANT'S DEFAULT AND DID NOT CORRECT THE ERRORS IN THE MOTION FOR TEN YEARS; THE MAJORITY HELD THE ACTION HAD NOT BEEN ABANDONED, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT AND THE ACTION SHOULD BE RESTORED TO THE CALENDAR.

The Second Department, reversing Supreme Court's sua sponte dismissal of the complaint, over an extensive dissent, determined plaintiff bank in this foreclosure action, by filing a motion for an order of reference within one year of defendant's default, demonstrated it did not intend to abandon the action and the matter, therefore, should be restored to the calendar. The facts that the motion was initially rejected and plaintiff delayed ten years before addressing the defects in the motion did not require a different result: "Supreme Court erred in, sua sponte, directing dismissal of the complaint in this action pursuant to CPLR 3215(c). The plaintiff demonstrated that it filed a motion, inter alia, for an order of reference on October 24, 2008, which was within one year of the defendants' default in the action. Presenting this motion to the court was sufficient to demonstrate the plaintiff's intent to have the action proceed, notwithstanding that the motion papers were ultimately rejected by the court as defective ... . Although our dissenting colleague notes that the plaintiff thereafter failed to explain its failure to fix the defects that resulted in the motion papers being rejected for a period of 10 years, once a plaintiff establishes 'compliance with CPLR 3215(c),' it is 'not required, under the plain language of that subdivision, to account for any additional periods of delay that may have occurred subsequent to the initial one-year period contemplated by CPLR 3215(c)' ,,, ,Thus, because the plaintiff did not abandon the action, the court should have granted the plaintiff's motion to vacate the dismissal order and to restore the action to the active calendar ...". ***Deutsche Bank Natl. Trust Co. v. Lamarre*, 2022 N.Y. Slip Op. 07056, Second Dept 12-14-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE, APPEALS, EVIDENCE.

THE MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW SHOULD NOT HAVE BEEN GRANTED; THE MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED; A NEW TRIAL IS NECESSARY BECAUSE AN APPELLATE COURT CANNOT MAKE NEW FINDINGS OF FACT IN A JURY TRIAL.

The Second Department, reversing Supreme Court in this medical malpractice case. determined the motion to set aside the verdict as a matter of law should not have been granted. but the motion to set aside the verdict as against the weight of the evidence should have been granted, explaining the difference: " 'A motion for judgment as a matter of law pursuant to CPLR 4404(a) may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party' ... . 'In considering such a motion, the facts must be considered in a light most favorable to the nonmovant' ... . '[A] motion to set aside a jury verdict as contrary to the weight of the evidence should be granted '[o]nly where the evidence so preponderates in favor of the unsuccessful litigant that the verdict could not have been reached on any fair interpretation of the evidence' ... . 'Whether a particular factual determination is against the weight of the evidence is itself a factual question. In reviewing a judgment of the Supreme Court, the Appellate Division has the power to determine whether a particular factual question was correctly resolved by the trier of facts. If the original fact determination was made by a jury, as in this case, and the Appellate Division concludes that the jury has made erroneous factual findings, the court is required to order a new trial, since it does not have the power to make new findings of fact in a jury case' ... . * * * As to the weight of the evidence, based on the record, we find that the verdict in favor of the plaintiffs could not have been reached on any fair interpretation of the evidence, and must be set aside (see CPLR 4404[a] ...). Accordingly, we reverse the judgment, reinstate the complaint, grant that branch of the defendants' motion which was pursuant to CPLR 4404(a) to set aside the verdict as contrary to the weight of the evidence and for a new trial, and remit the matter to the Supreme Court, Queens County, for a new trial....". ***Osorio v. New York City Health & Hosps. Corp.*, 2022 N.Y. Slip Op. 07072, Second Dept 12-14-22**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE RAISED PORTION OF THE SIDEWALK FLAG OVER WHICH PLAINTIFF TRIPPED DID NOT ABUT DEFENDANTS' PROPERTY SEVERAL FEET OF THE FLAG EXTENDED IN FRONT OF DEFENDANTS' PROPERTY; THE VILLAGE CODE MANDATES THAT ABUTTING PROPERTY OWNER'S MAINTAIN SIDEWALKS IN A SAFE CONDITION; DEFENDANTS DID NOT SUBMIT ANY EVIDENCE THAT THEY MAINTAINED THE ABUTTING PORTION OF THE SIDEWALK IN A SAFE CONDITION OR THAT ANY FAILURE TO DO SO WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S FALL.

The Second Department, reversing Supreme Court, determined the defendant homeowners were not entitled to summary judgment in this sidewalk slip and fall case. Apparently, the raised part of a sidewalk flag over which plaintiff tripped was not in front of defendants' property, but much of that same flag abutted defendants' property. Because the village code placed responsibility on the homeowners to keep the sidewalk in a safe condition, in order to warrant summary judgment, the defendants were required to demonstrate they maintained the portion of the sidewalk in front of their property in a reasonable safe condition or that the failure to do so was not a proximate cause of plaintiff's fall. Defendants offered no evidence on that issue: "While the homeowners demonstrated that the section of the sidewalk containing the defect on which the plaintiff allegedly tripped did not abut their property, their submissions in support of their motion also included evidence that the sidewalk flag on one side of the defect—which was not level with the adjacent flag, resulting in the height differential on which the plaintiff tripped—extended several feet onto their side of the property line. To meet their prima facie burden, the homeowners were 'required to do more than simply demonstrate that the alleged defect was on another landowner's property' ... . They were required to make a prima facie showing that they maintained the portion of the sidewalk abutting their own property in a reasonably safe condition, or that any failure to do so was not a proximate cause of the plaintiff's injuries ...". ***Kuritsky v. Meshenberg*, 2022 N.Y. Slip Op. 07066, Second Dept 12-14-22**

PERSONAL INJURY, MUNICIPAL LAW, IMMUNITY.

THE CITY WAS NOT ENTITLED TO QUALIFIED IMMUNITY IN THIS "UNSAFE INTERSECTION DESIGN" CASE BECAUSE NO STUDIES OF THE INTERSECTION HAD BEEN UNDERTAKEN AND NO HIGHWAY-PLANNING DECISIONS HAD BEEN MADE; THE FACTS THAT THE CITY HAD NO NOTICE OF THE CONDITION AND NO PRIOR ACCIDENTS HAD BEEN REPORTED DID NOT WARRANT SUMMARY JUDGMENT ON WHETHER THE CITY HAD CREATED A DANGEROUS CONDITION.

The Second Department, reversing Supreme Court, determined the "unsafe intersection design" cause of action against the city in this traffic accident case should not have been dismissed. The city was not entitled to qualified immunity because there was no evidence any studies of the intersection had been undertaken or any highway-planning decision concerning the intersection had been made. The court noted the fact that the city had no notice the intersection was unsafe and no accidents had been reported did not warrant summary judgment on whether the city had created a dangerous condition: "[W]here the initial traffic design is challenged, the municipality must show that there was a reasonable basis for the traffic plan in the first instance ... . As the City defendants failed to establish that the original design of the subject intersection was based on a deliberative decision-making process which entertained and passed on the very same question of risk that the plaintiff would put to a jury, the City defendants did not sustain their prima facie burden on the issue of qualified immunity ... . [T]he lack of prior similar accidents or notice did not establish the City defendants' prima facie entitlement to judgment as a matter of law under ordinary negligence

principles. Since the City defendants created the alleged dangerous condition with their design of the intersection, 'the 'usual questions of notice of the condition are irrelevant' ... . [T]he lack of prior similar accidents within the five years preceding the plaintiff's accident did not establish, by itself, that the intersection was reasonably safe. Whether a dangerous or defective condition exists 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury' ... . A lack of prior accidents 'is some evidence that a condition is not dangerous or unsafe' ... . However, it is only a factor to be considered and does not negate the possibility of negligence ...". ***Petronic v. City of New York*, 2022 N.Y. Slip Op. 07085, Second Dept 12-14-22**

REAL PROPERTY LAW, CONTRACT LAW.

DEFENDANT WAS A GOOD-FAITH PURCHASER OF THE REAL PROPERTY AND WAS ENTITLED TO A DECLARATION OF SOLE OWNERSHIP; DEFENDANT PURCHASED THE PROPERTY FROM THE RECORD OWNER AND WAS UNAWARE OF THE UNRECORDED BENEFICIAL OWNERSHIP AGREEMENT BETWEEN THE RECORD OWNER AND PLAINTIFF WHO RESIDED ON THE PROPERTY; THE FACT THAT PLAINTIFF FILED A NOTICE OF PENDENCY BEFORE DEFENDANT RECORDED THE DEED HAD NO EFFECT.

The Second Department, reversing Supreme Court, determined defendant's (Vertex's) motion for summary judgment dismissing the complaint and declaring defendant was the sole owner of the real property should have been granted. Vertex purchased the property from the record owner. The fact that the record owner had entered into an unrecorded agreement acknowledging beneficial ownership by others who contributed to the purchase price, including plaintiff, who resided on the property, did not affect defendant's status as a good-faith purchaser, despite plaintiff's filing a notice of pendency prior to defendant's recording of the deed: "[T]o establish itself as a bona fide purchaser for value, a party has the burden of proving that it purchased the property for valuable consideration and did not have 'knowledge of facts that would lead a reasonably prudent purchaser to make inquiry' ... . Vertex established ... that it purchased the subject property for valuable consideration, without actual or constructive notice of the plaintiff's alleged interest ... . Contrary to the plaintiff's contention, his filing of a notice of pendency against the property before Vertex filed its deed did not negate Vertex's status as a good-faith purchaser ... . '[H]aving failed to avail itself of the protection of either Real Property Law §§ 291 or 294, the plaintiff may not successfully contend that its filing of a notice of pendency serves as a substitute for the recording of a conveyance or a contract' ... . Vertex also established ... that the plaintiff's occupancy at the property 'was not inconsistent with the title of the apparent owner of record,' and thus, did not defeat Vertex's status as a good-faith purchaser ... . In addition, Vertex established ... that the 2008 agreement did not negate its status as a good-faith purchaser, as that agreement was insufficient to satisfy the statute of frauds (see General Obligations Law § 5-703 ...)". ***Bello v. Ouellette*, 2022 N.Y. Slip Op. 07043, Second Dept 12-14-22**

THIRD DEPARTMENT

WORKERS' COMPENSATION.

HERE THE CLAIMANT WAS DEEMED DISABLED BY AN OCCUPATIONAL DISEASE (CANCER) CAUSED BY EXPOSURE TO ASBESTOS; THE EMPLOYER RESPONSIBLE FOR COMPENSATION IS THE LAST EMPLOYER WHERE THE NATURE OF THE WORK EXPOSED CLAIMANT TO ASBESTOS, NOT NECESSARILY THE EMPLOYER AT THE TIME THE CANCER WAS DIAGNOSED.

The Third Department, reversing the Workers' Compensation Board and remitting the matter, determined the Board did not use the correct criteria for determining the employer or insurer responsible to pay for claimant's disability due to occupational disease, i.e., lung cancer caused by asbestos exposure: "[I]n determining that the carrier was on the risk for the claim, the Board premised its finding solely on the date of disablement, or October 15, 2019, instead of evidence concerning the timing of claimant's contraction of lung cancer and the 'employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted' (Workers' Compensation Law § 44). This reasoning resulted in a misapplication of Workers' Compensation Law § 44. 'Simply put, disability while employed by a previous employer is not a prerequisite to a finding that a claimant contracted an occupational disease while employed by that employer' ... . As such, we reverse and remit for a determination in the first instance of the proper employer and/or carrier on the risk utilizing the correct standard set forth in Workers' Compensation Law § 44 ...". ***Matter of Candela v. Skanska USA Bldg. Inc.*, 2022 N.Y. Slip Op. 07113, Third Dept 12-15-22**

WORKERS' COMPENSATION.

DECEDENT'S WIFE'S CLAIM FOR DEATH BENEFITS BASED UPON DECEDENT'S WORK AT THE WORLD TRADE CENTER AFTER 9-11 IS SUBJECT TO THE TWO-YEAR DEADLINE FOR NOTICE IN WORKERS' COMPENSATION LAW § 28; BECAUSE THE NOTICE REQUIREMENT WAS NOT COMPLIED WITH, THE DEATH BENEFITS CLAIM WAS PROPERLY DENIED; THERE WAS A DISSENT.

The Third Department, over a dissent, determined the claim by decedent's wife for death benefits pursuant to Workers' Compensation Law Article 8-a (re: disability due to work at the World Trade Center after 9-11) was properly denied because the two-year notice requirement in Worker's Compensation Law § 28 applies and was not complied with: "[G]iven that decedent, not claimant, was a participant within the meaning of Workers' Compensation Law § 161, it was decedent who was entitled to file a claim for benefits outside of the period allowed by Workers' Compensation Law § 28. Claimant cannot piggyback upon that entitlement, as her claim for death benefits 'accrue[d] at the time

of [decedent's] death and 'is a separate and distinct legal proceeding' from [decedent's] original disability claim' ... .The language of the ... statutory provisions ... clearly reflects that claimant cannot avail herself of the exception to the two-year filing requirement created by Workers' Compensation Law § 168." ***Matter of Garcia v. WTC Volunteer*, 2022 N.Y. Slip Op. 07110 Third Dept 12-15-22**

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