NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
January 6 – 10, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts January 6 – 10, 2025, and Posted on the New York Appellate Digest Website on Monday, January 13, 2025. The Entries in the Table of Contents Link to the Summaries Which Link to the Full 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 Report.

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The First Department, reversing Supreme Court, determined the defendant hotel booking service, Agoda, could not be compelled to arbitrate in this slip and fall action against the hotel booked through Agoda. The terms of use confined Agoda's potential liability to the booking services and expressly excluded liability for personal injury:

A "party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute" … . Where arbitration provisions do not clearly and unequivocally provide that questions about the scope of the arbitration provisions are for the arbitration panel to determine, the threshold question whether the dispute is encompassed within an agreement to arbitrate is for the courts (CPLR 7503[b] …).

The arbitration clause in the terms of use covers "all disputes or claims arising out of or relating to your relationship with Agoda." The terms of use also define Agoda's role as providing a platform for individuals to browse information about accommodations and make reservations at accommodations. Furthermore, the terms of use make clear that "Agoda does not in any way . . . own, manage, operate or control" the accommodations and that Agoda will not be liable in damages for any "(PERSONAL) INJURY . . ., OR OTHER DAMAGES, ATTRIBUTABLE TO THE ACCOMMODATION." Because plaintiff's claim is one to recover damages for a personal injury caused by the resort's negligence, it does not arise from or relate to the relationship between plaintiff and Agoda, which was limited to plaintiff's booking a reservation at the resort, and therefore is not arbitrable … .

As for Agoda's motion to dismiss, the terms of use constitute documentary evidence under CPLR 3211(a)(1), and the limitation of liability clause in the terms of use definitively disposes of plaintiff's claim to recover damages from Agoda for personal injury caused by the resort's alleged negligence … . McWashington v Hyatt Corp., 2025 NY Slip Op 00050, First Dept 1-7-25

Practice Point: Here the hotel booking service's terms of use expressly excluded liability for plaintiff's personal injury at the hotel. Therefore the booking service could not be compelled to arbitrate in plaintiff's slip and fall case.

January 7, 2025

CIVIL PROCEDURE, CONTRACT LAW, LANDLORD-TENANT.

THE SIX-YEAR STATUTE OF LIMITATIONS BEGAN TO RUN WHEN THE LANDLORD COULD HAVE DEMANDED PAYMENT PURSUANT TO THE LEASE, NOT WHEN THE DEMAND WAS ACTUALLY MADE YEARS LATER (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the six-year statute of limitations for breach of contract (here, a lease) started running when a demand for payment could have been made, not when the demand was actually made:

… [A]lthough the motion court awarded the entirety of the amounts of unpaid additional rent going back to 2006, the landlord's inexplicable delay in asserting these counterclaims until September 13, 2019 rendered the amounts that accrued before September 13, 2013 time-barred (CPLR 213[2]). The law is well settled that the statute of limitations on breach of contract claims begin to run "when the party that was owed money had the right to demand payment, not when it actually made the demand" … . Because the limitations period cannot be extended "by simply failing to make a demand" … , the judgment must be reduced to include only those amounts that accrued on or after September 13, 2013, and we remand for the calculation of the proper award and commensurate reduction in statutory interest. Abarrotes Mixteca Corp., Inc. v Brisk, 2025 NY Slip Op 00034, First Dept 1-7-25

Practice Point: For a breach of contract, the statute of limitations begins to run when the party can demand payment pursuant to the contract, not when the demand is actually made. The statute of limitations cannot be extended by failing to make a demand.

January 7, 2025

CRIMINAL LAW, APPEALS.

THE STANDARD FOR AN INTERMEDIATE APPELLATE COURT'S REVIEW OF A SENTENCE CLARIFIED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a three-judge dissenting opinion, remitted the matter to the Appellate Division for a determination whether a sentence reduction is warranted using the correct standard. The defendant need not demonstrate extraordinary circumstances or an abuse of discretion by the sentencing court to warrant a review of the sentence by the intermediate appellate court:

The intermediate appellate courts are empowered to reduce a sentence that, though legal, is "unduly harsh or severe" (CPL 470.15 [6] [b]). The decisions whether a sentence warrants reduction under that standard, and the extent to which the sentence should be reduced, are committed to the discretion of the intermediate appellate court, which has "broad, plenary power" to reduce the sentence "without deference to the sentencing court" … . A defendant need not demonstrate extraordinary circumstances or abuse of discretion by the sentencing court in order to obtain a sentence reduction … . People v Brisman, 2025 NY Slip Op 00123, CtApp 1-9-25

Practice Point: The correct standard for review of a sentence in an intermediate appellate court is whether the sentence is "unduly harsh or severe." The decision to reduce a sentence is committed to the discretion of the intermediate court without deference to the sentencing court. The defendant need not show extraordinary circumstances or an abuse of discretion by the sentencing court.

January 9, 2025

CRIMINAL LAW, EVIDENCE, JUDGES.

THE DEFENDANT DID NOT CONSENT, IN A WRITING SIGNED IN OPEN COURT, TO THE SUBSTITUTION OF AN ALTERNATE JUROR AFTER DELIBERATIONS HAD BEGUN REQUIRING A NEW TRIAL; THE SHOWUP IDENTIFICATION OF DEFENDANT WAS UNREASONABLE AND UNDULY SUGGESTIVE REQUIRING DISMISSAL OF THE COUNTS RELATED TO ONE OF THE TWO ROBBERIES (SECOND DEPT).

The Second Department, reversing one of defendant's robbery convictions and ordering a new trial, determined (1) a new trial is required because the judge did not obtain defendant's written and signed consent to the substitution of an alternate juror after deliberations had begun, and (2) the showup identification of the defendant was unreasonable and unduly suggestive, requiring dismissal of the counts relating to one of the two robberies (there was no identification testimony at the trial):

"Under CPL 270.35, once the jury has commenced deliberations an alternate juror may not be substituted for a regular juror unless the defendant consents to the replacement . . . in writing . . . signed by the defendant in person in open court in the presence of the court" … . * * *

… [T]the People failed to establish that the showup identification was conducted in close temporal proximity to the crime … . Further, there was no unbroken chain of events or exigent circumstances that justified the showup identification, as the defendant was already under arrest for the second robbery … .

… [T]he People failed to establish that the showup identification was not unduly suggestive. Here, prior to the showup identification, the complainant was informed by the police officers that they had someone in custody who matched the description provided by the complainant. During the showup identification, the defendant was handcuffed with his hands behind his back and there were one to two police officers near the defendant as he was treated by emergency medical service providers. While these factors alone do not necessarily render a showup identification unduly suggestive, when viewed cumulatively with other factors, including that the officers informed the complainant that the defendant committed another crime around the corner, that the defendant's face was severely bruised and bleeding, and that it was "an active crime scene" with several surrounding officers

dealing with witnesses "[y]elling and screaming," the showup identification was unduly suggestive … . People v Simon, 2025 NY Slip Op 00117, Second Dept 1-8-25

Practice Point: A defendant's consent to the substitution of an alternate juror after deliberations have begun must be in writing signed in open court.

Practice Point: Consult this decision for an example of a showup identification deemed unreasonable and unduly suggestive.

January 8, 2025

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THE OFFICER WHO SEARCHED DEFENDANT'S PERSON INTENDED TO ARREST THE DEFENDANT AT THE TIME OF THE SEARCH; THEREFORE THE SEARCH WAS NOT A VALID SEARCH INCIDENT TO ARREST AND THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, reversing defendant's conviction and dismissing the indictment, determined the People did not prove the officer who searched defendant's person intended to arrest the defendant at the time of the search. Therefore the People did not prove the evidence was seized pursuant to a valid search incident to arrest and the evidence should have been suppressed:

Defendant was entitled to suppression of the cocaine and money recovered in a search of his person, which occurred after officers pulled over the minivan in which he was a passenger for two traffic violations and detected a strong odor of marijuana as they approached the van. An officer saw loose marijuana on defendant's lap, asked him to step out of the car, and immediately frisked him, finding a small plastic bag in defendant's pocket and a significantly larger one inside the top of his underwear. The drugs were not recovered in a valid search pursuant to a lawful arrest because the record fails to show that the officer had any intention of arresting defendant before recovering the cocaine … . People v Aragon, 2025 NY Slip Op 00055, First Dept 1-7-25

Practice Point: Unless the People prove the officer who searched defendant's person intended to arrest the defendant when the search was done, the search is not a valid search incident to arrest and suppression is required.

January 7, 2025

FAMILY LAW, EVIDENCE, JUDGES.

A MINOR INJURY TO ONE CHILD BY ANOTHER WHILE MOTHER WAS NAPPING NEARBY, AND A SUBSEQUENT VERBAL ARGUMENT WITH THE POLICE, DID NOT AMOUNT TO NEGLECT BY MOTHER (FIRST DEPT).

The First Department, reversing Family Court, determined the single incident in which one child injured another while mother was napping and a subsequent verbal argument with the police did not amount to neglect:

Petitioner failed to show by a preponderance of the evidence that a minor accident involving two of the children while the mother was napping constituted neglect. The agency's proof that the brother had a minor injury to his neck after an isolated incident did not establish that the child's mental or emotional condition was impaired or in imminent danger of being impaired as a result of the incident, or that the mother failed to exercise a minimum degree of care … . Indeed, the brother was without any visible injury shortly after the incident. Nor did the incident cause any impairment or imminent danger to the daughter or to the baby, who was asleep in the next room. Although an isolated accidental injury may constitute neglect if the parent was aware of an intrinsically dangerous situation … , there is no evidence that the mother's napping while the children were in close proximity and within earshot was intrinsically dangerous.

Similarly, Family Court's finding that the mother's interaction with the police in any respect rose to the level of neglect is not supported by a preponderance of the evidence. A verbal argument with a police officer did not pose any serious or potentially serious harm to the infant child, who was the only child with her at that time … . Matter of Rebecca F. (Danequea J.), 2025 NY Slip Op 00042, First Dept 1-7-25

Practice Point: One child inflicted a minor injury on another while mother was napping nearby. Subsequently mother argued with the police when she was not

allowed back in the apartment to get her cell phone charger. These incidents did not support Family Court's neglect finding.

January 7, 2025

FAMILY LAW, TRUSTS AND ESTATES.

THE PETITION FOR GUARDIANSHIP OF THE CHILD SHOULD NOT HAVE BEEN DISMISSED BECAUSE PETITIONER IS NOT RELATED TO THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined the petition for guardianship of the child should not have been dismissed on the ground petitioner was not a relative. The applicable provision of the Surrogate's Court Procedure Act (SCPA 1703) states the petition can be brought by "any person:"

Although the petitioner is not biologically related to the child, SCPA 1703, which is applicable to this proceeding (see Family Ct Act § 661), provides that a petition for the appointment of a guardian may be brought by "any person" (SCPA 1703 …). Nor was there any basis in the record to dismiss the petition with prejudice … . Matter of Karma-Marie W. (Jerry W.), 2025 NY Slip Op 00104, Second Dept 1-8-25

Practice Point: Pursuant to SCPA 1703 "any person" may petition for guardianship of a child. There is no requirement that petitioner be related to the child.

January 8, 2025

HUMAN RIGHTS LAW, ADMINISTRATIVE LAW, AGENCY, LANDLORD-TENANT, MUNICIPAL LAW.

PURSUANT TO THE NEW YORK CITY HUMAN RIGHTS LAW, PROPERTY OWNERS (LANDLORDS) MAY BE HELD VICARIOUSLY LIABLE FOR THE DISCRIMINATORY CONDUCT OF THEIR AGENTS IN DEALING WITH PROSPECTIVE TENANTS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kennedy, determined the owners of housing accommodations may be vicariously liable (pursuant to the

NYC Human Rights Law) for discrimination by their agents who deal with prospective tenants. Here plaintiff is an indigent person with AIDS. The complaint alleges he was denied housing by defendant, who acted as an agent for defendant property owners:

… [A]bsent vicarious liability, landlords would evade liability under the City HRL except when they directly interact with a prospective tenant. This is neither the mandate of the statute, nor supported by the legislative intent behind § 8-107 of the City HRL … .

The text of the City HRL also supports the imposition of vicarious liability upon landlords. Specifically, the key statutory remedy in the City HRL for housing discrimination is to approve the rental and to provide housing (see Administrative Code § 8-120[a][7]). Moreover, §§ 8-122 and 8-502 permit a tenant allegedly aggrieved by discriminatory practices to seek injunctive relief. In the absence of vicarious liability against owners, who have title to the prospective property, these remedies would be unavailable and rendered meaningless … . Newson v Vivaldi Real Estate LTD., 2025 NY Slip Op 00052, First Dept 1-7-25

Practice Point: Pursuant to the NYC Human Rights Law, landlords may be vicariously liable for the discriminatory conduct of their agents in dealing with prospective tenants.

January 7, 2025

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF FELL FROM A SCAFFOLD WITHOUT GUARDRAILS; DEFENDANTS' EVIDENCE THAT GUARDRAILS WERE AVAILABLE WAS NOT STRONG ENOUGH TO RAISE A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff in this scaffold-fall case was entitled to summary judgment on his Labor Law 240(1) cause of action. Defendants argued that guardrails for the scaffold were available but plaintiff failed to use them. The First Department held that the evidence of the availability of the guardrails was not strong enough to raise a question of fact:

"Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in

the immediate vicinity of the accident" … . Caselaw has not further defined the meaning of "readily available," beyond qualifying that a safety device need not be "in the immediate vicinity." Nonetheless, the seminal Gallagher case itself specifies that the worker should at least "kn[o]w where to find the safety devices" … . Conversely, a defendant may do much to show that safety devices were readily available by showing that the worker knew "exactly where they could be found" … .

While defendants indicated that workers were generally aware that railings were available throughout the site, defendants failed to show that their precise locations were made known to the workers. The affidavits of the three foremen and coworker are conclusory, the record does not specify or even approximate the location of the guardrails, and at oral argument, counsel was unable to specify where these safety devices could be found. Moreover, although the record contains photos of the subject scaffold, there are no photographs of the missing guardrails that might serve as a guide to their possible location. Defendant's proof demonstrated only "[t]he general availability of safety equipment at a work site [which] does not relieve the defendants of liability" … . Perez v 1334 York, LLC, 2025 NY Slip Op 00066, First Dept 1-7-25

Practice Point: Although a defendant may escape liability in a Labor Law 240(1) action if the plaintiff failed to use available safety equipment, proof of the "general availability" of the safety equipment does not raise a question of fact. The proof of available safety equipment must be specific. Here there was no evidence the defendants even knew where the safety devices were.

January 7, 2025

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, EVIDENCE.

PLAINTIFF WAS NOT IN AN AREA IN WHICH FALLING OBJECTS COULD BE ANTICIPATED, SO THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED; PLAINTIFF WAS STRUCK BY A BOARD INTENTIONALLY THROWN INTO THE EXCAVATED AREA WHERE HE WAS WORKING; THE LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION PROPERLY SURVIVED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined plaintiff's Labor Law 240(1) and 241(6) causes of action should have been dismissed. Plaintiff was in an excavated area four or five feet below ground level when a worker at ground level threw a board into the excavated area which struck plaintiff. Apparently throwing boards into the excavated area was part of the work, so the Labor Law 200 and negligent supervision causes of action survived:

Defendant thus demonstrated prima facie entitlement to judgment as a matter of law by showing that plaintiff was not injured by an "object [that] fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" … .T he burden thus shifted to plaintiff to raise a triable issue of fact, which plaintiff failed to do" … , requiring dismissal of the Labor Law § 240 (1) cause of action. * * *

Defendant's proof showed that the dig area was not "normally exposed to falling material or objects" (12 NYCRR 23-1.7 [a] [1]), and, in any event, plaintiff was working only four to five feet below grade. Thus, defendant demonstrated the "overhead protection" regulation was not applicable … . Accordingly, defendant met its preliminary burden to show that plaintiff could not recover under Labor Law § 241 (6) as a matter of law … . Plaintiff's proof does not raise an issue of fact on this point, thus dismissal of the Labor Law § 241 (6) claim should have been granted … . James v Marini Homes, LLC, 2025 NY Slip Op 00132, Second Dept 1-9-25

Practice Point: If the safety precautions related to falling objects are not applicable because the plaintiff was working in an area where falling objects could not be anticipated, then the "falling objects" protections in Labor Law 240(1) and 241(6) will not be triggered.

January 9, 2025

NEGLIGENCE, MUNICIPAL LAW EMPLOYMENT LAW, IMMUNITY.

PLAINTIFF ALLEGED HE WAS SEXUALLY ABUSED BY AN EMPLOYEE OF THE COUNTY SHERIFF'S DEPARTMENT IN A GUARDED DEPARTMENT PARKING LOT AND IN A LOCKED BATHROOM IN THE JAIL; BECAUSE THE COUNTY WAS ENGAGED IN A GOVERNMENTAL, NOT A PROPRIETARY, FUNCTION (PROVIDING SECURITY FOR THE PARKING LOT AND JAIL), PLAINTIFF MUST DEMONSTRATE THE COUNTY OWED HIM A SPECIAL DUTY, WHICH HE WAS UNABLE TO DO (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligence action against the county in this Child Victims Act case should have been dismissed. Plaintiff alleged defendant Weis, a corrections officer employed by defendant Suffolk County Sheriff's Department, sexually abused him in a guarded parking lot at the Sheriff's Department and in a locked bathroom in the jail. The Second Department held that the alleged negligence related to a governmental function, not a proprietary function of the Sheriff's Department, requiring plaintiff to demonstrate he was owed a "special duty:"

… [T]he specific acts or omissions that allegedly caused the plaintiff's injuries were the defendant's decisions regarding the level of security and surveillance to provide in a fenced-in jail parking lot, with admission controlled by a posted guard, or within the facility itself. Those decisions go beyond the scope of the defendant's duty as a landlord and constitute actions undertaken in the defendant's police protection capacity … . Accordingly, the specific acts or omissions at issue here involved a governmental function.

… [B]ecause the defendant was engaged in a governmental function, the plaintiff was required to demonstrate that the municipality owed him a "special duty" … . A special duty can arise, as relevant here, where "the plaintiff belonged to a class for whose benefit a statute was enacted" or "the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally" … . Here, the defendant demonstrated, prima facie, that it did not owe a special duty to the plaintiff, and the plaintiff failed to raise a triable issue of fact in opposition … . Neary v Suffolk County Sheriff's Dept., 2025 NY Slip Op 00105, Second Dept 1-8-25

Practice Point: It is not easy to determine whether a governmental entity is engaged in a governmental function or a proprietary function at the time of an alleged negligent act or omission. Here plaintiff alleged abuse by a Sheriff's Department employee in the guarded department parking lot and in a locked bathroom in the jail. The Second Department deemed the security of the parking lot and the jail a governmental function (acting as a landlord) and held the county could not be liable unless it owed plaintiff a 'special duty." Plaintiff was unable to demonstrate a "special duty."

January 8, 2025

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

PLAINTIFF VIOLATED THE VEHICLE AND TRAFFIC LAW BY MAKING A LEFT TURN DIRECTLY INTO DEFENDANT'S PATH OF TRAVEL WHEN DEFENDANT HAD A GREEN LIGHT; PLAINTIFF'S TESTIMONY THAT DEFENDANT WAS SPEEDING WAS NOT ENOUGH TO RAISE A QUESTION OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver was entitled to summary judgment in this intersection traffic accident case. Defendant had the right-of-way (green light) when plaintiff made a left turn directly into defendant's path of travel. Plaintiff's testimony that defendant was speeding was not enough to raise a question of fact:

"A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se" … . "Vehicle and Traffic Law § 1141 provides that the 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. Further, Vehicle and Traffic Law § 1163(a) provides that no person shall turn a vehicle at an intersection . . . until such movement can be made with reasonable safety" … . "Although a driver with the right-of-way is entitled to anticipate that the other driver will obey the traffic laws requiring him or her to yield, a driver is bound to see what is there to be seen through the proper use of his or her senses and is negligent for failure to do so" … . However, "a driver with the right-of-way

who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" … . * * *

… [P]laintiff's contention that the defendant was operating his vehicle at an excessive speed "is speculative and unsupported by any competent evidence" … . The defendant testified at his deposition that he was driving below the speed limit, and the plaintiff admitted during her deposition that she did not see the defendant's vehicle prior to the collision … . Although evidence regarding the force of a collision or the manner in which a vehicle moved as a result thereof may be sufficient to create an inference that a driver was speeding in some circumstances … , the plaintiff's deposition testimony was not sufficient to create such an inference … . Further, the plaintiff's "contention[ ] that [the defendant] could have avoided the accident . . . w[as] speculative and unsupported by the record … . Morante v Blaney, 2025 NY Slip Op 00086, Second Dept 1-8-25

Practice Point: Although proof that defendant driver with the right-of-way was speeding when the plaintiff driver violated the Vehicle and Traffic Law by making a left turn may raise a question of fact, here plaintiff driver's testimony standing alone, claiming defendant was speeding, was not enough to raise a question of fact.

January 8, 2025

WORKERS' COMPENSATION, EVIDENCE.

DETERMINING SCHEDULE LOSS OF USE BY COMPARING THE RANGE OF MOTION OF LIMBS ON THE INJURED SIDE TO THE RANGE OF MOTION OF CORRESPONDING LIMBS ON THE OTHER SIDE MAY NOT BE APPROPRIATE IF THE OTHER SIDE HAS ALSO SUFFERED INJURIES, WHETHER PERMANENT OR TEMPORARY, IN THE PAST (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined comparison of the ranges of motion of the injured limbs to the corresponding limbs on the other side of the body (contralateral members), which resulted in 0 % loss of schedule use (SLU), was a flawed approach. The Board concluded that such a comparison was not appropriate only if the injuries on the other side of the body are permanent, which was not demonstrated to be the case here. The Third Department disagreed and held that the comparison may also be inappropriate if

the prior injuries on the other side of the body were temporary, The matter was remitted:

… [W]e agree that evidence of a permanent physical or functional impairment of the contralateral member due to traumatic injury or other condition that does not affect the subject member would render a comparison to the contralateral member when determining range of motion inappropriate. However, comparing contralateral members that have temporary physical or functional impairments, either due to work-related or nonwork-related injuries, would also be inappropriate as such comparisons could equally result in inequitable range of motion findings. In our view, the Board's interpretation of section 1.3 (3) (b) of the guidelines to apply only to permanent physical or functional impairments is unreasonable and cannot be upheld … . Here, the Board rejected [the] findings that a comparison of the contralateral members was inappropriate due to a lack of evidence that the injuries that claimant suffered to those members in the 2014 work-related accident resulted in permanent impairments. Under these circumstances, we remit the matter to the Board so that a proper assessment regarding a comparison of contralateral members may occur … . Matter of Brooks v New York City Tr. Auth., 2025 NY Slip Op 00130, Third Dept 1-9-25

Practice Point: Consult this decision for insight into the problems raised by determining a loss of schedule use by comparing ranges of motion on both sides of the body. Comparison of the injured side to the other side may not be appropriate if the other side has been injured in the past.

January 9, 2025

WORKERS' COMPENSATION, NEGLIGENCE, CIVIL PROCEDURE.

THE JUSTICE FOR INJURED WORKERS ACT (JIWA), WHICH TOOK EFFECT DECEMBER 30, 2022, AMENDED THE WORKERS' COMPENSATION LAW SUCH THAT A WORKERS' COMPENSATION BOARD RULING CANNOT BE GIVEN COLLATERAL ESTOPPEL EFFECT IN A SUBSEQUENT PERSONAL INJURY ACTION; THE FIRST DEPARTMENT HELD THE JIWA APPLIES RETROACTIVELY (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Moulton, determined the amendment to the Workers' Compensation Law (the Justice for Injured Workers Act [JIWA]), which precludes giving a Workers' Compensation Board's ruling collateral estoppel effect in a subsequent personal injury action, applies retroactively. Therefore the defendants' motion for leave to amend their answer to add the collateral estoppel defense should have been denied:

Plaintiff alleges that he sustained neck and back injuries in a construction site accident that occurred on August 6, 2020. He commenced this action on September 28, 2020, and separately applied for workers' compensation benefits. In a decision filed October 19, 2021, a three-judge panel of the Workers' Compensation Board held that plaintiff's claimed injuries were not causally related to his accident. … [D]efendants moved, in effect, for summary judgment dismissing plaintiff's neck and back claims, based on the Workers' Compensation Board's decision to which, they argued, the court should give collateral estoppel effect. * * *

JIWA's legislative sponsor explained that its purpose was to correct what the Legislature perceived to be an injustice to injured workers caused by Second Department precedent (see Langdon v WEN Mgt. Co. (147 AD2d 450 [2d Dept 1989]) and left unresolved by the Court of Appeals' decision in Auqui v Seven Thirty One Ltd. Partnership (22 NY3d 246 [2013]) … . Thus, JIWA was intended to return to what the Legislature perceived to have been the rule "for almost 80 years" — namely that courts, in third-party actions, would "reject[ ] attempts by defendants to apply collateral estoppel" to decisions reached in the "swift[ ]" and "cursory" workers' compensation context — and that workers would not be prevented "from exercising their constitutional right to a jury trial" … . Accordingly, the Legislature clearly intended JIWA to be remedial in nature, to correct an unintended judicial interpretation, and to reaffirm what the Legislature

believed the law should be. Garcia v Monadnock Constr., Inc., 2025 NY Slip Op 00154, First Dept 1-9-25

Practice Point: The December 30, 2022, amendment to the Workers' Compensation Law which precludes giving Workers' Compensation Board rulings collateral estoppel effect in subsequent personal injury actions applies retroactively.

January 9, 2025