



The First Department this week tackled whether the New York Constitution authorizes a criminal defendant to be charged in a superior court information with counts of a higher level or degree than were originally contained in the felony complaint. Joining the Third Department, the First Department held that it does not. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

## FIRST DEPARTMENT

### CRIMINAL LAW

*People v Perkins*, 2024 NY Slip Op 04361 (1st Dept Sept. 05, 2024)

**Issue:** May a superior court information that charges an offense for which a defendant was held for action of a grand jury also, under CPL 195.20 and consistent with New York Constitution article I, § 6, charge a joinable offense of a higher grade or degree than any contained in the felony complaint?

**Facts:** Defendant was charged in a felony complaint with fourth-degree grand larceny, petit larceny, and fifth-degree criminal possession of stolen property for snatching a cell phone from another person. The felony complaint did not state that defendant used any force or charge him with an offense that required the use of force. Defendant waived his right to be prosecuted by indictment and consented to be prosecuted by a SCI charging him with third-degree robbery and petit larceny. Third-degree robbery requires the use of force, which is an aggravating element. Defendant pleaded guilty to the SCI. Defendant appealed, arguing that the SCI was jurisdictionally defective because it charged him with a higher-level felony than had been contained in the felony complaint.

**Holding:** The First Department, joining the holding of the Third Department in *People v Coss* (178 AD3d 25 [3d Dept 2019]), held that "a joinable offense must be of an equal or lesser grade or degree than the offense for which defendant was held for action by a grand jury." The Court explained, "the New York Constitution article I, § 6 permits prosecution pursuant to an SCI only for 'an offense' for which a defendant has been held for the action of a grand jury. Such an 'offense' includes the lesser included offenses as well as a greater offense charged in the felony complaint, but does not include a greater offense, not charged in the felony complaint, which has additional aggravating elements. Permitting inclusion in an SCI of an offense of a higher grade than any charged in the felony complaint would permit circumvention of the constitutional imperative of prosecution by indictment." Thus, the Court held, including "the third-degree robbery charge in the SCI renders it jurisdictionally defective because it is a higher-grade offense than any contained in the felony complaint and because it charges an offense which has an additional aggravating element."

### TORTS, PREEMPTION

*Malerba v New York City Tr. Auth.*, 2024 NY Slip Op 04344 (1st Dept Aug. 29, 2024)

**Issue:** Does the federal Hazardous Materials Transportation Act preempt plaintiffs' personal injury claims sounding in defective design and failure to warn after he was injured by a container used in transporting hazardous materials in commerce?

**Facts:** Plaintiff was injured during the course of his employment for third-party defendant Ameron Global, Inc. while performing maintenance on compressed gas tanks from the fire suppression system of defendants New York City Transit Authority and Metropolitan Transit Authority. As plaintiff worked with the compressed gas tank, it suddenly actuated and struck him, causing severe injuries. Plaintiff sued, asserting claims for negligence based on defective design and failure to warn. Following discovery, defendant moved for summary judgment to dismiss the complaint in its entirety, arguing, among other things, that plaintiffs' claims were preempted by the HMTA. Supreme Court denied the motion, holding that the preemption question was a question of fact still to be resolved.

**Holding:** The First Department held the question of federal preemption under the HMTA is a question of law for the court to decide as a matter of law. "[A]lthough courts will not hesitate to hold that state common-law claims are preempted by federal legislation, the analysis in each express preemption case must turn on the precise language of the relevant preemption provision. The preemption provision applicable here, 49 USC § 5125 (b) (1), provides as follows in relevant part: '[A] law . . . of a State . . . about any of the following subjects, that is not substantively the same as a provision [or regulation] under this chapter . . . , is preempted: . . . (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.'" The Court explained, since "the applicable statute (49 USC § 5125 [b]) is one providing for express preemption, the correct framing of the issue presented is simply

whether the scope of that provision encompasses plaintiffs' claims." "The statute's reference to 'package, container, or packaging component' (49 USC § 5125 [b] [1] [E]) concerns items meant to contain a hazardous substance. Accordingly, as relevant here it applies to an item or component meant to contain compressed gas" and "plaintiffs' design defect claim is 'about' 'the designing and manufacturing' of the valves." Thus, the Court held, "Plaintiffs' claims sounding in negligence and strict liability based on defective design and inadequate warnings" fall within the scope of the HMTA's preemption provision, and those claims should have been dismissed.

## SECOND DEPARTMENT

### FREEDOM OF INFORMATION LAW

*Matter of Puig v City of Middletown, 2024 NY Slip Op 04326 (2d Dept Aug. 28, 2024)*

**Issue:** Was an award of attorneys' fees warranted against a municipality for the erroneous denial of a Freedom of Information Law request based on a misinterpretation of a recent change in the law?

**Facts:** Petitioners commenced this CPLR article 78 proceeding to compel the respondents to disclose the disciplinary records of all active City of Middletown police officers and for an award of attorney's fees. Petitioner's alleged that after the repeal of Civil Rights Law former § 50-a, which previously authorized the withholding of those records, respondents erroneously denied their FOIL request for those records based on respondents' conclusion that the repeal of Civil Rights Law former § 50-a was not retroactive and, thus, Civil Rights Law former § 50-a still applied to prevent disclosure of disciplinary records that were generated prior to the date that it was repealed. Supreme Court held that the repeal of Civil Rights Law former § 50-a was retroactive and ordered respondents to disclose the records, but declined to award petitioner attorneys' fees. Petitioners appealed the portion of the Supreme Court judgment that denied their request for attorneys' fees.

**Holding:** The Second Department affirmed the denial of petitioners' attorneys' fees application. Noting that the FOIL statute provides that the court "shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by the petitioner in any case . . . in which the petitioner has substantially prevailed and the court finds that the agency had no reasonable basis for denying access," the Court held that although the petitioner substantially prevailed, "at the time the respondents made the determination to deny the FOIL request, just three months after the repeal of Civil Rights Law former § 50-a, since no New York court had yet determined whether the repeal of that provision was retroactive or prospective, the respondents asserted a reasonable, albeit erroneous, basis for denying access at that time." Thus, an award of attorneys' fees was not appropriate under those circumstances.

## THIRD DEPARTMENT

### ARBITRATION, CPLR ARTICLE 75 VACATUR

*Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO (New York State Police), 2024 NY Slip Op 04290 (3d Dept Aug. 22, 2024)*

**Issue:** When may a court vacate an arbitration award and, if it does, what relief may the court grant in that instance?

**Facts:** After a CSEA member was observed engaging in sexual conduct in his cubicle, the member faced three disciplinary charges: a count of misconduct and two counts of sexual harassment. Following a grievance arbitration, the arbitrator found the member guilty of the first charge, but not guilty of the second and third charges. Although the arbitrator found that the member had engaged in the sexual conduct, "the arbitrator found this to be an isolated incident not directed at any specific person and which [the member] had not intended to be observed." CSEA moved to confirm the award, and the State Police cross-moved to vacate the findings on the second and third charges and to impose a penalty of termination. Supreme Court confirmed the guilty finding on the first charge, "but vacated the award as to charges 2 and 3 as irrational and against public policy. Supreme Court found Ambrosio guilty of these charges and remitted the matter to a different arbitrator for the imposition of a new penalty."

**Holding:** The Third Department affirmed the portions of the Supreme Court order that confirmed the guilty finding on the first charge and vacated the not guilty findings on the second and third charges. The Court explained, "[w]hen evaluating charges 2 and 3, the arbitrator was required to consider the definition of sexual harassment as provided in the civilian manual and in the employee handbook." The Court held that the arbitrator failed to do so, however. "In making the ultimate determination as to counts 2 and 3, the arbitrator disregarded the definition of sexual harassment as contained in the manual and the handbook and supplied additional requirements not contained in either. These included that this was an isolated incident, the coworkers' failure to file complaints or opine themselves to be victims of sexual harassment and Ambrosio's apparent intentions behind his actions, all while disregarding the impact of those actions. By doing so, the arbitrator impermissibly exceeded her authority as she 'effectively modified the terms' of the sexual harassment policies in the manual and the handbook."

Although Supreme Court properly vacated the not guilty findings on the second and third charges, it exceeded its jurisdiction by finding the CSEA member guilty of those charges. The Court explained, "courts can neither substitute judicial opinion for the arbitrator's decision nor rule on either the merits of the underlying allegations or impose a remedy that we feel is appropriate. Accordingly, we must reverse

those aspects of Supreme Court’s order that did both. Instead, we simply vacate the portions of the award finding Ambrosio not guilty of sexual harassment under charges 2 and 3 and remit the matter to a new arbitrator for a new determination as to those charges and the imposition of an appropriate penalty.”

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