SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 30, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4906 The People of the State of New York, Respondent, Ind. 46762C/05

-against-

Rene Bonilla,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered June 14, 2007, as amended October 29, 2007, convicting defendant, after a jury trial, of murder in the second degree and attempted murder in the second degree, and sentencing him to consecutive terms of 25 years to life and 25 years, respectively, unanimously affirmed.

The court properly determined that no reasonable view of the evidence, viewed in a light most favorable to defendant, supported the submission of a charge on justification (*see People v Cox*, 92 NY2d 1002 [1998]; *People v Reynoso*, 73 NY2d 816, 818 [1988]). Defendant was convicted of attempting to kill one victim, and also killing a 10-year-old bystander. In his own

testimony, defendant, who described prior altercations with the surviving victim and claimed that this person had threatened him and his girlfriend, admitted that he carefully concealed a pistol in his clothing and went to a park to confront the victim. Although defendant maintained that he only wanted to talk to the victim and only fired his weapon when the victim moved his hand toward his waist, he admitted firing at least five shots. The evidence also established that at one point defendant straddled the victim while he lay helpless on the ground and continued to fire at him. Even under defendant's account of the incident, his claimed belief that the victim's hand motion signified imminent use of deadly force was not objectively reasonable (*see People v Goetz*, 68 NY2d 96, 105-106 [1986]; *People v Henriquez*, 233 AD2d 268 [1996], *lv denied* 89 NY2d 942 [1997]). Furthermore, the evidence demonstrated that defendant could have retreated even after the victim made the alleged hand motion, as well as that it was unreasonable for defendant to fire numerous shots. It was also an unreasonable use of force, under the circumstances presented, to fire shots in close proximity to a crowd of people, which was the circumstance that caused the death of the child.

The court also properly refused to submit the affirmative defense of extreme emotional disturbance (Penal Law § 125.25[1][a]), since, again viewing the evidence in a light most favorable to defendant, there was no reasonable view of the

evidence to support that defense. Even accepting defendant's account of the incident and his claim of being in great fear of the surviving victim, the evidence failed to establish that defendant suffered from any mental infirmity at the time of the shooting, and it also showed that he acted with a high degree of self-control that was inconsistent with the extreme emotional disturbance defense (*see People v Roche*, 98 NY2d 70 [2002]; *People v White*, 79 NY2d 900 [1992]).

Defendant was charged with the murder of the child bystander under a transferred intent theory. The court properly refused to submit manslaughter in the first degree as a lesser included offense, since there was no reasonable view of the evidence, viewed, once again, most favorably to defendant, that he merely intended to inflict serious physical injury on the surviving victim but not death. Defendant's course of conduct, even as he described it in his testimony, established that he kept firing at the victim for the purpose of killing him (*see People v Echevarria*, 17 AD3d 204 [2005], *affd* 6 NY3d 89 [2005]).

We also conclude that any error in failing to grant defendant's charge requests was harmless. Regardless of whether defendant's testimony, if credited, spelled out a justification defense, an extreme emotional disturbance defense, or a lack of homicidal intent, there is no reasonable possibility that the jury, even if instructed as defendant wished, would have credited

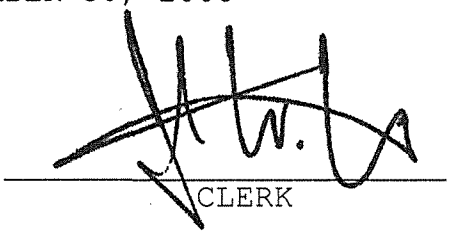
his version of the incident in the face of overwhelming prosecution evidence that the incident did not occur as defendant described it, but was in fact a premeditated ambush.

The People met their burden of establishing the legality of the consecutive sentences imposed (*see* Penal Law § 70.25[2]; *People v Rosas*, 8 NY3d 493, 496 [2007]). Although defendant's intent with respect to each act was to kill the surviving victim, he committed separate and distinct acts when he fired his first shot, which killed the child, and then fired several more shots, seriously injuring the intended victim (*see People v Azaz*, 10 NY3d 873 [2008]). Nothing in the court's instructions on transferred intent required concurrent sentences (*see People v Alvarez*, 44 AD3d 562, 565 [2007], *lv denied* 9 NY3d 1030 [2008]).

Defendant's claim that the procedure by which the court determined that he was eligible for consecutive sentences violated the principles of *Apprendi v New Jersey* (530 US 466 [2000]) is unpreserved and without merit (*see People v Lloyd*, 23 AD3d 296, 298 [2005], *lv denied* 6 NY3d 755 [2005]).

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

ENTERED: DECEMBER 30, 2008



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Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4907 All American Flooring, Ltd., Index 105901/06
Plaintiff-Appellant,

-against-

The Sirius America Insurance Co., et al.,
Defendants-Respondents.

Law Office of Joseph A. Marra, Yonkers (Vincent P. Fiore of counsel), for appellant.

Brody, O'Connor & O'Connor, Northport (Scott A. Brody of counsel), for respondent.

Judgment, Supreme Court, New York County (Louis B. York, J.), entered May 2, 2008, denying plaintiff's motion for summary judgment and granting defendants' cross motion for summary judgment declaring that defendants are not required to defend or indemnify plaintiff in an underlying personal injury action, unanimously affirmed, without costs.

The evidence shows that plaintiff's president was notified of the injured party's accident the day after it occurred, was aware that she was hurt but had refused an ambulance, and did not notify defendants of the possibility of a claim until more than six months later. This was unreasonable as a matter of law (*see DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 345-346 [2004], *lv denied* 3 NY3d 608 [2004]). Although a good-faith belief in nonliability may excuse the failure to provide timely notice (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742,

743-744 [2005]), there is no indication that plaintiff attempted to ascertain the possibility of its liability for the accident. For example, had plaintiff conducted an inquiry by contacting the injured party after the accident, it would have learned that she was bleeding and had pain in her shoulder and back after a closet door, which plaintiff's employees had removed during the course of their work in the injured party's apartment, had fallen on her back and that she subsequently went to the hospital, where she was treated for her injuries. Under the circumstances presented, there is no basis for a good-faith belief in plaintiff's nonliability (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [2008]; *York Speciality Food, Inc. v Tower Ins. Co. of N.Y.*, 47 AD3d 589 [2008]).

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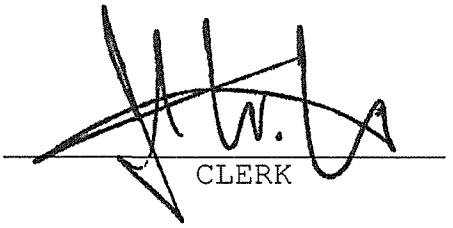
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 30, 2008



Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4908-
4908A In re H. Children,

Tanesha H.,
Petitioner-Respondent,

-against-

Phillip C.,
Respondent-Appellant.

Joseph V. Moliterno, Scarsdale, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

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

Orders, Family Court, Bronx County (Marian Shelton, J.), entered on or about July 12, 2007, declaring respondent to be the father of the subject children, unanimously affirmed, without costs.

The hearing evidence, as well as the testimony of the children received in camera, amply establishes that respondent acted and held himself out to be the children's father over a period of years, and that they perceived themselves as having had a loving family relationship with him. According due deference to the court's assessment of the conflicting testimony of the parents (*Matter of Anne R. v Estate of Francis C.*, 234 AD2d 375, 376 [1996], *lv denied* 89 NY2d 815 [1997]), we find that petitioner proved respondent's paternity by clear and convincing

evidence (*Matter of Commissioner of Social Servs. [Patricia A.] v Philip De G.*, 59 NY2d 137 [1983]). Furthermore, in viewing the matter from the perspective of the children, we conclude that it would not be in their best interests to conduct genetic marker testing in furtherance of respondent's challenge to paternity, which the court equitably estopped (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320 [2006]; *Matter of Jose F.R. v Reina C.A.*, 46 AD3d 564 [2007]). Although the court should have reduced its decision to writing at the time (Family Ct Act § 418[a]), its reasoning must have been clear to respondent from the explicit fact-finding on the record.

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

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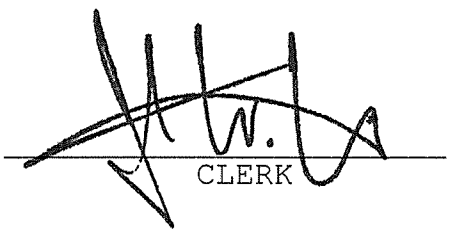


Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4909 Sislyn Benjamin, Index 102211/06
Plaintiff-Appellant,

-against-

New York City Department of Health,
Defendant-Respondent.

Noah A. Kinigstein, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 29, 2007, which, in an action for employment discrimination based on national origin and a shoulder injury disability, and a retaliatory firing, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

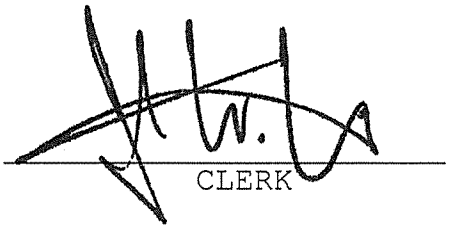
The action is precluded by plaintiff's prior filing with the New York City Commission on Human Rights (Executive Law § 297[9]; Administrative Code of City of NY § 8-502[a]). The Commission conducted an investigation and determined that there was no discrimination based on skin color, stress, gastric disorders or a peptic ulcer, and that the disciplinary action taken against plaintiff was based on substandard job performance. Although plaintiff's Commission filing did not claim, as plaintiff does here, discrimination based on national origin and a shoulder injury, the instant claims are based on the same continuing allegedly discriminatory underlying conduct asserted in the

Commission proceedings, and thus the statutory election of remedies applies (*see Bhagalia v State of New York*, 228 AD2d 882, 883 [1996]). Similarly, while plaintiff contends that she did not and could not have asserted a retaliatory firing claim before the Commission because she was not fired until after she had filed her complaint with the Commission, the Commission did investigate her claims of retaliatory discipline and found them without merit. The retaliatory firing alleged herein was simply the culmination of the disciplinary process that the Commission found to have been based on substandard work performance (*see Spoon v American Agriculturalist*, 103 AD2d 929 [1984]). Moreover, a prior state court action containing the same claims as those herein was discontinued with prejudice by stipulation of the parties. There being nothing ambiguous about the stipulation, matters extrinsic to it may not be considered (*see Aivaliotis v Continental Broker-Dealer Corp.*, 30 AD3d 446, 447 [2006]), and its res judicata effect is the same as a judgment on the merits (*see Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292 [2005]). Accordingly, to the extent plaintiff's claims are not

barred by the Commission filing, they were waived under the stipulation.

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

ENTERED: DECEMBER 30, 2008



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Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4910 The People of the State of New York, Ind. 4748/02
Respondent,

-against-

Shamar Holloway,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered July 2, 2003, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 6 to 12 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY2d 342, 349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's identity was confirmed by the recovery of prerecorded buy money from his pocket upon his arrest, and defendant's argument that the evidence raises doubts about whether such a recovery was ever made is unpersuasive.

After a thorough inquiry, the court properly discharged, as grossly unqualified, a juror who informed the court that he had observed the three police witnesses at lunch together, had seen

one of the officers holding a photocopy of the prerecorded buy money, and thought that the officer had lied when he testified that he had not spoken to the other witnesses about the case during lunch. The juror not only formed a premature opinion in a manner that would prevent him from serving as a fair and impartial juror (*see People v Rosado*, 53 AD3d 455, 457 [2008]), but did so on the basis of information that, although collateral (as discussed below), was not in evidence.

The court properly exercised its discretion in denying the defense request to call the discharged juror, and to recall one of the officers, to testify about the lunchtime incident. This testimony would have had nothing to do with the crimes charged, but would have instead constituted extrinsic evidence on a collateral matter, introduced for the sole purpose of impeaching credibility (*see People v Pavao*, 59 NY2d 282, 288-289 [1983]). Defendant's theory under which this testimony would allegedly fall outside the collateral matter rule is speculative. Moreover, the court did permit the defense to recall the officer who had been seen holding the copy of the buy money during lunch. That officer provided an innocuous explanation for the lunchtime incident, and there is no reason to believe that testimony by the juror or further testimony by the other officer would have affected the verdict.

Defendant's claim that he was constitutionally entitled to

call the juror or recall the other officer is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). Finally, any error in these rulings was harmless under the standards for both constitutional and nonconstitutional error.

The court properly permitted the prosecution to introduce $188 recovered from defendant's pocket that was not prerecorded buy money. Since defendant was charged on an accomplice theory with two additional sales, the money was admissible as evidence tending to prove that he was a participant in a drug-selling operation with his companions (*see People v Valentine*, 7 AD3d 275 [2004], *lv denied*, 3 NY3d 682 [2004]).

We perceive no basis for reducing the sentence.

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

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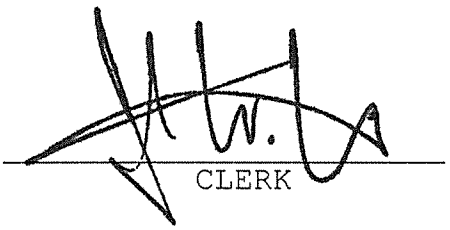

Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4911 Fada International Corp., Index 603640/06
Plaintiff-Appellant,

-against-

Rowena Cheung, et al.,
Defendants-Respondents.

Carabba Locke LLP, New York (Steven I. Locke of counsel), for appellant.

Kauff McClain & McGuire LLP, New York (J. Patrick Butler of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 5, 2007, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff does not allege that its former employee, defendant Cheung, stole its customer list or any confidential information. Rather, it maintains that the use of its client contact information, of which Cheung was aware from her 20 years on the job, to solicit business for her new company constituted a misappropriation of confidential information. Defendants did not steal the information, and since plaintiff's "customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products," the trade secret protection does not attach (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 [1972]). In the absence

of a restrictive covenant, the nondisclosure agreement requiring that customer lists not be revealed cannot be interpreted as a noncompete agreement that protects plaintiff's goodwill.

The additional causes of action, for unfair competition and breach of contract, were duplicative of the causes for misappropriation of confidential information and goodwill. The final cause of action, for breach of the duty of loyalty, was also properly dismissed since there is no claim that defendants used plaintiff's time, facilities or proprietary secrets in setting up their new business (*Reed & Co. v Irvine Realty Group*, 281 AD2d 352 [2001], *lv denied* 96 NY2d 720 [2001]).

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

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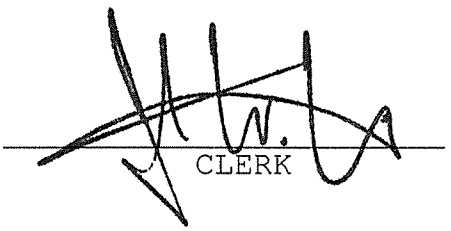

Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4912 Vanessa C. David, Index 112791/05
Petitioner-Appellant,

-against-

New York City Commission on
Human Rights, et al.,
Respondents-Respondents.

Bailey & Sherman, P.C., Douglaston (Edward G. Bailey of counsel), for appellant.

Clifford Mulqueen, New York, for New York City Commission on Human Rights, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for New York City Department of Education and Frank Borrowiec, respondents.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered May 29, 2007, which, insofar as appealed from as limited by the briefs, denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to annul the determination of respondent New York City Commission on Human Rights (HRC), dated August 9, 2005, affirming HRC's determination and order after investigation, finding no probable cause to believe that petitioner was discriminated against by her employer, respondent Department of Education, and to convert the proceeding into a plenary action, unanimously affirmed, without costs.

HRC's determination had a rational basis and was not arbitrary and capricious (*see Matter of McFarland v New York*

State Div. of Human Rights, 241 AD2d 108, 111-112 [1998]). Notwithstanding petitioner's concern with HRC's alleged predisposition, the record establishes that HRC conducted a sufficient investigation, including interviewing over 20 witnesses, that was not "abbreviated or one sided" into her claims of discrimination on the basis of race, color, gender and sexual orientation (*Matter of Levin v New York City Commn. on Human Rights*, 12 AD3d 328, 329 [2004]). Nor is there evidence that HRC was biased against petitioner.

In light of the foregoing, petitioner's request to convert this proceeding into a plenary action (CPLR 103[c]) has been rendered academic.

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

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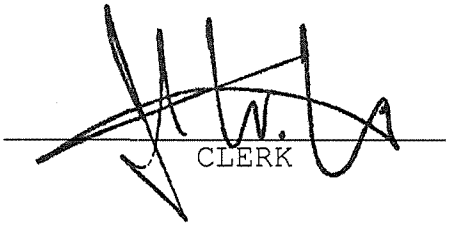


Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4913 The People of the State of New York, Respondent, Ind. 2587/06

-against-

Eric Cruz, also known as Kenneth Lightly, Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Edward M. Davidowitz, J.), rendered on or about June 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.

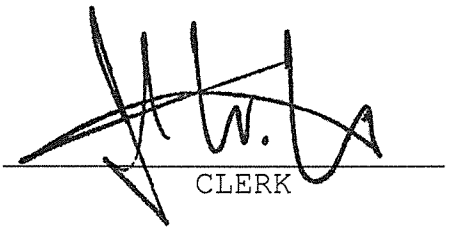
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: DECEMBER 30, 2008



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Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4914 New York Foundation for Senior Citizens, Inc., et al., Petitioners-Respondents, Index 111987/07

-against-

Norman Mactas Ackerman, Respondent-Appellant.

Norman Mactas Ackerman, appellant pro se.

Kellner Herlihy Getty & Friedman, LLP, New York (Carol Anne Herlihy of counsel), for respondents.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about May 30, 2008, terminating respondent's participation and discharging him from the Enriched Housing Program, evicting him and awarding possession of the premises to petitioner landlord, and directing respondent to pay petitioner Foundation the principal sum of $19,000, unanimously affirmed, without costs.

Respondent knowingly and expressly accepted a stipulation settling petitioners' claims and his counterclaims. This stipulation, which fully resolved issues as to the validity of the fees allegedly unpaid by respondent and the contentions underlying his counterclaims, called for him to apply for a grant from a government agency and seek to relocate. After a hearing at which respondent was allowed to cross-examine petitioners'

sworn witness while offering his own unsworn fact testimony and the comments of his family, it was properly determined that he had not fulfilled his obligations under the stipulation.

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

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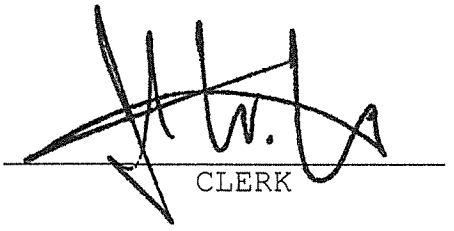

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Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4916 Patrick Direnna, Index 113039/07
Plaintiff-Respondent,

-against-

Paul P. Christensen,
Defendant-Appellant.

David E. Frazer, New York, for appellant.

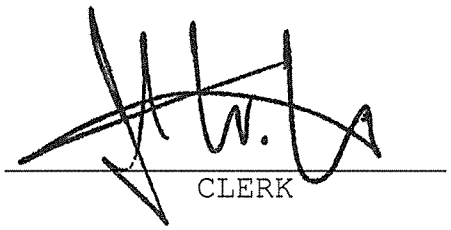
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 14, 2008, which, in an action alleging unlawful rent overcharges, denied defendant's motion pursuant to CPLR 3211(a)(5) to dismiss the amended complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the amended complaint.

Plaintiff subtenant's action is time-barred since the first overcharge alleged by him occurred in April 2003 and this action was not commenced until September 2007 (*see Mozes v Shanaman*, 21 AD3d 854 [2005], *lv denied* 6 NY3d 715 [2006]; CPLR 213-a). Plaintiff may not avoid the applicable four-year statute of limitations by amending his complaint to withdraw his claim for

earlier months of rent overcharge (*see e.g. Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 87-88 [2008]; *Bones v Prudential Fin., Inc.*, 54 AD3d 589 [2008]).

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

ENTERED: DECEMBER 30, 2008



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Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4917 The People of the State of New York, Ind. 93/06
Respondent,

-against-

Renee Thompson,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Joseph Fisch, J.), rendered on or about August 10, 2006, 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.

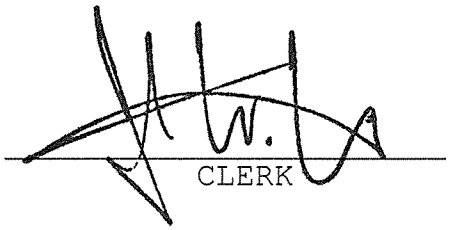
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: DECEMBER 30, 2008



Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4918 Rebecca King Kaplan, etc., Index 7009/00
Plaintiff-Appellant,

-against-

Robin B. Karpfen, M.D., et al.,
Defendants-Respondents.

Napoli Bern Ripka, LLP, New York (Denise A. Rubin of counsel), for appellant.

Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Robin B. Karpfen, M.D. and Middletown OBS-GYN Assoc., P.C., respondents.

Anthony Sammartano, White Plains, for Satish Kumar Rohatgi, M.D., respondent.

O'Connor, McGuinness, Conte, Doyle & Oleson, White Plains (Montgomery L. Effinger of counsel), for Horton Hospital, respondent.

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered August 13, 2007, which, to the extent appealed from as limited by the briefs, granted the motions of defendants Satish Kumar Rohatgi, M.D., and Horton Hospital for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiffs failed to raise a triable issue of fact in opposition to defendants' demonstration of their entitlement to summary judgment. Their experts' opinions that the infant plaintiff suffered traumatic brain injury either during birth or shortly thereafter were conclusory and speculative (*see Alvarez v*

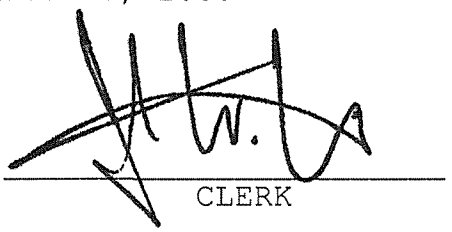
Prospect Hosp., 68 NY2d 320, 324-325 [1986]; *Bullard v St. Barnabas Hosp.*, 27 AD3d 206 [2006]). While these opinions were based in large part on the presence of a cephalohematoma noted a few days after the birth, none of plaintiffs' experts contested the assertions of defendants' experts that this injury, and the others noted, including a broken clavicle, were superficial, were a normal consequence of an uncomplicated birth, and did not indicate brain damage. Nor did they explain except in conclusory terms how or when the alleged traumatic brain injury occurred, the causal relationship between the injury and plaintiff's present behavioral problems, or the standard of care that defendants violated.

Plaintiffs' psychologist and psychiatrist failed to demonstrate that they possessed sufficient knowledge or expertise to testify outside their specialties as to either the existence and cause of plaintiff's alleged brain injury or defendants' alleged deviation from the accepted standard of care for

pediatricians or obstetricians and gynecologists (*see Romano v Stanley*, 90 NY2d 444, 451-452 [1997]; *Browder v New York City Health and Hosps. Corp.*, 37 AD3d 375 [2007]).

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

ENTERED: DECEMBER 30, 2008



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Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4919 The People of the State of New York, Ind. 6344/04
Respondent,

-against-

Willie Richardson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 5, 2006, convicting defendant, after a jury trial, of assault in the first degree (two counts) and gang assault in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 18 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Contrary to defendant's argument, we find that the evidence supporting the element of serious physical injury was overwhelming. Furthermore, the court properly declined to charge second-degree assault as a lesser included offense because there is no reasonable view of the evidence, viewed in a light most favorable to defendant, that would support a finding that he only caused physical injury. In addition to abdominal injuries that could

readily be inferred by a jury to have been life-threatening, the victim sustained prominent and disfiguring scars on his face and head, which, standing alone, constituted serious physical injury (*see* Penal Law § 10.00[10]), and there was no reasonable view that they only amounted to physical injury (*see People v Vasquez*, 25 AD3d 465 [2006], *lv denied* 6 NY3d 854 [2006]; *People v Lawrence*, 256 AD2d 358 [1998], *lv denied* 93 NY2d 973 [1999]). The record clearly reflects that the victim showed these scars to the jury, and defendant's argument to the contrary is without merit.

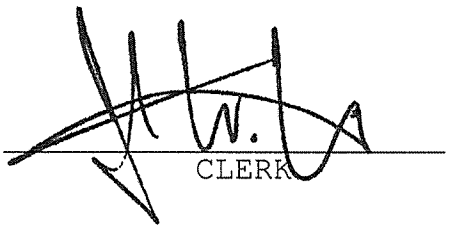
The court properly permitted the jointly tried codefendant, over defendant's objection, to establish that the victim told an interviewing prosecutor that the codefendant sold drugs for defendant, but that the victim had never seen defendant supply the codefendant with drugs. We need not decide the extent, if any, that the principles of *People v Molineux* (168 NY 264 [1901]) apply to uncharged crimes evidence elicited not by the prosecution, but by a codefendant, or address the circumstances under which one defendant may elicit evidence damaging to another where no pretrial severance motion has been made (*see People v McGee*, 68 NY2d 328, 333-334 [1986]), because the brief and limited testimony could not have caused defendant any prejudice. At most, this evidence tended to show that the victim had made an unsupported accusation against defendant, thereby evincing

arguable bias and lack of credibility. Furthermore, any error in receipt of this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's constitutional claim, and his claim that the court should have provided a limiting instruction, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 30, 2008



Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4920-
4920A-
4920B Continental Casualty Company, et al., Plaintiffs-Appellants, Index 120016/03

-against-

PricewaterhouseCoopers, LLP, Defendant-Respondent.

- - - - -

Eagle Partners, L.P., et al., Plaintiffs-Appellants, 121132/03

-against-

PricewaterhouseCoopers, LLP, Defendant-Respondent.

- - - - -

Jeremy M. Jones, et al., Plaintiffs-Appellants, 602962/03

-against-

PricewaterhouseCoopers, LLP, Defendant-Respondent.

Pachulski Stang Ziehl & Jones LLP, New York (Dean A. Ziehl of counsel), for appellants.

Orrick, Herrington & Sutcliffe LLP, New York (J. Peter Coll, Jr. of counsel), for respondent.

Judgments, Supreme Court, New York County (Karla Moskowitz, J.), entered January 7, 2008, dismissing the actions pursuant to an order, same court and Justice, entered November 9, 2007, which granted defendant's motion for summary judgment, unanimously affirmed, with costs. Appeal from above order unanimously dismissed, without costs, as subsumed in the consolidated appeal

from the judgments.

Even if plaintiff limited partners' claims of fraudulent inducement are sufficient, as a legal matter, to support a direct claim against the partnership's auditor (*see e.g. Kaufmann v Delafield*, 224 App Div 29 [1928]), they failed to submit evidence to raise an issue of fact in opposition to defendant's prima facie showing that the damages claimed all emanated from losses that took place after the initial investment, did not affect plaintiffs differently from other limited partners, and were therefore derivative (*see generally Abrams v Donati*, 66 NY2d 951 [1985]; *see also Gentile v Rossette*, 906 A2d 91, 99 [Del 2006] [claims of corporate overpayment]).

In view of the foregoing, it is unnecessary to address appellants' other contentions.

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

ENTERED: DECEMBER 30, 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 December 30, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Luis A. Gonzalez
Eugene Nardelli
John T. Buckley
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 511/03
Respondent,

-against- 4921

Harry Vallevaleix,
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 (Marcy L. Kahn, J.), rendered on or about June 8, 2007,

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

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

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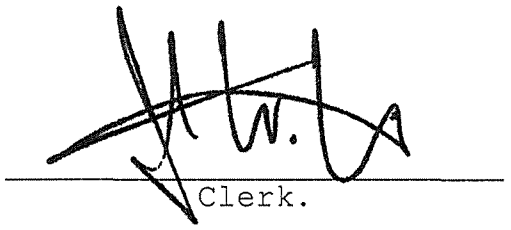


Clerk.

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

Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4922 Jeffrey Ritzer, Index 112308/05
Plaintiff-Appellant,

-against-

6 East 43rd Street Corp., et al.,
Defendants-Respondents.

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

Goldberg Segalla LLP, White Plains (William G. Kelly of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 4, 2007, which denied plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) and § 241(6), unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff was injured when he fell from a scaffold. In order to defeat summary judgment, defendants had to establish that plaintiff had adequate safety devices available, that he was aware of that availability and the expectation that he would use them, that for no good reason he chose not to, and that had he not made that choice he would not have been injured (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [2008]). Defendants have not offered an alternative theory as to the cause of injury. They have not alleged or demonstrated that plaintiff was solely responsible for his own injuries or was furnished with

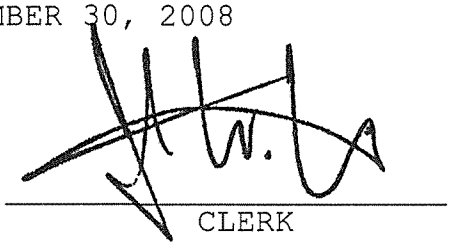
protective devices, or that the scaffold had safety rails or a locking mechanism free of defects to prevent the apparatus from slipping. All they have offered is speculation that the accident might have occurred in some other manner (*see Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [2008]). In short, plaintiff was subjected to an elevation-related risk while working, and the failure to provide him with adequate safety devices was a proximate cause of his injuries (*see Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 978 [2003]). Without a genuine question of fact, plaintiff is entitled to the protection of Labor Law § 240(1) as a matter of law.

As for the cause of action predicated on Industrial Code (12 NYCRR) § 23-5.18(b) and (e), mandating that manually propelled, mobile scaffolds be equipped with a safety railing and properly designed casters, this regulation is sufficiently specific to support a claim under § 241(6) (*see Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 281 [2005]). It is undisputed that the scaffold had no safety railings and was equipped with only two locking devices for the four wheels of the scaffold. Since defendants never raised a triable question of fact as to plaintiff's prima facie

showing under 12 NYCRR 23-5.18, plaintiff should also have been afforded partial summary judgment on his claim under § 241(6).

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

ENTERED: DECEMBER 30, 2008



CLERK

Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4923 Monique Concool Mendelson, Index 110581/96
Plaintiff-Appellant,

-against-

Empire Associates Realty Co. Assn., etc.,
Defendant-Respondent.

Stephen W. Edwards, Brooklyn, for appellant.

Reena Malhotra, New York, for respondent.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered August 8, 2007, insofar as it granted so much of defendant's cross motion as sought to amend a prior judgment to limit prejudgment interest to the period from March 20, 1991 to October 2, 2001, unanimously affirmed, and the appeal from that part of the order denying plaintiff's motion to "clarify" a prior order, unanimously dismissed, without costs.

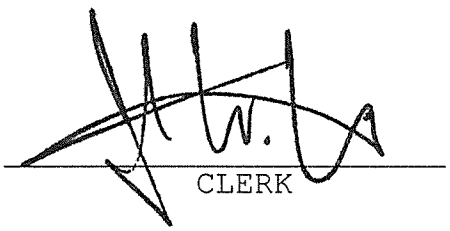
Plaintiff's motion to "clarify" is properly deemed one to reargue, the denial of which is not appealable. Were we to consider the merits, we would affirm on the same grounds as we affirm the balance of the order on appeal.

In a prior order (278 AD2d 40), we affirmed the striking of an award of treble damages, but also agreed not to vacate the award of interest to plaintiff. In the present appeal, we consider whether the court improvidently limited the amount of prejudgment interest plaintiff could recover due to delay in

entering the corrected judgment, namely, to the period between the date of the DHCR rent overcharge award and the entry date of the order awarding that interest. It was incumbent upon plaintiff, and in her interest as prevailing party in the action to enforce the DHCR award, to enter a corrected judgment as soon as possible in order to enforce and collect upon it. The court was thus warranted in limiting the amount of prejudgment interest plaintiff could recover because of her inordinate delay in entering the corrected judgment (*see Peerless Ins. Co. v Casey*, 194 AD2d 411 [1993]; *see also Jackson v Brook*, 227 AD2d 381 [1996]).

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

ENTERED: DECEMBER 30, 2008



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Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4924N Stuart L. Melnick, et al., Plaintiffs-Appellants, Index 109218/07

-against-

Fred Khoroushi, et al., Defendants-Respondents,

Heidi Liebowitz, Defendant.

Law Offices of Stuart L. Melnick, LLC, New York (Stuart L. Melnick of counsel), appellants pro se.

Friedman, Harfenist, Kraut & Perlstein LLP, Lake Success (Steven J. Harfenist of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 18, 2008, which denied plaintiffs' motion to vacate a default judgment that had affirmed an arbitration award directing plaintiffs to refund $12,000 in legal fees to defendants, unanimously affirmed, with costs. Sanction for frivolous prosecution of this appeal (22 NYCRR 130-1.1) imposed on plaintiffs for $3,500. The Clerk of Supreme Court, New York County directed to enter judgment payable in that amount to Lawyers' Fund for Client Protection, and the matter remanded for determination of reasonable attorney fees incurred in responding to this appeal, to be payable by plaintiffs to defendants Khoroushi and Alpine Armoring.

A default is considered intentional when a party takes no steps to vacate it until after judgment has been entered against

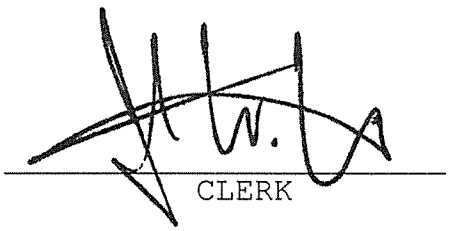
him (*see Roussodimou v Zafiriadis*, 238 AD2d 568, 569 [1997]). Despite having been afforded ample opportunity to avoid the entry of default judgment, plaintiffs failed to demonstrate either a reasonable excuse for their default or a meritorious defense to the counterclaims asserted by defendants (*see Granibras Granitos Brasileiros, Ltda. v Farber*, 34 AD3d 230 [2006]).

Under the circumstances, this appeal is frivolous. Sanctions should be imposed, and the responding defendants should be reimbursed for their reasonable expenses and attorney fees incurred on this appeal (*see Tsabbar v Auld*, 26 AD3d 233 [2006]).

We have considered plaintiffs' remaining arguments and find them without merit.

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

ENTERED: DECEMBER 30, 2008



CLERK

Lippman, P.J., Gonzalez, Nardelli, Buckley, Acosta, JJ.

4925N- 542 Holding Corp., Index 105673/05
Plaintiff-Respondent,

-against-

Prince Fashions, Inc., et al.,
Defendants-Appellants,

Foravi, Inc., et al.,
Defendants.

- - - - -

4926N Prince Fashions, Inc., 120149/02
Plaintiff-Appellant,

-against,

542 Holding Corp.,
Defendant-Respondent.

Herrick, Feinstein LLP, New York (John P. Sheridan of counsel), for appellants.

Robinson & McDonald LLP, New York (K. Ann McDonald of counsel), for respondent.

Orders, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 12, 2007, and June 13, 2007, which, after a hearing, granted the motions of 542 Holding Corp. (the Co-op) for injunctive relief and ordered Prince Fashions, Inc., inter alia, to comply with its prior orders concerning access to the leased premises, to cease using hazardous materials such as spray paint in the basement, and to remove a portable staircase and partitions installed in the basement and restore the premises to their previous condition, and awarded the Co-op reasonable expenses for the repair of damaged property and costs, including

reasonable attorney's fees, in an amount to be determined by a special referee, unanimously modified, on the law and the facts, to vacate the portions of the orders that directed Prince to remove the staircase, partitions and any other installations that do not comply with applicable laws and restore the premises and the portion of the orders that granted the Co-op its reasonable expenses for the repair of damaged property, costs and reasonable attorney's fees, and otherwise affirmed, without costs.

The Co-op demonstrated its entitlement to a preliminary injunction to preserve the property pending disposition of the ejectment action (*see Olympic Tower Condominium v Cocoziello*, 306 AD2d 159 [2003]). Contrary to Prince's contention, there was ample evidence that it was using the unventilated basement space for spray-painting furniture, that fumes therefrom permeated the building, causing discomfort to the residents, and that the use of the basement for that purpose was not permitted under the building's certificate of occupancy. There was also evidence that the use of spray-painting materials could be hazardous. Prince did not claim that it would be harmed if it were enjoined from using the basement for such purposes.

The court's finding that the so-ordered stipulation concerning the Co-op's access to the leased premises was so ambiguous that it had to be read carefully "about 150 times" to be understood would have precluded a finding that Prince's

insistence on 24 hours' advance notice except in case of emergency constituted willful defiance of the order. However, the court's interpretation of the so-ordered stipulation to mean that 24 hours' notice was not required when access was sought during business hours was reasonable and its directive to Prince to comply with the order as so clarified, and to maintain a key on the premises, was proper.

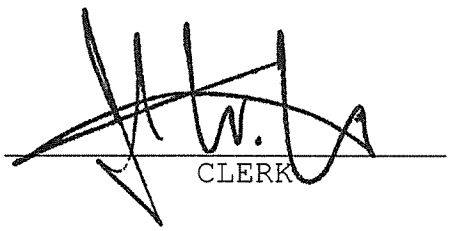
The Co-op failed to demonstrate extraordinary circumstances warranting the grant of a mandatory injunction requiring Prince to remove its nonstructural alterations and restore the premises to their previous condition (*see St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 349 [2003]). Prince showed that its lease allowed it to make nonstructural alterations necessary for its use of the premises (*see Harar Realty Corp. v Michlin & Hill*, 86 AD2d 182, 185-187 [1982], *lv dismissed* 57 NY2d 607 [1982]). The testimony of the Co-op's expert, who had not inspected the premises and speculated as to a possible violation of applicable codes created by the partitions, did not support a finding that the partitions posed a risk of irreparable injury. Nor did the record support the award of expenses for the repair of damaged property, which were not sought in the pleadings or motions.

The award of costs and attorney's fees to the Co-op was improper (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69

NY2d 1, 5 [1986]). While the court stated that the award was for the Co-op's "having to spend . . . a year[] to get to this point," it made no finding that Prince had engaged in frivolous conduct (*see* 22 NYCRR 130-1.1).

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

ENTERED: DECEMBER 30, 2008



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

656N Helmsley-Spear, Inc., et al., Index 102590/06
Plaintiffs-Respondents,

-against-

Michael Fishman as President of SEIU, etc., et al.,
Defendants-Appellants.

Levy Ratner, P.C., New York (Daniel Engelstein of counsel), for appellants.

McCarter & English, LLP, New York (Peter D. Stergios of counsel), for respondents.

Upon remittitur from the Court of Appeals for consideration of issues raised but not determined on the appeal to this Court, the order of the Supreme Court, New York County (Martin Shulman, J.), entered April 13, 2006, which granted plaintiffs' motion for a preliminary injunction against defendants continuing their "banging racket" outside the Empire State Building, unanimously affirmed, without costs.

Initially, we find that plaintiffs made out a cause of action for private nuisance. The Court of Appeals decision on November 24, 2008 was premised on the fact that the complaint alleged a cause of action for private nuisance. This is made clear in the opening sentences of the decision: "The issue on this appeal is whether *plaintiffs' private nuisance cause of action* is preempted by the National Labor Relations Act (NLRA). We hold that it is not" (__ NY3d __, 2008 NY Slip Op 9246, *1

[emphasis added]). The Court, in discussing whether federal law preempted plaintiffs' action, also held: "The tort of *private nuisance*, much like the tort of trespass, has historically been governed by state law" (Slip Op at 4 [emphasis added]). There are other references, both explicit and implicit, which show that the Court of Appeals viewed this cause of action for private nuisance to be viable and sustainable. We further hold that the present action does not concern a "labor dispute" as that term is defined in Labor Law § 807(10)(c):

> The term "labor dispute" includes any controversy concerning terms or conditions or employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.

As between the parties to this litigation, none of the elements that go into defining "labor dispute" are present. The issues as between these parties are litigated against the backdrop of a genuine labor dispute taking place between defendants here and nonparty Copstat Security, LLC, but are not, in and of themselves, part of that dispute.

Indeed, the Court of Appeals recognized that tort actions generally fall outside the ambit of labor disputes. Citing *Sears, Roebuck & Co. v San Diego County Dist. Council of*

Carpenters, (436 US 180, 205 [1978]), where the issue involved the tort of trespass, the Court of Appeals held, "Just as trespass, as found in *Sears*, 'is far more likely to be unprotected than protected" under the NLRA, "so, too, is the tort of private nuisance (Slip Op at 4)." In such cases, in order for § 807 to come into play, the party must be a person or association "participating or interested in a labor dispute," i.e., a party or association against whom "relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation" (807[10][b]). Regarding § 807(10)(c), plaintiffs, who are building owners and unrelated businesses, do not even arguably fall into any of those categories that would make them either participants or parties interested in a labor dispute as defined by statute.

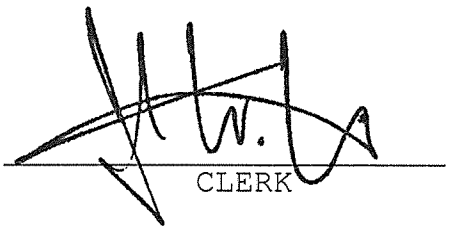
Plaintiffs have alleged and sustained an independent tort. The complaint alleges defendants' drum banging was unreasonably disruptive and constituted a private nuisance. The motion court logically found, inter alia, that the banging "adversely affected productivity, efficiency and morale of On Location and Northpoint employees situated directly opposite the [Empire State Building]; that greater injury will be inflicted upon plaintiffs by the

denial of the preliminary injunction than will be inflicted upon union defendants by the granting thereof"; and that enjoining "the banging racket will not directly or indirectly foreclose the Union from its organizing activities and getting its message across to Helmsley, Copstat, ESB tenants, ESB visitors or anyone else willing to listen." The injunction, moreover, only enjoined the continuation of the drum banging; it did not, in any way, limit defendants' ability to continue their picketing, leaflet distribution or holding a rally, which in fact was held.

As plaintiffs are neither participating nor interested in the labor dispute between defendants and Copstat, and as the action before us does not constitute a labor dispute, Labor Law 807 simply does not apply. The motion court, therefore, properly issued the injunction.

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

ENTERED: DECEMBER 30, 2008



Mazzarelli, J.P., Friedman, Nardelli, Williams, Freedman, JJ.

4241-
4242 Colin Fraser, et al., Index 113586/02
Plaintiffs-Appellants,

-against-

301-52 Townhouse Corp., et al.
Defendants-Respondents.

Jaroslawicz & Jaros, LLC, New York (Robert J. Tolchin of counsel), for appellants.

Schechter & Brucker, P.C., New York (Thomas V. Juneau, Jr. of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 9, 2007, which granted plaintiffs' motion for reargument and renewal of a prior order, same court and Justice, entered October 5, 2006, which, after a *Frye* hearing, granted defendants' motion to preclude plaintiffs from offering certain expert evidence at trial and granted defendants summary judgment dismissing plaintiffs' causes of action based on personal injury, and, upon reargument and renewal, adhered to the original determination, affirmed, without costs. Appeal from the aforesaid order entered October 5, 2006, unanimously dismissed, as academic, without costs.

Plaintiffs, former residents of a unit in the cooperative apartment building owned by defendant 301-52 Townhouse Corp., assert causes of action against defendants for, inter alia, personal injuries (specifically, respiratory problems, rash and

fatigue) allegedly caused by dampness in the building and the mold infestations that allegedly resulted from such dampness. Upon defendants' motion seeking summary judgment and preclusion of plaintiffs' expert evidence purporting to establish that the building's alleged dampness and mold condition caused their health problems, the motion court directed that a *Frye* hearing be held to determine whether plaintiffs' causation theory was generally accepted as reliable within the relevant scientific community. After the *Frye* hearing, the court granted defendants' motion, precluding the expert evidence and dismissing the personal injury claims (other causes of action were severed for further proceedings). The court subsequently granted plaintiffs reargument and renewal, and, upon reargument and renewal, adhered to the prior determination. We now affirm.

Contrary to the dissent's contention, defendants' experts did deny that it is generally accepted within the scientific community that it has been established that indoor dampness and mold "cause" health problems like plaintiffs'. While there is general agreement that indoor dampness and mold are "associated" with upper respiratory complaints, defendants' experts took the position, consistent with the literature they submitted, that the observed association between such conditions and such ailments is not strong enough to constitute evidence of a causal

relationship.[1] In other words, "*'association' is not equivalent to 'causation'*" (Green, Freedman & Gordis, Reference Guide on Epidemiology, in Federal Judicial Center, *Reference Manual on Scientific Evidence*, at 336 [2d ed 2000] [emphasis in original]; *see also id.* at 348 ["Although a causal relationship is one possible explanation for an observed association between an exposure (to an agent) and a disease, an association does not necessarily mean that there is a cause-effect relationship"]). In this regard, even plaintiffs' main expert, Dr. Eckardt Johanning, testified that "association" is not the same concept as "causation." Given that plaintiff failed to demonstrate general acceptance of the notion that a causal relationship has been demonstrated between the conditions and ailments in question, Dr. Johanning's claim to have established causation in this case by means of "differential diagnosis" is unavailing (*see Marso v Novak*, 42 AD3d 377, 378 [2007] [expert's opinion as to causation, at which he arrived through differential diagnosis, was not admissible where the resulting conclusion was not

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[1]For example, a review of the relevant scientific literature published by the Institute of Medicine of the National Academies, *Damp Indoor Spaces and Health* (National Academies Press 2004), concluded that there was "sufficient evidence of an association" between upper respiratory (nasal and throat) tract symptoms, on the one hand, and damp indoor environments and the presence of mold, on the other hand, but found that it could *not* be said that there was "sufficient evidence of a causal relationship" between any set of health outcomes and such conditions (*id.* at 253-254 [Tables 5-12 and 5-13]).

accepted in the medical community]; *see also Lara v New York City Health & Hosps. Corp.*, 305 AD2d 106 [2003] [affirming preclusion of expert testimony that "relied solely on a theory . . . neither recognized nor accepted" in the medical community]). Thus, on the record presented to us, plaintiffs have failed to meet their burden of establishing general acceptance of the theory on which the specific claims at issue are based. We note that whether plaintiffs' theory of causation is scrutinized under the *Frye* inquiry applicable to novel scientific evidence (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 446-447 [2006]) or under the general foundational inquiry applicable to all evidence (*see id.* at 447), the conclusion is the same: the proffered expert evidence must be precluded on the ground that the underlying causal theory lacks support in the scientific literature placed before us in the present record. We stress that our holding does not set forth any general rule that dampness and mold can never be considered the cause of a disease, only that such causation has not been demonstrated by the evidence presented by plaintiffs here.

Nothing said here "set[s] an insurmountable standard" (*Parker*, 7 NY3d at 447) for the reception of scientific evidence. In particular, we disclaim the suggestion attributed to us by the dissent that "*Frye* requires that the medical literature conclusively establish that an allegedly offending substance not only have the potential to cause illness but that it *always*

causes illness" (emphasis in original). To be clear, the deficiency of plaintiffs' expert evidence is not that the medical literature fails to "conclusively establish" their causal theory or to show that indoor dampness and mold "*always* cause[] illness."[2] Rather, plaintiffs' expert evidence falls short because *none* of the medical literature in the record supports the stated position of plaintiffs' expert that the observed association between damp or moldy indoor environments and upper respiratory symptoms is strong enough to be considered, under generally accepted principles of scientific analysis, evidence that the former causes the latter. Aside from referencing two studies that Dr. Johanning mischaracterized as demonstrating a causal link, the dissent does not identify any study concluding that indoor dampness and mold have been shown to cause upper respiratory symptoms such as plaintiffs'.[3] Without any warrant

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[2]Obviously, there is no rule that a jury may hear only theories that are either "conclusively establish[ed]" by the scientific literature or unanimously supported by the scientific authorities. Further, we do not suggest, nor did the motion court suggest, that a substance cannot be considered the cause of a health outcome unless the substance "always" causes that health outcome.

[3]Contrary to Dr. Johanning's assertion, neither of the two studies referenced in the first excerpt from his opposition affidavit quoted by the dissent reached the conclusion that a causal relationship has been demonstrated between indoor dampness and mold and the upper respiratory symptoms of which plaintiffs complain. The first study referenced in the excerpt from Dr. Johanning's affidavit (Cox-Ganser, et al., *Respiratory Morbidity in Office Workers in a Water-Damaged Building*, 113 Environmental Health Perspectives 485 [2005]) concluded only that "[o]ccupancy

in the scientific literature in the record, the dissent, like Dr. Johanning, simply asserts that "the 'association' between building dampness and illness is one of causation," thereby conflating the distinct concepts of association and causation.[4]

Even if it is assumed that plaintiffs' experts established the general acceptance of their view that indoor dampness and mold is capable of causing plaintiffs' health problems (general causation), the experts failed to specify the threshold level of exposure to dampness or mold needed to produce these effects. Without evidence that they were exposed to a level of dampness or mold sufficient to cause their alleged injuries (specific causation), plaintiffs cannot prevail on their personal injury

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of the water-damaged building was *associated* with onset and exacerbation of respiratory conditions" (*id.* at 485 [emphasis added]). The authors of *Respiratory Morbidity* acknowledged that the "major limitation" of the study, which was based on voluntary responses to a questionnaire, was "the possible influence of participation bias" (*id.* at 490). The other study referenced in the quoted excerpt from Dr. Johanning's affidavit (Jaakkola, et al., *Home Dampness and Molds, Parental Atopy, and Asthma in Childhood: A Six-Year Population-Based Cohort Study*, 113 Environmental Health Perspectives 357 [2005]) focused on risk factors for the development of childhood asthma, and is therefore of little relevance to this case, which does not involve a child suffering from asthma.

[4]We have no argument with the dissent's statement that "'[a]ssociation' . . . is a continuum . . . span[ning] from . . . coincidence . . . to . . . causation." This observation is of little help to plaintiffs, however, because the dissent points to nothing in the record, other than Dr. Johanning's unsupported assertions, that justifies the conclusion that the observed association between the conditions and ailments in question is strong enough to constitute evidence of causation.

claims (*see Parker*, 7 NY3d at 448 [plaintiff must show not only exposure to the toxin and that the toxin is capable of causing the particular illness alleged, i.e., general causation, but also that plaintiff was exposed to sufficient levels of the toxin to cause the illness, i.e., specific causation]). It appears from plaintiffs' own literature that there is no standardized or recognized method of measuring "dampness," thus rendering it impossible for plaintiffs' experts to compare the level of dampness in plaintiffs' apartment to that in the studies (*cf. id.* at 449). Nor would plaintiffs' experts be able to make any reasoned comparison of plaintiffs' exposure to the by-products of dampness to those in other studies. While plaintiffs did offer a measure of the level of mold present in the apartment, their experts did not testify to any threshold level at which mold is capable of causing the injuries of which plaintiffs complain. Finally, while "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship" (*id.* at 448), we do not believe that, under the circumstances, plaintiffs' reliance on the method of differential diagnosis was an adequate substitute for quantitative proof.

An additional ground for granting summary judgment dismissing the personal injury claims is that plaintiffs failed to offer a reliable measurement of the level of mold in the subject apartment. That is to say, even if plaintiffs' theory of

causation satisfied the *Frye* test, the mold measurement they offered does not meet the standard of reliability set forth in the record and therefore fails to satisfy the post-*Frye* foundational inquiry into "whether the accepted methods were appropriately employed in a particular case" (*Parker*, 7 NY3d at 447, citing *People v Wesley*, 83 NY2d 417, 429 [1994]).[5] A textbook that plaintiffs placed into evidence at the hearing states that an estimate of average inhalation exposure should be based on sampling at least three times a day for at least three consecutive, representative days, with duplicate samples for all analyses (Macher, ed., *Bioaerosols: Assessment and Control*, at 5-10 [1999]). Plaintiffs' environmental expert, however, collected only two indoor air samples within a short time span on the same day, which, according to plaintiffs' own authority, was insufficient.

Finally, although defendants filed their motion for summary judgment 300 days after the filing of the note of issue, defendants have demonstrated good cause for the delay in that disclosure had been completed only two weeks before the motion was made. Accordingly, the motion was properly considered on the merits (*see Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108 [2006]).

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[5]Although the *Frye* inquiry and the foundational inquiry are distinct, they may proceed simultaneously (*see People v Wesley*, 83 NY2d at 436 n 2 [Kaye, Ch. J., concurring]).

All concur except Mazzarelli, J.P. and Nardelli J., who dissent in a memorandum by Mazzarelli, J.P. as follows:

MAZZARELLI, J. (dissenting)

Plaintiffs allege that they suffered adverse health effects as a result of chronic water leaks into their cooperative apartment. The leaks began in 1996. In their bill of particulars plaintiffs asserted that, as a result of the leaks, damp conditions prevailed in the apartment and promoted the generation of "toxic mold, toxic fungi, [and] other microbial life." They further claimed that the damp conditions caused them to suffer, among other things, repetitive upper respiratory infections, asthmatic symptoms, severe allergic reactions and allergy symptoms, rashes and fatigue. In addition, plaintiffs claimed certain cognitive and fertility problems, but subsequently withdrew those claims.

Plaintiffs identified five expert witnesses who they expected to testify at trial. Included among those experts was Dr. Eckardt Johanning, a medical doctor who had examined plaintiffs and who has extensively studied in the field of "health effects of microbiological exposure." The disclosure statement indicated that Dr. Johanning was expected to testify that the damp conditions inside the apartment exposed plaintiffs to "excessive and atypical microbiological contamination." Dr. Johanning was further expected to testify that such exposure can cause serious health effects in humans and that plaintiffs were harmed by the damp conditions in their apartment.

Defendants moved for summary judgment and, in the alternative, for preclusion of plaintiffs' medical experts, or a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]). With respect to summary judgment, defendants argued that plaintiffs could not prove that, generally speaking, "the presence of, or exposure to, mold in an indoor residential setting causes the types of ailments" alleged by plaintiffs. They argued that plaintiffs could not specifically prove they were exposed to "mycotoxins" in the apartment and that, even if they could, they could not prove when the exposure took place or the "dose or duration" of any such exposure.

With respect to preclusion, defendants specifically sought to bar testimony

> "to the extent the plaintiffs intend to have [their expert] witnesses provide scientific 'evidence' or opinions that: (a) the presence of, or exposure to, mold in an indoor residential setting causes the types of ailments for which [p]laintiffs are seeking money damages (such 'evidence' or opinions are not generally accepted as reliable by the scientific community); and (b) the presence of, or the exposure of [p]laintiffs to, mold in the Apartment caused [p]laintiffs' specific alleged injuries (such 'evidence' or opinions cannot be provided with a reasonable degree of medical certainty)."

Defendants submitted affidavits from three physicians in support of the motion. One of the affidavits, that of a neuropsychologist, became irrelevant once plaintiffs withdrew their claim that the damp condition in their apartment caused

them to suffer cognitive deficits. The first was by Ronald E. Gots, M.D., Ph.D., a toxicologist who does not purport to have any expertise in mold sampling methodology. He devoted three paragraphs to critiquing mold sampling performed inside the apartment and offered some generalities purporting to support his opinion that the sampling data "is not reliable for determining exposure." Dr. Gots failed to discuss any of the specific findings in any of the mold sampling reports exchanged by plaintiffs during discovery.

Dr. Gots opined that it is highly unlikely that the levels of mold humans can be exposed to in residential or commercial buildings can ever be enough to cause mycotoxicosis, that is, illness caused by the biochemical products produced by molds as part of their life cycle. However, he acknowledged that indoor mold can cause allergic effects "manifest[ed] primarily as respiratory allergies" and that, although uncommon, "[i]rritant effects may occur when there is significant mold growth (thousands of mold spores per cubic meter of air)." At best, he stated, household mold can cause allergic reactions in the 5% of people who are allergic to mold in the first place. Dr. Gots cited to two published scientific works to support his theory that any relation between building dampness and illness is essentially hypothetical. These were a 2002 paper by the American College of Occupational and Environmental Medicine

(ACOEM) entitled *Adverse Human Health Effects Associated with Molds in the Indoor Environment*, and a 2004 book entitled *Damp Indoor Spaces and Health*, which reflected findings of a study conducted by the Institute of Medicine of the National Academies (IOM).

Dr. Gots also opined that under "causation analysis" plaintiffs could not prove their claim. He described the basic principle of such analysis as (1) identifying what is wrong with the patient, (2) whether the "agent at issue" can produce the given disorder, and (3) whether the agent did indeed cause the disorders at issue in the case. He claimed that plaintiffs could not have had an allergic reaction to mold because "RAST" blood testing performed on them, which looked for allergen-specific IgE-mediated antibodies, was negative. He discounted IgG testing results[1] as irrelevant to respiratory allergies and stated that, in any event, positive IgG results could not prove the time and place of exposure. He described the complaints of plaintiffs recorded in their medical records as subjective and not contemporaneous with medical visits. He further questioned why the symptoms persisted even after plaintiffs vacated the

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[1] "IgE" and "IgG" refer to immunoglobulin types which reflect the level of antibodies developed by the body in response to exposure to antigens such as allergens and foreign organisms. IgG is a delayed marker, which indicates that the antibody to the inducing matter was developed over an elongated period of time. This contrasts with IgE, which is indicative of an immediate allergic reaction to a foreign body.

apartment. Dr. Gots concluded that plaintiffs' complaints had to have been related to conditions other than exposure to the damp conditions in the apartment. He did not offer any opinion as to what could have caused plaintiffs' symptoms.

The second affidavit was by S. Michael Phillips, M.D. He conceded that indoor mold can cause some of the symptoms asserted in plaintiffs' bill of particulars. For example, Dr. Phillips stated that plaintiffs "may have been exposed to molds and had minor allergic/irritant reactions resulting from such exposure." He further noted that "[e]pidemiologic studies indicate that the presence of mold in indoor environments is associated with upper respiratory symptoms, cough, wheeze, asthma symptoms in sensitized asthmatic persons, and hypersensitivity pneumonitis in susceptible persons." He cited to one of the two scientific publications relied upon by Dr. Gots to support this conclusion. Dr. Phillips also stated that "some of [plaintiffs'] complaints are compatible with irritant or allergic reactions to molds."

However, Dr. Phillips concluded that plaintiffs could never prove that mold caused their symptoms because they could not establish that the level of mold in the apartment was sufficient to result in adverse health effects. However, much like Dr. Gots, Dr. Phillips failed to compare the actual mold measured by plaintiffs to what, in his expert opinion, would be a sufficient level to cause illness. Rather, he described the levels of

"expected indoor molds" recorded inside the apartment as "modest," and asserted that "[n]o convincing evidence of high-level exposures via actual air sampling data was available in the materials available for my review." Also, similarly to Dr. Gots, Dr. Phillips noted that plaintiffs' "alleged allergic symptoms have more likely explanations than mold," and suggested that perhaps dust mites and/or plaintiffs' cats were the culprits. Finally, Dr. Phillips asserted that the ill effects of mold exposure are transitory and could not have persisted in plaintiffs after they moved out of the apartment.

In opposition to defendants' motion, plaintiffs submitted the affidavit of Dr. Johanning. In reviewing the state of scientific thought on the relationship between building dampness and illness, Dr. Johanning, who is Board certified in Family Practice and in Occupational and Environmental Medicine, focused on two "large-scale, peer-reviewed epidemiological studies." First, he discussed *Respiratory Morbidity in Office Workers in a Water Damaged Building*, commissioned by the National Institute of Health and published on line in January 2005. Second, he discussed *Home Dampness and Molds, Parental Atopy, and Asthma in Childhood: A Six-Year Population Based Cohort Study*. This was published in the March 2005 edition of the peer-reviewed journal *Environmental Health Perspectives*. Dr. Johanning represented that these two studies:

> "showed that the 'association' between damp buildings, mold, and respiratory morbidity, including new-onset asthma, is one of causation, a fact that had been apparent to clinicians for years. More importantly, they show that building dampness and mold cause permanent irritative and allergic-type problems, including new-onset asthma. Because these studies answered questions left open by the ACOEM and IOM papers[2], they were widely publicized and discussed. Neither Dr. Gots nor Dr. Phillips are aware of these studies, or if they are, they chose not to reveal them to the Court, and instead assert that the biased ACOEM 2002 paper and the IOM 2004 paper are the only and 'final word' on the matter. They are not. Occupational and Environmental physicians involved in direct patient care and research disagree with the conclusions by 'scientists' with mostly theoretical or peripheral experience about these clinical matters. The defendants' experts' ignorance (or concealment) of the current relevant medical literature is no basis to exclude my testimony. These papers directly contradict the assertions of Drs. Gots and Phillips that irritative and/or allergic-type reactions caused by damp buildings are always transitory in nature."

Unlike defendants' experts' submissions, Dr. Johanning explained in detail the significance of the mold samplings taken by plaintiffs. For example, in attempting to discredit Dr. Gots's statement that indoor air sampling levels in the apartment were below outdoor levels, he pointed out that the indoor air samples were "approximately triple and five times higher than the outdoor sample in terms of levels." He further noted the

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[2] That is, the papers discussed by Dr. Gots in his affidavit.

significance of the fact that the indoor samples were dominated by Aspergillus versicolor, "an atypical, hydrophilic... mold not commonly found in the outdoor air in any significant concentration." According to Dr. Johanning:

> "From a medical perspective, its presence and predominance in the Fraser home was very significant because it reveals the presence of atypical species, meaning that our bodies are not used to breathing it in significant concentrations, and it or its by-products are therefore highly allergenic and irritative. This testing is indeed relevant from a health and exposure assessment perspective, as it is indicative of exposure by elevated levels of atypical molds, as a consequence of water events that preceded the testing."

Dr. Johanning further disputed Dr. Gots's statement that in order for mold to exert physical effects on a person that person must be one of the 5% of the general population who are generally susceptible. He explained that, contrary to Dr. Gots's position, mold irritation is not necessarily an allergic reaction but can come about because of chronic irritation caused by inhalation of mold. Accordingly, Dr. Gots's observation concerning the absence of elevated IgE levels was, Dr. Johanning observed, irrelevant. It was sufficient that Colin and Pamela Fraser

> "showed clear evidence of microbial specific IgG antibodies (typical in Type III or Type IV reactions) to a number of organisms commonly found in damp buildings. This means that their bodies produced antibodies in response to an exposure to these organisms prior to the testing and consistent with the patient's history and timeline of exposure."

Defendants did not submit any papers in reply to plaintiffs' opposition.

Without discussion of the parties' respective positions and submissions, the motion court denied the summary judgment motion and directed a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923], *supra*). The court stated:

> "The submissions have raised an issue [of fact] as to whether the theory of plaintiffs - that mold in their apartment caused them respiratory problems - is generally accepted in the relevant scientific community and whether the methodology used by plaintiffs to measure the mold was within generally accepted scientific methods."

The *Frye* hearing was conducted on 10 days between July 27, 2005 and March 28, 2006. Dr. Johanning and Paul Ehrlich, M.D., a clinician specializing in pediatric allergies and asthma, testified on plaintiffs' behalf. Dr. Gots and Dr. Phillips testified for defendants. Plaintiffs placed in evidence nearly 40 articles, treatises and other published studies concerning the relationship between building dampness and mold and sickness in humans. Defendants placed approximately 15 such publications in evidence.

Dr. Johanning testified that the symptoms with which plaintiffs presented to him were caused by the damp conditions in the apartment. He stated that he utilized a differential diagnosis methodology, which he described as:

> "using a comprehensive occupational and

> environmental history, physical examination, laboratory tests, review of environmental data, looking at medical reports and test results from other providers, and looking at any information that can help me to rule in or out diagnosis or differential diagnostic considerations."

Dr. Johanning then explained that, in diagnosing Colin Fraser, he consulted the various environmental reports created by Olmsted Environmental Service, as well as medical reports generated by other medical providers who had examined or treated Mr. Fraser. He also viewed photographs showing stains and discoloration inside the subject apartment.

Dr. Johanning took his own history of Mr. Fraser. Mr. Fraser related that he never smoked or abused alcohol or drugs, and that he had never been exposed to organic dust or significant bioaerosols such as those associated with garden work, pesticides, heavy metals or chemicals. Although Mr. Fraser worked as a stamp broker, he denied working with wet or moldy stamps or working in anything but "clean" environments. Mr. Fraser filled out an eight-page questionnaire regarding his health. He reported that he felt generally better since vacating the apartment.

Dr. Johanning also performed a complete physical examination of Mr. Fraser. He ordered laboratory testing, the results of which revealed that Mr. Fraser was not suffering from an infection or any other identifiable condition. His total

immunoglobin count was normal, indicating that he had an appropriate and normal level of immune parameters. However, Mr. Fraser had IgG subclass abnormalities "which showed an altered immune response similar as it can be seen in people who have allergy." Dr. Johanning specified that these IgG levels (which he described as "striking") indicated "hypersensitivity to a number of fungi and bacteria, precisely . . . six out of eight; specifically, Micropolyspora, Thermoactinomyces, Alternaria, Aureobasidium, Phoma herbarum, Trichoderma." Two of those organisms, Micropolyspora, Thermoactinomyces, were described by Dr. Johanning as being more akin to bacteria than mold, and he testified that they were commonly found in people who are exposed to wet organic material, including wood. Dr. Johanning described all of these organisms as being capable of causing allergic, irritative and toxic reactions. Three of them, which are molds, were found in the apartment, according to laboratory reports reviewed by Dr. Johanning. The fact that the particular mold- and bacteria-antibody-specific IgG levels were high indicated to Dr. Johanning that Mr. Fraser had been exposed to those particular organisms for a lengthy period of time. Dr. Johanning stated that it was not necessary to perform skin prick testing to further confirm the significance of abnormal IgG results.

When asked to describe his diagnosis of Mr. Fraser, Dr. Johanning testified as follows:

> "Essentially, again, based on the history, the presentation, past medical history, family history, review of systems, the work history, the results of physical examination, laboratory test results as I outlined earlier, the environmental information, consultation reports from other specialists, I concluded, using a differential diagnosis approach, that the best explanation for Mr. Fraser's problem is the history of acute irritant allergic type reaction while he was living in his previous apartment at 301 East 52nd Street."

Regarding plaintiff Pamela Fraser, Dr. Johanning recounted a similar history related by the patient. The information elicited was also designed to rule out other possible causes of the reported symptoms including nasal problems, itchy and teary eyes, shortness of breath, burning sensation in the throat, sore throat, wheezing and tightness in the chest. IgG testing showed reaction to Micropolyspora, Thermoactinomyces and Trichoderma. Dr. Johanning testified that repeated general blood count and differential and platelet counts did not indicate any other medical problems. Accordingly, Dr. Johanning recorded in his records that, based on all the laboratory and clinical findings:

> "and the differential diagnosis approach, I conclude with a reasonable degree of medical certainty that Miss Fraser had a history of allergic and irritant type reactions while she was residing at her previous apartment which had water damage and microbial growth problems."

Finally, Dr. Johanning testified about his examination of the infant plaintiff, who, because of her age, could not be

subjected to the same diagnostic tests as her parents (including testing for IgG levels). The parents related a history of respiratory problems which dissipated after they vacated the apartment. Dr. Johanning concluded that, based upon his differential diagnosis approach, the child had respiratory problems which seemed to be ongoing and episodic and that, while she was too young to determine specific allergies, it was "reasonable to assume" that where she lived "caused some respiratory inflammation and allergic response."

Dr. Phillips testified that Dr. Johanning did not record the presence of IgE antibodies in any of the plaintiffs. While he described IgG as having the capability to cause certain diseases in people, he characterized it as "common" and "not unexpected." Moreover, he testified that IgG test results provide no clues as to when a person was exposed to a particular antigen, the length of exposure or the amount of exposure. He stated that approximately 10% of people have developed antibodies to mold, but less than 50% of those people have showed clinical problems related to mold.

Dr. Phillips asserted that IgG is not correlated in any way or related to an allergy. He criticized the manner in which Dr. Johanning tested for IgG, claiming that his technique would always yield a positive result. Moreover, because he did not see the presence in Dr. Johanning's report of any clinical symptoms

associated with IgG exposure, he concluded that it was impossible to tell whether the conditions reported in plaintiffs' apartment contributed to any illness.

Subsequent to the *Frye* hearing, the court issued an order holding that "plaintiffs are precluded from introducing testimony demonstrating that mold caused their health complaints and plaintiffs' causes of action based upon personal injury are dismissed with prejudice." The order contained a lengthy recitation of facts that summarized in detail the initial mold sampling report secured by plaintiffs, the medical reports prepared by Dr. Johanning upon his examination of plaintiffs, the testimony of all the witnesses, and the scientific publications submitted by both sides. The court discredited the testimony of both Dr. Johanning and Dr. Gots as being compromised by their "strongly held views on the subject of mold and a stake in advancing those views." It credited the testimony of Dr. Phillips, whom it found to be "very impressive", and found that "plaintiffs failed to demonstrate that the community of allergists, immunologists, occupational and environmental health physicians and scientists accept their theory - that mold and/or damp indoor environments cause illness."

The court summarized the scientific writings submitted by the parties, which it described as "peer-reviewed and published in journals generally accepted in the scientific community," and

concluded that they:

> "demonstrate that, with the exception of one article, the scientific research has not established that indoor exposure to mold causes the symptoms for which the plaintiffs seek to recover in this action. Although some of the literature found that indoor mold exposure or dampness had an 'association' with transient upper respiratory problems in adults (symptoms similar to those of the common cold), or a 'strong association with asthma in children, these findings fall short of a finding of 'causation.'"

The court then ruled that, even if plaintiffs had established at the hearing that, generally, there is a causal link between building dampness/mold and illness, the case could not go forward. According to the court:

> "It became clear at the hearing that plaintiffs wished to argue that moisture in the Fraser apartment caused them ill health. Plaintiffs contended that a damp indoor environment produced bacteria, mold, endotoxins, Beta Glucans, MVOCs and other toxic materials, which caused the Frasers' complained of symptoms. However, moisture, bacteria, endotoxins, MVOCs and Beta Glucans were never measured in the Fraser apartment. Moreover, the scientific literature and the testimony of Dr. Phillips established that two measurements for mold in a short time span, the method of measurement used here, was insufficient to give a valid mold reading. Then too, the hearing evidence demonstrated that: there are no standards for what amount of mold was excessive in terms of human health and the indoor environment; there are no generally accepted standards for measuring indoor airborne mold; there are no generally accepted standards for the acceptable amount of mold in indoor air; there are many types of mold, each of which have different or no health effects; there

> are no standard scientific definitions for "dampness" or "moisture"; skin prick tests for allergy, which were not done here, were deemed the most reliable way to test for allergy by the literature, Dr. Ehrlich, Dr. Gots and Dr. Phillips; and the IgE test performed on Colin and Pamela Fraser, which is related to allergies, did not show allergy to mold."

Plaintiffs moved to reargue and renew the order. They sought reargument based on a variety of asserted defects. This was granted, solely to modify the order to eliminate any reference to the manner in which air testing of plaintiffs' apartment was conducted, which the court recognized was improper in a *Frye* hearing. Renewal, based on the intervening Court of Appeals decision in *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]), was also granted. However, based on *Parker*, the court held that plaintiffs had failed to lay a proper foundation for their experts' testimony. The court determined that Dr. Johanning's differential diagnosis, which it defined as "a list of possible causes of a symptom," was an inadequate foundation for a finding of specific causation. The court wrote:

> "Dr. Johanning testified without underlying proof of causation or strong association, without proof of mold allergies, without reliable standards for measurement of mold exposure, and without measurements of mold by-products that plaintiffs' symptoms must have been caused by airborne mold and mold by-products. On the other hand, with respect to Mrs. Fraser, he failed to rule in cat and dust allergies."

The court further stated that *Parker* implies that only a "significant association" between a substance asserted to cause illness and illness itself is enough to pass the *Frye* test. It found that this is "consistent with Dr. Phillips' testimony that a strong association occurs all of the time."

The court acknowledged that some courts had found Dr. Johanning's differential diagnosis valid, but failed to provide any case citations. However, it stated that "other courts, which this court finds more persuasive, have disagreed," citing *Jazairi v Royal Oaks Apt. Assoc., L.P.* (217 Fed Appx 895 [11th Cir 2007]) and *Roche v Lincoln Prop. Co.* (278 F Supp 2d 744 [D Va 2003]). For a second time, the court granted summary judgment to defendants dismissing all of plaintiffs' personal injury claims.

Defendants' submissions on their original motion plainly did not, in the first instance, support the need for the *Frye* hearing directed by the motion court. Accordingly, I would reverse. Neither Dr. Gots nor Dr. Phillips ever stated in their respective affidavits that it is not generally accepted by scientists that indoor mold or damp conditions can cause the allergies and irritation experienced by plaintiffs. To the contrary, both stated, Dr. Phillips in unambiguous terms, that indoor mold and building dampness have the potential to cause the health conditions alleged by plaintiffs.

Defendants also failed to rebut Dr. Johanning's criticism of

the scientific studies upon which they relied, nor did they even attempt to refute the studies cited by Dr. Johanning in his own affidavit. Defendants' failure to call into question the studies submitted by plaintiffs is most significant, because it left the court with two studies ostensibly doubting any link between indoor mold and illness and two which supported such a link. Even one of defendants' experts relied favorably on the IOM study - which defendants submitted in support of their motion - as supporting his statement that "the presence of mold in indoor environments is associated with upper respiratory symptoms, cough, wheeze, asthma symptoms in sensitized asthmatic persons, and hypersensitivity pneumonitis in susceptible persons."

The purpose of a *Frye* hearing is not to prove by any particular evidentiary standard that proposed scientific evidence is sound. Rather, it is to establish that a theory has gained general recognition in the scientific community. To be sure, the proponent of scientific evidence bears the burden of establishing *Frye* admissibility (*Marso v Novak*, 42 AD3d 377, 378 [2007]). However, before that burden is ever imposed the party contesting the proffered evidence must first make a prima facie case that the theory has *not* gained general recognition in the scientific community (*see Middleton v Kenny*, 286 AD2d 957, 958 [2001]). Here, defendants' submissions failed to make a prima facie case that there is not a consensus in the scientific community that

building dampness and mold can cause illness. In fact, their experts conceded this point.

As for the second issue defined by the motion court in its order directing a *Frye* hearing, defendants similarly failed to make a prima facie showing that the methodology by which plaintiffs measured mold in the subject apartment was not generally accepted by the relevant scientific community. Defendants' experts never identified how plaintiffs' mold-measuring methodology was "novel" such that plaintiffs should have been required to establish general acceptance. Indeed, in the original order to show cause submitted by defendants, they did not even seek a *Frye* hearing on this subject. Ultimately, the manner in which plaintiffs collected mold samples was a minor factor in the court's decision to preclude plaintiffs' experts. Indeed, in the decision on reargument the court modified the original order to eliminate any reference to the manner in which mold was sampled. Nevertheless, the court's directive that the *Frye* hearing include mold sampling methodology within its scope is indicative of the large gap between what defendants argued in their submissions and the issues that the court decided were the proper subject of a *Frye* hearing. As discussed below, this resulted in a great deal of confusion at the hearing as to what precisely was at issue.

Plaintiffs met their burden of establishing the

admissibility of evidence that the conditions in their apartment caused their illness. The conclusion by the motion court, adopted by the majority, that plaintiffs failed to establish at the hearing that exposure to building dampness and mold can cause illness is based on too restrictive an application of *Frye*. *Frye* hearings are to test the reliability of novel scientific evidence (*Parker v Mobil Oil Corp.*, 7 NY3d at 446. *Frye* itself held that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." (*Frye*, 293 F at 1014). As Judge Kaye stated in her concurrence in *People v Wesley* (83 NY2d 417, 439 [1994]), *Frye* "emphasizes 'counting scientists' votes, rather than on verifying the soundness of a scientific conclusion."

Courts have warned against an over-restrictive use of *Frye*. For example, the Court of Appeals stated in *Parker* that

> "As with any type of expert evidence, we recognize the danger in allowing unreliable or speculative information (or 'junk science') to go before the jury with the weight of an impressively credentialed expert behind it. But, it is similarly inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court. It is necessary to find a balance between these two extremes."

(7 NY3d at 447). The Second Department, in reversing a

preclusion order after a *Frye* hearing, observed that:

> "[t]he trial court, while purporting to credit the deductive reasoning of the plaintiff's experts, apparently believed that the *Frye* test could only be satisfied with medical texts, studies, or other literature which supported the plaintiff's theory of causation under circumstances virtually identical to those of the plaintiff. However, the *Frye* test is not that exacting."

(*Zito v Zabarsky*, 28 AD3d 42, 46 [2006]).

Here, the majority has "set an insurmountable standard." (*Parker*, 7 NY3d at 447). It essentially posits that in a case such as this, *Frye* requires that the medical literature conclusively establish that an allegedly offending substance not only have the potential to cause illness but that it *always* causes illness. Indeed, the motion court, in interpreting *Parker* to require at least a "significant association" between an allegedly harmful substance and illness, endorsed Dr. Phillips's position that a "strong association occurs all of the time." This is far too rigorous an application of *Frye*.

In this case, plaintiffs submitted at least 20 peer-reviewed publications describing an association or strong association between building dampness and mold and the type of irritative symptoms described by plaintiffs. Collectively, these studies establish that the "association" between building dampness and illness is one of causation, not one of coincidence. In his testimony, Dr. Phillips stated that an "association" is probative

of nothing. In other words, he explained that if one observes a man in a black suit get struck by a car, and observes the same thing a few blocks later, it would not be logical to conclude that one should not wear a black suit while crossing the street. "Association," however, is a continuum, which spans from the coincidence described in the above scenario to unquestionable causation. The evidence submitted by plaintiffs here, while perhaps not establishing that building dampness always causes illness, is far closer to the causation end of the continuum than the coincidence end.

Moreover, it is not plaintiffs' contention that building dampness and mold *always* cause illness, and that is not required. Rather, plaintiffs claim, and the literature confirms, that more than an outlying segment of the scientific community has concluded that there is evidence that building dampness and mold have *the potential* to cause allergic and irritative reaction in sensitized people. Plaintiffs simply seek an opportunity to prove to a jury that the dampness and mold in their apartment caused their symptoms.

Indeed, Dr. Phillips's testimony concerning the causal relationship between building dampness and illness reveals that he considers the "association" described in the literature submitted by plaintiffs as being on the causation end of the continuum discussed above. Dr. Phillips stated that because

science has only identified an "association" between dampness and illness, a doctor treating a patient complaining of mold-related illness must perform a complete evaluation of the patient and his environment to confirm his claim. In other words, he said that because science has not established that mold always causes illness, the doctor may not simply accept that the patient is sick from mold. In his practice, Dr. Phillips has treated "thousands" of patients complaining of respiratory problems associated with a damp building. He testified that when a patient presents with such a complaint:

> "[y]ou evaluate the patient, you try to see how ill they are, what the clinical manifestations are. You try to establish the presence or absence of mold sensitization. I give them instructions in terms of what they can do to control, for example, the moisture, the dehumidification.
>
> ***
>
> "Because excess moisture increases growth of mites and mold and bacteria and other things. So high amounts of moisture is an adverse environment in which that patient is going to live. You are going to try to help them in any way you can. You give them proper medicine and test them if in fact they are sensitive to mold, and in some cases do desensitization shots."

This is the precise approach Dr. Johanning took with plaintiffs. It recognizes that building dampness can cause illness but that the link between the two is not so consistent that a doctor can dispense with a detailed examination into whether it did in fact cause illness. In employing this approach, Dr. Phillips

recognizes that the theory that there is a link between building dampness and illness is not the type of "theoretical speculation or...scientific 'hunch'" that *Frye* hearings are designed to weed out (*Zito v Zabarsky*, 28 AD3d at 46).

Finally, to the extent that this Court has in recent history precluded expert testimony under *Frye*, it has based such decisions upon a complete *absence* of literature or studies supporting the claim (*see e.g. Marso v Novak*, 42 AD3d 377 [2007], *supra*; *Lara v New York City Health & Hosps. Corp.*, 305 AD2d 106 [2003]; *Selig v Pfizer, Inc.*, 290 AD2d 319 [2002], *lv denied* 98 NY2d 603 [2002]; *Stanski v Ezersky*, 228 AD2d 311 [1996], *lv denied* 89 NY2d 805 [1996]). Here, a *plethora* of peer-reviewed articles supports plaintiffs' claim.

The motion court was correct in stating that *Parker v Mobil Oil Corp.* required it not only to consider the general question of whether the link between building dampness and illness is generally accepted, but also that a scientific foundation existed for plaintiffs' experts' conclusion that plaintiffs were sickened by the conditions in their apartment. However, *Parker*'s applicability here is limited to that general proposition. Indeed, there is no basis for the motion court's statement that "[t]here is a striking similarity between the testimony of plaintiffs' experts and the vague expert testimony rejected by the Court of Appeals in *Parker*."

In *Parker*, the plaintiff, a former gasoline station attendant, claimed to have developed acute myelogenous leukemia as a result of exposure to benzene contained in gasoline. The defendants sought to dismiss the case on the theory that the plaintiff could not establish a causal link between the exposure and his illness. The Court of Appeals held that a traditional *Frye* analysis was unnecessary because the plaintiff's scientific theory was not "novel." However, it further held that the trial court still had a gatekeeping role of ensuring the reliability of the proposed scientific evidence. In *Parker*, that required ensuring that the plaintiff's experts could demonstrate the threshold of exposure to benzene below which leukemia would not occur, as well as the exposure level to which the plaintiff was subjected. The Court rejected the plaintiff's experts' opinions because they failed to offer any scientific measure of the level of the plaintiff's exposure in other than the most general and conclusory terms.

In contrast to *Parker*, here plaintiffs are not claiming that they were harmed by the *toxic* effects of mold. Rather, they claim to have been sickened by those properties of mold and building dampness which have an irritative and allergic effect. Accordingly, as Dr. Johanning explained, ascertaining the specific levels of a particular mold in a building is not determinative of whether the mold caused irritative or allergic

effects. This is because, he explained, as long as a person has become sensitized to the mold, he or she may react to a small amount of exposure. In any event, Dr. Johanning objectively determined that there was sufficient mold in the apartment for plaintiffs to have become sensitized. Specifically, he viewed photographs demonstrating the significant mold growth in the apartment. More importantly, he relied on the Olmsted report showing levels of atypical organisms existing in the apartment as high as five times the levels in which they are normally encountered outdoors. This was in sharp contrast to the facts in *Parker*, where the record was devoid of any specific articulation of the plaintiff's exposure.

In any event, even if quantifying mold levels was critical to plaintiffs' case, *Parker* does not help defendants here. The holding in *Parker* put rest to the notion that to establish an appropriate reliability foundation, plaintiffs in a toxic tort case must establish precisely quantified exposure levels or a dose-response relationship, provided, the Court wrote, that "whatever methods an expert uses to establish causation are generally accepted in the scientific community" (7 NY3d at 448). Here, Dr. Johanning's differential diagnosis satisfied that test. Differential diagnosis has been recently accepted by the Fourth Department as a generally accepted method for establishing specific causation in mold cases. That court found in *B.T.N. v*

Auburn Enlarged City School Dist. (45 AD3d 1339 [2007]), a case involving atypical mold in a school building, that a differential diagnosis was an adequate basis for opining that the mold caused the plaintiffs' symptoms.

Here, defendants never argued in their initial motion papers that the differential diagnosis performed by Dr. Johanning was not a generally accepted methodology. Moreover, to the extent that the motion court can be read as holding that differential diagnosis is not a generally accepted methodology in mold cases, that was patently unfair. The order directing the *Frye* hearing cannot possibly be read to include within its scope the issue of whether differential diagnosis is generally accepted in such cases.

Dr. Johanning's differential diagnosis was scientifically valid and the motion court articulated no basis for concluding otherwise. A differential diagnosis has been described as "a patient-specific process of elimination that medical practitioners use to identify the 'most likely' cause of a set of signs and symptoms from a list of possible causes" (*Ruggiero v Warner-Lambert Co.*, 424 F3d 249, 254 [2d Cir 2005][internal quotation marks and citation omitted). Indeed, *Jazairi v Royal Oaks Apt. Assoc., L.P.* (217 Fed Appx 895 [11th Cir. 2007], *supra*), one of the cases upon which the motion court relied in rejecting Dr. Johanning's differential diagnosis approach, noted

that "[t]he record reflects that differential diagnosis is widely accepted by the medical community" (*id.* at 898).

Here, Dr. Johanning specifically ruled in the damp conditions in the subject apartment to be the cause of plaintiffs' symptoms, based not only on the history related by plaintiffs, but also on specific immunological markers which demonstrated lengthy exposure by plaintiffs to specific organisms related to irritants that were found to be inside the apartment in levels greater than outdoors. In addition, he ruled out all other causes, such as smoking, other allergens and irritants unrelated to mold or building dampness, or even other possible dampness-related conditions such as those related to Colin Fraser's vocation as a stamp broker.

In contrast, the 11th Circuit in *Jazairi* rejected the differential diagnosis (also performed by Dr. Johanning) because he:

> "apparently did not conclude that [the plaintiff] suffered symptoms due to exposure to any of the molds that were present in her apartment. To the extent that Dr. Johanning was prepared to testify that the mold in [the plaintiff's] apartment caused her conditions, Dr. Johanning's testimony would have been based *solely* on temporal proximity and anecdotal evidence." (Emphasis added)(*Jazairi*, 217 Fed Appx at 898).

In other words, the differential diagnosis in *Jazairi* was not one at all, because it was based on no objective medical data and because it ruled nothing in and nothing out. Here, that was far

from the case. Indeed, the motion court's statement that "Dr. Johanning's opinion was based solely on temporal proximity to mold and anecdotal evidence" is plainly contradicted by his testimony.

Moreover, nearly all of the factors which the motion court identified as demonstrating that Dr. Johanning's opinion had no reliable scientific foundation were erroneous. First, the court stated that Dr. Johanning testified "without underlying proof of causation or strong association." As discussed above, however, plaintiffs established that it is generally accepted that building mold and dampness can generally cause illness. The court also stated that Dr. Johanning testified "without proof of mold allergies." However, Dr. Johanning did base his conclusion on plaintiffs' physiological reaction to mold and other dampness-related organisms. While this may not have been the "traditional" IgE-mediated allergy, which the court was focused on, the fact that diagnostic tests revealed an IgG-mediated response to dampness-related irritants was probative of a causal link between the conditions in the apartment and plaintiffs' symptoms. Moreover, while defendants tangentially questioned the reliability of IgG readings in their initial motion and at the hearing, they did not ask for a ruling that using IgG testing for diagnostic purposes in mold cases is not generally accepted, nor can the order directing the hearing be interpreted as requiring

plaintiffs to establish the reliability of such testing.

Second, the court treated as fatal plaintiffs' failure to measure for moisture and non-mold by-products of moisture identified by Dr. Johanning as contributing to illness, such as endotoxins, mycotoxins, or Beta-D-glucans. However, such measurements were not critical to Dr. Johanning's differential diagnosis because, as he testified, the level of organisms sufficient to sensitize plaintiffs could vary significantly depending on the individual. In any event, Dr. Johanning did have objective evidence of significant mold growth in the apartment from the photographs he viewed and the Olmsted report. Moreover, the fact that there were significant water intrusions into the subject apartment was apparently never in dispute.

As for the court's statement that Dr. Johanning failed to rule in cat and dust allergies as a possible cause of Pamela Fraser's symptoms, there is no evidence in the record that she had cat allergies. Dr. Johanning did note that she had a reaction to dust mites. However, he stated that it was "slight," which hardly suggests that he would have ever ruled it in as the most likely cause of her symptoms. Moreover, there is no requirement that the proponent of expert scientific testimony prove the ultimate theory of the case during a *Frye* hearing. Rather, he or she must only establish the basic reliability of the methodology utilized to reach that conclusion. As we

recently held, any further challenges to an expert's methodology and/or conclusions above and beyond its basic reliability are more "properly the subject of cross-examination at trial, as they go to credibility and to the weight to be given to the evidence" (*Nonnon v City of New York*, 32 AD3d 91, 108 [2006], *affd* 9 NY3d 825 [2007]).

Here, Dr. Johanning's use of the methodology of differential diagnosis was reliable as it was based on the confirmed presence of dampness and mold in plaintiffs' apartment and the presence in plaintiffs' systems of antibodies to organisms typically associated with mold and dampness. Moreover, plaintiffs exhibited symptoms consistent with dampness-related illness, and related no other source of exposure to dampness-related antigens. Once Dr. Johanning established this baseline of reliability, defendants were relegated to challenging his conclusions before the trier of fact.

Finally, plaintiffs not only met their burden at the hearing in this case, they did so in the face of substantial confusion fostered by the motion court. The order directing the hearing was vague and overbroad in terms of what plaintiffs were required to establish. Moreover, the order required them to prove the general acceptance of mold sampling methodology when not even defendants had asked for such relief. Because of the court's ambiguous order, a significant portion of the hearing was devoted

to argument between the parties and the court over precisely what was at issue. For example, the parties and the court differed over whether plaintiffs were required to establish the general acceptance of a causal link between damp buildings and sickness or, more specifically, mold in general. They argued about whether plaintiffs were required to identify a specific "disease" caused by the conditions in their apartment, or merely the presence of physical symptoms. They also debated whether plaintiffs were required to establish the general acceptance of differential diagnosis as a methodology for establishing specific causation.

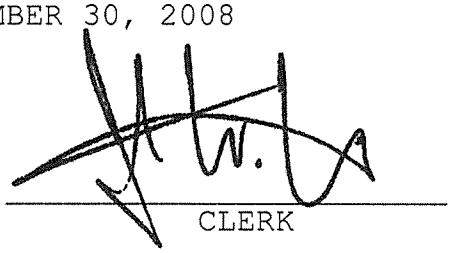
As a result, the scope of the hearing was continuously defined and re-defined over its course. This left plaintiffs at sea, without the ability to divine the path the court required for them to satisfy their burden. In spite of this confusion, plaintiffs established the reliability of their experts' opinions. Nevertheless, the motion court usurped the function of the jury here and became the finder of fact, not as to whether or not plaintiffs' theories and evidence satisfied the *Frye* and *Parker* tests, but of the ultimate question as to whether

defendants were responsible for plaintiffs' injuries.

Accordingly, I would reverse the orders appealed and reinstate plaintiffs' personal injury claims.

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

ENTERED: DECEMBER 30, 2008



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Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4424 Madison Liquidity Investors 119, LLC, Index 602099/04
Plaintiff-Appellant,

-against

Patricia Hope Griffith,
Defendant-Respondent.

Seyfarth Shaw LLP, New York (Jonathan P. Wolfert of counsel), for appellant.

Ciampi, LLC, New York (Arthur J. Ciampi of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 30, 2007, which granted the motion of defendant, assignor of a claim in bankruptcy, for summary judgment dismissing the complaint in its entirety, denied plaintiff assignee's cross motion for summary judgment and granted defendant's motion for summary judgment on her counterclaim for her share of distributions under the agreement and for attorneys' fees and costs, unanimously affirmed, with costs.

In this breach of contract action, defendant Patricia Griffith was employed by Inacom as senior vice-president of marketing and engagement services. Between 1999 and 2000, she entered into retention and other compensation and benefit agreements with Inacom. On June 16, 2000, Inacom, its affiliates, and other associated debtors filed for Chapter 11 bankruptcy protection, and on or about August 31, 2000, Griffith

filed a claim in the debtors' cases. Two years later Griffith and Inacom stipulated to her employee claim in the gross amount of $839,494.13, which was so ordered by the bankruptcy court on November 21, 2002.

On November 11, 2002, Griffith and Madison Liquidity Investors, LLC (Madison)[1] entered into a transfer of claim agreement for the purchase of Griffith's wage claim. The terms of this agreement stated a purchase price of $71,357.00 and 50% of any distributions received by Griffith in excess of 12% of the value of the claim. Madison paid Griffith $71,357.00 on November 21, 2002. This agreement was superseded by an amended transfer of claim (agreement) on June 18, 2003. The terms increased the purchase price to $130,121.59 and 50% of distributions in excess of 28% of the value of the claim. Madison paid defendant an additional $58,764.69 representing the purchase price under the amended agreement.

The agreement required that Griffith "sell, convey, transfer and assign" to Madison all "claims," "causes of action," and "cash, securities or other property distributed, received or payable." The agreement did not include any specific provisions for the treatment of tax withholding.

Distributions, including the wage claim, were subject to the

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[1] The contract with Griffith was executed by Madison Liquidity Investors, LLC, and this suit is brought by its assignee, Madison Liquidity Investors 119, LLC.

Inacom Liquidation Plan (Plan) dated March 24, 2003 and approved by the bankruptcy court on May 23, 2003. The express terms of the Plan stated: "[t]o the extent applicable, the Plan Administrator will comply with all tax withholding and reporting requirements imposed . . . and all distributions pursuant to this Plan will be subject to such withholding and reporting requirements." Consequently, the disbursements made to Madison reflected amounts withheld for income taxes. Madison was unsuccessful in its attempts to secure reimbursement from Griffith for the withheld taxes. It then refused to pay Griffith her agreed upon share of the distributions or to provide any accounting required by the agreement.

On or about June 30, 2004, Madison commenced the instant suit seeking recovery of $71,467.51, representing the total taxes withheld as of that date. Griffith counterclaimed for the amounts owed to her by Madison for the additional distributions. Both parties also sought attorneys' fees and costs.

On April 23, 2007, the court granted Griffith's motion for summary judgment dismissing Madison's complaint and on her counterclaim for additional distributions and attorneys' fees. Madison's cross motion for summary judgment was denied.

On appeal, the crux of Madison's argument is that Griffith did not transfer *all* of the distributions due under the agreement, because she did not transfer the tax monies that were

withheld. Madison first argues that the taxes were improperly withheld by Inacom because Griffith never had constructive receipt of, or control over, the distribution. Since she never received the money, the taxes should not have been considered payable by Inacom. Alternatively, Madison argues that even if taxes were properly withheld, Griffith, as the beneficiary of the withholding, should reimburse Madison for the tax deductions. It bolsters this argument by asserting that Griffith was credited for the withheld taxes and benefitted from receiving those monies in subsequent tax refunds issued for the years 2000-2005.

Griffith asserts that the motion court appropriately held that according to applicable tax law, where an assignment of income is made after it is earned, the income is constructively received by the assignor when it is received by the assignee. Therefore, the distributions were constructively received by Griffith, and Inacom was required by law and the Plan to withhold income taxes. Griffith further contends that the motion court ruled correctly in deciding that Madison, as the assignee of a wage claim, is subject to the burdens of the claim including tax obligations.

As a threshold matter, the wages, which are characterized as earned income, are clearly taxable, and Griffith, as assignor, is obligated to pay taxes on any distributions when they are made to Madison (see *Helvering v Eubank*, 311 US 122 [1940]). As such,

Madison's claim that the taxes were improperly withheld on Griffith's behalf is unavailing.

Further, as Griffith's assignee, Madison "stands in [her] shoes" (*Wald v Marine Midland Bus.* Loans, 270 AD2d 73, 74 [2000]). The assignment grants Madison the same rights and interests with regard to the wage claim to which Griffith had been entitled with all of its "infirmities, equities, and defenses" (*Trans-Resources, Inc. v Nausch Hogan & Murray*, 298 AD2d 27, 30 [2002]). Madison's rights were derivative and "'an assignee never stands in any better position than his assignor'" (*TPZ Corp. v Dabbs*, 25 AD3d 787 [2006], *quoting Matter of International Ribbon Mills* [Arjan Ribbons], 36 NY2d 121, 126 [1975]).

It is clear that Griffith did not actually receive the distributions because they were paid directly to Madison. The withholding of the taxes and their payment to the state and federal governments was solely in the province of the bankruptcy court. There is nothing in the record to support Madison's reasoning that as a "beneficiary" of the tax withholding, Griffith received a windfall to which she was not entitled. This wage claim was subject to income taxation, and Madison, in the absence of specific provisions to the contrary, took assignment of the claim with this burden.

It should also be noted that the Plan, which explicitly set

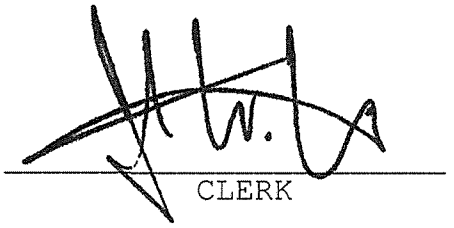
forth the tax payment requirement, was approved by the court almost one month prior to the execution of the agreement giving Madison ample time to discover the terms of the distributions through due diligence. Further, as a sophisticated party in the agreement, Madison should have reasonably anticipated that a wage claim would give rise to tax liability and contracted accordingly. Bankruptcy assignments are Madison's stock-in-trade, and this "deficiency" in an agreement that they drafted is properly construed against them (*Croman v Wacholder*, 2 AD3d 140, 143 [2003]). Madison's claim that it cannot be expected to foresee "every theoretically possible way in which such payments could be [] diverted," does not excuse them from considering the obvious and logical implications of tax withholding in a wage claim.

As to Griffith's counterclaim, because she is the prevailing party, she is entitled to her contractual share in any distributions in accordance with the express terms. As the

prevailing party in this action and by the terms of the agreement, Griffith is also entitled to recovery of attorneys' fees and costs.

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

ENTERED: DECEMBER 30, 2008



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Gonzalez, J.P., Nardelli, Buckley, Acosta, JJ.

4915 Public Adjustment Bureau, Inc., Index 601202/05
Plaintiff-Appellant,

-against-

Greater New York Mutual Insurance Company,
Defendant,

Seward Park Housing Corp.,
Defendant-Respondent.

Weg and Myers, P.C., New York (Joshua L. Mallin of counsel), for appellant.

Anderson & Ochs, LLP, New York (Mitchell H. Ochs of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered October 12, 2007, which denied plaintiff's motion to enforce a purported settlement agreement between plaintiff and defendant Seward Park Housing Corp., unanimously affirmed, without costs.

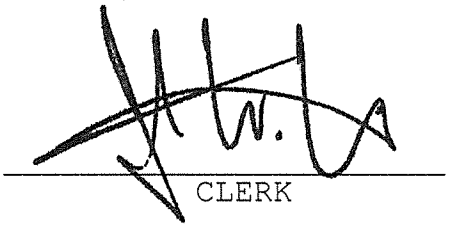
The parties' communications with respect to settlement were insufficient to meet the requirements of CPLR 2104, which provides that a settlement agreement "is not binding upon a party unless it is in a writing subscribed by [the party] or [its] attorney or reduced to the form of an order and entered" (*see Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 285-286 [2004]). Nor is the computer entry by the County Clerk containing the word "SETTLED" sufficient to satisfy the open-court requirement set

forth in CPLR 2104 (*see Matter of Dolgin Eldert Corp.*, 31 NY2d 1, 9-10 [1972]; *Gustaf v Fink*, 285 AD2d 625, 626 [2001]).

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

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

ENTERED: DECEMBER 30, 2008



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Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4927-
4927A The People of the State of New York, Respondent, Ind. 6628/97

-against-

Darrell Byrd,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about December 14, 2006, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), and order, same court and Justice, entered on or about May 17, 2007, which denied his motion to vacate the prior order on the ground, among others, of denial of the right to counsel, unanimously affirmed, without costs.

The court acted properly, and in any event did not cause defendant any prejudice, when, after defendant's trial counsel declined to represent him at the SORA hearing, it appointed, with defendant's consent, a competent attorney from the County Law article 18-B panel to do so rather than appointing the Legal Aid Society, which was representing defendant on a pending CPL article 440 motion. At no point during the SORA hearing did

defendant or his newly assigned counsel object that the attorney with the Legal Aid Society should represent defendant or that the court should have contacted that attorney. The court did not interfere with an established attorney-client relationship (*see People v Knowles*, 88 NY2d 763, 766 [1996]; *People v Hall*, 46 NY2d 873, 875 [1979]), because defendant's relationship with his Legal Aid attorney was limited to his direct appeal, which had been completed years before, and to his CPL 440 motion. The representation did not extend to the entirely distinct SORA proceeding, because "risk level determinations are a consequence of convictions for sex offenses, but are not a part of the criminal action or its final adjudication." (*People v Stevens*, 91 NY2d 270, 277 [1998]). The connection between the 440 motion and the SORA hearing cited by defendant is illusory; while the 440 motion became tangentially involved in the SORA hearing when the People asserted that the making of the motion evinced defendant's failure to accept responsibility for his crime, the court rejected that argument and assessed no points on that basis. While it may have been the better practice for the court to have contacted defendant's Legal Aid attorney, whose identity was known to the court, it does not follow that defendant is entitled to a new SORA hearing in the circumstances presented.

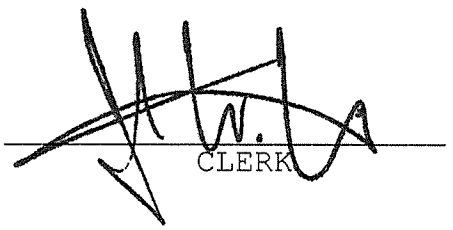
Since courts may take judicial notice of their own prior proceedings and records, including exhibits, even sua sponte

after trial (*see Musick v 330 Wythe Ave. Assoc., LLC*, 41 AD3d 675, 676 [2007]; *Rothstein v City Univ. of N.Y.*, 194 AD2d 533, 534 [1993]), the SORA court properly considered the presentence report, which was part of the prior proceedings before it. While defendant complains on appeal that he did not have the opportunity to rebut the information in the report, the record reflects that his counsel made reference to the report and had a suitable opportunity to be heard as to its contents.

We have considered and rejected defendant's remaining arguments, including his challenges to particular point assessments made by the court.

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

ENTERED: DECEMBER 30, 2008



Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4928-
4928A Cyrille Allannic, et al.,
Plaintiffs-Appellants,

Index 601216/06

-against-

Paul Levin, et al.,
Defendants-Respondents.

McGuireWoods LLP, New York (Marshall Beil of counsel), for appellants.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Nicholas Caputo of counsel), for Paul Levin, John Philip Hesslein, Winifred Viani, Hugh Van Deventer and 682 Sixth Avenue Housing Development Fund Corporation, respondents.

Deutsch Tane Waterman & Wurtzel, P.C., New York (Stewart Wurtzel of counsel), for 682 Sixth Avenue, LLC, respondent.

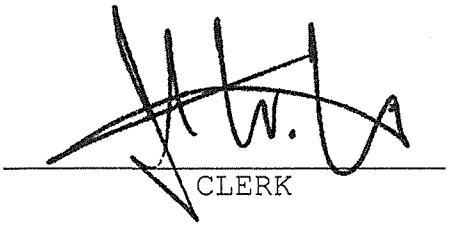
Order and judgment (one paper), Supreme Court, New York County (Leland G. DeGrasse, J.), entered January 25, 2008, which denied plaintiffs' motion for summary judgment, granted defendants' cross motion for summary judgment, declared that the March 13, 2006 vote of the board of directors of defendant 682 Sixth Avenue Housing Development Fund Corporation (the "co-op") to extend the master lease to defendant 682 Sixth Avenue, LLC is valid, and dismissed the complaint, unanimously modified, on the law, defendants' cross motion denied, the judgment vacated and the complaint reinstated, with costs in favor of plaintiffs. Appeal from order, same court and Justice, entered April 4, 2008, which, upon granting plaintiffs' motion for renewal and

reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

The business judgment rule does not foreclose inquiry into the disinterested independence of those members of the board chosen to make the corporate decision on its behalf (*Auerbach v Bennett*, 47 NY2d 619, 631 [1979]). The rule shields such directors only if they possess a disinterested independence and do not have dual relations that prevent an unprejudicial exercise of judgment (*id.*; *In re Comverse Technology, Inc.*, 56 AD3d 49, 866 NYS2d 10, 18 [2008]). The defendant housing cooperative board members were not disinterested members when they voted to enter into a lease extension of a master lease pursuant to which all of the shareholders would not be treated fairly and evenly. As such there are questions of fact regarding whether the board engaged in self-dealing and whether its failure to treat all shareholders fairly and evenly constitutes a breach of its fiduciary duties (*see Schwartz v Marien*, 37 NY2d 487, 491-492 [1975]; *Aronson v Crane*, 145 AD2d 455, 456 [1988]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476, 478 [1987]).

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

ENTERED: DECEMBER 30, 2008



CLERK

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4929 In re Daniel D. and Another, Index 350353/05

Dependent Children Under the Age of Eighteen Years, etc.,

John D.,
Respondent-Appellant,

Commissioner of the Administration for Children's Services,
Petitioner-Respondent,

John D., appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), Law Guardian.

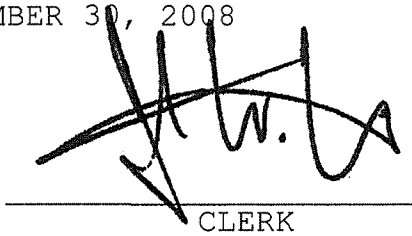
Fact-finding order, Supreme Court, New York County (Harold B. Beeler, J.), entered on or about July 13, 2007, finding that respondent-appellant neglected his children, unanimously affirmed, without costs.

The preponderance of the credible evidence supports the finding, made after a hearing (*see Matter of Tammie Z.*, 66 NY2d 1 [1985]), that respondent subjected his two young children to emotional harm (*see Nicholson v Scoppetta*, 3 NY3d 357, 370 [2004]) by encouraging them to make false allegations against their maternal grandfather that resulted in repeated and distressing interviews and medical examinations, and by engaging in a campaign to alienate the children from their mother (*see*

Matter of Ramazan U., 303 AD2d 516, 517 [2003]). Respondent's decision not to testify allowed the court "to draw the strongest negative inference" against him (*Matter of Devante S. v John H.*, 51 AD3d 482 [2008] [internal quotation marks omitted]). Supreme Court properly consolidated this child protective proceeding with the divorce/custody action pending before it given its extensive familiarity with the many common factual and legal issues (*see e.g. Paul B. S. v Pamela J. S.*, 70 NY2d 739 [1987]; *Kosovsky v Zahl*, 52 AD3d 305, 305 [2008]). It was not a violation of CPLR 603 for the court to order consolidation on its own initiative and without a motion having been made, where the court gave all parties an opportunity to be heard (*see Nelson v Lundy*, 300 AD2d 967, 968 [2002]). We have considered respondent's other arguments and find them without merit.

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

ENTERED: DECEMBER 30, 2008



CLERK

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4933 The People of the State of New York, Docket 10609C/06
Respondent,

-against-

Robert Brooks,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

Judgment, Criminal Division of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered August 30, 2006, convicting defendant, after a nonjury trial, of attempted assault in the third degree, attempted criminal possession of a weapon in the fourth degree, menacing in the third degree and harassment in the second degree, and sentencing him to an aggregate term of 60 days, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternate holding, we reject this claim on the merits. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

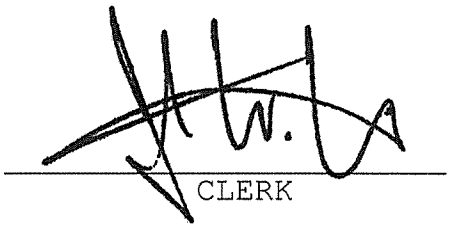
The court properly declined to draw an adverse inference against the prosecution from the absence of an incident report

form and a videotape of the incident, which were items created, or allegedly created, by the company that owned the drugstore where the crime occurred. "The People have no constitutional or statutory duty to acquire, or prevent the destruction of, evidence generated and possessed by private parties" (*People v Banks*, 2 AD3d 226 [2003], *lv denied* 2 NY3d 737 [2004]). Here, however, defendant claims that the People, by negligently stating an inaccurate date of offense on the complaint, prevented him from acquiring this private-party evidence. Nevertheless, the record does not establish any connection between the mistake as to the date and the unavailability of the evidence. The People attempted to obtain the report but were unable to do so despite a diligent search. With respect to the videotape, the record does not support the conclusion that any such tape ever existed.

Defendant's claim that the People improperly used prior consistent statements by the complainant is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

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

ENTERED: DECEMBER 30, 2008



CLERK

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4934-
4934A Lori Beth Walters, Index 107047/03
Plaintiff-Respondent,

-against-

Collins Building Services, Inc.,
Defendant,

American Building Maintenance Co., et al.,
Defendants-Appellants.

- - - - -

American Building Maintenance Co., 590986/05
Third-Party Plaintiff-Appellant,

-against-

Trammell Crow Services, Inc., etc.,
Third-Party Defendant-Appellant.

Jeffrey Samel & Partners, New York (Judah Z. Cohen of counsel), for American Building Maintenance Co., appellant.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Eileen M. Baumgartner of counsel), for American Express Company, appellant.

White, Quinlan & Staley, LLP, Garden City (Eileen Farrell of counsel), for Trammell Crow Services, Inc., appellant.

Sacco & Fillas, LLP, Whitestone (Andrew Wiese of counsel), for respondent.

Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered August 6, 2007 and September 11, 2007, which denied the respective motions of defendants American Building Maintenance Co. (ABM) and American Express Company and third-party defendant Trammell Crow Services, Inc. for summary judgment dismissing the complaint and the third-party complaint and all

cross claims, unanimously reversed, on the law, without costs, the motions granted and the complaint, the third-party complaint and all cross claims dismissed. The Clerk is directed to enter judgment accordingly.

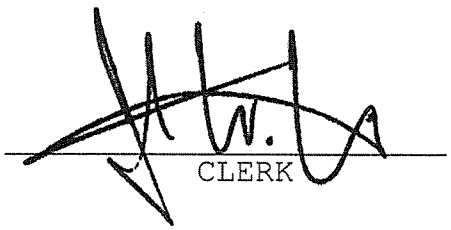
Defendants established prima facie that they neither created nor had actual or constructive notice of the wet floor of the women's restroom on which plaintiff allegedly slipped and fell (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-501 [2008]). American Express employees' testimony and Trammell's activity reports demonstrated that American Express was not responsible for cleaning the restrooms, that its agents, ABM and Trammel, routinely attended to maintenance matters of which they were made aware, and that none of these parties had knowledge of a plumbing problem in that restroom on the day of plaintiff's accident before the accident happened.

Plaintiff failed to raise a triable issue of fact through her testimony that she had seen the same toilet overflowing earlier in the day, that after the accident she asked the receptionist to inform maintenance personnel of the problem, which the receptionist agreed to do, and that before the accident she had heard other employees in the building complaining about that particular toilet (*see Guttierez v Lenox Hill Neighborhood House*, 4 AD3d 138 [2004]). Trammell's activity reports reflect the occasional toilet clogging or flooding incident and a prompt

response thereto. They do not support plaintiff's contention that there was a recurring problem such as would constitute constructive notice of a hazardous condition (*see McFadden v 530 Fifth Ave. RPS III Assoc., LP*, 28 AD3d 202 [2006]). Nor is there any evidence that the receptionist ever conveyed plaintiff's complaint to anyone.

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

ENTERED: DECEMBER 30, 2008



Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4935 In re Omar W.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for presentment agency.

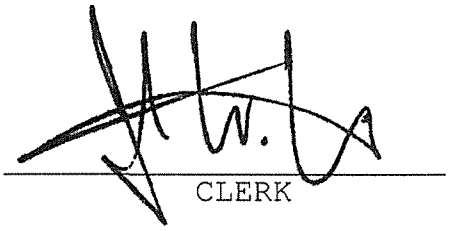
Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about April 26, 2007, which adjudicated appellant a juvenile delinquent upon a finding that he committed acts, which if committed by an adult, would constitute the crimes of attempted assault in the first degree (two counts), assault in the second degree (two counts), and criminal possession of a weapon in the fourth degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

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

The credible evidence disproved defendant's justification defense beyond a reasonable doubt.

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

ENTERED: DECEMBER 30, 2008



CLERK

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4936-
4936A In re William A. Connors, et al., Index 117330/06
Petitioners,

-against-

The New York City Loft Board,
Respondent.

William A. Connors and Susan Byrne, petitioners pro se.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Determinations of respondent New York City Loft Board, dated January 19 and July 20, 2006, which (1) adopted, with minor modifications, the recommendation of the Administrative Law Judge denying all but one of petitioners' numerous allegations of unreasonable interference by the owner with petitioners' use of their apartment (29 RCNY 2-01[h]), denying petitioners' claim of an intent on the part of the owner to harass (29 RCNY 2-02[b]), and declining to impose civil penalties against the owner, and (2) accepted the report and recommendation of respondent's Executive Director denying petitioners' application for reconsideration, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Eileen A. Rakower, J.], entered October 12, 2007), dismissed, without costs.

Respondent's findings are supported by substantial evidence (*see Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]). Indeed, rather than showing unreasonable interference by the owner, the record shows that petitioners sought at every juncture to obstruct and delay the legalization work that the owner had undertaken (*see* Multiple Dwelling Law § 284; 29 RCNY 2-01). No basis exists to disturb respondent's decision not to impose a fine for the single sustained allegation of unreasonable interference (*cf.* 29 RCNY 2-01[h]), which the ALJ described as a "relatively minor" matter that the owner was willing to correct, or the ALJ's findings of credibility. We have considered petitioners' other arguments and find them unavailing.

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

ENTERED: DECEMBER 30, 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 December 30, 2008.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
Luis A. Gonzalez
James M. McGuire
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 1743/05
Respondent,

-against- 4939

Elroy Hodge,
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 (Robert Stolz, J.), rendered on or about August 21, 2007,

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

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

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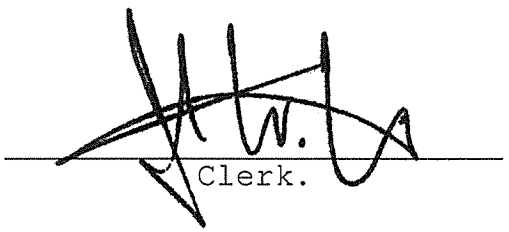


Clerk.

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

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4940 The People of the State of New York, Respondent, Ind. 2643/87

-against-

Bienvenido Polanco, Defendant-Appellant.

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

Order, Supreme Court, New York County (Arlene R. Silverman, J.), entered on or about January 18, 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.

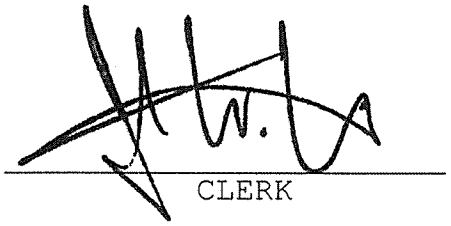
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: DECEMBER 30, 2008



CLERK

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4941 In re Charla Bikman, etc., Index 113348/06
Petitioner-Respondent,

-against-

New York City Loft Board,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for appellant.

Charla Bikman, respondent pro se.

Order and judgment (one paper), Supreme Court, New York County (Emily J. Goodman, J.), entered May 11, 2007, inter alia, granting the petition to annul respondent's determination, dated January 9, 2003, which granted the owner's abandonment application and denied petitioner's application for reimbursement of the fixtures installed and improvements made in the subject loft by petitioner's decedent, and remanding the matter for an appraisal of the fixtures and improvements, unanimously affirmed, without costs.

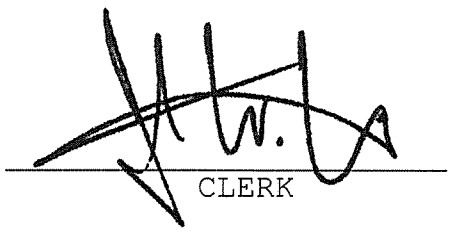
Loft Board Order No. 3049 denied petitioner's reconsideration application. Loft Board Order No. 2770 is the underlying order. Therefore, Order No. 2770 is "the final agency determination from which judicial review may be sought" (see 22 RCNY 1-07[d][ii]).

Contrary to the Administrative Law Judge's determination, which was adopted by respondent, the estate of a loft tenant is

entitled to the value of improvements installed by the tenant (*see Matter of Moskowitz v Jorden*, 27 AD3d 305, 306 [2006], *lv dismissed* 7 NY3d 783 [2006]). Thus, respondent's grant of the owner's abandonment application without requiring a sale of the improvements and compensation therefor to the estate was affected by an error of law (CPLR 7803[3]). Respondent's argument that petitioner waived any right to compensation for the value of the improvements because she never asserted this claim before surrendering the unit in 2001 is not properly before this Court (*see Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 593 [1982]). In any event, the estate did not waive its rights to the unit, because petitioner surrendered the unit in her individual capacity following Housing Court litigation to which the estate was not a party.

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

ENTERED: DECEMBER 30, 2008



CLERK

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4942 In re Meryl Brodsky, et al., Petitioners-Appellants, Index 118316/06

-against-

New York City Campaign Finance Board, Respondent-Respondent.

Arthur W. Greig, New York, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 27, 2007, which, inter alia, denied petitioners' challenge to respondent's determination that they pay $470 in penalties and $35,415 in reimbursements, unanimously affirmed, without costs.

Respondent's penalty determination was not arbitrary, capricious or contrary to law. Based on the information before it, respondent acted reasonably in concluding that petitioners failed to meet their burden of establishing that the post-election payments to petitioner Feinsot represented routine and nominal expenses necessary for compliance with the post-election audit, and that the post-election payment to Staples for a 2005 holiday card mailing was a routine and nominal expense associated with winding up the campaign (*see* Administrative Code of City of NY § 3-710 and 52 RCNY 5-03[e][2][ii]). The timing and amounts of the payments to Feinsot, as well as petitioner Brodsky's

testimony before respondent, are consistent with the conclusion that these were improper "bonus payments or gifts to staff or volunteers" paid out of leftover campaign funds (*id.*). Similarly, the evidence justified the Board's determination that the mailing expense was not actually for "a holiday card mailing to contributors, campaign volunteers, and staff" who had supported Brodsky's 2005 City Council campaign in particular (*id.*). Moreover, respondent's final determination on the obligation to repay unspent funds was not arbitrary, capricious or contrary to law because the findings that the post-election payments to Feinsot and the post-election Staples expense for the 2005 holiday mailing violated § 5-03(e)(2)(ii) required respondent to exclude those expenditures from the disbursements side of petitioners' unspent funds calculation (*see e.g. Matter of Eisland v New York City Campaign Fin. Bd.*, 31 AD3d 259, 263 [2006]).

We also reject petitioners' contention that respondent failed to follow its own rules by issuing its penalty determination prior to its final payment obligation determination, thereby precluding petitioners from exercising their right to challenge the repayment obligation determination under 52 RCNY § 5-02(a). The final repayment obligation determination followed as a matter of law from the final penalty determination. Rather than refusing to follow its own rules, the

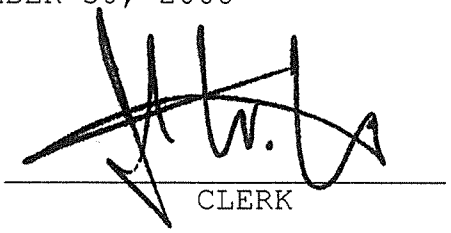
Board's interpretation of § 5-02(a) simply prevented petitioners from indirectly challenging the final penalty determination through a procedure reserved for review of a final repayment obligation determination.

There is no merit to petitioners' claim of denial of due process. The three Board members who issued the final penalty and final repayment obligation determinations did not have the July 12, 2006 Board meeting transcript available to them until after the determinations were issued, and only one of them had actually been present at that meeting. However, all three had an audiotaped recording of the meeting, and presumably listened to it before voting. In addition, the Board had before it all of the other materials submitted by petitioners in response to the numerous requests and inquiries made by respondent. These materials and the audiotaped recording were more than sufficient to enable the three Board members to make an informed decision (*see Matter of Joyce v Bruckman*, 257 App Div 795, 797-798 [1939], *appeal dismissed* 284 NY 736 [1940]). There is no reason here to probe the mental processes of the Board members to determine how they reviewed the record in reaching their conclusions (*Matter of Weekes v O'Connell*, 304 NY 259, 265 [1952]).

We have considered petitioners' remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 30, 2008



CLERK

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4943 In re Kymel Daveiga, Petitioner, Index 117047/07

-against-

The City of New York, et al., Respondents.

Meyer, Suozzi, English & Klein, P.C., New York (Joni H. Kletter of counsel), for petitioner.

Ricardo Elias Morales, New York (Samuel Veytsman of counsel), for The New York City Housing Authority and The Board of The New York City Housing Authority, respondents.

Determination of respondent New York City Housing Authority, dated October 31, 2007, terminating petitioner's employment as Supervisor of Grounds, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Carol R. Edmead, J.], entered March 6, 2008), dismissed, without costs.

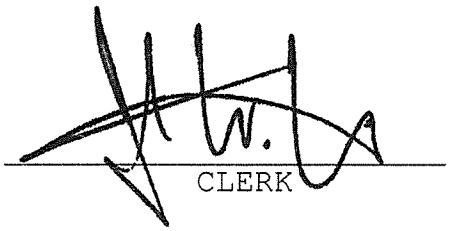
The finding that petitioner violated respondent's policy, set forth in Chapter I, Rule XII, Section C(21) of its personnel manual, prohibiting employees from "commit[ting] any . . . violation of the law either on or off duty or on or off the work site implicating their fitness or ability to perform their duties," is supported by substantial evidence (*see Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 417 [1991]), namely, petitioner's admission

that he possessed marijuana with an intent to use it while on respondent's property. We reject petitioner's argument that this rule required respondent to show that his possession and intent to use marijuana resulted, or was likely to result, in a demonstrably deficient job performance. Under the rule, reasonably interpreted (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [2007], *appeal dismissed* 10 NY3d 858 [2008]), it was enough to show that petitioner's possession and intent to use marijuana implicated his fitness, or suitability, for a supervisory position that is expected to promote respondent's efforts to provide a drug-free living environment for public housing residents, and its integrity in the eyes of other employees and residents. There is no evidence that, in reaching its determination, respondent, in violation of CPL 160.50 and 170.56(4) and Executive Law 296(16), relied on the sealed record of the criminal proceedings that were instituted against petitioner and dismissed. Having never requested the court's

leave to conduct disclosure pursuant to CPLR 408, petitioner cannot complain on appeal that he was not granted such leave. We have considered and rejected petitioner's other arguments.

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

ENTERED: DECEMBER 30, 2008



CLERK

Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4946N Mary Henry, etc.,
Plaintiff-Appellant,

-against-

Central Hudson Gas and Electric Corporation, et al.,
Defendants-Respondents.

Index 23455/06

Newman, O'Malley & Epstein, LLC, New York (Lawrence Epstein of counsel), for appellant.

Rizzo & Kelley, Poughkeepsie (James P. Kelley of counsel), for respondents.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered April 10, 2008, which, in an action for wrongful death and other personal injuries arising out of a motor vehicle accident in Ulster County, granted defendants' motion pursuant to CPLR 510(3) to change venue from Bronx County to Ulster County, unanimously affirmed, without costs.

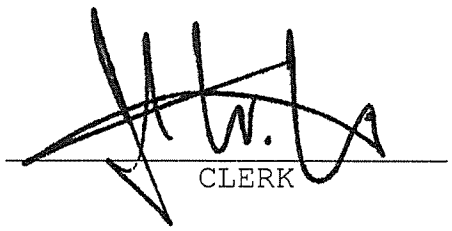
The court exercised its discretion in a provident manner in granting the motion to change venue, where defendants made the requisite showing that retention of this action in Bronx County would inconvenience nonparty material witnesses (*see Hoogland v Transport Expressway, Inc.*, 24 AD3d 191 [2005]). Defendants submitted, inter alia, the affidavits of a witness who came upon the accident scene while plaintiff's decedent may still have been alive, of the police officer and EMS worker who responded to the scene and prepared reports detailing their actions at the scene,

and of the now-retired Medical Examiner of Ulster County. All of the witnesses averred that they would be willing to testify in the case, but that traveling to Bronx County to testify would be inconvenient. Furthermore, the police officer and EMS worker stated that they would be inconvenienced by having to take a day off of work from their public service jobs to travel to Bronx County to testify, and inasmuch as the officer's testimony will bear on liability, and the paramedic has evidence respecting the injuries sustained in the accident, their testimony is material and the court appropriately considered their convenience (*see Kennedy v C.F. Galleria at White Plains*, 2 AD3d 222 [2003]).

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

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

ENTERED: DECEMBER 30, 2008



Tom, J.P., Friedman, Gonzalez, McGuire, Acosta, JJ.

4947N In re Elizabeth L. de Sanchez, Grantor. Index 9650/52 4573/74 4574/74

- - - - -

Pedro Arellano Lamar, et al., Movants-Appellants,

Eugenio J. Silva, et al., Cross-Movants Appellants,

-against-

JPMorgan Chase Bank, Respondent-Respondent.

Dorsey & Whitney LLP, New York (Mark S. Sullivan of counsel), for movant-appellants.

McCallion & Associates LLP, New York (Kenneth F. McCallion of counsel), for cross-movants appellants.

Kelley Drye & Warren LLP, New York (Robert E. Crotty of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 7, 2008, which denied the motion and cross motion by descendants of the grantor of certain 1927 trusts to vacate judicial orders of settlement entered on February 26, 1953, August 30, 1974, and September 11, 1975, unanimously affirmed, with costs.

In 1927, two years before the Great Depression, Elizabeth Laurent de Sanchez, whose family owned a sugar plantation in Cuba, set up seven inter vivos trusts for the benefit of her six children -- Emilio (two trusts in his name), Jorge, Julio,

Marcelo, Maria and Gabriela. In 1953, following the grantor's death, the first intermediate accounts for these trusts were settled and approved by Supreme Court, New York County, for Hanover Bank, as successor in interest to Central Union Trust Company and predecessor in interest to JP Morgan Chase Bank. In 1974, the court settled the bank's second intermediate accounts for the Emilio trusts, and in 1975, the court approved the bank's second and final accounts for the Jorge and Marcelo trusts. A half-century after the first accountings and more than 30 years after the second accountings, appellants -- the grantor's grandchildren, great grandchildren and great great grandchildren -- seek to vacate the judgments settling these accounts on the grounds that the bank engaged in constructive fraud against them, and the court never obtained personal jurisdiction over them.

Contrary to appellants' contentions, the motion court did not improperly raise the issue of timeliness sua sponte; the bank actually argued in its 2005 memorandum of law that the motions were untimely. Although the applicable standard of review is disputed, under either standard -- CPLR 317 or 5015 -- the motions were untimely. Even had the motions been timely, the arguments asserted on appeal -- lack of personal jurisdiction and "overwhelming evidence" of constructive fraud -- would be without merit.

With respect to personal jurisdiction, it is well

established that the affidavit of a process server constitutes prima facie evidence of proper service. The mere denial of receipt of service "is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service" (*De La Barrera v Handler*, 290 AD2d 476, 477 [2002]). Appellants' affidavits contained simply conclusory denials, and were thus insufficient to rebut the presumption of proper service (*see e.g. Ortiz v Santiago*, 303 AD2d 1, 3-4 [2003]). In any event, appellants' interests were "virtually represented" by the grantor's eldest living survivor in each line of descent (*see* CPLR 7703; SCPA 315). Her descendants, including the movants and cross movants herein, are successor income and contingent remainder beneficiaries. Neither the grantor nor any of appellants had present interests in income. Therefore, there was no need to serve the movants and cross movants with process in the accounting, since the grantor's interest was aligned with that of her progeny (*see Matter of Schwartz*, 71 Misc 2d 80 [1972]).

The remaining arguments with respect to personal jurisdiction are without merit. Cross movants' contention that the grantor's estate was a necessary party in the 1952 proceeding, so many years after the judgment, does not require that it be set aside as to them (*see Herskowitz v Friedlander*, 224 AD2d 305, 306 [1996]). The petitions and orders to show

cause adequately apprised the interested persons of the nature of the proceedings, and stated that the bank sought accountings for the trusts and to be relieved of any liability for its acts concerning those trusts for the periods of the accounts.

A judgment or order may be vacated for "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]). After the trusts were created in 1927, the goal of the investment fiduciary throughout the Great Depression and long thereafter was to preserve the principal while creating a reasonable income (*see Matter of Carnell*, 260 App Div 287, 289 [1940], *affd* 284 NY 624 [1940]). "The rule in respect of the duty of a trustee is to keep funds in a state of security, productive of interest and subject to future recall" (*Matter of Flint*, 240 App Div 217, 226 [1934], *affd* 266 NY 607 [1935]). The trust investments were not for growth of assets for the grantor's grandchildren and great grandchildren, but rather in accordance with her express direction that they be in securities that were "long term" and "tax exempt." Furthermore, extensive correspondence confirms that she and her family were kept apprised of the investments, and Emilio Sanchez confirmed that "all the changes during all the years have been done with my approval and that of Mrs. Elizabeth Laurent de Sanchez."

With respect to mortgage participation, where there has been full disclosure followed by judicial decree, post-decree

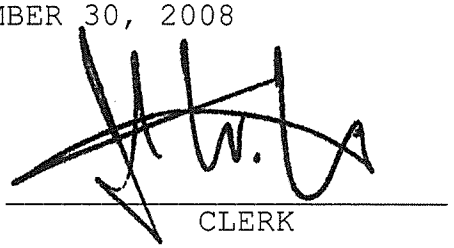
objections on matters raised by the accounting cannot suffice to open the decree (*see Matter of Van Deusen*, 24 Misc 2d 611, 616-617 [1960]). The record shows that the bank communicated extensively with the beneficiaries as to mortgage participation and did not conceal anything. In addition, there was no self-dealing, as the bank merely purchased the mortgage for the trust.

Finally, the bank did not misrepresent precedent concerning the Rule Against Perpetuities to the grantor, the beneficiaries, and the court in the 1974 proceeding concerning Jorge's and Marcelo's trusts, as there is a longstanding principle of interpretation that when there is an alternative possible construction that would not violate the Rule, the trust will not be invalidated and a construction that does not violate the Rule will be found to be the one the grantor intended (EPTL 9-1.3[b]; *see Schettler v Smith*, 41 NY 328, 336 [1869]). In this case, the problem arose because some of the grantor's children did not have issue of their own. It is unreasonable to argue that the grantor intended the trusts to be invalidated; in fact, the construction provided by the bank's counsel was clearly communicated to counsel for all parties, and no objections were raised.

We have considered appellants' remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 30, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
David Friedman
John W. Sweeny, Jr.
James M. McGuire, JJ.

1984
Ind 3208/03

The People of the State of New York,
Respondent,

-against-

Juwanna Wrotten,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, Bronx County (Steven Lloyd Barrett, J. at application for televised testimony; Harold Silverman, J. at witness availability hearing, jury trial and sentence), rendered November 23, 2004, convicting her of assault in the second degree, and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky and Jonathan Marvinny of counsel), for appellant.

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

McGUIRE, J.

This appeal calls upon us to determine whether Supreme Court erred in allowing the complainant to give televised testimony in defendant's assault trial. Although we do not decide this appeal on federal constitutional grounds, a review of the law on the scope of a defendant's Sixth Amendment right to confront the witnesses against him or her helps explain the state law ground on which we would decide the appeal. In our view the admission of the two-way, televised testimony is not only unauthorized by either the Legislature or the inherent powers of the Judiciary, it is clearly, albeit implicitly, prohibited by the relevant provisions of the Criminal Procedure Law.

Defendant, a home health aide, briefly cared for the complainant's wife in the couple's Bronx home until the wife moved to a nursing home. Approximately two and a half months after the wife moved to the nursing home, defendant, who maintained a relationship with the couple, went to the complainant's house. While both defendant and the complainant testified that defendant helped the complainant prepare snacks to bring to the wife, they offered dramatically different accounts of what happened at the house. The complainant testified that defendant assaulted him with a hammer and demanded (and took) money from him before fleeing the house. Defendant testified

that the complainant grabbed her breasts and that, to get his hands off her, she "picked up something and hit him with it." Defendant denied demanding or taking money from the complainant.

Defendant was indicted for assault in the first degree and two counts of robbery in the first degree. Prior to her trial, Supreme Court (Barrett, J.) granted the People's motion to present the complainant's testimony by television if he was unable to travel to New York to the extent of ordering a hearing on the issue of whether there was a factual necessity to permit the complainant to give televised testimony. Following the hearing, Supreme Court (Silverman, J.) determined that the People had established by clear and convincing evidence that the complainant was unable to travel to New York without seriously endangering his health. For this reason, Supreme Court concluded that he was unavailable to testify and permitted the People to present his testimony by a live, two-way television conference.

The complainant, while physically in California, gave the televised testimony. The complainant could see the courtroom, including the Judge and defendant, although the extent to which the witness could see the courtroom participants is in dispute, and could hear the proceedings in the courtroom. Those in the courtroom could see and hear the complainant. Ultimately, the jury considered four counts: one count of assault in the first

degree, one count of assault in the second degree and two counts of robbery. The jury acquitted defendant of assault and robbery in the first degree but convicted her of assault in the second degree.[1] On her appeal from her conviction of assault in the second degree, defendant's principal contention is that Supreme Court erred in permitting the complainant to give televised testimony.

Even assuming that defendant otherwise had a full opportunity to cross-examine her accuser, it does not follow that her Sixth Amendment right of confrontation was not violated. The Confrontation Clause of the Sixth Amendment "provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross examination" (*Coy v Iowa*, 487 US 1012, 1017 [1988]). The former right "guarantees the defendant a *face-to-face* meeting with witnesses appearing before the trier of fact" (*id.* at 1016 [emphasis added]), and, due to the undeniably "profound effect upon a witness of standing in the presence of the person the witness accuses" (*id.* at 1020), "serves much the same purpose" as the latter right in "ensur[ing] the integrity of the factfinding

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[1]The jury was unable to reach a verdict on the count of robbery in the second degree and the court declared a mistrial on that count.

process" (*id.* [internal quotation marks omitted]).

More recently, in *Crawford v Washington* (541 US 36, 51 [2004]), the Supreme Court observed the following about testimonial statements admitted against an accused: "The constitutional text, like the history underlying the common-law right of confrontation, . . . reflects an especially acute concern with [this] specific type of out-of-court statement." The statements by defendant's accuser in this case unquestionably were testimonial and, at least in a physical sense, those statements were made out of court.

To be sure, the Supreme Court also has emphasized that it "ha[s] never held ... that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial" (*Maryland v Craig*, 497 US 836, 844 [1990] [emphasis in original]), and that "in *Coy v Iowa*, we expressly left for another day the question whether any exceptions exist to the irreducible literal meaning of the Clause: a right to meet face to face all those who appear and give evidence at trial" (*id.* [internal quotation marks, ellipsis and emphasis omitted]). In *Maryland v Craig*, the Court upheld the receipt into evidence, in accordance with the required findings and procedures specified by the Maryland statute under constitutional challenge, the testimony of a child witness, who

was alleged to be the a victim of child abuse, given by one-way closed circuit television even though the witness could not see the defendant from the room outside the courtroom in which she was questioned. The majority, whose opinion was delived by Justice O'Connor, joined by Justices Rehnquist, White, Blackmon and Kennedy, held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured" (497 US at 850). The dissent, delivered by Justice Scalia, joined in by Justices Brennan, Marshall and Stevens, argued that the "categorical guarantee" (*id.* at 860) of a face-to-face confrontation could not be overcome by the policy judgments of the Maryland legislature relating to the commission and prosecution of child abuse crimes (*id.* at 861). Stressing the "explicit constitutional text" (*id.*), Justice Scalia would have found unconstitutional this public policy exception to the constitutional guarantee that "'[i]n *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him'" (*id.* at 870, quoting the Sixth Amendment [emphasis in original]).

Before *Maryland v Craig* was decided, the Court of Appeals

upheld, against a facial challenge premised on the Sixth Amendment right of confrontation, the provisions of CPL article 65, a comprehensive legislative enactment "authoriz[ing], in limited circumstances, the use of live two-way closed-circuit television as a method of permitting certain child witnesses to give testimony in sex crime cases from a testimonial room ... separate and apart from the courtroom" (*People v Cintron*, 75 NY2d 249, 253-254 [1990] [footnotes omitted]). That legislative scheme reflected the Legislature's considered policy decisions in an effort to balance important but competing concerns. As the Court stated, "Article 65 is designed to further the aim of insulating child witnesses from the trauma of testifying in open court and also, under certain conditions, from having to testify in the presence of the defendant while, at the same time, fully preserving the defendant's constitutional rights" (*id.* at 254).

After *Maryland v Craig* was decided, a panel of the Second Circuit rejected a defendant's contention that his constitutional right to confront the witnesses against him was violated by the admission at trial of the testimony of a government witness who testified via two-way, closed circuit television from a remote location (*United States v Gigante*, 166 F3d 75, 79 [1999], *cert denied* 528 US 1114 [2000]). After an evidentiary hearing was held on the government's application, the District Court issued

an order authorizing the closed-circuit presentation of the witness' testimony on the ground that the witness was too ill to travel to court. Significantly, the District Court issued the order despite the absence of any Congressional enactment specifically authorizing the receipt of testimony at trial against a criminal defendant via closed-circuit, two-way television. Rather, as stated by the Second Circuit, the District Court Judge "bas[ed] his decision upon his inherent power under Fed. R. Crim. P. 2 and 57(b) to structure a criminal trial in a just manner" (*id.* at 80 [internal quotation marks omitted]). Notably, the Second Circuit's decision does not discuss -- presumably the issue was not raised -- the question of whether the District Court had the inherent authority to permit the televised testimony.

Defendant argues, among other things, that this case is distinguishable from *Maryland v Craig* because securing the testimony of a witness who is unavailable to testify due to poor health is not a sufficiently important public policy concern to justify the attendant curtailment of a defendant's Sixth's Amendment right of confrontation. In this regard, defendant relies in particular on the en banc decision of the Eleventh Circuit in *United States v Yates* (438 F3d 1307 [2006]), in which the testimony of two witnesses who were unwilling to travel from

Australia to the United States to testify was presented to the jury by live, two-way video teleconference (*id.* at 1309, 1315). The Eleventh Circuit accepted the District Court's conclusion that the witnesses were necessary to the prosecution's case (*id.* at 1316), but held that under the circumstances presented, "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face" (*id.*).

Defendant also challenges the finding that the witness was unavailable to testify due to poor health, and stresses that the prosecution's expert, when asked whether the witness would survive a trip back to New York, responded "You know, I suppose he would." In addition, defendant offers two other fact-based reasons, both of which she raised in Supreme Court, to support her contention that the televised testimony violated her Sixth Amendment right of confrontation. First, defendant maintains that the witness was unable to see clearly the participants in the courtroom in New York. Second, defendant objects, albeit not in the argument section of her main brief, that no New York court officer or any other New York judicial official was present in the room in California to supervise the proceedings and make sure that the witness was not improperly communicated with during the

televised testimony.[2]

Finally, defendant also argues that, given changes in the composition of the United States Supreme Court since *Maryland v Craig* was decided, the Supreme Court as presently constituted likely would rule that her Sixth Amendment right of confrontation was violated.[3] Of course, however, a decision of the United States Supreme Court is binding on us unless and until it is overruled. An argument that the Supreme Court will or likely will overrule one of its decisions, whatever force the argument may have in a particular case, does not undermine the binding nature of the precedent; our office is not to predict the law, but to declare and apply it.

In any event, we need not decide any of defendant's specific contentions or reach the federal constitutional question pressed upon us by the parties. The Legislature has authorized trial courts to admit televised testimony only by child witnesses in certain sex crime cases and under carefully specified circumstances. In this crucial respect, *Maryland v Craig* and

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[2]The witness was not sworn to tell the truth by anyone in California but by the court clerk, who of course was in New York. The parties do not address the issue of whether he was validly sworn.

[3]Defendant makes no mention in his main or reply brief of *People v Cintron*.

People v Cintron are distinguishable in that the abridgment, albeit not the violation, of the defendants' right to confront the witnesses against them in these cases was authorized by statutes reflecting critical public policy choices by the legislative branch.

If trial courts in New York have the inherent authority to admit the live, two-way, televised testimony of elderly or infirm witnesses who are unable to appear in court without endangering their lives, at least four confounding questions arise. (1) Was the enactment of CPL article 65 unnecessary in the sense that even without article 65 trial courts could have exercised that inherent authority and received the live, two-way, televised testimony of child witnesses in certain sex crime cases under circumstances identical or similar to those specified by the Legislature in article 65? (2) If the answer to the first question is yes, can that answer be reconciled with the fundamental precept of separation of powers committing critical public policy judgments exclusively to the legislative branch (*see Bourquin v Cuomo*, 85 NY2d 781, 784 [1995] ["the constitutional principle of separation of powers . . . requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies"] [citations omitted]), not to the judicial branch or

the judicial branch acting at the behest of an executive branch official, i.e., the District Attorney? (3) If the answer to the first question is yes, could the Judiciary invoke its inherent authority and permit, for example, the receipt of live, two-way, televised testimony either from child witnesses who are 15 years old or less (despite the Legislature's determination to authorize such testimony only by child witnesses who are 14 years old or less [*see* CPL 65.00(1)]) or in prosecutions under Penal Law article 263, entitled "Sexual Performance By A Child" (despite the Legislature's determination to limit the offenses to those defined in Penal Law article 130 and Penal Law §§ 255.25, 255.26 and 255.27 [*see* CPL 65.00(1)])?[4] (4) Whatever the answer to the first question is, can the enactment of the carefully circumscribed authority conferred by article 65 be thought to authorize an expansion of that authority by the judicial branch or the judicial branch acting at the behest of the executive

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[4]Pursuant to chapter 320, section 12 of the Laws of 2006, the Legislature expanded the class of offenses to include Penal Law §§ 255.26 and 255.27. Two years earlier, pursuant to chapter 362 of the Laws of 2004, the Legislature amended the provision of CPL 265.00(1) defining the term "child witness" to mean a person 12 years old or less by redefining that term to mean a person 14 years old or less. Accordingly, another but not at all confounding question arises: were these legislative enactments amending article 65 unnecessary in the sense that they could have been effectuated by the Judiciary through an exercise of its inherent authority?

branch?

As is both evident from *Maryland v Craig* and *People v Cintron* and indisputable in any event, the enactments at issue in both cases reflected critical policy judgments by the legislative branch. For that reason, we doubt that the answer to the second question is yes. But that question need not be decided for this case turns on the answer to the first, third and fourth questions. In our view, the answer to these three questions is no, and that answer compels the conclusion that the trial court had no authority to permit the live, two-way, televised testimony admitted against defendant. If, as we think is self-evident, the Judiciary lacks the authority effectively to make piecemeal revisions to CPL article 65 like those hypothesized in the third question, it is impossible to understand how the Judiciary could have the authority effectively to make the more sweeping revisions to CPL article 65 that actually would be made by sustaining the use of the televised testimony in this case. As discussed below, moreover, the conclusion that the televised testimony in this case is not authorized is supported by more than logic.

The question of the authority of the trial court to admit the televised testimony is preserved for our review. In an opinion dated March 22, 2004, Justice Steven L. Barrett, who did

not preside over the trial, granted the People's application for a conditional examination of the witness pursuant to CPL 660.20. As Justice Barrett noted, however, "[s]uch an examination . . . contemplates the witness' presence in New York state." Thereafter, the People asserted that the witness was too ill to travel to New York and sought an order permitting the receipt of the witness' testimony at trial via a live, two-way televised procedure whereby the witness would remain in California. In opposing the People's motion, counsel argued both that the procedure would violate defendant's Sixth Amendment right to confront the witness and that "[t]he procedure . . . the [P]eople seek to conduct is not authorized in New York." In support of the latter argument, counsel expressly argued that New York courts "have recognized video testimony of a witness, in lieu of physical presence, only when authorized by statute." Justice Barrett rejected that argument and granted the People's motion in a written decision and order dated August 10, 2004. Justice Barrett relied on "the inherent power of a trial court to fashion procedures that will ensure the integrity of the trial process." He cited Judiciary Law § 2-b(3), which provides that "[a] court of record has power ... to devise and make new process and forms of proceedings, necessary to carry into effect the powers and

jurisdiction possessed by it."[5] Accordingly, defendant's timely and specific protest that the procedure sought by the People was not authorized, as well as Justice Barrett's express ruling on that protest that the inherent power of the courts was sufficient to authorize it, has preserved the issue for our review (CPL 470.05[2]).[6]

Justice Barrett's and the dissent's reliance on Judiciary Law § 2-b(3) is misplaced. That statute limits the authority of a court to adopt "new process and forms of proceedings" to those that are "*necessary* to carry into effect the powers and jurisdiction possessed by it" (emphasis added). The word "necessary" is not so elastic as to include whatever a court considers convenient or desirable from a public policy perspective. That trial courts in criminal cases did without

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[5]Thereafter, counsel elaborated upon this argument at length in a memorandum of law submitted in support of defendant's motion to reargue the August 10, 2004 order. In a written decision and order dated September 3, 2004, Justice Barrett adhered to his prior decision. Although Justice Barrett discussed the Sixth Amendment issue at length, he saw no reason to allow reargument on the issue of the "inherent power [of courts] to employ procedures not expressly authorized by statute" as that issue was "squarely addressed at oral argument, in the memorandum filed, and in the initial decision of the Court."

[6]In light of this conclusion, we need not consider whether the admission of the televised testimony constitutes a mode of proceedings error that need not be preserved for appellate review (*see People v Agramonte*, 87 NY2d 765, 769-770 [1996]).

live two-way, televised testimony of *any* witnesses until CPL article 65 was enacted in 1985 (L 1985, ch 505) is proof enough that authorizing the televised testimony in this case is not "necessary to carry into effect the powers and jurisdiction" of trial courts.

For this reason alone Judiciary Law § 2-b(3) cannot plausibly be thought to authorize the televised testimony of witnesses in criminal trials under any circumstances, let alone circumstances broader than those specified in article 65. Moreover, there is another important reason why Judiciary Law § 2-b(3) does not authorize the televised testimony in this case. The authority it confers or recognizes is limited as well to "new process and forms of proceedings." The statute, in other words, is concerned with the authority of courts over matters of procedure. The inherent authority of courts over matters of procedure may well entail some incidental authority over matters of substance, and we recognize that a nice distinction between matters of procedure and substance cannot always be drawn.[7] But it scarcely follows that a coherent line can never be drawn. As discussed above (and below), any determination to permit the

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[7]Similarly, the powers of each branch "cannot be neatly divided into isolated pockets" (*Bourquin v Cuomo*, 85 NY2d at 784).

receipt of the live, two-way, televised testimony of a witness in criminal cases necessarily requires substantive policy decisions to be made, not decisions about matters that largely are procedural in nature. Indeed, what is true of the Legislature's decision to enact article 65 is equally true of the decision by the trial court in this case to permit the televised testimony of the witness. The bill jacket for the bill that enacted article 65 contains a letter from the Office of Court Administration responding to a request from Governor Cuomo for its views on the bill. OCA's counsel stated that "[t]he Office of Court Administration takes no position with respect to the advisability of permitting a child's testimony to be taken by means of closed-circuit television, which is a matter of public policy to be determined by the Legislature" (July 1, 1985 letter from Michael Colodner, at 2, Bill Jacket, L 1985, ch 505).

If the inherent powers of the Judiciary are sufficient to authorize the televised testimony in this case, it must be that these powers represent a broad source of authority that would permit trial courts to expand the use of live, two-way, televised testimony in other circumstances not specified in article 65. The dissent stresses that "the record supports the hearing court's finding that it would be medically unsafe and potentially life-threatening for the victim, a man in his eighties afflicted

with severe health problems and residing in a California assisted living facility, to travel to New York." But if the expanded use of televised testimony in this case is authorized by the inherent powers of the Judiciary, it necessarily follows that these powers would authorize its expansion, for example, to all cases in which it would be "medically unsafe and potentially life-threatening" for any witness, regardless of age or where the witness resides (be it New York or any other state), to travel to the particular court in New York in which the prosecution is pending. A policy judgment or a constitutional provision would or might prevent such an expansion, but the dissent does not and cannot identify any limiting principle in the inherent powers of the Judiciary that would prevent it.[8]

We recognize that the inherent powers of the Judiciary "are neither derived from nor dependent upon express statutory authority" (*Gabrelian v Gabrelian*, 108 AD2d 445, 448 [1985],

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[8]Indeed, the contended-for inherent powers of the Judiciary must be broader still. After all, it cannot be that the inherent power of the Judiciary to authorize the use of televised testimony of witnesses in criminal cases first sprang into existence when television became a reality in the middle of the twentieth century. Thus, it must be that the inherent powers of the Judiciary to authorize the use of televised testimony of witnesses in criminal cases is an instance of some broader authority that existed before the advent of television. Suffice it to say, the nature of that preexisting authority is not apparent.

appeal dismissed 66 NY2d 741 [1985]), and thus are of constitutional stature (*id.* at 448-449). But even assuming that Judiciary Law § 2-b(3) confers powers that are narrower than those arising from the constitutional stature of the courts, the analysis would not change (*see id.* at 449 [under the inherent powers doctrine a court "has the powers reasonably *required* to act as an efficient court"] [internal quotation markes omitted, emphasis added]).

The dissent suggests that we view Supreme Court's inherent powers, and its powers under Judiciary Law § 2-b(3), as being "limited to those absolutely indispensable to its functioning." We say nothing that reasonably can be construed as expounding any such view. To the contrary, our position is not that there is *no* elasticity in the word "necessary" (or in the word "required") but only that, to repeat ourselves, the word is not so elastic as to include whatever a court considers convenient or desirable from a public policy perspective.

It certainly would be presumptuous of us, to say the least, to construe the word "necessary" inconsistently with Chief Justice Marshall's famous opinion in *McCulloch v Maryland* (17 US 316 [1819]). Happily for us, we do not. As Chief Justice Marshall stressed, the word "necessary," "like others, is used in various senses; and, in its construction, the subject, the

context, the intention of the person using them, are all to be taken into view" (*id.* at 415). Thus, in rejecting the argument that Congress' power under article 1, § 8 to pass laws "necessary and proper for carrying into Execution" the powers expressly granted to Congress is limited to those that "are indispensable, and without which the power would be nugatory" (*id.* at 413), Chief Justice Marshall relied in part on the terms of the second sentence of article 1, § 10, which prohibits the states, without the approval of Congress, from laying imports or duties on imports or exports, "except what may be *absolutely* necessary for executing its inspection Laws." As Chief Justice Marshall wrote, it is "impossible" not to "feel[] a conviction that the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely'" (*id.* at 414-415).

More importantly, however, Chief Justice Marshall concluded that there was more than a dollop of elasticity in the word "necessary" for a more fundamental reason. To construe the word to confer only those powers that are "indispensably necessary" (*id.* at 418), "would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think ... too apparent for controversy" (*id.* at 419). Similarly, our view is that the

scope of the Judiciary's inherent powers must be appraised in the context of a constitution providing that "[t]he legislative power of this state shall be vested in the senate and assembly" (NY Const, art III, § 1). We also think it too apparent for controversy that the dissent nonetheless vests in the Judiciary sweeping powers that are legislative in nature because they entail the authority to make "critical policy decisions" (*Bourquin v Cuomo*, 85 NY2d at 784).

For the reasons discussed, the Judiciary's inherent powers under the dissent's view are laden with policy-making authority. But consider, too, the following: the only limiting principle on the authority to receive the televised testimony of an absent witness in a criminal case appears to be that the prosecution otherwise must not be able to go forward.[9] Presumably, the dissent does not believe that this inherent authority can be enlisted only in the ranks of the prosecution. That could not be reconciled with either the presumption of innocence or a defendant's constitutional right to present a defense (*see Chambers v Mississippi*, 410 US 284, 294 [1973]). Accordingly, it

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[9]In other words, the court's inherent authority to receive the testimony is at its zenith when the witness is most important to the prosecution and at its nadir when the witness is not important. Does the exercise of that authority also depend on judgments by trial courts about how important the crime charged is from a public policy perspective?

must be that the Judiciary's inherent powers also are so sweeping as to permit the televised testimony of an absent defense witness when the defendant otherwise would not be able to go forward with a defense.

The dissent does not attempt any answer to the first question posed above. Its position, however, entails the proposition that the Judiciary, even before the enactment of article 65, had inherent authority to permit the televised testimony of child witnesses in certain sex crime cases under circumstances identical or similar to those specified in article 65. Moreover, its position entails the additional proposition that the Judiciary, even before the enactment of article 65, had inherent authority to permit the televised testimony of witnesses in criminal cases under circumstances broader than those specified in article 65, including those presented by the facts of this case. Both propositions are inconsistent with "the constitutional principle of separation of powers ... requir[ing] that the Legislature make the critical policy decisions" (*Bourquin v Cuomo*, 85 NY2d at 784); the dissent makes no attempt to reconcile the sweeping inherent powers it discovers in the Judiciary with that constitutional principle.

People v Herring (135 Misc 2d 487 [1987]) provides clear, albeit indirect, support for our position. In *Herring*, the court

concluded that CPL 60.44, which expressly authorizes a court to permit a witness less than 16 years old to use an anatomically correct doll in testifying in prosecutions for certain sex crimes and other offenses, did not preclude the court from permitting the use of such a doll to facilitate the testimony of an elderly and aphasic witness in a sodomy prosecution (*id.* at 489-490). As the authorities cited by the court make clear (*id.* at 490), and as cannot be doubted in any event, trial courts always have had discretionary authority to allow the use of demonstrative evidence. Accordingly, the decision to permit the receipt into evidence and use of an anatomically correct doll is a mere instance of that existing authority. It no more required legislative authorization than did the decision of courts with the advent of color photography to permit the receipt into evidence and use of color rather than black and white photographs. Moreover, also unlike the decision to permit the use of the televised testimony of a witness in a criminal case, the decision to permit the use of this particular form of demonstrative evidence does not entail the exercise of any significant policy-making authority and does not affect, let alone curtail, a substantive constitutional right of the

defendant.[10]

On this score, finally, we note that in *United States v Yates* (438 F3d 1307) the Eleventh Circuit rejected the prosecution's argument that the admission of the two-way, televised testimony of the witnesses in Australia was a matter within the inherent powers of trial courts (*id.* at 1314). In this regard, the Eleventh Circuit held that "history demonstrates otherwise" (*id.*) and relied largely on the Supreme Court's decision not to transmit to Congress for its approval an amendment to Federal Rule of Criminal Procedure Rule 26 proposed by the Advisory Committee on the Criminal Rules that would have conferred broad authority to allow testimony by means of two-way video conferencing (*id.*). The Eleventh Circuit pointed out that Justice Scalia had "filed a statement explaining that he shared 'the majority's view that the Judicial Conference's proposed Fed.

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[10]For these same reasons, it would make no sense to construe CPL 60.44 to reflect a legislative determination to preclude the use of anatomically correct dolls in all circumstances other than those specified in the statute. Moreover, we note that the bill jacket for the bill that enacted CPL 60.44 contains two letters from legislators to Governor Cuomo. Both letters report that "some judges" had not allowed the use of such dolls (*see* July 18, 1986 letter from Senator Dean G. Skelos, at 1, Bill Jacket, L 1986, ch 358; July 14, 1986 letter from Assemblywoman May W. Newburger, at 1, Bill Jacket, L 1986, ch 358). By contrast, as discussed below, the only reasonable conclusion is that article 65 does reflect a legislative determination to preclude the use in criminal cases of televised testimony in all circumstances other than those specified in this comprehensive enactment.

Rule Crim. Proc. 26(b) is of dubious constitutional validity under the Confrontation Clause of the Sixth Amendment'" (*id.* at 1314 [quoting *Order of the Supreme Court*, 207 FRD 89, 93 (2002)]).[11] We reach the same result for the different reason that precisely because courts would be required to make judgments about the relative importance of various public policy concerns -- judgments that are not the province of the Judiciary (*Bourquin v Cuomo*, 85 NY2d at 784) -- their inherent powers do not authorize them to decide when to permit the use of the televised testimony of witnesses in criminal cases.

Even if there were a well of inherent judicial authority deep enough to authorize the use of the televised testimony of a witness in criminal cases, article 65 displaced its waters so as to preclude the exercise of that authority. The comprehensive legislative scheme enacted as CPL article 65 reflects a host of crucial policy judgments made by the Legislature. The Judiciary, as a co-equal branch, is bound to conclude that the policy judgments made by the Legislature were considered ones (*see Middlesex County Sewerage Auth. v National Sea Clammers Assn.*,

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[11]Of course, the inherent powers of federal district courts are not necessarily as broad as those of New York courts and, in any event, we would not be required to come to the same conclusion as the Eleventh Circuit even if they were (*see People v Kin Kan*, 78 NY2d 54, 60 [1991]). Needless to say, however, we regard the Eleventh Circuit's decision as persuasive authority.

453 US 1, 15 [1981] ["In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"]; *Farrington v Pickney* 1 NY2d 74, 88 [1956] ["the choice of measures is for the legislature, who are presumed to have investigated the subject, and to have acted with reason, not from caprice"] [internal quotation marks omitted]). Obviously, in enacting article 65, the Legislature went only so far in authorizing the admission against criminal defendants of live, two-way, televised testimony of witnesses. Nothing in article 65 even hints that the Legislature intended to allow trial courts to admit such testimony under any circumstances other than those prescribed in article 65. If we conclude, as we must, that the decision to go only that far was a considered judgment by the Legislature, we should conclude as well that whatever the scope of the Judiciary's inherent powers otherwise might be, trial courts have no authority to permit the receipt of such testimony in circumstances that are not authorized by article 65. The contrary conclusion would permit another branch of government not only to exercise legislative powers but to trample on the policy choices made by the Legislature. And that, of course, would offend "the constitutional principle of separation of powers, . . . [which] requires that the Legislature make the critical policy

decisions" (*Bourquin v Cuomo*, 85 NY2d at 784).

Our conclusion that the Legislature intended in CPL article 65 to go only as far as it did in authorizing the receipt of live, two-way, televised testimony in criminal cases is buttressed by "the standard canon of construction of *expressio unius est exclusio alterius*" (*Morales v County of Nassau*, 94 NY2d 218, 224 [1999]). Thus, we can infer that the expression of authority to permit such testimony under specific circumstances indicates an exclusion of authority under other circumstances (*see id.*). Similarly, that conclusion is reinforced by the comprehensive nature of CPL article 65. In *Mark G. v Sabol* (93 NY2 710 [1999]), the Court of Appeals rejected the claim that a private cause of action should be recognized under title 4 of article 6 of the Social Services Law. In explaining its conclusion that recognizing such a cause of action "would not be consistent with the legislative scheme" (*id.* at 720), the Court wrote:

> "The Legislature specifically considered and expressly provided for enforcement mechanisms. As Senator Pisani's sponsoring memorandum makes clear, the provisions of title 4 were enacted as the 'comprehensive' means by which the statute accomplishes its objectives. Given this background, it would be inappropriate for us to find another enforcement mechanism beyond the statute's already 'comprehensive scheme'" (*id.*).

Two other decisions of the Court of Appeals are instructive.

In *People v Ayala* (75 NY2d 422 [1990]) the trial court adopted "a more expansive reading" (*id.* at 429) of CPL 670.10, so as to permit the receipt into evidence at trial of testimony given by a witness at a prior proceeding, a suppression hearing, even though that proceeding was "not literally within any of the three categories of prior proceedings delineated in the statute" authorizing the receipt of prior testimony (*id.* at 428). The trial court concluded that it "'defies logic'" to believe that the Legislature intended to exclude testimony at a suppression hearing while permitting the use at trial of testimony given at a felony hearing (*id.* at 429). In holding that the admission of the suppression hearing testimony was not authorized, the Court wrote:

> "[A]lthough CPL 670.10 is largely a codification of common-law principles, this court has already rejected the argument that the statutory terms and their fair import are not exclusive. As the court has noted, the statute contains three carefully worded and enumerated exceptions to the general rule against hearsay evidence, suggesting that the Legislature intended the statute's reach to be relatively narrow and limited to its precise terms. Further, the general rule that in criminal matters the courts must be more circumspect, counsels against a construction that would extend CPL 670.10 well beyond the fair import of its language (*id.* at 429 [internal brackets, quotation marks and citations omitted]).

Clearly, the reasoning of *People v Ayala* applies with equal force here and further supports the conclusion that the carefully

delineated circumstances set forth in CPL article 65 also are exclusive (*cf. Gade v National Solid Wastes Mgmt. Assn.*, 505 US 88, 98 [1992] [noting that field preemption, one of the two types of implied preemption, applies "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"] [internal quotation marks omitted]).

In *People v Grasso* (11 NY3d 64 [2008]), the Court stated that "[a]lthough the Executive must have flexibility in enforcing statutes, it must do so while maintaining the integrity of calculated legislative policy judgments. That balance falters where, as here, the Executive seeks to create a remedial device incompatible with the particular statute it enforces" (*id.* at 70-71). The amount of the allegedly excessive compensation was irrelevant, "however unreasonable that compensation may seem on its face" (*id.* at 72). The Attorney General's effort to recover the compensation was inconsistent with the statutory scheme and was invalid because it "would tread on the Legislature's policymaking authority" (*id.*). Similarly, it is of no moment how unreasonable it may seem on its face to exclude live, two-way, televised testimony of an infirm and elderly witness. Whether it is reasonable is a policy judgment committed to the Legislature. In delineating in CPL article 65 the specific circumstances under

which the live, two-way, televised testimony of a witness could be received into evidence, the Legislature struck a balance between the legitimate exigencies of law enforcement and the ability if not the absolute federal constitutional right of a defendant physically to confront the witnesses against him. That balance, too, may not be disturbed without "tread[ing] on the Legislature's policy-making authority" (*id.*).

The dissent offers nothing, except for subdivision three of CPL 65.10 in support of its conclusion that "[n]othing in CPL article 65 suggests that the Legislature ... intended to curtail otherwise existing judicial authority to deal with other kinds of situations not addressed by that article." This conclusion, however, erroneously assumes that prior to the enactment of article 65 the Judiciary had inherent authority to permit the use of televised testimony of witnesses in criminal cases. Another flaw in the dissent's position is apparent from its use of the phrase "other kinds" of situations. The dissent thus glosses over the critical point: the "situation" presented by this case differs in *substance* from the "situation" addressed by article 65. Moreover, if, as we conclude, the Judiciary's inherent powers are not so sweeping as to permit -- before or after the enactment of article 65 -- the televised testimony of witnesses in criminal cases, the savings clause of CPL 65.10(3) is

irrelevant. That clause preserves preexisting authority "to protect the well-being of a witness *and the rights of the defendant*" (CPL 65.10(3) [emphasis added]). Regardless of whether the use of the televised testimony in this case is consistent with the guarantees of the Confrontation Clause, it unquestionably abridged rather than "protect[ed]" defendant's "right physically to face those who testif[ied] against [her]" (*Coy v Iowa*, 487 US at 1017).

Just as the dissent does not attempt any answer to the first question posed above, it does not attempt to answer the third question, either. Presumably, however, the dissent does not believe that the Judiciary could exercise its inherent powers and approve a relatively modest expansion of the use of televised testimony in criminal cases so as to permit, for example, the receipt of televised testimony from children who are 15 years old or less. If the Judiciary could not, it can only be because that expansion would be inconsistent with the policy choices made by the Legislature when it enacted and later amended article 65 and specified that a child witness must be 14 years old or less. But if that is so, and we believe it is, it is difficult to fathom how the far broader expansion of the use of televised testimony that was permitted in this case could be consistent with the policy choices made by the Legislature when it enacted article 65

and authorized the televised testimony of a witness only in certain sex crime cases and only then with respect to certain child witnesses. On the other hand, if the dissent believes that the Judiciary could exercise its inherent powers and permit the receipt of televised testimony from children who are 15 years old or less, it is difficult to fathom how that position can be reconciled with "the constitutional principle of separation of powers ... requir[ing] that the Legislature make the critical policy decisions" (*Bourquin v Cuomo*, 85 NY2d at 784).

The claimed authority to allow the televised testimony in this case also is inconsistent with the far more comprehensive legislative scheme of which article 65 is a part. CPL article 680, entitled, "Securing Testimony Outside the State for Use in Proceeding Within the State -- Examination Of Witnesses on Commission," prescribes the circumstances under which testimony material to a trial "may be taken by 'examination on a commission' outside the state and received in evidence at [the] trial" (CPL 680.10[1]). A "commission" -- i.e., "a process issued by a superior court designating one or more persons as commissioners and authorizing them to conduct a recorded examination of a witness or witnesses under oath" (CPL 680.10[2]) -- is authorized when, among other requirements, the "witness resides outside the state" (CPL 680.20[2][d]) and

"possesses information material to the action which in the interest of justice should be disclosed at the trial" (CPL 680.20[2][e]). The commission authorizes the commissioner or commissioners to administer the oath to the witness (CPL 680.60[1][c]) and, when "the examination is to occur within the United States or any territory thereof," the commissioner or commissioners must be an "attorney authorized to practice law in the specified jurisdiction or any person authorized to administer oaths therein" (CPL 680.60[2][a]). Although the testimony of the witness is taken "primarily on the basis of interrogatories annexed to the commission" (CPL 680.10[2]), direct and cross-examination also is authorized "[u]pon the conclusion of the questioning ... upon the written interrogatories" (CPL 680.70[3]). The "defendant has a right to be represented by counsel at the examination, and the district attorney also has a right to be present" (CPL 680.70[3]).

The critical point here is that article 680 permits the People to take the testimony of a witness by commission only if the defendant first has applied for the issuance of a commission and that application has been granted (CPL 680.30[1], 680.40). Thus, the People have only a defensive or derivative right to examine on a commission a witness who resides outside the state. In essence, article 680 prohibits the People from taking the

testimony of a witness outside of the state by commission except when the defendant first has been authorized by article 680 to take the testimony of a witness outside of the state that the defendant regards as relevant to his or her defense. Notably, for precisely this reason, Justice Barrett rejected an earlier application by the People to examine the witness on a commission pursuant to article 680.

Article 680 contains no exception to that prohibition for cases in which either the witness' testimony would be critical to the prosecution's case or the witness cannot travel to New York without endangering his or her life or health. At the very least, that prohibition would be undermined if the People can obtain an order from a trial court authorizing the receipt into evidence of the televised testimony of a prosecution witness who resides outside the state without regard to whether the defendant has sought a similar order relating to a defense witness.

Moreover, and in any event, as defendant expressly argued in opposing the People's motion for an order permitting the witness to testify by way of a live two-way televised procedure, "[t]he legislature has already addressed the remedies available when a witness is physically present outside New York." Because the Legislature specifically addressed that circumstance in article 680, the Judiciary lacks authority to address it and provide

another remedy (*cf. People v Grasso, supra*). The receipt of the televised testimony in this case can be reconciled with the strictures of article 680 only by indulging the transparent fiction that despite the physical presence of the witness in California, he was not outside New York because his testimony was being transmitted by television to a courtroom in New York.[12]

In addition, the claimed authority to allow the televised testimony in this case is hard to square with article 660 of the Criminal Procedure Law, entitled, "Securing Testimony for Use in a Subsequent Proceeding -- Examination of Witnesses Conditionally." Under article 660, either party may obtain an order directing the examination of a witness conditionally if the witness "[p]ossesses information material to the criminal action or proceeding" (CPL 660.20[1]), and "[w]ill not be amenable or responsive to legal process or available as a witness at a time when his testimony will be sought, either because he is: (a) About to leave the state and not return for a substantial period of time; or (b) Physically ill or incapacitated" (CPL

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[12]We note, moreover, that article 680 does not authorize the testimony of the witness to be recorded by videotape. By contrast, in prescribing in CPL article 660 the circumstances under which a witness may be examined conditionally -- i.e., when the witness may be unavailable at the time of trial (*see* CPL 660.20[2]) -- the Legislature expressly authorized the court to "order that the examination also be recorded by videotape" (CPL 660.50[3]).

660.20[2]).[13] Although the witness may be examined in a county other than the one in which the criminal action or proceeding is pending (CPL 660.50[2]), the examination must be conducted within the state (*People v Craig*, 151 Misc 2d 442, 444 [1992]). Of course, a criminal defendant enjoys both a statutory (CPL 260.20) and a federal constitutional right to be present at trial (*Kentucky v Stincer*, 482 US 730, 745 [1987]). As is clear from the express provision specifying that the examination "must be conducted in the same manner as would be required were the witness testifying at a trial" (CPL 660.60[1]), the defendant has a right to be present when it is conducted (*People v Craig*, 151 Misc 2d at 444 ["The only features of a conditional examination which differ from those of a trial are the absence of a jury and the presence of duly authorized videotape recording"]).

Surely the Legislature could not have intended that the defendant's right to be present during the conditional examination of a prosecution witness could be thwarted (or the defendant's right of confrontation abridged even if not violated) whenever the prosecution does not seek a conditional examination before a witness leaves the state but applies for an order

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[13]The examination is "conditional" because the testimony taken is admissible only if the witness is unavailable to testify at the trial or other proceeding (CPL 670.10[1]).

permitting the use of live, two-way, televised testimony only after the witness leaves the state. At the very least, to avoid such a nonsensical conclusion, it would be necessary to require the prosecution to establish that it did not know and could not with reasonable diligence have known that the witness was about to leave the state.[14] Moreover, in opposing the People's application for permission to use a live, two-way, televised procedure to present the witness' testimony, defendant argued that "[w]hat the People are seeking to do ... [is] to circumvent the established rule that a conditional examination pursuant to CPL article 660 may not be conducted outside New York." That is a substantial argument. The only conceivable response is that the provisions of article 660 are distinguishable because, although the witness' testimony was recorded on videotape, it was simultaneously presented to the jury. From the perspective of a criminal defendant who wants the protections of his "right physically to face those who testify against him" (*Coy v Iowa*, 487 US at 1017), however, it is of no moment that the testimony of an accuser is presented through live testimony rather than

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[14]Although defendant appears not to have disputed that the prosecution did not know that the witness had moved to California until after the move occurred, nothing in the record bears on the issue of whether the prosecution was remiss in not knowing of the move in advance.

through testimony recorded on videotape days or weeks earlier.

One last issue remains to be discussed. We recognize that defendant does not press in the briefs he submitted to this Court the contention that Supreme Court lacked authority to approve the use of live, two-way, televised testimony from his principal accuser.[15] Although prudential considerations might counsel against reviewing a claim pressed by a defendant before Supreme Court but not on appeal, we are not aware of any precedent that precludes this Court from reviewing, on the law, such a preserved claim of error (*cf. People ex rel Matthews v New York State Div. of Parole*, 95 NY2d 640, 644 n 2 [2001] [argument raised in trial court but not in Appellate Division nonetheless preserved for review]). One such consideration of course is the possibility of prejudice to the People by reversing on the basis of an issue they have not addressed in their brief to this Court. The issue of the trial court's authority to permit the receipt of the

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[15]On the other hand, defendant does not expressly abandon that contention either. Thus, in the argument section of his main brief, defendant contends that "New York State's Criminal Procedure Law explicitly permits two-way video testimony in criminal proceedings involving 'vulnerable' child witness, NY Crim Proc Law § 65.10 ... but does not explicitly permit such testimony in any other instance." And in recounting the pretrial proceedings in his statement of facts, defendant points out that his "counsel argued that only the legislature, and not the courts, could authorize" the use of a televised presentation of the witness' testimony.

televised testimony in this case, however, presents a pure question of law and certainly merits review by the Court of Appeals. Regardless of whether this Court affirms or reverses the judgment of conviction, the Criminal Procedure Law expressly authorizes the Court of Appeals to review a question of law that is preserved for review in the trial court regardless of whether it was raised in the intermediate appellate court (CPL 470.35 [1], [2][a], [b]). Thus, the People would have a full and fair opportunity to address the issue in the Court of Appeals. Moreover, reviewing and deciding this appeal on state law grounds is consistent with our obligation to avoid deciding constitutional questions whenever reasonably possible (*Matter of Clara C. v William L.*, 96 NY2d 244, 250 [2001] ["We are bound by principles of judicial restraint not to decide constitutional questions unless their disposition is necessary to the appeal"] [internal quotation marks omitted]).

Finally, if an exercise of our interest of justice powers were necessary to decide this appeal on the ground that the receipt of the televised testimony was unauthorized, we would do so. At the very least, even assuming that defendant's Sixth Amendment right of confrontation was not violated, she was denied a valuable component of that right. In our judgment, in the absence of express legislative authorization, depriving defendant

of a face-to-face meeting with her principal accuser -- indeed, the person whose testimony was necessary for the prosecution to make out a prima facie case -- tainted the fairness of the trial.

Accordingly, the judgment of Supreme Court, Bronx County (Steven Lloyd Barrett, J. at application for televised testimony; Harold Silverman, J. at witness availability hearing, jury trial and sentencing), rendered November 23, 2004, convicting defendant of assault in the second degree, and sentencing her to a term of 5 years, should be reversed, on the law, and the matter remanded for a new trial.

All concur except Saxe and Friedman, JJ. who dissent in an opinion by Friedman, J.

FRIEDMAN, J. (dissenting)

This case, in which defendant is charged with assaulting an 84-year-old man, presents the issue of whether a defendant's right of confrontation is satisfied by the two-way televised testimony of a necessary prosecution witness whose health would be jeopardized by travel for the purpose of appearing in court. The record supports the hearing court's case-specific finding that televised testimony was necessary to further an important public policy (*see Maryland v Craig*, 497 US 836, 850 [1990]). Accordingly, I would affirm the conviction, and therefore respectfully dissent.

At the outset, two threshold issues require discussion. First, the record supports the hearing court's finding that it would be medically unsafe and potentially life-threatening for the victim, a man in his eighties afflicted with serious health problems and residing in a California assisted living facility, to travel to New York. The hearing court properly credited the testimony of the People's witness, an expert in geriatric medicine who actually examined the victim, over that of defendant's witness, who had no such expertise and never saw the victim. Second, the record fails to support defendant's assertion that when the victim ultimately testified at trial by two-way television, defendant's right of confrontation was

undermined by the victim's inability to see the trial participants clearly. The victim stated that he could see defendant and the other persons present in the courtroom. While the elderly victim expressed some difficulty in seeing the people in the courtroom, defendant has not established that this difficulty was any greater than what the victim might have experienced had he testified in person.

Turning to the principal issue, I note that in reversing a conviction where child witnesses were kept out of the view of the defendant by means of a screen, the United States Supreme Court stated that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact" (*Coy v Iowa*, 487 US 1012, 1016 [1988]). Two years later, however, in *Maryland v Craig* (497 US 836, *supra*), the Court held that one-way televised testimony (that is, where the defendant and other trial participants see the witness, but not vice versa), could be permitted on a showing of necessity to further an important policy interest, which, in that case, was the protection of child sex crime victims from psychological trauma. I conclude that protection of the life or health of an infirm witness is of at least equal importance to the interest recognized in *Craig*. Since the People's showing in this case met the *Craig* standard for the use of one-way televised testimony, we

need not decide whether the use of two-way video equipment may be permitted on a lesser showing.

Notably, the use of live, two-way television to transmit a witness's testimony to the courtroom, where circumstances make it impossible for the witness to testify in the courtroom, has been held to satisfy the Confrontation Clause by the Second Circuit (*United States v Gigante*, 166 F3d 75 [2d Cir 1999], *cert denied* 528 US 1114 [2000] [witness was in the Witness Protection Program, and in the final stages of inoperable cancer]) and by the Supreme Court of Florida (*Harrell v State*, 709 So 2d 1364 [Fla 1998], *cert denied* 525 US 903 [1998] [the two complaining witnesses, one of whom was in poor health, were residents of a foreign country]). *Harrell* strikingly parallels the present case. The defendant in *Harrell* was charged with robbing an Argentinian couple vacationing in Florida. Before trial, the victims returned to Argentina (beyond Florida's subpoena power), and one of them developed medical problems that made it impossible for her to travel to the United States even voluntarily. At trial, the prosecution was permitted to present the witnesses' testimony from Argentina by means of live, two-way satellite transmission (709 So 2d at 1367). The Supreme Court of Florida held that this procedure was permissible because the witnesses could not be brought physically into the courtroom (*id.*

at 1369-1370) and were "absolutely essential to this case" (*id.* at 1370), and because the satellite procedure satisfied the Confrontation Clause requirements of "oath, cross-examination, and observation of the witness's demeanor" (*id.* at 1371).

I emphasize that our case is not one of those in which it would be merely inconvenient or impractical to transport a witness from a remote location; here, it was plainly dangerous to the witness's life or health. Thus, as in *Harrell*, there was simply no possibility of the witness testifying in person, and, other than televised testimony, there was no alternative to dismissal of this serious assault case (*see People v Craig*, 151 Misc 2d 442 [1992] [CPL art 660 conditional examination may not be conducted outside the state]). Accordingly, I would reject defendant's Confrontation Clause arguments.

Although defendant herself does not advocate this position on appeal, the majority strenuously argues that New York law did not authorize the court to permit the elderly and infirm victim to give televised testimony for the purpose of avoiding danger to his physical health. In particular, the majority contends that the Legislature, by expressly providing for televised testimony by child witnesses under certain circumstances in prosecutions for certain sex-related offenses (CPL art 65), implicitly divested courts of the power to permit televised testimony in

situations that do not involve the prospect of "serious mental or emotional harm" to a child witness (CPL 65.10[1]). I disagree.

The directive permitting the victim to give televised testimony under the circumstances of this case was within Supreme Court's inherent power to take steps "to aid in the exercise of its jurisdiction" and "in the administration of justice" (*Gabrelian v Gabrelian*, 108 AD2d 445, 449 [1985], *appeal dismissed* 66 NY2d 741 [1985]), as well as within its general statutory power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it" (Judiciary Law § 2-b[3]). Nothing in CPL article 65 suggests that the Legislature, in affirmatively providing for the reception of televised testimony by child witnesses in sex-crime cases under specified circumstances, intended to curtail otherwise existing judicial authority to deal with other kinds of situations not addressed by that article. Moreover, the Legislature expressly disclaimed any such intention in CPL 65.10(3), which provides in pertinent part: "Nothing herein shall be con[s]trued to preclude the court . . . from exercising any authority it otherwise may have to protect the well-being of a witness and the rights of the defendant." Given CPL 65.10(3), the majority's fear that the court's action "trample[d] on the policy choices made by the Legislature" is

unfounded, and there can be no separation of powers issue.[16]

The majority also suggests that permitting the televised testimony was somehow "inconsistent" with CPL article 680 ("Securing Testimony Outside the State for Use in Proceeding Within the State -- Examination of Witnesses on Commission"). Again, I disagree. The majority overlooks that the Legislature intended to make it possible for both the prosecution and the defense to secure the attendance at a criminal trial of a witness at liberty in another state, as reflected by the enactment of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (CPL article 640). In this case, of course, article 640 could not have been used by reason of the poor health of the witness, but article 680 poses no obstacle to the remedy Supreme Court devised to deal with the situation presented. True, an examination of an out-of-state witness on a commission issued pursuant to article 680 is available to the People only after an application by the defendant for such a commission has been granted (CPL 680.30[1]). Article 680, however, was not intended to address the specific problem of an

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[16]The majority's reliance on *People v Herring* (135 Misc 2d 487 [1987]) is puzzling, since that case illustrates the principle that the statutory authorization of a method for giving or receiving testimony under a specified set of circumstances does not necessarily mean that the use of that method is forbidden in any case the statute does not address.

out-of-state witness who is physically unable to travel to New York, as the inability to bring the witness to the state is not a statutory prerequisite for relief under that article (*see* CPL 680.20, 680.30). Thus, article 680 was devised, not as a solution to the problem of an immobile out-of-state witness, but as a legislative accommodation provided to a defendant who wishes to secure the testimony of an out-of-state witness for his defense but wishes to forgo bringing the witness to New York to testify at the trial in person.[17] This explains why relief under article 680 is available to the People on a reciprocal basis only. It follows that allowing the televised testimony of the complaining witness in this case, where the witness is physically unable to travel to New York, in no way constituted an evasion of the limitation of the availability to the People of an article 680 commission.

Nor does CPL article 660 ("Securing Testimony for Use in a Subsequent Proceeding -- Examination of Witnesses Conditionally") pose any obstacle to permitting the televised testimony in this

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[17]I note, however, that, as a commission pursuant to CPL article 680 is a discretionary remedy (*see People v Carter*, 37 NY2d 234, 238 [1975]), the court may consider the defendant's efforts to secure the attendance of the out-of-state witness at the trial under CPL article 640 in determining whether to issue a commission for an out-of-state examination under article 680 (*see id.* at 239).

case. As previously noted, a conditional examination of a witness under article 660 (which serves to preserve the witness's testimony to be received into evidence at a subsequent trial [CPL 660.10]) must be conducted within the state (*see People v Craig*, 151 Misc 2d 442, *supra*). Thus, since defendant has never contended that the People had any notice or knowledge of the complaining witness's intent to move to California before the move occurred, article 660 is simply irrelevant to the issue presented by this appeal.

I respectfully disagree with the majority's view that "authorizing the televised testimony in this case is not 'necessary to carry into effect the powers and jurisdiction' of trial courts." In my view, Supreme Court's inherent powers, and its powers under Judiciary Law § 2-b(3), are by no means limited to those absolutely indispensable to its functioning (*cf. M'Culloch v State of Maryland*, 17 US 316, 413 [1819] [Marshall, Ch. J.] [rejecting the argument that Congress's power under US Const, art I, § 8, to pass laws "necessary and proper for carrying into Execution the foregoing Powers" is limited to such laws "as are indispensable, and without which the power would be nugatory"]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968] [adopting a liberal interpretation of the words "material and necessary" in CPLR 3101(a)]). In any event, and to reiterate,

given the distant location and infirm condition of the complaining witness, this prosecution could not have gone forward at all if Supreme Court lacked power to provide for the witness's testimony from outside the courtroom. Thus, the reception of such testimony by televised means was, in fact, "necessary to carry into effect the powers and jurisdiction possessed by [Supreme Court]" in this particular case.

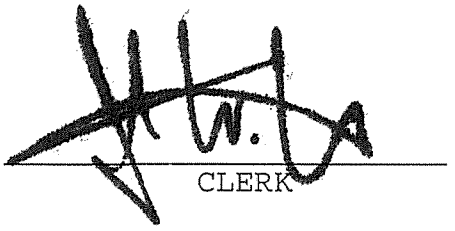
To recapitulate, while there is no question that courts are duty-bound to defer to the Legislature's "critical policy decisions" (*Bourquin v Cuomo*, 85 NY2d 781, 784 [1995]), neither CPL article 65, article 660 nor article 680 of the CPL reflects any legislative policy determination, one way or the other, about the propriety of allowing televised testimony by a witness whose physical infirmities render him unable to travel to the courthouse to testify in person. In the absence of direction from the Legislature, Supreme Court retained discretion under its inherent powers and Judiciary Law § 2-b(3) to determine what steps, if any, could be taken to permit this prosecution to proceed notwithstanding the complaining witness's inability to be physically present in the courtroom. In my view, such discretion was properly exercised in this case.

I would also reject defendant's argument that the trial court's refusal to deliver a justification charge constituted

reversible error. The court's refusal to deliver a justification charge was proper because no reasonable view of the evidence, even when that evidence is viewed in a light most favorable to defendant, supported such a charge (*see People v Cox*, 92 NY2d 1002, 1004 [1998]). Specifically, there was no reasonable view that defendant was justified in using the degree of force she admittedly used against the unarmed and aged victim, whether that degree of force is deemed to have been deadly or non-deadly (*see* Penal Law § 35.15[1]).

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

ENTERED: DECEMBER 30, 2008



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DEC 30 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David H. Friedman
Eugene Nardelli
James M. Catterson, JJ.

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Index 601037/03

x

Continental Casualty Company, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Employers Insurance Company of
Wausau, et al.,
Defendants-Respondents-Appellants,

Michael O'Reilly, etc., et al.,
Defendants-Respondents,

Robert A. Keasbey Company, etc.,
Defendant.

- - - - -

The Travelers Indemnity Company,
Amicus Curiae.

x

Cross appeals from an order of the Supreme Court, New York County (Richard F. Braun, J.), entered on or about June 11, 2007, insofar as it declared that the asbestos claims against insured Keasbey are not within the products liability coverage, and thus not subject to the policies' aggregate limits; that the defendant class is not subject to the affirmative defenses that plaintiffs may have had against Keasbey; that coverage for the defendant class is triggered by exposure and that each individual class member's exposure to conditions resulting in bodily injury constituted a separate occurrence; and that the aggregate limit of CNA's policy RDU 8047261 was not exhausted.

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Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN (Rolf E. Gilbertson of the Minnesota Bar, admitted pro hac vice, of counsel) and Seward & Kissel LLP, New York (Dale C. Christensen, Jr. of counsel), for Employers Insurance Company of Wausau, respondent-appellant.

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Simpson Thacher & Bartlett LLP, New York (Andrew T. Frankel, Mary Beth Forshaw and Elisa Alcabes of counsel), for amicus curiae.

CATTERSON, J.

In this declaratory judgment action, plaintiff insurance companies seek a declaration that they do not have a duty to indemnify the now-defunct insured, Robert A. Keasbey Co., in pending asbestos-related claims. Although the tort claims of the defendant class (hereinafter referred to as "the claimants") have not yet been adjudicated, and even though a judgment must be entered against Keasbey before an action could be brought under Insurance Law § 3420(a)(2) against the plaintiffs, the insurers seek the declaration that all the pending claims in the underlying complaints against Keasbey fall within the products hazard/completed operations coverage. Such coverage is subject to aggregate limits which indisputably were exhausted after the insurers paid out more than $110,000,000 in negotiated settlements on policies issued to Keasbey.

Continental Insurance Co. and American Casualty Co. (hereinafter referred to as "CNA") initiated this action first against its insured, Keasbey, as aggregate limits were being exhausted by lawsuits that had been brought against Keasbey as a manufacturer, seller and distributor of an inherently dangerous product, asbestos. In May 2001, counsel for about 20,000 claimants informed Keasbey and CNA that these claimants would be pursuing a new theory of liability (non-products or "operations" coverage), which was not subject to aggregate limits, and thus

opened up Keasbey and its insurers to "perpetual coverage."

The record reflects that now-dissolved defendant Keasbey was an insulation contractor that installed, repaired, renovated and removed insulation at various sites in and around New York since the late 1800s. Keasbey distributed and installed insulation materials for industrial and commercial facilities including the powerhouses, Consolidated Edison and other utilities. Until about 1972 those insulation materials contained asbestos. Keasbey also mixed and distributed two asbestos-containing finishing cements.

Most of the litigation against Keasbey occurred as a result of the post-World War II construction boom in the 1950s and 1960s, and the need for new and upgraded powerhouses. The increase in construction activity also increased the use of asbestos-containing insulation in powerhouses and other commercial facilities.

By 1965, however, studies conducted by Dr. Irving Selikoff and his research team at Mt. Sinai Hospital revealed the potential dangers of asbestos. Dr. Selikoff's studies sparked concern among asbestos workers, other trades and their employers, about the use of asbestos.

As a result of these developments, ConEd directed, in 1971 and 1972, that asbestos no longer be used at ConEd sites; Keasbey complied with ConEd's directive. Keasbey management also issued

a written directive in the early 1970s banning the use of asbestos-containing products.

The subject insurance policies are 17 primary level comprehensive general liability (hereinafter referred to as "CGL") policies that were issued by CNA to Keasbey between February 1970 and February 1987. None of the CNA policies issued to Keasbey during this time period contained asbestos-related exclusions.[1] The primary policies generally insured Keasbey against claims for "bodily injury" caused by an "occurrence."

The CNA policies have aggregate limits that apply only to claims that come within the definition of "products hazard" or "completed operations hazard." The products hazard aggregates range from $300,000 to $1,000,000 per policy, with combined aggregate limits of $8,700,000. Under the policies, "products hazard" "includes bodily injury [...] arising out of the named insured's products [...] but only if the bodily injury [...] occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others."

The completed operations hazard is defined as: "bodily injury and property damage arising out of operations [...] but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from

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[1]CNA also issued excess policies.

premises owned by or rented to [...] the named insured."

The CNA policies contain no aggregate limits for claims that are not products hazards, such as "operations" claims. The only limitation for such coverage is the per occurrence provision in each policy. Between 1972-78 CNA additionally issued Keasbey five excess policies with aggregate limits totaling $50 million.

Since 1986, thousands of individuals have brought tort claims against Keasbey for asbestos-related injuries. Most of the claimants are tradesmen and other individuals who worked for other companies and who were allegedly exposed to asbestos while working in the vicinity of Keasbey insulators.

In the early 1990s, New York state and federal judges consolidated hundreds of the asbestos claims in litigation known as the "Powerhouse Cases." Keasbey was a defendant in those consolidated actions. Claimants tried the cases against Keasbey on a strict products liability and negligent "failure to warn" theory emphasizing Keasbey's role as manufacturer and distributor of asbestos products.

None of the plaintiffs in the Powerhouse Cases ever presented any evidence of Keasbey's negligent installation. Until 2001 the insured, the insurers, primary and excess carriers, and the claimants all treated Keasbey claims as strict products liability claims based on the inherently dangerous nature of Keasbey's asbestos products.

While the Powerhouse Cases proceeded, CNA, among others, engaged in settlement discussions with counsel for the claimants. As CNA emphasizes, Keasbey pushed at that time to bring in its excess carriers because the claimed damages appeared to exceed the aggregate amounts of products coverage left under the subject primary policies. Keasbey accepted the excess carriers' contributing funds to the State Powerhouse Cases, and did not object to the cost-sharing agreement among the excess carriers, which expressly treated the asbestos claims as products hazard claims subject to the aggregate limit.

Thus, by May 1992, CNA exhausted their aggregate limits of $8,700,000 in the State Powerhouse Cases. Between May 1992 and May 2001, the excess insurance carriers, including CNA, paid out more than $100,000,000 under their policies and, for all intents and purposes, CNA exhausted their excess policy limits also.[2] Keasbey ceased doing business in 1995, and was dissolved in 2001.

By letter dated May 15, 2001, the attorneys for the majority of the remaining asbestos-injured claimants sent a letter to Keasbey's litigation counsel asserting that the remaining claims against Keasbey were "non-products" or "operations" hazard claims

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[2]While CNA asks this Court for a declaration that four of its excess policies which paid out a total of $50 million in indemnity and defense costs exhausted their products aggregates, the exhaustion of these is not contested in this appeal. The issue of exhaustion of aggregate limits remains -and is determined below-- with respect to only one of CNA's excess policies, RDU 8047261, which had aggregate limits of $1,000,000.

that were not subject to the products hazard aggregate limits. The letter stated in relevant part:

> "it is highly likely that the products/ completed operations aggregate limits do not apply to these so-called 'non-products' claims. As a result, the actual value of Keasbey's insurance asset appears to be vastly greater than is reflected [...] The claimants therefore wish to ensure [...] that Keasbey and the carriers do not [...] otherwise extinguish the insurers' obligations that, in many cases *could be perpetual*." (emphasis added).

The letter did not identify any particular claimant, lawsuit or insurer.

CNA did not issue a disclaimer of coverage in response to the May 15, 2001 letter; instead, it commenced this declaratory judgment action in October 2001 against Keasbey and added as of right the defendant class of asbestos claimants against Keasbey. CNA asked the court to declare that it owed no duty to indemnify Keasbey for any of the pending asbestos-related bodily injury claims because *all* of the remaining claims were within the definition of products liability/completed operations coverage in the primary level policies that CNA had issued to Keasbey, that the limits of the subject policies had been exhausted, and that CNA had other defenses to further obligations under the policies.

Following a transfer of venue from Westchester County to New York County, the case was certified as a class action against the defendant class in January 2004. After extensive discovery and motion practice, a nonjury trial began on July 13, 2005, and

ended on October 28, 2005. Keasbey, which had already ceased operations, defaulted in the action.

The trial court concluded, inter alia, that CNA had failed to carry its burden in showing that pending asbestos claims fall within the "products aggregates" of the subject insurance policies for products hazard and completed operations coverage. Moreover, it determined that the claimants were entitled to coverage under the "operations" provision.

Second, the court decided that the defunct Keasbey was guilty of laches but that the claimants were not subject to the affirmative defenses that CNA may have had against Keasbey. The court observed that such defenses as timely notice of claim, laches, ratification, estoppel and judicial estoppel were based on Keasbey's conduct, and that any right of the members of the defendant class to sue CNA was not derived from Keasbey directly, but was derived from Insurance Law § 3420(a)(2). Thus, the court determined that the only defenses the insurer had against the injured claimants were those that "grow out of" the terms of the policy. The court also determined that CNA would nonetheless be precluded from asserting affirmative defenses, as it failed to timely disclaim coverage as to the class defendants.

Third, the court determined that coverage for asbestos-related injuries is triggered by exposure through inhalation and that each separate class member's exposure to conditions

resulting in bodily injury constituted a separate occurrence under the subject insurance policy.

Further, the court held that CNA could not rely on the "expected or intentional" exclusion, nor on the pollutant exclusion under the primary policies; and that the aggregate limit of plaintiff's excess policy RDU 8047261 was not exhausted. Finally, the court determined that One Beacon's defense obligations extended only to claims arising out of an exposure to a Keasbey asbestos-containing product at the Indian Point Nuclear Power Plant Units #2 and #3.

On appeal, CNA asserts that the trial court erred in virtually every determination except the finding that Keasbey was guilty of laches. CNA argues that the "operations" provision is not applicable to the suits of the claimants because there is no evidence whatsoever that bodily injury in the plain meaning of the phrase was sustained while installation operations were ongoing or that it was incurred before the completion of any of the projects.

CNA also asserts that since Keasbey has defaulted, the claimants stand in the shoes of Keasbey, and thus the equitable affirmative defenses like laches, waiver and equitable estoppel may be used against them; that exposure/inhalation is not the trigger according to applicable policy provisions; and that the trial court was wrong about allocating the burden of proof to

CNA. Additionally CNA asserts that its excess policies should be declared exhausted.

Defendant One Beacon America Insurance Company cross-appeals from that part of the order declaring that CNA's claims for reimbursement and contribution against One Beacon were not barred by CNA's failure to provide timely notice of the claims for which reimbursement and contributions were sought. Defendant Employers Insurance Company of Wausau also cross-appeals from the court's findings of fact and conclusions of law with respect to the obligations of CNA and One Beacon under their policies.

At the outset, we find that a disclaimer of coverage is not necessary in order for CNA to preserve its defenses under the policy. See Generali-U.S. Branch v. Rothschild, 295 A.D.2d 236, 237-238, 744 N.Y.S.2d 159, 161 (1st Dept. 2002) (commencement of a declaratory judgment action can constitute disclaimer); see also Travelers Ins. Co. v. Volmar Constr. Co., 300 A.D.2d 40, 45, 752 N.Y.S.2d 286, 290 (1st Dept. 2002) (insurer has duty to disclaim only after it receives demand for defense and indemnification).

Further, for the reasons set forth below, this Court finds that the trial court erred in denying CNA the declaration it sought. As a threshold matter, it is well established that CNA has the burden of proving that it is entitled to the declarations it seeks. Mount Vernon Fire Ins. Co. v. NIBA Constr., 195 A.D.2d

425, 427, 600 N.Y.S.2d 936, 937 (1st Dept. 1993) (Sullivan J., concurring). For CNA to obtain a declaratory judgment as to its obligation to indemnify in advance of trial, it must demonstrate as a matter of law that "there is no possible factual or legal basis on which the insurer may eventually be held liable under its policy." First State Ins. Co. v. J & S United Amusement Corp., 67 N.Y.2d 1044, 1046, 504 N.Y.S.2d 88, 90, 495 N.E.2d 351, 353 (1986).

Notwithstanding the foregoing, the equally well established principle is that an insured must prove entitlement to the coverage sought while an insurer must prove an exclusion in the policy to defeat coverage. Consolidated Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208, 218, 746 N.Y.S.2d 622, 625, 774 N.E.2d 687, 690 (2002). Since Keasbey, the insured, defaulted and claimants stand in its shoes, claimants bear the same burden of proof. D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 665, 563 N.Y.S.2d 24, 27, 564 N.E.2d 634, 637 (1990).

In this case, CNA demonstrated that there exists no possible basis, factual or legal, for liability outside of the products/completed operations provisions. In any event, claimants did not produce any evidence whatsoever in support of the new theory of liability; namely, that injuries arose before contracting operations by Keasbey were completed.

In the most egregious part of its determination, the trial

court agreed that Keasbey was guilty of laches but that none of the equitable defenses of laches, waiver, ratification or estoppel were available to CNA against the claimants. The court found that Keasbey had never brought a declaratory judgment action asserting that there should be "operations" coverage for asbestos claims against it. It further found that CNA, as Keasbey's insurer, would be prejudiced in defending any such "operations" claims because numerous material witnesses had died, and relevant documents are no longer available.

Indisputably, Keasbey was guilty of laches. The court found, however, that the claimants were in a different position. In so ruling, the trial court misconstrued Insurance Law § 3420, which deals with the rights of an injured plaintiff to proceed directly against an insurer after obtaining judgment against an insured. See Lang v. Hanover Ins. Co., 3 N.Y.3d 350, 354-355, 787 N.Y.S.2d 211, 214, 820 N.E.2d 855, 858 (2004), quoting Coleman v. New Amsterdam Cas. Co, 247 N.Y. 271, 275, 160 N.E. 367, 369 (1928) (Cardozo, Ch.J.) (under New York's direct action statute, Insurance Law § 3420, the rights of an injured claimant against the insurer are no less and *no greater* than those of the insured). This plainly means that all the defenses available to an insurer against an insured are available also against injured claimants.

In its departure from New York law, the trial court appeared

to rely on Rucaj v. Progressive Ins. Co. (19 A.D.3d 270, 797 N.Y.S.2d 79 [1st Dept. 2005]), in which this Court held that an insurer's defenses in a section 3420 action against a claimant are those it would have against the insured. Then, without the support of any legal authority, the court stated: "That should not be held to mean that all of the insurer's defenses against the insured are available against an injured claimant." Instead of relying on case law that was precisely on point, the trial court relied on two cases that had nothing to do with rights derived from Insurance Law § 3420.

The principle that neither party in a section 3420 action has any rights greater or lesser than if the action were between insurer and insured has been consistently applied by the Court of Appeals and intermediate appellate courts, which have found that those rights include the equitable affirmative defenses available against a policyholder. See D'Arata, 76 N.Y.2d at 665, 563 N.Y.S.2d at 27. In D'Arata, the plaintiff, a victim of an assault, brought an action under section 3420, seeking to compel the insurer to pay a judgment on behalf of the insured defendant up to the limit of the policy. The insurer used collateral estoppel as an affirmative defense asserting that the plaintiff was estopped from relitigating the issue of insured's intent to inflict bodily injury. Id. at 662, 563 N.Y.S.2d at 25 (analysis related to whether a finding in a criminal proceeding could be

used to satisfy the expected and intended exclusion of the policy).

In considering whether the defense barred the claim, the Court of Appeals first observed that the affirmative defense of collateral estoppel is an "equitable doctrine [...] grounded on concepts of fairness and should not be rigidly or mechanically applied." Id. at 664; 563 N.Y.S.2d at 26. The Court further held that the plaintiff was subject to the same affirmative defenses that would apply against the insured, and explained: "Plaintiff by proceeding directly against [insurer] does so as subrogee of the insured's rights and is subject to whatever rules of estoppel would apply to the insured." Id. at 665, 563 N.Y.S.2d at 27; see also Zimmerman v. Tower Ins. Co. of N.Y., 13 A.D.3d 137, 138-139, 788 N.Y.S.2d 309, 310-311 (1st Dept. 2004) (plaintiff subrogee of insured's rights is subject to whatever rules of estoppel that would apply to insured); Van Gordon v. Otsego Mut. Fire Ins. Co., 232 A.D.2d 405, 648 N.Y.S.2d 306 (2d Dept. 1996) (noncooperation of insured party is ground upon which insurer was denying coverage and may be asserted by insurer as defense in action on a judgment by injured plaintiff pursuant to Insurance Law § 3420(a)).

Thus, the issue is not whether *claimants* engaged in delay and are guilty of laches. The issue properly framed is whether claimants can obtain coverage under a newly asserted theory of

liability when the insured engaged in acts or omissions that would preclude that coverage had the insured brought this claim. The answer must be, as precedent demands, that equitable affirmative defenses are available to CNA against the claimants who stand in Keasbey's shoes, and that if laches is available against Keasbey, it may be used against the claimants.

Laches is an equitable doctrine based on fairness. Courts have invoked the doctrine to prevent stale claims and the prejudice that can result. Whether the doctrine is applicable, however, depends on the facts of the case. See Orange & Rockland Util. v. Philwold Estates, 70 A.D.2d 338, 343, 421 N.Y.S.2d 640, 643 (3rd Dept. 1979), modified, 52 N.Y.2d 253, 437 N.Y.S.2d 291, 418 N.E.2d 1310 (1981).

In this case, the inequity would be particularly egregious. As the amicus curiae brief asserts in behalf of Keasbey's insurers, CNA would be in a position to owe "perpetual and virtually unlimited obligations to provide coverage for a never-ending torrent of asbestos claims" under a theory of coverage "never before asserted by Keasbey," and yet they would be "hampered in their ability to defend [...] because of the loss of evidence." Here, counsel for claimants raised the possibility of "perpetual coverage" under a new theory of liability in May 2001 as the products aggregates were being exhausted. As a result of negotiated settlements, eventually more than $110,000,000 was

paid out over 10 years, largely to the clients of the law firm of Weitz & Luxenberg. Of that, CNA paid out $8.7 million on its primary policies and more than $50,000,000 as an excess insurer.

Moreover, testimony at the bench trial in this case adduced the following: that until 2001, Keasbey was sued as a manufacturer, distributor and seller for strict products liability and failure to warn. Keasbey argued in each case that it was an installer (which should have triggered "operations" coverage for alleged negligent installation), but Keasbey always lost that argument. Claimants, or rather counsel for claimants, apparently did not want to be involved in cases where they would have to prove that bodily injury was tied to a specific accident or occurrence of negligent installation in a specific period of time when the installer had used a specific manufacturer's asbestos product.

Indeed, the simplest route to recovering damages for asbestos-related claims after 1973 was to assert products liability against the manufacturer, distributor or seller based on asbestos being "unreasonably dangerous." See Borel v. Fiberboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 969, 95 S.Ct. 127, 42 L.Ed.2d 107. Under Borel, which was followed in New York, claimants were obligated to prove only that (1) they had been exposed to defendant's product and (2) show an asbestos-related disease. Additional

relief for claimants appeared in 1986 when a legislative amendment to the statute of limitations meant that the clock started running upon "discovery" of disease rather than actual injury.

The foregoing events led to the biggest mass tort litigation of our time with courts in New York creating asbestos dockets where cases, sometimes hundreds at a time, were consolidated and special asbestos rules allowed standard complaints and discovery requests to be used in cases where, as CNA asserts, facts were tried for a few and then special verdicts were applied to all. Cases against Keasbey were brought mainly in New York by a handful of law firms, the most prolific of which were Weitz & Luxenberg, and Wilentz Goldman.

Testimony further adduced that a typical claimant filed a standard asbestos complaint generally against a list of defendants which typically read: "During the course of [plaintiff's] employment, plaintiff was exposed to the defendants' asbestos and asbestos containing materials to which exposure directly and proximately caused him to develop an asbestos related disease." All claimants alleged that Keasbey was a manufacturer and seller who "should have known" about the health hazards of products and warned others of those hazards.

The record reflects that in the State Powerhouse consolidation trial of 1992, two claimants obtained multi-million

damages verdicts after claimants' counsel opened the proceedings by pointing to Keasbey's role as a manufacturer with a "'resultant obligation' to understand [...] its resultant potential liability for a failure to warn." Counsel closed by calling Keasbey a "murderer." After 1992 and until 2003, only a few Keasbey cases began trial and all settled before verdict

As to settlement negotiations, testimony at trial further adduced the following: In late 1991, court-supervised settlement negotiations began in the State Powerhouse Cases combined with Federal Powerhouse Cases. In cases from both jurisdictions, hundreds of claimants, dozens of defendants and insurers for each defendant participated in negotiations. CNA was part of the discussions as Keasbey's primary insurance carrier; subsequently Hartford, Keasbey's excess carrier, joined the discussions, as did excess carriers INA and Fireman's Fund, a second-level insurer.

As CNA asserts, it was understood that excess carriers would pay for Keasbey's asbestos cases only if prior products cases had exhausted the aggregate limits in the primary policies and if the pending cases were all products-hazard cases. Since insurers at the time were aware that a "non-products" argument could avoid aggregation, Hartford, INA and Fireman's Fund scrutinized the evidence on these issues to satisfy themselves that the claims indeed fit within the products-hazard coverage and thus were

subject to aggregate limits.

Indeed, trial exhibits established that Keasbey's counsel discussed coverage issues including whether to file a declaratory judgment coverage action arguing for coverage beyond aggregate limits such as would be available in claims pursuant to "operations" coverage. As determined by the trial court, Keasbey never filed such an action, and in fact testimony at trial established that until 2001, when CNA was paying the last of its excess coverage, nobody questioned that Keasbey asbestos claims were products claims subject to products aggregate limits. By the time aggregate limits were reached, claimants had received more than $110,000,000 in satisfaction of their claims.

Ultimately, the prejudice in defending against a new theory of liability (see discussion below) that is particularly dependent on establishing facts for each individual claimant is obvious when witnesses have either died or are suffering from faded memories, and relevant documents have been lost. Given the foregoing, it is patently false for claimants to argue that CNA knew that asbestos claims against Keasbey are likely to be "operations" claims. On the contrary, prior to CNA reaching the aggregate limit of its coverage in 2001, all claims were products claims. Thus, CNA had no reason to preserve evidence or perpetuate testimony (even had it been able to depose claimants), or seek declaratory relief regarding any particular insured.

The well-established rationale for the doctrine of laches is to prevent a party from injustice that would arise from the assertion of stale claims. See Marcus v. Village of Mamaroneck, 283 N.Y. 325, 332, 28 N.E.2d 856, 859 (1940) (defense of laches is based upon the principle that plaintiffs have delayed to the prejudice of defendants). Thus, the trial court correctly found that laches is applicable in this case.

However, contrary to the court's findings, there is nothing at all inequitable in applying the doctrine to the claimants. Even if the Insurance Law did not require such application to the subrogee claimants, in this case it is fittingly applied to them. It is worth noting that as late as 2003, a Keasbey trial brought by claimant Michael O'Reilly opened and closed in a fashion consistent with all prior cases. Keasbey was sued as manufacturer, seller or distributor on theories of strict products liability and failure to warn. In this case, the same Michael O'Reilly stands as the class representative, typical of all class members, who apparently would sue Keasbey for sustaining bodily injury during Keasbey's *negligent* installation of asbestos under a non-products theory simply because the theory provides a new set of deep pockets. In another case, where a claimant is now also a member of defendant class, counsel defeated a summary judgment motion filed by Keasbey by arguing that Keasbey was a manufacturer and seller of asbestos-containing

products. No evidence was presented that Keasbey was negligent in installation. The summary judgment motion was argued in October 2003, more than two years after counsel had raised the issue of non-products claims against Keasbey.

We find therefore that laches in this case is a valid affirmative defense against the claimants who stand in defendant Keasbey's shoes, and it bars the claim of the defendant class. Thus, there exists no legal basis on which the insurer may eventually be held liable for operations coverage under its policy.

Furthermore, the trial court erred in holding that a factual basis exists for CNA's liability under the non-products/operations provisions because it incorrectly relied on the holding in Frontier Insulation Contrs. v. Merchants Mut. Ins. Co. (91 N.Y.2d 169, 667 N.Y.S.2d 982, 690 N.E.2d 866 [1997]). The court erred in its extrapolation from that case that exposure by inhalation constitutes an injury that triggers coverage. The instant case is simply not controlled by Frontier.

Frontier involves only the very narrow issue of an insurer's duty to defend where allegations before the court included those of negligent installation. In fact, the Court started its opinion with the words: "The narrow issue before us [...] is whether the 'products hazards' exclusions in the insurance policies at issue relieve defendant insurers of the duty to

defend their insured, an asbestos insulation contractor." Id. at 173-174, 667 N.Y.S.2d at 984.

The insurer in Frontier sought a ruling that all of the claims against its policyholder should be considered products-hazards claims since injuries arose out of the inherently dangerous nature of the product. Frontier however, was not a manufacturer or seller like Keasbey, but only an installer of insulation products. The tort claims arising against it were not based on a manufacturer's or seller's duty to warn or based on what a seller or manufacturer should know about a product they put into the stream of commerce, but were based on a theory of *negligent* installation. The Court of Appeals ruled against the insurer, as it found that products liability coverage "cannot apply to *accidents or occurrences* that allegedly took place while Frontier's installation work was in progress because the offending product - the asbestos installation - was not relinquished from Frontier's control until installation was complete." Id. at 177, 667 N.Y.S.2d at 986 (emphasis added).

Rather, the Court observed that at least some of the suits "expressly allege" that negligent installation of asbestos caused their personal injuries. The Court then added that:

> "Since asbestos fibers may be readily released into the air and inhaled while a contractor is cutting and sawing the product during installation, there is a reasonable possibility that any liability attributed to Frontier would stem from injuries that occurred during ongoing operations - covered events." Id. at 177-78,

667 N.Y.S.2d at 986.

Much has been made of this foregoing observation in the trial court's decision and by the claimants on appeal. Mistakenly so, since it should not be considered as anything more than dicta.

First, the issue before the Frontier court was the duty to defend, which is a much broader duty than the duty to indemnify. Atlantic Mut. Ins. Co. v. Terk Tech. Corp., 309 A.D.2d 22, 28, 763 N.Y.S.2d 56, 60 (1st Dept. 2003) (the duty to indemnify does not turn on the pleadings but rather on whether the loss as established by the facts is covered by the policy). The duty to defend is decided solely on the allegations in the complaint which must be accepted by a court as true, and which here included allegations of personal injuries arising out of negligent installation.

Further, the declaration sought in Frontier was that all the claims fell within the products-hazard *exclusion*, and there was no distinction made as to whether the injuries happened before or after operations were completed. More significantly, the insurers did not present any evidence as to the scope or timing of the injury, and so there was no such analysis by the Frontier Court. In other words, there was no evidence, as there is in the instant case, as to what constitutes injury in an asbestos claim, and whether that injury can in fact occur while operations are

ongoing and before they are completed. Ultimately, the Frontier Court was constrained to rule against the insurer because it found there was a "reasonable possibility" of liability.

To the extent that there was no evidence before the Frontier court, and therefore no analysis, on the issue of "injury," we decline to follow the suggestion that injury happens on inhalation, as it is obiter dictum. The trial court, therefore, incorrectly interpreted the Frontier decision to stand for the proposition that injury in asbestos-related claims occurs upon exposure by inhalation of fibers.

To reach that point in this case, the trial court made the distinction between three different theories of liability: (1)products hazard coverage for insurable risks due to a defective product that has been put into the stream of commerce; (2) completed operations coverage, which covers risks of loss for injuries that arise out of operations of the insured that have been completed and occur away from the premises of the insured, and (3) premises/operations coverage, which covers risks that arise due to injuries from the defective product while the work with the product is still in progress. 16 Misc 3d 223, 230-231, 839 N.Y.S.2d 403, 410-411 (2007). "If relinquishment has not occurred, and the operations have not been completed, then operations coverage applies." Id. at 231, 839 N.Y.S.2d at 411.

The court then held that CNA had not demonstrated that the

injuries of claimants occurred after relinquishment of the asbestos products or after operations were completed. The court observed that: "When defendant Keasbey cut, sawed, mixed, and removed asbestos-containing materials as part of its installation operations at various job sites, other individuals at those sites were exposed to asbestos dust." Id. at 229, 839 N.Y.S.2d at 410. Without pointing to any other evidentiary material, the court then concluded: "*the evidence has shown that the injuries happened while the installation operations of defendant Keasbey were ongoing.*" Id. at 231, 839 N.Y.S.2d at 411 (emphasis added).

In its discussion as to when coverage is triggered for malignant and non-malignant asbestos-related injuries, the court stated that "coverage is triggered under the subject insurance policies when a bodily injury occurs." Id. at 241, 839 N.Y.S.2d at 418. In the next paragraph however, citing to Appalachian Ins. Co. v. General Elec. Co., (19 A.D.3d 198, 796 N.Y.S.2d 609 [1st Dept. 2005], aff'd, 8 N.Y.3d 162, 831 N.Y.S.2d 742, 863 N.E.2d 994 [2007]) and Matter of Midland Ins. Co., (269 A.D.2d 50, 709 N.Y.S.2d 24 [1st Dept. 2000]), the court held that, "it is an occurrence that triggers coverage, and an occurrence is the exposure to asbestos by inhaling it [...] not an injury therefrom." Therefore coverage for both types of injuries is "triggered by exposure to asbestos during the policy periods." 16 Misc 3d at 241, 839 N.Y.S.2d at 418.

Finally, in addition to these conflicting determinations, the trial court observed: "[t]he risks of injuries during operations grows out of the use of the asbestos products during the operations." Id. at 231, 839 N.Y.S.2d at 411.

Setting aside the fact that the timing of the *risks* of injuries is irrelevant, the court, in relying on Matter of Midland Ins. Co. and Frontier [that occurrence not injury triggers coverage] ignored the applicable policy provisions relevant to this case; and in holding that "injuries happened" during installation operations, disregarded New York law. The court all but ignored the testimony of medical experts that went largely uncontroverted at trial.

As a starting point for any analysis as to what triggers coverage, the Court must look at the applicable policy provisions. As noted, in this case, the policies at issue are 17 primary level CGL policies. The policies between 1970 and 1987 cover bodily injury and property damage which occur during the policy period. Three pre-1973 policies under the CGL provisions state that CNA is obligated to pay "all sums" for an occurrence defined as an "accident including continuous or repeated exposure to conditions which results *during the policy period in bodily injury.*"

In the 1973-1987 primary policies, "bodily injury" is defined as "bodily injury, sickness or disease sustained by a

person which occurs during the policy period." "Occurrence" is defined as "an accident including continuous or repeated exposure to conditions which results in bodily injury [...] neither expected nor intended from the standpoint of the insured."

Quite clearly then, under the 17 subject policies, it is "bodily injury" that triggers coverage, and an insured in order to recover under the policy must show that an injury occurred during the policy period and that it occurred as a result of an accident or injurious exposure. Further, to recover under the "operations" provisions, an insured must show that the injury occurred before any such contracting operations were completed.

Testimony at trial indicated that a typical instruction for claims handlers looking at claims falling within "operations" coverage stated: "This type of loss relates to injuries that allege injury to the claimant resulting from exposure while the insured is using a substance or causes a substance to be released." The example given in the instructions was of an employee of the insured -- as for example a Keasbey installer would be -- repairing a chemical tank on the premises of corporation "A". During repair the insured ruptures the tank causing an employee of corporation "A" to suffer chemical burns.

This simple example of a visible injury sustained contemporaneously with the negligent act or occurrence however is not particularly useful to any analysis of asbestos-related

claims. The undisputed fact that both malignant and non-malignant asbestos-related diseases require periods of long, intensive exposure rather than a single period of inhalation coupled with the fact that the full-blown version of both types of disease develop only after a long latency period almost always prompts the question of what constitutes injury in an asbestos-related claim. Moreover, in an "operations coverage" case, establishing the when and the how of the injury is especially crucial since injury must be shown to arise before the completion of an operation.

The question of what constitutes injury in asbestos-related claims has vexed state and federal courts across the nation since the 1980s. See Insurance Co. of N. Am. v. Forty-Eight Insulations Inc., 633 F.2d 1212, 1222 (6th Cir. 1980), cert. denied, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981) ("cumulative, progressive disease does not fit the disease or accident situation which the policies typically cover"). The Sixth Circuit majority explained the dilemma as follows: "There is usually little dispute as to when an injury occurs when dealing with a common disease or accident. [In the case of asbestosis] there is considerable dispute as to when an injury [...] should be deemed to occur." Id. at 1222. Hence the pertinent question is: what constitutes sufficient bodily injury to trigger coverage. See Continental Cas. Co. v. Rapid-American Corp., 80

N.Y.2d 640, 650, 593 N.Y.S.2d 966, 970-971, 609 N.E.2d 506, 510-511 (1993).

Testimony by CNA's medical experts as to how malignant and non-malignant types of asbestos-related diseases develop was largely uncontroverted. It established that adverse health effects from asbestos are "due to the inhalation of fibers in concentrations sufficient to overwhelm the normal pulmonary defense and clearance mechanisms." Researchers, acknowledged to be authoritative by the claimants' expert, testified that "most workers with asbestos exposure, as well as members of the general population who inhale asbestos fibers from ambient air, show no evidence of [subclinical] fibrosis."

Medical experts for both sides at trial agreed that there is a threshold fiber dose below which asbestosis is not seen, although the claimants' expert did not offer an opinion as to when it was reached. CNA, however, introduced testimony based on leading studies that showed the following statistics: that asbestosis is usually observed in individuals who have had many years of high-level exposure, typically asbestos miners and millers, asbestos textile workers and asbestos insulators like Keasbey employees (who are not members of the class in the instant case because workers compensation laws prevent them from suing Keasbey). The Selikoff studies showed that for asbestos insulators asbestosis occurs in 92% of those with more than 40

years exposure but in only 10% of those with 10-19 years of exposure.

Typical "bystanders" on the other hand, who comprise the majority of the claimants, here have normal lungs 71% of the time if they had less than 30 years of exposure. Based partly on these studies, one of CNA's medical experts opined that the threshold is typically not reached for "bystanders" for at least "several years" - which CNA asserts is longer than any Keasbey contracting job took to complete.

Dr. Edward Philip Cohen, for CNA, testified as follows as to the development of asbestos-related diseases:

> "Each inhalation of asbestos fibers results in alterations that contribute in a significant manner to the cumulative disease process. I would not use the word injury [...] but certainly the presence of asbestos fibers indirectly results in damage to cells and alterations of cellular material that *over a period of 20-40 years* can result in the development of impairment." (Emphasis supplied).

Testifying about the point where cell mutation becomes irreversible in malignant asbestos related diseases like mesothelioma, Dr. Cohen stated:

> "to say that cancers develop well before clinical manifestations is true but not for mesothelioma [...] once the last mutation occurs the cells take off and grow very, very rapidly and the evidence from that is the time of death from the time symptoms first appear."

As for what causes mesothelioma, he testified:

> "mesothelioma is common in individuals who have been exposed to asbestos however [...] many individuals with mesothelioma have no such exposure history [...] and

> even in individuals who have [it] and have an exposure history does not necessarily prove that mesothelioma was a consequence of the earlier exposure to asbestos and the only way to prove [that] is to examine the mesothelioma and look for presence of asbestos bodies."

As for lung cancer, Dr. Cohen testified that studies have shown "a synergistic increase in the risk of lung cancer is present in individuals who both smoked and were exposed to asbestos."

Hence, testimony and evidence established that it can take 20 to 40 years after exposure for actual impairment of bodily functions to develop, that it is a progressive, cumulative disease that starts with alterations of tissue cells and subclinical tissue damage and could progress, though not necessarily progress, into full-blown asbestosis, mesothelioma or lung cancer.

Further, medical evidence submitted in this case established that while those with asbestos-related diseases can usually track the illness back to asbestos exposure of some type, it is not axiomatic that exposure results in asbestos-related injury, sickness or disease. The conclusion to be drawn therefore is that factors other than mere initial or one-time exposure to asbestos fibers are implicated in the development or progression towards asbestos-related injury sickness or disease. Whether these factors are related to the length of exposure or intensity of exposure, or whether there are catalysts like smoking or

genetic predisposition involved is not established. However, one indisputable fact to emerge from medical evidence in the plethora of asbestos cases litigated in many different jurisdictions is that actual injury generally develops over time depending on a range of circumstances and conditions, but does not occur upon exposure by inhalation.

As one judge of the Sixth Circuit eloquently stated in his dissent in Insurance Co. Of N. Am. v. Forty Eight Insulations Inc.:

> "The [exposure] rule is not satisfactory because some asbestos may be safely inhaled without the disease ever developing. With more exposure, some harm may later develop but remain latent for a significant number of years. Insurance law does not impose liability or coverage until some identifiable harm arises. An indemnifiable act does not occur at the time of the negligent act, but at the time the legally recognizable harm appears [...] [a]t the time of initial exposure, a victim could not successfully bring an action against the manufacturer because at that time he has suffered no compensable harm." 633 F.2d at 1229 (Merritt, J.).

There are jurisdictions like the Sixth Circuit that subscribe to the exposure theory holding that even minimal tissue damage is injury. It is the theory that the trial court appears to favor. But that is not the law in New York. The Court of Appeals declined to subscribe to an exposure theory in Continental Casualty Co. v. Rapid America Corp. (80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506 (1993)), and instead appeared to approve of injury-in-fact as a trigger for coverage. It explained:

> "Decisions on when coverage is triggered for asbestos-related injury generally may be divided into four categories: (1) on exposure to asbestos; (2) on manifestation of disease; (3) on onset of disease, whether discovered or not ('injury-in-fact'); and (4) all of the above - in other words, a 'continuous trigger.' Federal courts have concluded that the 'injury-in-fact' rule is most consistent with New York law." Id. at 650-651, 593 N.Y.S.2d at 971 (internal citations omitted).

Indeed, an injury-in-fact test rests on when the injury, sickness, disease or disability actually began and, of the four categories, comports most closely with general principles of tort and insurance law. In American Home Prods. Corp. v. Liberty Mut. Ins. Co. (565 F.Supp. 1485 [S.D.N.Y. 1983], aff'd in part, modified in part, 748 F.2d 760 [2d Cir. 1984]), the court stated:

> "although exposure to asbestos does not usually injure seriously enough to constitute an 'occurrence' in the context of a liability insurance policy, a finder of fact might, nevertheless, find that a particular exposure or period of exposure contemporaneously caused a compensable injury [...]" 565 F.Supp. at 1498.
>
> "[A] real but undiscovered injury *proved in retrospect to have existed at the relevant time* would establish coverage irrespective of the time the injury became manifest." Id. at 1497.

But the court stated unequivocally that "injury-in-fact" requires the insured to demonstrate actual damage or injury during the policy period. Id. at 1497.

Claimants in the instant case offered no evidence whatsoever that any of them sustained an injury-in-fact in any one of the policy periods arising out of "ongoing operations." Not surprisingly since the burden on claimants to prove so would be

insurmountable given not only the absence of evidentiary material, but the difficulty if not impossibility of pinpointing when any subclinical tissue damage tipped over into actual impairment. In Matter of Midland Ins. Co., this Court determined that "[t]here exist at present no medical techniques capable of specifically identifying and quantifying the progression of asbestos-related injury, sickness or disease actually sustained in each year from and after a first exposure to asbestos fiber." 269 A.D.2d at 58, 709 N.Y.S.2d at 30.

The Fifth Circuit echoed that view, observing: "[t]he challenge in adopting the injury-in-fact approach is that, in each case [...] a mini-trial must be held to determine at what point the build-up of asbestos in the plaintiff's lungs resulted in the body's defenses being overwhelmed. At that point, asbestosis could truly be said to occur." Guaranty Natl. Ins. Co. v. Azrock Indus., 211 F.3d 239, 246 (5th Cir. 2000) (internal quotation marks and citation omitted).

Thus, each claimant in the instant case would have to produce medical evidence that the point where asbestos fibers overwhelmed the body's defenses happened in one of the 17 years of the subject insurance policies. Further, and crucial to recovery under non-products/operations coverage, they would have to establish that the injury was sustained before a contracting operation was completed. This means that a claimant would have

to show one of two sets of conditions occurred: (1) contemporaneous injury, that is, injury-in-fact stemming from an ongoing operation in the same policy year, but the probability of such a situation appears highly unlikely given the absence of evidence that any Keasbey installation project lasted long enough for the sort of lengthy intensive exposure required for asbestosis to develop in the same year; or, possibly (2) injury-in-fact arising in the policy year but as a result of exposure during an ongoing operation years, maybe decades, prior. In the latter case, a claimant would have to show that he was exposed only during that ongoing operation and that he was never exposed to asbestos after a Keasbey installation project was completed. In other words, setting aside the lack of documentary evidence or witness testimony to establish such, the claimant would be obligated to prove a negative, that is, he was never exposed to asbestos after Keasbey completed its installation operations.

This would be impossible for claimants who typically were "bystanders," that is tradesmen and utility workers who worked alongside Keasbey installers during installation projects and then continued working in the plant after operations were completed, and were thus exposed to the installed asbestos.

Indeed, no such evidence was presented at trial for any group of claimants, never mind the class. Claimants rely on the assertion that CNA acknowledged in the prior "products hazards"

claims that the claims arose out of plaintiffs' exposure to asbestos dust during contracting operations, in effect admitting that injuries were sustained during an ongoing operation.

They are mixing apples and oranges. CNA acknowledged that claimants were exposed during operations, and that at some future point in time, sometimes decades later, claimants manifested asbestos-related disease. Recovery under products liability claims is not dependent, as it is here, on the timing of the actual injury nor the particular stage of installation projects at which actual injury may have taken place. The claimants are making an impermissible leap if they believe they can go forward and prove injury during ongoing operations simply by a conclusory assertion: claimant was exposed, claimant developed full blow-blown asbestos-related injury decades later, ergo, injury was sustained at time of exposure.

In rejecting the contention that manifestation of asbestosis 40 years later is proof that injury occurred when the first asbestos dust was inhaled, it is perhaps worth considering the view of Judge Learned Hand in 1939 when he wrote on a health insurance case: "A disease is no disease until it manifests itself. Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted." Grain Handling Co. v. Sweeney, 102 F.2d 464, 465-466 (2d Cir. 1939) cert. denied, 308 U.S. 570, 60 S.Ct. 83, 84 L.Ed. 478

(1939).

In any event, injecting a conclusory assertion into what is essentially a products liability argument is not enough to establish a basis for coverage under ongoing operations provisions of the subject policies. The only conclusion that can be reached is that injury did occur sometime before manifestation and after exposure. However, in order for claimants to establish their entitlement to limitless liability and perpetual coverage they must show, under the relevant provisions of the subject policies, that the actual injury occurred in the policy period and that it arose solely out of an ongoing operation. The burden on a claimant to come forward with the necessary medical evidence or documentation or witnesses to support that his or her only exposure occurred during an ongoing project rises to the level of factual impossibility.

We find, therefore, that CNA has demonstrated that there is no factual or legal basis for liability other than under the products/completed operation provisions of the policies, and so the declaration sought by plaintiffs that they have no duty to indemnify is warranted by the record.

Finally, we are persuaded that as to excess policy RDU 8047261, the aggregate limit of $1,000,000 is exhausted. More than a year after CNA filed its declaratory action in 2001, CNA settled six claims for $2,865,000. At the time of the

settlements, CNA did not know there was a 1971 excess policy with $1,000,000 in untapped products coverage. Consequently, it accounted for the settlement of the six claims by labeling them with an accounting code that indicated bodily injury claims rather than products cases. The defendant class assert that CNA cannot now reclassify the claims and so have the excess policy declared exhausted. We disagree.

As CNA points out, the claims were settled on six trial-ready cases that CNA was not ready to defend. It argues that it used a catch-all accounting code for bodily injury because no other code applied once aggregate limits appeared exhausted. But CNA rejects the contention that it made a deliberate coverage decision to classify the claims as operations claims. It settled the claims to avoid default judgment. Indeed, by bringing the declaratory judgment action in the prior year, we would agree that CNA reserved its right to apply the $2,865,000 against the later-discovered products policy, thus exhausting the aggregate limit of the policy.

In light of the foregoing, we find the remaining issues raised by plaintiffs on appeal and defendants One Beacon and Wausau on cross appeal academic, and therefore decline to rule on them.

Accordingly, the order of the Supreme Court, New York County (Richard F. Braun, J.) entered on or about June 11, 2007, insofar

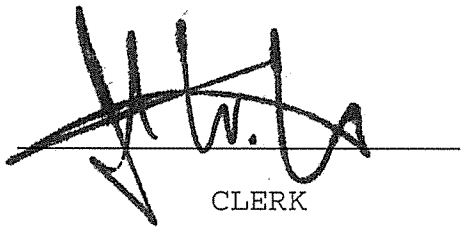
as it declared that the asbestos claims against insured Keasbey are not within the products liability coverage, and thus not subject to the policies' aggregate limits; that the defendant class is not subject to the affirmative defenses that plaintiffs may have had against Keasbey; that coverage for the defendant class is triggered by exposure and that each individual class member's exposure to conditions resulting in bodily injury constituted a separate occurrence; and that the aggregate limit of CNA's policy RDU 8047261 was not exhausted, should be reversed, on the law, with costs, and it is declared that (1) claims arising out of Keasbey's asbestos insulating activities are included within the products hazard/completed operations coverage (2) defendant class is subject to the affirmative defenses that CNA may have had against Keasbey (3) coverage for defendant class is not triggered by exposure, but by injury-in-fact and each individual class member's exposure to conditions resulting in bodily injury does not constitute a separate occurrence (4) the aggregate limit of CNA's excess policy RDU 8047261 is exhausted.

M-6192 **Continental Casualty Company, et al v Employers Insurance Company, etc.**

Motion seeking leave to file amicus brief granted.

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

ENTERED: DECEMBER 30, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Milton L. Williams
James M. Catterson
Karla Moskowitz, JJ.

4412
Index 109424/06

x

In re Espada 2001, et al.,
Petitioners-Respondents-Appellants,

-against-

New York City Campaign Finance Board,
Respondent-Appellant-Respondent.

x

Cross appeals from a judgment of the Supreme Court, New York County (Edward H. Lehner, J.), entered May 4, 2007, dismissing respondent's counterclaim for penalties as against petitioner Kenneth Brennan, and granting the petition to the extent of annulling certain individual violations and the penalties imposed therefor.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella and Leonard Koerner and Hillary Weisman of counsel), for appellant-respondent.

Genova, Burns & Vernoia, New York (Laurence D. Laufer and Jisha V. Dymond of counsel), for respondents-appellants.

SAXE, J.

This article 78 proceeding raises the issue of whether penalties may be properly assessed by respondent New York City Campaign Finance Board against a candidate and the campaign treasurer as well as the campaign committee itself for various violations of the New York City campaign finance laws. Supreme Court held that penalties for certain violations could properly be imposed on the campaign committee only and that penalties for other violations could be imposed on the candidate as well, but that the treasurer could be liable for penalties only if he personally engaged in the rule violations. We disagree and, for the reasons that follow, reverse and reinstate in its entirety the determination of respondent Board.

A candidate, having chosen to participate in New York City's campaign finance program, must agree to abide by the program's requirements under the New York City Campaign Finance Act (Administrative Code of City of NY § 3-701 *et seq.*) and the rules enacted by the Campaign Finance Board pursuant to the Act (Rules of City of NY [52 RCNY] § 1-01 *et seq.*), which include filing obligations and limitations on spending and contributions. Having opted to participate, a candidate must comply with all the program's requirements even if the candidate ultimately fails to qualify for or accept public funds under the program

(Administrative Code of City of NY § 3-703[11]).

On March 26, 2001, petitioner Pedro Espada, Jr. opted to participate in the New York City campaign finance program as a candidate for Bronx Borough President in the 2001 elections. He submitted the required candidate certification form designating Espada 2001 as his principal committee and petitioner Kenneth Brennan as treasurer of the committee. In the certification, both Espada and Brennan acknowledged that they understood that "failure to abide by the requirements of the Act or Rules may result in the imposition of such penalties as are provided in Section 3-711 of the Act and other applicable law or rules," and that the candidate, the treasurer and the principal committee "may be jointly and severally liable for the repayment of public funds and/or civil penalties pursuant to Sections 3-710 and 3-711 of the Act." The Espada campaign applied formally for matching funds on July 31, 2001 by submitting a disclosure statement.

The Campaign Finance Board conducted a pre-election audit of the Espada 2001 campaign and found indications of a number of campaign finance law violations. Among these were: (1) A large number of individual contributions received by the campaign were from employees of Soundview Health Care Network, a not-for-profit corporation owned and operated by petitioner Espada; the Board asked for documentation establishing that these contributions

were made out of the employees' personal funds and the employees received no reimbursement from Soundview. (2) Expenses related to a van covered with campaign posters for Espada had not been reported in petitioners' statements. (3) Expenses relating to a purported newsletter entitled "The Bronx-New York Tribune," which was owned by the candidate and appeared to amount to campaign literature, were not documented in petitioners' submissions. (4) Expenditures for joint campaign activities featuring both Espada and his son, an incumbent City Council member running for re-election, such as the use of a poster and flyer supporting both candidates, were not addressed in petitioners' submissions to the Board.

On August 16, 2001, the Board voted provisionally to deny the campaign $173,000 in matching funds. It directed the campaign to provide additional information and documentation responsive to the above-cited concerns. After a hearing on August 30, 2001, the Board concluded that the campaign's "undisclosed use of corporate contributions and repeated failures to provide full disclosure" reflected a lack of compliance, and payment of matching funds was denied.[1] Espada lost the 2001

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[1] The campaign's CPLR Article 78 challenge to the provisional denial of matching funds was dismissed (*see Espada 2001 v New York City Campaign Fin. Bd.*, Index No. 115778/01 [Sup Ct, NY County Sept. 7, 2001], *appeal dismissed* 302 AD2d 299 [1st Dept 2003]).

primary election.

The Post-Election Audit

On June 9, 2003, the Board issued a draft report of its post-election audit, setting forth a number of problems, including the committee's acceptance of excess aggregate contributions from the candidate in a variety of forms, including loans that were not repaid and in-kind contributions from entities controlled by the candidate, and information that employees of Soundview, a business owned by the candidate, who were reported to have made cash campaign contributions, had been reimbursed by their employer for their purported contributions.

Before the Board proceeded with the remaining steps in issuing the final audit report, a criminal prosecution was brought, on January 16, 2004, against a number of Soundview employees, some of whom had official roles in the campaign, charging a scheme to defraud as well as grand larceny. Ultimately, three Soundview senior managers pleaded guilty to the scheme to defraud stemming from Soundview's use, for the benefit of the campaign, of governmental funds that Soundview had received for its WIC and HIV programs; a fourth Soundview manager pleaded guilty to grand larceny in the third degree. In addition, two other Soundview employees were convicted of perjury

for falsely denying before a grand jury that they provided services to the campaign by circulating petitions during company time.

The Penalty Proceeding and Board Determination

On October 20, 2005, after reviewing the Espada campaign's responses to the draft audit report and the public documents relating to the Soundview criminal convictions, the Board initiated the formal penalty proceeding against the Espada campaign, enumerating 22 apparent violations of the Act and Rules and making penalty recommendations.

Some of the violations involved contributions by the candidate exceeding the $10,500 statutory limit (Administrative Code § 3-703[1][f]; Local Law 48 of 1998). These included purported loans from the candidate to the campaign totaling $192,018 that were not repaid; in view of the rule that a loan not repaid by the date of the election is considered a contribution (Administrative Code § 3-702[8]; 52 RCNY 1-05[a]), the Board treated that total amount as a contribution by Espada. Another deemed contribution in excess of the Act's limits arose from a debt owed by the campaign to the Community Leadership Network, apparently related to campaign workers, which was originally reported as an outstanding liability of $230,000 and

subsequently reduced to $75,881. The rules state that a creditor who extends credit to a campaign beyond 90 days is considered to have made a contribution of that amount to the campaign, unless the creditor has made a commercially reasonable attempt to collect the debt, and that debts forgiven or settled for less than the amount owed are also deemed contributions (52 RCNY 1-04[g][4], 1-04[g][5] and 1-05[j]). Other in-kind contributions considered to exceed the Act's limits included the cost of four issues of the Bronx-New York Tribune, treated by the Board as campaign literature, which were printed and distributed by Espada at a cost of more than $12,000.

As to cash contributions from individuals, the Board stated that $46,182 of the reported $122,152 in cash contributions was received from employees of organizations controlled by Espada, such as Soundview; while the committee submitted affidavits from 63 out of 173 contributors affirming that their contributions were made from personal funds that were not reimbursed, the Board had received information that employees were reimbursed for their contributions.

The Board's final audit report and final determination formally found 22 violations and assessed $61,750 in penalties jointly and severally against the candidate, the treasurer, and the committee. The three commenced this CPLR article 78

proceeding to challenge the Board's determination.

Supreme Court granted the article 78 petition in part and granted the Board's counterclaim for enforcement of the imposed penalties in part. It rejected petitioners' arguments that the Board was barred from enforcing its penalties by the three-year statute of limitations and impermissibly broadened the scope of its final post-election audit report by making findings regarding the "Campaign," since the draft audit took issue solely with the "Committee." The court then granted the Board's counterclaim to the extent of finding petitioners Espada and Espada 2001 jointly and severally liable for civil penalties totaling $39,700 for various enumerated violations. It further found the committee alone liable for penalties of $11,000 based upon two specific violations. The court annulled the Board's determination that treasurer Brennan was liable for any penalties, holding that a treasurer may be subject to a civil penalty only if he or she has personally violated a provision of the Act or a Board rule. In addition, the court annulled the determination with respect to a number of other individual violations.

DISCUSSION

Statute of Limitations

Initially, we agree with Supreme Court that CPLR 214(2) does not render the Board's enforcement claim untimely.

CPLR 214(2) applies a three-year limitations period to actions "to recover upon a liability, penalty or forfeiture created or imposed by statute . . ." The statute requires that the action be commenced within three years of the imposition of the "penalty." Thus, the claim accrued when the Board's final determination was issued in 2005 (*see e.g. State of New York v Uzzillia*, 156 AD2d 261 [1989]), not, as petitioners would have it, back in 2001, when the Board denied the Committee matching funds. To the extent petitioners argue that the Board improperly delayed in making its determination of violations or assessment of penalties, they fail to show that the time taken by the Board was improper or that petitioners were prejudiced by it.

Treasurer's and Candidate's Liability

We hold that the Board properly determined that treasurer Brennan and candidate Espada were jointly and severally liable for the campaign finance violations and the assessed penalties under Administrative Code § 3-711. Although we do not agree with the Board's suggestion that these individuals conceded joint

liability for *any* penalties imposed against the campaign simply by signing certification acknowledging that he "*may be* jointly and severally liable for the repayment of public funds and/or civil penalties pursuant to Sections 3-710 and 3-711 of the Act" (emphasis added), we nevertheless conclude that the law supports the imposition of penalties against them. The absence of a showing that Brennan personally committed any violation of the Act or Rules is not determinative.

As applicable to the 2001 election, Administrative Code § 3-711(1) (*see* Local Law 69 of 1990) provided that:

> "Any participating candidate whose principal committee fails to file in a timely manner a statement or record required to be filed by this chapter or the rules of the board in implementation thereof or who violates any other provision of this chapter or rule promulgated thereunder, and any principal committee treasurer or any other agent of a participating candidate who commits such a violation, shall be subject to a civil penalty in an amount not in excess of ten thousand dollars."

This Court has previously observed, *in unequivocal language*, that this provision "imposes personal liability upon *participating candidates and their primary committees' treasurers* and other agents *for penalties assessed by the Board for a 'violation' or 'infraction' . . . by the committee*" (*see New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 81 [2006] [emphasis added]). We recognize that this particular point was not the

focus of the ruling in *Ortiz*, which involved liability for repayment of public funds under section 3-710. However, the quoted observation was presented in the *Ortiz* decision as established and indeed unquestioned law on the precise question now before us and as such must carry considerable weight in guiding our subsequent determinations (*see* 28 NY Jur 2d, Courts and Judges § 213).

Even if we treat this statement of law in *Ortiz* as dictum and the question before us as undecided, and therefore turn to construing the language of the Act, the treasurer must in any event be held jointly liable with the candidate and the committee.

We disagree with Supreme Court's reading of § 3-711. We do not view the provision as limiting its application to the treasurer of a principal committee to circumstances in which he or she has personally violated the Act or Rules; nor do we agree that the provision limits the candidate's liability for the conduct of the committee to circumstances in which the committee has failed to timely file required statements and records. Reading the provision closely and in the context of the Act as a whole, we agree with the Board's interpretation, under which both the candidate and the treasurer are liable for violations by the principal committee.

Moreover, assuming arguendo that the language of section 3-711 may be considered ambiguous as to the candidate's and the treasurer's liability for violations, petitioners' argument must still fail. Where statutory language suffers from some "fundamental ambiguity," courts routinely defer to an agency's construction of a statute it administers (*see New York City Council v City of New York*, 4 AD3d 85, 97 [2004], *lv denied* 4 NY3d 701 [2004] [internal quotation marks & citation omitted]). In such cases, the administering agency's interpretation is entitled to great deference, and must be upheld if reasonable (*see Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]; *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [2007], *appeal dismissed* 10 NY3d 928 [2008]). The Board has consistently construed the New York City Campaign Finance Act (Administrative Code of City of NY § 3-701 *et seq.*) as holding the candidate, treasurer, and principal committee jointly and severally liable for any penalties assessed against the campaign for violations of the Act and rules committed by the campaign (*see e.g. New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d at 81; *New York City Campaign Fin. Bd. v Lewis*, Sup Ct, NY County, Nov. 8, 2004, James, J., Index No. 400626/04; *New York City Campaign Fin. Bd. v Villaverde*, Sup Ct, NY County, Nov 27, 2002, Stallman, J., Index

No. 405076/01; *New York City Campaign Fin. Bd. v Kramer*, Civ Ct, NY County, April 14, 2005, Singh, J., Index No. SCNY 3907/04). Since this interpretation is not manifestly wrong, it is entitled to great deference by the courts.

Furthermore, as a matter of policy, this interpretation, holding the candidate and the treasurer personally liable for violations by the committee, is not inappropriate. Indeed, as the Board points out, a contrary construction would nullify the intent of the program, since penalty proceedings generally occur only after the election, so by the time penalties are assessed, a campaign committee will often have been terminated and emptied of funds, rendering such penalties pointless unless the candidate and treasurer remain liable.

Merits of the Violations Findings

Initially, the Board's ultimate determination with respect to the campaign finance violations committed by Espada's principal committee is supported by more than substantial evidence and is not arbitrary and capricious (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]).

We reject petitioners' challenge to the Board's findings

regarding violations 8 and 11 through 16 and reverse Supreme Court's dismissal of them. Violation 8 related to a failure to provide copies of cancelled checks representing 25 loans from Espada, as called for by the Board's draft audit, which the Board properly found to violate the program's record-keeping requirements (*see* 52 RCNY § 4-01[g] [a participating campaign must make loan documentation records available to the Board upon request]). Violations 11 through 16 involved the campaign's acceptance of and failure to report various in-kind contributions in the form of outstanding liabilities based on services provided to the campaign by vendors. It was not arbitrary and capricious for the Board to penalize the campaign for failing to provide documentation showing that these loans could not be repaid, as the Board requested, particularly given the absence of evidence (invoices, bills) that any of the vendors made a commercially reasonable attempt to collect the monies owed by the campaign.

Similarly, the court erred in dismissing violations 19 and 20, relating to petitioners' failure to provide certain financial documents of Espada 2000, Espada's principal committee when he ran for the State Senate. 52 RCNY 3-02(f)(5) requires candidates to comply with Board requests for financial records of political committees authorized by a participant "that are not involved in a covered election [in which the candidate is currently a

participant]," as well as provisions that grant the Board broad audit and investigatory authority (Administrative Code §§ 3-703[1][d],[g]; 3-710[1]). Thus, the court should have deferred to the Board's penalty determinations for the campaign's failure to comply with the requests, which were not arbitrary and capricious.

Violation 3 was for accepting from the candidate more than $203,518 in excess of the $10,500 candidate contribution limit, including loans from Espada that were not repaid and goods and services from entities, including Soundview, that the Board deemed "a single source with the candidate." This was correctly determined to constitute a violation of Administrative Code section 3-702(8). The court correctly rejected petitioner's statutory argument that § 3-702(8) exempts payments made by the candidate from the definition of contribution, and found that these loans from Espada to his campaign exceeded the contribution limit. However, the court improperly found that because it was the committee and not the candidate that accepted the loan, the candidate was not liable. Accordingly, all three petitioners are liable for the violation, and the Board's determination with respect to violation 3 is reinstated as against both Espada and Brennan.

Violation 21 concerned the campaign's violation of an

advisory opinion of the Board prohibiting additional campaign spending between the originally scheduled primary election date of September 11, 2001, and the rescheduled date of September 25, 2001. Petitioners argued not that they lacked notice of the prohibition, but that they were not bound by this advisory opinion, as section 3-711 does not provide for the imposition of a civil penalty for the violation of an advisory opinion. Supreme Court upheld the violation, albeit against the committee alone. We agree with Supreme Court that although most advisory opinions do not have the force of rules, this opinion, adopted in light of the emergency rescheduling of the 2001 primary in order to prevent any candidate from gaining an advantage as a result of the September 11th attacks, must be treated as having a binding effect. Given petitioners' tacit acknowledgment of their awareness of the opinion, the Board's determination that petitioners are liable for violation 21 should therefore be reinstated as well, as against all petitioners.

Petitioners' challenges to violations 2, 4, 5, 7, 18 and 22 were properly rejected by Supreme Court; the Board's determination with respect to each violation is supported by substantial evidence in the record and is not arbitrary and capricious.

Consequently, the Board's determination of liability against

all three petitioners for all the violations is reinstated.

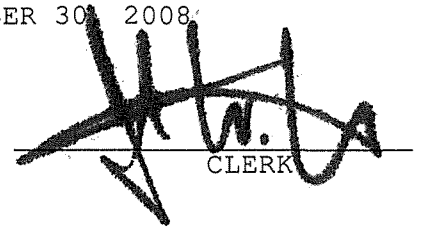
Finally, we agree with Supreme Court that the Board did not impermissibly broaden the scope of its investigation by addressing the campaign, defined as the three petitioners collectively, in the final post-election audit although the draft audit had referred to the committee. Petitioners were given more than adequate notice that the Board would consider violations and penalties against the candidate and the treasurer, as well as the committee.

Accordingly, the judgment of the Supreme Court, New York County (Edward H. Lehner, J.), entered May 4, 2007, dismissing respondent's counterclaim for penalties as against petitioner Kenneth Brennan, and granting the petition to the extent of annulling certain individual violations and the penalties imposed therefor, should be modified, on the law, so as to reinstate in its entirety respondent's determination finding petitioners in violation of the campaign finance program and assessing $61,500 in penalties, and as so modified, affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 30, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Milton L. Williams
James M. Catterson
Karla Moskowitz, JJ.

4418
Index 115909/07

x

Riverside South Planning Corporation,
Plaintiff-Respondent,

-against-

CRP/Extell Riverside, L.P., et al.,
Defendants-Appellants.

x

Defendants appeal from the order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered March 25, 2008, which denied its motion to dismiss the complaint.

Michael C. Marcus, Long Beach and Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for appellants.

Cravath, Swaine & Moore LLP, New York (Max R. Shulman of counsel), for respondents.

CATTERSON, J.

The instant appeal presents the issue of one party seeking to obtain through litigation and rhetoric what it plainly could not obtain from its adversaries through contract negotiations. Plaintiff claims that it is entitled to the enforcement of certain design guidelines indefinitely and absolutely. We find that it is not entitled to such enforcement because the terms of the underlying contract are plain and unambiguous. Furthermore, the contract expressly negates the possibility that its obligations were to run with the land.

In the early 1990s, Donald J. Trump allied himself with a coalition of civic, environmental and neighborhood groups, in order to gain support for his development of the land that stretches along the Hudson River from 59th to 72nd Street, the old Penn Central railway yard. In exchange for the coalition's pledge to support Trump during the governmental land-review process, Trump agreed to reach a compromise on the plan for development of Riverside South. After extensive negotiation, Trump withdrew his original proposal for development which had generated fierce public opposition and accepted a scaled-back plan for development (hereinafter referred to as the "Development Plan").

The Development Plan focused on environmental sustainability

and design criteria for the buildings and called for parks, open spaces and public arts programs. Trump and the coalition of community groups formed the plaintiff, the Riverside South Planning Corporation (hereinafter referred to as the "RSPC"), a not-for-profit corporation, designed to oversee the planning, design and construction of Riverside South pursuant to the Development Plan.

On or about March 31, 1993, Penn Yards Associates (hereinafter referred to as "Penn Yards") by its general partner, Trump, and the RSPC, together with various civic groups, entered into a four-page letter agreement (hereinafter referred to as the "1993 Agreement") setting forth the specific terms upon which the coalition of community groups would support the Development Plan. Annexed to the 1993 Agreement were two pages titled "Legal Requirements."

Under the 1993 Agreement, RSPC was to have an active role in planning Riverside South and ensuring that it was developed pursuant to the environmental sustainability and design principles set forth in the Development Plan. Specifically, Trump agreed that the parties would coordinate their efforts and that if he utilized "Special Permits," he would develop the project in substantial conformity with the Riverside South Design

Guidelines (hereinafter referred to as the "Design Guidelines").[1]

After setting forth certain joint undertakings, the 1993 Agreement binds Trump to certain obligations as follows:

> "We agree that RSPC may be dissolved at any time by mutual agreement of the parties, and that I shall have the right to dissolve RSPC if (1) we do not reach agreement on the development of the studio site, (2) Richard Kahan or a successor mutually agreed upon no longer heads RSPC or (3) any member organization withdraws from participation in RSPC. You agree to execute documents, promptly following request, and we shall jointly seek all required approvals, necessary to effect such dissolution. The agreements in this letter relating to design guidelines, park maintenance and operation, and restrictions on major modifications and rezoning shall survive the dissolution of RSPC, in which event approvals and consents of RSPC regarding these matters shall be granted by a majority of a three (3) person panel (including Donald J. Trump) to be acceptable to both me and the other members of the board of RSPC. *The agreements contained herein shall continue for ten (10) years, or such lesser period as either of the following conditions shall no longer remain satisfied: (1) the Special Permits shall remain in effect; and (2) I shall own, directly or indirectly, all or any portion of the subject property.*" (emphasis added). (hereinafter referred to as the "sunset" provision).

The next paragraph of the 1993 Agreement reads:

> "I agree that I will require any person who purchases any Parcel of the Subject Property from me so long as the Special Permits remain in effect, to agree to abide by the agreements in this letter insofar as they relate to the development of the project and the park, delegation of park maintenance, and the restrictions on seeking changes in the approved plan. In particular, I will contractually require

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[1]Special permits were apparently City approvals without which Riverside South could not legally be developed.

> the purchaser(s) to agree to develop such parcel in accordance with these guidelines and not to apply for any changes or modifications in the approved plan not permitted hereunder so long as the Special Permits remain in effect without approval of a majority of the members of RSPC, which approval is not to be unreasonably withheld or delayed."

Trump then agreed to fund RSPC for three years. After that period Trump had the option but not the obligation to continue the funding.

The Legal Requirements attached to the 1993 Agreement state that the 1993 Agreement was not "intended to, nor shall be interpreted to, nor shall any enforcement of the [1993] Agreement, create an interest in real property ... lien or other encumbrance up on the Subject Property . . ."

In 1994, Trump transferred title to Hudson Waterfront Associates, L.P. (hereinafter referred to as "Hudson Waterfront"), an entity in which he retained an interest, but not control. More than 10 years later, on June 17, 2005, the defendants (Extell) purchased their interest in Riverside South from Hudson Waterfront. The terms under which Extell assumed the obligations of the 1993 Agreement were set forth in an Assignment and Assumption Agreement, dated November 3, 2005, which provided that Extell:

> "assume[d] all of the duties, obligations and liabilities of Assignor under [the 1993 Agreement] arising from and after the date hereof, it being understood that this Assignment shall not be deemed to be an admission by either Seller or

> [Extell] that there are or will be any duties, obligations or liablities in connection with the [1993 Agreement] or that the [1993 Agreement] is in effect."

RSPC maintains that initially after Extell purchased its interest in the project, Extell funded RSPC and its architects corresponded with RSPC and promised to provide plans for a new building (hereinafter referred to as "Building I"). However, when construction on Building I was about to commence, Extell allegedly switched course without RSPC's approval, constructing Building I with more glass than the Design Guidelines permitted and failing to conduct the required environmental sustainability assessments and calculations. Extell then refused to involve RSPC in any aspect of Riverside South's planning or design. As a result, Extell allegedly prevented RSPC from fulfilling its primary function, i.e., to ensure development of Riverside South, in the public interest, in accordance with the principles agreed to by the community when it permitted the project to proceed in the first place.

On November 29, 2007, RSPC filed a complaint, asserting causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, and demanded specific performance of Extell's assumed obligations. Extell moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) on the ground that the sunset provision barred RSPC's action.

By decision and order dated March 13, 2008, the Supreme Court denied Extell's motion, finding "the 1993 Agreement ambiguous whereby it is unclear whether the sunset provision applies to the entire agreement or only those obligations recited in the paragraph in which the provision is embedded." The motion court explained:

> "Both interpretations proffered by the parties are reasonable. Looking at the entire body of the contract it is reasonable to conclude that where the 'sunset provision' comes at the end of a distinct set of obligations and immediately follows a provision reiterating that distinct set, it is [to] that set that the phrase 'agreements contained herein' refers. It is arguable that if it was intended by the parties that the provision apply to the entire agreement, it would follow *all* of the obligations charged to Trump."

Noting that the 1993 Agreement clearly stated that its intent is to "ensure the development of the site in accordance with the approved plan," the motion court found that a reading of the sunset provision that resulted in the 1993 Agreement's expiration at the end of 10 years would be inconsistent with the intent of the contract. Finally, the motion court added:

> "[Extell's] interpretation which cuts off the obligation of subsequent developers after ten years appears to be inconsistent with the intent of the contract because ten years is an inconceivably short amount of time within which to develop a project as large as Riverside South."

On appeal, Extell contends that the only reasonable interpretation of the sunset provision is that all of the

obligations created by the 1993 Agreement expire no later than 10 years after its signing. Extell claims that the clear and unequivocal words used by the "sophisticated parties and their lawyers" who drafted the provision, regardless of its placement on page three of the four-page agreement, in no way reflect an intent to create contractual obligations in perpetuity. For the reasons set forth below, we agree.

The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent (see e.g., Slatt v. Slatt, 64 N.Y.2d 966, 488 N.Y.S.2d 645, 477 N.E.2d 1099 (1985)), and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing." Slamow v. Del Col, 79 N.Y.2d 1016, 1018, 584 N.Y.S.2d 424, 425, 594 N.E.2d 918, 919 (1992). Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous. See e.g., W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 443, 566 N.E.2d 639, 642 (1990).

A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties. Teichman v. Community Hosp. of W. Suffolk, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474, 633 N.E.2d

628, 630 (1996); Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16, 19, 210 N.Y.S.2d 516, 518, 172 N.E.2d 280, 282 (1961).

A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning." Greenfield v. Philles Records, 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 570, 780 N.E.2d 166, 170-171 (2002). Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous. Innophos, Inc. v. Rhodia, S.A., 38 A.D.3d 368, 369, 832 N.Y.S.2d 197, 199 (1st Dept. 2007), aff'd, 10 N.Y.3d 25, 852 N.Y.S.2d 820, N.E.2d 389 (2008).

Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc., 28 A.D.3d 175, 177, 809 N.Y.S.2d 70, 73 (1st Dept. 2006) (internal quotation marks and citation omitted). The existence of ambiguity is determined by examining the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed," with the wording to be considered "in the light of the obligation as a whole and the intention of the parties as manifested thereby." Kass v. Kass, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356-57, 696 N.E.2d 174, 181 (1998), quoting Atwater & Co. v. Panama R.R. Co., 246 N.Y. 519, 524, 159

N.E.418, 419 (1927). Whether a contract is ambiguous presents a question of law for resolution by the court. Kass, 91 N.Y.2d at 566, 673 N.Y.S.2d at 356.

The Court of Appeals has made plain that the rule requiring a written agreement to "be enforced according to its terms" has special importance in transactions relating to real property:

> "We have . . . emphasized this rule's special import 'in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 767, 807 N.E.2d 876, 879 (2004), quoting Matter of Wallace v. 600 Partners Co., 86 N.Y.2d 543, 548, 634 N.Y.S.2d 669, 671, 658 N.E.2d 715, 717 (1995).

In the instant case, the ordinary and natural meaning of the 1993 Agreement's words are dispositive: "[t]he agreements contained herein shall continue for ten (10) years, or such lesser period..." A plain reading of these words makes clear that 10 years is the maximum term of the contract at issue, with the possibility that the term may be some "lesser period" if the specified conditions occur. We note that clear contractual language does not become ambiguous simply because the parties to the litigation argue different interpretations. Bethlehem Steel Co. v. Turner Constr. Co., 2 N.Y.2d 456, 460, 161 N.Y.S.2d 90, 93, 141 N.E.2d 590, 593 (1957); Moore v. Kopel, 237 A.D.2d 124, 125, 653 N.Y.S.2d 927, 929 (1st Dept. 1997).

Contrary to the position of the dissent, there is no legal requirement that contractual provisions fixing the term of a contact must appear at the end of (or at any other particular place in) the document, especially in a short, informal letter agreement as is the case here. Instead, all that is required is that a provision fixing an end date be clear. See Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 198, 738 N.Y.S.2d 658, 660, 764 N.E.2d 958, 960 (2001), quoting W.W.W. Assoc., 77 N.Y.2d at 162, 565 N.Y.S.2d at 443 ("when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms").

It is evident that RSPC's interpretation of the sunset provision is its after-the-fact attempt to rewrite its plain wording to provide: "[t]he agreements [set forth above but not below] shall continue for ten (10) years, or such lesser period..." No such express statement appears anywhere in the 1993 Agreement to that effect. Because the 1993 Agreement was "[an] instrument... negotiated between sophisticated, counseled business people negotiating at arm's length," (see Vermont Teddy Bear Co., 1 N.Y.3d at 475, 775 N.Y.S.2d at 767-768) (internal quotation marks & citations omitted)), it is untenable that the parties would have intentionally left the meaning of their agreement to such vagaries as placement and punctuation. This is

especially true given the obvious need for "commercial certainty" in a huge, multi-billion dollar real estate deal. Id. at 475; 775 N.Y.S.2d at 767.

It is also worth mentioning that RSPC could not bind Trump's successors under the theory that the obligations set forth in the 1993 Agreement were covenants running with the land because the agreement expressly states that it was not to be recorded. Deepdale Cleaners v. Friedman, 16 Misc.2d 716, 184 N.Y.S.2d 463 (1957), aff'd, 7 A.D.2d 926, 183 N.Y.S.2d 411 (2d Dept. 1959).

Furthermore, contrary to the motion court's ruling and the view of the dissent, we believe that our reading of the sunset provision is completely consistent with the parties' intent. It is well settled that in interpreting any contract, "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." See W.W.W. Assoc., 77 N.Y.2d at 162; 565 N.Y.S.2d at 442. Here, rather than pointing to anything in the 1993 Agreement itself to support its position, RSPC merely relies on the self-serving affidavit of its counsel as evidence of the parties' supposed intent, and what "everyone knew" about Trump's intentions to sell his interest, and other matters outside of the contact. Such unsupported statements by counsel are not entitled to any weight whatsoever on a CPLR 3211 motion.

See McDermott v. Village of Menands, 74 A.D.2d 661, 424 N.Y.S.2d 776 (3d Dept. 1980). In any event, nothing about the sunset provision's express language supports the contention that the 1993 Agreement's obligations regarding the Design Guidelines and other environmental considerations would expire at the end of 10 years if Trump were the developer, but continue in perpetuity for any other subsequent developer.

The dissent believes that there is a question about the length of time successors to the 1993 Agreement would be bound which cannot be answered on a motion to dismiss. We disagree. The provision stating "[t]he agreements contained herein shall continue for (10) years..." is unequivocal. The other possibility contemplated is that the agreement might last for a "lesser period." Nothing in any part of the agreement suggests that the parties contemplated it could last longer; certainly not the paragraph that follows the sunset provision.

The dissent maintains that the paragraph following the sunset provision binds Trump's successors to the 1993 Agreement "so long as the Special Permits remains in effect." However, that paragraph, when read in conjunction with the preceding paragraph, makes plain that it is only implicated when the Special Permits are in effect and Trump owns only a part of the "Subject Property" rather than the entire "Subject Property." In

that eventuality, he agreed that he would "require any person who purchases any Parcel of the Subject Property from me so long as the Special Permits remain in effect, to agree to . . ."

However, in this case, Extell rather than Trump owns all of the "Subject Property." In fact, had this situation arisen prior to the end of the 10-year period, the agreements would have terminated in that "lesser period." Thus, the dissent is construing a paragraph that by its terms applies only to a situation where Trump owned a portion of the property and sold the remainder, as extending the sunset provision for the entire agreement in perpetuity.

While it may be true that RSPC wanted to obtain an unlimited and absolute commitment from Trump on behalf of his partnership or successors to abide by certain Design Guidelines indefinitely and absolutely; however, what RSPC actually obtained was only a limited and conditional commitment. To ask this Court to ignore those limitations and conditions is merely an attempt to obtain through litigation a result that RSPC was unable to achieve during negotiations.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered March 25, 2008, which denied defendants' motion to dismiss the complaint should be reversed, on the law, with costs, and the motion granted. The Clerk is

directed to enter judgment in favor of defendants dismissing the complaint.

All concur except Williams and Moskowitz, JJ. who dissent in an opinion by Moskowitz, J.

MOSKOWITZ, J. (dissenting)

I would affirm the order of the motion court because the contract language is ambiguous making it inappropriate to dismiss at this early juncture prior to development of the record and summary judgment. The majority finds no ambiguity only by overfocusing on a single sentence.

The area located on the West Side of Manhattan known as Riverside South is a 76-acre parcel of land running north to south from 72nd Street to 59th Street and east to west from 11th Avenue to the Hudson River. In the early 1990's, Donald Trump, who owned Riverside South, proposed a plan for its development. Various civic groups opposed his plan. After extensive negotiation among these civic groups, Trump and local government, all sides ultimately reached agreement. The civic groups agreed to support the project. In exchange, Trump agreed to withdraw his original proposal and to implement the Riverside South Development Plan (Development Plan). The Development Plan focused on environmental sustainability and design criteria for the buildings, calling for parks, open spaces and public art programs.

The civic groups created plaintiff Riverside South Planning Corporation (RSPC), a not-for-profit corporation responsible for the planning, design and construction of Riverside South. On or

about March 31 1993, Penn Yards Associates (Penn Yards), by its general partner, Trump, the RSPC and various civic groups entered into a four-page letter agreement (1993 Agreement). The 1993 Agreement set forth the terms upon which the civic groups would support the Development Plan. Annexed to the Agreement were two pages of "Legal Requirements."

Under the 1993 Agreement, the RSPC was to have an active role in planning Riverside South. Specifically, Trump agreed that the parties would coordinate their efforts and that, if he utilized "Special Permits," he would develop the project in substantial conformity with the Riverside South Design Guidelines (Design Guidelines). After setting forth certain joint undertakings, the Agreement then provided:

> "We agree that RSPC may be dissolved at any time by mutual agreement of the parties, and that I [Trump] shall have the right to dissolve RSPC if (1) we do not reach agreement on the development of the studio site, (2) Richard Kahan or a successor mutually agreed upon no longer heads RSPC or (3) any member organization withdraws from participation in RSPC. You agree to execute documents, promptly following request, and we shall jointly seek all required approvals, necessary to effect such dissolution. The agreements in this letter relating to design guidelines, park maintenance and operation, and restrictions on major modifications and rezoning shall survive the dissolution of RSPC, in which event approvals and consents of RSPC regarding these matters shall be granted by a majority of a three (3) person panel (including Donald J. Trump) to be acceptable to both me and the other members of the board of RSPC. The agreements contained herein shall continue for (10) years, or such lesser period as

> either of the following conditions shall no longer remain satisfied: (1) the Special Permits remain in effect; and (2) I shall own, directly or indirectly, all or any portion of the subject property" (emphasis added) (sunset provision).

The very next paragraph of the 1993 Agreement reads:

> "I [Trump] agree that I will require any person who purchases any Parcel of the Subject Property from me *so long as the Special Permits remain in effect*,[1] to agree to abide by the agreements in this letter insofar as they relate to the development of the project and the park, delegation of park maintenance, and the restrictions on seeking changes in the approved plan. In particular, I will contractually require the purchaser(s) to agree to develop such parcel in accordance with these guidelines and not to apply for any changes or modifications in the approved plan not permitted hereunder *so long as the Special Permits remain in effect* without approval of a majority of the members of RSPC, which approval is not to be unreasonably withheld or delayed." (emphasis added).

Trump then agreed to fund RSPC for three years, after which, in good faith, he would consider continued funding.

In 1994, Trump transferred title to Hudson Waterfront Associates, L.P. ("HWA"), an entity in which he retained an interest, but not control. On June 17, 2005, defendants (Extell) purchased their interest in Riverside South from HWA. RSPC claims that Extell assumed the obligations under the 1993 Agreement through a 2005 Assignment and Assumption Agreement, and

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[1] The Special Permits were apparently City approvals without which Riverside South could not legally be developed.

that for a time after its purchase, Extell funded RSPC, had its architects correspond with RSPC and promised to provide plans for a new building, Building I. However, when construction on Building I was about to commence, Extell allegedly switched course without RSPC's approval, constructing Building I with more glass than the Design Guidelines permitted and failing to conduct the required environmental sustainability assessments and calculations. Extell then refused to involve RSPC in any aspect of Riverside South's planning or design and, as a result, allegedly prevented RSPC from fulfilling its primary function, *i.e.*, to ensure development of Riverside South, in the public interest, in accordance with the principles agreed to by the community when it permitted the project to proceed in the first place.

On November 29, 2007, RSPC filed a complaint, asserting causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing and demanding specific performance of Extell's assumed obligations. On January 18, 2008, Extell, relying on the sunset provision, moved to dismiss. Extell claimed that the entire contract was only effective for 10 years, 10 years had passed and therefore the agreement had expired by its own terms. RSPC claimed that the 10-year sunset provision only applied to *Trump's* obligations to abide by the

design guidelines, work with RSPC on park development and maintenance and not apply for major rezonings without consent. The court denied Extell's motion, finding the 1993 Agreement ambiguous because "it is unclear whether the 'sunset provision' applies to the entire agreement or only to those obligations recited in the paragraph in which the provision is embedded." Extell appealed.

"Whether or not a contract provision is ambiguous is a question of law to be resolved by a court" (*Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 191 [1986]; *see 1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d 329, 331 [2007]). In interpreting a contract, it is important to read the writing as a whole in order to give each clause its intended purpose (*see Williams Press v State of New York*, 37 NY2d 434, 440 [1975]). "'Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 144 [2008] *quoting Atwater & Co., v Panama R. R. Co.*, 246 NY 519, 524 [1927]).

The majority focuses on the words "agreements contained herein shall continue for ten (10) years, or such lesser period . . ." in the sunset provision to interpret the 1993 Agreement to mean that 10 years is the maximum term for the

entire contract.

However, once the entire contract is taken into account, the contract can be read to apply the 10-year limitation only to certain of Trump's obligations.

To begin with, it is clear that not all the obligations in the 1993 Agreement ran for 10 years. For example, Trump had only a three year obligation to fund RSPC. Therefore, by the very terms of the 1993 Agreement, the sunset provision cannot possibly apply to every obligation.

In addition, the paragraph immediately succeeding the sunset provision requires Trump to bind his successors to the subset of obligations from the preceding paragraph relating to "the development of the project and the park, delegation of park maintenance, and the restrictions on seeking changes in the approved plan." However, 10 years is not the time period for which this paragraph requires successors to abide by those obligations. Rather, this subsequent paragraph binds them "*so long as the Special Permits remain in effect.*" That same paragraph also requires Trump to bind successors to develop the parcel in accordance with the Design Guidelines. The repetition of those same obligations in a paragraph following the sunset provision, then, at the very least raises questions about the length of time successors are bound. Is it for the 10-year term

from the preceding paragraph or is it for "so long as the Special Permits remain in effect"? This question cannot be answered on a motion to dismiss.

Further, the paragraph containing the sunset provision clarifies that provision's limitations. The phrase the majority isolates and relies upon so heavily, "agreements contained herein," occurs as the last sentence in a paragraph discussing *Trump's* obligations "relating to design guidelines, park maintenance and operation, and restrictions on major modifications and rezoning." Therefore, the phrase "agreements contained herein" does not necessarily mean the entire 1993 Agreement, but rather could easily just put a time limit on Trump's obligations relating to these issues. Had the parties intended the sunset provision to govern the entire agreement, why would they have embedded it as the third sentence of a paragraph dealing primarily with the dissolution of RSPC and a specific subset of Trump's obligations?

The majority reads the agreement to implicate the paragraph immediately following the sunset provision only: (1) when the Special Permits are in effect and (2) Trump owns only a part of the "Subject Property" rather than the entire "Subject Property." It then interprets the second paragraph to refer to the situation where Trump sells some portion of the property but retains an

interest. The majority then argues that because Extell purchased the entire property, the second paragraph does not become implicated.

However, there is another way to interpret these two paragraphs. This is because it is not clear that the second paragraph deals only with the situation where an entity purchases part of the Subject Property while Trump retains ownership of a portion. The language requires "any person who purchases any Parcel of the Subject property from me" to abide by the 1993 Agreement so long as the Special Permits remain in effect. There is no indication that by using the words "any Parcel" the parties meant to exempt an entity that purchased all 76 acres. If the parties meant to exempt this sort of purchaser, would they not have said so, particularly as the 1993 Agreement does contemplate the possibility that Trump would sell the entire parcel.

Moreover, the sunset provision states that it will continue for:

> "ten (10) years, or such lesser period as either of the following conditions shall no longer remain satisfied: (1) the Special Permits shall remain in effect; and (2) I [Trump] shall own, directly or indirectly, all or any portion of the Subject Property."

While this language is hardly a model of clarity, I agree with the majority that it contemplated a possible time period that was less than 10 years if Trump sold his entire interest to another

entity. But, this time limit may only impact *Trump's* obligations. If the parties meant to tie the 10-year time limit to successor entities also, why would they not have put the 10-year time limit in the second paragraph, or said so directly?

That the language of the contract could be read to obligate Trump for only 10 years while successors could conceivably have obligations under the Design Guidelines for longer than that may be a sensible construction. The parties would have drafted the 1993 Agreement to provide for precisely that event, if, for instance, everyone knew that Trump would eventually sell his interest to another party. The 1993 Agreement certainly contemplates this possibility. However, the motivation behind this ambiguous document will never come to light because the majority cuts this case off at the motion to dismiss stage before discovery into the intent of the parties can occur.

The majority characterizes RSPC's argument to mean that the Design Guidelines and other environmental considerations would expire at the end of 10 years if Trump were the developer but continue "in perpetuity" for any other subsequent developer. This is an incorrect characterization of RSPC's argument and a misreading of the 1993 Agreement. As I have already discussed, the 1993 Agreement states that the Design Guidelines and other considerations were to continue "[so] long as the Special Permits

remain in effect," not "in perpetuity" as the majority claims.

I agree with the majority that *Vermont Teddy Bear Co. v 538 Madison Realty Co.* (1 NY3d 470 [2004]) mandates courts to enforce contracts according to their express terms, especially in cases involving real property. However, the majority's application of *Vermont Teddy Bear* to this case is misplaced. In *Vermont Teddy Bear* neither party claimed that the lease was ambiguous. Here, not only does RSPC claim that the 1993 Agreement is ambiguous, but the agreement is ambiguous because it contains two, possibly competing, time restrictions. The first, that the majority relies upon, could be read to restrict the entire agreement to 10 years. The second could be read to bind successors "so long as the Special Permits remain in effect."

In *Vermont Teddy Bear*, the Court of Appeals cautioned that courts "'may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing'" (*id.* at 475 [internal quotation marks and citations omitted]). Yet, that is precisely what the majority does here. By ignoring the paragraph requiring successors to abide by the guidelines "*so long as the Special Permits remain in effect*" (emphasis added) the majority effectively excises that language from the 1993 Agreement.

Thus, the agreement is facially ambiguous as it is subject

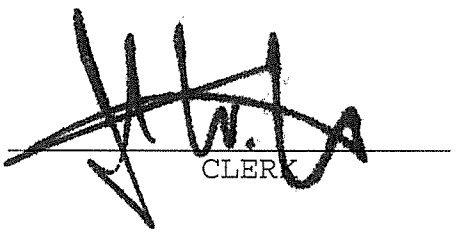
to more than one interpretation (*see Yanuck v Paston & Sons Agency*, 209 AD2d 207 [1994]). Accordingly, resort to extrinsic evidence is necessary to resolve the ambiguity (*Korff v Corbett*, 18 AD3d 248, 251 [2005]).

Finally, the majority's decision does not address what happens to design decisions that RSPC and either Extell or its predecessor have already made. It would undermine design agreements RSPC made with Trump or HWA during the 10-year period for Extell to fail to abide by those decisions. This would render the 1993 Agreement a complete nullity. There would have been no reason for RSPC to have entered into it, and it would have received nothing in exchange for its support of Trump's development plan.

Accordingly, I would affirm the order of the Supreme Court.

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

ENTERED: DECEMBER 30, 2008



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