SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 15, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3274 Shamika Zamore, etc., et al., Index 26670/98
Plaintiffs-Appellants,

-against-

Fabio A. Peralta, et al.,
Defendants-Respondents,

A.J.L. Transportation, Inc.,
Defendant.

Powers & Santola, LLP, Albany (Michael J. Hutter of counsel), for appellants.

Mintzer Sarowitz Zeris Ledva & Meyers, LLP, New York (Erika L. Omundson of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 20, 2006, dismissing the complaint upon a jury verdict finding that the infant plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

The court properly dismissed plaintiff's claim that she was unable to perform substantially all of her usual and customary activities for at least 90 out of the 180 days following the accident for failure to establish a prima facie case. Plaintiff did not provide objective evidence demonstrating that such

activities were restricted (*see Uddin v Cooper*, 32 AD3d 270 [2006], *lv denied* 8 NY3d 808 [2007]). Although her attendance may have been irregular, plaintiff was able to return to school within 10 days of the accident.

We find that the jury verdict is supported by a fair interpretation of the evidence (*see Rivera v 4064 Realty Co.*, 17 AD3d 201, 203 [2005]). We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 15, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
Milton L. Williams
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 443/06
Respondent,

-against- 3390

Windell Harris,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about January 31, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTER:

Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Lippman, P.J., Tom, Williams, Acosta, JJ.

3391-
3391A 1166 EJM LLC,
Plaintiff-Appellant,

Index 118057/06

-against-

Marsh & McLennan Companies, Inc.,
Defendant-Respondent.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Greenberg Traurig, LLP, New York (Leslie D. Corwin of counsel), for respondent.

Judgment, Supreme Court, New York County (Louis B. York, J.), entered December 6, 2007, dismissing the action, and bringing up for review an order, same court and Justice, entered November 28, 2007, which granted defendant's motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

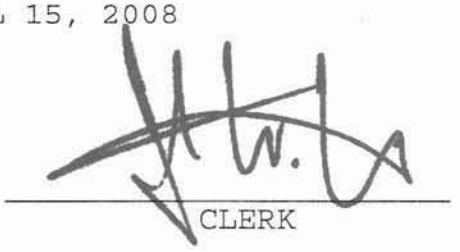
This action for reformation sought a $5 million reduction in the selling price of several floors of a commercial condominium building based on the seller's alleged failure to disclose certain utility charges. The court correctly interpreted the unambiguous provisions (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]) in the contract between these sophisticated parties in finding plaintiff's claims barred by, inter alia, the specific disclaimer regarding expenses and income (*see generally*

Danann Realty Corp. v Harris, 5 NY2d 317 [1959]), the disclaimer of reliance, and the acknowledgment that plaintiff had been afforded the opportunity to conduct its own investigation. The evidence did not support plaintiff's contention that the disclaimers should be circumvented by any alleged disparity of knowledge between the parties.

We have considered plaintiff's other contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008



CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3392 Gustavo Gamarra, Index 8512/04
Plaintiff-Respondent,

-against-

Top Banana, LLC, et al.,
Defendants,

Circle Rubbish of New York,
Defendant-Appellant.

Litchfield Cavo, L.L.P., New York (Edward Fogarty Jr. of counsel), for appellant.

Philip J. Sporn & Associates, Bronx (Robert J. DiGianni, Jr. of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 26, 2007, which, to the extent appealed from, denied defendant Circle Rubbish of New York's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Circle Rubbish dismissing the complaint as against it.

Circle Rubbish, which contracted with defendant Hunt's Point Terminal Market Cooperative Association to provide street cleaning services at the market, demonstrated that none of the situations in which a contractor of this type may be said to have assumed a duty of care, and thus to be potentially liable in tort to third persons, is present here (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). There is no evidence that

Circle Rubbish launched "a force or instrument of harm" (*Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]), that plaintiff detrimentally relied on the continued performance of Circle Rubbish's duties under its contract with Hunt's Point, or that that contract was comprehensive and exclusive and therefore gave rise to a duty on Circle Rubbish's part that displaced either owner's normal duty to maintain the premises in a safe manner (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3393 In re Lady Justice I.,

A Dependent Child Under
Eighteen Years of Age, etc.,

Edna I.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, for appellant.

John R. Eyerman, New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Linda M. Diaz of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about April 25, 2007, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed her custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record shows that the agency made diligent efforts to encourage and strengthen the parental relationship, by providing referrals to the mother for psychiatric counseling and parenting skills

classes, and scheduling visits with the child (*see Matter of Lenny R.*, 22 AD3d 240 [2005], *lv denied* 6 NY3d 708 [2006]). Despite these diligent efforts, the mother, who was diagnosed as schizophrenic and bipolar, and was repeatedly incarcerated, was inconsistent in her compliance with medical treatment, and failed to complete the parenting skills program during the statutorily relevant time period (*see Matter of Jacqueline A.*, 277 AD2d 86 [2000], *lv denied* 96 NY2d 708 [2001]). A lack of cooperation by the mother, rather than a lack of diligence by the agency, supports the court's findings (*see Matter of Sheila G.*, 61 NY2d 368, 385 [1984]).

The evidence at the dispositional hearing was preponderant that the best interests of the child would be served by terminating the mother's parental rights so as to facilitate the child's adoption by her foster mother with whom she has lived almost all of her young life and who has tended to her special needs (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The circumstances presented do not warrant a suspended judgment.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3394 The People of the State of New York, Respondent, Ind. 9665/94

-against-

Luis Grueso Camacho, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Richard Joselson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about June 2, 2006, which specified and informed defendant that the court would resentence him for his conviction of three counts of criminal possession of a controlled substance in the first degree to an aggregate term of 28 years, unanimously affirmed, and the matter remitted to Supreme Court, New York County, for further proceedings upon defendant's application for resentencing.

We perceive no basis for reducing the proposed sentence, which reduces defendant's original aggregate term from 35 years to life to 28 years.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3395 Miguel Reyes, Index 23886/01
Plaintiff-Appellant,

-against-

Harding Steel, Inc., et al.,
Defendants-Respondents,

Bay Windows Shade Co.,
Defendant.
- - - - - -
Harding Steel, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Lewistown Manufacturing, Inc.,
Third-Party Defendant-Respondent.

[And a Fourth Party Action]

Peter E. Tangredi & Associates, White Plains (Denise O'Connor of counsel), for Miguel Reyes, appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Debra A. Adler of counsel), for Harding Steel, Inc., respondent/appellant.

Law Office of Lori D. Fishman, Tarrytown (Michael J. Latini of counsel), for Nate Nate Metal Craft, Barzel Iron Works, Inc. and Metal Craft by N. Barsily, Inc., respondents.

Henderson & Brennan, White Plains (John T. Brennan of counsel), for Lewistown Manufacturing, Inc., respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered February 27, 2007, which granted the motions of third-party defendant Lewistown Manufacturing, Inc. and defendants Nate Nate Metal Craft, Barzel Iron Works, Inc., and Metal Craft by N. Barsily, Inc. (collectively, Metal Craft) for summary judgment

dismissing the complaints and all cross claims against them, and granted defendant Harding Steel, Inc.'s motion for summary judgment dismissing the complaint as against it and on its third-party claims against Lewistown and its cross claims against Metal Craft to the extent of dismissing the complaint as against it, unanimously modified, on the law, to reinstate the complaint as against Harding and Metal Craft and to reinstate Harding's cross claims against Metal Craft for common-law indemnification, and otherwise affirmed, without costs.

Plaintiff commenced this product liability action to recover damages for injuries he sustained when a parking lift collapsed because of the alleged failure of the telescopic lift rods. Plaintiff's testimony that, after the accident, the rear lift rods were broken at the threads and "opened up like a flower" was sufficient to raise an inference that the rods did not perform as intended and were the cause of the lift's collapse (*see Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]). Further evidence that the lift rods were defective was provided by the president of fourth-party defendant MD Parking Machine Specialists, an installer of parking lift machines, who inspected the rods shortly after the accident and opined, in a letter to Harding that was admissible as a business record (*see Petrocelli v Tishman Constr. Co.*, 19 AD3d 145, 146 [2005]), that the rods could not support the weight of the lift because their threading

was cut too deep.

Defendants' theory that the lift collapsed because plaintiff was adjusting it improperly is unsupported by any evidence (*see Novak v Corco Chem. Corp.*, 194 AD2d 652, 653 [1993]). Lewistown's general manager testified that applying force as plaintiff was doing at the time of the accident would *not* cause the parking lift to collapse. While he also testified that the lift could collapse if a load of more than 50,000 pounds caused the teeth in the locking mechanism to become separated from the rest of the assembly, there is no evidence in the record that the teeth became separated.

Harding may be held liable for the allegedly defective rods as a retailer or distributor thereof (*Sukljian v Ross & Son Co.*, 69 NY2d 89, 95 [1986]). Moreover, as it expressly warranted the parking lift and its replacement and component parts, and its chairman and CEO testified that the warranty was in effect for the subject lift, Harding may be held liable for breach of warranty.

An issue of fact as to Metal Craft's liability was raised by the post-accident statements of the aforementioned individuals, albeit hearsay, that Metal Craft manufactured the allegedly defective rods, in conjunction with the testimony of Harding's chairman and CEO that Harding paid Metal Craft to manufacture the rods (*see Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1999]).

Harding therefore may pursue its cross claims against Metal Craft for common-law indemnification (*see generally McDermott v City of New York*, 50 NY2d 211, 216-217 [1980]).

The third-party complaint against Lewistown was correctly dismissed because the evidence establishes that, after the parking lift left Lewistown's control and before the accident, lift rods that Lewistown fabricated were replaced by the allegedly defective rods, which it did not fabricate (*see Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 475 [1980]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3396 James Todd Smith, professionally known as, LL Cool J, Index 102364/05
Plaintiff-Appellant,

-against-

GTFM, Inc.,
Defendant-Respondent,

GTFM, LLC,
Defendant.

Meloni & McCaffrey, P.C., New York (Robert S. Meloni and Thomas P. McCaffrey of counsel), for appellant.

Davidoff Malito & Hutcher LLP, New York (Charles Klein of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered June 22, 2007 which, upon reargument, granted defendant GTFM Inc.'s cross motion for partial summary judgment, unanimously affirmed, with costs.

Summary judgment was properly based on a letter signed by plaintiff unambiguously showing his waiver of any claims for breach of contract arising prior to June 14, 2002 (*see Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69 [2003], *lv dismissed* 2 NY3d 794 [2004]). Plaintiff's assertions in his affidavit that by signing the letter he never intended to waive

his right to sue defendants for breach of contract were unsubstantiated, and thus insufficient to defeat a motion for summary judgment on this point (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3397 Lauren Shapiro, Index 405160/06
Petitioner-Appellant,

-against-

Ira Sanders,
Respondent-Respondent.

Lauren Shapiro, appellant pro se.

Ira Sanders, respondent pro se.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered April 3, 2007, which denied petitioner's application to vacate an arbitration award awarding respondent a downward modification of child support and denying petitioner's claims for child support arrears and an upward modification of child support, unanimously affirmed, without costs.

Under the parties' 1996 separation agreement incorporated but not merged into their 1996 judgment of divorce, petitioner was awarded custody of both the parties' son and daughter. For reasons not presently in issue, respondent was given temporary custody of the son in 1999. Respondent continued to pay the child support directed in the judgment until March 2004, when, three months after having been awarded permanent custody of the son, he sought a downward modification based on the son's change of custody. Petitioner moved for an upward modification based on an alleged increase in respondent's earnings. Pursuant to an

arbitration clause in the separation agreement, the parties were directed to arbitration (25 AD3d 526 [2006], *lv denied* 6 NY3d 711 [2006]), where petitioner also sought post-March 2004 arrears. The arbitrator found that the parties' incomes are nearly equal and ruled that neither should be required to pay the other child support for the child in the other's custody. Petitioner fails to show that award does not comply with the Child Support Standards Act (Domestic Relations Law § 240[1-b]) or is otherwise not in the best interests of the children (*see Frieden v Frieden*, 22 AD3d 634 [2005], *lv denied* 6 NY3d 712 [2006]). We have considered petitioner's other arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3398 The People of the State of New York, Respondent, Ind. 4657/00

-against-

Robert Wright, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jennifer Marinaccio of counsel), for respondent.

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. on speedy trial motion; Michael A. Gross, J. at jury trial and sentence), rendered May 3, 2002, convicting defendant of assault in the first degree, and sentencing him to a term of 16 years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. The dispositive issue is whether the People's declarations of readiness were rendered illusory by the undisputed fact that, on the dates in question, they were not yet in possession of forensic evidence and medical records that they ultimately introduced at trial. We find no basis for finding these unequivocal announcements of present readiness to be illusory. There is nothing in CPL 30.30 to preclude the People from declaring their present readiness, but still gathering additional evidence to strengthen their case. Moreover, "neither statute

nor case law requires that the People have the ability to produce their witnesses instantaneously in order for a statement of readiness to be valid." (*People v Dushain*, 247 AD2d 234, 236 [1998], *lv denied* 91 NY2d 1007 [1998]). Here, the People could have tried this case on the basis of eyewitness testimony alone, and the wisdom of doing so is irrelevant for speedy trial purposes. While defendant asserts that the People had a duty under *Brady v Maryland* (373 US 83 [1963]) to ascertain whether forensic tests performed by the police produced any exculpatory evidence, this is analogous to a claim that the People answered ready without turning over discoverable material. However, discovery failures have no bearing on the People's readiness (*People v Anderson*, 66 NY2d 529, 543 [1985]). Accordingly, no additional time should be charged to the People based on defendant's claim that certain declarations of readiness were illusory. While defendant claims that two additional periods should have been charged to the People, those periods, when added to the 141 days that the court charged, would not entitle defendant to dismissal of the indictment. In any event, we have considered and rejected defendant's claims relating to those two periods.

The challenged portions of the prosecutor's summation did not deprive defendant of a fair trial. Defendant's summation suggested that there had been collusion among prosecution

witnesses and collective tailoring of testimony, and the prosecutor made a fair response to that argument (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]). We do not find that the prosecutor mischaracterized defendant's defense or suggested that the jury could only reach a not guilty verdict if it found an actual conspiracy among witnesses. Defendant's remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no pattern of inflammatory remarks, and that, to the extent anything in the summation could be viewed as a misstatement of law, the court's charge was sufficient to prevent any prejudice.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3399 Silke Winter, Index 350534/04
Plaintiff-Respondent-Appellant,

-against-

Pierre Winter,
Defendant-Appellant-Respondent.

Burger Yagerman & Green, New York (Nancy M. Green of counsel), for appellant-respondent.

Chemtob Moss Forman & Talbert, LLP, New York (Paul M. Talbert of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Laura Visitación-Lewis, J.), entered January 11, 2007, after a nonjury trial, to the extent appealed and cross-appealed from, setting amounts of spousal maintenance, child support and defendant husband's share of add-on child expenses, allocating marital property and assets subject to certain credits including accounting for wasteful dissipation, denying defendant credit for pendente lite mortgage payments on the marital residence, and ordering defendant to pay 40% of plaintiff's legal fees, unanimously modified, on the facts, to reduce defendant's obligation with respect to plaintiff's legal fees to 30%, and to reduce the value assigned to the parties' Jeep Cherokee from $15,000 to $11,000, and otherwise affirmed, without costs.

The parties were married in 1997 and have one child, born in 2002. This divorce action was commenced in 2004. The parties

stipulated to the grounds, and the financial aspects were tried over the course of six days, during which defendant appeared pro se.

To a large extent, defendant's appeal is based on the court's determinations that a gift from plaintiff's father toward the purchase of the marital home was a gift of separate property to her and that she individually owned certain bank accounts and income-producing property in Germany. These determinations were made by the court based upon its finding that defendant's testimony as to these assets lacked credibility, in contrast to the testimony of plaintiff and her father, both of whom the court found to be credible. We see no basis in the record to disturb these findings of credibility, which are entitled to great weight on appeal (*see Antes v Antes*, 304 AD2d 597 [2003]).

In determining the value of the Jeep Cherokee, the court used the vehicle's 2004 purchase price of $15,000. In her September 30, 2005 net worth statement, plaintiff valued that asset at $11,000. In the absence of any other evidence as to the vehicle's worth, plaintiff's valuation should have been adopted by the court.

At trial, while defendant generally preserved his right to challenge the reasonableness of attorney fees incurred by plaintiff, he did so by asking limited questions that fail to provide a basis for disturbing the court's findings on this

issue. To the extent that defendant now objects to the amount of fees as unsupported by documentary evidence in the form of bills or time sheets, such objection has been waived by his failure to request an evidentiary hearing at the time of trial (*see Adler v Adler*, 203 AD2d 81 [1994]). However, in the circumstances presented, we find the percentage of plaintiff's attorney's fees for which defendant is responsible is excessive to the extent indicated (Domestic Relations Law § 237[a]).

The court properly considered the appropriate factors, including the parties' lifestyle, the custodial parent's financial resources and the child's needs, in determining child support (*see Matter of Culhane v Holt*, 28 AD3d 251 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3400 The People of the State of New York, Respondent,

-against-

Stacey Casidy, Defendant-Appellant.

Ind. 6947/04

Steven Banks, The Legal Aid Society, New York (Adrienne Gantt of counsel), for appellant.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered on or about May 26, 2005, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

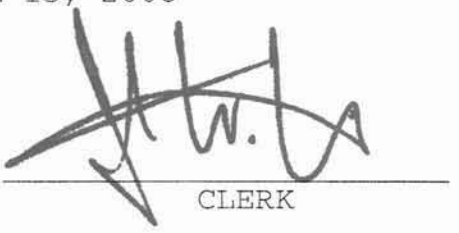
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008



CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3401 The People of the State of New York, Ind. 2924/02
Respondent,

-against-

Darryl Adams,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

Darryl Adams, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J. at hearing; Joseph Fisch, J. at jury trial and sentence), rendered December 4, 2003, convicting defendant of attempted coercion in the first degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Defendant failed to preserve his claim that his conviction of attempted coercion in the first degree violated the principles of *Apprendi v New Jersey*, 530 US 466 (2000), or his claim that the first-degree coercion statute (Penal Law § 135.65[1]) is unconstitutional because it purportedly contains a mandatory presumption of "heinousness" (*see People v Iannelli*, 69 NY2d 684 [1986], *cert denied* 482 US 914 [1987]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. When coercion is predicated on a

threat of physical injury or property damage, "it is an anomaly of our statutes that the language used to define the felony of coercion in the first degree (Penal Law § 135.65) is virtually identical to that employed to describe the misdemeanor of coercion in the second degree (Penal Law § 135.60)." (*People v Discala*, 45 NY2d 38, 41 [1978]). "Making the misdemeanor offense 'all-inclusive' is apparently a 'safety-valve' feature included in the event an unusual factual situation should develop where the method of coercion is literally by threat of personal or property injury, but for some reason it lacks the heinous quality the Legislature associated with such threats." (*People v Eboli*, 34 NY2d 281, 287 [1974]). "Heinous quality" is not an element of the higher degree of coercion. On the contrary, in the situation of coercion by threat of injury to person or property, the elements of the two degrees are the same, and "the discretion to decide what is an 'exceptional' case warranting prosecution for the lower degree is entrusted to the prosecutor." (*id.* at 288). There was no *Apprendi* violation because the court did not increase the penalty for the crime of which defendant had been convicted based upon facts not found by the jury. Furthermore, the court did not instruct the jury that "heinousness" is presumed (*compare Sandstrom v Montana*, 442 US 510 [1979]), and the first-degree coercion statute does not shift the burden of proving any element of the crime to the defendant (*compare*

Mullaney v Wilbur, 421 US 684 [1975]). In explaining to the jury the elements of first-degree coercion or attempted coercion, the court never mentioned "heinousness," nor was it required to do so.

Defendant's argument that the trial court improperly denied his request to have coercion in the second degree charged as a lesser included offense of coercion in the first degree is moot since he was acquitted of the first-degree coercion charges and convicted only of attempted first-degree coercion. Defendant improperly claims for the first time in his reply brief that the trial court should have charged *attempted* coercion in the second degree as a lesser included offense of attempted coercion in the first degree. In any event, his argument is unpreserved since he neither requested such a charge nor objected to the charge given, and we decline to review it in the interests of justice. As an alternative holding, we also reject it on the merits. Even when viewed in the light most favorable to defendant, there is no reasonable view of the evidence which would support a finding that defendant committed the lesser offense but not the greater (*see Discala*, 45 NY2d at 41).

We have considered and rejected defendant's pro se claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3402 ExxonMobil Corporation, Index 603471/06
Plaintiff-Appellant,

-against-

Certain Underwriters at Lloyd's, London, et al.,
Defendants-Respondents.

Howrey LLP, Washington, DC (Jeffrey M. Lenser, of the District of Columbia Bar, admitted pro hac vice, of counsel), for appellant.

Locke Lord Bissell & Liddell LLP, Chicago, IL (Laura S. McKay, of the State of Illinois Bar, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered June 5, 2007, which denied plaintiff's motion for partial summary judgment and granted defendants' motion for partial summary judgment on the ground that the underlying product liability claims against plaintiff constituted multiple occurrences under the insurance policies at issue, unanimously affirmed, with costs.

An "occurrence" is defined in the policies as "an accident, an event or a continuous repeated exposure to conditions which result in personal injury or property damage, provided all damages arising out of such exposure to substantially the same general conditions existing at or emanating from each premises location of the Assured shall be considered as arising out of one occurrence." This does not reflect an intention of the parties to aggregate individual claims for the purpose of subjecting them

to a single policy deductible (*see International Flavors & Fragrances, Inc. v Royal Ins. Co. of Am.*, 46 AD3d 224 [2007]). Had they intended to aggregate all claims resulting from the manufacture of plaintiff's product, "it would have been a simple matter to rewrite the definition of 'occurrence'" (*id.* at 229).

In the absence of a specific aggregation-of-claims provision precisely identifying the operative incident or occasion giving rise to liability, the court must apply the "unfortunate events" test (*see Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.*, 7 NY2d 222 [1959]) to determine whether the underlying multiple claims constitute multiple "occurrences" under the policy (*see Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d 162, 173 [2007]; *International Flavors*, 46 AD3d at 228). Under this test, the manufacture and sale of plaintiff's two defective products did not constitute a single occurrence. Each installation of ExxonMobil's polybutylene resin into a municipal utility water system, and each introduction of AV-1 lubricant into an aircraft engine, created "exposure" to a condition that resulted in property damage, to multiple claimants on different dates over many years. Under the circumstances, the underlying product

liability claims "share few, if any, commonalities" (*Appalachian*, 8 NY3d at 174).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3403 The People of the State of New York, Respondent,

-against-

Ygnacio Gonzalez, Defendant-Appellant.

Ind. 6310/05

Robert S. Dean, Center for Appellate Litigation, New York (Carl S. Kaplan of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered March 28, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 3½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that defendant was a possessor of the cocaine the police seized from defendant's companion and from the companion's nearby parked car. Defendant fled and hid from the police who raided his apartment. In the apartment, the officers found drug weighing and packaging paraphernalia in open view on a living room table, along with

records of drug transactions and defendant's identification card. The companion was found standing near a closet in defendant's bedroom and holding 33 tin foils of cocaine whose packaging material matched the packaging found on the table. In defendant's bedroom, the police also found a ledger recording drug transactions. From this evidence, the inference is inescapable that defendant and his companion were jointly engaged in a drug-selling enterprise, and that the drugs recovered from the companion's hands and vehicle were possessed by both men as part of that enterprise. Accordingly, defendant could properly be convicted under both a theory of constructive possession, which the court correctly submitted to the jury, as well as under a theory of accessorial liability (*see People v Hyde*, 302 AD2d 101 [2003], *lv denied* 99 NY2d 655 [2003]; *People v Jackson*, 283 AD2d 201 [2001], *lv denied* 96 NY2d 902 [2001]; *see also People v Bundy*, 90 NY2d 918, 920 [1997]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3404 The People of the State of New York, Ind. 3515/05
Respondent,

-against-

Shane Hyatt,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), and Weil, Gotshal & Manges LLP, New York (Jason Lichter of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 28, 2006, convicting defendant, after a jury trial, of attempted assault in the second degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility.

The court properly permitted brief and limited testimony from a Department of Correction investigator concerning the events leading up to defendant's arrest (*see e.g. People v Guerrero*, 22 AD3d 266 [2005], *lv denied* 5 NY3d 882 [2005]). The testimony was based on the investigator's personal knowledge, and it did not contain any hearsay, express or implied. Defendant's

argument that this testimony invaded the fact-finding function of the jury, particularly by referring to the incident as an "assault," is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it without merit.

By failing to object, by failing to make specific objections, or by failing to request further relief after curative actions were taken by the court, defendant failed to preserve his present challenges to testimony that allegedly suggested he had committed uncharged crimes or bad acts while incarcerated, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The court's curative actions were sufficient to prevent any undue prejudice.

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence or directing that it be served concurrently with an unrelated sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3405 Enso Perez, Index 8464/05
Plaintiff-Appellant,

-against-

Amelia Canale, et al.,
Defendants,

Atlantic Development Group, LLC, et al.,
Defendants-Respondents.

Law Office of Scott B. Schwartz, PLLC, New York (Scott B. Schwartz of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Patrick J. Lawless of counsel), for respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 19, 2007, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Atlantic Development Group, LLC, Sagamore Street Associates, L.P., Birchall Avenue, L.P., and Knickerbocker Management, LLC for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established a prima facie entitlement to summary judgment in this action where plaintiff was injured when he allegedly slipped and fell on snow and ice while traversing a cement walkway leading to a building owned by Sagamore and managed by Knickerbocker. The climatological data relied upon by defendants' expert meteorologist was prima facie evidence of the facts stated therein (CPLR 4528), and the expert permissibly concluded that due to temperatures that were well above freezing

in the 12 hours prior to plaintiff's fall, it would have been impossible for there to have been a precipitation-related ice or snow accumulation in the vicinity of plaintiff's fall. Contrary to plaintiff's contention, it was not speculative for defendants' qualified expert to conclude that the temperatures were at levels that would have caused melting on the days prior to and of the accident (*compare Neidert v Austin S. Edgar, Inc.*, 204 AD2d 1030 [1994]).

The affidavit of plaintiff's friend does not raise a triable issue of material fact, in the face of the evidence that ice could not have been present on the walkway at the time of the accident (*see Leo v Mt. St. Michael Academy*, 272 AD2d 145, 146 [2000]). The court also properly discounted plaintiff's photographs taken the day after the accident, where the photos were not of the accident location.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3406 In re George C. Johnson, etc., Index 111080/06
Petitioner-Appellant,

-against-

The New York City Housing Authority,
Respondent-Respondent.

Nathan M. Ferst, New York (Lewis C. Taishoff of counsel), for appellant.

Ricardo Elias Morales, New York (Menachem Simon of counsel), for respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered February 6, 2007, which denied the petition, declared petitioner ineligible for continued occupancy of a public housing apartment as a remaining family member, and dismissed the proceeding, unanimously affirmed, without costs.

The challenged determination was based on a fair interpretation of respondent's own rules and regulations, and was neither arbitrary nor capricious (*see Matter of Hutcherson v New York City Hous. Auth.*, 19 AD3d 246 [2005]). Petitioner conceded that he never obtained the required written permission from respondent to live in the apartment (*see Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289 [2004]). For the several years prior to the death of petitioner's father in 2003, the annual income affidavits submitted to respondent listed that

individual as the sole tenant in the apartment (*see Jamison v New York City Hous. Auth.*, 25 AD3d 501 [2006]). There was no evidence that respondent knew petitioner might also have taken up residency there (*id.* at 291).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3407N Jonathan E. Vick, et al., Index 605143/99
Plaintiffs-Respondents,

-against-

Richard Albert, et al.,
Defendants-Appellants,

Evelyn Renee Albert, et al.,
Defendants.

Robert A. Ross, Huntington, for appellants.

Steven B. Sarshik, New York, for respondents.

Appeal from order, Supreme Court, New York County (Karla Moskowitz, J.), entered April 4, 2007, which denied the motion by defendants Albert and the Albert Greenberg & Vick and Godwin Realty partnerships to deposit funds into court as a satisfaction piece in order to stay enforcement of a judgment pending appeal, unanimously dismissed as moot, without costs.

After plaintiffs obtained a judgment against appellants, both sides appealed, during the pendency of which appellants moved to deposit funds into court pursuant to CPLR 5021(a)(3), in partial satisfaction and as an undertaking for the balance of the judgment, in order to stay enforcement. Appellants argued that a deposit made under CPLR 5021(a)(3), as opposed to an undertaking under CPLR 2501(2) or 5519(a)(2), tolls the running of postjudgment interest and avoids the requirement to pay the 2% administrative fee under CPLR 8010(1). Plaintiffs successfully

opposed the motion, and pending the instant appeal from that order, appellants filed an undertaking pursuant to CPLR 5519(a)(2), which does not require a court order to stay enforcement of the judgment.

On January 17, 2008, this Court affirmed the judgment in plaintiffs' favor (47 AD3d 482), effectively rendering the instant appeal moot. Were we to reach the merits, we would find that the motion court properly exercised its discretion in denying appellants' effort to deposit funds pursuant to CPLR 5021(a)(3), since they failed to make an unconditional tender of the judgment prior to making the motion (*Meilak v Atlantic Cement Co.*, 30 AD2d 254 [1968]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Buckley, Sweeny, JJ.

9918 The People of the State of New York, Ind. 2425/04
Respondent,

-against-

Anthony Rivera,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 17, 2004, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fourth degree and three counts of criminal possession of a controlled substance in the seventh degree, and sentencing him as a second felony offender, to an aggregate term of 4 to 8 years, unanimously affirmed.

The hearing testimony revealed the following facts: at approximately 9 p.m. in the vicinity of West 24th Street in Manhattan, an undercover police team consisting of four officers in an unmarked vehicle observed defendant driving a blue Chevrolet Lumina with a clear windshield and tinted side and rear windows. The team followed defendant's care after ne of the officers recognized it from a previous narcotics surveillance operation. The officers confirmed via their vehicle's computer

that defendant's vehicle was registered to an address that the officer recalled from the prior narcotics operation.

Defendant parked his vehicle in a vacant lot and the officers observed him make a series of calls on his cell phone. He then drove to a residential high rise building at 525 West 25th Street. One officer with experience in narcotics cases got out of the police vehicle and positioned himself facing defendant so that he could see into defendant's vehicle, which had its interior lights on. Approximately 10 to 15 minutes later, a woman came out of a building, walked over to defendant, got into his vehicle and gave him money in exchange for a "small object," leaving the vehicle approximately 30 seconds later and reentering her building. The officer making these observations continued to watch defendant for a minute or so and then radioed the other officers, who drove up alongside defendant's car and arrested him.

A cell phone, $429 in currency and a spiral notebook containing addresses, phone numbers and monetary figures were recovered from defendant's person. Drugs were found inside the car, in plain view, in a small compartment next to the steering wheel.

On appeal, defendant argued that the trial court had erroneously denied his motion to suppress physical evidence without a hearing, as well as claiming that his sentence was

excessive. We held the appeal in abeyance and remanded the matter for a hearing on his motion to suppress physical evidence (42 AD3d 160). After the hearing on July 26, 2007, the court denied the motion. The parties have submitted supplemental briefs concerning the propriety of that determination.

The hearing court credited the police officer's testimony, noting that the arresting officers were experienced police who had made numerous narcotics arrests. The court also noted that defendant's vehicle had been used as a "drug courier car" approximately one prior to this incident. Based on the totality of the circumstances, including the observations of the exchange between defendant and the woman in defendant's vehicle, the court determined there was probable cause for defendant's arrest and denied his motion to suppress the physical evidence seized by the police. We agree.

To sustain a finding of probable cause to arrest, the evidence must show that the police possessed of information that would lead a reasonable person to conclude it was more probable than not that a crime had been committed, and, that the person being arrested defendant was the perpetrator (*People v Radoncic*, 239 AD2d 176, 179 [1997], *lv denied* 90 NY2d 897 [1997]). Although the arresting officers here were assigned at that time to the anti-crime unit, two of them were highly experienced narcotics officers, with between 250-300 and 300-400 narcotics

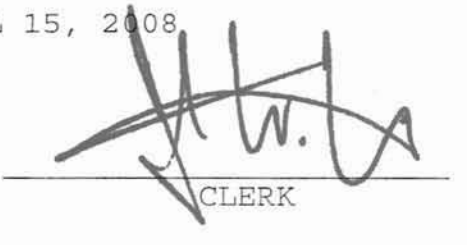
arrests respectively. In fact, one of them recognized defendant's vehicle as having been involved in a prior narcotics investigation, which was confirmed by a computer search. Based upon all the facts and circumstances of this case, there was ample probable cause for defendant's arrest (*see People v Bigelow*, 66 NY2d 417, 423 [1985]).

Nor do we find reason to disturb defendant's sentence. Given defendant's NYSID report which was before the sentencing court and showed an extensive criminal history, including convictions for drug possession, it cannot be said that the sentence was excessive. Nor is there any merit to defendant's claim that his sentence reflects punishment for going to trial. The fact that the court imposed a higher sentence after trial than that previously offered as part of a plea bargain, does not warrant a reduction in the sentence (*see People v Diaz*, 177 AD2d 406 [1991], *affd* 80 NY2d 780 [1992])absent evidence that the court relied on improper factors.

We have considered and rejected defendant's remaining arguments.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008



CLERK

Tom, J.P., Saxe, Nardelli, Sweeny, Catterson, JJ.

1832-
1832A The People of the State of New York, Ind. 1883/03
Respondent,

-against-

Brian Henderson,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Simpson Thacher & Bartlett LLP, New York (Marsha W. Yee of counsel), for appellant.

Brian Henderson, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Lawrence H. Cunningham of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert G. Seewald, J.), rendered May 9, 2005, convicting defendant, after a jury trial, of attempted assault in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, and order, same court and Justice, entered March 8, 2006, which denied defendant's CPL 440.10 motion to vacate the judgment, affirmed.

The verdict was based on more than legally sufficient evidence, and was not against the weight of the evidence. Defendant was convicted on the basis of the eyewitness testimony of two correction officers who both observed him stabbing a fellow inmate. The jury had substantial grounds to credit these officers, and to reject the testimony of defendant's witness, the

inmate-victim who vaguely claimed that the attack was by three Hispanic inmates whom he could not identify, and asserted that defendant had nothing to do with the attack.

We agree with the trial court that the People's belated disclosure of Officer Sheridan's report, though a *Rosario* violation (*see People v Rosario*, 9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]), does not require reversal, since we perceive no reasonable possibility that timely disclosure would have altered the verdict (*see People v Vilardi*, 76 NY2d 67, 77 [1990]).

Defendant's right to a fair trial was not violated by the prosecutor's cross-examination of the inmate-victim or by remarks made in the course of summation. The questions and comments relating to the victim's failure to identify defendant as the perpetrator were proper attacks on his credibility.

The cases relied upon by defendant which involve prosecutors improperly accusing defendants of intimidating witnesses in the absence of evidentiary support (*see e.g. People v Lantigua*, 228 AD2d 213, 219 [1996]; *People v Norton*, 164 AD2d 343, 356 [1990], *affd* 79 NY2d 808 [1991]) are inapposite here. A limited inquiry into whether the inmate-victim might have been subjected to intimidation or might legitimately expect reprisal was an appropriate subject of cross-examination, and, to the extent included in the prosecutor's summation, was also properly

responsive to the defense's rhetorical question, "Why in a room full of inmates, did not one inmate come forward to say that Brian Henderson had anything to do with this?" Nor was improper prejudice likely from the prosecutor's question as to the term commonly used for inmates who testify against other inmates. Any instances of improper remarks by the prosecutor were minor, isolated, and harmless.

Cases in which it was held prejudicial to inform the jury of the defendant's incarcerated status (*see e.g. People v Randolph*, 18 AD3d 1013 [2005]) are inapposite where the jury was necessarily aware from the outset that the case concerned an assault among inmates at the Rikers Island detention facility (*see People v Wong*, 163 AD2d 738 [1990], *lv denied* 76 NY2d 992 [1990]).

Defendant's remaining contentions, including those contained in his pro se supplemental brief, are without merit.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

Because I believe the People's unfounded comments and insinuations about the intimidation of the victim substantially prejudiced the defendant, I would reverse and remand for a new trial. I, therefore, respectfully dissent.

This is a case where the People ignored the victim's testimony that the defendant was not his assailant, and suggested, without any evidentiary basis, that the victim was lying because he had been intimidated by the defendant. When the victim denied any intimidation, the People then argued that the victim's denials meant that he had, in fact, been intimidated. The victim's denials therefore became the People's evidence-in-chief on the issue of witness intimidation. Indeed, the People offered no evidence whatsoever that the defendant intimidated the victim.

On March 17, 2003, a fight broke out among three inmates at Rikers Island causing injury to one of the inmates, Pablo Pastrana.[1] The defendant, Brian Henderson, was subsequently charged with attempted assault in the first degree.

During trial, conflicting testimony was offered on the issue of whether the defendant was correctly identified as the

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[1]Testimony regarding the number of inmates present in the day room during the fight varied; one correction officer testified that there were between 8 and 14 inmates, and the victim testified that there were approximately 25 to 28 inmates.

assailant. Two correction officers testified that they were standing 20-30 feet away[2] and witnessed the defendant pull out a metal object and swing it at the victim. The victim, however, testified that the correction officers had improperly "fingered" the defendant as the culprit and that he was assaulted "by some Spanish brother."[3]

Throughout the trial, the People attacked the *victim's* credibility by suggesting that he had been intimidated into testifying on behalf of the defendant. The People also intentionally crafted questions and elicited responses that informed the jury of the fact that victim and defendant were incarcerated together. For instance, during the cross-examination of the victim, the People asked:

> Q. Before today, when was the last time that you saw Mr. Henderson? ...
>
> A. Last time we came to court and recently since we been together.
>
> Q. You mean last Thursday, ... downstairs in M-37?
>
> A. Yes ...
>
> Q. Is that when you spoke to the defense attorney for the first time?
>
> A. Yes.
>
> Q. Is that when you told the defense attorney that the

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[2]One officer was 20-25 feet away; the other officer was 25-30 feet away.

[3]The defendant is an African-American.

person that's in the cell closest to you, wasn't the one that did it?

At another point in the trial, the People asked, "What do inmates ... call an individual who ... comes to court and testifies against another inmate?"

The victim forcefully denied that he had been intimidated. On cross-examination, he stated:

> "I want to say something. I want to - really want to know where you are leading with this. Because if you are making it seem like... Making it seem like I'm scared. No. I'm not scared. If you been checking through all your paperwork, you will see how long I been locked up... If you could see, nobody is going to put pressure on [me]. I'm here for the reason because he wasn't the one. I'm not going to be scared of him or no man... I didn't have to come. I could have refused. I refused court before."

Nevertheless, during summation, the People stated, "[s]nitches get stitches." The People said, "This case is about [defendant's] arrogance and thinking that no one would be here to testify ... against him. He got the victim to testify for him."

Defense counsel objected, and the court sustained the objection. Immediately thereafter, however, the People continued, "You don't always need a shank to exercise power over another person ... It's a small community."[4]

After the People's summation, defense counsel moved for a mistrial on the ground that the People had implied that the defendant had forced or pressured the victim to testify for him.

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[4]Defense counsel did not object to this comment.

Defense counsel acknowledged that the court had stricken part of the summation in response to its objections but argued that this did not reverse the prejudice to the defendant. Defense counsel also objected to the People's reference to defendant's incarceration. The court denied the motion for a mistrial, and the defendant was convicted of attempted assault in the first degree.

On appeal, the People assert that the comments were appropriate because they were identifying grounds on which to question the victim's credibility. Unfortunately, there simply was no evidence of record that the defendant intimidated the victim and therefore, no good faith basis to question the victim's credibility.

The People also assert that they were responding to the defense summation, which asked, "Why in a room full of inmates, did not one inmate come forward to say that [the defendant], had anything to do with this?"

For the reasons set forth below, I would reverse and remand for a new trial because I believe that the defendant was substantially prejudiced by the People's improper comments. The People, by suggestion and insinuation only, created the distinct impression that the victim had lied in testifying that the defendant was not the assailant because the victim had been intimidated by the defendant. Yet, the People presented no

evidence that anyone had intimidated the victim in any way. On the contrary, the victim explicitly testified that the defendant had absolutely nothing to do with the attack, and he emphatically denied being intimidated. In similar circumstances, this Court has granted new trials. See, e.g., People v. Lantigua, 228 A.D.2d 213, 219, 643 N.Y.S.2d 963, 967 (1st Dept. 1996) ("the prosecutor's numerous remarks that this was a case of 'intimidation,' involving a witness who was 'afraid,' are clearly contradicted by the evidence"; new trial granted); People v. Norton, 164 A.D.2d 343, 356, 563 N.Y.S.2d 802, 810 (1st Dept. 1990), aff'd, 79 N.Y.2d 808, 580 N.Y.S.2d 174 (1991) (new trial granted where prosecutor improperly argued that the defendant had threatened witness). While the People contend that they were responding to the defense summation, this does not allow the People to make arguments that contradict the evidence. See generally People v. Ashwal, 39 N.Y.2d 105, 109-10, 383 N.Y.S.2d 204, 206 (1976).

Furthermore, when evaluating the impact of the People's misconduct, a determination as to whether the People persistently disregarded the court's instructions such that the People sidetracked the jury is a relevant inquiry. See People v. Alicea, 37 N.Y.2d 601, 605, 376 N.Y.S.2d 119, 122 (1975). Here, the People's improper comments persisted throughout the summation, even after the court sustained numerous objections.

In my view, it was highly prejudicial for the People to make comments with no evidentiary foundation in the record such as "You don't always need a shank to exercise power over another person" and "It is a small community." These comments informed the jury that the defendant was incarcerated with the victim and hence had an opportunity to influence the victim's testimony. Evidence of this prejudice is adequately demonstrated by the juror's post-trial comment that he thought that "the likelihood of undue influence was much greater" in light of the victim's and the defendant's incarceration together.

Further, the People's assertion that because the victim testified that he was *not* intimidated by the defendant means that he *was* intimidated by the defendant is not only preposterous in its Alice-in-Wonderland-type reasoning[5] but an obvious attempt by the People to evade their obligation to present evidentiary support for their argument. In their brief, the People state, "The very fact that [the victim] testified for the person who attacked him led to the reasonable inference that [the victim] had felt some pressure not to identify [the defendant]." However, the People's argument clearly presupposes that the defendant was the perpetrator and improperly places the burden of proof with

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[5] From Alice's Adventures in Wonderland : "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean..." Lewis Carroll, Alice in Wonderland (1865).

him. See People v. Harte, 29 A.D.3d 475, 476, 815 N.Y.S. 2d 93, 94-95 (1st Dept. 2006).

I believe this was a close case, in which the jury's assessment of credibility was crucial: the victim's testimony was directly contrary to that of the corrections officers and there was no admissible proof submitted to explain why either side had a reason to perjure themselves. In my view, the People's impermissible comments unfairly tipped the scales against the defendant, and so they cannot be viewed as harmless error.

Finally, the court's sustaining of the defense's objections to the People's comments did not eliminate the prejudicial effect of the comments especially in light of the People's persistence in making similarly improper comments during its summation. See People v. Calabria, 94 N.Y.2d 519, 523, 706 N.Y.S.2d 691, 694 (2000) ("A court's instruction to a jury to disregard matters improperly brought to their attention cannot always assure elimination of the harm already occasioned") (internal quotation marks and citation omitted).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Andrias, J.P., Friedman, Buckley, McGuire, Moskowitz, JJ.

2952-
2953-
2954-
2955 Carl Geonie,
Plaintiff-Appellant,

Index 115117/03
591232/04
590750/05

-against-

OD & P NY Limited, et al.,
Defendants-Respondents,

Apollo Partners, etc., et al.,
Defendants.

- - - - -

[And a Third-Party Action]

- - - - -

O.D. & P., New York, Ltd.,
Second Third-Party Plaintiff-Respondent,

-against-

ARI Products, Inc.,
Second Third-Party Defendant-Respondent.

David P. Kownacki, P.C., New York (David P. Kownacki of counsel), for appellant.

Gartner & Bloom, P.C., New York (Susan P. Mahon of counsel), for OD & P NY Limited, New York Mercantile Exchange, I. Park Lake Success, LLC, I. Park Holdings, LLC and I. Park Investments, Inc., respondents.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Michael J. Lenoff of counsel), for Cushman & Wakefield, respondent.

Pillinger Miller Tarallo, LLP, Elmsford (Jenna Cirelli of counsel), for ARI Products, Inc., respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered August 3, 2006, which, to the extent appealed from as limited by the briefs, denied plaintiff's cross motion for

summary judgment on his Labor Law § 240(1) claim, upon searching the record, dismissed the Labor Law § 240(1) and § 241(6) claims against all defendants, and granted the cross motion of defendants I. Park Lake Success, LLC, I. Park Holdings, LLC and I. Park Investments, LLC for summary judgment dismissing the Labor Law § 240(1) and § 241(6) claims as against them, unanimously affirmed, without costs. Order, same court and Justice, entered June 7, 2007, which, to the extent appealed from as limited by the briefs, dismissed the Labor Law § 240(1) and § 241(6) claims as against defendant Cushman & Wakefield, unanimously affirmed, without costs. Order, same court and Justice, entered June 7, 2007, which, to the extent appealed from as limited by the briefs, dismissed the Labor Law § 240(1) and § 241(6) claims as against defendant New York Mercantile Exchange, unanimously affirmed, without costs. Order, same court and Justice, entered July 16, 2007, which, to the extent appealed from as limited by the briefs, dismissed the remaining Labor Law § 200 and negligence causes of action as against defendant OD & P NY Limited, unanimously affirmed, without costs.

The Labor Law § 240(1) claim was properly dismissed because plaintiff's stepping into the opening left by the removal of a tile in a raised "computer floor" was not caused by defendants' failure to provide safety devices to protect against an

elevation-related hazard (*see Piccuillo v Bank of N.Y. Co.*, 277 AD2d 93, 94 [2000]; *D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 765 [2000], *lv denied* 95 NY2d 765 [2000]).

The Labor Law § 241(6) claim based on Industrial Code (12 NYCRR) § 23-1.7(b)(1) was properly dismissed because the opening into which plaintiff stepped was not the type of opening intended to be covered by the regulation.

The Labor Law § 200 and common-law negligence claims were properly dismissed as against the general contractor, OD & P, because the evidence that OD & P's project superintendent coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if he observed an unsafe condition is insufficient to raise a triable issue whether OD & P exercised the requisite degree of supervision and control over the work to sustain those claims (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [2006], *affd* 7 NY3d 805 [2006]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [2007]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [2005]). Moreover, there is no evidence that OD & P had actual notice of the unsafe condition, and the evidence that the topic of removed tile was generally discussed at weekly safety meetings was insufficient to

raise a triable issue as to constructive notice (*see Mitchell v New York Univ.*, 12 AD3d 200, 201 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3206N Doron Zanani, Index 600111/05
Plaintiff-Appellant,

-against-

Miriam Schvimmer, et al.,
Defendants-Respondents.

Doron Zanani, New York, appellant pro se.

Barry & Associates, Brooklyn (Barry R. Feerst of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered April 4, 2006, which, insofar as appealed from, denied plaintiff's motion for summary judgment seeking recovery of unpaid legal fees, unanimously reversed, on the law, with costs, summary judgment awarded to plaintiff, and the matter remanded for further proceedings to determine whether defendants, as claimed in their cross motion for partial summary judgment, are entitled to a setoff in the amount of $6,740 for amounts not properly credited to their account.

Plaintiff's motion for summary judgment should have been granted, because defendants failed to raise a triable issue of fact as to whether plaintiff, the attorney who represented them in a partition action, established an account stated by rendering bills to them to which they failed to object. Defendant Miriam Schvimmer's assertion that she orally objected to the bills is insufficient because she fails to state when she objected or the

specific substance of the conversations in which the objections were made (*see Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668 [2003], *lv denied* 1 NY3d 509 [2004]; *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781 [1981], *lv dismissed* 53 NY2d 1028 [1981]). Indeed, with respect to bills received by defendants after plaintiff was terminated, Miriam Schvimmer does not even assert that she objected to the bills, only that she "discussed" plaintiff's outstanding fees with him and told him that when the matter was concluded she would "address the issue with him." Furthermore, she failed to show that the invoices were insufficiently itemized. Even if they were, that fact does not in itself prevent an account stated from being created (*see Shea & Gould v Burr*, 194 AD2d 369, 371 [1993]). Moreover, defendants' position that an account stated was not created because they disputed the bills all along is contradicted by the fact that they made partial payment on a substantial number of the bills rendered by plaintiff (*see id*).

Notwithstanding our grant of summary judgment to plaintiff, we remand for a determination as to whether defendants are entitled to a setoff for amounts alleged by them, in their cross motion for partial summary judgment, to have been paid to plaintiff but not credited to them. However, the other sums for

which defendants seek a credit in their cross motion are part of the account stated and, accordingly, these issues have necessarily been decided in plaintiff's favor.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Gonzalez, J.P., Williams, Catterson, Moskowitz, JJ.

3244N-
3244NA The CLC/CFI Liquidating Trust, et al., Index 603859/03
Plaintiffs-Appellants,

-against-

Bloomingdale's, Inc., a Division of
Federated Department Stores, Inc.,
an Ohio Corporation, et al.,
Defendants-Respondents.

Lieff Cabraser Heimann & Bernstein, LLP, New York (Jonathan D. Selbin of counsel), for appellants.

Jones Day, New York (Mark R. Seiden of counsel), for respondents.

Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered September 12 and November 14, 2007, which respectively denied plaintiffs' motions for class certification and, to the extent appealed from, to renew, unanimously affirmed, with costs.

Plaintiffs allege that during the putative class action period, defendant department stores affiliated with Federated (now Macy's) improperly imposed chargebacks on vendors for merchandise that did not comply with "floor-ready" requirements without giving the reasonable notice required by UCC 2-607, and took certain cash discounts.

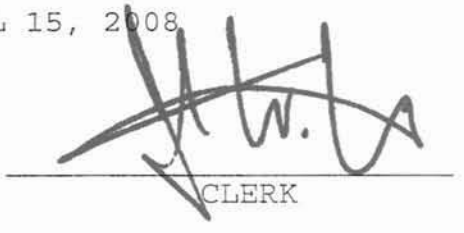
Whether a particular lawsuit qualifies as a class action ordinarily rests within the sound discretion of the trial court, although the Appellate Division can exercise the same authority

even absent an abuse of discretion (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52-53 [1999]). However, the party seeking class certification still bears the initial burden of establishing the criteria prescribed in CPLR 901(a) (*Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349 [2006]). The motion court was warranted in determining that notwithstanding defendants' use of uniform contract forms and procedures, the claims asserted in the complaint involve a preponderance of individualized factual questions that render this case unsuitable for class treatment (CPLR 901[a][2]; *see Shovak v Long Is. Commercial Bank*, 35 AD3d 837 [2006]; *Solomon v Bell Atl. Corp.*, 9 AD3d 49 [2004]). In light of the number of individual inquiries required as to each vendor and transaction, plaintiffs failed to demonstrate that a class action would be a superior method of resolving these issues.

The court appropriately denied plaintiffs' motion to renew based on its determination that new case law concerning the adequacy of assignees to act as class representatives would not have required a different result.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008



CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3372 The People of the State of New York, Ind. 3011/03
Respondent,

-against-

Anderson Stuckey,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Ana Vuk-Pavlovic of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bryan C. Hughes of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered January 6, 2006, convicting defendant, after a jury trial, of course of sexual conduct against a child in the first degree, criminal contempt in the first degree (five counts), criminal contempt in the second degree, and tampering with a witness in the third degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 16 years, unanimously affirmed.

Defendant was convicted of having sexual intercourse with his daughter for a period of approximately two years that began when she was seven years old. In light of the child victim's young age and expressed fear of retribution if she disclosed the abuse, her report of this conduct, made approximately three days following the last incident, constituted a prompt outcry which was properly admitted under that exception to the hearsay rule

(*see People v Vanterpool*, 214 AD2d 429 [1995], *lv denied* 86 NY2d 875 [1995]).

"An outcry of rape is prompt if made at the first suitable opportunity and is a relative concept dependent on the facts." (*People v Shelton*, 1 NY3d 614, 615 [2004][internal quotation marks and citations omitted]). We reject defendant's argument that the prompt outcry exception is inapplicable to an outcry made, as here, at the end of a course of sexual conduct. This case is illustrative of how this hearsay exception might apply to such a case. The child's fear of her father was finally overcome when her teacher taught a class on how to deal with inappropriate touching. The child began crying during the class, asked to speak to the teacher privately, and immediately reported defendant's course of conduct to school personnel. While other evidence tended to explain the reason for the long delay in reporting, without the outcry evidence the jury would have been left to speculate as to what caused the ultimate revelation of the abuse. Such speculation would have tended to cast unfair doubt on the credibility of the People's case.

By failing to object, or by failing to make specific objections, defendant failed to preserve any of his complaints about the alleged multiplicity of prompt outcry witnesses, the specifics of their testimony, or the prosecutor's summation comments on this subject, and we decline to review them in the

of defendant's guilt including, among other things, extensive evidence of witness tampering, which evinced defendant's consciousness of guilt.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3373 In re Richard Gullo, Index 111208/06
Petitioner-Appellant,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York, etc., et al.,
Respondents-Respondents.

Raymond E. Kerno, Mineola, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered February 6, 2007, which denied the petition seeking to annul respondents' determination denying accident disability retirement benefits, unanimously affirmed, without costs.

The Medical Board examined petitioner three times, and detailed the objective evidence it considered and relied upon in reaching its determination. That determination was supported by substantial evidence, and was neither arbitrary nor capricious (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]). While the opinions of petitioner's experts may have supported conclusions at variance with those reached by the Board, the latter's resolution of the conflicting medical evidence cannot be said to have been

erroneous as a matter of law (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept. Art. 1-B Pension Fund*, 90 NY2d 139, 145-146 [1997]).

The Medical Board found that the medical evidence submitted did not establish petitioner's disability at the time of his retirement (*see Matter of Bansley v Safir*, 299 AD2d 185 [2002]). Although the relevant date of separation for the purpose of disability is the date of separation from service, the Board did consider many reports from petitioner's doctors dated after his retirement, but concluded that this evidence did not establish petitioner's disability.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3374 In re Joan V.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ann E. Scherzer of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 6, 2007, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute assault in the third degree, and imposed a conditional discharge for a period of 9 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for a dismissal or an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a conditional discharge (*see Matter of Jonaivy Q.*, 286 AD2d 645 [2001]), which, given the fact that the incident took place in a school and resulted in a serious injury to a fellow student, was the least restrictive

alternative (*see Matter of Katherine W.*, 62 NY2d 947, 948 [1984]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3375 Berman Brothers-Bloch Furs Inc., Index 601232/06
Plaintiff-Appellant, 590499/06

-against-

Fashion Vault Corp., et al.,
Defendants,

Valley National Bank,
Defendant-Respondent.

[And a Third-Party Action]

J. Papapanayotou, Long Island City, for appellant.

Pak & Whang, P.C., New York (Tae Hyun Whang of counsel), for respondent.

Judgment, Supreme Court, New York County (Louis B. York, J.), entered April 4, 2007, inter alia, dismissing plaintiff's claims against defendant Valley National Bank, and bringing up for review an order, same court and Justice, entered March 6, 2007, which, inter alia, denied plaintiff's motion for summary judgment in its favor against defendants Valley and Frederick Margulies and for leave to amend the complaint to assert a claim of tortious interference with contract against Valley, and granted Valley's cross motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

Issues of material fact preclude summary judgment in plaintiff's favor on its cause of action for tortious interference with contract against Margulies, who claimed he was

acting as president of the corporation, on the advice of the corporation's accountant, and in furtherance of a corporate purpose (*see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 914-915 [1978]). None of the documentary evidence on which plaintiff relies conclusively disposes of the question whether Margulies acted outside the scope of his authority. In addition, Margulies claimed that he acted with the consent of his co-owner, who denied that he consented, thereby creating an issue of credibility to be resolved at trial (*see Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 81 [2002]).

Plaintiff lacks standing to bring an action against Valley under Uniform Commercial Code §§ 3-409(1) and (2) for wrongful dishonor of a check and in tort, respectively, because it was not a "customer" of the bank within the meaning of UCC § 4-402 (*see Quitsgaard v EAB Eur. Am. Bank & Trust Co.*, 182 AD2d 510, 514 [1992]; *see also Campbell v Citibank*, 302 AD2d 150, 152 [2003]). In any event, stop payment orders had been placed on the checks (*see Berler v Barclays Bank of N.Y.*, 82 ADd2d 437, 439 [1981], *appeal dismissed* 55 NY2d 645 [1981]).

As plaintiff's proposed claim of tortious interference with contract against Valley is merely a claim of wrongful dishonor of a check in a different guise, the court properly denied plaintiff

leave to amend the complaint to assert such claim (*see Spitzer v Schussel*, 2008 NY Slip Op 01022 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3376 In re Steven Rabinowitz, etc., Index 530269/94
Petitioner-Respondent,

-against-

James M., etc.,
Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Namita Gupta of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Monica Wagner of counsel), for respondent.

Thomas J. Spota, District Attorney, Riverhead (Guy Arcidiacono of counsel), for Suffolk County District Attorney.

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered May 18, 2007, which, after a hearing, granted a subsequent order of retention requiring respondent to remain in a secure psychiatric facility for a period not to exceed one year from May 1, 2007, unanimously affirmed, without costs.

The court properly granted the application for a subsequent retention order, where a preponderance of the evidence demonstrates that respondent currently suffers from a mental disorder causing him to be a physical danger to himself and others (*see Matter of George L.*, 85 NY2d 295, 303 [1995]; *Matter of Richard H. v Consilvio*, 6 AD3d 7 [2004], *lv denied* 3 NY3d 601 [2004]). The record establishes that in 1988, respondent pleaded not responsible by reason of mental disease or defect to attempted murder in the second degree and reckless endangerment

in the first degree. After being determined to suffer from a "dangerous mental disorder" (CPL 330.20[1][c]), he was committed to a secure psychiatric facility. Following an unsuccessful transfer to a nonsecure environment, he was returned to secure confinement, where he has remained under a series of subsequent retention orders, one of which issued pursuant to this Court's directive (*see Matter of James M. v Consilvio*, 6 AD3d 153 [2004]).

Although the underlying criminal act is remote, its violent nature cannot be discounted (*id.* at 159), and while the record contains evidence of progress, it also demonstrates that respondent has made threats of violence against staff members and patients of the facility, engaged in physical acts of violence, refused to participate in treatment, and been accused of forced sexual contact upon a fellow patient. There is also a strong medical consensus that respondent is unable to accept responsibility for his acts, has a profound lack of insight into his mental illness, and suffers from bipolar disorder characterized by antisocial, borderline and paranoid traits that sometimes cause aggressive and violent behavior. Furthermore, three medical assessments opine that if he is transferred to a

nonsecure facility, respondent will at this time present a high risk for dangerous behavior.

M-1498 ***In re Rabinowitz, etc. v James M., etc.***

Motion seeking leave to amend caption granted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3377 Edelmira Meza, Index 23153/01
Plaintiff-Appellant,

-against-

Consolidated Edison Company of New York, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellant.

London Fischer, LLP, New York (Brian A. Kalman of counsel), for respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about June 12, 2007, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants had no obligation to maintain a constantly dry floor during a snowstorm (*see Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [2005]). Nor were they required to cover the entire floor with mats (*Garcia v Delgado Travel Agency*, 4 AD3d 204 [2004]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3378 The People of the State of New York, Ind. 948/05
Respondent,

-against-

Nicholas Simpson,
Defendant-Appellant.

Richard M. Weinstein, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 13, 2005, convicting defendant, after a jury trial, of four counts each of robbery in the first and second degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 35 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion, made after the court had completed its charge to the jury, that was based on the prosecutor's attempt in summation to explain the absence of fingerprint evidence. The comment constituted a fair response to the defense summation (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). Defendant's other challenge to the prosecutor's summation is unpreserved and we

decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3380 The People of the State of New York, Ind. 5591/05
Respondent,

-against-

Paul George,
Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered October 3, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 6 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court improperly denied defendant's challenge for cause to a prospective juror who expressed doubt about his ability to be impartial due to his dealings with drug users and dealers in the context of his medical practice. The panelist specialized in treating HIV-positive patients, many of whom acquired that condition as the result of drug use. He volunteered his belief that he might be unqualified, repeatedly and emphatically expressed concern that he would be "judgmental" in a case involving drug dealing, and appeared to be in some degree of emotional distress about sitting on a drug case. Although the

panelist understood that he needed to follow the court's instructions on the law, he did not unequivocally state that he could follow the presumption of innocence and remain open-minded, merely giving answers such as "I am sure I can listen," "I would try to be open-minded," "I think I could be open-minded," "I honestly would want to listen to all the evidence," and "I could probably follow the law."

"[W]hen potential jurors reveal knowledge or opinions reflecting a state of mind likely to preclude impartial service, they must in some form give unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614 [2000]). "If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another" (*People v Arnold*, 96 NY2d at 362 [internal quotation marks and citations omitted]). In evaluating a prospective juror, the trial court may consider "the whole examination of the juror, including his appearance and demeanor" (*People v Shulman*, 6 NY3d 1, 27-29, [2005], *cert denied*, 547 US 1043 [2006]). While the use of terms such as "I think" or "I'll try," will not automatically make a statement equivocal, the panelist's statements in context and as a whole must provide an unequivocal assurance of his or her ability to set aside a stated bias

(*People v Chambers*, 97 NY2d 417 [2002]).

Here, the court did not elicit an unequivocal assurance from the prospective juror that he would be able to put his bias aside and render an impartial verdict on the evidence, and no such assurance could be derived from the totality of his responses. The overall tone of his statements was that he had a bias that would remain a problem. Moreover, some of his answers that appeared to offer assurances of impartiality were not fully responsive to the specific questions asked. Accordingly, it was error to deny the challenge for cause.

In view of the foregoing, we find it unnecessary to reach any other issues.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3381 Kiran Ali, et al.,
Plaintiffs-Respondents,

Index 25595/04
84538/05

-against-

Zahid R. Khan, et al.,
Defendants-Appellants.

[And a Third-Party Action]

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy Seldin of counsel), for appellants.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about September 28, 2007, which denied defendants' motion for summary judgment dismissing so much of the complaint as brought by plaintiffs Ali and Akhtar for lack of the requisite serious injury, unanimously reversed, on the law, without costs, and the motion granted and the complaint dismissed as to those plaintiffs. The Clerk is directed to enter judgment accordingly.

Defendants met their burden of demonstrating that Ali and Akhtar did not sustain serious injuries as defined in Insurance Law § 5102(d), and these plaintiffs failed to produce prima facie evidence in admissible form to support such claim (*see Licari v Elliott*, 57 NY2d 230 [1982]). Neither of these plaintiffs presented competent medical evidence contemporaneous to the time

of the accident showing the condition of her lumbar and cervical spine (*see Petinrin v Levering*, 17 AD3d 173 [2005]). Where the only objective evidence of limitation of motion is contained in a report of an orthopedist who examined the plaintiff several years after the accident, the finding is "too remote to raise an issue of fact as to whether the limitations were caused by the accident" (*Lopez v Simpson*, 39 AD3d 420, 421 [2007]). Nor was there any contemporaneous "admissible evidence that [either] plaintiff was ever diagnosed by her treating physician with a fracture that resulted from this accident" (*O'Bradovich v Mrijaj*, 35 AD3d 274, 275 [2006]). Inasmuch as the claimed spinal injuries were non-permanent in nature, plaintiffs failed to proffer any objective evidence of the persistence of these injuries during the statutory 90/180-day period that caused them to curtail performance of their usual and customary activities (*see Norona v Manhattan & Bronx Surface Tr. Operating Auth.*, 40 AD3d 480 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3383 The People of the State of New York, Respondent, SCI 17/04

-against-

Victor De Los Santos, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Margaret Clancy, J. at plea; Maxwell Wiley, J. at sentence), rendered on or about February 17, 2004, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3384-
3384A Byrnam Wood, LLC, Index 603930/06
Plaintiff-Appellant,

-against-

Dechert LLP,
Defendant-Respondent.

Edwards Angell Palmer & Dodge LLP, New York (Ira G. Greenberg of counsel), for appellant.

Miller & Wrubel P.C., New York (Claire L. Huene of counsel), for respondent.

Judgment, Supreme Court, New York County (Karla Moskowitz, J.), entered October 24, 2007, dismissing the complaint pursuant to an order, same court and Justice, entered October 1, 2007, which, in a breach of contract action, granted defendant's motion for summary judgment and denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, with costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The plain words of the parties' agreement do not support plaintiff's interpretation that the agreement was a retainer agreement entitling it to a $225,000 fixed fee whether or not defendant asked it to perform any services so long as plaintiff was ready, willing and able to perform the services delineated in the agreement. A reading of the agreement as a whole "so as to

give each part meaning" (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 533 [1996]), demonstrates that its purpose was for plaintiff, which is in the business of negotiating leases for tenants worldwide, to aid defendant in either negotiating a new lease with its existing landlord, or negotiating a lease for new premises. As part of the process, plaintiff would, among other things, review necessary documents, obtain specialists, formulate a negotiating position, and locate and inspect new properties. It can therefore be concluded that plaintiff was performing brokerage services.

Moreover, the plain words of the agreement establish further that plaintiff's interpretation of the agreement as a retainer agreement is commercially unreasonable, and contrary to the purpose of the agreement (*see Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170 [2003]). It is apparent from the agreement that the parties changed the standard brokerage commission from a percentage-based amount to a fixed fee, and that the fixed fee was otherwise contemplated to be paid the same way a standard brokerage commission would be paid, i.e., upon successful negotiation of the lease. We also note that the facts that plaintiff, throughout the eight months of its engagement, and upon termination of its services, never asked defendant for a fee, never sent an invoice for a fee, and never stated that a fee was due and owing, contradict its position that it was entitled

to be compensated for its services regardless of whether a lease was negotiated. Even if the agreement could be deemed ambiguous, the aforementioned extrinsic evidence would compel the same result.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 15, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
David Friedman
John W. Sweeny, Jr., Justices.

The People of the State of New York, Ind. 5492/06
Respondent,

-against- 3385

James Avent,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about April 25, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTER:

Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3387 In re Charles F. Hoskins, Index 114272/06
Petitioner-Appellant,

-against-

Raymond Kelly, Commissioner of the
New York City Police Department, et al.,
Respondents-Respondents.

Warren S. Hecht, Forest Hills, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), entered January 31, 2007, which denied the petition seeking to annul respondents' determination denying petitioner's application for a retired police officer pistol license and dismissed the proceeding, unanimously affirmed, without costs.

In light of petitioner's history of domestic violence, including an arrest and the issuance of orders of protection against him, as well as his failure to safeguard his firearm, which was in his car when the car was stolen, respondents' determination denying his application for a retired police officer pistol license was not arbitrary and capricious (*see Matter of Wong v Kelly*, 12 AD3d 213 [2004], *lv denied* 4 NY3d 708 [2005]). Indeed, the Nassau County Police Department repeatedly suspended petitioner's previous handgun license as a result of these incidents.

We have considered petitioner's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3388N Jose Diaz Cabreja, et al.,
Plaintiffs-Respondents,

Index 21432/06
20601/06

-against-

James Rose, et al.,
Defendants-Appellants.

- - - - - - - -

Bienvenida Resto,
Plaintiff,

-against-

Citiwide Auto Leasing, et al.,
Defendants-Appellants,

Jose Dias Cabreja, et al.,
Defendants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellants.

Pillinger Miller Tarallo, LLC, Elmsford (David E. Hoffberg of counsel), for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 8, 2007, which, to the extent appealed from as limited by the brief, denied the motion by defendants Rose and Citiwide Auto Leasing to change venue to New York County, unanimously affirmed, without costs.

Plaintiffs Vargas (a Bronx resident) and Resto were passengers in a vehicle owned by defendant Salazar and driven by Diaz Cabreja (a Bronx resident also known as Cabreja Diaz), when it was allegedly struck by a vehicle in upper Manhattan owned by defendant Citiwide (a Kings County corporation) and operated by

defendant Rose, a New York City police officer. A nonparty witness in the Citiwide vehicle was also a Bronx resident. Cabreja and Vargas received medical treatment in the Bronx.

The motion by defendants Citiwide and Rose for change of venue to New York County was based in part on CPLR 504(3), which calls for an action in New York City against the City or one of its officers to be tried "in the county . . . in which the cause of action arose."

The City of New York is not a party to this action, and CPLR 504(3) was not intended as a benefit for individual litigants such as defendants Rose and Citiwide (*Swainson v Clee*, 261 AD2d 301 [1999]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
David B. Saxe
Eugene Nardelli
Milton L. Williams
Karla Moskowitz, JJ.

2571
Ind. 5053/02

The People of the State of New York,
Respondent,

-against-

Jimmy Byrd,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered February 26, 2004, convicting him, after a jury trial, of assault in the first and second degrees, and imposing sentence.

Daniel Crupain, New York for appellant.

Robert M. Morgenthau, District Attorney, New York (Eric Rosen and Gina Mignola of counsel), for respondent.

MOSKOWITZ, J.

The primary issue on this appeal is whether it was error for the trial judge to admit the complainant's grand jury testimony after determining that the complainant was unavailable to testify at trial because of battered person syndrome. For the reasons that follow, we find no error.

Defendant Jimmy Byrd and Jill J. lived together from late 1991 until defendant's arrest on August 7, 2002. Their daughter was born in January 1993. For years, defendant physically and verbally abused Jill J. On July 26, 2002, defendant flew into a rage apparently because the glass that Jill J. was using for their daughter's water had remnants of juice in it. Defendant smashed Jill J.'s head against the tile floor of their kitchen and, wearing hard plastic sandals, repeatedly stomped on her abdomen, breaking her ribs and causing her pancreas to split in half.

Despite these injuries, defendant refused to take Jill J. to the hospital, responding to one request with a veiled threat that he had not hurt her as much as he could have. Instead, he insisted that she continue performing her usual household chores. He reportedly said that taking her to the hospital would "open Pandora's box."

Over the next few days, Jill J. repeatedly asked defendant to take her to the hospital. Defendant refused. Her condition deteriorated. It was not until six days after the attack, when defendant took their daughter out, that Jill J. was able to go to an emergency room. There, she required surgery to save her life. The surgeon, Dr. Herron, testified that, had she waited longer, she would have died. Defendant was arrested and charged with one count of attempted murder, three counts of first-degree assault and one count of second-degree assault.

At first, Jill J. cooperated with the prosecution. She testified before the grand jury via videotape from the hospital and gave the police physical evidence. Later, however, she stopped cooperating and stated she would refuse to testify at trial.

The court held a *Sirois* hearing (*see Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [1983]) to determine whether to admit Jill J's grand jury testimony in the event she would refuse to testify against the defendant at trial. At the hearing, Jill J. maintained that her refusal to testify was a product of her free choice, that she wanted to forgive defendant and that she believed he needed treatment rather than incarceration. She claimed that she cooperated initially and testified before the grand jury out of fear that the Administration for Child Services

would take her child from her.

However, she also admitted reluctantly that she had received "many" calls from defendant since his incarceration. She said that, during these calls, defendant requested money for the prison commissary, told her he loved her, expressed his regret and stated he wanted their family to stay together. Jill J. testified that defendant never asked her not to testify against him. These calls violated an order of protection and, because defendant's prison PIN number would have blocked these calls, defendant likely borrowed PIN numbers from other inmates.

The People presented evidence from several witnesses, including Jill J.'s mother, that Jill J. feared defendant. The People also called Professor Ann Burgess. The court permitted her to testify as an expert in the field of domestic violence and battered person syndrome. Prof. Burgess testified that battered victims who go to the police quite frequently recant their initial reports and refuse to continue to cooperate with the prosecution because they become emotionally dependent upon their batterers who have for years controlled them through verbal and physical abuse and isolation from family and friends. Domestic violence has three phases that comprise the "cycle of violence:" (1) the tension building phase, (2) the violence phase and (3) the honeymoon phase. During the first two phases the victim is

reduced to a state of fear and anxiety due to impending or actual violence. In the honeymoon phase, the abuser acts with contrition, begs for forgiveness and makes declarations of love. During the honeymoon phase, the victim is seduced into believing that the abuse will cease and that the family will remain intact. This cycle repeats itself over many years.

Prof. Burgess also testified that during the honeymoon phase, victims of domestic abuse often recant their reports of abuse and refuse to testify. During this phase, the batterer has, often in violation of an order of protection, repeatedly contacted the victim, professing apologies and declarations of love to trick the victim into believing that the violence will end. During this "reconciliation" the batterer is able to convince the victim that recantation would solve their problems. Prof. Burgess also noted that the abuser will often use the presence of children in the relationship to pressure the victim to keep the family together. The batterer does not have to tell the victim directly not to testify. Instead, the batterer manipulates the victim and takes advantage of the victim's low self-esteem by talking about how a trial and conviction would hurt the children. All this continues while the victim is legitimately terrified of the batterer and of confronting him in court. Thus, the ambivalence inherent in these relationships,

i.e., the control and coercion that the victim believes is love, on the one hand, and terror on the other, work together to deter the victim from ever testifying.

In Prof. Burgess's opinion, defendant had "coercive control" over Jill J. The relationship between defendant and Jill J. followed the typical pattern: minor physical abuse escalating into serious physical abuse. Burgess testified that defendant's physical and verbal threats, ridicule and intimidation over the years led Jill J. to fear for her own life and that her daughter could be taken from her.

Prof. Burgess described the July 26, 2002 attack as typical of the violence phase because the attack started with an argument over a "trivial incident" (i.e., Jill J.'s failure to clean a glass properly). An assault followed, after which Jill J. returned to cleaning the glass. Her conduct demonstrated defendant's control of Jill J. That defendant inspected Jill J.'s urine and vomit for blood and refused to take her to the hospital, further showed how far defendant controlled her.

According to Prof. Burgess, defendant's behavior after Jill J. went to the hospital typified the honeymoon phase. He repeatedly visited her, apologized, begged for forgiveness, told her he loved her and begged her not to break up the family. According to Prof. Burgess, defendant, through his loving

behavior, was trying to solidify his control over Jill J. Therefore, Prof. Burgess believed that the coercion inherent in the "honeymoon phase" caused Jill J to testify at the *Sirois* hearing that she did not fear defendant. Prof. Burgess opined that defendant intended his actions in the honeymoon period to keep Jill J. under his control and prevent her from cooperating in the case against him.

Defendant continued to exert control over Jill J. in that she at first denied receiving more than 400 calls from defendant since his incarceration, testifying instead that she had received only 2 or 3 calls. Thus, his continued "coercive control" over her was demonstrated by her willingness to lie under oath to protect him. That defendant called her up to 10 times a day demonstrated the intense pressure he was putting on her. His making these phone calls, despite an order of protection, demonstrated his implicit threat to Jill J., because it showed that he was not going to obey the law. Hence, according to Prof. Burgess, defendant had "control" over Jill J. because of his long history of domestic abuse, his subsequent behavior where he refused to allow her to obtain medical attention and his more than 400 calls to her from prison in violation of an order of protection.

Defendant presented no evidence at the *Sirois* hearing. The court reserved decision on whether to admit Jill J's grand jury testimony until trial.

On December 4, 2003, right before trial, Jill J. wrote a personal letter to the court. She wrote that she did not want defendant to remain in jail, but was "confident that if he were given a chance at professional help" he would change. She expressed regret that this was the second holiday season that her daughter had to spend without her father. She also claimed that she was "not expecting to share his life as a wife again." However, Jill J's mother, who visited Jill J. right before trial, observed Jill J. wearing a diamond engagement ring that defendant had once given her.

On January 8, 2004, despite a grant of complete transactional immunity with respect to possible perjury arising out of her grand jury testimony, Jill J. refused to testify at trial. The court ruled that Jill J. was unavailable because of defendant's misconduct and admitted her grand jury testimony. Although the court acknowledged the long history of abuse that Jill J. had endured, the court took pains to clarify that the decision was based only on defendant's actions subsequent to the attack on July 26, 2002.

During the trial, the court also permitted Prof. Burgess to testify as an expert in traumatic stress and relationship violence. Defendant presented no evidence at the trial. On January 21, 2004, the jury convicted defendant of one count each of first-degree assault and second-degree assault, but acquitted him of the remaining charges of attempted murder in the second degree and two other counts of first degree assault.

DISCUSSION

I. The *Sirois* Hearing and Admission of Complainant's Grand Jury Testimony

The bulk of defendant's claims on appeal focus on the court's decision to admit Jill J.'s grand jury testimony after a *Sirois* hearing. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him (US Const Sixth Amend). Thus, ordinarily a witness's out-of-court statements, including grand jury testimony, are inadmissible as evidence-in-chief at trial (*see e.g. People v Geraci*, 85 NY2d 359, 365 [1995]).

However, when the People can prove by clear and convincing evidence that a defendant has procured the witness's unavailability "through violence, threats or chicanery," the defendant forfeits the constitutional right to confrontation as well as the protection that the rules against the admission of

hearsay would have afforded him or her (*id.* at 365-366 [citations omitted]; *see also People v Jernigan*, 41 AD3d 331 [2007]).

To determine whether to admit a witness's out of court statements, such as grand jury testimony, because a defendant's misconduct has rendered the witness unavailable, courts hold a pretrial hearing, commonly known as a *Sirois* hearing (*Matter of Holtzman v Hellenbrand*, 92 AD2d 405, 415 [1983]). At this hearing, a court must determine whether the People have shown by "clear and convincing evidence" that the witness is "unavailable" to testify at trial and that the defendant, through his or her misconduct, intentionally made the witness unavailable (*Geraci*, 85 NY2d at 366-67; *Jernigan*, 41 AD3d at 332). The People need not demonstrate that the defendant's sole motivation is to procure the witness's unavailability. It is enough that a "desire to silence the witness" motivated the defendant "in part" (*see People v Maher*, 89 NY2d 456, 462 [1997]).

The Supreme Court was correct to admit Jill J.'s grand jury testimony at the trial because the People proved by clear and convincing evidence that defendant's misconduct induced her unavailability to testify. After beating Jill J. nearly to death, defendant repeatedly visited her in the hospital, where others observed his hostility and abusiveness. He made hundreds of calls to Jill J. during the pendency of the case in violation

of an order of protection. There also were numerous phone calls from defendant's relatives during the pendency of the case and evidence that at least one of those relatives tried to persuade Jill J. not to testify. All this occurred in the context of a relationship with a long history of physical and mental abuse that culminated in the beating that led to this case, in which defendant refused to allow Jill J. to obtain medical attention and threatened her with further abuse were she to seek it.

The hearing court also correctly admitted the history of domestic abuse in this case and testimony about battered person syndrome. This evidence was relevant to place defendant's actions in context to show that he had such a degree of control over Jill J. that seemingly innocuous calls or hospital visits would have a coercive effect on her (*see People v Jernigan*, 41 AD3d at 332 [analyzing defendant's misconduct against the backdrop of his several acts of violence going back 20 years]; *see also People v Santiago*, 2003 NY Slip Op 51034[U] at * 17).

Nor was it necessary, as defendant contends, for the court to hold a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]) before admitting Burgess's expert testimony. A *Frye* hearing is necessary only if expert testimony involves "novel or experimental" matters (*Parker v Crown Equip. Corp.*, 39 AD3d 347, 348 [2007]). Battered person syndrome is not novel or

experimental. The courts of this state have accepted it since 1985 (*see e.g. People v Ellis*, 170 Misc 2d 945, 949 [Sup Ct, NY County 1996]).

Using testimony about battered person syndrome at a *Sirois* hearing to show that a defendant has procured a witness's unavailability may be a relatively new application of this theory. However, the application of an accepted theory to a specific factual record does not require a *Frye* hearing (*see Parker v Crown Equip. Corp.*, 39 AD3d 347,348 [2007]). In sum, it was not error for the court to admit Burgess's expert testimony at the *Sirois* hearing.

Defendant also challenges Burgess's trial testimony as unnecessary and irrelevant. However, it is likely that an average juror would not understand the dynamics that cause a battered victim to refuse to testify against her abuser (*see People v Ellis*, 170 Misc 2d at 952-53 [permitting expert testimony about battered person syndrome to explain victim's recantation]). In addition, the court instructed the jury that Burgess was not there to say whether "something is proven or not proven, or something is more likely or not likely in this case, whether something happened or didn't happen." This instruction ensured that the jury did not improperly rely on Prof. Burgess's testimony to establish the assault.

Nor does the admission of the portion of Jill J.'s grand jury testimony regarding defendant's preventing Jill J. from seeking medical assistance, contravene *People v Maher* (89 NY2d 456 [1997]). The jury in this case, that had to decide if defendant was guilty of attempted murder and first degree assault, considered only his actions on July 26, 2002, not his actions during the following few days.

II. Is a "Shod Foot" a Dangerous Instrument?

Defendant challenges his conviction under the second count of the indictment (first-degree assault) by contesting only one element. He claims that a shod foot is not a dangerous instrument because a body part cannot be a dangerous instrument (*see People v Owusu*, 93 NY2d 398, 405 [1999]). This elevates form over substance. A shod foot is clearly a foot "furnished or equipped with a shoe" (Merriam Webster's Collegiate Dictionary 1150 [11th ed 2007]).

Footwear may constitute a dangerous instrument, if, under the circumstances in which a defendant uses it, it is readily capable of causing serious injury (*see e.g. People v Lev*, 33 AD3d 73 [2006] [sneaker was dangerous instrument when used to kick fallen victim in midsection with significant force]; *People v Edwards*, 16 AD3d 226 [2005], *lv denied* 5 NY3d 762 [2005] [shoe was dangerous instrument where kick caused dislocated elbow]).

The evidence supported the conclusion that defendant's hard plastic sandal, by virtue of the manner in which defendant used it (i.e., to stomp on Jill J's abdomen), was readily capable of causing and did cause serious physical injury. The jury examined the actual sandals defendant used in the attack as well as the shorts Jill J. wore at the time of the attack that still, a year and a half later, bore a footprint. The jury heard Jill J.'s grand jury testimony during which she described how defendant, who was wearing these sandals, repeatedly stomped on her, causing her serious injury. In addition, there was testimony from one of Jill J's treating doctors, Dr. Herron, that defendant's footwear could have aggravated her injury. Thus, defendant's "shod foot" was a dangerous instrument.

III. Sufficiency of the Evidence

Defendant points to what he describes as inconsistent testimony from Dr. Herron. After eliciting testimony from Dr. Herron that the victim's injuries were consistent with being stomped on the belly while lying on a hard surface, the prosecutor asked Dr. Herron:

> "Would it make a difference if the person during the stomping was bare footed or wearing any sort of footwear say hard plastic sandals?"

Dr Herron responded:

> "It wouldn't make a substantial difference, it would depend how hard the person was kicked."

Defendant argues that this answer means only that it was the force with which defendant delivered the blows to Jill J.'s abdomen and not his footwear that caused the serious physical injury. However, this same doctor also testified that defendant's wearing of footwear could have aggravated Jill J.'s injury. Defendant claims that these two statements are inconsistent and therefore the jury could not conclude beyond a reasonable doubt that defendant's sandal was the proximate cause of Jill J.'s injuries.

"A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*People v Danielson*, 9 NY3d 342, 349 [2007]). Here, the jury examined the sandals used in the attack that had an inch-thick piece of hard plastic with raised treads on the bottom. The jury also heard Jill J.'s grand jury testimony that defendant, who was wearing these sandals, repeatedly stomped on her. The jury examined the shorts Jill J. was wearing at the time of the attack with defendant's footprint still visible. Thus, all this evidence, not merely Dr. Herron's

testimony, supported the jury's conclusion that defendant had used his shod foot as a dangerous instrument in the assault.

IV. Weight of the Evidence

Nor was the verdict against the weight of the evidence. In conducting a weight of the evidence review "[e]ssentially, the court sits as a thirteenth juror and decides which facts were proven at trial." (*Danielson*, 9 NY3d at 348). "[T]he reviewing court must weigh the evidence in light of the elements of the crime as charged to the other jurors" (*id.*) Upon our review of the evidence, we conclude that the jury properly found that defendant had intentionally caused serious physical injury by means of a dangerous instrument.

IV. The People's Summation

The court ameliorated any prejudice to defendant from the prosecutor's references to Jill J.'s current fear of him with prompt curative instructions.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, these claims are also rejected on the merits.

Accordingly, the judgment of the Supreme Court, New York

County (James A. Yates, J.), rendered February 26, 2004, convicting defendant, after a jury trial, of assault in the first and second degrees, and sentencing him to concurrent terms of 25 and 7 years, respectively, should be affirmed.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2008

CLERK