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September 27, 2019

Chief Clerk and Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207
Attention John P. Asiello

RE: *Cutaia, Michael v. Bd of Mngrs of 160/170 Varick, et al.*
N.Y. County Index No.: 155334/12
Court of Appeals Docket No.: APL-2019-00168

Dear Honorable Sir:

This office represents the interests of the defendants-appellants, The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York ("Trinity Church"), and Michilli Construction, Inc. and Michilli Inc. ("Michilli"), in this matter. Please accept this letter submission pursuant to Rule 500.11 of the Court of Appeals' Rules of Practice and pursuant to the Court's letter of September 6, 2019.

Preliminary Statement

Trinity Church and Michilli seek reversal of the May 2, 2019 decision and order of the Appellate Division, First Department, which reversed the Supreme

Court's denial of the motion for summary judgment under Labor Law § 240(1) by the plaintiff-respondent, Michael Cutaia ("plaintiff"). Trinity Church and Michilli seek reversal because the majority's May 2, 2019 decision and order is at odds with pre-2009 precedent of the First Department, it demonstrates and exacerbates a split of authority among the four appellate judicial departments, putting the First Department at odds with decisions of the Second, Third, and Fourth Departments, and it is contrary to the binding decision by the Court of Appeals in *Nazario v. 222 Broadway, LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016]. The Second, Third, and Fourth Departments, and the Court of Appeals, have held that where a worker falls from a ladder, *and there is no evidence in the record that the ladder was defective, collapsed, or otherwise moved,* after having sustained an electric shock, a question of fact is presented as to whether the plaintiff is entitled to judgment under Labor Law § 240(1).

Accordingly, it was reversible error for the majority to award summary judgment to the plaintiff on his Labor Law § 240(1) cause of action. Rather, the Court of Appeals should reverse for the well-stated reasons that formed the dissenting opinion in the court below by the Honorable Justice Peter Tom, and joined by the Honorable Justice Marcy L. Kahn, and for the reasons stated below.

Legal Argument

I. The Decision and Order By the First Department Below to Grant Summary Judgment to the Plaintiff on His Labor Law § 240(1) Cause of Action Should Be Reversed and the Denial of Said Motion as to Labor Law § 240(1) by the Supreme Court in New York County Reinstated

The majority opinion of Appellate Division, First Department's May 2, 2019 decision and order reversed the denial of summary judgment to plaintiff on his Labor Law § 240(1) claim. Despite the First Department's prior incorrect holding in *Nazario v. 222 Broadway LLC*, 135 A.D.3d 506, 23 N.Y.S.3d 192 [1st Dep't 2016], which was reversed by the Court of Appeals (*see* 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016]), the First Department here once again adhered to its rationale as set forth in *Vukovich v. 1345 Fee, LLC*, 61 A.D.3d 533, 878 N.Y.S.2d 15 [1st Dep't 2009] and *DelRosario v. United Nations Federal Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dep't 2013], both of which marked a sharp departure from pre-2009 holdings of the First Department, and from holdings in the other three appellate departments and the Court of Appeals. In his concurring opinion, in *Nazario, supra*, 135 A.D.3d at 512-13, which was essentially adopted by the Court of Appeals, Justice Tom wrote that "prior to this Court's holdings in *Vukovich* and *DelRosario*, all four Departments were unanimous in finding that a question of fact exists on the issue of liability under

Labor Law § 240(1) when a plaintiff worker falls from an A-frame stepladder as a result of an electric shock, and where there is no evidence the ladder is defective and no record evidence of the need for another device" (*Nazario, supra*, 135 A.D.3d at 512-13).

Although the majority here, in its May 2, 2019 order wrote that "*Nazario* never suggested that all elevated falls following electrical shocks were carved out of the protections of the statute," neither Trinity Church and Michilli, nor Justices Tom and Kahn in their dissenting opinion below, have suggested any such thing. As stated in Justice Tom's prescient concurring opinion in *Nazario* and reiterated in his dissenting opinion below, issues of fact are presented when a worker falls from a ladder after having received an electric shock *"where there is no evidence the ladder is defective and no record evidence of the need for another device"* (*Id.* [emphasis added]).

Justice Tom aptly pointed out in his dissenting opinion below that it is the majority which has carved out exclusively in the First Department, "a special category of injury that circumvents a plaintiff's responsibility in the first instance of establishing a prima facie case of causation" (*see* dissenting opinion appended to May 2, 2019 order). Although the majority would assuredly deny that a special category of injury has now been carved out in the First Department, the majority's

opinion below, and *Vukovich* and *DelRosario*, have essentially ensured such a result.

The majority's decision below is in direct contravention of this Court's decision in *Nazario v. 222 Broadway LLC*, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 [2016] and *Blake v. Neighborhood Hous. Servs of N.Y. City*, 1 N.Y.3d 280, 288-89, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003] [referring to "the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party" and that "causation must also be established"].

The majority's decision below is also in direct conflict with decisions of the Second, Third, and Fourth Departments. In *Gange v. Tilles Inv. Co.*, 220 A.D.2d 556, 632 N.S.Y.2d 808 [2d Dep't 1995], the Second Department held:

> [T]he fact that the plaintiff fell off of the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240(1) for injuries sustained as a result of the fall from the ladder (*see, Izrailev v Ficarra Furniture*, 70 NY2d 813). However, the plaintiff is not entitled to summary judgment under Labor Law § 240(1) as there are questions of fact as to whether, inter alia, the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether the plaintiff should have been provided with additional safety devices [citations omitted].

(*Gange*, 220 A.D.2d at 558 [citing *Izrailev v Ficarra Furniture of Long Is.*, 70 N.Y.2d 813, 523 N.Y.S.2d 432, 517 N.E.2d 1318 [1987]).

The majority's decision below is also in direct conflict with the Third Department's decision in *Grogan v. Norlite Corp.*, 282 A.D.2d 781, 723 N.Y.S.2d 529 [3d Dep't 2001], where the appellate court held:

> The Court of Appeals has routinely ruled that in order for a plaintiff to recover under Labor Law § 240(1), the injury must be proximately caused by a defendant's failure to provide an adequate safety device [citations omitted]. Moreover, this Court has consistently held that "a mere fall from a ladder or other similar safety device that did not slip, collapse or otherwise fail is insufficient to establish that the ladder did not provide appropriate protection to the worker" [citations omitted]. However, the holdings of these cases are a corollary to the general rule in this Court that "when a worker injured in a fall was provided with an elevation-related safety device, the question of whether the device provided proper protection within the meaning of Labor Law § 240(1) is ordinarily a question of fact ... except where the device collapses, slips or otherwise fails to perform its function of supporting the workers and their materials" [citations omitted].
>
> Thus, where, as here, there is no evidence that the ladder slipped, collapsed or was otherwise defective, the question of whether the ladder provided proper protection is a factual one and neither the injured worker nor the owner is entitled to summary judgment on a Labor Law § 240(1) claim [citation omitted]. To this end, we note that under circumstances essentially identical to the case at bar, each of the other Departments has held that a question of fact exists on the issue of liability under Labor Law § 240(1) when a plaintiff worker falls from an A-frame stepladder as a result of an electrical shock (*see*, *Donovan v CNY Consol. Contrs.*, 278 AD2d 881; *Weber v 1111 Park Ave. Realty Corp.*, 253 AD2d 376, 378; *Gange v Tilles Inv. Co.*, 220 AD2d 556, 558).

(*Grogan*, 282 A.D.2d at 782-83).

The majority's decision below is also in direct conflict with the Fourth Department's decision in *Jones v. Nazareth College of Rochester*, 147 A.D.3d 1364, 46 N.Y.S.3d 357 [4th Dep't 2017], where that court held:

> We conclude that Supreme Court properly denied plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240(1) cause of action. At the time of the accident, plaintiff was using a 10-foot A-frame ladder to install flashing around a duct. The ladder was folded shut and leaning against the wall while plaintiff was using it. Just before the accident, he was using both hands to take a measurement above his head, while standing on "the fourth or fifth rung" of the ladder, which was "at least four feet off the floor." As he extended his tape measure, he felt a strong electric shock to his left arm and he fell off the ladder.
>
> Contrary to plaintiff's contention, we conclude that the court properly denied the motion. "[T]here are questions of fact . . . whether . . . the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether . . . plaintiff should have been provided with additional safety devices" (*Gange v Tilles Inv. Co.*, 220 AD2d 556, 558 [1995]; *see Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 1055 [2016]; *Grogan v Norlite Corp.*, 282 AD2d 781, 782-783 [2001]; *Donovan v CNY Consol. Contrs.*, 278 AD2d 881, 881 [2000]).

(*Jones*, 147 A.D.3d at 1365).

As early as one month after the First Department's 2009 decision in *Vukovich*, *supra*, the trial courts within the department began begrudgingly citing it with bewilderment, noting its departure from well-established precedent not only in the First Department, but from the other appellate departments as well (*see*

Nakis v. Apple Computer, Inc., 24 Misc.3d 967, 879 N.Y.S.2d 910 [Sup.Ct.2009], in which Justice Edward H. Lehner, J.S.C., wrote in a reported decision:

> [C]oming to the issue of whether the fall as a result of an electric shock can result in liability under § 240(1), the First Department, in denying summary judgment in *Weber v. 1111 Park Avenue Realty Corp.*, 253 A.D.2d 376, 676 N.Y.S.2d 174 (1998), quoted the Second Department conclusion in *Gange v. Tilles Investment Co.*, 220 A.D.2d 556, 632 N.Y.S.2d 808 (1995), that "the fact that the plaintiff fell off the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240(1), ... (but) the plaintiff is not entitled to summary judgment ... as there are questions of fact as to whether, inter alia, the ladder, which was not shown to be defective in any way, failed to provide proper protection and whether plaintiff should have been provided with additional safety devices" (p. 378, 676 N.Y.S.2d 174). Similar holdings that an issue of fact is raised when a worker falls off a non-defective ladder as a result of an electric shock were rendered in *Karapati v. K.J. Rocchio, Inc.*, 12 A.D.3d 413, 783 N.Y.S.2d 839 (2nd Dept.2004); *Donovan v. CNY Consolidated Contractors, Inc.*, 278 A.D.2d 881, 718 N.Y.S.2d 760 (4th Dept.2000); *Grogan v. Norlite Corporation*, 282 A.D.2d 781, 782–783, 723 N.Y.S.2d 529 (3rd Dept.2001) ("we note that under circumstances essentially identical to the case at bar, each of the other Departments has held that a question of fact exists on the issue of liability under Labor Law § 240(1) when a plaintiff worker falls from an A-frame stepladder as a result of an electric shock," citing the foregoing cases).
>
> *However, this year in Vukovich v. 1345 Fee, LLC, 58 A.D.3d 410, without mentioning any of the above-cited cases, the First Department granted summary judgment to plaintiff under facts similar to those in said cases, stating merely that the "ladder provided to plaintiff was inadequate to prevent him from falling five to seven feet to the floor after being shocked and was a proximate cause of his injuries."* That action was then tried before me and resulted in a jury award to plaintiff of over $5,000,000. However,

> shortly after the award, the First Department recalled its prior determination and issued a new decision (61 A.D.3d 533, 878 N.Y.S.2d 15), which adhered to its prior grant of summary judgment to plaintiff, but withdrew the portion of the prior decision that granted summary judgment on an indemnity claim, and determined that there were triable issues of fact on such claim.
>
> In view of the above, the motion of Apple to dismiss plaintiff's claim against it under § 240(1) is denied. It is noted that plaintiff has not moved for summary judgment.

(*Nakis*, 24 Misc.3d at 971-72 [emphasis added]).

Once *Vukovich* was decided, the First Department began relying on it as precedent to, as Justice Tom wrote in his dissent below, carve out "a special category of injury that circumvents a plaintiff's responsibility in the first instance of establishing a prima facie case of causation." In *DelRosario*, the First Department cited *Vukovich* as precedent. In the First Department's decision in *Nazario*, which was later reversed by this Court, the First Department relied on *Vukovich* and *DelRosario*. Now, despite the Court of Appeals' decision in *Nazario, supra*, 28 N.Y.3d 1054, the First Department here has again reverted back to reliance on *Vukovich* and *DelRosario* as precedent, contrary to this Court's decision in *Nazario* and contrary to the decisions by all the other appellate departments.

With its 2009 decision in *Vukovich*, the First Department split with the other three departments and abandoned its own precedent as seen in its 1998 decision in

Weber v. 1111 Park Ave. Realty Corp., 253 A.D.2d 376, 676 N.Y.S.2d 174 [1st Dep't 1998].

In *Weber*, the First Department cited the Second Department's decision in *Gange*, *supra*, with approval:

> *Gange v Tilles Inv. Co.* (220 AD2d 556) is directly on point. There, the Appellate Division, Second Department, stated (at 558), "the fact that the plaintiff fell off of the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240(1) for injuries sustained as a result of the fall from the ladder (*see*, *Izrailev v Ficarra Furniture*, 70 NY2d 813). However, the plaintiff is not entitled to summary judgment under Labor Law § 240(1) as there are questions of fact as to whether, *inter alia*, the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether the plaintiff should have been provided with additional safety devices".

(*Weber*, 253 A.D.2d at 378).

Perhaps the case that best illustrates how the majority of the justices in the First Department on the decision below overlooked or misapprehended the Court of Appeals' decision in *Nazario* and the decisions of the other departments, is *Faver v. Midtown Trackage Ventures LLC*, 150 A.D.3d 580, 52 N.Y.S.3d 626 [1st Dep't 2017]. In *Faver*, in reversing the denial of summary judgment to the plaintiff there on his Labor Law § 240(1) claim, a unanimous panel of the First Department wrote: "Plaintiff established entitlement to partial summary judgment on his Labor Law § 240(1) claim through his own testimony that he was hit in the

arm by an electrical wire that shot out of a section of conduit pipe after being jammed inside, *causing the unsecured ladder he was standing on to wobble, which resulted in plaintiff losing his balance and falling to the ground"* (150 A.D.3d at 580 [emphasis added]).

Justice Kahn, who joined Justice Tom's dissent here, voted unanimously with her colleagues in *Faver*. Why? The undersigned believes that the reason is clear. Justice Kahn clearly voted with the majority in *Faver* because the plaintiff there presented evidence that the ladder he was using was unsecure, was caused to wobble as a result of his electric shock, and that such wobbling caused the plaintiff to lose his balance and fall to the ground. In other words, the plaintiff in *Faver* established that the safety device provided to him was inadequate for the task which he was assigned. In the case at bar, the plaintiff, Michael Cutaia, has proffered no evidence that the ladder he was using was unsecure. To the contrary, he testified that the ladder was stable and "sturdy up against the wall" (480, 501).[1] Unlike in *Faver*, the plaintiff here presented no evidence that the ladder wobbled or otherwise moved as a result of his electric shock. To the contrary, he testified that after his "electrocution" he does not know how he ended up on the floor (508). When asked what happened to the ladder when he got electrocuted and whether it

[1] Citations herein to the Record on Appeal filed with the Appellate Division are in the form "( )".

stayed against the wall or fell, plaintiff responded "I don't know" (508). The only other person with plaintiff in the room when the accident occurred was his co-worker, Michael Alonzo. When asked at his deposition whether he observed the ladder after the accident, Alonzo responded "I don't remember" (1749). When asked if he saw the ladder on the ground after the accident, Alonzo responded "I don't remember" (1750).

Plaintiff provided no testimony or other evidence that he lost his balance or that he would not have fallen off of any other ladder or scaffold that could have been or should have been provided to him. As Justice Tom aptly pointed out in his dissent, plaintiff's expert "did not elaborate on how a scaffold or manlift could have even fit into such a confined space and thus could have even been used for the assigned plumbing task" [where] "the record suggests that if an A-frame ladder could not be opened in the subject location, assembling a scaffold would have been precluded, as would the use of a manlift under similar dimensional factors." Based on plaintiff's opposition to Trinity Church and Michilli's motion for leave to appeal to the Court of Appeals, it appears that plaintiff's position is that the room was large enough to accommodate, in the opened position, the A-frame ladder that plaintiff was using, yet plaintiff chose to use it in the closed position because it offered more convenient access to the pipe that plaintiff was working on. The

problem with this argument is that it is a factual argument by plaintiff's counsel without any foundation in the record. Plaintiff's counsel's argument is creative and perhaps even plausible, but plaintiff's deposition testimony in such regard was ambiguous at best. In fact, plaintiff testified that he tried to open the ladder "but I couldn't" (490).

In opposition to the motion for leave to appeal, plaintiff's counsel also argued, and will likely argue to this Court here, that the room was large enough to accommodate the ladder in the open position, in that the room was supposedly 15 to 20 feet long. However, this again is counsel's argument, but it is not supported by the record. What plaintiff actually testified to was that the pipe he was working on at the time of his accident was about 20 feet long, but that the pipe was not straight, it had "some elbows," "[i]t turned" (527). Plaintiff testified that the pipe that he was cutting in the ceiling "continued into another room" and that where he was cutting was "maybe 15 feet" from the door (737). Contrary to plaintiff's counsel's argument, plaintiff did not testify that the room was 15 to 20 feet long. There is no evidence in the record to establish the size of the room other than plaintiff's testimony that he tried to open the ladder, but could not given the dimensions of the workspace. To that end, plaintiff's expert affidavit by Robert

Fuchs, P.E., who never even visited the accident location, is based on mere speculation and proffers nothing more than legal opinions.

Justice Tom astutely wrote in his dissent below that "[a] claim under section 240(1) still requires proof that an injurious fall from a height, even when induced by an electrical shock, was proximately caused by the inadequacy of the safety devices provided," that "we are left to speculate as to the feasibility of alterative safety devices," that "the record is bereft of evidence plausibly explaining why plaintiff fell, apart from his having been shocked," and that "the record does not allow us to conclude as a matter of law that the ladder somehow slipped." The undersigned believes that these distinctions between *Faver* and the case at bar is why Justice Kahn voted with the majority in *Faver* and yet joined Justice Tom's dissent here. Justices Tom and Kahn did not overlook or misapprehend these important distinctions, which, respectfully, the majority below did.

To be clear, Trinity Church and Michilli have at no time sought dismissal of plaintiff's Labor Law § 240(1) cause of action and they have not appealed the award of summary judgment to plaintiff on his Labor Law § 241(6) claim pertaining to the electric shock itself. Rather, it has been our position all along that there are material questions of fact that preclude the award of judgment as a matter of law to plaintiff on his Labor Law § 240(1) cause of action.

Accordingly, the Court of Appeals should reverse that portion of the First Department's May 2, 2019 decision and order, which awarded summary judgment to plaintiff on his Labor Law § 240(1) cause of action upon reversing the Supreme Court's denial of that aspect of the plaintiff's motion. In other words, this Court should hold that plaintiff has not met his burden of proof on his motion for summary judgment and that whether Labor Law § 240(1) was violated is an issue of fact to be resolved at trial.

Conclusion

Based on this Court's prior decisions in *Nazario* and *Blake*, this Court should hold that where a worker falls from a ladder upon receipt of an electric shock, and where there is no evidence that the ladder was not secure, moved, or was otherwise defective or inadequate for the work being performed, there is an issue of fact as to the defendant's liability under Labor Law § 240(1). Upon such holding, that portion of the First Department's May 2, 2019 decision and order that awarded summary judgment to plaintiff on his Labor Law § 240(1) cause of action should be reversed and the issue remitted to the Supreme Court for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to 22 NYCRR § 500.11(m), that the foregoing letter brief was prepared on a computer word processor using Word and that a proportionally spaced typeface was used as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the Certificate of Compliance and the Table of Contents, Table of Authorities, Proof of Service, or authorized addendum containing statutes, rules, regulations, etc., if any, is 3,812.

Dated: September 27, 2019
New York, New York

Respectfully submitted,
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