CasePrepPlus

January 6, 2016

An advance sheet service summarizing recent and significant New York appellate cases

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FIRST DEPARTMENT

ADMINISTRATIVE LAW; LANDLORD-TENANT.

INCONSISTENCIES IN TWO FINAL RENT-ADJUSTMENT ORDERS ALLOWED RECONSIDERATION OF THE NATURE OF THE MAJOR CAPITAL IMPROVEMENTS DESCRIBED IN THE ORDERS.

In a rent-increase matter which was before the NYS Division of Housing and Community Renewal (DHCR), the First Department, over an extensive two-justice dissent, determined a discrepancy between two prior rent-adjustment orders constituted "an irregularity in a vital matter" which allowed the DHCR, on remand, to reconsider the two (final) orders. The discrepancy related to the nature of the "major capital improvement [MCI]" (purportedly justifying a rent increase) to which each order referred. The dissent argued that the two orders were final orders and collateral estoppel prohibited further reexamination of them. **Matter of 60 E. 12th St. Tenants' Assn. v New York State Div. of Hous. & Community Renewal, 2015 NY Slip Op 09599, 1st Dept 12-29-15**

ATTORNEYS; JUDICIARY LAW; MALICIOUS PROSECUTION.

FACEBOOK'S SUIT AGAINST LAW FIRMS WHICH REPRESENTED A CLIENT IN A FRAUDULENT SUIT AGAINST FACEBOOK DISMISSED.

The First Department, reversing Supreme Court, dismissed a malicious prosecution and Judiciary Law 487 action brought by Facebook against law firms which represented a client who brought a fraudulent lawsuit against Facebook. The client apparently forged a contract with Mark Zuckerberg (the founder of Facebook) which would have given the client a 50% interest in Facebook. The client's suit against Facebook was dismissed and the client was indicted for wire fraud. The First Department held that the "conclusory" allegations in the complaint did not sufficiently plead the "no probable cause to bring the suit" element of a malicious prosecution cause of action or the "egregious conduct" element of a Judiciary Law 487 cause of action: "Here, the . . . court's granting of a TRO at the inception of the [client's] action, prior to any of the defendants' representation of [the client], created a presumption that [the client] had probable cause to bring the case. This presumption must be overcome by specifically pleaded facts ... . Moreover, a plaintiff's factual allegations regarding lack of probable cause and malice may be disproved by the evidentiary material submitted by defendant in support of a motion to dismiss ... . Applying these principles to this case, we find that the allegations in the instant complaint concerning defendants' lack of probable cause are entirely conclusory, and are thus inadequate to support the lack of probable cause element of the malicious prosecution claim ... . * * * Relief under a cause of action based upon Judiciary Law § 487 'is not lightly given' . . . and requires a showing of 'egregious conduct or a chronic and extreme pattern of behavior' on the part of the defendant attorneys that caused damages ... . Allegations regarding an act of deceit or intent to deceive must be stated with particularity . . . ; the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient ...". **Facebook, Inc. v DLA Piper LLP (US), 2015 NY Slip Op 09602, 1st Dept 12-29-15**

FAMILY LAW; CONTRACT LAW.

STIPULATION WHICH DID NOT SPECIFICALLY CALL FOR A REDUCTION OF CHILD SUPPORT UPON THE EMANCIPATION OF THE OLDEST CHILD WOULD NOT BE INTERPRETED OTHERWISE.

The First Department, over a two-justice dissent, determined that a stipulation which was incorporated but not merged into the divorce did not call for the reduction of child support upon emancipation of the older child. The dissent argued that, applying standard principles of contract interpretation, it was clear the parties intended emancipation of the older child would result in the reduction of child support, despite the absence of a formula for the reduction in the stipulation: "There is no evidence, other than plaintiff's testimony, that the parties had agreed to a reduction in child support on account of any purported emancipation of the older child. Indeed, their agreement, freely entered into, does not allocate plaintiff's child support obligation as between the children or provide a formula for a reduction in the event of one child's emancipation ... . 'When child support has been ordered for more than one child, the emancipation of the oldest child does not automatically reduce the amount of support owed under an order of support for multiple children' ...". **Schulman v Miller, 2015 NY Slip Op 09603, 1st Dept, 12-29-15**

FRAUD.

FRAUD AND FRAUDULENT CONCEALMENT CAUSES OF ACTION AGAINST MORGAN STANLEY, STEMMING FROM RESIDENTIAL MORTGAGE-BACKED SECURITIES, PROPERLY SURVIVED A MOTION TO DISMISS.

The First Department, in a full-fledged opinion by Justice Friedman, determined Morgan Stanley's motion to dismiss fraud and fraudulent concealment causes of action was properly denied. The action stemmed from residential mortgage-backed securities (RMBS) and the collapse of subprime mortgages. In essence, Morgan Stanley argued the plaintiff, Basis Yield, a mutual fund, did not allege justifiable reliance on the ratings of the investments and did not allege it exercised due diligence in researching the quality of the investments. With respect to the "failure to allege the exercise of due diligence" argument, the court wrote: "Morgan Stanley . . . argues that the fraud claims are legally insufficient because Basis Yield does not allege that it conducted, or sought to conduct, a due diligence investigation into the allegedly misrepresented matters. This argument relies on the well-established principle that a plaintiff suing for fraud (and particularly a sophisticated plaintiff, such as Basis Yield) must establish that it 'has taken reasonable steps to protect itself against deception' ... . * * * If accepted, Morgan Stanley's position would require the prospective purchaser of a credit instrument to assume that the instrument's credit rating is fraudulent until the rating has been verified through a detailed retracing of the steps of the underwriter and credit rating agency. This would largely negate the utility of the credit ratings of negotiable bonds and notes that are published by accredited rating agencies. Morgan Stanley does not draw our attention to any New York decision holding that the due diligence obligation of even a sophisticated investor extends so far as to require it to seek to verify the accuracy of an accredited agency's credit rating of a note or bond through an investigation of nonpublic information." **Basis Yield Alpha Fund Master v Stanley, 2015 NY Slip Op 09645, 1st Dept 12-29-15**

LANDLORD-TENANT.

SECURITY DEPOSIT CANNOT BE USED BY THE LANDLORD AS AN OFFSET AGAINST UNPAID RENT, BUT CAN BE USED BY THE TENANT TO REDUCE AMOUNT OWED TO THE LANDLORD.

In finding the special referee exceeded the scope of the reference from Supreme Court, the First Department explained the consequences of a landlord's failure to place a security deposit in a separate account pursuant to General Obligations Law 7-103: "Section 7-103 prohibits landlords from commingling security deposits with their own funds. Violation of the statute gives rise to an action in conversion and the right to immediate return of the funds ... . A landlord who violates Section 7-103 of the General Obligations Law cannot use the security as an offset against unpaid rents. This is so because a landlord is considered to be a trustee with respect to those funds deposited as security. To allow the landlord to set off the rent against the deposit would be to treat the deposit as a debt and the landlord as a debtor, the situation the statute was enacted to change ... .The same logic does not pertain where a tenant seeks to apply the security deposit to reduce amounts found owing to the landlord." **23 E. 39th St. Mgt. Corp. v 23 E. 39th St. Dev., LLC, 2015 NY Slip Op 09605, 1st Dept 12-29-15**

MUNICIPAL LAW.

FAILURE TO NAME INDIVIDUAL POLICE OFFICERS, OR "JOHN DOE" OFFICERS, IN A NOTICE OF CLAIM PRECLUDED SUIT AGAINST THE POLICE OFFICERS SUBSEQUENTLY NAMED IN THE COMPLAINTS.

The First Department affirmed the lower court's dismissal of an action against the police department and several named individual police officers because the notice of claim named only the New York City Police Department as a defendant and did not name any individual officers or any "john doe" officers. Justice Sweeny explained his reasoning for affirming in a concurring memorandum. Two justices dissented in a memorandum by Justice Manzanet-Daniels. Justice Sweeny argued that the underlying purpose of a notice of claim is to allow the municipality to make a timely investigation into the allegations. By failing to name individual officers, the municipality was not given sufficient notice. The dissent argued that the General Municipal Law does not require the naming (in a notice of claim) of individual employees of a municipality to state a valid claim against employees of a municipality: "Plaintiffs here did not put the City on notice that it would seek to impose liability upon specific employees of the NYPD. Indeed, as the action progressed, more and more police officers were added as individual defendants, the last of which over three years removed from the incident in question, thus rendering a timely investigation into and assessment of the claims impossible. To permit such a result raises questions of fundamental fairness for the individual defendants, since they were not put on notice, even in a generic way by way of "Police Officer John Doe" or similar language, that they were going to become defendants. Moreover, the prejudice accruing to both the municipal and individual defendants from such a delay is obvious, since memories fade over time, records that could have easily been obtained early on may have been archived, lost or discarded, and witnesses may have relocated, just to name a few of the potential obstacles. Delay in investigating and evaluating a claim defeats the purpose of GML § 50-e.' **Alvarez v City of New York, 2015 NY Slip Op 09601, 1st Dept 12-29-15**

PERSONAL INJURY; LABOR LAW; EVIDENCE.

PLAINTIFF STRUCK WHEN TWO WORKERS LOST CONTROL OF A HEAVY BEAM THEY WERE LOWERING TO THE GROUND ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240(1) CAUSE OF ACTION; EXPERT OPINION THAT NO SAFETY DEVICES WERE NECESSARY INSUFFICIENT TO DEFEAT SUMMARY JUDGMENT MOTION.

The First Department affirmed Supreme Court's grant of summary judgment to the plaintiff in a Labor Law 240(1) cause of action. Plaintiff was injured when a heavy beam being lowered by two other workers struck him in the chest and leg when the workers lost control of it. The court noted an expert opinion that no safety devices were needed was insufficient to establish the absence of a Labor Law 240(1) violation: "The court properly found a causal connection between the object's inadequately regulated descent and plaintiff's injury ... . By submitting an expert affidavit, plaintiff met his initial burden of showing that the beam required securing for the purposes of the undertaking ... , and that statutorily enumerated safety devices could have prevented the accident ... . It is undisputed that no enumerated safety devices were provided, and the testimony and expert opinion that such devices were neither necessary nor customary is insufficient to establish the absence of a Labor Law § 240(1) violation. The height differential cannot be described as de minimis given the amount of force [the beam was] able to generate over [its] descent ... . Plaintiff was not the sole proximate cause of his injuries, which were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which the other two workers lowered the beam; comparative negligence is no defense to the Labor Law § 240(1) claim ...". [internal quotation marks omitted] **Bonaerge v Leighton House Condominium, 2015 NY Slip Op 09632, 1st Dept 12-29-15**

SECOND DEPARTMENT

ADMINISTRATIVE LAW.

DEPARTMENT OF HEALTH EXECUTIVE-COMPENSATION-CAP AND CONFLICT-OF-INTEREST RULES FOR AGENCIES PROVIDING SERVICES TO DEVELOPMENTALLY DISABLED CHILDREN DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The First Department, in a full-fledged opinion by Justice Dickerson, reversing Supreme Court, determined that two Department of Health (DOH) rules concerning services provided to developmentally disabled children did not violate the separation of powers doctrine. One rule placed a cap on executive compensation, and the other prohibited an agency which evaluates a child's need for services from itself providing those services ("conflict of interest" rule). The First Department explained the underlying general principles and then went through each of the *Boreali* (71 N.Y.2d 1) "separation of powers" factors for each rule: "[The *Boreali*] factors are (1) whether the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) whether the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) whether the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) whether the agency used special expertise or competence in the field to develop the challenged regulations ... . The central theme of a *Boreali* analysis is that an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than find[ing] means to an end chosen by the Legislature ...". [internal quotation marks omitted] **Agencies for Children's Therapy Servs., Inc. v New York State Dept. of Health, 2015 NY Slip Op 09647, 2nd Dept 12-30-15**

CIVIL PROCEDURE; MUNICIPAL LAW; EVIDENCE; PERSONAL INJURY.

RECORDINGS OF 911 CALLS RE: PLAINTIFF'S DECEDENT'S CAR ACCIDENT DISCOVERABLE IN A WRONGFUL DEATH ACTION.

In a matter of first impression at the appellate level, the Second Department determined the recordings of 911 calls relating to plaintiff's decedent's (Reece's) car accident were discoverable. The wrongful death action was brought against the state alleging that a traffic counting device shattered when plaintiff's decedent's car drove over it, puncturing the gas tank and causing a fire which killed plaintiff's decedent and two children. The claimant served a subpoena upon non-party county for the recordings and the county moved to quash the subpoena. The Second Department held that the motion to quash was properly denied: "The County moved to quash the subpoena on the ground that under County Law § 308(4), 911 recordings and documents are not discoverable by any entity or person other than certain designated public agencies and emergency medical providers. * * * We view the language of County Law § 308(4) as generally prohibiting entities and private individuals from accessing 911 tapes and records ... . However, the statute is not intended to prohibit the disclosure of matter that is material and relevant in a civil litigation, accessible by a so-ordered subpoena or directed by a court to be disclosed in a discovery order ... . Indeed, in analogous criminal practice, 911 tapes and records are frequently made available to individual defendants as part of the People's disclosure obligations pursuant to *People v Rosario* (9 NY2d 286 ...) and are admitted at trials to describe events as present sense impressions of witnesses ... , to identify perpetrators as present sense impressions ... , or as excited utterances ... . Clearly, the general language of County Law § 308(4), which is part of the statute governing the

establishment of an emergency 911 system in various counties, cannot be interpreted as prohibiting court-ordered discovery of 911 material in civil litigation." **Anderson v State of New York, 2015 NY Slip Op 09648, 2nd Dept 12-30-15**

CRIMINAL LAW.

FAILURE TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF HIS PLEA REQUIRED THAT HE BE GIVEN THE OPPORTUNITY TO WITHDRAW HIS PLEA, DESPITE THE FACT THAT THE COURT OF APPEALS CASE MANDATING AN EXPLANATION OF DEPORTATION CONSEQUENCES CAME DOWN AFTER DEFENDANT'S PLEA.

The Second Department determined defendant should be afforded the opportunity to withdraw his plea because he was not informed of the deportation consequences of the plea. Although the Court of Appeals case requiring that the deportation consequences be explained came down after defendant's plea, the issue was properly raised on defendant's direct appeal: "Relying upon *People v Peque* (22 NY3d 168) the defendant contends that his plea of guilty was not knowing and voluntary because the plea record demonstrates that the court never advised him of the possibility that he would be deported as a consequence of his plea. In *Peque*, the Court of Appeals held that, as a matter of 'fundamental fairness,' due process requires that a court apprise a noncitizen pleading guilty to a felony of the possibility of deportation as a consequence of the plea of guilty (*id*. at 193). A defendant seeking to vacate a plea based on this defect must establish that there is a 'reasonable probability' that he or she would not have pleaded guilty and would instead have gone to trial had the court warned of the possibility of deportation (*id*. at 176, 198). As a threshold matter, we disagree with the People's contention that *Peque* should only apply prospectively. Inasmuch as *Peque*, decided after the defendant's plea, involved federal constitutional principles, it must be applied to this direct appeal ... . Contrary to the People's contention, the record does not demonstrate either that the Supreme Court mentioned, or that the defendant was otherwise aware of, the possibility of deportation. Therefore, the defendant's claim is not subject to the requirement of preservation ...". **People v Odle, 2015 NY Slip Op 09699, 2nd Dept 12-30-15**

CRIMINAL LAW.

PEOPLE'S FAILURE TO OBJECT TO JURY INSTRUCTION WHICH (UNNECESSARILY) INCREASED THEIR BURDEN OF PROOF REQUIRED THE PEOPLE TO MEET THAT BURDEN.

The Second Department determined that People's failure to object to the judge's instruction to the jury, which increased the People's burden of proof, required that the People meet that burden (which the People failed to do). The defendant was charged with first degree robbery. Two victims, Brandt and Bishop, were ordered to lie on the ground at gunpoint. Brandt was shot when he didn't lie down and later died. Property was taken from Bishop, but not from Brandt. In the charge to the jury, the judge stated that, in order to convict the defendant of first degree robbery, the jury must find property was forcibly taken from Brandt. The People did not object: "As the People correctly concede, the evidence was legally insufficient to establish the defendant's guilt of robbery in the first degree under Penal Law § 160.15(1), as that crime was charged to the jury. As relevant here, '[a] person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime . . . [c]auses serious physical injury to any person who is not a participant in the crime' (Penal Law § 160.15[1]). In this case, the Supreme Court instructed the jurors, without objection, that to find the defendant guilty of robbery in the first degree, they had to find, inter alia, that the defendant, acting in concert with at least one other individual, forcibly stole property from Brandt. Where, as here, 'the trial court's instructions to the jury increase the People's burden, and the People fail to object, they must satisfy the heavier burden' ... . Inasmuch as the evidence demonstrated that property was only taken from Bishop, the People failed to satisfy their burden as to the count of robbery in the first degree. Although the defendant's legal sufficiency claim as to this count is unpreserved for appellate review, we reach it in the exercise of our interest of justice jurisdiction ...". **People v Rose, 2015 NY Slip Op 09702, 2nd Dept 12-30-15**

CRIMINAL LAW.

SENTENCING COURT'S FAILURE TO CONSIDER YOUTHFUL OFFENDER STATUS REQUIRED VACATION OF SENTENCE.

The Second Department determined Supreme Court's failure to consider whether defendant should be adjudicated a youthful offender required vacation of the sentence, despite the fact defendant did not request youthful offender status: "In *People v Rudolph* (21 NY3d 497, 499), the Court of Appeals held that compliance with CPL 720.20(1), which provides that the sentencing court 'must' determine whether an eligible defendant is to be treated as a youthful offender, 'cannot be dispensed with, even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request.' Compliance with CPL 720.20(1) requires the sentencing court to actually consider and make an independent determination of whether an eligible youth is entitled to youthful offender treatment ... . Here, the Supreme Court did not place on the record any reason for not adjudicating the defendant a youthful offender on his conviction of attempted robbery in the second degree under Indictment No. 9960/10, and there is nothing in the record to indicate that it

considered and made an actual determination as to whether the defendant should be granted youthful offender treatment for his conviction under that indictment ... . Under these circumstances, we vacate the defendant's sentence and remit the matter to the Supreme Court, Kings County, for a determination of whether the defendant should be afforded youthful offender treatment." **People v Worrell, 2015 NY Slip Op 09706, 2nd Dept 12-30-15**

FAMILY LAW; JUVENILE DELINQUENCY; EVIDENCE.

ONLY A CLOSE RELATIVE COULD SUFFICIENTLY ALLEGE THAT THE APPELLANT WAS UNDER SIXTEEN TO SUPPORT THE AGE-ELEMENT OF THE CHARGED OFFENSE; HERE APPELLANT'S COUSIN'S ALLEGATION APPELLANT WAS FOURTEEN WAS INSUFFICIENT.

The Second Department determined that the allegation of appellant's age in a juvenile delinquency petition was insufficient. The adjudication based upon "unlawful possession of weapons by persons under sixteen" was therefore deleted. Although an allegation of age by a close relative will be sufficient to support an age-element of an offense, here the age allegation was made by appellant's cousin: "Here, the petition failed to provide an adequate nonhearsay allegation of an essential element of Penal Law § 265.05, namely, that the appellant was under the age of sixteen at the time of the incident. The complainant's supporting deposition alleged that the appellant was his '14-year-old cousin,' but it did not state the source of the complainant's knowledge of the appellant's age. The presentment agency contends that the allegation is sufficient, and it relies on the proposition that 'it is generally recognized that the age of a family member is common knowledge within a family' (*Matter of Brandon P.*, 106 AD3d 653, 653). That proposition, however, applies to close family relationships. Notably, in *Matter of Brandon P.*, the allegation as to the appellant's age was made by the appellant's sister (see *id*. at 653). The relationship of 'cousin,' by contrast, is too distant and too broad in degree of consanguinity (*see* Black's Law Dictionary 442-443 [10th ed 2014]) to meet the requirements of Family Court Act § 311.2 in this case. Specifically, the complainant's statement regarding the appellant's age was not a sufficient nonhearsay allegation based on personal knowledge establishing reasonable cause to believe that the age element of the offense was met. Since count four of the petition was jurisdictionally defective, that count must be dismissed, and the order of disposition and the order of fact-finding modified accordingly ...". **Matter of Diamond J. (Anonymous), 2015 NY Slip Op 09689, 2nd Dept 12-30-15**

FAMILY LAW; JUVENILE DELINQUENCY; EVIDENCE.

STATEMENT TO LAW ENFORCEMENT PERSONNEL BY AN INCAPACITATED JUVENILE ADMISSIBLE IN PROBABLE CAUSE HEARING WHICH LED TO A MENTAL HEALTH COMMITMENT OF THE JUVENILE.

The Second Department determined a statement made to law enforcement personnel by a juvenile respondent who was deemed incapacitated was admissible in the probable cause hearing which led to the juvenile's commitment to the custody of the commissioner of mental health/mental retardation and developmental disabilities. The juvenile allegedly started a fire in his father's house. Family Court found the juvenile to be incapacitated and therefore no fact-finding hearing was held. At the probable cause hearing (re: commitment of the juvenile) the juvenile's statement, made after waiving his Miranda rights, was admitted in evidence: "Family Court did not violate [the juvenile's] due process rights by ordering his commitment based on a probable cause finding that depended, in part, on a written statement he made to law enforcement officials. The court's finding that the appellant lacked the capacity to proceed to a fact-finding hearing did not equate to a finding that the appellant could not comprehend the Miranda warnings . . . that were administered by a police officer before the appellant made his statement. To be competent to proceed to a fact-finding hearing, a juvenile respondent must have the capacity to understand the proceedings and to assist in his or her own defense (see Family Ct Act § 301.2[13]). In contrast, '[a]n individual may validly waive Miranda rights so long as the immediate import of those warnings is comprehended, regardless of his or her ignorance of the mechanics by which the fruits of that waiver may be used later in the criminal process' ... . Thus, the court's incapacity finding did not undermine the reliability of the appellant's statement with respect to whether there was probable cause to believe that the appellant committed an offense. Further, the statement was, prima facie, competent for that purpose, even if it might later be rendered inadmissible by extrinsic proof ...". **Matter of Jaime E. S. (Anonymous), 2015 NY Slip Op 09694, 2nd Dept 12-30-15**

PERSONAL INJURY; EVIDENCE.

DEFENDANTS DID NOT DEMONSTRATE CEMENT PATCH WAS A TRIVIAL DEFECT AS A MATTER OF LAW; NO EVIDENCE OF DIMENSIONS OF DEFECT SUBMITTED.

The Second Department determined defendants did not demonstrate, as a matter of law, that the cement patch over which plaintiff allegedly tripped was a trivial defect. The defendants did not submit evidence of the dimensions of the defect: " '[T]here is no minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable ...'. Photographs that fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable ... . Here, in support of their motion, the defendants submitted, inter alia, the deposition testimony of the plaintiff and photographs which the plaintiff claimed accurately depicted the condition that allegedly caused her to fall. Viewed in the light most favorable to the plaintiff, as the nonmovant ... , the evidence submitted by the defendants

failed to establish their prima facie entitlement to judgment as a matter of law. No evidence was elicited as to the dimensions of the defect at the time of the accident. In light of the photographs, which depict the irregular nature of the sidewalk, as well as the time, place, and circumstance of the plaintiff's fall, it cannot be said as a matter of law that the condition at issue was trivial as a matter of law and therefore not actionable ...". **Mazza v Our Lady of Perpetual Help R.C. Church, 2015 NY Slip Op 09657, 2nd Dept 12-30-15**

PERSONAL INJURY; LABOR LAW.

INDUSTRIAL CODE PROVISION REQUIRING THAT SAFETY DEVICES BE KEPT SOUND AND OPERABLE CONSTITUTED A CONCRETE PREDICATE FOR A LABOR LAW 241(6) CAUSE OF ACTION WHICH ALLEGED INJURY DUE TO THE ABSENCE OF A "PROTECTOR" ON A GRINDER.

The Second Department determined a provision in the Industrial Code, 12 N.Y.C.R.R. 23-9.2(a), was sufficiently concrete to serve as a predicate for a Labor Law 241(6) cause of action. The plaintiff was using a grinder to cut sheet metal when a piece of sheet metal and a piece of the grinder "shot out" and injured him. Plaintiff alleged a "protector" had been removed from the grinder: "Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to 'provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed' ... . As a predicate to a section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code ... . * * * [P]laintiff's Labor Law § 241(6) claim is predicated on an alleged violation of 12 NYCRR 23-1.5(c)(3), which provides that '[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.' Sections 23-9.2(a) and 23-1.5(c)(3) each set forth an action to be taken ('corrected by necessary repairs or replacement'; 'repaired or restored . . . or removed') and set forth the trigger or time frame for taking such action ('upon discovery'; 'immediately . . . if damaged'). Therefore . . . we hold that 12 NYCRR 23-1.5(c)(3) is sufficiently concrete and specific to support the plaintiff's Labor Law § 241(6) cause of action ...". **Perez v 286 Scholes St. Corp., 2015 NY Slip Op 09664, 2nd Dept 12-30-15**

PERSONAL INJURY; LABOR LAW.

WORKER STRUCK BY DEBRIS WHICH FELL THROUGH A GAP IN PROTECTIVE NETTING ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240(1) CAUSE OF ACTION.

The Second Department, reversing Supreme Court, granted summary judgment on plaintiff's Labor Law 240(1) cause of action. Workers were using jackhammers to chip away concrete on an elevated structure. Netting had been installed to catch falling pieces of concrete. Plaintiff was struck and severely injured by a four-foot piece of concrete which fell through a gap in the netting. The netting was deemed to be an inadequate safety device: "The plaintiffs' submissions demonstrated that the injured plaintiff suffered harm that 'flow[ed] directly from the application of the force of gravity' to the piece of concrete that struck him ... , and that given the nature and purpose of the work that was being performed at the time of his injury, the falling debris presented a significant risk of injury such that the . . . defendants were obligated under Labor Law § 240(1) to use appropriate safety devices to safeguard the injured plaintiff from the harm it posed ... . The plaintiffs' submissions also demonstrated that the injured plaintiff's injury was 'the direct consequence of a failure to provide adequate protection against [the] risk' of harm posed by the falling debris ... . Indeed, the plaintiffs established that the vertical netting that was installed around the controlled access zone to protect workers from the falling debris had pulled loose from the plywood barricade, creating an opening through which the concrete that struck the injured plaintiff traveled. Under these circumstances, the vertical netting constituted a safety device within the meaning of Labor Law § 240(1) ... , and the plaintiffs demonstrated that it was not 'so constructed, placed and operated as to give proper protection' (Labor Law § 240[1])." **Sarata v Metropolitan Transp. Auth., 2015 NY Slip Op 09667, 2nd Dept 12-30-15**

FOURTH DEPARTMENT

CIVIL PROCEDURE; CLASS CERTIFICATION; INJURY TO PROPERTY; ENVIRONMENTAL LAW.

CLASS ACTION PROPERLY CERTIFIED IN CASE ALLEGING NEGLIGENT DISCHARGE OF CHEMICALS INTO THE ATMOSPHERE.

In an action alleging defendants negligently discharged chemicals into the atmosphere, resulting in a reduction of property values and quality of life, the Fourth Department determined a class action was properly certified. The court explained the criteria: "[A] class action may be maintained in New York only after the five prerequisites set forth in CPLR 901 (a) have been met, i.e., the class is so numerous that joinder of all members is impracticable, common questions of law or fact predominate over questions affecting only individual members, the claims or defenses of the representative parties are typical of the class as a whole, the representative parties will fairly and adequately protect the interests of the class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy ... . A plaintiff seeking class certification has the burden of establishing the prerequisites of CPLR 901 (a) and thus establish[ing] . . . entitlement to

class certification ... . Although the individual class members may have sustained differing amounts of damages, it is well settled that the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class ... . * * * [B]ecause the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, [the fact that the class representative's] damages may differ from those of other members of the class is not a proper basis to deny class certification ...". [internal quotation marks omitted] **DeLuca v Tonawanda Coke Corp., 2015 NY Slip Op 09739, 4th Dept 12-31-15**

CIVIL PROCEDURE; PERSONAL INJURY; MUNICIPAL LAW.

SHERIFF IS NOT VICARIOUSLY LIABLE FOR EMPLOYEES OF THE SHERIFF'S DEPARTMENT; SHERIFF, THEREFORE, IS NOT UNITED IN INTEREST WITH THE SHERIFF'S DEPARTMENT OR THE COUNTY; RELATION-BACK DOCTRINE DOES NOT APPLY; SHERIFF CANNOT BE ADDED TO THE COMPLAINT AFTER THE STATUTE OF LIMITATIONS HAS RUN.

Plaintiff sued the county alleging plaintiff's decedent was not properly screened and supervised when placed in the Erie County Holding Center where plaintiff's decedent committed suicide. After the statute of limitations had run, plaintiff was allowed to add the Erie County Sheriff as a defendant. The Fourth Department reversed, explaining that the sheriff is not vicariously liable for the actions of the Sheriff's Department and is therefore not "united in interest" with the County/Sheriff's Department: "Here, defendant County of Erie (County) is not united in interest with the Sheriff inasmuch as the County cannot be held vicariously liable for the alleged negligent acts of the Sheriff or his deputies ... . Nor is defendant Erie County Sheriff's Department (Sheriff's Department) united in interest with the Sheriff for purposes of the relation back doctrine. The Sheriff is not vicariously liable for the alleged negligent acts of the deputies employed at the Holding Center ... . In addition, the Sheriff's Department does not have a legal identity separate from the County ... , and thus an 'action against the Sheriff's Department is, in effect, an action against the County itself' ... . Given that the Sheriff and the County are not united in interest, it follows that the Sheriff and the Sheriff's Department are not united in interest, and the court therefore erred in granting plaintiff's motion for leave to amend the complaint to add the Sheriff as a party." **Johanson v County of Erie, 2015 NY Slip Op 09736, 4th Dept 12-31-15**

CRIMINAL LAW.

VICTIM'S DEATH FIVE MONTHS AFTER THE ASSAULT WAS SUFFICIENTLY LINKED TO DEFENDANT'S ACTIONS.

In affirming defendant's murder conviction, the Fourth Department concluded the victim's death five months after the assault was sufficiently linked to defendant's actions: "[I]t has long been the rule in New York that '[i]f a person inflicts a wound . . . in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes cooperated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible' ... . Thus, '[f]or criminal liability to attach, a defendant's actions must have been an actual contributory cause of death, in the sense that they forged a link in the chain of causes which actually brought about the death' ... . Additionally, the 'defendant's acts need not be the sole cause of death; where the necessary causative link is established, other causes, such as a victim's preexisting condition, will not relieve the defendant of responsibility for homicide . . . By the same token, death need not follow on the heels of injury' ...". **People v Pratcher, 2015 NY Slip Op 09730, 4th Dept 12-31-15**

CRIMINAL LAW.

DEFENDANT'S REQUEST TO PROCEED PRO SE, MADE ON THE EVE OF TRIAL, WAS NOT UNTIMELY AND SHOULD NOT HAVE BEEN SUMMARILY DENIED ON THAT GROUND; NEW TRIAL ORDERED.

The Fourth Department determined defendant's request to proceed pro se, made prior to the prosecution's opening statement, was not untimely and should not have been summarily denied on that ground. A new trial was ordered: "[T]he judgment of conviction should be reversed and a new trial granted because the court erred in summarily denying, as untimely, his request to proceed pro se ... . Although requests [to proceed pro se] on the eve of trial are discouraged, the Court of Appeals has found that a request may be considered timely when it is interposed prior to the prosecution's opening statement, as here ...". [internal quotation marks omitted] **People v Smith. 2015 NY Slip Op 09757, 4th Dept 12-31-15**

CRIMINAL LAW; EVIDENCE.

VIOLATION OF CIVIL CONTEMPT ORDER PROPERLY ADMITTED IN GRAND LARCENY TRIAL TO SHOW LARCENOUS INTENT.

The Fourth Department, over a two-justice dissent, determined defendant's violation of a civil contempt order was properly admitted in defendant's grand larceny trial to show larcenous intent: "The . . . order directed defendant's businesses to turn over all monies they had received as a result of defendant diverting credit card proceeds from Webster Hospitality

Development LLC (WHD), a company in which defendant held majority ownership and which was in receivership, to undisclosed bank accounts maintained for defendant's businesses. Contrary to defendant's contention, the contempt order does not constitute a finding that defendant stole the money; rather, it demonstrates that defendant's businesses failed to abide by the earlier order to return money to WHD and to provide certain documentation to the receiver. We thus conclude that the contempt order was properly admitted as relevant evidence of defendant's intent to deprive WHD of the money by 'withhold[ing] it or caus[ing] it to be withheld from [WHD] permanently' (§ 155.00 [3]; *see People v Molineux*, 168 NY 264, 293). Moreover, we note that '[l]arcenous intent . . . is rarely susceptible of proof by direct evidence, and must usually be inferred from the circumstances surrounding the defendant's actions' ... . Here, the contempt order had significant probative value inasmuch as it showed that defendant's conduct did not merely constitute poor financial management but, rather, that defendant, through his businesses, intended to deprive WHD of the diverted money permanently. The court therefore properly concluded that 'the probative value of the evidence outweighed its prejudicial effect' ...". **People v Frumusa, 2015 NY Slip Op 09718, 4th Dept 12-31-15**

CRIMINAL LAW; EVIDENCE.

STATEMENT MADE AFTER UNEQUIVOCAL REQUEST FOR COUNSEL SHOULD HAVE BEEN SUPPRESSED; NEW TRIAL ORDERED.

The Fourth Department reversed defendant's conviction and ordered a new trial after concluding defendant's statements to police should have been suppressed. After defendant told police she needed to talk to a lawyer, the police questioned her further during a "smoke break": "After answering questions for approximately an hour and ten minutes, defendant said, 'I think I need to talk to an attorney.' In response, the first investigator stated, 'Would you like to talk to one? If you think that, that's fine. That's up to you.' Defendant replied, "'need to,' before going on to state that she would never have bad feelings toward the boy and genuinely cared about him. The questioning then ceased, and the first investigator allowed defendant to go outside with the second investigator and a female Child Protective Services worker to smoke a cigarette. While defendant was smoking in the parking garage, the second investigator engaged her in a lengthy conversation. Unbeknownst to defendant, the conversation was being digitally recorded by the second investigator. During the conversation, defendant made numerous admissions, all but confessing that she had engaged in sexual activity with the boy. * * * [W]e conclude that, although defendant's statement 'I think I need to talk to an attorney' may not, standing alone, constitute an unequivocal invocation of the right to counsel ... , her subsequent statement 'I need to' — made in reply to the first investigator stating 'Would you like to talk to one? If you think that, that's fine. That's up to you' — removed any ambiguity and made clear that defendant was requesting the assistance of counsel ...". **People v Kennard, 2015 NY Slip Op 09729, 4th Dept 12-31-15**

CRIMINAL LAW; EVIDENCE.

JUDGE'S RESPONSE TO JURY NOTE ALLOWED JURY TO CONSIDER EVIDENCE OF ACTIONS NOT CHARGED IN THE INDICTMENT, CONVICTION REVERSED AND INDICTMENT DISMISSED.

The Fourth Department determined the trial judge's response to a jury note allowed the jury to consider evidence of actions not charged in the indictment. Defendant's conviction for endangering the welfare of a child was therefore reversed and the indictment was dismissed: "As set forth in the indictment and bill of particulars, as well as pursuant to the People's theory at trial, the endangerment charge was based on the conduct alleged in the preceding six counts of rape in the second degree and incest in the second degree, of which defendant was acquitted. After receiving a jury note during deliberations, the court instructed the jurors that they were not precluded from considering conduct other than the alleged rape and incest when considering the endangerment charge. That instruction allowed the jury to consider conduct not charged in the indictment. Because the jury may have convicted defendant of . . . act[s] . . . for which he was not indicted, defendant's right to have charges preferred by the [g]rand [j]ury rather than the prosecutor at trial was violated ... . Additionally, based on the vague nature of the court's instruction, [i]t is impossible to ascertain what alleged act of [endangerment] was found by the jury to have occurred, whether it was one . . . for which he was indicted, or indeed whether different jurors convicted defendant based on different acts ...". [internal quotation marks omitted] **People v Utley, 2015 NY Slip Op 09749, 4th Dept 12-31-15**

CRIMINAL LAW; EVIDENCE; PROSECUTORIAL MISCONDUCT.

PROSECUTOR ADMONISHED FOR IMPROPER REMARKS IN SUMMATION (CONVICTION NOT REVERSED HOWEVER); INSUFFICIENT EVIDENCE OF PHYSICAL INJURY TO SUPPORT ASSAULT THIRD CONVICTION.

The Fourth Department admonished the prosecutor for improper remarks in summation, but did not reverse the conviction. The court found the evidence of "physical injury" insufficient to support the assault in the third degree conviction and reversed that unpreserved error under a "weight of the evidence" analysis: "Despite this Court's repeated admonitions to prosecutors not to engage in misconduct during summation, the prosecutor improperly referred to facts not in evidence when he insinuated that the victim regretted that she did not get out of defendant's vehicle ... . The prosecutor also improperly appealed to the jury's sympathy and bolstered the victim's credibility, and did so repeatedly, by commenting on how difficult it was for her to recount her ordeal, first to the police, then before the grand jury, and finally in her trial testimony

... . In addition, the prosecutor improperly suggested that the jury experiment on themselves to see how quickly bite marks fade ... . Nevertheless, [a]lthough we do not condone the prosecutor's conduct, it cannot be said here that it caused such substantial prejudice to the defendant that he has been denied due process of law ... . We admonish the prosecutor, however, and remind him that prosecutors have special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process ... . * * * We conclude, upon our independent review of the evidence, that the People failed to prove beyond a reasonable doubt that the victim sustained a physical injury ... . The indictment alleged that defendant caused physical injury to the victim by striking her in the face. Although the victim testified that defendant struck her in the face, and photographs of the victim showed swelling and discoloration of the left side of her face, the victim did not testify that she suffered substantial pain from that injury or that she sought medical attention for it ...". [internal quotation marks omitted] **People v Gibson, 2015 NY Slip Op 09722, 4th Dept 12-31-15**

CRIMINAL LAW; PROSECUTORIAL MISCONDUCT.

PROSECUTOR'S REMARKS IN SUMMATION REQUIRED REVERSAL.

The Fourth Department, in the interest of justice, reversed defendant's conviction based upon prosecutorial misconduct in summation: "On summation, the prosecutor repeatedly invoked a 'safe streets' argument ... , even after Supreme Court sustained defense counsel's objection to the prosecutor's use of that argument; denigrated the defense by calling defense counsel's arguments 'garbage,' 'smoke and mirrors,' and 'nonsense' intended to distract the juror's focus from the 'atrocious acts' that defendant committed against the victim ... ; improperly characterized the defense as being based on a 'big conspiracy' against defendant by the prosecutor and the People's witnesses ... ; and denigrated the fact that defendant had elected to invoke his constitutional right to a trial ... . Perhaps most egregiously, given that 'the potential danger posed to defendant when DNA evidence is presented as dispositive of guilt is by now obvious,' the prosecutor engaged in misconduct when she mischaracterized and overstated the probative value of the DNA evidence in this case ...". **People v Jones, 2015 NY Slip Op 09773, 4th Dept 12-31-15**

ENVIRONMENTAL LAW; MUNICIPAL LAW.

VILLAGE'S AGREEMENT TO SELL ONE MILLION GALLONS OF WATER PER DAY FOR TRANSPORT TO PENNSYLVANIA WAS A TYPE I ACTION REQUIRING SEQRA REVIEW.

Upon remittitur after reversal by the Court of Appeals, the Fourth Department affirmed Supreme Court's rulings re: the Water Agreement and Lease Agreement entered into by the Village of Painted Post. The Lease Agreement concerned the construction of a railroad transloading facility and the Water Agreement concerned the sale of one million gallons of water per day to be transported (by rail) to Pennsylvania. The Fourth Department determined the Water Agreement was a Type I, not Type II, action which required review under the State Environmental Quality Review Act (SEQRA). Because the Village of Painted Post did not conduct a SEQRA review of the Water Agreement, the relevant village resolutions were annulled and a consolidated SEQRA review of both the Water Agreement and Lease Agreement was ordered: "SEQRA review was required for the Water Agreement. Although the Village conducted a SEQRA review of the Lease Agreement, segmentation, i.e., the division of environmental review for different sections or stages of a project (*see* 6 NYCRR 617.2 [ag]), is generally disfavored … . We thus conclude that the court properly determined, on the merits of the first cause of action, that all of respondent Village's resolutions should be annulled and that a consolidated SEQRA review of both agreements was required." **Matter of Sierra Club v Village of Painted Post, 2015 NY Slip Op 09707, 4th Dept 12-31-15**

MENTAL HYGIENE LAW.

PETITIONER'S MOTION FOR A DIRECTED VERDICT IN AN ARTICLE 10 TRIAL SHOULD NOT HAVE BEEN GRANTED; A TRIABLE ISSUE HAD BEEN RAISED CONCERNING PETITIONER'S ABILITY TO CONTROL HIS SEXUAL CONDUCT.

The Fourth Department, over a two-justice dissent, reversing Supreme Court, determined that petitioner-sex-offender's motion for a directed verdict in an Article 10 trial should not have been granted. Petitioner had been deemed a dangerous sex offender and was committed to a secure facility. In the instant proceeding, petitioner sought release under a regimen of strict and intensive supervision and treatment. The state presented evidence petitioner had been diagnosed with antisocial personality disorder, paraphilia otherwise specified, and cannabis dependence. The majority concluded that the state's expert, Dr. Prince, had presented sufficient additional evidence, including a history of defendant's sexual behavior, his response to treatment, and the results of psychological tests, to raise a triable issue of fact whether defendant had serious difficulty in controlling his sexual conduct. **Matter of Wright v State of New York, 2015 NY Slip Op 09711, 4th Dept 12-31-15**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DRIVER WITH THE RIGHT-OF-WAY WAS COMPARATIVELY NEGLIGENT IN COLLISION WITH DRIVER WHO FAILED TO YIELD THE RIGHT OF WAY.

The Fourth Department determined there was question of fact whether the driver of a car with the right-of-way (defendant) was comparatively negligent in striking a car (driven by Deering) which failed to yield the right-of-way at an intersection:

"There is no dispute that Deering was negligent in failing to yield the right-of-way or that defendant was entitled to anticipate that she would obey the traffic laws that required her to yield the right-of-way to him ... . Nevertheless, in moving for summary judgment, defendant had the burden of establishing not only that Deering was negligent, but also that he was free of comparative fault ... . Defendant failed to meet that burden, inasmuch as his own submissions raised triable issues of fact whether he was negligent ... . At his deposition, defendant testified that he saw the Deering vehicle at the intersection after he traveled over an elevated overpass on Route 5 that is approximately 300 yards from the intersection, but he looked away and did not see the Deering vehicle before or at the moment of impact. [I]t is well settled that drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident, and defendant's admitted failure to see the Deering vehicle immediately prior to the accident raises an issue of fact whether he violated that duty ... . Thus, even though defendant had the right-of-way as he approached Bayview Road, he may nevertheless be found negligent if he . . . fail[ed] to use reasonable care when proceeding into the intersection . . . A driver cannot blindly and wantonly enter an intersection ...". [internal quotation marks omitted] **Deering v Deering, 2015 NY Slip Op 09715, 4th Dept 12-31-15**

PERSONAL INJURY; LABOR LAW.

LABOR LAW 241(6) CAUSE OF ACTION STEMMING FROM EYE INJURY ASSOCIATED WITH USE OF A NAIL GUN PROPERLY SURVIVED SUMMARY JUDGMENT.

Plaintiff was injured when using a nail gun. A nail ricocheted and struck his eye. The Fourth Department determined defendant was not entitled to summary judgment dismissing the Labor Law 241(6) cause of action because eye protection was required by the Industrial Code, and plaintiff was not entitled to summary judgment because there were questions of fact whether eye protection was available to the plaintiff. The court noted that the risk of eye injury from use of a nail gun is more apparent than any such risk associated with manual hammering: "We reject defendant's contention that it was entitled to summary judgment pursuant to this Court's holding in *Herman v Lancaster Homes* (145 AD2d 926, 926, *lv denied* 74 NY2d 601). Unlike the circumstances in *Herman*, plaintiff herein was not manually hammering nails but, rather, was operating a pneumatic nail gun when a nail ricocheted and penetrated his right eye. In our view, 'the dangers a nail gun present[s] to the eyes are more apparent tha[n] the dangers of manual hammering' . . . and the plaintiff's use of the nail gun clearly falls within the regulatory definition of engaging 'in any other operation which may endanger the eyes' (12 NYCRR 23-1.8 [a]). Contrary to defendant's further contention, based upon the record before us, we conclude that plaintiff established as a matter of law that the regulation applies, and that defendant failed to raise a triable issue of fact on that point ...". **Quiros v Five Star Improvements, Inc., 2015 NY Slip Op 09713, 4th Dept 12-31-15**

PERSONAL INJURY; PRODUCTS LIABILITY.

EXPERT EVIDENCE OF A RECALL AND EVIDENCE OF CUSTOMER COMPLAINTS ABOUT DEFENDANTS' MOTORCYCLE RELEVANT TO DEFENDANTS' DUTY TO WARN.

The Fourth Department, eliminating restrictions on the evidence imposed by Supreme Court, determined evidence from plaintiffs' electrical expert and evidence of customer complaints were relevant to defendants' duty to warn. Plaintiffs alleged an electrical defect in their motorcycle (manufactured by defendants) caused the accident. Plaintiffs sought to introduce evidence of a recall made prior to the accident and evidence of customer complaints: "[W]e conclude that the court erred in granting that part of defendants' motion seeking to preclude the testimony of plaintiffs' electrical engineer expert and the customer complaints to the extent that such evidence is relevant to defendants' continuing duty to warn. We therefore modify the order accordingly. 'A manufacturer or retailer may . . . incur liability for failing to warn concerning dangers in the use of a product which come to his attention after manufacture or sale . . . through being made aware of later accidents involving dangers in the product of which warning should be given to users . . . Although a product [may] be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn' ... . 'What notice . . . will trigger [this] postdelivery duty to warn appears to be a function of the degree of danger which the problem involves and the number of instances reported . . . [Whether] a prima facie case on that issue has been made will, of course, depend on the facts of each case' ...". **Smalley v Harley-Davidson Motor Co. Group LLC, 2015 NY Slip Op 09712, 4th Dept 12-31-15**

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