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Table of Contents

Contents

CIVIL PROCEDURE, HYBRID ACTION, PLEADING REQUIREMENTS, STANDING. 4

IN A HYBRID ACTION SEEKING AN ANNULMENT PURSUANT TO ARTICLE 78 AND A DECLARATORY JUDGMENT (AND DAMAGES), THE BURDENS TO DEMONSTRATE STANDING ARE DIFFERENT; IN AN ARTICLE 78 THE PETITIONER MUST AFFIRMATIVELY DEMONSTRATE STANDING; AND IN A DECLARTORY-JUDGMENT/DAMAGES ACTION, THE RESPONDENT (DEFENDANT) MUST DEMONSTRATE PETITIONER DOES NOT HAVE STANDING AS A MATTER OF LAW TO WARRANT SUMMARY JUDGMENT (SECOND DEPT). 4

CRIMINAL LAW, APPEALS, CONSTITUTIONAL LAW, RIGHT OF CONFRONTATION, HARMLESS ERROR. 5

ON REMAND FROM THE US SUPREME COURT, THE COURT OF APPEALS FOUND THAT THE VIOLATION OF DEFENDANT'S RIGHT OF CONFRONTATION WAS HARMLESS ERROR (CT APP). 5

CRIMINAL LAW, SECOND FELONY OFFENDER, EQUIVALENT FELONY. 6

THE FEDERAL POSSESSION-OF-A-FIREARM-BY-A-FELON STATUTE IS NOT THE EQUIVALENT OF A NEW YORK FELONY BECAUSE THE FEDERAL STATUTE DOES NOT REQUIRE A SHOWING THE WEAPON WAS OPERABLE; DEFENDANT'S SECOND FELONY OFFENDER ADJUDICATION VACATED (SECOND DEPT). 6

CRIMINAL LAW, SENTENCING, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT. 7

DEFENDANT WAS ENTITLED TO THE VACATION OF THE SENTENCE FOR THE MURDER OF HIS FATHER'S GIRLFRIEND UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (SECOND DEPT). 7

CRIMINAL LAW, SENTENCING. 8

HERE DEFENDANT SET A FIRE TO CONCEAL EVIDENCE AND WAS CONVICTED OF ARSON AND TAMPERING WITH EVIDENCE; BECAUSE BOTH CHARGES AROSE FROM A SINGLE ACT, THE SENTENCES MUST RUN CONCURRENTLY (THIRD DEPT). 8

CRIMINAL LAW, ACCOMPLICE LIABILITY JURY INSTRUCTION. 9

THE PRINCIPAL WITNESS AGAINST DEFENDANT IN THIS FIRST DEGREE MURDER (MURDER-FOR-HIRE) TRIAL WAS AN ACCOMPLICE AS A MATTER OF LAW; IT WAS REVERSIBLE ERROR TO FAIL TO SO INSTRUCT THE JURY; ALTHOUGH THE ISSUE WAS NOT PRESERVED, IT WAS CONSIDERED IN THE INTEREST OF JUSTICE; THE DEFENDANT'S ALLEGED SILENCE IN RESPONSE TO AN ACCUSATION (ADOPTIVE ADMISSION) WAS INADMISSIBLE BECAUSE THE PEOPLE DID NOT PROVE DEFENDANT HEARD THE ACCUSATION (SECOND DEPT). 9

Table of Contents

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, ILLEGAL STRIKE. 10

ONE OF THE PERSONS INVOLVED IN A VIOLENT CONFRONTATION OUTSIDE A SCHOOL THREATENED TO RETURN THE NEXT DAY WITH A GUN; A TEACHER IMMEDIATELY HELD A MEETING WHERE CALLING IN SICK THE NEXT DAY WAS DISCUSSED; 23 TEACHERS CALLED IN SICK; THAT ACTION CONSTITUTED AN ILLEGAL STRIKE PURSUANT TO CIVIL SERVICE LAW 210 (THIRD DEPT). 10

FAMILY LAW, MODIFICATION OF CALIFORNIA CUSTODY ORDER. 12

FATHER, WHO LIVES IN CALIFORNIA, SOUGHT MODIFICATION OF THE CALIFORNIA CUSTODY ORDER; MOTHER, WHO LIVES IN NEW YORK, SOUGHT MODIFICATION OF THE CALIFORNIA ORDER IN NEW YORK; FAMILY COURT CORRECTLY COMMUNICATED WITH THE CALIFORNIA COURT BUT DID NOT ALLOW THE PARTIES TO PRESENT FACTS AND LEGAL ARGUMENTS BEFORE DISMISSING THE NEW YORK PETITION; FAMILY COURT REVERSED (SECOND DEPT). 12

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE REQUIREMENTS. . 13

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH RPAPL 1303 WHICH REQUIRES THE NOTICE OF FORECLOSURE TO USE SPECIFIC TYPE SIZES AND A PAPER-COLOR DIFFERENT FROM THE SUMMONS AND COMPLAINT; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 13

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE REQUIREMENTS. . 14

THE BANK'S PROOF THAT THE RPAPL 1304 NOTICE OF FORECLOSURE WAS MAILED TO THE DEFENDANTS WAS INSUFFICIENT; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 14

INSURANCE LAW, MISREPRESENTION IN APPLICATION. 15

THE ALLEGED MISPRESENTATION IN PLAINTIFF'S APPLICATION FOR CAR INSURANCE, I.E., THAT SHE LIVED IN NEW ROCHELLE AND THE CAR WOULD BE GARAGED THERE WHEN IN FACT SHE LIVED IN BROOKLYN AND THE CAR WOULD BE GARAGED THERE, WAS NOT DEMONSTRATED TO HAVE BEEN "MATERIAL" AS A MATTER OF LAW; THE INSURER HAD DENIED COVERAGE BASED UPON THE ALLEGED MISREPRESENTATION; THE INSURER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 15

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS. 16

PLAINTIFF'S EXPERT'S AFFIDAVIT WAS NOT CONCLUSORY AND SPECULATIVE; DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 16

NEGLIGENCE, EDUCATION-SCHOOL LAW, INJURED STUDENT. 18

INFANT PLAINTIFF WAS INJURED WHEN HE INADVERTENTLY SLAPPED A DISPLAY CASE IN THE HALL OF A SCHOOL AND THE GLASS SHATTERED; THERE WAS EVIDENCE A SIMILAR INCIDENT HAD OCCURRED IN THE PAST AND SOME OF THE PANELS IN THE DISPLAY CASE WERE MADE OF SHATTERPROOF PLEXIGLASS; PLAINTIFF'S PREMISES-LIABILITY CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT). 18

NEGLIGENCE, SLIP AND FALL. 19

ALTHOUGH THE STEP WAS MARKED AND THERE WAS A WARNING SIGN, THERE WAS EVIDENCE THE STEP AND THE SIGN COULD NOT BE SEEN WHEN THE AREA WAS CROWDED; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS STAIR-FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).. 19

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW. 20

THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF'S MOTORCYCLE WAS SO CLOSE AS TO CONSTITUTE AN IMMEDIATE HAZARD WHEN DEFENDANT ATTEMPTED TO MAKE A LEFT TURN ACROSS PLAINTIFF'S LANE OF TRAFFIC; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 20

NEGLIGENCE. SLIP AND FALL, CONSTRUCTIVE NOTICE. 21

THE BUILDING DEFENDANTS DEMONSTRATED THE AREA WHERE PLAINTIFF ALLEGED SHE SLIPPED AND FELL ON WATER ON THE FLOOR WAS INSPECTED AND FOUND TO BE DRY CLOSE IN TIME TO THE ALLEGED FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT). 21

TOXIC TORTS, ASBESTOS EXPOSURE. 22

PLAINTIFF DID NOT PRESENT EXPERT OPINION TO SUPPORT THE ALLEGATION HE INHALED SUFFICIENT AMOUNTS OF ASBESTOS TO HAVE CAUSED HIS CANCER; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT). 22

TOXIC TORTS, ASBESTOS EXPOSURE. 23

PLAINTIFF'S EXPERT EVIDENCE WAS NOT SUFFICIENT TO DEMONSTRATE PLAINTIFF INHALED ENOUGHT ASBESTOS FIBERS TO CAUSE HIS CANCER; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT). 23

TOXIC TORTS, ASBESTOS EXPOSURE. 24

THE PROOF AT TRIAL DID NOT DEMONSTRATE PLAINTIFF INHALED SUFFICIENT LEVELS OF ASBESTOS WHEN USING DEFENDANT'S TALCUM POWDER TO HAVE CAUSED HER MESOTHELIOMA; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED (FIRST DEPT). 24

TOXIC TORTS, ASBESTOS EXPOSURE. 25

WHETHER PLAINTIFF INHALED ENOUGH ASBESTOS TO CAUSE HIS CANCER WAS THE SUBJECT OF COMPETING SIMULATION STUDIES; PLAINTIFF'S EXPERT EVIDENCE WAS NOT SUFFICIENT TO DEFEAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (FIRST DEPT). 25

CIVIL PROCEDURE, HYBRID ACTION, PLEADING REQUIREMENTS, STANDING.

IN A HYBRID ACTION SEEKING AN ANNULMENT PURSUANT TO ARTICLE 78 AND A DECLARATORY JUDGMENT (AND DAMAGES), THE BURDENS TO DEMONSTRATE STANDING ARE DIFFERENT; IN AN ARTICLE 78 THE PETITIONER MUST AFFIRMATIVELY DEMONSTRATE STANDING; AND IN A DECLARTORY-JUDGMENT/DAMAGES ACTION, THE RESPONDENT (DEFENDANT) MUST DEMONSTRATE PETITIONER DOES NOT HAVE STANDING AS A MATTER OF LAW TO WARRANT SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, explained the different burdens of proof in an Article 78 proceeding and an action seeking declaratory relief and damages. In an Article 78 proceeding, the petitioner has to show standing as part of its prima facie case. In a declaratory judgment/damages action, the respondent (defendant) has to demonstrate the petitioner does not have standing as a matter of law to warrant summary judgment:

The Supreme Court erred in granting the respondents' motion to dismiss the proceeding/action based on lack of standing. "'In a hybrid proceeding and action,

separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand'" … . Generally, in an action to recover damages, "[o]n a defendant's motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing. To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" … . Within the context of a special proceeding pursuant to CPLR article 78, "[t]he petitioner 'has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated'" … . Matter of Crown Castle NG E., LLC v City of Rye, 2022 NY Slip Op 04626, Second Dept 7-20-22

Practice Point: The burdens on the issue of standing are different in an Article 78 proceeding and a declaratory judgment/damages action. Here both were brought in a hybrid proceeding. The petitioner must demonstrate standing in the Article 78 proceeding. The respondent (defendant) must demonstrate petitioner does not have standing as a matter of law to warrant summary judgment in the declaratory judgment/damages action.

CRIMINAL LAW, APPEALS, CONSTITUTIONAL LAW, RIGHT OF CONFRONTATION, HARMLESS ERROR.

ON REMAND FROM THE US SUPREME COURT, THE COURT OF APPEALS FOUND THAT THE VIOLATION OF DEFENDANT'S RIGHT OF CONFRONTATION WAS HARMLESS ERROR (CT APP).

The Court of Appeals, on remand from the US Supreme Court, determined the evidentiary error was harmless and affirmed defendant's conviction. The defendant was convicted of murder. The plea allocution of Morris, who was initially prosecuted for the same murder (but exonerated by DNA evidence). was allowed in evidence in defendant's trial, a violation of defendant's right to confront the witnesses against him. The Court of Appeals held the evidence against defendant

was overwhelming rendering the violation of defendant's right of confrontation harmless:

… "[T]here is no reasonable possibility" that the erroneously admitted plea allocution "might have contributed to defendant's conviction" (People v Crimmins , 36 NY2d 230, 237 [1975]). The plea allocution neither exculpated Morris nor inculpated defendant as the shooter, thus allowing defendant to argue to the jury that Morris was the perpetrator. Indeed, it merely supported a conclusion that Morris possessed a .357 magnum revolver on the day in question, and [a witness] had already testified to that alleged fact. … [T]he prosecutor's reliance on the plea was exceedingly minimal. Under these circumstances and in light of the other, overwhelming evidence of defendant's guilt, the error below was "harmless beyond a reasonable doubt" (id. at 237, citing Chapman v California , 386 US 18 [1967]). People v Hemphill, 2022 NY Slip Op 04663, CtApp 7-21-22

Practice Point: It is worth remembering that even a constitutional error, here the violation of defendant's right to confront the witnesses against him, is subject to a harmless-error analysis.

CRIMINAL LAW, SECOND FELONY OFFENDER, EQUIVALENT FELONY.

THE FEDERAL POSSESSION-OF-A-FIREARM-BY-A-FELON STATUTE IS NOT THE EQUIVALENT OF A NEW YORK FELONY BECAUSE THE FEDERAL STATUTE DOES NOT REQUIRE A SHOWING THE WEAPON WAS OPERABLE; DEFENDANT'S SECOND FELONY OFFENDER ADJUDICATION VACATED (SECOND DEPT).

The Second Department, vacating defendant's second felony offender adjudication, determined the federal possession-of-a-firearm-by-a-felon statute is not the equivalent of a New York felony:

… [T]he defendant should not have been adjudicated a second felony offender on the basis of a prior federal conviction for possession of a firearm by a felon (see 18 USC § 922[g][1]). "An out-of-state felony conviction qualifies as a predicate felony under New York's sentencing statutes only if it is for a crime 'whose

elements are equivalent to those of a New York felony"' (… see Penal Law § 70.06[1][b][i]). Here, the defendant's predicate crime does not require as one of its elements that the firearm be operable … and thus, does not constitute a felony in New York for the purpose of enhanced sentencing … . People v Bilfulco, 2022 NY Slip Op 04637, Second Dept 7-20-22

Practice Point: The federal possession-of-a-weapon statute (18 USC 922[g][1]) is not the equivalent of a New York felony because it does not require that the weapon be operable. Therefore that federal statute cannot be the basis for a second felony offender adjudication.

CRIMINAL LAW, SENTENCING, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT.

DEFENDANT WAS ENTITLED TO THE VACATION OF THE SENTENCE FOR THE MURDER OF HIS FATHER'S GIRLFRIEND UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant was entitled to the vacation of his sentence for the murder of his father's girlfriend pursuant to the Domestic Violence Survivors Justice Act (DVSJA). Defendant was 19 at the time of the killing of his father and his father's girlfriend, with whom he resided. supreme Court had granted defendant's motion with regard to the manslaughter conviction for the killing of his father, but denied the motion with regard to the murder conviction for the killing of his father's girlfriend. The facts are not discussed, but the Second Department found that the facts supported the vacation of the sentence for the murder of father's girlfriend:

The DVSJA permits courts to impose reduced alternative, less severe, sentences in certain cases involving defendants who are victims of domestic violence … .. The DVSJA sets forth three factors for a court to consider, namely: (1) whether the defendant was a victim of domestic violence inflicted by a member of the same family or household at the time of the offense; (2) whether the abuse was a significant contributing factor to the defendant's criminal behavior; and (3) whether, having regard for the nature and circumstances of the crime and the

history, character, and condition of the defendant, a sentence in accordance with the customary statutory sentencing guidelines would be unduly harsh (see Penal Law § 60.12). The preponderance of the evidence standard applies … . The DVSJA permits the court to impose a less punitive and less harsh sentence without diminishing the seriousness of the offense or finding the crime to have been justified … . People v Burns, 2022 NY Slip Op 04638, Second Dept 7-20-22

Practice Point: Here defendant was 19 when he killed his father and his father's girlfriend. Based on the facts, which were not discussed, the Second Department determined the sentences should be vacated and defendant should be resentenced pursuant to the Domestic Violence Survivors Justice Act.

CRIMINAL LAW, SENTENCING.

HERE DEFENDANT SET A FIRE TO CONCEAL EVIDENCE AND WAS CONVICTED OF ARSON AND TAMPERING WITH EVIDENCE; BECAUSE BOTH CHARGES AROSE FROM A SINGLE ACT, THE SENTENCES MUST RUN CONCURRENTLY (THIRD DEPT).

The Third Department determined the sentences for arson and tampering with evidence arose from a single act and, therefore, the sentences must run concurrently. Defendant had participated in tying her disabled child to a bed. When defendant returned home, the child had died. To conceal the evidence, defendant participated in setting the home on fire. Under these circumstances, the arson and tampering with evidence charges arose from a single act:

… County Court should not have imposed consecutive terms of imprisonment upon defendant's convictions of arson in the third degree and tampering with physical evidence. … "Sentences imposed for two or more offenses may not run consecutively where, among other things, a single act constitutes two offenses" … . Given that the fire admittedly was set to conceal evidence, the arson and tampering with physical evidence convictions necessarily arose from a single act. As a result, although the terms of imprisonment imposed upon such convictions properly ran consecutively to the sentence imposed upon defendant's conviction of manslaughter in the first degree … , the sentences imposed upon the arson and

tampering convictions must run concurrently with one another … , and defendant's sentence is modified to that extent. People v Franklin, 2022 NY Slip Op 04677, Third Dept 7-21-22

Practice Point: The defendant set a fire to conceal evidence and was charged with and convicted of arson and tampering with evidence. Because both convictions arose from a single act, the sentences must run concurrently.

CRIMINAL LAW, ACCOMPLICE LIABILITY JURY INSTRUCTION.

THE PRINCIPAL WITNESS AGAINST DEFENDANT IN THIS FIRST DEGREE MURDER (MURDER-FOR-HIRE) TRIAL WAS AN ACCOMPLICE AS A MATTER OF LAW; IT WAS REVERSIBLE ERROR TO FAIL TO SO INSTRUCT THE JURY; ALTHOUGH THE ISSUE WAS NOT PRESERVED, IT WAS CONSIDERED IN THE INTEREST OF JUSTICE; THE DEFENDANT'S ALLEGED SILENCE IN RESPONSE TO AN ACCUSATION (ADOPTIVE ADMISSION) WAS INADMISSIBLE BECAUSE THE PEOPLE DID NOT PROVE DEFENDANT HEARD THE ACCUSATION (SECOND DEPT).

The Second Department, reversing defendant's murder-first-degree conviction and ordering a new trial, determined the jury should have been instructed that the defendant's paramour, Lovell, who was involved the plot to have the victim killed by a third-party, and who testified against the defendant at trial, was an accomplice as a matter of law. Despite defense counsel's failure to preserve the error, the issue was considered on appeal in the interest of justice. The Second Department also held that the "adoptive admission" by the defendant should not have been admitted in evidence. It was alleged the defendant remained silent when her mother-in-law accused her of killing the victim. The People did not prove defendant actually heard the accusation:

Supreme Court failed to instruct the jury that Lovell was an accomplice and subject to the statutory corroboration requirement. Although the court was "under a duty to charge . . . even without a request from the defendant … , the rule of preservation requires that defense counsel object to the court's failure in order to preserve a

question of law for appellate review … . Notwithstanding defense counsel's failure to object at trial, under the circumstances of this case, we reach the unpreserved error in the interest of justice and find that the failure to properly instruct the jury constituted reversible error … …. [T]he evidence of the defendant's guilt, which consisted principally of Lovell's testimony, was not overwhelming … . * * *

"To use a defendant's silence or evasive response as evidence against the defendant, the People must demonstrate that the defendant heard and understood the assertion, and reasonably would have been expected to deny it" … . Here, the People failed to establish that the defendant actually heard the mother-in-law's accusations or that the defendant had an opportunity to respond to the accusations prior to the mother-in-law disconnecting the phone call. Therefore, the court should not have admitted the evidence. People v Noel, 2022 NY Slip Op 04647, Second Dept 7-20-22

Practice Point: The testimony of defendant's paramour, who was involved in the murder-for-hire, was the principal evidence against the defendant. The failure to instruct the jury that the paramour was an accomplice as a matter of law whose testimony must be corroborated was reversible error. Although the error was not preserved the Second Department considered it ion appeal in the interest of justice. The defendant's silence in the face of an accusation (an adoptive admission) should not have been admitted in evidence because the People did not prove the defendant heard the accusation.

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, ILLEGAL STRIKE.

ONE OF THE PERSONS INVOLVED IN A VIOLENT CONFRONTATION OUTSIDE A SCHOOL THREATENED TO RETURN THE NEXT DAY WITH A GUN; A TEACHER IMMEDIATELY HELD A MEETING WHERE CALLING IN SICK THE NEXT DAY WAS DISCUSSED; 23 TEACHERS CALLED IN SICK; THAT ACTION CONSTITUTED AN ILLEGAL STRIKE PURSUANT TO CIVIL SERVICE LAW 210 (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, determined that the Public Employment Relations Board (PERB) properly found that the petitioner,

the Buffalo Teachers Federation, engaged in an unlawful strike in violation of Civil Service Law section 210. There was a violent confrontation between two older individuals and students outside the school at dismissal time. One of the older individuals, while fleeing the police, said he was going to come back the next day with a gun. He said "if you show up to work tomorrow, you're to all die." A teacher at the school, Nicole LaRusch, called an immediate meeting where calling in sick the next day was discussed. Ultimately 23 teachers called in sick. The question before the Third Department was whether there was "substantial evidence" in the record to support the PERB's ruling the action was an illegal strike:

Civil Service Law article 14, known as the Taylor Law, provides that "[n]o public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike" (Civil Service Law § 210 [1]). The term "strike" is statutorily defined as "any strike or other concerted stoppage of work or slowdown by public employees" … . "[T]he substantial evidence standard is a minimal standard" that is "less than a preponderance of the evidence, and demands only that a given inference is reasonable and plausible, not necessarily the most probable" … . * * *

According to [a] teacher's aide union representative, LaRusch stated that they were calling out sick because "the principal didn't care about [their] safety" and that they were sending a message to "downtown" — meaning the district's headquarters — so that they could "get resource officers in the school." In our view, the … evidence amply supports the conclusion that, in violation of the Taylor Law, LaRusch and the 15 other absent teachers engaged in a concerted slowdown or stoppage of work as part of a coordinated effort to obtain a safer work environment … . Matter of Buffalo Teachers Fedn., Inc. v New York State Pub. Empl. Relations Bd., 2022 NY Slip Op 04680, Third Dept 7-21-22

Practice Point: 23 teachers called in sick after a person threatened to return to the school the next day with a gun and kill the teachers who showed up for work. That action was deemed an illegal strike in violation of the Civil Service Law section 210.

FAMILY LAW, MODIFICATION OF CALIFORNIA CUSTODY ORDER.

FATHER, WHO LIVES IN CALIFORNIA, SOUGHT MODIFICATION OF THE CALIFORNIA CUSTODY ORDER; MOTHER, WHO LIVES IN NEW YORK, SOUGHT MODIFICATION OF THE CALIFORNIA ORDER IN NEW YORK; FAMILY COURT CORRECTLY COMMUNICATED WITH THE CALIFORNIA COURT BUT DID NOT ALLOW THE PARTIES TO PRESENT FACTS AND LEGAL ARGUMENTS BEFORE DISMISSING THE NEW YORK PETITION; FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court did everything right in dealing with the modification of a California custody order, including communication with the California court, but did not allow the parties to present facts and legal arguments before ruling New York did not have jurisdiction. Father was in California and mother was in New York. Father sought modification of the custody order in California and mother sought modification of the custody order in New York:

"If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with [Domestic Relations Law article 5-A], the court of this state shall stay its proceeding and communicate with the court of the other state" (Domestic Relations Law § 76-e[2]; see id. § 77-f …). "If the court of the state having jurisdiction substantially in accordance with [Domestic Relations Law article 5-A] does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding" … .

When a court, acting pursuant to these provisions, communicates with a court of another state on substantive matters, it must make a record of the communication, promptly inform the parties of the communication, and grant the parties access to the record … . The court may, in its discretion, allow the parties to participate in the communication, but "[i]f the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made" … .

… [A]fter providing that information to the parties, who had not participated in the communication, the court immediately announced its decision on the issue of jurisdiction, without affording the parties an opportunity to present facts and legal arguments. This did not comport with the requirements of Domestic Relations Law § 75-i(2), and, under the circumstances of this case, requires reversal … . Matter of Touchet v Horstman, 2022 NY Slip Op 04633, Second Dept 7-20-22

Practice Point: When a New York resident seeks modification of an out-of-state custody order, Family Court must communicate with the out-of-state court about whether the New York petition should be dismissed. Where the parties did not participate in the communication, before ruling, Family Court must allow the parties to present facts and legal arguments. Here the court's failure to allow the parties to present facts and legal arguments required reversal.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE REQUIREMENTS.

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH RPAPL 1303 WHICH REQUIRES THE NOTICE OF FORECLOSURE TO USE SPECIFIC TYPE SIZES AND A PAPER-COLOR DIFFERENT FROM THE SUMMONS AND COMPLAINT; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action did not demonstrate strict compliance with RPRL 1303, which requires that the notice of foreclosure use certain sizes of type and a different color paper:

RPAPL 1303 requires that a notice titled "Help for Homeowners in Foreclosure" be delivered to the mortgagor along with the summons and complaint in residential foreclosure actions involving owner-occupied, one- to four-family dwellings (see RPAPL 1303[1],[3] …). The statute mandates that the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and

complaint, and that the title of the notice be in bold, 20-point type (see RPAPL 1303[2]). Proper service of an RPAPL 1303 notice is a condition precedent to commencing a foreclosure action, and the plaintiff has the burden of showing compliance with the statute … . Bank of N.Y. Mellon v McCaffrey, 2022 NY Slip Op 04619, Second Dept 7-20-22

Practice Point: In a foreclosure action, the bank's strict compliance with the notice requirements in the Real Property Actions and Proceedings Law (RPAPL) is a condition precedent for the action. Here the bank did not demonstrate that the notice of foreclosure complied with RPAPL 1303 which requires certain type sizes and a paper-color different from that of the summons and complaint. The bank's motion for summary judgment should not have been granted.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE REQUIREMENTS.

THE BANK'S PROOF THAT THE RPAPL 1304 NOTICE OF FORECLOSURE WAS MAILED TO THE DEFENDANTS WAS INSUFFICIENT; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff bank did not demonstrate compliance with the notice requirements of RPAPL 1304 and therefore should not have been awarded summary judgment in this foreclosure action:

The affidavits of Daphne Proctor, Theresa Robertson, and April Martin, all of whom were document execution specialists employed by Nationstar Mortgage, LLC (hereinafter Nationstar), the plaintiff's loan servicer, were insufficient to establish that the plaintiff complied with RPAPL 1304. Proctor, Robertson, and Martin attested that they were familiar with Nationstar's records and record-keeping practices, but they failed to attest that they personally mailed the notices or that they were familiar with the mailing practices and procedures of Nationstar. Moreover, Martin attested that the plaintiff mailed the notices, but neither she nor Proctor or Robertson attested that they were familiar with the plaintiff's mailing

practices and procedures. Therefore, they failed to establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . The plaintiff also failed to submit any domestic return receipts or other documentation from the United States Postal Service proving the certified and first-class mailing … . The presence of numbered bar codes on the envelopes and the copies of the 90-day notices submitted by the plaintiff did not suffice to establish, prima facie, proper mailing under RPAPL 1304 … . Bank of N.Y. Mellon Corp. v Salvador, 2022 NY Slip Op 04618, Second Dept 7-20-22

Practice Point: These foreclosure summary-judgment reversals based on the bank's failure to submit sufficient proof of the mailing of the RPAPL 1304 notice of foreclosure to the defendants just keep coming, week after week, year after year.

INSURANCE LAW, MISREPRESENTION IN APPLICATION.

THE ALLEGED MISPRESENTATION IN PLAINTIFF'S APPLICATION FOR CAR INSURANCE, I.E., THAT SHE LIVED IN NEW ROCHELLE AND THE CAR WOULD BE GARAGED THERE WHEN IN FACT SHE LIVED IN BROOKLYN AND THE CAR WOULD BE GARAGED THERE, WAS NOT DEMONSTRATED TO HAVE BEEN "MATERIAL" AS A MATTER OF LAW; THE INSURER HAD DENIED COVERAGE BASED UPON THE ALLEGED MISREPRESENTATION; THE INSURER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the alleged misrepresentation in plaintiff's application for car insurance was not demonstrated to have been "material" as a matter of law. Therefore defendant-insurer's motion for summary judgment in this hit-and-run accident case should not have been granted. Plaintiff was alleged to have stated in her application that she lived in New Rochelle and the car would be garaged there, when in fact she lived in Brooklyn and the care would be garaged there:

The plaintiff allegedly was injured in a hit-and-run motor vehicle accident … . At the time of the accident, the plaintiff's vehicle was insured by the defendant,

Mercury Casualty Company (hereinafter Mercury). The plaintiff commenced this action to recover damages for breach of the insurance policy, alleging that Mercury breached the policy by failing to make payment on her claim under an uninsured motorists endorsement to the policy in connection with the subject accident. …Mercury moved … for summary judgment dismissing the complaint on the ground that it had no obligation to provide the plaintiff with benefits under the "fraud or misrepresentation" provision of the insurance policy. …

Mercury failed to demonstrate the materiality of the misrepresentation complained of, as a matter of law. Although Mercury submitted an affidavit of an underwriting supervisor who stated that it would have issued the plaintiff a different policy with a higher premium had the plaintiff disclosed her Brooklyn address, the underwriting guidelines submitted by Mercury do not state that it does not insure vehicles kept in Brooklyn or that policies insuring vehicles kept in Brooklyn are assessed a higher premium than those garaged in New Rochelle … . Rodriguez v Mercury Cas. Co., 2022 NY Slip Op 04656, Second Dept 7-20-22

Practice Point: To warrant a denial of coverage based on a misrepresentation in an application for insurance, the misrepresentation must be "material." Here there was a question of fact on that question and the insurer's motion for summary judgment should have been denied. It was alleged plaintiff stated in her application she lived in New Rochelle and the car would be garaged there, when in fact she lived in Brooklyn and the car was garaged there. The underlying incident was a hit-and-run accident.

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

PLAINTIFF'S EXPERT'S AFFIDAVIT WAS NOT CONCLUSORY AND SPECULATIVE; DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant doctor's (Falkovsky's) motion for summary judgment in this medical malpractice case should not have been granted. Although the doctor made out a prima facie case

demonstrating there was no departure form good and accepted medical malpractice, plaintiff's expert raised questions of fact about whether defendant should have considered cardiac disease in his differential diagnosis:

[Plaintiff] presented to Falkovsky … with complaints of loss of taste and appetite for two weeks, the unintentional loss of ten pounds, and two episodes of dizziness and vomiting that resolved on their own. During a follow up visit on March 17, 2015, Falkovsky noted … that blood work had revealed that the decedent had anemia. Falkovsky believed the cause of the decedent's symptoms was most likely a neoplasm, and referred the decedent to a gastroenterologist and a nephrologist. On March 19, 2015, the decedent was examined by a nephrologist, who noted … that the decedent had lower extremity edema. The decedent underwent an endoscopy with his gastroenterologist on March 25, 2015, which revealed … reflux and gastritis. A renal sonogram performed on April 11, 2015, showed that the decedent had a right renal cyst and a possible angeomyolipoma. The decedent died on April 16, 2015. An autopsy revealed that the decedent died as a result of atherosclerotic and hypertensive cardiovascular disease. * * *

… [T]he opinions of the plaintiff's expert were not speculative and conclusory … . The plaintiff's expert opined, inter alia, that Falkovsky departed from the standard of care by failing to include cardiac disease in his differential diagnosis based upon the decedent's symptoms in light of his medical history, and failing to order proper tests or to refer the decedent to a cardiologist for cardiac-related tests, which resulted in a lack of proper treatment that could have prevented the decedent's death. Shirley v Falkovsky, 2022 NY Slip Op 04659, Second Dept 7-20-22

Practice Point: A conclusory or speculative expert affidavit will not raise a question of fact in a medical malpractice case. Here plaintiff's expert opined that defendant doctor should have considered cardiac disease in his differential diagnosis, based on plaintiff's symptoms, which included swelling of the lower extremities. Plaintiff died from his cardiac disease. Supreme Court should not have found plaintiff's expert's affidavit to have been speculative and conclusory and therefore should not have granted the doctor's motion for summary judgment.

NEGLIGENCE, EDUCATION-SCHOOL LAW, INJURED STUDENT.

INFANT PLAINTIFF WAS INJURED WHEN HE INADVERTENTLY SLAPPED A DISPLAY CASE IN THE HALL OF A SCHOOL AND THE GLASS SHATTERED; THERE WAS EVIDENCE A SIMILAR INCIDENT HAD OCCURRED IN THE PAST AND SOME OF THE PANELS IN THE DISPLAY CASE WERE MADE OF SHATTERPROOF PLEXIGLASS; PLAINTIFF'S PREMISES-LIABILITY CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's premises-liability cause of action against defendant school district should not have been dismissed. Infant plaintiff was pretending to play basketball when he inadvertently slapped a display case in the hall of the school and the glass shattered. There was evidence glass in the display case had shattered before and some of the glass panels were made of shatterproof plexiglass:

The defendant's evidence in support of the motion did not eliminate triable issues of fact as to whether it had notice of the allegedly dangerous or defective condition because, among other things, the head custodian of the school testified at his deposition that at least one other glass panel in a similar display case in the school had shattered prior to the accident … . Further, the evidence submitted in support of the defendant's motion failed to eliminate all triable issues of fact as to whether the glass panel was open and obvious and not inherently dangerous. In particular, the evidence demonstrated that the display case where the accident occurred contained two panes of shatterproof plexiglass and one glass pane and that the infant plaintiff was under the impression that the display case was made entirely of unbreakable material. R.B. v Sewanhaka Cent. High Sch. Dist., 2022 NY Slip Op 04616, Second Dept 7-20-22

Practice Point: Here a glass panel in a display case located in the hallway of a school shattered when plaintiff-student slapped it. There was evidence a similar incident occurred in the past, and some of the panels in the display case were made of shatterproof plexiglass. Therefore there was evidence the school had notice of the dangerous condition and there was a question whether the dangerous condition was open and obvious.

NEGLIGENCE, SLIP AND FALL.

ALTHOUGH THE STEP WAS MARKED AND THERE WAS A WARNING SIGN, THERE WAS EVIDENCE THE STEP AND THE SIGN COULD NOT BE SEEN WHEN THE AREA WAS CROWDED; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS STAIR-FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this stair-fall case should not have been granted. Although there was evidence the single step in defendant's nightclub was marked and there was a warning sign, there was also evidence the area was crowded, obscuring the step and the sign:

… [T]he defendants' submissions demonstrated that the single-step riser was located between the dance floor and another area of the premises, such that persons exiting the dance floor in that direction would traverse the area where the step was located and a crowd could form, obscuring both a warning sign which was below eye level, and the step which was painted white. The plaintiff testified at her deposition that the premises were crowded, and that she did not see the step or the paint on the step. Another witness testified at her deposition that the premises were so crowded that the witness could not see the floor. Kernell v Five Dwarfs, Inc., 2022 NY Slip Op 04624, Second Dept 7-20-22

Practice Point: Here the step where plaintiff allegedly fell was marked and there was a warning sign. But there was evidence that when this area of defendants' nightclub was crowded neither the step nor the sign could be seen. Defendants' motion for summary judgment in this stair-fall case should not have been granted.

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF'S MOTORCYCLE WAS SO CLOSE AS TO CONSTITUTE AN IMMEDIATE HAZARD WHEN DEFENDANT ATTEMPTED TO MAKE A LEFT TURN ACROSS PLAINTIFF'S LANE OF TRAFFIC; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this intersection traffic accident case should not have been granted summary judgment. Plaintiff motorcyclist collided with defendants' vehicle as defendant driver was attempting to make a left turn crossing plaintiff's lane of traffic. The Second Department determined there was a question of fact about whether plaintiff's motorcycle was so close as to constitute an immediate hazard at the time defendant initiated the turn:

Pursuant to Vehicle and Traffic Law § 1141, "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard" … . A violation of this statute constitutes negligence per se … .

The plaintiff failed to meet his prima facie burden of demonstrating entitlement to judgment as a matter of law on the issue of liability. In support of his motion, the plaintiff submitted, inter alia, the transcripts of his deposition testimony and that of the defendants. This evidence, when viewed in the light most favorable to the defendants, as the nonmoving parties, raised triable issues of fact as to whether, at the time the defendant driver initiated her turn, the plaintiff's motorcycle was "so close as to constitute an immediate hazard" … . DePass v Beneduci, 2022 NY Slip Op 04622, Second Dept 7-20-22

Practice Point: Vehicle and Traffic Law 1141 prohibits making a left turn when oncoming traffic is "so close as to constitute an immediate hazard." Plaintiff motorcyclist collided with defendant's car as defendant attempted a left turn across plaintiff's lane of traffic. Supreme Court granted plaintiff's motion for summary judgment but the Second Department held there was a question of fact whether

plaintiff was '"so close as to constitute an immediate hazard" when defendant initiated her turn.

NEGLIGENCE. SLIP AND FALL, CONSTRUCTIVE NOTICE.

THE BUILDING DEFENDANTS DEMONSTRATED THE AREA WHERE PLAINTIFF ALLEGED SHE SLIPPED AND FELL ON WATER ON THE FLOOR WAS INSPECTED AND FOUND TO BE DRY CLOSE IN TIME TO THE ALLEGED FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the affidavit of a building porter stating that the area where plaintiff slipped and fell was dry when he inspected shortly before the alleged fall warranted granting defendants' summary judgment motion. Plaintiff alleged she slipped and fell on water ono the floor:

…[T]the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not create the hazardous condition or have actual or constructive notice of it. In support of the motion, the defendants submitted a transcript of the deposition testimony and affidavit of the building's porter, which established that, shortly before the accident, the porter traversed the hallway where the accident occurred, inspected the floor for wetness, and observed that the floor was dry … . Serebrenik v Chelsea Apts., LLC, 2022 NY Slip Op 04658, Second Dept 7-20-22

Practice Point: When a defendant brings a summary judgment motion in a slip and fall case, the motion papers must demonstrate the defendant did not create the alleged dangerous condition and did not have notice of the alleged dangerous condition. If defendant can show the area was inspected close in time to the fall and the area was clean (or dry in this case), the defendant will have demonstrated a lack of constructive notice of the condition. Absent evidence to the contrary presented in opposition, summary judgment in favor of the defendant is warranted.

TOXIC TORTS, ASBESTOS EXPOSURE.

PLAINTIFF DID NOT PRESENT EXPERT OPINION TO SUPPORT THE ALLEGATION HE INHALED SUFFICIENT AMOUNTS OF ASBESTOS TO HAVE CAUSED HIS CANCER; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff in this asbestos-exposure case did not raise a question of fact about whether his exposure to asbestos was sufficient to have caused his cancer. Plaintiff alleged he was exposed to asbestos when he installed defendant ABI's vinyl floor tiles. Defendant presented evidence from simulation studies and plaintiff offered no expert evidence in opposition:

In Nemeth v Brenntag N. Am. (___ NY3d ___, 2022 NY Slip Op 02769 [2022]), the Court of Appeals, while recognizing its conclusion in Parker v Mobil Oil Corp. (7 NY3d 434 [2006]) that precise qualification of exposure to a toxin is not always required, stated that causation nonetheless requires plaintiff to provide proof of "sufficient exposure to a substance to cause the claimed adverse health effect" … . …

Plaintiff challenges the opinion proffered by ABI's expert, who relied upon calculations arising from experiments funded by defendants, in determining that decedent was exposed, if at all, to asbestos in amounts similar to those in ambient air, an exposure insufficient to cause cancer. While the reliability of those calculations could pose an issue of credibility, the fact that they were performed by a paid expert does not automatically invalidate their conclusions. Plaintiff offered no expert to counter ABI's calculation of decedent's cumulative lifetime exposure, and thus no question of fact was raised as to its validity … . Killian v A.C. & S., Inc., 2022 NY Slip Op 04610, First Dept 7-19-22

Practice Point: Here defendant presented evidence of simulation studies to show that plaintiff's exposure to asbestos was not sufficient to have caused his cancer and plaintiff presented no expert evidence in opposition. Defendant's motion for summary judgment should have been granted.

TOXIC TORTS, ASBESTOS EXPOSURE.

PLAINTIFF’S EXPERT EVIDENCE WAS NOT SUFFICIENT TO DEMONSTRATE PLAINTIFF INHALED ENOUGHT ASBESTOS FIBERS TO CAUSE HIS CANCER; DEFENDANT’S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff did not present sufficient expert evidence that his exposure to asbestos from defendant ABI’s vinyl floor tiles and sheet flooring caused his cancer. Plaintiff was an electrician and he alleged he worked in close proximity to workers installing ABI’s flooring:

[I]n asbestos exposure and other toxic tort cases, “an opinion on causation should set forth a plaintiff’s exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)” … As to specific causation, “there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the [relevant] harm” … .

… “[B]ecause there are times that ‘a plaintiff’s exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value,’ ‘it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community'” … . …

Plaintiff’s opposition failed to raise any issue of fact as to specific causation. A showing that the decedent “work[ed] in dust laden with asbestos generated from products containing asbestos” accompanied by “expert testimony that dust raised from manipulating asbestos products ‘necessarily’ contains enough asbestos to cause mesothelioma” is not enough … . Plaintiff’s medical expert did point to simulation studies measuring an average level of airborne asbestos as high as 0.27 f/cc during the cutting, sanding, and snapping of asbestos-containing floor tile. He did not, however, provide any correlation between the asbestos fiber levels to which plaintiff may have been exposed and the amount of inhaled asbestos that

would have caused decedent's lung cancer … .Pomponi v A.O. Smith Water Prods. Co., 2022 NY Slip Op 04612, First Dept 7-19-22

Practice Point: The general evidentiary requirements for a plaintiff's prima facie case in an asbestos-exposure care are clearly explained. Plaintiff's expert evidence was not sufficient to raise a question of fact about whether the exposure caused his cancer.

TOXIC TORTS, ASBESTOS EXPOSURE.

THE PROOF AT TRIAL DID NOT DEMONSTRATE PLAINTIFF INHALED SUFFICIENT LEVELS OF ASBESTOS WHEN USING DEFENDANT'S TALCUM POWDER TO HAVE CAUSED HER MESOTHELIOMA; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant J & J's motion to set aside the verdict in the asbestos-exposure trial should have been granted. Plaintiffs, as a matter of law, did not demonstrate the exposure to asbestos in defendant's talcum powder caused plaintiff's mesothelioma:

At trial, plaintiffs failed, as a matter of law, to carry their burden "to establish sufficient exposure to a substance to cause the claimed adverse health effect" … . To make such a showing, a plaintiff must present expert testimony providing a "scientific expression of the level of exposure to toxins in defendant's products that was sufficient to have caused the disease" … . Even if it is assumed that plaintiffs presented sufficient evidence to support their mineral expert's estimate of the amount of asbestos to which plaintiff Donna Olson was exposed each time she used J&J's talcum powder products, plaintiffs' medical expert never set forth a scientific expression of the minimum lifetime exposure to asbestos that would have been sufficient to cause mesothelioma, the disease in question … . Thus, the medical expert's testimony that mesothelioma could have resulted from "a significant exposure above normal background levels" was insufficient. Matter of New York City Asbestos Litig., 2022 NY Slip Op 04611, First Dept 7-19-22

Practice Point: This is another decision in a group of four decisions released on the same day by the First Department finding plaintiff's expert evidence failed, as a matter of law, to demonstrate plaintiff had inhaled enough asbestos to have caused lung disease.

TOXIC TORTS, ASBESTOS EXPOSURE.

WHETHER PLAINTIFF INHALED ENOUGH ASBESTOS TO CAUSE HIS CANCER WAS THE SUBJECT OF COMPETING SIMULATION STUDIES; PLAINTIFF'S EXPERT EVIDENCE WAS NOT SUFFICIENT TO DEFEAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant ABI's motion for summary judgment in this asbestos-exposure case should have been granted. Plaintiff sold vinyl floor tiles made by ABI. Plaintiff alleged when he cut, manipulated and broke the tiles in demonstrations for customers, he inhaled asbestos fibers which were embedded in the vinyl tiles. The Fist Department found the expert evidence did not demonstrate plaintiff was exposed to sufficient levels of asbestos to cause lung cancer:

ABI had the burden to tender sufficient evidence to demonstrate the absence of any material issues of fact as to causation … . Once this burden was met, it would fall to plaintiff to produce evidentiary proof, in admissible form, establishing that there were disputed material issues of fact … . * * *

The dispute based upon the competing simulation studies about whether the decedent was exposed to asbestos in an amount that exceeded ambient levels typically found in non-occupational settings is not enough to avoid summary judgment. … [S]imply showing that exposures to a toxin were "'excessive'" or "'far more'" a certain threshold (ambient) is not enough … . … [P]laintiff had the "'difficult, if not impossible,'" task of establishing that his decedent had a sufficient exposure to asbestos to have caused his lung cancer … . [Plaintiff's expert] does not provide any reliable correlation between the presence of asbestos fiber concentrations found in the studies and how much in haled asbestos would have caused lung cancer generally and the decedent's lung cancer in

particular. Dyer v Amchem Prods. Inc., 2022 NY Slip Op 04609, First Dept 7-19-22

Practice Point: This decision includes a useful discussion of the proof requirements in an asbestos-exposure case. The decision characterized the plaintiff's task of demonstrating sufficient exposure to cause cancer as "difficult, if not impossible."

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