SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 22, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3429 The People of the State of New York, Respondent, Ind. 54109C/05

-against-

Silva Mendoza,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Troy K. Webber, J. on motion; David Stadtmauer, J. at plea and sentence), rendered June 9, 2006, convicting defendant of promoting prison contraband in the first degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied, without a hearing, defendant's motion to suppress contraband that correction officers discovered in his pocket during a search they conducted while defendant was an inmate at Rikers Island, since his factual allegations, even if accepted as true, would not have warranted a conclusion that the search was unreasonable (*see* CPL 710.60[3]). While defendant's allegations may have stated a Fourth Amendment claim

in the context of a search of a person at liberty, defendant did not address the diminished Fourth Amendment rights of a prison inmate (*see Bell v Wolfish*, 441 US 520, 557 [1979]). The facts alleged in defendant's moving papers did not set forth a basis for suppression, given the prison context (*see Hudson v Palmer*, 468 US 517, 529 [1984]; *People v Frye*, 144 AD2d 714 [1988], *lv denied* 73 NY2d 891 [1989]). 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 22, 2008

CLERK

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3430-
3430A Steve Newman, Index 602338/04
Plaintiff-Respondent,

-against-

Morrell I. Berkowitz,
Defendant-Appellant.

Gallet Dreyer & Berkey, LLP, New York (Joseph V. Aulicino of counsel), for appellant.

Steve Newman, New York, respondent pro se.

Order, Supreme Court, New York County (Debra A. James, J.), entered August 24, 2006, which, to the extent appealed from as limited by the briefs, ordered defendant to pay plaintiff's costs, including attorney's fees, incurred in opposing a motion for reargument, unanimously affirmed, without costs. Order, same court and Justice, entered July 19, 2007, which denied defendant's motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for summary judgment in his favor to the extent of granting plaintiff summary judgment as to liability, unanimously reversed, on the law, without costs, plaintiff's motion denied and defendant's motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

This breach of contract action should have been dismissed because defendant, as an individual, was not a party to the

contract. Read as a whole, the letter agreement, which was drafted on the letterhead of defendant's professional corporation and included a schedule indicating that legal fees were to be shared between plaintiff and defendant's professional corporation, shows that the intended party was the corporation. The absence of a reference to a corporate office above or below defendant's personal signature does not prove otherwise (*see 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 7 [2004]; *PNC Capital Recovery v Mechanical Parking Sys.*, 283 AD2d 268, 270-271 [2001], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

Conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1[c]). The court properly found that defendant's motion for reargument was frivolous, since defendant was unable to articulate a legal ground for it, and followed proper procedure in imposing the sanction against him (*see Spinnell v Toshiba Am. Consumer Prods.*, 239 AD2d 175 [1997]).

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

ENTERED: APRIL 22, 2008

CLERK

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3432-
3433-
3434 In re Sheenagh O'R.,
Petitioner-Respondent-Appellant,

-against-

Sean F.,
Respondent-Appellant-Respondent.

Bernard G. Post LLP, New York (William S. Hochenberg of counsel), for appellant-respondent.

Blaustein & Saltzman, PLLC, New York (Amy Saltzman of counsel), for respondent-appellant.

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about July 24, 2007, which denied respondent's motion to vacate a May 7, 2007 arrest warrant and order of conditional incarceration, unanimously reversed, on the law and the facts, without costs, and the motion granted. Order, same court and Judge, entered on or about August 31, 2007, which, insofar as appealed from, (1) directed the Support Magistrate to re-calendar the matter to permit respondent to cross-examine petitioner's expert, (2) denied respondent's request to have his expert examine the parties' child and testify thereto, (3) directed the Support Magistrate to issue additional findings of fact regarding the child's needs, the cost of special services for the child, and household expenses, including the mortgage payment, and (4) ordered child support to remain in effect in the

amount of $8,095 per month pending the Support Magistrate's new findings, unanimously modified, on the law and the facts, to permit respondent's expert to examine the child and testify thereto, to delete the requirement that the Support Magistrate make additional findings regarding household expenses (including the mortgage payment), and to reduce respondent's monthly support payment to $5,500 pending the Support Magistrate's new findings, and otherwise affirmed, without costs.

The July 2007 order found that respondent had willfully failed to obey a 1998 support order by not obtaining life insurance in the amount of $750,000. However, in September 2006, the Support Magistrate specifically found that respondent "non-wilfully failed to obey" the 1998 order by not obtaining insurance and ordered respondent to obtain insurance by November 1, 2006. Petitioner neither appealed from nor filed objections to that finding, but instead brought the instant violation petition, alleging that respondent had willfully failed to obey the September 2006 order. If respondent's failure to obtain life insurance prior to September 2006 was not willful, his post-September 2006 failure can not be deemed willful, where the record shows that respondent suffered a brain aneurysm in January 2005, and as a result, was unable to obtain life insurance, even though he had approached at least 20 insurance carriers as of April 2007. Even assuming respondent willfully violated the 1998

order because he could have obtained life insurance between 1998 and the time he suffered the brain aneurysm, incarcerating him now will not make him insurable. Considering that civil contempt penalties should be remedial, not punitive (*see Matter of Wynyard v Beiny*, 214 AD2d 344 [1995]), and since respondent is uninsurable (*see Hartog v Hartog*, 85 NY2d 36, 50 [1995]), the motion to vacate the May 7, 2007 order and arrest warrant should have been granted. Accordingly, with the order being vacated, there is no basis for requiring respondent to post $97,140 to purge his contempt.

Regarding the August 2007 order, respondent never argued that petitioner's upward modification petition should have been dismissed because the parties' 1998 stipulation of settlement was non-modifiable pursuant to Family Court Act § 516. Were we to consider this unpreserved argument, we would find it unavailing because the proceeding settled by the parties' stipulation was not a paternity action brought under article 5 of the Family Court Act, but rather was an action brought under article 4.

Respondent contends that the upward modification petition should have been dismissed because the child's needs are being met by petitioner's income and respondent's child support payments. This argument is unavailing because pursuant to Family Court Act § 424-a(b), the petition could have been granted based solely on respondent's failure to file a financial disclosure

affidavit (*see Matter of Wallace v Whitsell*, 183 Misc 2d 177, 179 [1999]). Respondent is also deemed to have admitted the expenses set forth in petitioner's financial disclosure affidavit because he failed to submit his own affidavit (*see e.g. Matter of Brim v Combs*, 25 AD3d 691, 693 [2006], *lv denied* 6 NY3d 713 [2006]). However, Family Court Act § 424-a(b) does not require the court to grant the relief demanded in the petition, but provides the court with the choice of granting such relief, or precluding the respondent from offering evidence as to his financial ability to pay support. Here, rather than simply granting petitioner the requested amount, the Support Magistrate held a hearing and calculated the child's needs, and contrary to petitioner's contention, respondent's failure to provide financial information did not preclude Family Court from remanding to the Support Magistrate for additional calculations.

The court properly directed the Support Magistrate to re-calendar the matter to permit respondent to cross-examine petitioner's expert (*see Musumeci v Musumeci*, 267 AD2d 365 [1999]; *Hill v Arnold*, 226 AD2d 232, 233 [1996]). However, respondent's expert should have also been permitted to examine the child and testify thereto (*see Musumeci*, 267 AD2d at 365).

Family Court ordered respondent to keep paying $8,095 a month pending the Support Magistrate's new findings. If the Support Magistrate ultimately finds that respondent's child

support obligation is less than $8,095 per month, respondent will be unable to recover the overpayments by reducing future support payments (*see e.g. Matter of Maksimyadis v Maksimyadis*, 275 AD2d 459, 461 [2000]). Since we previously granted a stay pending appeal on condition that respondent, inter alia, pay $5,500 per month pending the Support Magistrate's new findings (2007 NY Slip Op 83249(U) [2007]), respondent shall continue paying that amount. We emphasize that this figure is not meant to prejudge what respondent's ultimate child support obligation will be.

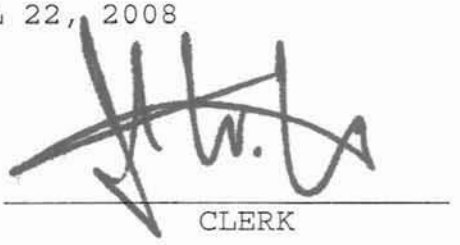
Since Family Court found that the Support Magistrate's determination of household expenses other than the mortgage payment was reasonable, there was no need to remand for additional findings on such household expenses. As for the mortgage, the stipulation does not say that the only mortgage was an interest-free loan of $120,000 owed by petitioner to respondent; on the contrary, it acknowledged that there was a mortgage of $250,000 on the condominium unit. The allegation that petitioner improperly took out an additional $250,000 mortgage on the condominium in 2006 was made only in the affirmation of respondent's attorney, and since there is no indication that the attorney had first-hand knowledge of petitioner's actions, the affirmation has no evidentiary value (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Respondent's claim that the Support Magistrate was biased

against him, as evidenced by the Support Magistrate's ex parte communications with petitioner's counsel, is unpreserved (*see e.g. Douglas v Kingston Income Partners '87*, 2 AD3d 1079, 1082 [2003], *lv denied* 2 NY3d 701 [2004]). Were we to consider the claim, we would find that the Support Magistrate's child support order was not based on any improper communications (*see Kawasaki v Kasting*, 124 AD2d 1034 [1986]).

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

ENTERED: APRIL 22, 2008



CLERK

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3435-
3435A The People of the State of New York, Ind. 2111/93
Respondent,

-against-

Calvin Buari,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Joseph A. Cerbone, J.), rendered December 5, 1995, convicting defendant, after a jury trial, of two counts of murder in the second degree, and sentencing him to consecutive terms of 25 years to life, and order, same court (Dominic R. Massaro, J.), entered on or about April 10, 2006, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant's argument that the trial court failed to follow the three-step *Batson* protocol (*Batson v Kentucky*, 476 US 79 [1986]) by not allowing him to give a race-neutral reason for one of his peremptory strikes is unpreserved (*see People v Glenn*, 7 AD3d 314 [2004], *lv denied* 3 NY3d 674 [2004]), and we decline to review it in the interest of justice. Defendant's objection to seating the juror was insufficient to preserve the specific procedural claim he raises on appeal. As an alternative holding,

we also reject this claim on the merits. Contrary to defendant's contention, the trial court gave him an opportunity to proffer a race-neutral reason for his challenge, and properly seated the juror when defendant failed to provide any reason.

At sentencing, defense counsel asserted that, after the verdict, defendant's family told him that one of the jurors was defendant's allegedly "estranged" great-uncle. Counsel also submitted an affidavit from a defense investigator relating his interview of the juror, who claimed he never revealed the family relationship during trial because he was unaware of it. Counsel requested an adjournment for further investigation into whether the juror might be lying about his prior unawareness of the relationship, and for the purpose of determining whether to file a CPL 330.30(2) motion to set aside the verdict on the ground of the juror's alleged misconduct. We conclude that the court properly exercised its discretion in declining to adjourn the sentencing (*see People v Boddie*, 240 AD2d 155 [1997], *lv denied* 90 NY2d 902 [1997]). Defendant's claim of misconduct was speculative, and the only information before the sentencing court specifically contradicted it. Furthermore, the sentencing court invited defendant's retained counsel to raise this issue in a CPL 440.10 motion, but no such motion was forthcoming until many years later, after the juror in question had died. Although on appeal defendant claims to be prejudiced by the juror's present unavailability as a witness, defendant is entirely responsible

for the delay, and his attempt to excuse the delay is without merit.

Furthermore, that portion of defendant's CPL 440.10 motion raising the juror issue was properly denied (*see People v Friedgood*, 58 NY2d 467, 471-473 [1983]). The information before the motion court further undermines defendant's claim, since there was evidence that defendant's family told defense counsel about defendant's relationship to the juror during the trial, rather than after the verdict. To the extent defendant raises a constitutional claim under *McDonough Power Equip. v Greenwood*, 464 US 548, 556 [1984]), such claim is unavailing since defendant failed to establish that the juror deliberately lied during voir dire (see *United States v Shaoul*, 41 F3d 811, 815 [2d Cir 1994]). The court properly denied those portions of the CPL 440.10 motion made on the ground of newly discovered evidence. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). After a thorough hearing, the court properly found that the alleged new evidence, consisting essentially of unreliable recantations and confessions that were themselves recanted, and extremely remote evidence of third party-culpability, did not justify vacating the judgment (*see* CPL 440.10 [1][g]; *see also People v Dukes*, 284 AD2d 236 [2001], *lv denied* 97 NY2d 681 [2001]). We note that the hearing evidence

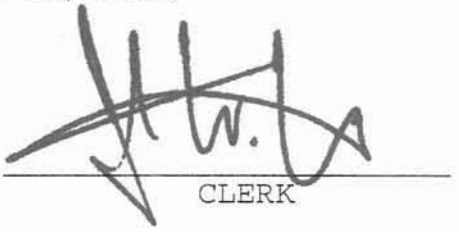
supports the conclusion that defendant coerced one of the People's witnesses into confessing to the crimes of which defendant was convicted. Since the record supports the motion court's findings that none of the alleged newly discovered evidence was reliable, and since there is no reason to believe that any prosecution witness committed perjury at defendant's trial, or that anyone but defendant committed the murders, we reject defendant's constitutional claims relating to this evidence. We also find that defendant was not prejudiced by the People's delay in disclosing a taped conversation relating to the subject of the hearing.

While, at trial, the prosecutor failed to disclose a pending marijuana possession charge against one of the witnesses (*see* CPL 240.45[1][c]; *see also Brady v Maryland*, 373 US 83 [1963]), despite defendant's specific request for such information, and failed to correct the witness's mistaken trial testimony that the subject charge had been dismissed, the motion court properly denied the portion of defendant's CPL 440.10 motion raising that issue. There is no reasonable possibility that the nondisclosure

affected the verdict (*see People v Vilardi*, 76 NY2d 67, 73-77 [1990]), given the overwhelming evidence of defendant's guilt, and the nature of the pending charge.

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

ENTERED: APRIL 22, 2008



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Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3436 The People of the State of New York, Respondent, Ind. 2691/04

-against-

Catherine Melendez, Defendant-Appellant.

Lawrence Schwartz, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered July 15, 2005, convicting defendant, after a jury trial, of assault in the first degree, and sentencing her to a term of 10 years, unanimously affirmed.

The court properly denied defendant's mistrial motion, made after the prosecutor elicited from a defense witness that she had visited defendant during defendant's pretrial incarceration. Under the circumstances of the case, the witness's knowledge that her friend was incarcerated was arguably inconsistent with her failure to come forward with exculpatory evidence (*see People v Jenkins*, 88 NY2d 948 [1997]). We note that the court offered to provide a curative instruction, but defendant declined that offer.

By failing to object, by making generalized objections, or by failing to request further relief after the court took curative actions, defendant failed to preserve her other

challenges to the prosecutor's cross-examination of defense witnesses, or any of her contentions regarding evidence of her prearrest silence, the prosecutor's summation or the court's main charge and response to a jury note, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even if trial counsel should have raised the issues suggested by defendant on appeal, we would find that his failure to do so did not deprive defendant of a fair trial or cause her any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]).

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

ENTERED: APRIL 22, 2008

CLERK

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3439-
3439A Anthony Matthews, et al., Index 100715/04
Plaintiffs-Respondents, 591121/04

-against-

Trump 767 Fifth Avenue, LLC, et al.,
Defendants-Respondents-Appellants,

Otis Elevator Company,
Defendant-Respondent,

Conseco, Inc.,
Defendant.

- - - - -

Trump 767 Fifth Avenue, LLC, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Triangle Services, Inc.,
Third-Party Defendant-Appellant-Respondent.

Gallo Vitucci Klar Pinter & Cogan, LLP, New York (Yolanda L. Ayala of counsel), for appellant-respondent.

Hoey, King, Toker & Epstein, New York (Robert O. Pritchard, Jr. of counsel), for respondents-appellants.

Salenger Sack Schwartz & Kimmel, LLP, New York (Michael Schwartz of counsel), for Anthony and Carol Matthews, respondents.

Geringer & Dolan, LLP, New York (John T. McNamara of counsel), for Otis Elevator Company, respondent.

Orders, Supreme Court, New York County (Carol R. Edmead, J.), entered February 2 and July 17, 2007, which, in an action by a window washer, employed by third-party defendant Triangle, for personal injuries sustained while working on a powered work platform, maintained by defendant Otis and known as a Wall

Glider, at high-rise building owned and managed by the Trump defendants (collectively Trump), inter alia, upon motions for summary judgment, dismissed plaintiff's cause of action under Labor Law § 200 as against Otis and sustained it as against Trump, denied Trump's motion for summary judgment on its cause of action against Triangle for contractual indemnification, dismissed Trump's causes of action against Triangle for contribution and common-law indemnification, and dismissed Trump's causes of action against Otis for contribution and contractual and common-law indemnification, unanimously affirmed, without costs.

We note that it is Triangle, not plaintiff, who is appealing the dismissal of plaintiff's negligence claim against Otis. Otis made a prima facie showing that the Wall Glider was operating properly on the day of the accident, based on the testimony of plaintiff, Otis's resident mechanic, and Otis's expert (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712 [2005]). Plaintiff's assertions that the platform's armatures had a history of disengaging from the indented vertical mullions in windy conditions or because of weight distribution and other problems, do not implicate any specific negligent acts on the part of Otis (*see Reilly v Newireen Assoc.*, 303 AD2d 214, 224 [2003], *lv denied* 100 NY2d 508 [2003]); Trump's own witness asserted that the mullions are permanently affixed to the

building and were not maintained by Otis as part of the Wall Glider equipment. Nor was Otis under an obligation to provide an anemometer. The Trump/Otis contract was limited to maintenance and excluded the provision of "major parts such as, but not limited to, gearing, ropes, brakes, armatures, etc." Thus, it was Triangle's or Trump's responsibility, not Otis's, to supervise the work of the window washers and supply them with equipment.

Trump's argument that it cannot be held liable in negligence because the method used by plaintiff to reengage the armature into the mullion was improper, unforeseeable and the sole proximate cause of his back injury, and also because Trump did not have actual or constructive notice of the platform's arms disengaging from the mullions, is rebutted by the testimony of Trump's handyman that the mullions were wavy, that it was Trump's responsibility to maintain them, and that the arms disengaged due to windy conditions on several occasions when he rode the Wall Glider. Also on the basis of this handyman's testimony that he employed the same method as plaintiff when the arms disengaged from the mullions, it cannot be said, as a matter of law, that plaintiff's method was so unforeseeable as to constitute the sole and superseding cause of his injuries (*see Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]).

For this same reason, i.e., the existence of an issue of

fact as to Trump's negligence in maintaining the mullions, Trump's motion for summary judgment on its claim against Triangle for contractual indemnification was properly denied (*see Linarello v City Univ. of N.Y.*, 6 AD3d 192, 194 [2004]). Trump's claim for common-law indemnification against Otis was properly dismissed given no evidence that Otis had notice of, or was responsible for causing, the disengagement of the platform's arm from the mullion (*see Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]). Because such disengagement did not implicate any functions to be performed by Otis under its contract with Trump, Trump's claim against Otis for contractual indemnification was also properly dismissed.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: APRIL 22, 2008

CLERK

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3440 Ida Hovav, Index 102806/97
Plaintiff-Appellant,

Philip Hovav,
Plaintiff,

-against-

Michael Loew,
Defendant-Respondent,

Ester Purjes,
Defendant.

Herbert Monte Levy, New York, for appellant.

Rosenfeld & Kaplan, L.L.P., New York (Steven M. Kaplan of counsel), for respondent.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered August 13, 2007, dismissing the complaint after a nonjury trial, unanimously affirmed, with costs.

The court's finding that plaintiff-purchaser Ida Hovav breached the contract of sale by failing to provide financial information required by the cooperative board was amply supported by the evidence. The purchaser redacted material information from the tax return she was required to submit, and provided no verification for her claimed assets, refusing to provide such information despite repeated warnings from defendant Loew, who was the escrow agent for defendant-seller Purjes. This failure prevented submission of the purchaser's application to the cooperative board (*see Glanzer v Altman*, 267 AD2d 79 [1999]).

Even months after the information should have been submitted, the trial evidence shows that the seller was still willing to close on the transaction. Under these circumstances, the escrow agent acted in good faith in disbursing the deposit to the seller, who also happened to be his law client.

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

ENTERED: APRIL 22, 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 22, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David B. Saxe
Luis A. Gonzalez
Eugene Nardelli, Justices.

The People of the State of New York, Ind. 5384/05
Respondent,

-against- 3441

Michael Bayne,
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 (Carol Berkman, J.), rendered on or about June 21, 2006,

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.

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 22, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David B. Saxe
Luis A. Gonzalez
Eugene Nardelli, Justices.

The People of the State of New York, Ind. 7185/04
Respondent, 2029/05

-against- 3443

Julio Sanchez,
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 (Maxwell Wiley, J. at plea; Arlene Goldberg, J. at sentence), rendered on or about November 29, 2006,

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., Saxe, Gonzalez, Nardelli, JJ.

3444 Graham Kuhn, et al.,
Plaintiffs,

-against-

Sugar Reef Inc. doing business as Global 33, et al.,
Defendants.

- - - - -

[And A Third-Party Action]

- - - - -

Sugar Reef Inc., doing business as Global 33,
Second Third-Party Plaintiff-Respondent,

-against-

Buckmiller Automatic Sprinkler Corp., et al.,
Second Third-Party Defendants-Appellants.

Index 103986/03
590449/03
590572/06

Nicoletti Gonson Spinner & Owen LLP, New York (Edward L. Owen, III of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Kisha V. Augustin of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered October 24, 2006, which denied the second third-party defendants' motion to dismiss the second third-party complaint seeking common-law indemnification or contribution, unanimously modified, on the law, to dismiss the claim for common-law indemnification, and otherwise affirmed, without costs.

When a fire broke out at a restaurant owned by third-party plaintiff Sugar Reef Inc. d/b/a Global 33 in April 2000, the

automatic sprinkler system was activated but did not put out the fire. The system had been installed by third-party defendant Buckmiller Automatic Sprinkler Corp. in early 1990 and inspected monthly by third-party defendant Petzvel Corp. for a year preceding the fire. Although Sugar Reef conceded its own negligence, issues of fact exist as to negligence on the part of Buckmiller and Petzvel and whether any of their actions or omissions were an additional proximate cause of the fire (*see Raquet v Braun*, 90 NY2d 177, 183 [1997]; *Odhan v City of New York*, 268 AD2d 86, 89 [2000], *lv denied* 95 NY2d 769 [2000]; *see also* CPLR 1401).

As Sugar Reef admitted fault, it is not entitled to common-law indemnification (*see Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [2006], *appeal dismissed* 7 NY3d 864 [2006]).

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

ENTERED: APRIL 22, 2008

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3445 General Security Insurance Company as subrogee of Sugar Reef doing business as Global 33, Plaintiff-Respondent,

-against-

Eliahu Nir, Defendant,

Buckmiller Automatic Sprinkler Corp., et al., Defendants/Third-Party Plaintiffs-Appellants,

-against-

William W. Moorhead, etc., Third-Party Defendant,

Sugar Reef Inc., doing business as Global 33, Third-Party Defendant-Respondent.

Index 102417/03
590450/03

Nicoletti Gonson Spinner & Owen LLP, New York (Edward L. Owen, III of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Kisha V. Augustin of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 1, 2007, which denied the cross motion of defendants/third-party plaintiffs Buckmiller and Petzel for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, with costs.

A fire in 2000 caused extensive damage to the insured-lessee's restaurant. It was alleged that the sprinkler system

installed by defendant Buckmiller in 1990 was defective and/or not properly inspected by defendant Petzvel, pursuant to a 1999 inspection agreement. Plaintiff insurer was subrogated to its insured's rights after it made payment on the insured's claim. Plaintiff's negligence action was timely commenced against defendants in February 2003. While the relationship between the parties had its genesis in contract, the nature of the contracted-for services at issue had a significant impact on the public interest, giving rise to a duty of reasonable care independent of contractual obligations that would be more time-bound to a date of breach (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 552-553 [1992]; *Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 192 AD2d 151 [1993]). Deposition testimony from the principal of both defendants, combined with, inter alia, the fire sprinkler inspection observations of plaintiff's expert, raise issues of fact whether the sprinkler system was negligently installed and/or maintained by defendants.

Defendants' spoliation argument was properly rejected. They had an opportunity to inspect the fire-damaged premises on several occasions, and did so. Plaintiff promptly notified defendants formally of its intent to seek indemnification based on the allegedly faulty sprinkler system. Plaintiff's letter also advised that the sprinkler system would be disassembled, and

expressly requested that defendants respond so a mutual date for disassembly and inspection could be arranged. Defendants' principal acknowledged receiving that letter, yet there is no assertion or evidence in the record that they ever responded. On this record, it can not be concluded that premature disposal of the sprinkler gave plaintiff an unfair advantage over defendants (*see e.g. Ifraimov v Pheonix Indus. Gas*, 4 AD3d 332 [2004]). The trial court can instruct the jury, if appropriate, as to adverse inferences, as well as the need to weigh plaintiff's explanation of how and why the sprinkler system is no longer available (*Tawedros v St. Vincent's Hosp. of N.Y.*, 281 AD2d 184 [2001]).

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

ENTERED: APRIL 22, 2008

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3446 The People of the State of New York, Respondent,

-against-

Flor Cruz, Defendant-Appellant.

Ind. 2425N/05

Paul J. Angioletti, Staten Island, for appellant.

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered October 24, 2005, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court improperly precluded material evidence offered by defendant. An undercover officer testified that after he entered a parking garage and announced a desire to purchase drugs, defendant followed him out of the garage to a location about a block away, where defendant negotiated a drug transaction, departed and returned a few minutes later to consummate the sale. Defendant sought to call as a witness his 19-year-old daughter, who would have testified to a very different scenario. According to defendant, his daughter would have testified that at the approximate time of the incident, there was a prearranged meeting

in front of the garage between defendant, the proposed witness and his younger daughter, after which defendant walked away from the garage with his two daughters, met up with friends on the street, and assisted his daughters in obtaining a taxi.

The court precluded this proposed testimony on the ground that it either constituted alibi evidence, for which defendant failed to serve the notice required by CPL 250.20, or that, if it did not constitute an alibi, it was irrelevant. On appeal, the People concede that the precluded testimony was not alibi testimony, but argue that it was properly precluded as lacking probative value. Their principal argument is that, given the spatial and temporal factors, the events described by the undercover officer and those set forth in the proposed testimony could have both happened.

While the daughter's testimony, if credited, would not have rendered the prosecution scenario impossible, it would have rendered that scenario unlikely, supported defendant's defense, and corroborated his testimony (*see People v Cuevas*, 67 AD2d 219, 223-225 [1979]; *see also People v Jack*, 74 NY2d 708 [1989]). There is no indication that defendant sought to call his daughter primarily to garner sympathy from the jury, or that the testimony would have been unduly prejudicial to the People. Accordingly, the evidence should not have been precluded on the ground of irrelevance.

Furthermore, to the extent the court considered the daughter an alibi witness, under the circumstances of the case it should have admitted her testimony after giving the People a reasonable opportunity to prepare (*see* CPL 250.20[3]). Counsel's failure to serve an alibi notice does not appear to have been an attempt to obtain a tactical advantage, but instead appears to have resulted from counsel's good faith belief that no notice was required as a matter of law, and the absence of notice would not have caused irreparable prejudice to the People (*see Taylor v Illinois*, 484 US 400, 414-415 [1988]; *Noble v Kelly*, 246 F3d 93, 98-100 [2d Cir 2001], *cert denied* 534 US 886 [2001]).

We also find that the error in precluding this testimony was not harmless. We decline to reach any other issue.

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

ENTERED: APRIL 22, 2008

CLERK

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3447 Yoda, LLC, et al., Index 115498/06
Plaintiffs-Respondents,

-against-

National Union Fire Insurance Company
of Pittsburgh, Pa.,
Defendant-Appellant,

Han Soo Lee, et al.,
Defendants.

Sedgwick, Detert, Moran & Arnold LLP, New York (Jeffrey M. Winn of counsel), for appellant.

Miranda Sokoloff Sambursky Slone Vervenoitis, LLP, Mineola (Michael A. Miranda of counsel), for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered December 28, 2006, which denied defendant National Union Fire's motion to dismiss the complaint and granted plaintiffs' cross motion for summary judgment to the extent of declaring the insurer's disclaimer of coverage ineffective under Insurance Law § 3420(d), unanimously modified, on the law, the cross motion denied, without prejudice to renewal after completion of discovery, and otherwise affirmed, without costs.

Inasmuch as no discovery has been conducted in this matter, and contrary to the IAS court's observation, National Union did object to entertaining the motion for summary judgment, the court

erred in ruling on it at this juncture (*see Primedia Inc. v SBI USA LLC*, 43 AD3d 685 [2007]; *see also City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). A judgment for plaintiffs on the merits must at least await the filing of an answer.

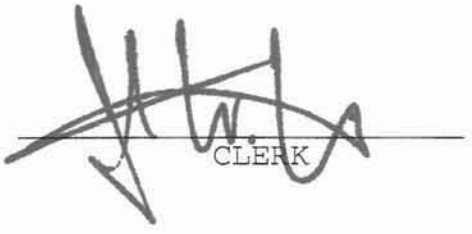
National Union's motion to dismiss was properly denied, however, since there are questions concerning, for instance, the parties' intentions, the terms of the subcontract, and National Union's delay in disclaiming while monitoring the underlying Labor Law litigation, which preclude a determination as a matter of law that Yoda and Riverhead were not additional insureds, even in the absence of an explicit listing of their names on the umbrella policy (*see e.g. Queens Off. Tower Assoc. v General Mills Rest.*, 269 AD2d 223, 224 [2000]).

National Union's reliance on the employers' liability exclusion in its policy is unavailing. The reason for this is that if Yoda and Riverhead are found to be additional insureds, the liability of National Union's insured (the nonparty subcontractor and employer of the injured worker) would be

indirect (*see North Riv. Ins. Co. v United Natl. Ins. Co.*, 81 NY2d 812, 814 [1993]).

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

ENTERED: APRIL 22, 2008



Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3448 The People of the State of New York, Ind. 5162/04
Respondent,

-against-

Carmen Molina,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about May 15, 2007, 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 22, 2008

CLERK

Lippman, P.J., Saxe, Gonzalez, Moskowitz, JJ.

3449N Eric Elmore, Jr., etc., et al., Plaintiffs-Respondents, Index 8580/04

-against-

2720 Concourse Associates, L.P., et al., Defendants-Appellants.

Kopff, Nardelli & Dopf, LLP, New York (Martin B. Adams of counsel), for appellants.

Perecman & Fanning, PLLC, New York (Barry S. Huston of counsel), for respondents.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered April 17, 2007, which, to the extent appealed from, denied defendants' request for disclosure of plaintiff Maria Elmore's psychiatric history, unanimously affirmed, without costs.

While this Court may exercise its own discretion regarding the supervision of discovery, deference is generally afforded to the trial court's determinations in this regard (*Don Buchwald & Assoc. v Marber-Rich*, 305 AD2d 338 [2003]). Given defendants' failure to offer proper expert evidence establishing a particularized need for inquiry into matters not directly at issue in this action, the denial of their discovery request was proper (*Mendez v Equities By Marcy*, 24 AD3d 138 [2005]; *Mayi v 1551 St. Nicholas*, 6 AD3d 219 [2004]). Defendants' expert affidavits are conclusory and fail to substantiate the assertion

that the mother's records are necessary or relevant (*Scipio v Upsell*, 1 AD3d 500, 501 [2003]).

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

ENTERED: APRIL 22, 2008

CLERK

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3450N-
3450NA American Furniture, LLC, et al., Index 121141/03
Plaintiffs-Appellants,

-against-

ACG Credit Company, LLC, et al.,
Defendants-Respondents.

Patterson Belknap Webb & Tyler LLP, New York (John D. Winter of counsel), for appellants.

Hahn & Hessen LLP, New York (Zachary G. Newman of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 3, 2006, which, to the extent appealed from as limited by the briefs, awarded defendant ACG Credit attorney fees and denied plaintiffs' motion for a hearing as to whether the sale of collateral was commercially reasonable, and supplemental judgment, same court and Justice, entered February 1, 2007, awarding defendants the principal sum of $460,000 in post-judgment attorney fees, unanimously affirmed, with one bill of costs.

The court correctly interpreted the expansive fee provisions in the note and guaranty in awarding attorney fees with respect to certain New Hampshire litigation and post-judgment matters, inter alia, and properly applied the governing rule and reviewed the evidence in awarding reasonable fees. Plaintiffs failed to raise an issue of fact regarding collusion, fraud or self-dealing

in opposition to defendants' showing that their disposition of the collateral had been performed in a commercially reasonable manner, and no hearing was warranted on the issue (*see Golden City Commercial Bank v Hawk Props. Corp.*, 240 AD2d 218, 219 [1997]). Under the circumstances, while the sale price of the collateral differed from that in an appraisal several years earlier, this did not require further scrutiny (*see Buttermark Plumbing & Heating Corp. v Sagarese*, 119 AD2d 540 [1986], *lv denied* 68 NY2d 607 [1986]).

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

ENTERED: APRIL 22, 2008

CLERK

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

2426-
2427 In re Michael Gill, et al., Index 118095/04
Petitioners-Respondents-Appellants,

-against-

The New York State Racing and Wagering Board,
Respondent-Appellant-Respondent.

Andrew M. Cuomo, Attorney General, New York (Sasha Samberg Champion of counsel), for appellant-respondent.

Bonstrom & Murphy, Old Chatham (Karen A. Murphy of counsel), for respondents-appellants.

Order and judgment (one paper), Supreme Court, New York County (Ronald A. Zweibel, J.), entered March 9, 2006, invalidating an emergency rule promulgated by respondent New York State Racing and Wagering Board (Racing Board) that permitted the post-race testing of horses for the presence of the drug Fluphenazine and provided for disciplinary action against the horses' owners, enjoining the Racing Board from implementing and enforcing the rule, annulling the Racing Board's determination disqualifying petitioners' horses and declaring their purses forfeited, and remitting the matter to the Racing Board for further proceedings, unanimously modified, on the law, so as to dismiss petitioners' first two causes of action on statute of limitations grounds and reinstate the determination disqualifying petitioners' horses and declaring their purses forfeited, and otherwise affirmed, without costs, and the matter remanded to

Supreme Court for further proceedings consistent herewith.

The Racing Board did not waive its argument that the statute of limitations on petitioners' first two causes of action challenging the promulgation of an emergency rule accrued when the rules were promulgated because, although the nature of its argument was modified on appeal, the Racing Board asserted the statute of limitations on its cross motion to dismiss, and the modified argument does not depend on any facts not contained in the record considered by the court (*see New York City Health and Hosps. Corp. v Bane*, 208 AD2d 97, 103 [1995], *revd on other grounds*, 87 NY2d 399 [1995]). Because the first two causes of action challenge the enactment of the emergency rule that was in place on the date petitioners were informed that their horses had tested positive for Fluphenazine, the claims asserted in those causes of action accrued for statute of limitations purposes at the latest on August 18, 2004, the day the rule was promulgated, which was more than four months before this proceeding was commenced (State Administrative Procedure Act § 202[8]; CPLR 217[1]; *see Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). The Racing Board is not equitably estopped from asserting the statute of limitations, because petitioners have not established that they were induced by fraud, misrepresentations or deception to refrain from filing a timely action (*see Simcuski v Saeli*, 44 NY2d 442, 448-49 [1978]).

The third cause of action is not time-barred, however, because it alleges constitutional infirmities in the manner in which the rule was enforced, not in how it was enacted, and was brought within four months of its accrual on the date petitioners were informed that the horses had tested positive. Nor is this cause of action premature. Insofar as the determination that the horses tested positive directs petitioners to return the purse monies and not race the horses until they are re-tested, its effect is certain and it constitutes a final determination (*see Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986]). Furthermore, the Racing Board does not identify any steps that petitioners could have taken administratively to challenge the denial of their due process right to a hearing.

The court correctly declined to dismiss the proceeding for failure to join necessary parties. While the owners of other horses who ran in the races from which petitioners' horses were disqualified may have had a material interest in the disposition of the escrowed purse money, such disposition was not the subject matter of the petition (*see generally Matter of Martin v Ronan*, 47 NY2d 486, 490 [1979]). Nor is there any indication that those owners consider themselves aggrieved by the manner in which the emergency rules were enacted or by the failure of the Racing Board to afford petitioners a hearing, so that they can be said to have a due process right to be heard in this proceeding (*id.*).

Finally, if petitioners prevail against the Racing Board, they may be entitled to recover their forfeited purse and claiming fees lost as a result of the disqualification as incidental damages (*see Pauk v Board of Trustees of City Univ. of N.Y.*, 111 AD2d 17, 21 [1985], *affd* 68 NY2d 702 [1986]). Accordingly, Supreme Court is directed to consider petitioners' request for such damages in the event they prevail.

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

ENTERED: APRIL 22, 2008

CLERK

Mazzarelli, J.P., Andrias, Catterson, McGuire, JJ.

2564-
2564A Francisco Reyes, et al., Index 17842/03
Plaintiffs-Respondents,

-against-

Morton Williams Associated
Supermarkets, Inc.
Defendant,

Emil Mosbacher Real Estate LLC,
Defendant-Appellant,

Red and White Markets, Inc.
Defendant-Respondent.

Gannon, Rosenfarb & Moskowitz, New York (David A. Drossman of counsel), for appellant.

Goldblatt & Associates, P.C., Mohegan Lake (Spencer M. Fein of counsel), for Francisco and Benefactora Reyes, respondents.

Paganini, Herling, Cioci, Cusumano & Farole, Lake Success (Peter A. Cusumano of counsel), for Red and White Markets, Inc., respondent.

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered July 12, 2007, insofar as it, upon reargument, denied the motion of defendant Emil Mosbacher Real Estate LLC (Mosbacher) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, Mosbacher's motion granted and the complaint dismissed as against it. The Clerk is directed to enter judgment accordingly. That part of the appeal from the dismissal of Mosbacher's cross claims for contractual indemnification against Red and White Markets

unanimously dismissed, without costs, as academic. Appeal from order, same court and Justice, entered March 19, 2007, insofar as it dismissed Mosbacher's cross claims for contractual indemnification against Red and White, unanimously dismissed, without costs, as superseded by the appeal from the July 12 order.

The injured plaintiff, an employee of the Associated Supermarket operated by Red and White Markets at 15 East Kingsbridge Road in the Bronx, testified at his deposition that he was walking up a concrete ramp in the rear stockroom of the store when he slipped on water that had apparently dripped from overhead refrigeration pipes and accumulated on the ramp. He further testified that he tried to hold onto something to break his fall, but there was nothing to grab. Plaintiff's engineering expert submitted an affidavit concluding, based on his examination of the ramp, a conversation with plaintiff, and a review of his deposition testimony, that the lack of handrails violated the New York City Building Code, thereby deviating from good and accepted engineering practice, and was a substantial cause of the accident.

It is well settled that an out-of-possession landlord such as Mosbacher is generally not liable for negligence with respect to the condition of the demised premises unless it "(1) is contractually obligated to make repairs or maintain the premises,

or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Vasquez v The Rector*, 40 AD3d 265, 266 [2007]).

In granting plaintiff reargument and denying Mosbacher summary judgment, the motion court found that plaintiff had raised a triable issue of fact whether Mosbacher was subject to liability because it appeared that the lack of a handrail is a statutory violation. However, not only is the applicability of the Building Code a purely legal question for the court to determine (*see Buchholz v Trump 767 Fifth*, 4 AD3d 178, 179 [2004], *affd* 5 NY3d 1 [2005]), but, also, none of the sections of the Building Code relied upon by plaintiff's expert, which relate to means of egress from buildings and require handrails on certain interior stairs and ramps used in lieu of such stairs, apply to the ramp in question (*cf. Gaston v New York City Hous. Auth.*, 258 AD2d 220, 224 [1999]). Moreover, it is undisputed that the ramp and overhead refrigeration pipes, which were installed by Red and White Markets after it took possession of the premises and made renovations, were not located in a public portion of the building, the stockroom being specifically off limits to the public. Thus, there is no basis on which to impose liability on Mosbacher, which was required by its lease with Red and White Markets to maintain and repair only the public portions

of the building. Red and White Markets, on the other hand, was required, at its sole cost and expense, to make all nonstructural repairs to the premises.

With respect to contractual indemnification, the relevant portion of that clause provides that Red and White Markets will indemnify Mosbacher against any and all claims, suits, actions or damages arising from any personal injury or damage to property sustained on the premises, and for all costs, counsel fees and expenses incurred in defense of any actions, unless caused by or resulting from Mosbacher's negligence. The summary dismissal of Mosbacher's cross claims was premature, as there was a possibility Mosbacher would be found at trial not to have acted negligently. In such event, the broad language of the indemnification clause would have obligated Red and White Markets to indemnify Mosbacher (*cf. Rivera v Urban Health Plan, Inc.*, 9 AD3d 322 [2004]). However, in light of our dismissal of the complaint as against Mosbacher, the question of indemnification is academic.

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

ENTERED: APRIL 22, 2008

CLERK

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

2711 In re Isabel L.,
Petitioner-Appellant,

-against-

Biridia L.,
Respondent-Respondent.

Law Office of Kenneth M. Tuccillo, Hastings-On-Hudson (Kenneth M. Tuccillo of counsel), for appellant.

Anne Reiniger, New York, for respondent.

Carol Sherman, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), Law Guardian.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about January 10, 2006, insofar as it awarded custody of the subject children to respondent, unanimously affirmed, without costs. Appeal from so much of the order as advised respondent to arrange for grandparent and sibling visitation unanimously dismissed as academic, without costs.

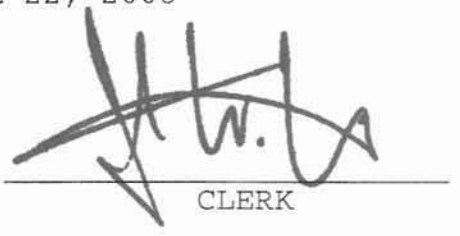
While an evidentiary hearing was required (*cf. Alix A. v Erika H.*, 45 AD3d 394 [2007]), Gilbert has now been living uneventfully with respondent for the past two years, and we see no reason to remit the matter for a hearing at this point, particularly where the record supports the court's finding that awarding custody to respondent was in the children's best

interests (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *Skidelsky v Skidelsky*, 279 AD2d 356 [2001]; *Melnitzky v Melnitzky*, 278 AD2d 2 [2000]).

That portion of the order that advised respondent to arrange for grandparent and sibling visitation has been superseded by an order of visitation, rendering academic this aspect of the appeal (*see Matter of Maria Raquel L.*, 36 AD3d 425 [2007]).

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

ENTERED: APRIL 22, 2008



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

2780 Purchase Partners II, LLC, et al., Plaintiffs-Appellants, Index 604219/04

-against-

Anthony E. Westreich, Defendant-Respondent.

[And a Third-Party Action]

Emery, Celli, Brinckerhoff & Abady, LLP, New York (Richard D. Emery of counsel), for appellants.

Kramer Levin Naftalis & Frankel LLP, New York (Marshall H. Fishman of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 8, 2007, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint and denied plaintiffs' motion for summary judgment, unanimously modified, on the law, to declare that plaintiffs are not entitled to enforce the August 11, 2004 letter agreement, and otherwise affirmed, without costs.

Even if, arguendo, plaintiffs were third-party beneficiaries of the August 11, 2004 letter agreement between defendant and third-party defendant Hochfelder, the merger clause in their November 12, 2004 separation agreement effectively barred their claims under the earlier agreement (*see Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001]). Plaintiffs were aware of the terms of the separation agreement, which did not contain the

claimed benefits but did contain such merger clause, and they did not object (*see Barnum v Milbrook Care Ltd. Partnership*, 850 F Supp 1227, 1236 [1994], *affd* 43 F3d 1458 [1994]). We modify solely to declare in defendant's favor (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: APRIL 22, 2008

CLERK

APR 22 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
David B. Saxe
Luis A. Gonzalez
John W. Sweeny, Jr., JJ.

2903
Index 109703/06

Camella Price, et al.,
Petitioners/Plaintiffs-Appellants,

-against-

New York City Board of Education, etc, et al.,
Respondents/Defendants-Respondents.

- - - - -

Unified Federation of Teachers,
Amicus Curiae.

Petitioners/plaintiffs appeal from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), entered June 18, 2007, dismissing the article 78 proceeding and action for declaratory judgment, and denying their motion for discovery.

Norman Siegel, New York, and Lovells, LLP, New York (David Leichtman of counsel), and Morgan, Lewis & Bockius LLP, New York (Carolyn W. Jaffe, Alan J. Neuwirth, Shira R. Rosenblatt, Jason H. Casell, and Namita E. Mani of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams and Kristin M. Helmers of counsel), for respondents.

Stroock & Stroock & Lavan LLP, New York (Alan M. Klinger, Ernst H. Rosenberger and Beth A. Norton of counsel), for United Federation of Teachers, Amicus Curiae.

MAZZARELLI, J.P.

This appeal requires us to balance the interests of the New York City Department of Education (the Department) in maintaining order and discipline in its schools with the concerns of parents and guardians for their children's well-being.

In September 2005, the Department, as required by Education Law § 2801(2), issued its Disciplinary Code or Citywide Standards of Discipline and Intervention Measures "for the maintenance of order on school property." The Code enumerated various "infractions," rating them in five levels ranging from "Insubordinate Behaviors" (Level 1) to "Seriously Dangerous or Violent Behavior" (Level 5).[1] One of the Level 1 infractions was identified as "Bringing prohibited equipment or material to school without authorization (e.g., cell phone, beeper)."

Also in September 2005, current Chancellor Joel I. Klein issued Regulation A-412, which, according to its statement of intent, "sets forth the responsibilities of school staff for maintaining security in the schools." The Regulation specifically provides that "Beepers and other communication

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[1] The disciplinary consequences for a Level 1 infraction range from admonishment to removal from the classroom by a teacher. For a Level 5 infraction a student faces at minimum a suspension, and, for students at least 17 years old, a maximum penalty of expulsion.

devices are prohibited on school property, unless a parent obtains the prior approval from the principal/designee for medical reasons." The Chancellor was authorized to implement the Regulation by Education Law § 2554 (13)(a), which imbues all city boards of education in the State with the authority to "prescribe such regulations and by-laws as may be necessary...for the general management, operation, control, maintenance and discipline of the schools..."[2]

While cell phones were not specifically identified as contraband until the issuance of the 2005 Disciplinary Code, they would arguably have been prohibited in City schools earlier. In 1988 then-Chancellor Richard Green had instituted a system-wide ban on beepers, pagers and "other similar personal communication devices." However, it was not until April 2006 that the Department began to enforce the ban. On April 13, 2006, the Department announced that students at certain middle and high schools would be scanned by mobile metal detectors prior to entering the school. The intended target of the scans was "weapons and dangerous instruments such as firearms, knives and box cutters." Although a small number of weapons were found,

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[2] Although § 2554 expressly excepts "the city board of the city of New York," Education Law § 2590-h (17) confers on the City schools' Chancellor the powers and duties described in § 2554.

thousands of cell phones were detected. The Department confiscated the phones, relying on its Disciplinary Code and the Chancellor's regulation A-412.

In response, the Association of New York City Education Councils, an advocacy group for parents of City public school students, circulated a petition calling for a moratorium on the confiscation of cell phones. The petition asserted that the cell phone ban "[i]nfringes on the rights of parents seeking to provide cellular phones as a tool of protection for their child(ren)." It further claimed that the policy "[i]ntervenes in the ability of parents to communicate with their children and vice versa." By July 12, 2006, 3,185 individuals had signed the petition.

On May 2, 2006, the Executive Board of the United Federation of Teachers unanimously passed a resolution supporting the prohibition of cell phone use by students while on school grounds but calling for an end to the ban on possession. The resolution described cell phones as a "lifeline for many parents and students." In June 2006, the City Council Committees on Education and Public Safety met to consider the need for the ban. The Education Committee subsequently proposed a resolution calling for a moratorium on the ban pending a public hearing in each school district to find a compromise solution. Despite

these and other efforts on the part of concerned groups to reverse the prohibition against possession of cell phones, the Department and the Office of the Mayor made it clear that they would not reconsider the ban.

This hybrid proceeding was commenced in July 2006. The petitioners (collectively, the Parents) are individual parents opposed to the cell phone ban and the Chancellor's Parent Advisory Council (CPAC), an organization created pursuant to Chancellor's regulation A-660. CPAC is a group of elected parent leaders from each of the City's community school districts, 10 regional high school districts, an alternative high school district and a citywide special education district. It represents parents of students in all City public schools.

The first two causes of action seek review of the ban pursuant to CPLR article 78. In the first cause of action the Parents allege that in enacting the pertinent provisions of the Disciplinary Code and Regulation A-412, the Chancellor exceeded the authority granted him by Education Law § 2554 (13)(a) as they were not necessary to the "general management, operation, control, maintenance and discipline of the schools." In the second cause of action they claim that in implementing the ban the Department acted arbitrarily and capriciously. This they assert is because it ignored the fact that "cell phones are a

vital communication tool and security device that New York City public school students and their families rely upon during students' commute to and from school and after-school activities." The Parents also assert that the ban was overbroad and devoid of legitimate purpose in light of the alleged existence of "numerous more narrowly tailored alternatives."

In the third and fourth causes of action it is alleged that the ban violated the New York State and United States Constitutions as it infringed on parents' fundamental right to provide for the care, custody and control of their children. According to the Parents, the ban effectively renders parents unable to communicate with their children, thus depriving them of that liberty interest.

Each of the individual Parents submitted an affidavit in support of the petition detailing his or her child's daily routines and explaining how he or she relies on the child possessing a cell phone. Several of the Parents described their children's lengthy commutes to and from school and after-school activities by public transportation. They stated that often portions of those commutes require the children to walk in the dark through dangerous neighborhoods, where working pay phones are scarce. They asserted that they rely on their children's cell phones to keep track of their whereabouts through each step

of the journey or to coordinate meeting them at the bus or subway stop at the end of the trip home. They claimed that the cell phones are vital in the event of a disruption in transportation service or some other occurrence which requires parents to contact their children. Other Parents recounted instances where their children used their cell phones, or could have if they were not banned from possessing them, to call for help after being assaulted or threatened by other children. Some invoked their experiences on September 11, 2001.

In opposition to the petition, the Department argued that the dispute was non-justiciable because the cell phone ban was a product of executive-branch decision making so fundamental as to be outside the reach of judicial review. The Department further argued that the Parents failed to satisfy the condition precedent required by Education Law § 3813(1) of serving a written notice of claim.

As to the merits, the Department claimed that it was justified in implementing the ban in the exercise of its sound discretion because cell phones threaten order in the schools. In the 2005-2006 school year, the Department stated, 2,168 incidents involving cell phones on school property were reported. Emphasizing the various uses for cell phones besides placing and receiving calls, the Department cited instances in which cell

phones were used for seriously disruptive, in addition to some criminal, purposes. For example, the Department stated that students have used the camera function of cell phones to take and exhibit pictures with inappropriate sexual content and to use such pictures to harass others, including school personnel. According to the Department, cell phones have also been used to facilitate cheating on exams.

The Department detailed how cell phones have been abused by students. For example, students have called friends to rally them for assistance in a fight. They have used them to call other students to threaten and intimidate them. They have placed crank calls to teachers and called 911 as a practical joke. The Department acknowledged the convenience cell phones provide parents and guardians who want a means of communication with their children at all times. However, the Department argued that the ban was necessary to maximize the amount of time available for teaching. The Department further noted that it had considered the compromise solutions offered by some parents, such as the provision of lockers or a check-and-return system, but determined that they were "administratively cumbersome, prohibitively expensive and virtually impossible to implement."

Finally, the Department disputed the Parents' claim that the cell phone ban interfered with their fundamental right to provide

for the care, custody and control of their children. To the extent that any constitutional rights were implicated, the Department posited that a rational basis analysis was required, not strict scrutiny as advanced by the Parents. The Department argued that the ban easily passed the rational relationship analysis, as education is a legitimate state interest and the ban was reasonably related to the advancement of that interest.

After they filed their petition, but before the Department interposed its answer, the Parents moved for leave to take discovery pursuant to CPLR 408. They also sought confirmation that they could take discovery as of right regarding the constitutional claims. The Parents argued that discovery was necessary to determine whether the Department had empirical evidence to support its position that cell phones represented such a threat to order in the schools that a complete ban on their possession was necessary. The Department opposed the motion on the grounds that, even if the court reached the merits of the Parents' claims, the Department had amply demonstrated in its opposition to the petition why the ban was justified. Any further evidence, the Department argued, would be "superfluous and wasteful."

The court, in a June 18, 2007 order (16 Misc 3d 543 [2007]), dismissed the petition. Initially, the court rejected the

Department's position that it had no subject matter jurisdiction. Calling the non-justiciability argument "almost frivolous," it noted that article 78 has been invoked countless times to challenge determinations of the State Commissioner of Education and other educational entities. The court further found that the written notice of claim required by Education Law § 3813(1) did not apply to claims strictly for declaratory relief.

The court found "rational" the Parents' concerns about their children being "incommunicado" during the school day. It noted that, even though cell phones were not widely owned until relatively recently, parents and children had altered their behavior to rely on them. Nevertheless, the court held that the Department had demonstrated a proper basis for the cell phone policy and concluded that if the schools were required to enforce a ban on cell phone use, their pedagogical mission would be undermined by the time spent confronting and disciplining students. It further found that the Parents had failed to advance a "practically viable universal alternative" to the ban, and that this was an additional rational basis for the ban.

The court also rejected the Parents' constitutional claims, holding that the cell phone ban was central to the schools' educational mission. The court further found that the right extended to parents under the Fourteenth Amendment to the United

States Constitution to provide for the care, custody and control of their children did not embrace a right to communicate with children by cell phone. Accordingly, the court declined to engage in either a strict scrutiny or rational relationship analysis of the cell phone ban.

Finally, the court denied the Parents' motion for discovery. With respect to the article 78 proceeding, the court found that the issues could be resolved without discovery. It further held that discovery was irrelevant to the declaratory judgment causes of action because, "[i]f [p]etitioners' constitutional rights are violated, it hardly matters why or with what basis of support the Cell Phone Rules were adopted."

On appeal, the Parents argue that the court failed to address and rule upon their claim that the cell phone ban is overbroad and exceeds the Chancellor's statutory authority. In addition, they assert that the court improperly based its ruling on facts not in the record and on justifications for the cell phone policy allegedly raised by the Department for the first time in its answer to the petition. They further claim that the court mischaracterized and paid short shrift to their proposed alternatives to the ban.

The Parents argue that the ban violates the Fourteenth Amendment and article I, § 6 of the NY Constitution because it

infringes on their fundamental right to provide for the care, custody and control of their children. They further claim that the court erred in not subjecting the ban to any constitutional analysis, much less strict scrutiny, which they claim is the appropriate standard. Finally, the Parents claim that the court abused its discretion by denying their motion for discovery because the Department's opposition depended on factual assertions which could only be challenged after the Department fully disclosed its basis for them.

In an amicus brief, the United Federation of Teachers (UFT) supports the Parents' position that the Chancellor exceeded his authority in promulgating the ban. The UFT claims that the teachers' responsibility to care for students while they are at school gives them a vested interest in the students' well-being after they are released from school. It argues that several studies have concluded that how much a child achieves academically directly correlates to how much external stress the child has in his or her life. Thus, it asserts that if children have cell phones, they will worry less about their safety outside of school and consequently perform better in school. Finally, the UFT posits that enforcing a possession ban will require more of the school faculty than would enforcing a use ban, since, it alleges, the reality is that children are bringing their phones

to school notwithstanding the possession ban.

In response, the Department repeats its position that this dispute is nonjusticiable because it involves executive-branch decision making at a fundamental level. It claims that, in any event, the court gave the proper deference to the Chancellor's role in administering the schools and correctly ruled that the Department had a rational basis for implementing the ban because of the Chancellor's concern about discipline. It further argues that because the disputed action is a broad policy enactment, the court was not limited to consideration of the rationale employed by the Chancellor at the time he implemented the ban.

As for the Parents' constitutional claims, the Department argues that, in the context of education, administrative decisions which direct the manner in which children are educated are not subject to strict scrutiny because they do not infringe upon any fundamental rights. It distinguishes those cases confirming that parents have a fundamental right to provide for the care, custody and control of their children as involving government action "orders of magnitude beyond the intrusion claimed here." The Department further argues that even where the fundamental right is implicated by government action, only the rational-basis analysis need be applied. The Department claims that the cell phone ban easily passes the rational-basis test.

Finally, the Department argues that the Parents' appeal from the court's decision on the discovery motion should be dismissed as it is from a non-appealable interlocutory order. Moreover, it claims that the motion was properly decided as the Parents failed to demonstrate that the discovery sought was likely to advance their prosecution of the proceeding.

We find that the Parents' challenge to the rationality of the cell phone policy is nonjusticiable. "[A]bsent a showing of an ultra vires act or a failure to perform a required act, the decision of a school official involving an inherently administrative process, which is uniquely part of that official's function and expertise, presents a nonjusticiable controversy" (*Matter of Parent Teacher Assn. of P.S. 124M v Board of Educ.* of City School Dist. of City of N.Y., 138 AD2d 108, 113 [1988]). This notion derives from the doctrine of separation of powers and the courts' disinclination to be perceived as overseeing the discretionary affairs of the political branches of government (*see Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990, 992 [1976]). Thus, "courts may not under the guise of enforcing a vague educational public policy, suggested to it, assume the exercise of educational policy vested by constitution and statute in school administrative agencies" (*Matter of New York City School Bds. Assn. v Board of Educ. of City School Dist. of City*

of N.Y., 39 NY2d 111, 121 [1976]).

The court's statement that "[d]ecisions of school boards and other educational entities have been so routinely subject to review by the Courts under CPLR Article 78 so as to make [the Department's] contention [that this dispute is nonjusticiable] almost frivolous," is undermined by the cases it cites in support of that proposition. For example, in *Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills* (4 NY3d 51 [2004]), the Court of Appeals found it proper to interject itself into a dispute concerning whether the State Education Commissioner properly determined that teaching assistants were teachers for purposes of tenure only after noting that it "was faced with the interpretation of statutes and pure questions of law" (*id.* at 59). In *Matter of Davis v Mills* (98 NY2d 120 [2002]), the Court in addressing whether a teacher had a right pursuant to Education Law § 2510(1) to be placed in a newly created position that replaced her former position, deferred completely to the Commissioner's decision, stating that "[i]t is for the Commissioner in the first instance, and not for the courts, to establish and apply criteria to govern the selection and retention of qualified educators and staff" (*id.* at 125). Indeed, the Court of Appeals has specifically noted that "the myriad of tenure, racial discrimination, and teacher dismissal

cases heard by our courts" are justiciable even though they "touch, often deeply, educational policies, because discrete law issues are raised which are wholly apart from matters of policy" (*James*, 42 NY2d at 355-56). Here, the Chancellor's decision to ban possession of cell phones was wholly a matter of policy and no discrete issues of law are implicated.

The Parents argue that review of the cell phone policy is permissible because the policy is ultra vires the Chancellor's authority (*see Matter of Parent Teacher Assn. of P.S. 124M, supra at 113*). However, we agree with the court below which, in considering the policy on the merits, found that it was not. The Chancellor's determination that a mere ban on cell phone use would not be sufficiently effective was not irrational. It is now routine before theater, movie and other cultural presentations attended by adults, for patrons to be asked to turn off their cell phones. Even then there is no guarantee that the cell phone of an inattentive person will not ring at an inopportune time. While the vast majority of public school children are respectful and well-behaved, it was not unreasonable for the Chancellor to recognize that if adults cannot be fully trusted to practice proper cell phone etiquette, then neither can children.

Of course, the cell phone activity identified by the

Department as threatening discipline in the schools goes far beyond the occasional errant ring. The very nature of cell phones, especially with regard to their text messaging capability, permits much of that activity to be performed surreptitiously, which the Chancellor rationally concluded presents significant challenges to enforcing a use ban. Certainly the Department has a rational interest in having its teachers and staff devote their time to educating students and not waging a "war" against cell phones.

The Parents' comparison of the ban on cell phone possession to school dress regulations that have been struck down is strained. No school official could argue today that a blanket prohibition of slacks for female students furthers safety, order and discipline in the schools (*see Matter of Scott v Board of Educ., Union Free School Dist. No. 17*, 61 Misc 2d 333 [1969]). However, it cannot be denied that the use of cell phones for cheating, sexual harassment, prank calls and intimidation threatens order in the schools. The Parents' attempt to analogize the prohibition on hats addressed in *Appeal of Janet Pintka* (33 Educ Dept Rep 13,034 [1993]) falls similarly short. There, the State Education Commissioner determined that a school board's ban on the wearing of hats anywhere on school grounds was overbroad because hats only threatened decorum when worn inside

the classroom. For obvious reasons, a ban on hats in the classroom is easily enforced, without a need to extend it elsewhere. As the Department has demonstrated, a ban on possession on cell phones is necessary because a ban on use is not easily enforced.

The Parents' argument concerning the existence of limited-use cell phones does not further their position that the Chancellor acted ultra vires his authority. The Parents describe cell phones which have no other capabilities than making and receiving calls and assert that certain phones permit parents to restrict the numbers children can call and from which they can receive calls. They claim that these phones can be programmed to be operative only during certain times of the day. The Parents fail, however, to demonstrate that such telephones are widely available and owned by students. Furthermore, the Parents offer no way of assuring that the phones would uniformly be used in the manner necessary to guarantee that school decorum will not be compromised.

The Parents take issue with the court acceptance of the Department's representation that the financial costs and administrative burdens of installing lockers for the phones was too great. However, here the court properly recognized that the courts have no place in disputes which necessarily involve

allocation of public resources. Indeed, courts are loathe to interfere with a governmental agency's ordering of priorities and allocation of finite resources (*see Jiggetts v Grinker*, 75 NY2d 411, 415 [1990]). To inquire into whether the Department could afford to install lockers, or take other steps to accommodate the Parents' desire for the children to possess cell phones, would constitute judicial usurpation of a matter strictly reserved to the Chancellor.

Questions of justiciability aside, we are not unsympathetic to the Parents' wish to be secure in the knowledge that they can reach their children, or be reached by them, in the event of a private or public emergency. However, we note that Regulation A-412 expressly authorizes schools to permit a child to possess a cell phone if he or she has a medical reason. Thus, children who are legitimately predisposed to physical and/or psychological issues will be able to have a cell phone to reach their parents when not in school. We can think of no reason why the Department would not permit schools to entertain reasonable applications for exemptions to the policy which do not necessarily rely on medical issues but involve equally compelling situations. For example, one of the Parents asserted in an affidavit that her daughter was being "stalked" by another student. If a parent establishes that her child is in a similar situation, the school has the ability

to extend permission to the child to carry a cell phone. We further recognize that not every situation in which parents would wish to contact or be reached by their children by cell phone can be foreseen.

Ultimately, while the Parents present cogent reasons why they would like their children to carry cell phones during the school day, our role is not to choose between two legitimate but competing interests. Because the cell phone policy was within the Department's power, judicial interference is not warranted (*Matter of New York City School Bds. Assn.*, 39 NY2d at 121).

Finally, even if it had been appropriate for the court to consider the rationality of the cell phone ban on the merits, it did not exceed the bounds of what it was permitted to consider in determining whether the policy was rational. The cases which the Parents rely on in support of their argument that the court was limited to considering the rationale supporting the policy at the time the policy was implemented each involved review of administrative determinations after an agency proceeding in which the petitioner had an opportunity to be heard and to submit evidence (*see Matter of Scanlan v Buffalo Pub. School Sys.*, 90 NY2d 662 [1997] [review of determination that teachers were not entitled to retroactive membership in the New York State Teachers' Retirement system]; *Matter of Scherbyn v Wayne-Finger*

Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753 [1991][review of civil servant's dismissal from position]; *Matter of Aronsky v Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 NY2d 997 [1990][review of teacher's termination for reasons of misconduct]). The purpose behind the rule articulated in these cases, that the reviewing court may not consider facts other than those relied on by the agency in making its determination, is to "permit intelligent challenge by a party aggrieved" (*Matter of Simpson v Wolansky*, 38 NY2d 391, 396 [1975]).

These cases are inapposite because here, the challenge is not to an administrative determination made after the Parents had an opportunity to be heard. Rather, it is to a policy made by the Department pursuant to statute. Thus, the standard of review is even more limited than if this were a challenge to an administrative determination. Here, the court must determine only whether the regulations creating the policy are 'so lacking in reason for [their] promulgation that [they are] essentially arbitrary.'" (*Ostrer v Schenck*, 41 NY2d 782, 786 [1977], quoting *Matter of Marburg v Cole*, 286 NY 202, 212 [1941]). Furthermore, the record need only reveal that the regulation had a rational basis (*see Matter of Older v Board of Educ., Union Free School Dist. No. 1, Town of Mamaroneck*, 27 NY2d 333, 337 [1971]). There is no requirement that an agency must have articulated its

proferred rational basis for a regulation at the time of promulgation.

The Parents' constitutional claims also fail. The alleged violations of the Fourteenth Amendment of the United States constitution and of article I, §6 of the NY Constitution do not require the application of strict scrutiny analysis. Strict scrutiny is the standard of review ordinarily applied to determine if a state action infringes upon a "fundamental" right (*see e.g. Carey v Population Services Intl.*, 431 US 678, 686 [1977]). Such an action will only withstand strict scrutiny analysis if it is narrowly tailored to advance a compelling state interest (*id.*). The liberty interest alleged to be at stake here, a parent's interest in the care, custody and control of their children, is "perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court (*Troxel v Granville*, 530 US 57, 65 [2000]). However, the right is not absolute and is only afforded constitutional protection in "appropriate cases" (*Lehr v Robertson*, 463 US 248, 256 [1983]).

For example, the right is implicated where the state seeks to dictate where and whether parents send their children to receive education (*see Wisconsin v Yoder*, 406 US 205 [1972]; *Pierce v Society of Sisters*, 268 US 510 [1925]). It has also been recognized in matters concerning parents' interest in

retaining the custody of their children (*see Stanley v Illinois*, 405 US 645, 651 [1972]). In *Troxel*, the Supreme Court invoked it to strike down a Washington state court order granting plaintiffs the right to visit with their grandchildren (the daughters of their deceased son) over the objection of the children's mother. The Court held that the state court's "decisional framework...directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. In that respect, the court's presumption failed to provide any protection for [the mother]'s fundamental constitutional right to make decisions concerning the rearing of her own daughters" (*Troxel*, 530 US at 69-70 [internal citation omitted]).

In *Matter of Alfonso v Fernandez* (195 AD2d 46 [1993], *lv dismissed* 83 NY2d 906 [1994]), the Second Department held that school policy which interferes with parental decision-making in a "particularly sensitive area" (*id.* at 57), such as sex implicates the fundamental right to rear children under both the United States and New York State Constitutions. In that case, the petitioners commenced a hybrid article 78/declaratory judgment action alleging that the New York City Schools Chancellor exceeded his authority, and violated parents' constitutional rights, by making condoms available to high school students upon request without giving parents an opportunity to consent or opt

out. The Chancellor instituted the condom program as part of an existing HIV/AIDS education program that was created pursuant to mandate from the State Commissioner of Education. The Second Department held that the condom program implicated the fundamental right of parents to provide for the care, custody and control of their children because it forced them to "surrender a parenting right - specifically, to influence and guide the sexual activity of their children without State interference" (*id.* at 56). Applying strict scrutiny, the Court held that, while the State had a compelling interest in controlling AIDS, the condom program was not sufficiently tailored to serve that interest, since condoms are readily available from other sources and because parents could have easily been given an option to opt out (*id.* at 58).

Alfonso and the United States Supreme Court cases cited above collectively stand for the proposition that the state may not substitute its judgment for the judgment of parents regarding decisions that will have a *profound* effect on children's upbringing. Here, that standard is not met. By implementing the cell phone ban policy, the State is not depriving parents of the ability to raise their children in the manner in which they see fit. The ban by necessity will prevent children from calling their parents or receiving calls from them while commuting to and

from school. However, scrutiny of the individual Parents' affidavits does not reveal that any fundamental child-rearing function is being taken from them.

The Parents characterize the need for cell phones when the children are outside of school as a safety issue. However, the due process clause of the Fourteenth Amendment "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security" (*DeShaney v Winnebago County Dept. of Social Servs.*, 489 US 189, 195 [1989]). The purpose of the clause was to "protect the people from the State, not to ensure that the State protected them from each other" (*id.* at 196). To the extent that the Parents argue that if children have cell phones they will be safer should an emergency arise in the school, we note that the Parents appear to be amenable to the Department installing lockers in which the children could store their phones during the day. This solution would obviously limit the students' ability to use their phones in that type of an emergency.

Even if we were to hold that a fundamental liberty interest is at stake, we would not apply strict scrutiny. First, we note that there is no clear precedent requiring the application of strict scrutiny to government action which infringes on parents' fundamental right to rear their children. In *Troxel*, even though

the court found that the parent's right to control visitation rights was fundamental, it did not articulate any constitutional standard of review. Indeed, Justice Thomas specifically noted the plurality's failure to do so in his concurrence (*Troxel*, 530 US at 80). Some courts have held that where parents invoke the right in an effort to change school curricula or disciplinary policy, rational basis review is appropriate, notwithstanding *Troxel* (*see Leebaert v Harrington*, 332 F3d 134, 141-142 [2d Cir 2003]; *Littlefield v Forney Independent School Dist.*, 268 F3d 275, 291 [5th Cir 2001]). Of course, this case falls somewhere in between *Troxel* and those cases, because the Parents are challenging school disciplinary policy which they allege has a disparate impact on their ability to control their children outside of school.

Nevertheless, reasonable regulations that do not "directly and substantially" interfere with a fundamental right need not be strictly scrutinized (*Lyng v Castillo*, 477 US 635, 638 [1986]; *Zablocki v Redhail*, 434 US 374, 386-387 [1978]; *see also McCurdy v Dodd*, 352 F3d 820, 827-828 [3d Cir 2003] [holding that "[i]n the context of parental liberty interests...the Due Process Clause only protects against deliberate violations of a parent's fundamental rights - that is, where the state action at issue was specifically aimed at interfering with protected aspects of the

parent-child relationship"]).

The cell phone ban does not directly and substantially interfere with any of the rights alleged by the Parents. Nothing about the cell phone policy forbids or prevents parents and their children from communicating with each other before and after school. Accordingly, the only analysis that need be applied is the rational basis test. That is, the policy will stand if it is rationally related to a legitimate goal of government (*see e.g. Reno v Flores*, 507 US 292, 303 [1993]). Here, the Chancellor reasonably determined that a ban on cell phone possession was necessary to maintain order in the schools. The goal of discipline is unquestionably a legitimate one. Accordingly, the policy withstands rational basis review and is not constitutionally infirm.

Finally, we grant leave to the Parents to appeal that part of the order denying their discovery motion. Upon review, we find that the court did not abuse its discretion in denying the Parents' motion for discovery. The court reasonably concluded that the Department's submissions in opposition to the petition sufficed to credibly support its determination to ban cell phone possession in the schools (*see Stapleton Studios v City of New York*, 7 AD3d 273 [2004]). Under the circumstances, the Parents' assertion that they were entitled to further inquire into whether

the Department was justified in its position amounted to no more than an expression of hope insufficient to warrant deferral of judgment pending discovery (*see Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [2007]).

Accordingly, the judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), entered June 18, 2007, dismissing the article 78 proceeding and action for declaratory judgment, and denying petitioners/plaintiffs' motion for discovery, should be affirmed, without costs.

All concur.

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

ENTERED: APRIL 22, 2008

CLERK