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COURT OF APPEALS

CIVIL PROCEDURE, APPEALS. JUDGES.

THIS ACTION INVOLVED THE NAZIS' CONFISCATION OF A DEGAS PAINTING OWNED BY A GERMAN CITIZEN WHO SUBSEQUENTLY MOVED TO SWITZERLAND AND THEN FRANCE; SUPREME COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION ON FORUM NON CONVENIENS GROUNDS.

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a dissent, determined the action involving a Degas painting confiscated by the Nazis from a German citizen, who then moved to Switzerland and France, was properly dismissed on forum non coveniens grounds. The dismissal presented a matter requiring the exercise of discretion by Supreme Court, which was not abused: "CPLR 327 (a) provides that '[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just.' Generally, 'a decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to a court's discretion' ... and, if the courts below considered the various relevant factors in making such a determination, 'there has been no abuse of discretion reviewable by this [C]ourt,' even if we would have weighed those factors differently ... . * * * ... [T]he record reflects that the courts below painstakingly considered the relevant factors, including the public policies at issue, and determined that the balance of factors militated in favor of dismissal ... . Thus, plaintiffs' argument that this is one of the 'relatively uncommon' cases in which forum non conveniens can be resolved, and denied, as a matter of law ultimately fails ... . Inasmuch as the courts below considered the various relevant factors, 'there has been no abuse of discretion reviewable by this [C]ourt' ...". ***Estate of Kainer v. UBS AG*, 2021 N.Y. Slip Op. 07056, CtApp 12-16-21**

CIVIL PROCEDURE, DEBTOR-CREDITOR.

A JUDGMENT DEBTOR CANNOT BRING AN ACTION IN TORT AGAINST THE CREDITOR OR THE MARSHAL ALLEGING DAMAGES STEMMING FROM THE SEIZURE OF PROPERTY TO BE APPLIED TO THE DEBT; THE JUDGMENT DEBTOR'S REMEDIES ARE CONFINED TO THOSE DESCRIBED IN CPLR 5239 AND 5240.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, and an additional single-judge dissent, determined a judgment debtor cannot bring an action in tort against the creditor or the marshal stemming from the seizure of the judgment debtor's property. Any such claim must be made pursuant to CPLR 5239, 5240: " '[G]eneral provisions that permit 'any interested person'—including a judgment debtor—to secure remedies for wrongs arising under the statutory scheme' are set out in CPLR 5239 and 5240 ... . CPLR 5239 provides that '[p]rior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt.' In such a proceeding, '[t]he court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded' ... . Section 5240 in turn lays out the court's power to, 'at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure.' ... CPLR 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts' ... . CPLR 5240 provides courts with the ability to craft flexible and equitable responses to claims that arise with respect to enforcement of valid money judgments." ***Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 2021 N.Y. Slip Op. 07055, CtApp 12-16-21**

CRIMINAL LAW, APPEALS.

UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, AN OBJECTION WAS NECESSARY TO PRESERVE THE ERROR RELATED TO DEFENDANT'S ABSENCE FROM A SIDEBAR CONFERENCE ABOUT A PROSPECTIVE JUROR; DEFENDANT SUBSEQUENTLY WAIVED HIS RIGHT TO BE PRESENT AND WAS GIVEN THE OPPORTUNITY TO OBJECT TO HIS ABSENCE FROM THE PRE-WAIVER SIDEBAR.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissent, determined the defendant's absence from a sidebar conference regarding a prospective juror did not require reversal. Subsequent to the sidebar, defendant

waived his right to be present at sidebar conferences and was given the opportunity to object to the pre-waiver sidebar. Under these circumstance, the Court of Appeals held, although normally not required, an objection was necessary to preserve the error for appeal: "When a defendant is not present at a sidebar conference wherein the court actively solicits answers from a prospective juror which relate to issues of bias or hostility, *People v Antommarchi* (80 NY2d 247 [1992]) requires a new trial in the absence of defendant's waiver of the right to be present. Defendant's protest in the trial court is generally not required. The purpose of the *Antommarchi* rule, as derived from CPL 260.20, is to provide defendant the opportunity to personally assess the juror's facial expressions and demeanor in order to provide meaningful input on the prospective juror's retention or exclusion from the jury. The question presented on this appeal is whether defendant, having explicitly waived his Antommarchi right to be present at sidebars in the middle of the voir dire proceeding involving a prospective juror who was ultimately struck when codefendant exercised a peremptory strike, is entitled to a new trial based on his absence from a pre-waiver sidebar conference with that same prospective juror. We conclude that the claimed error, under these unique circumstances, required defendant's protest in the trial court given his acquiescence in the post-waiver voir dire of the prospective juror after being invited to express any objection that he may have had regarding the pre-waiver sidebar conference." ***People v. Wilkins*, 2021 N.Y. Slip Op. 06936, CtApp 12-14-21**

CRIMINAL LAW, APPEALS.

DEFENDANT FAILED TO CHALLENGE THE PREDICATE FELONY STATEMENT IN THE LOWER COURT; THEREFORE, THE ALLEGED ERROR WAS NOT PRESERVED FOR APPEAL.

The Court of Appeals, reversing the Appellate Division, determined the alleged error in the CPL § 400.21 predicate felony statement was not preserved for appeal: "Because defendant failed to challenge the CPL 400.21 predicate felony statement filed by the People in the court of first instance, her claim that her sentence was illegal due to the failure to include the tolling periods in that document did not present a question of law for purposes of appellate review ... . Defendant's claim was not reviewable under the narrow illegal sentence exception to the preservation requirement because it was not 'readily discernible from the trial record' that the sentence the court imposed was not within the permissible range ...". ***People v. Lashley*, 2021 N.Y. Slip Op. 06938, CtApp 12-14-21**

CRIMINAL LAW, JUDGES.

THE SEX TRAFFICKING STATUTE HAS TWO LINKED BUT DISTINCT ELEMENTS WHICH WERE PROPERLY EXPLAINED TO THE JURY IN THE INITIAL JURY INSTRUCTIONS; HOWEVER, THE SUPPLEMENTAL INSTRUCTION IN RESPONSE TO A JURY NOTE ERRONEOUSLY COLLAPSED THE STATUTE TO A SINGLE ELEMENT; NEW TRIAL ORDERED ON THE SEX TRAFFICKING COUNTS.

The Court of Appeals, in a brief memorandum, vacating the sex trafficking convictions and ordering a new trial, over two lengthy concurrences and a dissent, determined the supplemental jury instruction failed to explain to the jury that the sex trafficking statute has two linked but distinct elements which must be proven to convict. The positions taken by the concurrences differ and are too nuanced to fairly summarize here: "The sex trafficking statute is comprised of two distinct but linked elements, namely the offender must advance or profit from prostitution by one of the enumerated coercive acts (see Penal Law § 230.34). The trial court's supplemental instruction, in response to a jury note, erroneously severed the required link between those elements. Accordingly, defendant's sex trafficking convictions should be vacated, and a new trial held on those counts ... . * * * **From Judge Singas's Concurrence:** Collapsing sex trafficking into a single-element crime would cast too small a net, unjustifiably limiting the jurisdiction of this State to prosecute only those cases where the entire crime occurred in New York. Just as significantly, treating the statute's two elements as unlinked could unjustifiably authorize prosecution of crimes in New York for extraterritorial conduct having no impact on the public safety of the state. Accordingly, we would hold that the sex trafficking statute is comprised of two discrete yet connected elements, to wit, the offender must advance or profit from prostitution through coercive acts taken in furtherance of his or her prostitution enterprise." ***People v. Lamb*, 2021 N.Y. Slip Op. 07057, CtApp 12-16-21**

FAMILY LAW, CONTRACT LAW, EVIDENCE.

CASE 1: THE ACKNOWLEDGMENT OF SIGNATURES ON A NUPTIAL AGREEMENT MUST BE CONTEMPORANEOUS, BUT NOT NECESSARILY SIMULTANEOUS, WITH THE SIGNING; HERE A SEVEN-YEAR DELAY WAS TOO LONG; CASE 2: A DEFECT IN THE ACKNOWLEDGMENTS, HERE THE LAWYERS' FAILURE TO STATE THE SIGNERS WERE PERSONALLY KNOWN TO THEM, DID NOT INVALIDATE THE AGREEMENT.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined: (1) Pursuant to Domestic Relations Law (DRL) § 236(B)(3), the acknowledgment of signatures on a nuptial agreement must be contemporaneous, but not necessarily simultaneous, with the signing: and (2) if the signing is contemporaneous, but the acknowledgment is defective, the nuptial agreement remains enforceable. Here, in the Anderson case, the husband's signature was not acknowledged until seven years after the signing (shortly before filing for divorce). In that circumstance the agreement would have to be reaffirmed to be enforceable. In the *Koegel* case, the lawyers' acknowledgments failed indicate the undisputed fact that the signers were personally known to them. The defect in the acknowledgments did not affect the validity of the agreement and there

was no need for reaffirmation: "[Re: *Anderson*:] A document that depends on an untimely acknowledgment is the legal and functional equivalent of an unacknowledged document. However, in a case involving such a document, the parties are not without a remedy. When there is an excessive delay rendering an acknowledgment ineffective and the agreement therefore unenforceable, the parties are free to reaffirm their agreement, again based on the information available to them at that time. To comply with DRL § 236 (B) (3), reaffirmation would require that both parties must again sign and acknowledge the agreement. The rule thus places the parties on a fair and equal footing in deciding whether to be bound by the agreement—either initially or at some future date if the agreement is unenforceable because of the delay. * * * [Re: *Koegel*:] We ... hold that the defect ... presented in this appeal may be overcome with adequate evidence that the statutory requirements were met, even if the acknowledgment is not properly documented in the first instance. This limited remedy avoids invalidating a nuptial agreement when the parties have done all that the DRL requires of them. In other words, the signature and acknowledgment may satisfy the statutory mandates if extrinsic evidence supports 'that the acknowledgment was properly made in the first instance' even if the certificate fails to 'include the proper language' due to the notary's or other official's error ...". ***Anderson v. Anderson*, 2021 N.Y. Slip Op. 07058, CtApp 12-16-21**

FIRST DEPARTMENT

CIVIL PROCEDURE, BANKRUPTCY.

A CLAIM WHICH ARISES AFTER THE FILING OF A BANKRUPTCY PETITION BELONGS TO THE DEBTOR, NOT TO THE BANKRUPTCY ESTATE.

The First Department, noting its prior rulings to the contrary, determined a claim which arises after the filing of a bankruptcy petition belongs to the debtor, not the bankruptcy estate: "This Court has previously held that a claim which arose after the filing of a bankruptcy petition was the property of the estate (see *Barranco v Cabrini Med. Ctr.*, 50 AD3d 281, 282 [1st Dept 2008]; *Williams v Stein*, 6 AD3d 197, 198 [1st Dept 2004]). When those cases were decided, there was a split among the federal courts which had addressed the issue. However, there is now uniformity among the Federal Courts of Appeals, which have held that pursuant to section 541(a) of the Bankruptcy Code, a claim which arose after the filing of a bankruptcy petition belongs to the debtor and not the estate ... . As this Court is bound by federal law when making a determination on this issue ... we follow the ... federal holdings and find that because the claims at issue arose after the filing of the bankruptcy petition, the claims belong to Realty [plaintiff]. Thus, Realty has the capacity to sue [defendants]." ***Moncho v. Miller*, 2021 N.Y. Slip Op. 06960, First Dept 12-14-21**

CRIMINAL LAW.

AFTER PLEADING GUILTY IN FULL SATISFACTION OF THE CHARGES IN THE INDICTMENT, A SECOND PLEA TO ANOTHER COUNT OF THE INDICTMENT WAS PRECLUDED.

The First Department, vacating defendant's conviction by guilty plea and dismissing the relevant count, determined initial pleas in full satisfaction of the charges in the indictment precluded a second plea to another count in the indictment: "As the People concede, defendant's first plea, to one count of third-degree sale of a controlled substance, was in full satisfaction of the entire indictment, so that defendant's later plea to a second count of that indictment was not permissible ... . When the second plea court sought to add a plea to an additional count as part of a renegotiated disposition conditioned on drug treatment, it could only have done so by 'reinstatement. . . [of the indictment] which could have been accomplished by permitting the defendant to withdraw his original plea of guilty to [the first count]' ...". ***People v. Turane*, 2021 N.Y. Slip Op. 07071, First Dept 12-16-21**

CRIMINAL LAW, ATTORNEYS.

DESPITE DEFENSE COUNSEL'S ADMISSION BEFORE THE MOTION COURT THAT HE DID NOT PROPERLY INVESTIGATE THIS MURDER CASE, DEFENDANT DID NOT DEMONSTRATE THAT COUNSEL WAS INEFFECTIVE OR THAT THE ALLEGED INEFFECTIVENESS MET THE CRITERIA FOR A CONFLICT OF INTEREST.

The First Department, in a full-fledged opinion by Justice Moulton, determined defendant did not demonstrate his attorney provided ineffective assistance, despite the attorney's statements to the trial court acknowledging his failure to timely investigate the case, which led to his request to file a late alibi notice (the request was granted). The defendant told the trial court he did not want to change attorneys. And the trial court appointed a co-counsel. The First Department also rejected the unusual argument that defense counsel's ineffectiveness constituted a conflict of interest: "[D]efendant has not shown how defense counsel's performance deprived him of a fair trial. Defense counsel's self-proclaimed failures to properly investigate and prepare this murder case for trial are disturbing. Nevertheless, defendant has not shown that counsel's lapses deprived him of any useful information or negatively impacted his ability to mount a defense. Defendant only speculates that a proper investigation and trial preparation might have yielded something helpful to the defense, but he does not suggest what that exculpatory information might be ... . Defendant concedes that the conflict here is 'not typical' as it is 'derived from and centered on [defense counsel's] ineffectiveness.' ... Defendant argues that the conflict occurred when his

counsel refused to withdraw from representation for personal reasons, despite conceding that he did not effectively investigate the case and prepare for trial. However, defendant cannot 'demonstrate that the conduct of his defense was in fact affected by the operation of the conflict of interest' ... . After defense counsel declined to withdraw and defendant noted that he wished to proceed with counsel, the motion court appointed cocounsel to assist the defense ... . [T]he defense was not affected by operation of the conflict because after defense counsel declined to withdraw, defense counsel and cocounsel effectively represented defendant at trial." ***People v. Graham*, 2021 N.Y. Slip Op. 07068, First Dept 12-16-21**

FAMILY LAW, CRIMINAL LAW, JUDGES, EVIDENCE.

IN THIS FAMILY OFFENSE PROCEEDING, THE JUDGE SHOULD NOT HAVE PLACED TIME AND TESTIMONY RESTRICTIONS ON THE HEARING; ORDER REVERSED AND NEW HEARING ORDERED.

The First Department, reversing Family Court and ordering a new hearing in this family offense proceeding, determined the judge should not have placed time and testimony restrictions on the hearing: "Order of fact-finding and disposition ... , which, after a hearing, determined that respondent husband committed the family offense of harassment in the second degree, and entered a one-year order of protection directing him ... to refrain from assaulting or harassing petitioner wife and the parties' two children ... , unanimously reversed ... . Family Court erred in not conducting a full fact-finding hearing. The court improperly restricted the hearing, without notice to the parties to just 15-20 minutes and limited the testimony, including that of petitioner wife. Given this, Family Court is directed to conduct a full hearing on the petition and make the requisite factual findings ...". ***Matter of Kristina M. v. Paul M.*, 2021 N.Y. Slip Op. 06957, First Dept 12-14-21**

MUNICIPAL LAW, FALSE ARREST, FALSE IMPRISONMENT, MALICIOUS PROSECUTION.

PETITIONER ALLEGED HIS ARREST WARRANT WAS BASED UPON FALSE ATTESTATIONS AND SOUGHT TO FILE A LATE NOTICE OF CLAIM ALLEGING FALSE ARREST, FALSE IMPRISONMENT AND MALICIOUS PROSECUTION; THE CITY WAS DEEMED TO HAVE HAD TIMELY NOTICE OF THE ACTION BY VIRTUE OF THE CITY-PERSONNEL'S INVOLVEMENT IN DRAFTING THE WARRANT AND SUBSEQUENT REPORTS; THE REQUEST TO FILE A LATE NOTICE WAS PROPERLY GRANTED.

The First Department, over a dissent, determined the petition seeking leave to file a late notice of claim against the respondent City of New York in this false arrest, false imprisonment and malicious prosecution action was properly granted. The main issue was whether the city had timely notice of the claim, and therefore was not prejudiced by the delay. Petitioner alleged the arrest warrant was based upon false information. The First Department noted it was not following its prior 2021 decision: "Respondent's agents procured the allegedly false warrant upon attestations as to probable cause, executed the allegedly false arrest, and generated the reports pertaining thereto; the prosecutor would have had access to those same records and examined same in connection with preparing its opposition to defendant's motions and in preparing more generally for trial. Indeed, personnel from the special narcotics prosecutor were present during the arrest. Under these circumstances, 'knowledge of the essential facts constituting the claims within the statutory period can be imputed to the City' ... . Pursuant to investigatory procedures, the officers, agents, assistant district attorneys, and investigators who were involved in petitioner's arrest, detention, and prosecution were required to contemporaneously record factual details, including those related to any probable cause determination, so that the District Attorney's Office might properly evaluate the merits of a potential criminal prosecution and draft an accusatory instrument. ... While the mere existence of a report under certain circumstances might be insufficient to impute actual knowledge, here those reports were generated by those very persons who engaged in execution of the allegedly false arrest warrant and whose conduct forms the basis of petitioner's suit. To the extent *Matter of Singleton v City of New York* (198 AD3d 498 [1st Dept 2021]) differs, we decline to follow it. If we are to depart from settled principle, we should do so explicitly and not on the basis of a one-paragraph memorandum opinion that does not cite or discuss the relevant precedent let alone express an intent to overrule it." ***Matter of Orozco v. City of New York*, 2021 N.Y. Slip Op. 07066, First Dept 12-16-21**

MUNICIPAL LAW, PERSONAL INJURY.

PLAINTIFF'S DECEDENT COMMITTED SUICIDE BY JUMPING FROM THE GEORGE WASHINGTON BRIDGE; THE COMPLAINT ALLEGING PORT AUTHORITY FAILED TO MAINTAIN THE BRIDGE IN A SAFE CONDITION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined the complaint alleging defendant Port Authority breached its duty to maintain the George Washington Bridge (GWB) in a reasonably safe condition must be reinstated. Plaintiff's decedent committed suicide by jumping from the bridge: "Plaintiff's decedent died by suicide when he jumped from the George Washington Bridge (GWB), which is owned and operated by the Port Authority. Contrary to the Port Authority's contention that the complaint is addressed to actions taken in its governmental capacity, both this Court and the Second Department have recently held, in cases involving similar facts, that the Port Authority's responsibility for maintaining the guardrail on the pedestrian walkway over the Bridge is a proprietary function rather than a governmental function ... . [P]laintiff states a cause of action by alleging that the Port Authority, as a property owner, 'failed to maintain

the GWB in a reasonably safe condition by negligently failing to install suicide barriers along the walkways to prevent suicides,' thus presenting a foreseeable risk of harm in light of the allegations concerning the history of the George Washington Bridge's walkway as a place where frequent suicides occur." ***Lomtevas v. City of New York*, 2021 N.Y. Slip Op. 06953, First Dept 12-14-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW.

DEFENDANT ALLEGED ITS PRINCIPAL PLACE OF BUSINESS WAS IN NASSAU COUNTY BUT NEVER AMENDED ITS CERTIFICATE OF INCORPORATION WHICH DESIGNATED ITS PRINCIPAL PLACE OF BUSINESS AS QUEENS COUNTY; DEFENDANT'S MOTION TO CHANGE THE VENUE OF THIS SLIP AND FALL CASE FROM QUEENS TO NASSAU COUNTY SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant in this slip and fall case (Valley Park) did not present sufficient evidence to support a change of venue from Queens County to Nassau County: " 'To effect a change of venue pursuant to CPLR 510(1), a defendant must show that the plaintiff's choice of venue is improper and that its choice of venue is proper' ... . To succeed on its motion, Valley Park was obligated to demonstrate that, on the date that this action was commenced, none of the parties resided in Queens County ... . Only if Valley Park made such a showing was the plaintiff required to establish, in opposition, via documentary evidence, that the venue she selected was proper ... . Although Valley Park claimed that its principal office was in Nassau County and that it no longer maintained its principal office in Queens County, it failed to prove that its certificate of incorporation had been amended to designate a county other than Queens ... . The plaintiff's submission, in opposition, of a certified copy of Valley Park's certificate of incorporation, which stated that Valley Park's principal office was located in Queens County, further underscored that her choice of venue was proper." ***Green v. Duga*, 2021 N.Y. Slip Op. 06990, Second Dept 12-15-21**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

IN A FORECLOSURE PROCEEDING, THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 NOTICE MUST BE SENT TO THE BORROWER IN A SEPARATE ENVELOPE; HERE OTHER NOTICES WERE INCLUDED IN THE ENVELOPE ALONG WITH THE RPAPL 1304 NOTICE; DEFENDANT'S SUMMARY JUDGMENT MOTION WAS PROPERLY GRANTED.

The Second Department, in a full-fledged opinion by Justice Duffy, determined, in a foreclosure action, the requirement that the RPAPL 1304 notice be sent to the borrower "in a separate envelope from any other mailing or notice" must be strictly complied. Because other notices were included in the same envelope, the defendant's motion for summary judgment was properly granted: "[T]he plaintiff acknowledged that the envelope that it sent to the defendants, which contained the requisite notice under RPAPL 1304, also included other information in two notices pertaining to the rights of a debtor in bankruptcy and in military service. Since the plaintiff failed to establish, prima facie, that it strictly complied with the requirements of RPAPL 1304, the Supreme Court properly denied those branches of its motion which were for summary judgment ... . [O]n his cross motion, [defendant] established his ... entitlement to judgment as a matter of law dismissing the complaint ... by showing that the plaintiff failed to comply with RPAPL 1304 when it sent additional material in the same envelope as the requisite notice under RPAPL 1304." ***Bank of Am., N.A. v. Kessler*, 2021 N.Y. Slip Op. 06979, Second Dept 12-15-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANTS DIRECTED PLAINTIFF TO REMOVE PAINT BY SPRAYING LACQUER WHICH APPARENTLY LED TO AN EXPLOSION; THERE ARE QUESTIONS OF FACT WHETHER DEFENDANTS SUFFICIENTLY CONTROLLED OR SUPERVISED PLAINTIFF'S WORK SUCH THAT THE HOMEOWNER'S EXEMPTION TO A LABOR LAW § 241(6) CAUSE OF ACTION DID NOT APPLY, AND WHETHER THE DEFENDANTS WERE LIABLE UNDER LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE THEORIES.

The Second Department determined there were questions of fact whether the defendants were entitled to the homeowner's exemption from Labor Law § 241(6) liability, and whether they sufficiently controlled or supervised plaintiff's work to be liable under Labor Law § 200 or a common-law negligence theory. Plaintiff was injured in an explosion when, at the direction of a defendant, he was spraying lacquer to remove paint. The defendant did not want the plaintiff to sand the paint off, apparently plaintiff's usual practice, because of the resulting dust: "[T]he defendants failed to eliminate all triable issues of fact as to whether they directed or controlled the injury-producing method of work and failed to establish, prima facie, their entitlement to the homeowner exemption of Labor Law § 241(6) ... . * * * ... [T]he defendants failed to establish, prima facie, that they did not have actual or constructive notice of the allegedly dangerous electrical wiring in the kitchen ... , and

that they did not direct or control the method and manner in which the plaintiff performed the injury-producing work ...". ***Venter v. Cherkasky*, 2021 N.Y. Slip Op. 07022, Second Dept 12-15-21**

MEDICAL MALPRACTICE, PERSONAL INJURY.

THE "LACK OF INFORMED CONSENT" CAUSE OF ACTION IN THIS MEDICAL MALPRACTICE SUIT SHOULD NOT HAVE BEEN DISMISSED; THERE WAS NO EVIDENCE PLAINTIFF INSISTED ON THE PROCEDURE DESPITE THE RISKS OR DECLINED ANY PROFFERED EXPLANATION OF THE RISKS.

The Second Department, reversing (modifying) Supreme Court) determined the "lack of informed consent" to back surgery (implantation of an X-STOP device) should not have been dismissed: "As a defense to a medical malpractice action premised upon lack of informed consent, a practitioner may proffer evidence that 'the patient assured the medical . . . practitioner that he [or she] would undergo the treatment, procedure or diagnosis regardless of the risk involved, or the patient assured the medical . . . practitioner that he [or she] did not want to be informed of the matters to which he [or she] would be entitled to be informed' (Public Health Law § 2805-d[4][b]). Here, although [plaintiff's] deposition testimony made clear that he deferred to [defendant surgeon's] judgment as to whether he should undergo a procedure and, if so, which procedure, it does not establish that [plaintiff] either insisted on the procedure to implant the X-STOP devices, rather than other treatment options, regardless of risk, or that he refused any proffered advice. On the contrary, the record establishes that, far from insisting on a contraindicated procedure, [plaintiff] relied upon [defendant surgeon's] professional expertise in determining the correct course of treatment. Likewise, although [defendant surgeon's] testimony establishes that he explained the benefits of performing the procedure to implant the X-STOP devices rather than a laminectomy, he did not testify that he offered, or that [plaintiff] declined, any proffered explanation of the risks and limitations of the procedure to implant the X-STOP devices." ***Mirshah v. Obedian*, 2021 N.Y. Slip Op. 06994, Second Dept 12-15-21**

MUNICIPAL LAW, CIVIL PROCEDURE.

THE NYC WATER BOARD DETERMINED PETITIONER WAS NOT ENTITLED TO A RETROACTIVE REDUCTION IN SEWER CHARGES BUT WAS NOT NAMED AS A RESPONDENT IN PETITIONER'S ARTICLE 78 ACTION; THE WATER BOARD MUST BE ADDED AS A NECESSARY PARTY.

The Second Department noted that the NYC Water Board was a necessary party in the Article 78 contesting the Board's ruling on sewer charges. The Article 78 named only the NYC Department of Environmental Protection: "[T]he appellants correctly contend that the Water Board should be joined as a necessary party to this proceeding. 'Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants' (CPLR 1001[a]). In a proceeding pursuant to CPLR article 78, the governmental agency which performed the challenged action must be a named party ... . Since the instant petition challenged the Water Board's ... final determination, and the Water Board is the entity which promulgates the rate schedule of sewer rents and wastewater allowances ... in the discharge of its duties to fix and collect water and sewer charges in order for the City to maintain the water system ... , the Water Board was a necessary party to this proceeding. Indeed, the Water Board would be prejudiced by the judgment purporting to bind its rights when it had no opportunity to be heard ... . [B]ecause the Water Board should have been joined in this action and has not been made a party, and because it is subject to the jurisdiction of the court, the judgment must be vacated, and the Supreme Court should order the Water Board summoned in this proceeding so that it may be heard (see CPLR 1001[b] ...)." ***Matter of A&F Scaccia Realty Corp. v. New York City Dept. of Envtl. Protection*, 2021 N.Y. Slip Op. 06995, Second Dept 12-15-21**

PERSONAL INJURY.

THERE WAS A QUESTION OF FACT WHETHER THE DEFENDANT DEPARTMENT STORE SHOULD HAVE BEEN AWARE THE PAINT USED ON THE PARKING LOT SURFACE BECAME SLIPPERY WHEN WET AND WAS NOT APPROPRIATE FOR PEDESTRIAN-TRAFFIC AREAS.

The Second Department, reversing Supreme Court in this slip and fall case, determined there was a question of fact whether the department store, Costco, should have been aware that paint used in its parking lot was slippery when wet: " 'A defendant may not be held liable for the application of 'wax, polish, or paint to a floor . . . unless the defendant had actual, constructive, or imputed knowledge' that the product could render the floor dangerously slippery' ... . Here, Costco established, prima facie, that it did not have actual, constructive, or imputed knowledge that the subject paint could render the walkway slippery ... . In opposition, however, the plaintiff raised a triable issue of fact ... . The plaintiff relied on, among other things, an 'application bulletin' for the traffic marking paint used by Appell [the company hired by Costco], which was annexed to the expert report submitted by Appell ... . The application bulletin acknowledges the inherent danger present when painted surfaces become wet, and explicitly states that the paint 'should not be used to paint large areas subject to pedestrian traffic.' Considering the size of the painted area outside of the store entrance, there was a triable issue of fact as to whether Costco should have known that the product could render the parking lot slippery." ***Westbay v. Costco Wholesale Corp.*, 2021 N.Y. Slip Op. 07023, Second Dept 12-15-21**

PERSONAL INJURY, EMPLOYMENT LAW, BATTERY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

ALTHOUGH DEFENDANT THEATER MANAGER WAS NOT A SECURITY GUARD, HIS RESPONSIBILITIES INCLUDED DEALING WITH UNRULY PATRONS AND KEEPING THE PREMISES SAFE; THERE WAS A QUESTION OF FACT WHETHER HE WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE THREATENED A PATRON WITH A PELLET GUN; THEREBY RAISING A QUESTION OF FACT WHETHER THE THEATER WAS LIABLE FOR THE MANAGER'S ACTIONS UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR.

The Second Department, reversing (modifying) Supreme Court, determined the defendant movie- theater manager, Adams, may have been acting within the scope of his employment by the theater, AMC, when he threatened plaintiff, a theater patron, with a pellet gun. Therefore, AMC's motion for summary judgment should not have been granted: "[T]he general manager of the theater, Adams's supervisor, stated, during his deposition, that managers, like Adams, have security-related responsibilities, including ensuring that the theater is safe for customers and dealing with unruly patrons. And the plaintiff, during his deposition, stated that he believed Adams was a security guard. When a business employs security guards or bouncers to maintain order, the use of physical force may be within the scope of their employment ... . Adams did not hold either of these job titles, but his responsibilities included maintaining order at the theater, ensuring the safety of customers and staff, and, if necessary, facilitating the removal from the theater of "disruptive or potentially violent" customers. The accomplishment of these ends by means prohibited by the AMC defendants' policy was not necessarily unforeseeable. ... Unquestionably, Adams's response to the plaintiff and his friends was 'in poor judgment' ... and contrary to the AMC defendants' policy, but 'this in itself does not absolve [the AMC] defendants of liability for his acts' ...". ***Norwood v. Simon Prop. Group, Inc.*, 2021 N.Y. Slip Op. 07006, Second Dept 12-15-21**

PUBLIC HEALTH LAW.

THE PRIVATE RIGHT OF ACTION CREATED BY THE PUBLIC HEALTH LAW APPLIES TO "RESIDENTIAL HEALTH CARE FACILITIES," NOT TO "ASSISTED LIVING FACILITIES."

The Second Department determined the Public Health Law §§ 2801-d and 2803-c causes of action against defendant "assisted living facility" should have been dismissed. The private right of action created by the Public Health Law applies only to "residential health care facilities: "[T]he plaintiff concedes that the facility in which Kramer was a resident was licensed as an 'assisted living' facility, but asserts that it was operated as a de facto residential health care facility by virtue of the health-related services it provided, including management of medications, assistance with dressing and eating, and visits by nursing staff and physicians. Even accepting these allegations as true, they are insufficient to state a claim that the assisted living facility in which Kramer resided was a residential health care facility against which a private right of action pursuant to Public Health Law article 28 may be maintained (see Public Health Law § 2801[3] ...)." ***Broderick v. Amber Ct. Assisted Living*, 2021 N.Y. Slip Op. 06981, Second Dept 12-15-21**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS, APPEALS.

THE ELICITATION OF TESTIMONY FROM A DETECTIVE THAT DEFENDANT INVOKED HIS RIGHT TO COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION WAS SUBJECT TO A HARMLESS ERROR ANALYSIS AND DID NOT REQUIRE REVERSAL; THE DISSENT ARGUED THE ABSENCE OF A CURATIVE INSTRUCTION RENDERED THE ERROR REVERSIBLE.

The Third Department determined the People's improper elicitation of a detective's testimony that defendant invoked his right to counsel and his right against self-incrimination was subject to a harmless error analysis and did not require reversal. The dissent disagreed: "A defendant's invocation of his or her right against self-incrimination and/or his or her right to counsel during a custodial interrogation may not be used against him or her as part of the People's case-in-chief ... . This is because such evidence 'creates a prejudicial inference of consciousness of guilt' ... . However, the People's improper elicitation of the prejudicial evidence does not automatically result in a reversal of the judgment of conviction, even in the absence of a curative instruction or in the face of a deficient curative instruction ... . Rather, any such constitutional error is subject to a harmless error analysis ... . * * * **From the dissent:** The majority would have this Court engage in a harmless error analysis, whereas I would follow this Court's articulation in *People v Knowles* (42 AD3d at 665), rejecting such an analysis if the trial court fails to provide 'prompt and emphatic curative instructions that the jury may not draw any adverse inferences from [the] defendant's request for counsel.' As County Court failed to do so here, defendant's conviction should be reversed." ***People v. Serrano*, 2021 N.Y. Slip Op. 07037, Third Dept 12-16-21**

CRIMINAL LAW, EVIDENCE.

TESTIMONY THAT THE FREQUENCY OF SEXUAL RELATIONS BETWEEN DEFENDANT AND HIS WIFE DROPPED OFF PRECIPITOUSLY AT ABOUT THE TIME THE CHILD ALLEGED THE SEXUAL ABUSE BEGAN SHOULD NOT HAVE BEEN ADMITTED BECAUSE IT ALLOWED THE JURY TO SPECULATE ABOUT THE REASON FOR THE DROP-OFF; SEXUAL ASSAULT OF A CHILD AND RAPE CONVICTIONS REVERSED AND NEW TRIAL ORDERED.

The Third Department, reversing defendant predatory-sexual-assault-against-a-child and rape convictions and ordering a new trial, determined it was error to allow defendant's wife to testify that the frequency of their sexual relations dropped off precipitously at about the time the child-victim began to be abused. The testimony was erroneously deemed to constitute circumstantial evidence of the abuse: "[T]he 'fact' testified to, the significant reduction in the frequency of the couple's sexual encounters, is not a fact from which the jury could reasonably infer the existence of a fact material to the charges against defendant, i.e., whether he sexually abused the victim. Rather, it allows the jury to impermissibly speculate that the reason that defendant and the victim's mother had less frequent sex was because he replaced one sexual partner, the victim's mother, with another, the victim. Furthermore, '[i]t is axiomatic that evidence bearing on the sexual climate of a household is inadmissible where it does not tend to prove a material element of the crime charged and is introduced simply to demonstrate a predisposition to commit the subject offense' ... . Although such testimony may be admitted if it demonstrates the relationship between the parties or completes a sequence of events ... , the testimony in this case was not offered to prove a material element of the case, the relationship of the parties, nor was it an integral part of the sequence of events leading to the criminal conduct or delay in the disclosure. The People candidly admitted that the purpose of the testimony was to convince the jury that defendant, who the victim's mother testified had exhibited a vociferous sexual appetite, suddenly stopped having frequent sex with her and filled the void with the victim. As such, County Court erred in allowing the testimony." ***People v. Hansel*, 2021 N.Y. Slip Op. 07035, Third Dept 12-16-21**

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

THE SEXUAL ASSAULT REFORM ACT (SARA), WHICH PLACES RESTRICTIONS ON WHERE SEX OFFENDERS CAN RESIDE AFTER RELEASE FROM PRISON, DOES NOT VIOLATE THE EX POST FACTO CLAUSE OF THE U.S. CONSTITUTION.

The Third Department, reversing Supreme Court and agreeing with the First and Second Departments, determined the Sexual Assault Reform Act (SARA), which prohibits petitioner-sex-offender from residing within 1000 feet of school grounds, did not violate the Ex Post Facto clause of the U.S. Constitution: "Because petitioner was unable to locate housing in New York City that fulfilled the residency requirements imposed by SARA, even with respondents' assistance …, he remained incarcerated. * * * We are guided ... by a recent case concerning individuals in a situation akin to petitioner's, in which the Court of Appeals held that 'the temporary confinement of sex offenders in correctional facilities, while on a waiting list for SARA-compliant [New York City Department of Homeless Services] housing, is rationally related to a conceivable, legitimate government purpose of keeping level three sex offenders more than 1,000 feet away from schools,' and '[t]he existence of less restrictive methods of monitoring [individuals in these circumstances] during this period does not invalidate the use of correctional facilities' ... . '[I]n assessing the constitutionality of a statute, this Court does not review the merits or wisdom of the Legislature's decisions on matters of public policy, and the fact that the restrictions are difficult and cumbersome is not enough to make them unconstitutional. Although one can argue that such laws are too extreme or represent an over-reaction to the fear of sexual abuse of children, they do not violate the [E]x [P]ost [F]acto [C]lause' ...". ***People ex rel. Rivera v. Superintendent, Woodbourne Corr. Facility*, 2021 N.Y. Slip Op. 07044, Third Dept 12-16-21**

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