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Editor: Bruce Freeman

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FIRST DEPARTMENT

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

WHERE DEFENDANT ASSERTED HIS INNOCENCE AT TRIAL, HAS A PENDING APPEAL AND ASSERTS HIS RIGHT AGAINST SELF-INCRIMINATION IN THE SORA PROCEEDING, THE SORA COURT SHOULD NOT ASSESS POINTS UNDER RISK FACTOR 12 FOR FAILURE TO TAKE RESPONSIBILITY FOR THE OFFENSE.

The First Department, in a full-fledged opinion by Justice Pitt, reversing the SORA court, in a matter of first impression, determined that where defendant asserted his innocence at trial, has a pending appeal, and has asserted his right to avoid self-incrimination, he should not be assessed points under risk factor 12 for failing to take responsibility for the relevant offense: "[W]e conclude that a defendant who has invoked his Fifth Amendment right against self-incrimination and has a direct appeal pending should not be assessed points under risk factor 12. Considering this conclusion, and in view of defendant's consistent refusal to incriminate himself and the pending status of his direct appeal, the assessment of 10 points under this factor amounts to a violation of defendant's Fifth Amendment rights. * * * ... [D]efendant was forced to choose between, on the one hand, exercising his Fifth Amendment right against self-incrimination and being assessed points under risk factor 12, and, on the other, admitting responsibility for the acts that led to his conviction after so far maintaining his innocence and risking that those admissions would be used against him in a potential retrial or form the basis of a perjury charge. Ultimately, the penalty imposed on defendant when presented with this choice is that he was assessed 10 points under risk factor 12 and adjudicated a risk level two sex offender. The difference between a level one and level two sex offender adjudication is substantial and illustrative of why the penalty is so great as to compel self-incrimination. If defendant were classified as a level one sex offender, he would be required to register annually for a period of 20 years from the date of initial registration (see Correction Law § 168-h), but his personal information would not be listed in a publicly available database. However, as a level two sex offender, defendant would be required to register annually for life (see Correction Law § 168-h), and his photograph, address, place of employment, physical description, age, and distinctive markings would be included in a public database (see Correction Law § 168-q)." ***People v. Krull*. 2022 N.Y. Slip Op. 04783, First Dept 8-2-22**

LEGAL MALPRACTICE, NEGLIGENCE, ATTORNEYS.

FAILURE TO ALLEGE THAT "BUT FOR" DEFENDANT ATTORNEY'S NEGLIGENCE PLAINTIFF WOULD HAVE PREVAILED REQUIRED DISMISSAL OF THE LEGAL MALPRACTICE COMPLAINT.

The First Department determined plaintiff's legal malpractice complaint was properly dismissed for failing to allege that "but for" the attorney's negligence plaintiff would have prevailed: "Supreme Court properly dismissed plaintiff's legal malpractice cause of action in the original complaint because he failed to allege that 'but for' defendant's negligent conduct, he would have prevailed in the underlying action ... . Plaintiff's citation to a ruling in the underlying action denying dismissal of his fraud claim, among others, did not, without more, show that he would have prevailed in the underlying action had defendant timely commenced it by naming the proper parties in the original complaint ...". ***Markov v. Barrows*, 2022 N.Y. Slip Op. 04780, First Dept 8-2-22**

SECOND DEPARTMENT

CRIMINAL LAW.

UPON CONVICTION OF ROBBERY SECOND, ROBBERY THIRD, AS A LESSER INCLUDED OFFENSE, MUST BE DISMISSED.

The Second Department noted that robbery third is a lesser included offense of robbery second and must be dismissed upon conviction of robbery second: "[R]obbery in the third degree is a lesser included offense of robbery in the second degree (see CPL 300.30[4] ...). A verdict of guilt upon the greater count is deemed a dismissal of every lesser count (see CPL 300.40[3]). Accordingly, we vacate the conviction of robbery in the third degree and the sentence imposed thereon, and dismiss that count of the indictment …" . ***People v. Hardy*, 2022 N.Y. Slip Op. 04820, Second Dept 8-3-22**

CRIMINAL LAW, JUDGES, APPEALS.

A JURY NOTE WHICH REQUIRES NO ACTION BY THE COURT NEED NOT BE SHARED WITH DEFENSE COUNSEL.

The Second Department determined there was no need for the judge to notify defense counsel of a jury note which did not require any action by the court, Also, jury notes requesting exhibits did not need to be shared with counsel because counsel agreed at the outset of deliberations

that the jury could request exhibits: "In the defendant's view, the Supreme Court's failure to read note 6 into the record constituted a mode of proceedings error. We disagree. Note 6 did not request 'further instruction or information with respect to the law, [or] with respect to the content or substance of any trial evidence' (CPL 310.30). Nor did it indicate that the jury was deadlocked or struggling to reach a verdict on any or all of the counts submitted to it, or otherwise apprise the court of a significant development in the deliberations ... . All the note conveyed was that the jury was continuing to deliberate on all of the charges, and that they were nearing a verdict on the first count in the defendant's case, as well as the two counts in the codefendant's case. Plainly, then, there was no action for the Supreme Court to take, and, concomitantly, no input or participation from defense counsel was necessary to ensure that the defendant's rights were 'adequately protect[ed]' ... . Note 6 was, in short, not a substantive communication from the jury." ***People v. Edwards*, 2022 N.Y. Slip Op. 04818, Second Dept 8-3-22**

EMPLOYMENT LAW, BATTERY, FALSE IMPRISONMENT.

PLAINTIFF WAS DETAINED BY DEFENDANT HOME DEPOT'S EMPLOYEE BASED ON A FALSE ALLEGATION AND WAS SUBSEQUENTLY ARRESTED; PLAINTIFF'S VERDICT ON HIS BATTERY AND FALSE IMPRISONMENT CAUSES OF ACTION UPHELD.

The Second Department upheld a jury verdict (reducing it however) in favor of plaintiff who was detained in defendant Home Depot's store by a Home Depot employee based upon the false allegation plaintiff had assaulted a woman. Plaintiff was detained until the police arrived and then arrested. Plaintiff was a court attorney and was seeking a judicial nomination. Plaintiff was awarded $1.8 million, which the Second Department reduced to $500,000: "The jury, after a trial on the issue of liability, returned a verdict in favor of the plaintiff and against the defendants on the causes of action alleging battery and false imprisonment. ... False arrest and false imprisonment are two different names for the same common-law tort ... . The elements of the tort are intent to confine the plaintiff, the plaintiff was conscious of the confinement, the plaintiff did not consent to the confinement, and the confinement was not otherwise privileged ... . 'Probable cause is a complete defense to an action alleging . . . false imprisonment' ... . The fact that the police had probable cause to detain the plaintiff based on what Marrugo [the Home Depot employee] told them does not mean that Marrugo had probable cause to detain the plaintiff. Although a civilian complainant generally cannot be found liable for false imprisonment merely for providing information to the police which turns out to be wrong ... , a private person can be liable for false imprisonment for actively participating in the arrest such as 'importuning the authorities to act' ... . The record indicates that the plaintiff would not have been arrested but for Marrugo's detention of him, and importuning the police to arrest him. Marrugo instigated the arrest, making the police his agents in confining the plaintiff ... . Marrugo did so based upon false information that the plaintiff assaulted the female customer with a shopping cart." ***Wieder v. Home Depot U.S.A., Inc.*, 2022 N.Y. Slip Op. 04830, Second Dept 8-3-22**

FORECLOSURE, EVIDENCE.

PLAINTIFF BANK FAILED INCLUDE REFERENCED DOCUMENTS WITH ITS MOTION PAPERS AND THEREBY DID NOT DEMONSTRATE DEFENDANTS' DEFAULT OR PLAINTIFF'S STANDING IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank did not establish defendants' default or plaintiff's standing in this foreclosure action: "[T]he plaintiff submitted ... the affidavit of Christy Vieau, a document execution associate for the plaintiff, who, based upon her review of business records, attested to [defendant's] default in payment. While Vieau made the requisite showing that she was familiar with the plaintiff's record-keeping practices and procedures (see CPLR 4518[a]), she did not identify the records she relied upon, and did not attach them to her affidavit ... . Thus, her assertions as to the contents of these records were inadmissible ... . The plaintiff also failed to establish, prima facie, its standing to commence the action. ... 'A plaintiff has standing to commence a foreclosure action where it is the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint' ... . A plaintiff may establish its standing by 'demonstrating that the note was in its possession prior to the commencement of the action, as evidenced by its attachment of the endorsed note to the summons and complaint at the time the action was commenced' ... . Here, the plaintiff contends that it established standing by annexing a copy of the original note, endorsed to it, to the complaint. However, there is no copy of an endorsed note attached to the complaint. Rather, the copy of the note attached to the complaint states that it is an electronic document with an electronic transfer history, a fact wholly unaddressed by the plaintiff ...". ***Nationstar Mtge., LLC v. Koznitz I, LLC*, 2022 N.Y. Slip Op. 04813, Second Dept 8-3-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF IN THIS LABOR LAW § 240(1) ACTION FELL FROM AN INVERTED BUCKET HE WAS STANDING ON TO REACH A POWER CABLE; DEFENDANTS DEMONSTRATED THERE WAS NO NEED FOR PLAINTIFF TO ELEVATE HIMSELF TO DO HIS JOB; THEREFORE, PLAINTIFF WAS THE SOLE PROXIMATE CAUSE OF HIS INJURY.

The Second Department determined Supreme Court properly granted defendants' motion for summary judgment on the Labor Law § 240(1) cause of action. Plaintiff fell off an inverted bucket when he was installing stacked washers and dryers. Defendant demonstrated plaintiff did not need to elevate himself to do the work: "According to the plaintiff, on the day at issue, he was standing on an inverted bucket in order to reach the power cable for the stacked washer dryer unit that he had just pushed into the closet before he had plugged in the power cable. The plaintiff contended that the power cable was resting on top of the dryer and was out of reach, and that the washer dryer unit, although on wheels, was difficult to move, so he stood on an inverted bucket to reach the power cable. The plaintiff alleged that the bucket slipped out from under him and he fell and was injured. ... [T]he plaintiff was the sole proximate cause of his injuries because his conduct unnecessarily exposed him to an elevation-related risk ... . The plaintiff's deposition testimony ... established that a ladder was not necessary for the plaintiff

to do his work. The plaintiff testified that each of the stacked washer and dryer units that he was installing was on wheels and not secured within the closet in which they were being installed. ... [P]rior to the incident, he had installed approximately 20 stacked washer and dryer units without using a ladder. ... [W]ith respect to the unit he was installing on the day at issue, in order to reach the power cable, he could have moved the stacked washer and dryer out of the closet rather than stand on an inverted bucket, but he chose not to do so." ***Morales v. 50 N. First Partners, LLC*, 2022 N.Y. Slip Op. 04801, Second Dept 8-3-22**

LABOR LAW-CONSTRUCTION LAW.

THE ELECTRICAL STUB UP OVER WHICH PLAINTIFF TRIPPED IN THIS LABOR LAW § 241(6) ACTION WAS AN INTEGRAL PART OF THE CONSTRUCTION; THE INDUSTRIAL CODE PROVISIONS REQUIRING PASSAGEWAYS TO BE KEPT CLEAR OF DEBRIS GENERALLY DO NOT APPLY TO AN OBSTRUCTION WHICH IS AN INTEGRAL PART OF CONSTRUCTION; HERE THE FAILURE TO PROVIDE SAFETY MARKERS CALLING ATTENTION TO THE STUB UPS APPARENTLY BROUGHT THE FACTS WITHIN THE REACH OF THOSE "KEEP PASSAGEWAYS FREE OF DEBRIS" CODE PROVISIONS.

The Second Department, reversing (modifying) Supreme Court, determined the Industrial Code provisions which require passageways to be kept clear of debris applied to electric "stub ups" which protrude from the floor, even though the stub ups are integral parts of the construction, to which those Code provisions do not apply. Apparently, the absence of safety markers calling attention to the stub ups was deemed to be covered by those "free of debris" Code provisions: "Although neither subdivision (1) nor (2) of 12 NYCRR 23-1.7(e) applies where the object over which the plaintiff trips is an integral part of construction ..., that exception does not apply here. While it is undisputed that the stub up was an integral part of the construction, none of the defendants have pointed to evidence that it was necessary that the stub ups be unmarked or that safety markings or other protective measures would have interfered with the work ...". ***Murphy v. 80 Pine, LLC*, 2022 N.Y. Slip Op. 04811, Second Dept 8-3-22**

PERSONAL INJURY, EMPLOYMENT LAW.

DEFENDANT PIZZA-DELIVERY DRIVER WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE ALLEGEDLY RESISTED ARREST AND INJURED PLAINTIFF POLICE OFFICER; THE OFFICER'S SUIT AGAINST THE DRIVER'S EMPLOYER, UNDER VICARIOUS LIABILITY AND NEGLIGENT HIRING THEORIES, SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined plaintiff-police officer's (Maldonado's) action against Domino's Pizza (DP) as the employer of defendant pizza-delivery-driver (Alum) should have been dismissed. Maldonado pulled Alum over to issue a ticket for a defective headlight. Alum allegedly became violent and injured Maldonado sued DP under vicarious-liability theory negligent hiring-supervision theories. The Second Department held Alum was not acting within the scope of his employment when he resisted arrest, DP demonstrate it did not have knowledge or notice that Alum had a propensity for violence: "[DP demonstrated] that Allum's allegedly tortious conduct was not within the scope of his employment. ... DP demonstrated that the violent conduct displayed by Allum during the course of receiving a ticket for a defective headlight was not reasonably foreseeable or incidental to the furtherance of DP's business interests and that Allum was not authorized to use force to effectuate the goals and duties of his employment ... . DP demonstrated its prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for negligent hiring and negligent supervision. In this regard, DP demonstrated that it did not have knowledge, or notice, of Allum's propensity for the violent conduct that resulted in Maldonado's injury ... . Moreover, '[t]here is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee' ...". ***Maldonado v. Allum*, 2022 N.Y. Slip Op. 04798, Second Dept 8-3-22**

PERSONAL INJURY, MUNICIPAL LAW.

THE CITY HAD TIMELY KNOWLEDGE OF THE POTENTIAL LAWSUIT FROM AN ACCIDENT REPORT AND THEREFORE WAS NOT PREJUDICED BY THE FAILURE TO FILE A NOTICE OF CLAIM; THE PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED DESPITE THE ABSENCE OF A REASONABLE EXCUSE.

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim should have been granted. The accident alerted the city to the potential lawsuit and the delay was minimal. The absence of a reasonable excuse for the delay was overlooked: "It was readily inferable from a police accident report, a line-of-duty injury report, and witness statements taken on the day of the subject accident 'that a potentially actionable wrong had been committed by [an employee of] the public corporation' ... . Thus, the defendant was not prejudiced by the petitioner's delay, which was, in any event, minimal. Accordingly, the court should have granted the petition notwithstanding the lack of a reasonable excuse ...". ***Matter of Dautaj v. City of New York*, 2022 N.Y. Slip Op. 04802, Second Dept 8-3-22**

PERSONAL INJURY, MUNICIPAL LAW.

EVEN THOUGH THE CITY WAS NOT ABLE TO SHOW IT WAS PREJUDICED BY THE NINE MONTH DELAY BEFORE THE PETITION SEEKING LEAVE TO FILE A LATE NOTICE OF CLAIM, AND DESPITE THE FACT THAT A SLIP AND FALL INCIDENT REPORT WAS CREATED BY THE POLICE ON THE DAY OF THE INCIDENT, LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined leave to file a late notice of claim in this slip and fall case should not have been granted. There was a nine-month delay. There was an incident report prepared on the day of the accident but the Second Department found that the report did not notify the city of a potential lawsuit stemming from the accident. The attorney affirmation submitted by the city was speculative and therefore did not demonstrate the city was prejudiced by the failure to timely file the notice of claim. Petitioner did not have a reasonable excuse for failing to timely file. Despite the city's failure to show prejudice, the petition should have been denied: "[T]he appellants did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter ... . [A] Yonkers Police Department incident report prepared on the day of the accident by a responding officer did not provide the appellants with actual knowledge of the essential facts constituting the claim. For reports to provide actual knowledge of the essential facts, 'one must be able to readily infer from that report that a potentially actionable wrong had been committed' ... . A police accident report prepared by a responding officer, establishing knowledge of the accident, generally does not, without more, provide actual knowledge to the municipal defendants of the essential facts underlying the claim against them ... . Here, the Yonkers Police Department report indicated that the petitioner stated that she had slipped and fallen while exiting a ramp on the appellants' property and turning the corner, but there is no identification of the cause of the fall from which negligence on the part of the appellants could be inferred. The petitioner asserts that there is no prejudice to the appellants' ability to conduct an investigation inasmuch as the transitory nature of the icy condition would be difficult to investigate whether 90 days later or months later ... . In response, the appellants rely upon an attorney affirmation stating that their ability to conduct an investigation was substantially prejudiced by the delay because one of the responding officers retired and might not be available to testify, and the others could not be expected to recall the accident, given the passage of time. This affirmation, based solely on speculation and conjecture, is insufficient for the appellants to rebut the petitioner's showing of lack of prejudice with particularized evidence in the record ... . Nevertheless, weighing the appropriate factors, the Supreme Court should have denied the petition in light of the lack of reasonable excuse, the time elapsed, and the lack of actual knowledge of the essential facts giving rise to the claim ...". ***Matter of Ortiz v. Westchester County*, 2022 N.Y. Slip Op. 04807, Second Dept 8-3-22**

FOURTH DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, FAMILY LAW, NEGLIGENCE.

SEXUAL ABUSE FINDINGS IN A FAMILY COURT PROCEEDING COULD NOT BE THE BASIS FOR APPLYING THE COLLATERAL ESTOPPEL DOCTRINE IN THIS CIVIL ACTION UNDER THE CHILD VICTIMS ACT; HEARSAY ADMITTED IN THE FAMILY COURT PROCEEDING IS NOT ADMISSIBLE IN THIS CIVIL ACTION.

The Fourth Department, reversing Supreme Court, over a substantial dissent, determined defendant in this Child Victims Act action was not collaterally estopped from disputing the sexual abuse allegations based upon the related Family Court proceedings. Hearsay evidence properly admitted in Family Court is not admissible in this civil action in Supreme Court: "[A]lthough the burden of proof for both the Family Court proceeding and these personal injury actions is the same, i.e., preponderance of the evidence ... , hearsay evidence that was admissible in the underlying Family Court proceeding would not be admissible in the instant personal injury actions ... . Inasmuch as our determination in the prior Family Court proceeding was based largely on hearsay evidence that would not be admissible in these civil actions, we agree with defendant that he should not be collaterally estopped from defending these actions and that the court erred in granting plaintiffs' motions for partial summary judgment on liability." ***Of Doe 44 v. Erik P.R.*, 2022 N.Y. Slip Op. 04839, Fourth Dept 8-4-22**

CIVIL PROCEDURE, PERSONAL INJURY.

HERE PLAINTIFFS ALLEGED THEY WERE SEXUALLY ABUSED DECADES AGO IN MASSACHUSETTS AND SUED UNDER THE CHILD VICTIMS ACT WHICH SERVES TO EXTEND THE STATUTE OF LIMITATIONS; ORDINARILY THE BORROWING STATUTE APPLIES TO OUT-OF-STATE TORTS REQUIRING THE ACTION TO BE TIMELY UNDER BOTH NEW YORK AND THE FOREIGN STATE'S LAWS; HERE THE "RESIDENT EXCEPTION" APPLIED BECAUSE THE PLAINTIFF'S WERE NEW YORK RESIDENTS AT THE TIME OF THE ALLEGED ABUSE; THEREFORE THE ACTION NEED ONLY BE TIMELY UNDER NEW YORK'S CHILD VICTIMS ACT.

The Fourth Department, reversing (modifying) Supreme Court, determined the "resident exception" to the borrowing statute applied to New-York-resident plaintiffs who allegedly were sexually abused decades ago at a camp in Massachusetts run by Syracuse University. Ordinarily New York's borrowing statute requires that an action for an out-of-state tort be timely under both New York's Child Victims Act and the foreign state's statute of limitations. However, there is an exception to that rule when the plaintiffs, abused in a foreign state, were New York residents at the time of the abuse: " 'When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation[s] periods of both New York and the jurisdiction where the cause of action accrued' ... . In tort cases, the Court of Appeals has held that 'a cause of action accrues at the time and in the place of the injury' ... . Thus, for [such] claims to survive,

they must be timely under both CPLR 214-g and the applicable [foreign state's] statute of limitations. ... [Plaintiffs] were New York residents when the ... causes of action accrued. Pursuant to the 'resident exception' of the borrowing statute ... , a claim that accrues in favor of a New York resident will be governed by the New York statute of limitations regardless of where the claim accrued (see CPLR 202 ... . [The Child Victims Act] revival statute applies ...". ***Shapiro v. Syracuse Univ.*, 2022 N.Y. Slip Op. 04835, Fourth Dept 8-4-22**

CRIMINAL LAW, EVIDENCE.

THE MAJORITY AFFIRMED DEFENDANT'S CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE CONVICTION UNDER AN ACCOMPLICE THEORY; DEFENDANT ACCOMPANIED A FRIEND WHO WAS TO SELL COCAINE; TWO DISSENTERS ARGUED THE EVIDENCE OF SHARED INTENT WAS TOO WEAK TO SUPPORT THE CONVICTION.

The Fourth Department, over a two-justice dissent, determined the evidence was sufficient to support defendant's conviction of criminal possession of a controlled substance under an accomplice theory. Defendant agreed to go with her friend who was going to sell cocaine. The majority concluded the evidence defendant was going to be compensated proved shared intent. The two dissenters found the evidence defendant was to be compensated was too weak: "Here, the evidence and the reasonable inferences drawn therefrom establish that, two days before her arrest, defendant agreed that, in exchange for compensation, she would either drive or otherwise accompany the friend to complete a sale of cocaine. According to defendant's testimony, the friend indicated that she wanted defendant to accompany her because they were friends and she did not want to be alone with the two people involved in the proposed drug transaction, i.e., the drug dealer and the ostensible buyer. * * * From the dissent: Here, the People's theory at trial was that defendant intentionally aided her friend's possession of drugs by agreeing to drive her friend to another city where the friend would engage in the sale of such drugs, and that defendant would return by bus. However, the evidence in this case, when considered in the light most favorable to the People ..., established that defendant merely accompanied her friend." ***People v. Lewis*, 2022 N.Y. Slip Op. 04846, Fourth Dept 8-4-22**

FAMILY LAW, CONTRACT LAW.

THE POSTNUPTIAL AGREEMENT WAS NOT SIGNED UNDER DURESS AND WAS NOT UNCONSCIONABLE, SUPREME COURT REVERSED.

The Fourth Department, reversing Supreme Court in this divorce action, determined the postnuptial agreement was not signed under duress and was not unconscionable: "Initially, we conclude that the court erred insofar as it held that plaintiff signed the 2017 agreement under duress as a result of defendant's emotional abuse. An agreement is voidable on the ground of duress 'when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his [or her] free will' ... . Generally, 'the aggrieved party must demonstrate that threats of an unlawful act compelled his or her performance of an act which he or she had the legal right to abstain from performing' ... . '[T]he threat must be such as to deprive the party of the exercise of free will' … . Here, even accepting as true plaintiff's allegations that defendant persistently urged him to sign the 2017 agreement and threatened to tell the parties' children of plaintiff's wrongful actions in the past, such conduct did not amount to any unlawful acts on the part of defendant sufficient to constitute duress ... . [P]laintiff failed to sustain his burden of establishing that the 2017 agreement was unconscionable. 'An agreement is unconscionable if it is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense' ... . The fact that defendant was represented by counsel but plaintiff was not is [*sic*] a factor for the court to consider, but is not dispositive ... . As relevant here, in the 2017 agreement each party waived his or her rights in the other party's separate property, which was defined in that agreement. ... .[T]he parties waived any right to receive maintenance. ... Plaintiff ... signed ... three postnuptial agreements during the course of the marriage, and the testimony of both parties revealed that the parties conducted their finances in accordance with the terms of the agreements. ... [I]t cannot be said that the 2017 agreement was such that it would 'shock the conscience and confound the judgment of any [person] of common sense' ... " ***Campbell v. Campbell*, 2022 N.Y. Slip Op. 04875, Fourth Dept 8-4-22**

LABOR LAW, EMPLOYMENT LAW.

PLAINTIFFS-EMPLOYEES SEEKING THE PREVAILING WAGE FOR PUBLIC WORKS PROJECTS PURSUANT TO LABOR LAW § 220 ARE ENTITLED TO FULL SUPPLEMENTAL (FRINGE) BENEFITS, AS WELL AS WAGES.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiffs-employees were entitled to full payment of their supplemental (fringe) benefits in this Labor Law § 220 action seeking the prevailing wage for public works projects: "Plaintiffs are members of a class of employees who allege that defendant failed to pay them prevailing supplemental (or fringe) benefits for work they performed on various public works contracts. * * * Pursuant to Labor Law § 220 (3) (b), contractors undertaking a public works project must provide their employees with supplemental benefits 'in accordance with prevailing practices for private sector work in the same locality' ... . Supplemental benefits are defined as 'all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay[,] life insurance and apprenticeship training' (§ 220 [5] [b]). * * * Consider, for example, a hypothetical contractor that fails to pay prevailing wages (as opposed to benefits) to its employees on a public works project, and then pays the shortfall in wages into a common fund out of which all of its employees are compensated, including those who are not prevailing wage workers. Due to the dilution of funds resulting from those funds also being paid to the nonprevailing wage workers, the employees who worked on the public works contracts would not receive the full wages they would be entitled to for their work on the public works project. Under that scenario,

the contractor would clearly have failed to comply with Labor Law § 220 (3) (a), notwithstanding that the contractor paid the same amount in wages to a fund as it would have paid if the prevailing wage workers had been paid directly according to scale. We do not perceive any justification in law or logic for treating supplemental benefits differently from wages." ***Vandee v. Suit-Kote Corp.*, 2022 N.Y. Slip Op. 04852, Fourth Dept 8-4-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH THERE WAS EVIDENCE PLAINTIFF'S USE OF A LADDER INSTEAD OF THE SCISSORS LIFT CREATED THE SAFETY ISSUE LEADING TO PLAINTIFF'S FALL IN THIS LABOR LAW § 240(1) ACTION, THERE WAS EVIDENCE THE OPERATOR OF THE SCISSORS LIFT WOULD NOT ALLOW PLAINTIFF TO ACCESS IT, RAISING A QUESTION OF FACT WHETHER PLAINTIFF'S USE OF A LADDER WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT; THERE WAS A SUBSTANTIAL DISSENT.

The Fourth Department, over a substantial dissent, determined plaintiff's Labor Law § 240(1) action should have survived summary judgment. Plaintiff fell from a ladder attempting to pass sheet rock to another worker on a scissors lift. The dissent argued plaintiff should have used the scissors lift and therefore was the sole proximate cause of the fall. There was evidence the operator of the scissors lift refused to reposition it to allow plaintiff to access it, and, therefore, plaintiff's use of the ladder was not the sole proximate case of his fall: "With respect to the Labor Law § 240 (1) claim, we conclude that defendants did not meet their initial burden of establishing as a matter of law that plaintiff was the sole proximate cause of the accident ... . [D]efendants established that the coworker, who was operating and standing in the scissor lift at the time of the accident, denied plaintiff's request for access to the device by refusing to reposition it to allow plaintiff to safely lift the sheetrock into place. We note that '[i]t is well established that there may be more than one proximate cause of an injury' ... , and that '[q]uestions concerning . . . proximate cause are generally questions for the jury' ... . Our dissenting colleague argues that the court properly concluded that, as a matter of law, plaintiff was the sole proximate cause of the accident because he chose to use the ladder instead of the scissor lift. The court's conclusion was based on plaintiff's deposition testimony admitting that use of the scissor lift was the proper and expected way to perform the task of lifting the sheetrock. We disagree with the dissent's conclusion. Although plaintiff testified that the scissor lift was the proper device to use for his work, that statement alone does not, under the unique circumstances of this case, establish that plaintiff knew that the scissor lift was 'available' and 'chose for no good reason' not to use it ... . Further, '[w]here causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts' ... and, here, in light of the coworker's alleged conduct, the evidence is not conclusive about whether plaintiff chose to use the ladder over an 'available' scissor lift for 'no good reason.' " ***Thomas v. North Country Family Health Ctr., Inc.*, 2022 N.Y. Slip Op. 04836, Fourth Dept 8-4-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE, EMPLOYMENT LAW.

IN THIS MEDICAL MALPRACTICE ACTION, THE PLAINTIFF WAS NOT REQUIRED TO IDENTIFY EACH ALLEGEDLY NEGLIGENT EMPLOYEE OF THE DEFENDANT MEDICAL CENTER TO SURVIVE SUMMARY JUDGMENT.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff was not obligated to provide the name of every negligent employee of the defendant Erie County Medical Center Corporation (ECMC) to survive summary judgment in this medical malpractice action: "Contrary to the court's determination, plaintiff was not required to provide the name of every allegedly negligent actor engaging in conduct within the scope of employment for ECMC ... inasmuch as ECMC was on notice of the claims against it based on the allegations in the amended complaint, as amplified by plaintiff's bill of particulars to ECMC, noting failures and omissions by ECMC's employees. Indeed, ECMC is in the best position to identify its own employees and contractors and, as the creator of decedent's medical records, ECMC had notice of who treated decedent and of any allegations of negligence by its nursing staff." ***Braxton v. Erie County Med. Ctr. Corp.*, 2022 N.Y. Slip Op. 04866, Fourth Dept 8-4-22**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

THE CELL PHONE RECORDS OF PLAINTIFF-DRIVER IN THIS TRAFFIC ACCIDENT CASE HAD BEEN PROVIDED TO DEFENDANTS BUT THERE ARE SEVERAL POSSIBLE USES OF THE CELL PHONE WHICH ARE NOT REVEALED BY THE RECORDS; DEFENDANTS WERE ENTITLED TO DISCOVERY OF THE CELL PHONE TO DETERMINE WHETHER PLAINTIFF WAS USING IT AT THE TIME OF THE ACCIDENT.

The Fourth Department, reversing Supreme Court, determined defendants in this traffic accident case were entitled to access to plaintiff-driver's (Farrell's) cell phone to determine whether the phone was being used at the time of the accident. There are certain uses of the phone which were not revealed by the cell phone records already provided to defendants: "Although the cell phone records subsequently obtained from the service provider established that Farrell was not talking on his phone at the time of the accident, they did not indicate whether he opened or sent text messages during the relevant time period. On the phone used by Farrell, texts were sent as encrypted 'iMessages' that do not show up on phone records. Moreover, the phone records did not indicate whether Farrell was using any applications on his phone, such as Snapchat or Facebook. * * * Defendants 'satisf[ied] the threshold requirement that the[ir] request [was] reasonably calculated to yield information that [was] 'material and necessary'—i.e., relevant—' to issues involved in the action ... . 'The test is one of usefulness and reason' ... . In support of the motion ... defendants submitted evidence that Farrell was traveling at close to 80 miles per hour seconds before the accident, which occurred on a residential road near an elementary school. Defendants also submitted evidence that Farrell did not brake before colliding with the school bus. Evidence concerning whether Farrell was distracted before the collision is relevant to the issues involved in this negligence action, and defendants' request for production of or access to his cellular phone is reasonably calculated to yield relevant information ... , especially

considering that Farrell is unable, due to his injuries, to provide any information regarding his activities in the moments before the accident ...". ***Tousant v. Aragona*, 2022 N.Y. Slip Op. 04871, Fourth Dept 8-4-22**

PERSONAL INJURY, CONTRACT LAW.

PLAINTIFF RENTED DEFENDANT'S COTTAGE AND WAS INJURED WHEN THE DECK COLLAPSED; PLAINTIFF'S CAUSES OF ACTION BASED UPON RES IPSA LOQUITUR AND VICARIOUS LIABILITY FOR AN INDEPENDENT CONTRACTOR WHO CONSTRUCTED THE DECK SHOULD HAVE SURVIVED SUMMARY JUDGMENT; A PROPERTY OWNER HAS A NONDELEGABLE DUTY TO THE PUBLIC TO KEEP THE PREMISES SAFE, AN EXCEPTION TO THE GENERAL RULE THAT A PROPERTY OWNER WILL NOT BE LIABLE FOR THE ACTS OR OMISSIONS OF AN INDEPENDENT CONTRACTOR.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff's causes of action based upon res ipsa loquitur and vicarious liability for a contractor who constructed the deck should have survived a motion for summary judgment. Plaintiff rented a cottage from defendant. While plaintiff was on the deck, it collapsed: "In New York, in order to establish liability under that doctrine, the plaintiff must establish that the event was: '(1) of a kind which ordinarily does not occur in the absence of someone's negligence; (2) . . . caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) . . . not . . . due to any voluntary action or contribution on the part of the plaintiff' ... . 'The exclusive control requirement . . . is that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it' ... . 'The purpose is simply to eliminate within reason all explanations for the injury other than the defendant's negligence ... . 'Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts' ... . The 'most commonly accepted rationale' for that rule is that 'one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor' ... . There are, of course, exceptions to the general rule. 'A party may be vicariously liable for the negligence of an independent contractor in performing [n]on-delegable duties . . . arising out of some relation toward the public or the particular plaintiff' ... . To determine whether a nondelegable duty exists, the court must conduct 'a sui generis inquiry' because the court's conclusion rests on policy considerations ... . Although '[t]here are no clearly defined criteria for identifying duties that are nondelegable[,] . . . [t]he most often cited formulation is that a duty will be deemed nondelegable when the responsibility is so important to the community that the employer should not be permitted to transfer it to another' ... . Here, we conclude that defendant owes a nondelegable duty to the public to maintain the premises in reasonably safe condition ... , and thus that defendant failed to establish as matter of law that she may not be held liable for the actions of her independent contractor ...". ***McGirr v. Shifflet*, 2022 N.Y. Slip Op. 04831, Fourth Dept 8-4-22**

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