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# CasePrepPlus

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Editor: **Bruce Freeman**

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## COURT OF APPEALS

### APPEALS, MENTAL HYGIENE LAW.

BECAUSE OF A LACK OF PLACEMENT OPTIONS, A CHILD REMOVED FROM SCHOOL WHEN SHE BECAME UNMANAGEABLE REMAINED IN A HOSPITAL EMERGENCY ROOM FOR WEEKS; THE PETITION SOUGHT HER RELEASE FROM THE EMERGENCY ROOM; THE APPEAL WAS DEEMED MOOT BECAUSE THE NYS OFFICE OF PEOPLE WITH DEVELOPMENTAL DISABILITIES HAD FOUND SUITABLE PLACEMENT AND INSTITUTED A PROGRAM TO ENSURE THE PROBLEM WOULD NOT RECUR.

The Court of Appeals, dismissing the appeal as moot, over an extensive dissent, determined the exception to the mootness doctrine should not be applied because the problem at the heart of the petition had been adequately addressed by the NYS Office for People with Developmental Disabilities (OPWDD). The subject child had been removed from school and sent to a hospital emergency room because she had become unmanageable. The child ended up staying in the emergency room for weeks because suitable placement was not available. The habeas corpus petition sought her release from the emergency room. During the weeks the child was in the emergency room programs were instituted to facilitate prompt suitable placement of children facing similar circumstances: "[D]uring the pendency of petitioner's appeal to this Court, OPWDD developed a new program, Crisis Services for Individuals with Intellectual and/or Developmental Disabilities ([CSIDD] 14 NYCRR 635-16.1 et seq.), aimed at preventing persons with developmental disabilities from experiencing a crisis that may result in hospitalization and thereby reducing the likelihood of these issues recurring. At oral argument before this Court, counsel for OPWDD and DOH represented that the services provided by CSIDD are now available throughout the entirety of the State of New York, and particularly in the region where the child resided." ***Matter of Mental Hygiene Legal Serv. v. Delaney*, 2022 N.Y. Slip Op. 02578, CtApp 4-21-22**

### WORKER'S COMPENSATION LAW.

A SUBSEQUENT INJURY TO THE SAME BODY "MEMBER" WHICH WAS THE SUBJECT OF A PRIOR SCHEDULE LOSS OF USE (SLU) AWARD NEED NOT BE REDUCED BY THE PERCENTAGE LOSS OF THE PRIOR AWARD.

The Court of Appeals, in a full-fledged opinion addressing two cases by Judge Cannataro, over an extensive dissent in each case, determined that, under Workers' Compensation Law section 15, a subsequent injury to the same body "member" may be fully compensable, notwithstanding a prior injury involving the same body "member:" "The common issue in these appeals is whether, under Workers' Compensation Law (WCL) § 15, a claimant's schedule loss of use (SLU) award must always be reduced by the percentage loss determined for a prior SLU award to a different subpart of the same body 'member' enumerated in section 15. We hold that separate SLU awards for different injuries to the same statutory member are contemplated by section 15 and, when a claimant proves that the second injury, 'considered by itself and not in conjunction with the previous disability' (WCL § 15 [7]), has caused an increased loss of use, the claimant is entitled to an SLU award commensurate with that increased loss of use." ***Matter of Johnson v. City of New York*, 2022 N.Y. Slip Op. 02579, CtApp 4-21-22**

## FIRST DEPARTMENT

### CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION IN THIS A-FRAME LADDER-FALL CASE; ALTHOUGH NO DEPOSITIONS HAD BEEN TAKEN, THE DEFENDANT FAILED TO SHOW THE SUMMARY JUDGMENT MOTION WAS PREMATURE.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action in this A-frame ladder-fall case. The court noted that the motion for summary judgment was not premature, even though no depositions had been taken: "Plaintiff established prima facie that PPC is liable under Labor Law § 240(1) through plaintiff and his coworker's affidavits that the unstable eight-foot A-frame ladder, which was missing rubber feet, shifted, causing him to fall ... . It was undisputed that PPC was the owner of the property. Plaintiff also established that his work of retrofitting light fixtures was covered under § 240(1) and did not constitute mere maintenance ... . We reject

PPC's argument that plaintiff's motion was premature (CPLR 3212[f]). The fact that no depositions have been taken does not preclude summary judgment in plaintiff's favor, as PPC failed to show that discovery might lead to facts that would support its opposition to the motion ... . PPC also failed to show that facts essential to its opposition were within plaintiff's exclusive knowledge … . Its argument that deposition testimony might further illuminate issues raised by the affidavits is unavailing. 'The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion' ...". ***Laporta v. PPC Commercial, LLC*, 2022 N.Y. Slip Op. 02624, First Dept 4-21-22**

## CIVIL PROCEDURE, LANDLORD-TENANT, MUNICIPAL LAW, TAX LAW.

CLASS CERTIFICATION SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE CLASS WAS TOO SMALL; PLAINTIFF-TENANTS ALLEGED THE LANDLORD DE-REGULATED APARTMENTS WHILE RECEIVING J-51 TAX BENEFITS.

The First Department, reversing Supreme Court, determined plaintiffs, tenants of a 49-unit apartment building, should have been certified as a class. The complaint alleged the landlord deregulated apartments while receiving J-51 tax benefits: "Supreme Court erred in denying class certification on the ground that plaintiffs failed to show that 'the class is so numerous that joinder of all members . . . is impracticable' (CPLR 901[a][1]). *Borden v 400 E. 55th St. Assoc., L.P.* (24 NY3d 382, 383 [2014]) and subsequent cases, such as *Maddicks v Big City Props., LLC* (34 NY3d 116 [2019]), make it clear that qualified plaintiffs may 'utilize the class action mechanism to recover compensatory rent overcharges against landlords who decontrolled apartments in contravention of Rent Stabilization Law of 1969 (RSL) (Administrative Code of City of NY) § 26-516 (a) while accepting tax benefits under New York City's J-51 tax abatement program.' The legislature contemplated classes involving as few as 18 members ... . Here, as in Borden, plaintiffs allege defendant deregulated apartments while receiving J-51 tax benefits. Construing the class certification statute liberally ... given that the asserted class consists of former and current tenants who lived in the 16 units improperly treated as deregulated after November 15, 2013, while defendant was receiving J-51 tax benefits, it is reasonable to infer that some units in this 49-unit apartment building would have had more than one tenant and several tenants would have moved away, making joinder of all members impracticable ... . The identity of class members, i.e., which units were treated as deregulated and who leased them during the relevant time period, is within defendant's knowledge." ***Hoffman v. Fort 709 Assoc., L.P.*, 2022 N.Y. Slip Op. 02510, First Dept 4-19-22**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT WHETHER PEBBLE-SIZED DEBRIS WHICH FELL ON PLAINTIFF AND ALLEGEDLY SERIOUSLY INJURED HIS EYE GAVE RISE TO LIABILITY UNDER LABOR LAW §§ 240(1) AND 241(6).

The First Department, reversing (modifying) Supreme Court, determined there were questions of fact about liability pursuant to Labor Law §§ 240(1) and 241(6). Plaintiff was working in a shaft when pebble-sized debris fell on him, allegedly seriously injuring his eye. There were questions of fact whether the distance the debris fell was de minimus and whether the force with which the debris fell was de minimus. There was also a question of fact whether planking should have been installed above the shaft to protect against falling debris: "There are issues of fact as to whether the debris that fell on plaintiff — taking into account the elevation differential, the debris' weight, and the amount of force it could generate ... — was 'a load that required securing for the purposes of the undertaking at the time it fell' ... , and whether his injury was a direct consequence of defendants' 'failure to provide adequate protection against a risk arising from a physically significant elevation differential' ... . The trier of fact could find that the elevation differential between plaintiff and the level from which the debris fell was de minimis, that the debris' weight was inconsequential, or that the debris could not have generated any meaningful amount of force, and determine that plaintiff's 'injuries were the result of [a] usual and ordinary danger[] at a construction site' ... .. However, the trier of fact could determine that the elevation differential of at least one story was not de minimis, that the weight of the debris and the force it was capable of generating were significant, and that the debris should have been secured for the purpose of the undertaking." ***Peters v. Structure Tone, Inc.*, 2022 N.Y. Slip Op. 02518, First Dept 4-19-22**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

A HEAVY PUMP, 3 TO 4 FEET IN HEIGHT, WHICH WAS LEANING AGAINST THE WALL, TIPPED OVER AND STRUCK THE PLAINTIFF; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. A heavy fire pump that was leaning against the wall, unsecured, tipped over and struck plaintiff: "Liability under Labor Law § 240(1) arises where a safety device of the kind enumerated in the statute either proved inadequate to shield against injury resulting directly from the application of the force of gravity to a person or object or where no safety device was provided to shield against such injury ... . Here, plaintiff was injured when he and two coworkers were assigned to run conduits along the wall and ceiling of an approximately 8 by 10-foot fire pump room. As they were looking at the wall and ceiling and deciding how to proceed, plaintiff felt a sharp pain in his leg when a 3-to-4 foot tall, 300-500+

pound fire pump, which had been standing upright on the floor, on its narrower end and unsecured, fell on his leg. Where a load positioned on the same level as the injured worker falls a short distance, Labor Law § 240(1) applies if the load, due to its weight, is capable of generating significant force ... . Here, the fire pump was required to be secured against tipping or falling and the failure to secure it was a violation of Labor Law § 240(1) ...". ***Grigoryan v. 108 Chambers St. Owner, LLC*, 2022 N.Y. Slip Op. 02620, First Dept 4-21-22**

### PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC-ACCIDENT CASE SHOULD HAVE BEEN GRANTED; THE EVIDENCE ESTABLISHED DEFENDANT FAILED TO STOP AT A STOP SIGN AND FAILED TO SEE WHAT SHOULD HAVE BEEN SEEN.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this intersection traffic-accident case should have been granted: "Plaintiffs established their prima facie entitlement to partial summary judgment by averring that, at the time of the accident, their vehicle was traveling westbound through an intersection at 91st Avenue in Queens, when defendants' vehicle failed to stop at a designated stop sign and struck the middle of the driver's side of plaintiffs' vehicle ... . A presumption of negligence arises from the failure of a driver at a stop sign to yield the right of way to the vehicle on the highway in violation of Vehicle and Traffic Law § 1142 ... . ... Defendants' claim that defendant Bennett stopped at the stop sign, and checked for oncoming traffic but did not see plaintiffs' vehicle until it suddenly appeared in front of her as she proceeded into the intersection, fails to rebut the presumption of negligence arising from her failure to yield the right of way to plaintiffs' vehicle, but instead indicates that she was negligent in failing to see what was there to be seen ...". ***Samnath v. Lifespire Servs., Inc.*, 2022 N.Y. Slip Op. 02643, First Dept 4-21-22**

## SECOND DEPARTMENT

### CIVIL PROCEDURE, PERSONAL INJURY.

THE DOCUMENT LABELED A "SUPPLEMENTAL" BILL OF PARTICULARS WAS ACTUALLY AN "AMENDED" BILL OF PARTICULARS BECAUSE IT ADDED NEW INJURIES AFTER THE NOTE OF ISSUE WAS FILED; THE DEFENDANT'S MOTION TO STRIKE THE AMENDED BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this slip and fall case, determined the document labeled a "supplemental" bill of particulars was actually a post-note-of-issue "amended" bill of particulars which should not have been served without leave of the court: "[T]he document that they denominated a 'supplemental bill of particulars' ... , was, in reality, an amended bill of particulars, as they sought to add new injuries (see CPLR 3043[b]). Accordingly, the Supreme Court erred in denying that branch of [defendant's] motion which was to strike the amended bill of particulars ... , denominated as a supplemental bill of particulars, which was served without leave of court and after the note of issue had been filed ... ". ***Naftaliyev v. GGP Staten Is. Mall, LLC*, 2022 N.Y. Slip Op. 02556, Second Dept 4-20-22**

### CRIMINAL LAW, ATTORNEYS.

THE FOR CAUSE CHALLENGE TO THE PROSPECTIVE JUROR WHO WAS AN ASSISTANT DISTRICT ATTORNEY IN THE OFFICE PROSECUTING THE DEFENDANT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED.

The Second Department, ordering a new trial, determined defense counsel's for cause challenge to a juror who was an assistant district attorney in the office which was prosecuting the defendant should have been granted: "[D]uring jury selection, the subject prospective juror informed the Supreme Court that she was presently working as an assistant district attorney, within the Queens County District Attorney's Office, the same agency that was prosecuting the defendant, and that she was familiar with the prosecutor, the defense attorney, and the Justice. As the People correctly concede, the juror's contemporaneous working relationship with the agency prosecuting the defendant required that juror's dismissal for cause ...". ***People v. Cortes*, 2022 N.Y. Slip Op. 02561, Second Dept 4-20-22**

### FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE, CIVIL PROCEDURE.

ALTHOUGH THE RPAPL 1304 FORECLOSURE NOTICE, TO BE VALID, MUST ACCURATELY STATE THE DEFAULT AMOUNT AND THE LENGTH OF TIME THE BORROWER HAS BEEN IN DEFAULT, THERE WAS NO SHOWING HERE THE STATED AMOUNT WAS INACCURATE; THE BANK DID NOT DEMONSTRATE IT WAS IN POSSESSION OF THE NOTE AT THE TIME THE ACTION WAS COMMENCED AND THEREFORE DID NOT DEMONSTRATE STANDING TO FORECLOSE; THE EVIDENCE OF A MERGER SUBMITTED IN REPLY COULD NOT BE CONSIDERED ON THE STANDING ISSUE.

The Second Department, in a full-fledged opinion by Justice Dillon, determined the notice of foreclosure required by RPAPL 1304, which, to be valid, must state the default amount and length of time the borrower has been in default, was not shown to be inaccurate. But the plaintiff bank did not demonstrate standing to foreclose. The evidence that the bank's standing was

based on a merger with the holder of the note was not submitted until the reply, and therefore should not have been considered: "Where an RPAPL 1304 notice fails to reflect information mandated by the statute, including but not limited to the duration and an amount of the default, the statute will not have been strictly complied with and the notice will not be valid ... . ... [T]here is no reason for us to conclude at this juncture that the $64,862.12 default sum set forth in the plaintiff's RPAPL 1304 notice reflects any actual error. The second paragraph of the plaintiff's 30-day notice explains that the $64,862.12 amount claimed to be due includes principal, interest, escrow payments, and late charges, which would necessarily raise the gross amount due to a sum that exceeds the amount of the missed principal. * * * ... [T]he plaintiff failed to establish, prima facie, that it had standing to commence the action. The plaintiff is not the original lender. The subject note, though attached to the complaint, bears no indorsement. And further, the plaintiff failed to produce evidence in admissible form as part of its prima facie case that the note was assigned to it prior to the date of commencement of the action ... . ... The certificate of merger showing that ESB-LI merged into the plaintiff does not demonstrate that the plaintiff is the holder of the subject note. It was submitted to the Supreme Court for the first time in the plaintiff's reply papers, and therefore, could not be considered as part of the plaintiff's initial prima facie proof of standing ... ". ***Emigrant Bank v. Cohen*, 2022 N.Y. Slip Op. 02532, Second Dept 4-20-22**

## MUNICIPAL LAW.

IN THIS TRAFFIC ACCIDENT CASE INVOLVING THE DEFENDANT NYC TRANSIT AUTHORITY'S BUS, THE AUTHORITY GAINED TIMELY KNOWLEDGE OF THE POTENTIAL CLAIM WHEN IT INVESTIGATED THE ACCIDENT AND WAS NOT PREJUDICED BY THE DELAY; THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, NOTWITHSTANDING THE ABSENCE OF A REASONABLE EXCUSE.

The Second Department, reversing Supreme Court, determined the petition seeking leave to file a late notice of claim in this traffic accident case should have been granted. It was alleged defendant NYC Transit Authority's bus collided with a NYC sanitation truck which then collided with petitioner's car. The Transit Authority investigated the accident and therefore had knowledge of the essential facts of the claim. Because the defendant had timely actual knowledge of the potential claim and did not demonstrate prejudice from the delay, petitioner did not need to present a reasonable excuse for the late notice: "[A]s the Authority acquired timely knowledge of the essential facts constituting the petitioner's claim, the petitioner met his initial burden of showing that the Authority would not be prejudiced by the late notice of claim ... . In response to the petitioner's initial showing, the Authority failed to come forward with particularized evidence demonstrating that the late notice of claim substantially prejudiced its ability to defend the claim on the merits ... . Since the Authority had actual knowledge of the essential facts underlying the claim and no substantial prejudice to the Authority was demonstrated, the petitioner's failure to provide a reasonable excuse for the delay in serving the notice of claim did not serve as a bar to granting leave to serve a late notice of claim ...". ***Matter of Manbodh v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 02544, Second Dept 4-20-22**

## MUNICIPAL LAW, CONSTITUTIONAL LAW.

THE LOCAL LAW REQUIRING APPROVAL OF PROPOSED ALTERATIONS TO BUILDINGS IDENTIFIED AS "HISTORIC" IS NOT UNCONSTITUTIONAL.

The Second Department, reversing Supreme Court, determined a local law requiring permits for changes to buildings designated "historic" was not unconstitutional. The local law, the "Historic Building Preservation Law," gave the town's Historic Building Preservation Commission (HBPC) the power to approve or disapprove proposed alterations to historic buildings which were identified as such in a "Survey:" " 'Legislative enactments enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt' ... . 'The exceedingly strong presumption of constitutionality applies . . . to ordinances of municipalities' ... . The Fifth and Fourteenth Amendments to the United States Constitution guarantee due process protections for life, liberty, and property (see US Const Amends V, XIV). 'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property' ... . ... Here, the petitioners/plaintiffs failed to identify any constitutionally protected property interest that was implicated in the enactment of the 2017 local law and, thus, the petitioners/plaintiffs were not entitled to a hearing prior to the enactment of that law ... . Contrary to the petitioners/plaintiffs' contention, the 2017 local law did not require property owners to submit to warrantless searches of their properties in order to challenge a property's classification or inclusion on the Survey." ***Matter of Santomero v. Town of Bedford*, 2022 N.Y. Slip Op. 02552, Second Dept 4-20-22**

### PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

ALTHOUGH THE SECOND ORDER TO SHOW CAUSE SEEKING LEAVE TO FILE A LATE NOTICE OF CLAIM WAS FILED TWO DAYS AFTER THE ONE-YEAR-NINETY-DAY LIMITATIONS PERIOD, THE STATUTE OF LIMITATIONS WAS TOLLED FOR THREE DAYS BETWEEN THE FILING AND THE DENIAL OF THE FIRST ORDER TO SHOW CAUSE; THE MEDICAL RECORDS PROVIDED THE MUNICIPALITY WITH NOTICE OF THE ESSENTIAL FACTS OF THE CLAIM; THE MOTION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the motion seeking leave to file a late notice of claim was timely and should have been granted. Although the second order to show cause was submitted two days beyond the one year-and-90-day deadline for suing a municipality. the statute of limitations was tolled for three days between the filing of the first order to show cause and the denial of that first motion: "Since the time to serve a notice of claim upon a public corporation cannot be extended beyond the time limited for commencement of an action against that party ... , the court lacks authority to grant a motion for leave to serve a late notice of claim made more than one year and 90 days after the cause of action accrued, unless the statute of limitations has been tolled ... . 'CPLR 204(a) tolls the statute of limitations while a motion to serve a late notice of claim is pending' ... . Where 'a court declines to sign an initial order to show cause for leave to serve a late notice of claim on procedural grounds, but a subsequent application for the same relief is granted, the period of time in which the earlier application [was] pending [is also] excluded from the limitations period' ... . ... [T]he medical records provided the defendants with actual knowledge of the essential facts constituting the plaintiff's claim. The records evinced that a stroke code was called shortly after the plaintiff's presentation to the hospital, that, based on an assessment of her condition, it was decided that a tissue plasminogen activator was not needed, and that it was later determined that the plaintiff had suffered a stroke but that it was too late to administer that drug. The plaintiff further made an initial showing that the defendants would not suffer any prejudice by the delay in serving the notice of claim, and the defendants failed to rebut the showing with particularized indicia of prejudice ... . Finally, where, as here, there is actual knowledge and an absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim ...". ***Ahmed v. New York City Health & Hosp. Corp.*, 2022 N.Y. Slip Op. 02521, Second Dept 4-20-22**

# THIRD DEPARTMENT

### CRIMINAL LAW, EVIDENCE, JUDGES.

THE EVIDENCE DEMONSTRATED THE DEFENDANT PUNCHED THE POLICE OFFICER AFTER THE DEFENDANT WAS SPRAYED IN THE FACE WITH PEPPER SPRAY; THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE TO THE ASSAULT CHARGE; TWO JUSTICE DISSENT.

The Third Department, reversing defendant's conviction and ordering a new trial, over a two-justice dissent, determined the justification-defense jury instruction should have been given in this assault case. The defendant punched a police officer after the defendant was sprayed in the face with pepper spray: "[T]he People introduced into evidence a video recording of the assault, in which defendant can clearly be seen punching a police sergeant after defendant is sprayed in the face with pepper spray. Testimony revealed, and the video corroborated, that the pepper spray was deployed because defendant was refusing to take off his shoes and change into footwear provided by the jail so that an officer could finish searching him before bringing him into the jail. However, the video depicts a very brief time period between the initial directive for defendant to remove his footwear and the deployment of the pepper spray. Based on this fact, combined with other circumstances surrounding the incident, we find that there is a reasonable view of the evidence that the use of the pepper spray constituted excessive force in this scenario." ***People v. Heiserman*, 2022 N.Y. Slip Op. 02588, Third Dept 4-21-22**

# FOURTH DEPARTMENT

### CRIMINAL LAW.

ROBBERY WAS THE FELONY UPON WHICH THE FELONY ASSAULT WAS PREDICATED; THEREFORE, THE SENTENCES FOR ASSAULT FIRST AND ROBBERY FIRST MUST RUN CONCURRENTLY.

The Fourth Department determined the sentences for assault first and robbery first should not have been imposed consecutively: "[T]he court erred in directing that the sentence on the count of assault in the first degree run consecutively to the sentence imposed on the count of robbery in the first degree because the robbery was the predicate felony for the felony assault (see Penal Law § 70.25 [2] ...). Inasmuch as '[t]he felony upon which felony assault is predicated is a material element of that crime,' the sentence imposed on the count of assault in the first degree must run concurrently with the sentence imposed on the count of robbery in the first degree ...". ***People v. Brown*, 2022 N.Y. Slip Op. 02655, Fourth Dept 4-22-22**

## CRIMINAL LAW, JUDGES, CONTRACT LAW, APPEALS.

ALTHOUGH THE ISSUE WAS NOT PRESERVED, DEFENDANT'S GUILTY PLEA WAS VACATED BECAUSE IT WAS INDUCED BY THE JUDGE'S PROMISE THAT ALL THE COURT'S ORDERS COULD BE APPEALED; IN FACT, THE DEFENDANT'S CONTENTION THAT TWO COUNTS OF THE INDICTMENT WERE DUPLICITOUS COULD NOT BE RAISED ON APPEAL.

The Fourth Department, vacating defendant's sentence in the interest of justice, determined the defendant's guilty plea was induced by the judge's promise that defendant could appeal from all the court's orders. In fact, however, by pleading guilty defendant could not appeal the order rejecting his argument that the first two counts of the indictment were duplicitous: "We agree ... with defendant that his plea was not knowingly, voluntarily, and intelligently entered. Although defendant failed to preserve that contention for our review ... , we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]). 'A trial court is constitutionally required to ensure that a defendant, before entering a guilty plea, has a full understanding of what the plea entails and its consequences' ... , and where 'a guilty plea has been induced by an unfulfilled promise, the plea must be vacated or the promise must be honored' ... . Here, the court repeatedly promised defendant, who was proceeding pro se, that he would retain the right to appeal from all of its orders. The court reiterated that promise during the plea colloquy and did not advise defendant that he was forfeiting any challenge by pleading guilty. We conclude, however, that '[b]y pleading guilty, defendant forfeited his . . . contention that the first two counts of the indictment were duplicitous' ... . Consequently, '[i]nasmuch as the record establishes that defendant, in accepting the plea, relied on a promise of the court that could not, as a matter of law, be honored, defendant is entitled to vacatur of his guilty plea' ...". ***People v. Mothersell*, 2022 N.Y. Slip Op. 02661, Fourth Dept 4-22-22**

## CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE PEOPLE DID NOT PROVE THE ALLEGED ACTS OF SEXUAL MISCONDUCT OCCURRED AT LEAST 24 HOURS APART; THEREFORE THE PEOPLE DID NOT PRESENT PROOF SUPPORTING A 20 POINT ASSESSMENT FOR A "CONTINUOUS COURSE OF SEXUAL MISCONDUCT:" LEVEL THREE REDUCED TO LEVEL TWO.

The Fourth Department, reducing the defendant's risk lever from three to two, determined the People did not prove defendant engaged in a "continuous course of sexual misconduct" which requires that the acts be at least 24 hours apart: "The court erred … in assessing 20 points under risk factor 4 for having engaged in a continuous course of sexual misconduct. Points may be assessed under risk factor 4 if, as relevant here, the People establish by clear and convincing evidence that defendant engaged in 'two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours' ... . Here, '[a]lthough the People presented evidence that defendant engaged in acts of sexual contact with the victim on more than one occasion, they failed to establish 'when these acts occurred relative to each other' ... , and thus failed 'to demonstrate that such instances were separated in time by at least 24 hours' ...". ***People v. Ellis*, 2022 N.Y. Slip Op. 02654, Fourth Dept 4-22-22**

## CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

REFUSING TO TAKE A DWI BREATH TEST IS NOT AN OFFENSE.

The Fourth Department, reversing the conviction and dismissing the count, noted that refusing to take a DWI breath test is not an offense: "[W]e note that defendant's 'refusal to submit to a breath test did not establish a cognizable offense' ...". ***People v. Alim*, 2022 N.Y. Slip Op. 02671, Fourth Dept 4-22-22**

## ELECTION LAW, CONSTITUTIONAL LAW.

THE 2022 CONGRESSIONAL REDISTRICTING MAP FAVORED DEMOCRATS IN VIOLATION OF ARTICLE III OF THE NYS CONSTITUTION.

The Fourth Department, over a two-justice concurrence and a two-justice partial dissent, determined the NYS 2022 congressional redistricting map was drawn to favor democrats in violation of Article III of the NYS Constitution: "[W]e agree with petitioners and the court that the congressional map was unconstitutional in that it violated article III, § 4 (c) (5), which provides as relevant here that '[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.' * * * We conclude that evidence of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende, met petitioners' burden of establishing that the 2022 congressional map was drawn to discourage competition and favor democrats in violation of article III, § 4 (c) (5). First, democratic leaders in the legislature drafted the 2022 congressional redistricting map without any republican input, and the map was adopted by the legislature without a single republican vote in favor of it. Second, under the 2012 congressional map there were 19 elected democrats and 8 elected republicans and under the 2022 congressional map there were 22 democrat-majority and 4 republican-majority districts." ***Matter of Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 02648, Fourth Dept 4-21-22**

## FAMILY LAW, JUDGES.

IN THIS NEGLECT PROCEEDING AGAINST STEPMOTHER, THE STATUTORY REQUIREMENTS FOR THE ISSUANCE OF ORDERS OF PROTECTION IN FAVOR OF THE CHILDREN WERE NOT MET.

The Fourth Department, vacating the five-year orders of protection in favor of the children (re: respondent stepmother) in this neglect proceeding, determined the statutory criteria for issuance the orders of protection were not met: "[T]he stepmother contends that the court erred in issuing orders of protection in favor of the children with a duration of five years. We agree, and we therefore reverse the orders of protection ... . In an article 10 proceeding, the court may issue an order of protection, but such order shall expire no later than the expiration date of 'such other order made under this part, except as provided in subdivision four of this section' (Family Ct Act § 1056 [1]). Subdivision (4) of section 1056 allows a court to issue an independent order of protection until a child's 18th birthday, but only against a person 'who was a member of the child's household or a person legally responsible . . . , and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household.' Here, the orders of protection do not comply with Family Court Act § 1056 (1) and (4) because no other dispositional orders were issued with respect to the children at the time the court issued the orders of protection and the stepmother, although no longer living in the home, remains married to the children's mother ... . Moreover, the court erred in issuing the dispositional orders of protection without first holding a dispositional hearing. 'The Family Court Act directs that a dispositional hearing be held as a condition precedent to the entry of a dispositional order such as the order of protection granted by Family Court here' ...". ***Matter of Kayla K. (Emma P.-T.)*, 2022 N.Y. Slip Op. 02668, Fourth Dept 4-22-22**

## FORECLOSURE, CIVIL PROCEDURE, DEBTOR-CREDITOR.

THE STATUTE OF LIMITATIONS IN THIS FORECLOSURE ACTION STARTED ANEW WHEN DEFENDANT MADE A PARTIAL PAYMENT; DEFENDANT WAIVED THE LACK OF STANDING DEFENSE.

The Fourth Department, reversing Supreme Court, determined the statute of limitations in the foreclosure action had been restarted by partial payment and defendants had waived the argument that the plaintiff did not have standing: "The partial payment exception 'requires proof that 'there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder' ... . 'If the exception is established, the statute of limitations begins to run anew from the date of the partial payment' ... . * * * 'Having failed to interpose an answer which asserted the defense [of lack of standing] or to file a timely pre-answer motion raising that defense,' [defendant] waived his contention on his cross appeal that plaintiff lacked standing to commence the action ...". ***Citibank, N.A. v. Gifford*, 2022 N.Y. Slip Op. 02650, Fourth Dept 4-22-22**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF WAS DIRECTED TO LIFT A HEAVY BOX MANUALLY; THE FACT THAT A FORKLIFT WAS AVAILABLE WAS NOT DETERMINATIVE; A WORKER IS EXPECTED TO FOLLOW ORDERS; PLAINTIFFS' MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS LABOR LAW § 240(1) ACTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion to set aside the defense verdict in this Labor Law § 240(1) action should have been granted. The Labor Law § 240(1) claim was reinstated and judgment in favor of plaintiffs was granted. Apparently plaintiff was injured when lifting a heavy box after the stage manager directed him to do so. The fact that a forklift was available would only raise an issue of comparative negligence which will not defeat a Labor Law 240(1) claim: "[A]lthough defendants established that there was an available safety device, i.e., a forklift, and that plaintiff knew that it was available and that he was expected to use it, plaintiffs established that the stage manager instructed plaintiff and his coworkers to lift the box manually. Regardless of whether that stage manager was plaintiff's actual supervisor, plaintiff was under no obligation to demand safer methods for moving the box ... . To expect plaintiff to refuse the stage manager's demands 'overlooks the realities of construction work' ... . 'When faced with an . . . instruction to use an inadequate device [or no device at all], many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods' ...". ***Finocchi v. Live Nation Inc.*, 2022 N.Y. Slip Op. 02680, Fourth Dept 4-22-22**

## PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF AND DEFENDANT WERE HUNTING TURKEY WHEN DEFENDANT SHOT PLAINTIFF; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY SHOULD HAVE BEEN GRANTED, NOTWITHSTANDING POSSIBLE COMPARATIVE-NEGLIGENCE ISSUES.

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this hunting accident case should have been granted. Defendant, like the plaintiff, was hunting turkey when he shot plaintiff and his friend. Defendant subsequently pled guilty to attempted assault: "We agree with plaintiffs that they established as a matter of law that defendant was negligent by failing to exercise the degree of care that a reasonable person 'of ordinary prudence would exercise under the circumstances, commensurate with the known dangers and risks reasonably to be foreseen' ... ,

and that defendant failed to raise an issue of fact in response. We also agree with plaintiffs that triable issues of fact regarding plaintiff's comparative negligence do not preclude an award of summary judgment in plaintiffs' favor on the issue of defendant's negligence ...". ***Pachan v. Brown,* 2022 N.Y. Slip Op. 02684, Fourth Dept 4-22-22**

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