NEW YORK APPELLATE DIGEST, LLS

Weekly Reversal Newsletter
5-30-33 – 6-3-33

An Organized Compilation of Selected Decisions. Mostly Reversals, Released by Our New York State Appellate Courts 5-30-22 – 6-3-22 and Posted on the New York Appellate Digest Website on Monday 6-6-22, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Practice Points Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Newsletter.

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CIVIL PROCEDURE, LONG-ARM JURISDICTION.

PLAINTIFF, A TEXAS RESIDENT WHO WAS A FLIGHT ATTENDANT FOR 30 YEARS WITH MONTHLY STAY-OVERS IN NEW YORK, DEMONSTRATED NEW YORK HAD LONG-ARM JURISDICTION OVER THE NEW JERSEY COMPANY WHICH MANUFACTURED AND DISTRIBUTED TALCUM POWDER PLAINTIFF USED; THE TALCUM POWDER ALLEGEDLY CAUSED PLAINTIFF'S MESOTHELIOMA (FIRST DEPT).

English v Avon Prods., Inc., 2022 NY Slip Op 03571, First Dept 6-2-22

Practice Point: Even though plaintiff was a Texas resident and the company she was suing was based in New Jersey, she was able to sue using New York courts. Plaintiff was a flight attendant for 30 years with monthly stay-overs in New York. Defendant had an office in New York and marketed the talcum powder which allegedly cause plaintiff's mesothelioma nationwide.

CIVIL PROCEDURE, RES JUDICATA.

HERE THE DOCTRINE OF RES JUDICATA PRECLUDED PLAINTIFF'S FRAUDULENT CONVEYANCE ACTION; THE CAUSE OF ACTION COULD HAVE BEEN RAISED IN THE PRIOR ACTION WHICH WAS DISMISSED (FIRST DEPT).

Aboelnaga v National Bank of Can., 2022 NY Slip Op 03467, First Dept 5-31-22

Practice Point: The doctrine of res judicata precludes causes of action which could have been investigated and raised in a prior action.

CIVIL PROCEDURE, CONTRACT LAW, INSURANCE LAW, PUNITIVE DAMAGES.

PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IN THIS BREACH OF AN INSURANCE CONTRACT ACTION SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

Schlusselberg v New York Cent. Mut. Fire Ins. Co., 2022 NY Slip Op 03539, Second Dept 6-1-22

Practice Point: The criteria for punitive damages for breach of contract are difficult to meet. The defendant's conduct must amount to an independent tort, be morally reprehensible, wantonly dishonest, and criminally indifferent to civil obligations. Here, those criteria were not met by the allegations of breach of an insurance contract.

CIVIL PROCEDURE, EXPERT DISCLOSURE, TREATING PHYSICIAN, THIRD DEPARTMENT'S UNIQUE REQUIREMENTS.

CLAIMANT'S ATTORNEY WAS NOT AWARE OF THE THIRD DEPARTMENT'S UNIQUE REQUIREMENT OF FULL EXPERT-WITNESS DISCLOSURE FOR A TREATING PHYSICIAN; THAT WAS AN ADEQUATE EXCUSE FOR AN UNTIMELY DISCLOSURE (THIRD DEPT).

Freeman v State of New York, 2022 NY Slip Op 03559, Third Dept 6-2-22

Practice Point: Only the Third Department requires full expert-witness disclosure for a treating physician.

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW, REAL PROPERTY LAW, DEFAULT, LIS PENDENS.

THE LLC'S FAILURE TO CHANGE THE ADDRESS ON FILE WITH THE SECRETARY OF STATE IS NOT A SUFFICIENT EXCUSE FOR A DEFAULT; PARTIES TO WHICH THE SUBJECT PROPERTY WAS TRANSFERRED AFTER THE LIS PENDENS WAS FILED ARE NOT NECESSARY PARTIES BECAUSE THEY ARE BOUND BY THE RESULT IN THIS ACTION (FIRST DEPT).

Majada Inc. v E&A RE Capital Corp., 2022 NY Slip Op 03476, First Dept 5-31-22

Practice Point: A limited liability corporation's (LLC's) failure to change the address on file with the Secretary of State is not an acceptable excuse for a default. Because a lis pendens was filed against the defendant's property here, the parties to which the property was subsequently transferred are bound by the result of this action and are not, therefore, necessary parties.

CIVIL PROCEDURE, REAL PROPERTY LAW, JOINT VENTURE, LIS PENDENS.

PLAINTIFF WAS SEEKING THE PROCEEDS OF A JOINT VENTURE, WHICH, UNDER PARTNERSHIP LAW, INVOLVES PERSONAL PROPERTY, NOT REAL PROPERTY; PLAINTIFF HAD NO INTEREST IN THE REAL PROPERTY WHICH WAS TO BE USED AS AN INN OPERATED AS A JOINT VENTURE; THERFORE THE LIS PENDENS FILED BY PLAINTIFF SHOULD HAVE BEEN CANCELLED (FOURTH DEPT).

Renfro v Herrald, 2022 NY Slip Op 03593, Fourth Dept 6-3-22

Practice Point: Partnership law applies to joint ventures. Here the joint venture was the operation of an inn. Plaintiff sought the assets of the joint venture, which involves only personal property, not real property. Plaintiff had no interest in the real property (the inn). Therefore the lis pendens filed by the plaintiff should have been cancelled.

CONSTITUTIONAL LAW, LOBBYING ACT, GRASSROOTS LOBBYING, CHILD VICTIMS ACT.

PLAINTIFFS' ACTION ALLEGING THE LOBBYING ACT IS UNCONSTITUTIONAL AS APPLIED TO THEM SHOULD HAVE BEEN ALLOWED TO PROCEED; PLAINTIFFS ENGAGED IN "GRASSROOTS LOBBYING" IN SUPPORT OF PASSAGE OF THE CHILD VICTIMS ACT (CVA) (THIRD DEPT).

Sullivan v New York State Joint Commn. on Pub. Ethics, 2022 NY Slip Op 03553, Third Dept 6-2-22

Practice Point: Here the plaintiffs challenged whether the Lobbying Act, which requires lobbyists to register and report, was constitutional as applied to their "grassroots" efforts to garner support for the passage of the Child Victims Act.

Supreme Court had dismissed the action. The Third Department partially reinstated it.

CRIMINAL LAW, ACCOMPLICE LIABILITY.

THERE WAS NO EVIDENCE DEFENDANT SHARED THE ATTACKERS' INTENT TO ROB THE VICTIM; DEFENDANT'S ROBBERY CONVICTIONS UNDER AN ACCOMPLICE-LIABILITY THEORY REVERSED (THIRD DEPT).

People v Smith, 2022 NY Slip Op 03547, Third Dept 6-2-22

Practice Point: Although the defendant sent the victim to the address where the victim was to sell marijuana to a buyer, there was no evidence defendant was aware the buyer intended to attack and rob the victim. Therefore, there was no evidence defendant shared the robbers intent and his robbery convictions under an accomplice-liability theory were reversed.

CRIMINAL LAW, DEPRAVED INDIFFERENCE MURDER, PLEA COLLOQUY.

THE PLEA COLLOQUY IN WHICH DEFENDANT STATED HE CARED FOR THE THREE-YEAR-OLD VICTIM NEGATED AN ESSENTIAL ELEMENT OF DEPRAVED INDIFFERENCE MURDER; PLEA VACATED (FOURTH DEPT).

People v Bovio, 2022 NY Slip Op 03591, Fourth Dept 6-3-22

Practice Point: The defendant, during the plea colloquy for depraved indifference murder, stated that he cared for the three-year-old victim. That statement negated the element of depraved indifference murder which requires that the defendant "not care if the victim lived or died." The plea was vacated.

CRIMINAL LAW, INEFFECTIVE ASSISTANCE.

DEFENDANT PLED GUILTY TO ATTEMPTED GANG ASSAULT, WHICH IS A LEGAL IMPOSSIBILITY AT TRIAL; DEFENDANT WAS ENTITLED TO A HEARING ON WHETHER HIS PLEA WAS RENDERED INVOLUNTARY BY COUNSEL'S INACCURATE ADVICE ABOUT THE POSSIBILITY OF CONVICTION; MATTER REMITTED (FOURTH DEPT).

People v Davis, 2022 NY Slip Op 03610, Fourth Dept 6-3-22

Practice Point: "Attempted gang assault" is a legal impossibility at trial. Here defendant was entitled to a hearing on whether his plea to attempted gang assault was involuntary because of counsel's inaccurate advice about the possibility of conviction at trial.

CRIMINAL LAW, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILURE TO INTERVIEW A POTENTIALLY EXCULPATORY WITNESS; MOTION TO VACATE THE MURDER CONVICTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

People v Williams, 2022 NY Slip Op 03625, Fourth Dept 6-3-22

Practice Point: Here defense counsel was made aware of a potentially exculpatory witness and did not interview him. The fact that defense counsel felt the witness was not credible did not excuse the failure to investigate. Defendant's motion to vacate his conviction on ineffective assistance grounds was granted by the appellate court.

CRIMINAL LAW, BURGLARY, PARTIAL FINGERPRINT, APPEALS.

THERE WAS NO EVIDENCE LINKING DEFENDANT TO A BURGLARY EXCEPT A PARTIAL FINGERPRINT FOUND AT THE SCENE WHICH ONLY MATCHED 15 TO 22.5% OF THE CHARACTERISTICS OF DEFENDANT'S INKED PRINT; THE BURGLARY CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

People v Jones, 2022 NY Slip Op 03590, Fourth Dept 6-3-22

Practice Point: Here a partial fingerprint matched only 15 to 22.5% of the characteristics of defendant's inked print and the "match" was not verified by a second examiner conducting a blind verification. There was no other evidence linking defendant to the burglary. The conviction was deemed against the weight of the evidence.

CRIMINAL LAW, CONSTRUCTIVE POSSESSION.

THE PROOF DEFENDANT CONSTRUCTIVELY POSSESSED A FIREARM FOUND IN THE CEILING OF A HOUSE WHERE DEFENDANT WAS A GUEST WAS LEGALLY INSUFFICIENT; DNA EVIDENCE MAY HAVE DEMONSTRATED DEFENDANT POSSESSED THE FIREARM AT SOME POINT IN TIME, BUT IT DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION AT THE TIME THE FIREARM WAS SEIZED (FOURTH DEPT).

People v King, 2022 NY Slip Op 03606, Fourth Dept 6-3-22

Practice Point: Here DNA evidence suggested the defendant possessed the firearm at some point. But defendant's presence as a guest in the room where the firearm was found was not sufficient evidence of constructive possession of the firearm. Conviction reversed.

CRIMINAL LAW, HARVEY WEINSTEIN.

HARVEY WEINSTEIN'S CRIMINAL SEXUAL ACT AND RAPE CONVICTIONS AFFIRMED (FIRST DEPT).

People v Weinstein, 2022 NY Slip Op 03576, First Dept 6-2-22

Practice Point: The First Department found that the expert testimony about rape trauma syndrome, the extensive Molineux evidence, and the extensive Sandoval evidence were properly admitted in the Harvey Weinstein trial.

CRIMINAL LAW, JUDGES, ATTORNEYS, CONFLICT OF INTEREST.

THE JUDGE'S LAW CLERK WAS THE DISTRICT ATTORNEY WHO PROSECUTED DEFENDANT; THE JUDGE SHOULD NOT HAVE DECIDED DEFENDANT'S MOTION TO VACATE HIS CONVICTION (THIRD DEPT).

People v Roshia, 2022 NY Slip Op 03546, Third Dept 6-2-22

Practice Point: The judge should not have decided defendant's motion to vacate his conviction because the judge's law clerk was the DA who prosecuted defendant.

CRIMINAL LAW, JUDGES, JURY INSTRUCTIONS, JUSTIFICATION DEFENSE, APPEALS.

THE JURY WAS NOT INSTRUCTED TO STOP DELIBERATIONS IF IT FOUND THE JUSTIFICATION DEFENSE APPLIED TO THE TOP COUNT (MURDER); DEFENDANT'S MANSLAUGHTER CONVICTION REVERSED IN THE INTEREST OF JUSTICE (THE ISSUE WAS NOT PRESERVED) (THIRD DEPT).

People v Harris, 2022 NY Slip Op 03548, Third Dept 6-2-22

Practice Point: If the justification defense is to be considered by the jury, the jury must be instructed to stop any further deliberations (re: the lesser counts) if the justification defense is deemed to apply to to the top count. Here the issue was not preserved by an objection to the jury instruction, but the Third Department reversed in the interest of justice.

CRIMINAL LAW, JUDGES, PLEA COLLOQUY.

DEFENDANT'S PLEA COLLOQUY NEGATED AN ESSENTIAL ELEMENT (JURAT) OF HIS PERJURY CONVICTIONS; PLEA VACATED (THIRD DEPT).

People v Marone, 2022 NY Slip Op 03543, Third Dept 6-2-22

Practice Point: Here the defendant's plea colloquy negated an essential element of the crime.. The judge should have inquired further before accepting the plea. Plea vacated.

CRIMINAL LAW, JUDGES, PRONOUNCE SENTENCE.

THE SENTENCING JUDGE DID NOT SEPARATELY PRONOUNCE A SENTENCE FOR EACH CONVICTION; MATTER REMITTED (THIRD DEPT).

People v Robbins, 2022 NY Slip Op 03549, Third Dept 6-2-22

Practice Point: A sentencing judge must pronounce a sentence separately for each conviction.

CRIMINAL LAW, MOLINEUX EVIDENCE NOT NEEDED TO PROVE INTENT.

MOLINEUX EVIDENCE OF A PRIOR BURGLARY OF THE ROBBERY-VICTIM'S HOME TO SHOW THE INTENT TO COMMIT ROBBERY AND GRAND LARCENY SHOULD NOT HAVE BEEN ADMITTED; THE INTENT TO COMMIT ROBBERY AND GRAND LARCENY WAS DEMONSTRATED BY THE VICTIM'S TESTIMONY RENDERING EVIDENCE OF THE PRIOR BURGLARY TOO PREJUDICIAL (FOURTH DEPT).

People v Dejesus, 2022 NY Slip Op 03584, Fourth Dept 6-3-22

Practice Point: Evidence of defendant's commission of an uncharged crime (Molineux evidence) to show defendant's intent to commit the charged offenses will be deemed too prejudicial if the intent element of the charged offenses is demonstrated by the victim's testimony.

CRIMINAL LAW, TRAFFIC STOPS.

THE POLICE DID NOT HAVE PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED OR WAS COMMITTING A CRIME WHEN THEY BLOCKED DEFENDANT'S VEHICLE WITH THE POLICE VEHICLE, WHICH CONSTITUTES A SEIZURE; PLEA VACATED AND SUPPRESSION MOTION GRANTED (FOURTH DEPT).

People v King, 2022 NY Slip Op 03595, Fourth Dept 6-3-22

Practice Point: Blocking defendant's vehicle with a police vehicle is a seizure which requires probable cause to believe defendant has committed or is committing a crime.

EDUCATION-SCHOOL LAW, TRANSPORTATION TO PRIVATE SCHOOLS.

THE EDUCATION LAW PERMITS, BUT DOES NOT REQUIRE, SCHOOL DISTRICTS TO PROVIDE TRANSPORTATION TO STUDENTS ATTENDING NONPUBLIC SCHOOLS WHEN THE PUBLIC SCHOOLS ARE NOT IN SESSION (THIRD DEPT).

Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville Cent. Sch. Dist., 2022 NY Slip Op 03566, Third Dept 6-2-22

Practice Point: Here the legislative history of Education Law 3635 was consulted to determine that school districts are permitted, but not required, to provide transportation to nonpublic-school students went the public schools are not in session.

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S CAUSES OF ACTION FOR CONSTRUCTIVE DISCHARGE AND HOSTILE WORK ENVIRONMENT SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

Blackman v Metropolitan Tr. Auth., 2022 NY Slip Op 03490, Second Dept 6-1-22

Practice Point: A "constructive discharge" employment-discrimination cause of action requires the deliberate creation of intolerable working conditions designed to force the plaintiff to quit (not demonstrated here). A "hostile work environment" employment-discrimination cause of action requires "repeated conduct" which is not demonstrated discrete acts such as termination, failure to promote, denial of transfer or refusal to hire.

FAMILY LAW, ATTORNEYS, APPEALS.

ALTHOUGH FATHER FAILED TO APPEAR, HIS COUNSEL APPEARED AND FATHER WAS THEREFORE NOT IN DEFAULT; BECAUSE FATHER WAS NOT IN DEFAULT, APPEAL IS NOT PRECLUDED (FOURTH DEPT).

Matter of Akol v Afet, 2022 NY Slip Op 03641, Fourth Dept 6-3-22

Practice Point: When counsel appears in Family Court, the party represented by counsel is not in default. An appeal is available to a party not in default.

FAMILY LAW, JUVENILE DELINQUENCY.

THIS JUVENILE DELINQUENCY PROCEEDING STEMMED FROM ALLEGATIONS RESPONDENT COMMITTED VIOLENT ACTS AGAINST THE MOTHER OF HIS CHILD; THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED "IN FURTHERANCE OF JUSTICE;" CRITERIA EXPLAINED (THIRD DEPT).

Matter of James JJ., 2022 NY Slip Op 03555, Third Dept 6-2-22

Practice Point: The allegations of violence in this juvenile delinquency proceeding were deemed too serious to warrant dismissal of the juvenile delinquency proceeding "in furtherance of justice." This remedy should be used sparingly and at least one of the statutory factors for dismissal in furtherance of justice must be readily identifiable.

FAMILY LAW, JUDGES, CUSTODY MODIFICATION.

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

Matter of Neil VV. v Joanne WW., 2022 NY Slip Op 03557, Third Dept 6-2-22

Practice Point: Where, as here, a facially sufficient petition for a modification of custody had been filed, petitioner is entitled to a hearing.

INSURANCE LAW, ABORTION, CONSTITUTIONAL LAW, RELIGION.

A RECENT US SUPREME COURT RULING DOES NOT AFFECT THE NYS COURT OF APPEALS RULING THAT REGULATIONS REQUIRING HEALTH INSURANCE POLICIES TO COVER "MEDICALLY NECESSARY ABORTIONS" BUT WHICH EXEMPT POLICIES PROVIDED BY "RELIGIOUS EMPLOYERS" DO NOT IMPAIR THE FREE EXERCISE OF RELIGION (THIRD DEPT).

Roman Catholic Diocese of Albany v Vullo, 2022 NY Slip Op 03550, Third Dept 6-2-22

Practice Point: The NYS Court of Appeals ruling In Catholic Charitie [7 NY3d 510] approving the requirement that health insurance policies cover "medically necessary abortions" (with an exemption for "religious employers") was not affected by the recent ruling by the US Supreme Court in Fulton v Philadelphia [141 S Ct 1868].

LABOR LAW-CONSTRUCTION LAW, INJURY LIFTING A HEAVY OBJECT FOUR OR FIVE INCHES.

PLAINTIFF FELT HIS ARM SNAP WHEN ATTEMPTING TO LIFT A 400 POUND ELEVATOR PLATFORM FOUR OR FIVE INCHES TO PLACE A PALLET JACK UNDER IT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Schoendorf v 589 Fifth TIC I LLC, 2022 NY Slip Op 03580, First Dept 6-2-22

Practice Point: Even a height-differential of four or five inches can support a Labor Law 240(1) cause of action. Here plaintiff was attempting to lift a 400 pound elevator platform a few inches in order to place a pallet jack under it when he injured his arm.

NEGLIGENCE, SLIP AND FALL, EMPLOYMENT LAW, INDEMNITY, CONTRIBUTION.

PLAINTIFF'S EMPLOYER'S MOTIONS FOR SUMMARY JUDGMENT ON DEFENDANT'S CONTRACTUAL INDEMNITY, COMMON-LAW INDEMNITY AND CONTRIBUTION CAUSES OF ACTION SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (THIRD DEPT).

O'Toole v Marist Coll., 2022 NY Slip Op 03560, Third Dept 6-2-22

Practice Point: Defendant property owner's actions against plaintiff's employer for contractual and common law indemnity and contribution should have been dismissed because plaintiff's slip and fall was not the result of any act or omission on plaintiff's employer's part. The criteria for indemnity and contribution causes of action are explained.

NEGLIGENCE, SLIP AND FALL, PROOF OF CAUSE.

DESPITE THE FACT THAT PLAINTIFF COULD NOT SAY WHICH OF TWO CRACKS IN THE PAVEMENT CAUSED HIS FALL, THE CAUSE OF THE FALL WAS SUFFICIENTLY IDENTIFIED TO WITHSTAND SUMMARY JUDGMENT (THIRD DEPT).

Bovee v Posniewski Enters., Inc., 2022 NY Slip Op 03561, Third Dept 6-2-22

Practice Point: Plaintiff was able to testify that one of two cracks in the pavement was the cause of his fall. The cause was sufficiently identified to withstand summary judgment.

NEGLIGENCE, TRAFFIC ACCIDENTS, MUNICIPAL LAW.

IN THIS Y-INTERSECTION TRAFFIC ACCIDENT CASE, (1) THE TOWN DEMONSTRATED IT DID NOT HAVE THE REQUIRED WRITTEN NOTICE THAT OVERGROWN FOLIAGE BLOCKED LINES OF SIGHT; (2) QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON THE CAUSES OF ACTION ALLEGING INADQUATE SIGNAGE AND NEGLIGENT ROADWAY DESIGN (THIRD DEPT).

Read v Bell, 2022 NY Slip Op 03563, Third Dept 6-2-22

Practice Point: In a traffic accident case, a municipality will not be liable for overgrown foliage which blocks lines of sight if the town has not been provided with written notice of the condition. The written-notice requirement does not apply to causes of action alleging the accident was caused by inadequate signage or negligent roadway design.

NEGLIGENCE, SLIP AND FALL, EMPLOYMENT LAW, WORKERS' COMPENSATION.

DEFENDANT PROPERTY OWNER FAILED TO DEMONSTRATE IT WAS THE ALTER EGO OF PLAINTIFF'S EMPLOYER OR THAT PLAINTIFF WAS DEFENDANT'S SPECIAL EMPLOYEE; THEREFORE PLAINTIFF'S PERSONAL INJURY ACTION WAS NOT PRECLUDED BY THE EXCLUSIVE REMEDY ASPECT OF THE WORKERS' COMPENSATION LAW (SECOND DEPT).

Mauro v Zorn Realties, Inc., 2022 NY Slip Op 03509, Second Dept 6-1-22

Practice Point: Here the defendant property owner was not able to take advantage of the exclusive-remedy aspect of the Workers' Compensation Law in this personal injury action. Plaintiff's employer was not the alter ego of defendant and plaintiff was not defendant's special employee.

PRODUCTS LIABILITY, ROUTER, SEVERED THUMB.

IN THIS PRODUCTS LIABILITY ACTION WHERE A ROUTER SEVERED PLAINTIFF'S THUMB, THE FAILURE-TO-WARN CAUSE OF ACTION BASED ON THE MANUAL SHOULD HAVE BEEN DISMISSED BECAUSE PLANTIFF NEVER READ IT; THE GENERALIZED FAILURE-TO-WARN CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; DISAGREEING WITH THE SECOND DEPARTMENT, THE DESIGN-DEFECT CAUSE OF ACTION BASED ON THE LACK OF AN INTERLOCK DEVICE PROPERLY SURVIVED SUMMARY JUDGMENT (FIRST DEPT).

Vasquez v Ridge Tool Pattern Co., 2022 NY Slip Op 03488, First Dept 5-31-22

Practice Point: In this products liability case where plaintiff lost a thumb using a router, there was a question of fact whether plaintiff was familiar enough with the danger of amputation that the defendant should be relieved of liability for the failure to warn. Here the First Department, disagreeing with the Second

Department, determined the absence of an interlock device which would shut the router down raised a question of fact on the design-defect cause of action.

SECURITIES, CIVIL PROCEDURE.

PLAINTIFFS STATED CAUSES OF ACTION FOR VIOLATIONS OF THE SECURITIES ACT BASED UPON ALLEGEDLY MISLEADING INFORMATION IN THE SECONDARY PUBLIC OFFERING (SPO) (FIRST DEPT).

Erie County Empls.' Retirement Sys. v NN, Inc., 2022 NY Slip Op 03473, First Dept 5-31-22

Practice Point: The heightened pleading requirements for fraud (CPLR 3016) do not apply to the causes of action here alleging violations of the Securities Act—allegedly misleading information in a secondary public offering (SPO).

TRUSTS AND ESTATES, FOREIGN WILLS, DOMICILE.

IF GERMANY WAS DECEDENT'S DOMICILE, NEW YORK MAY RECOGNIZE THE GERMAN HOLOGRAPHIC WILL; MATTER SENT BACK TO SURROGATE'S COURT TO DEVELOP A RECORD ON THE DOMICILE ISSUE (THIRD DEPT).

Matter of Noichl, 2022 NY Slip Op 03558, Third Dept 6-2-22

Practice Point: Determination of a person's domicile is a question of law and fact, depending in part on the person's intent. Here, if Germany was decedent's domicile at the time the holographic German will was executed, or at the time of death, New York may recognize the German holographic will. Matter sent back to develop a factual record on the domicile issue.

TRUSTS AND ESTATES, TRANSFER OF HOME TO DECEDENT'S CAREGIVERS.

THE TRANSFER OF DECEDENT'S HOME TO THE TWO CHILDREN WHO WERE CARING FOR HIM WAS COMPENSATION FOR THE CAREGIVERS PURSUANT TO AN AGREEMENT, NOT A GIFT (WHICH WOULD NOT HAVE BEEN AUTHORIZED BY THE POWER OF ATTORNEY) (FOURTH DEPT).

Matter of Maik, 2022 NY Slip Op 03589, Fourth Dept 6-3-22

Practice Point: Here there was an agreement that the children who cared for the disabled decedent would be compensated. The transfer of decedent's home to the caregivers was compensation for their services, not a gift (which would not have been authorized by the power of attorney).

WORKERS' COMPENSATION, SCHEDULE LOSS OF USE (SLU).

THE WORKERS' COMPENSATION BOARD MISINTERPRETED SPECIAL CONSIDERATION 4 TO LIMIT SCHEDULE LOSS OF USE (SLU) OF PLAINTIFF'S LEG TO 10% (THIRD DEPT).

Matter of Blue v New York State Off. Of Children & Family Servs., 2022 NY Slip Op 03565, Third Dept 6-2-22

Practice Point: In determining the schedule loss of use (SLU) for claimant's leg, the Workers' Compensation Board misinterpreted "special consideration 4" resulting in an inappropriately low SLE percentage.