SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 1, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3534 The People of the State of New York, Respondent, Ind. 3994/05

-against-

Born Poledore, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jessica Slutsky of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered January 4, 2006, convicting defendant, after a jury trial, of criminal possession of stolen property in the fifth degree and sentencing him to a term of 1 year, unanimously affirmed.

The court was not obligated, sua sponte, to order a CPL article 730 examination (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878 [1995]). Nothing in the record casts doubt on defendant's ability to understand the proceedings or assist in his defense. Defendant's lucid interactions with the court contradicted his claim that any

irregularities in the timing or dosage of his psychiatric medication on the day in question rendered him incompetent.

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

ENTERED: MAY 1, 2008

CLERK

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

3535 Aurea Martinez, et al., Index 23869/04
Plaintiffs-Appellants,

-against-

Academy Bus LLC, et al.,
Defendants-Respondents.

Alexander J. Wulwick, New York, for appellants.

Mintzer, Sarowitz, Zeris, Ledva & Meyers, Hicksville (Marc D. Sloane of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 15, 2007, which, in an action for personal injuries resulting from a motor vehicle accident in which plaintiffs were passengers in defendants' bus, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

The court improperly granted defendants' motion based on the emergency doctrine, since the record shows that there are triable issues of fact regarding the applicability of the doctrine, including whether the actions of defendant bus driver in attempting to pass two other vehicles in rainy weather were reasonable, and whether the bus he operated first struck the other vehicle and caused it to spin out of control (*see Rhodes v United Parcel Serv.*, 33 AD3d 455 [2006]; *Rabassa v Caldas*, 306 AD2d 137 [2003]). Under the circumstances, it cannot be said as

a matter of law that defendant bus driver was faced with an emergency that was not of his own making (*see Raposo v Raposo*, 250 AD2d 420 [1998]).

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

ENTERED: MAY 1, 2008

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

3536 In re Christian O., and Another,

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

Juan O.,
Respondent-Appellant,

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

Randall S. Carmel, Syosset, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Colella of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about September 15, 2006, which, upon a fact-finding determination that respondent father neglected Christian O., and derivatively neglected Juan O., released the children to non-respondent mother with supervision by petitioner Administration for Children's Services for a period of 12 months, unanimously reversed, on the law and the facts, without costs, insofar as it brings up for review the fact-finding determination, the findings of neglect and derivative neglect vacated, the petitions dismissed, and the appeal otherwise dismissed.

Appellant father does not challenge the dispositional order

insofar as it released the children to their mother.

The record shows that when 11-year-old Christian arrived home significantly past his curfew without explanation, respondent lost his temper and kicked the mattress upon which Christian was lying. As he did so, Christian lifted his legs, and respondent kicked him once in the ankle. Medical treatment was not required, and there is no evidence to dispute the testimony that respondent, who expressed remorse for his actions and maintained that the kick to Christian's ankle was accidental, had not previously used corporal punishment when disciplining his children. Under these circumstances, we conclude that there is insufficient evidence that Christian suffered the requisite physical, mental or emotional impairment to support a finding of neglect (*see* Family Ct Act § 1012[f][i][B]; *Matter of Luke M.*, 193 AD2d 446 [1993]). This appears to have been an isolated incident, and "[w]hile losing one's temper does not excuse striking and injuring one's child, one such event does not necessarily establish. . .neglect" (*Matter of P. Children*, 272 AD2d 211, 212 [2000], *lv denied* 95 NY2d 770 [2000]).

Furthermore, since the finding of neglect is vacated, the finding of derivative neglect is also vacated.

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

ENTERED: MAY 1, 2008

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

3537 The People of the State of New York, Ind. 3381/04
Respondent,

-against-

Bob Wells,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered December 15, 2005, convicting defendant, after a jury trial, of attempted rape in the first degree, sexual abuse in the first degree and criminal trespass in the second degree, and sentencing him to an aggregate term of 3½ years, unanimously affirmed.

The court's *Sandoval* ruling permitting the prosecutor to cross-examine defendant about a prior bad act balanced the appropriate factors and was a proper exercise of discretion (*People v Hayes*, 97 NY2d 203 [2002]). There was a good faith basis for the prosecutor's inquiry (*see People v Alamo*, 23 NY2d 630, 633-635 [1969], *cert denied* 396 US 879 [1969]). The alleged bad act of sending harassing e-mails reflected a willingness to place defendant's self-interest above the interests of another

person and was thus relevant to defendant's credibility (*see e.g. People v Weinstein,* 254 AD2d 83 [1998]).

When a deliberating juror became unavailable, defendant specifically requested that the juror be replaced by the second alternate juror rather than the first, and executed a valid written consent to such replacement. Accordingly, defendant waived his argument that the court erred in departing from CPL 270.35(1) by seating the second alternate out of order (*see People v Acevedo*, 44 AD3d 168, 171 [2007], *lv denied* 9 NY3d 1004 [2007]), and there was no nonwaivable mode of proceedings error (*see People v Gajadhar*, 9 NY3d 438 [2007]).

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

ENTERED: MAY 1, 2008

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

3540 In re Jonathan G.,

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

Nancy Botwinik, New York for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari Kamlet of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Alma Cordova, J.), entered on or about September 2, 2005, which adjudicated appellant a juvenile delinquent, upon a jury verdict, convicting him of gang assault in the first degree and criminal possession of a weapon in the fourth degree followed by an order of removal of Supreme Court, Bronx County (John A. Barone, J.), entered on or about July 25, 2008, and placed him with the Office of Children and Family Services for a period of up to 18 months, unanimously affirmed, without costs.

The jury verdict, which served as the fact-finding determination underlying Family Court's order of disposition, was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. We reject appellant's assertion, made as part of his weight of the evidence claim, that the showup identification made by one of

the prosecution witnesses was unduly suggestive and therefore unreliable. We also note that Supreme Court upheld this identification procedure after a suppression hearing and appellant does not challenge that determination.

Appellant was tried in Supreme Court upon an indictment charging a combination of crimes for which he could have been criminally responsible despite his age and other crimes to which the defense of infancy applied. After the jury convicted him only of crimes in the latter category, Supreme Court transferred the case to Family Court for disposition. Family Court properly denied appellant's dismissal motion, made on the ground that he was not served with a copy of the removal order on his first post-verdict appearance. Contrary to appellant's arguments, there is nothing in Family Court Act § 311.1(7), or any other statute, requiring service of an order of removal. Appellant's claim that he did not receive proper notice of the charges remaining against him after the Supreme Court verdict is meritless. He received such notice by way of the verdict itself, rendered in open court in his presence, and the same information was repeated in his presence following removal to Family Court.

Moreover, the order of removal was actually served on him in Family Court only a few days after the initial appearance.

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

ENTERED: MAY 1, 2008

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

3541 Michael DuBasso, et al., Index 109769/05
Plaintiffs-Respondents,

-against-

East 69th Owners Corp., et al.,
Defendants-Appellants.

Smith, Buss & Jacobs, LLP, Yonkers (James R. Anderson of counsel), for appellants.

Wolf Haldenstein Adler Freeman & Herz, LLP, New York (Alan A.B. McDowell of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 12, 2007, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the first, second, and third causes of action, unanimously affirmed, with costs.

As the record presents issues of fact whether the challenged actions of defendant cooperative corporation's board of directors were outside the scope of the board's authority and whether they were undertaken in good faith, the court properly declined to conclude as a matter of law that these actions are protected by

the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-540 [1990]; *Barbour v Knecht*, 296 AD2d 218, 225 [2002]).

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

ENTERED: MAY 1, 2008

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

3542 The People of the State of New York, Ind. 2161/03
Respondent,

-against-

Charles Wicklesse, etc.,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about April 26, 2006, which denied defendant's application for resentencing pursuant to the 2005 Drug Law Reform Act (L 2005, ch 643), unanimously affirmed.

"[S]ubstantial justice" dictates that defendant's application be denied (L 2005, ch 643, § 1), in view of the seriousness of the underlying offense and defendant's criminal record (*see e.g. People v Vasquez*, 41 AD3d 111 [2007], *lv dismissed* 9 NY3d 870 [2007]).

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

ENTERED: MAY 1, 2008

CLERK

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

3543-
3544 The People of the State of New York, Ind. 7142/02
Respondent,

-against-

Lenford Price,
Defendant-Appellant.

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

Appeal from order, Supreme Court, New York County (Brenda Soloff, J.), entered on or about May 23, 2006, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Act, held in abeyance pending receipt of a supplemental appellant's brief, the motion by assigned counsel to be relieved denied without prejudice to renewal, and assigned counsel directed to serve a supplemental brief within 60 days of this Court's order.

Counsel submitted a brief pursuant to *People v Saunders* (52 AD2d 833 [1976]), which concedes that defendant is ineligible for resentencing because his resentencing motion was received on October 31, 2005, which was less than three years from his alleged parole eligibility date of October 27, 2008. However, there are potentially nonfrivolous issues concerning the time at which defendant's motion for resentencing should be deemed made

(*see* CPLR 2211; *see also Houston v Lack*, 487 US 266 [1988]; *compare Grant v Senkowski*, 95 NY2d 605, 607 [2001]), as well as regarding the effect of merit time reductions on his potential release date for the purpose of calculating his eligibility to apply for resentencing. Accordingly, counsel is directed to investigate these issues and file a supplemental brief addressing whether the denial of the motion presents any nonfrivolous issues that should be considered on appeal.

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

ENTERED: MAY 1, 2008

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

3546 The People of the State of New York, Ind. 4197/05
Respondent,

-against-

Tyrene Mills,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jessica Slutsky of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 22, 2006, convicting defendant, after a jury trial, of two counts of rape in the third degree and three counts of criminal sexual act in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 1½ to 3 years, unanimously affirmed.

The court properly exercised its discretion in precluding as repetitive defense counsel's questioning of a prospective juror who had stated unequivocally that he was willing to able to serve as a fair and impartial juror (*see generally People v Jean*, 75 NY2d 744 [1989]). Although defense counsel sought to ask the juror to explain aspects of his demeanor and body language, the court had the opportunity to observe the juror's demeanor and

properly concluded that further inquiry was unnecessary (*see People v Shulman*, 6 NY3d 1, 27 [2005], *cert denied* 547 US 1043 [2006]).

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

ENTERED: MAY 1, 2008

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

3547 Willard J. Price Associates, LLC, Index 104276/06
Plaintiff-Respondent,

-against-

Stateside Construction, LLC,
Defendant-Appellant,

Dami Construction,
Defendant.

Goldberg & Carlton, PLLC, New York (Robert H. Goldberg of counsel), for appellant.

Quirk and Bakalor, P.C., New York (Joel M. Maxwell of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 11, 2007, which, in an action arising out of plaintiff's (Price) settlement of an underlying action for personal injuries sustained by a construction worker on property owned by Price and managed by nonparty Proto, denied defendant-appellant construction manager's (Stateside) motion to dismiss plaintiff's causes of action for indemnification and contribution, unanimously affirmed, with costs.

Price, the site owner, and its property manager, nonparty Proto, were the defendants in the underlying action by the construction worker, and, jointly represented by an attorney hired by Price's liability insurer (CNA), impleaded Stateside, the construction manager. The contract between Price and Stateside contained an indemnity clause in favor of Price, and

Price's policy with CNA authorizes CNA to bring suit on behalf of Price based on that indemnification clause. Stateside is an LLC whose sole member is nonparty Demetrios Moragianis; Proto is a corporation whose sole shareholder is Moragianis; Price is an LLC in which Moragianis holds an undetermined interest, allegedly 25%. In the underlying action, this Court granted a motion by Stateside to disqualify the CNA attorney because, "without any permission from Moragianis (or anyone else from Proto)," he commenced the third-party action against Stateside after discussing the underlying action with Moragianis. This, we held, "impermissibly placed CNA's interests above those of Moragianis," and gave the appearance of a conflict of interest (*Flores v Willard J. Price Assoc., LLC*, 20 AD3d 343 [2005]). Price thereafter settled the underlying action, retained a new attorney, and commenced this action seeking to recover the amount of the settlement and defense costs.

Stateside argues that the same considerations that warranted disqualification of the attorney in the underlying action warrant dismissal of the instant action, in particular, that the action was brought for the primary benefit of the insurer, and that Moragianis could be called as a witness for both sides, requiring him to testify against an entity of which he is member. The motion court correctly rejected that argument on the ground that while Moragianis has a 100% interest in Proto, he has only a

minority interest in Price. The difference is that in *Flores*, Stateside, an entity wholly owned by Moragianis, was being sued by another entity wholly owned by Moragianis, Proto. Here, Stateside, an entity in which Moragianis holds an undetermined interest, but which, unlike Proto, is clearly not his alter ego, is the only plaintiff. Furthermore, the underlying action has been settled, narrowing the issues and need for testimony. There is no conflict of interest now because new counsel has never represented Stateside or Moragianis personally and has not even met Moragianis, and Moragianis, who signed the Price/Stateside contract on behalf of Stateside but not Price, need not necessarily be called as a witness for Price.

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

ENTERED: MAY 1, 2008

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

3548 The People of the State of New York, Respondent, SCI 6067/05

-against-

Reggie Owen, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Micki A. Scherer, J.), rendered on or about March 22, 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: MAY 1, 2008

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

3549 Winick Realty Group LLC, Index 602027/07
Plaintiff-Respondent,

-against-

Austin & Associates,
Defendant-Appellant,

Esprit International (GP), Inc., et al.,
Defendants.

Liddle & Robinson, L.L.P., New York (David Marek of counsel), for appellant.

Bingham McCutchen LLP, New York (Ted Poretz of counsel), for respondent.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered November 30, 2007, which, inter alia, denied defendant Austin & Associates' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

The complaint sufficiently sets forth a cause of action for recovery of a share of a real estate brokerage commission pursuant to an alleged oral agreement, at least on the theory that Austin's bad faith conduct prevented plaintiff from becoming the procuring cause of the leasing transaction consummated by the parties' client (*see DiStefano v Rosetti-Falvey Real Estate*, 270 AD2d 631, 632-633 [2000]; *Williams Real Estate Co. v Viking Penguin*, 228 AD2d 233 [1996]). The documentary evidence

submitted by Austin does not conclusively establish a defense to the asserted claims as a matter of law (*see Leon v Martinez*, 84 NY2d 83 [1994]). Finally, since plaintiff is entitled to plead inconsistent causes of action in the alternative, the quasi-contractual claims are not precluded by the pleading of a cause of action for breach of an oral agreement.

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

ENTERED: MAY 1, 2008

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

3550 The People of the State of New York, Respondent, Ind. 4338/05

-against-

Leon Nuculli, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered February 16, 2006, convicting defendant, after a jury trial, of two counts of sexual abuse in the first degree, and sentencing him to concurrent terms of 2 years, unanimously affirmed.

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

To the extent that the court may be deemed to have made an anticipatory ruling denying defendant a midtrial adjournment of indefinite length for the purpose of calling, as a defense witness, a police officer apparently incapacitated by illness,

that ruling was a proper exercise of discretion (*see Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]; *People v Foy*, 32 NY2d 473, 477-478 [1973]). Defendant wanted to call the officer to elicit an alleged prior inconsistent statement by the victim contained in the officer's complaint report. However, the alleged inconsistency would have been inadmissible because defendant never confronted the victim with the statement or sought to do so (*see People v Wise*, 46 NY2d 321, 326 [1978]). Moreover, the record establishes that, if called, the officer would have testified that the victim never actually made the alleged inconsistent statement (which was, instead, the product of a clerical error). Since the report was neither signed nor sworn, CPL 60.35(1) would have prevented defendant from using it to impeach his own witness. In addition, the court suggested a stipulation that would have addressed the purported inconsistency in a manner that was fair to both the prosecution and defense, but defendant rejected that offer. To the extent that defendant is raising a constitutional claim, such claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: MAY 1, 2008

CLERK

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

3551-
3552 Robert S. Ehrenspeck, Index 600337/02
Plaintiff,

-against-

Spear, Leeds & Kellogg, L.P., et al.,
Defendants-Appellants,

First Unum Life Insurance Company,
Defendant-Respondent.

Kramer Levin Naftalis & Frankel, LLP, New York (Michael J. Dell of counsel), for appellants.

Begos Horgan & Brown LLP, Bronxville (Patrick W. Begos of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered February 1, 2007, which, to the extent appealed from, denied the motion of Spear, Leeds & Kellogg, L.P. and Spear, Leeds & Kellogg-Futures Division Long Term Disability Income Plan's (collectively, SLK) for summary judgment dismissing plaintiff's claims against it, and, upon a search of the record, dismissed SLK's cross claim for indemnification against First Unum, unanimously affirmed, without costs. Order, same court and Justice, entered September 24, 2007, which denied SLK's motion for leave to amend its cross claim against First Unum, unanimously affirmed, without costs.

SLK's cross claim against First Unum was related to the

subject of the motion before the court (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]; *see also Frank v City of New York*, 211 AD2d 478, 479 [1995]), which was whether plaintiff was covered under First Unum's long-term disability policy.

SLK's proposed amended cross claim either contradicted SLK's own allegations or the policy itself or was repetitive of the original cross claim (*see generally American Theatre for Performing Arts, Inc. v Consolidated Credit Corp.*, 45 AD3d 506 [2007]).

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

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

ENTERED: MAY 1, 2008

CLERK

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

3553N-
3554N Sheila Leffler, et al., Index 6458/03
Plaintiffs-Appellants,

-against-

Michael Feld, M.D.,
Defendant-Respondent.

Alpert & Kaufman, LLP, New York (Morton Alpert of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for respondent.

Order, Supreme Court, Bronx County (Edgar Walker, J.), entered June 12, 2007, which granted defendant's motion for a *Frye* hearing, unanimously affirmed, without costs. Order, same court and Justice, entered July 18, 2007, which, after the *Frye* hearing, precluded the testimony of plaintiffs' expert, unanimously reversed, on the law, without costs, and defendant's motion to preclude denied.

The court correctly concluded that the theory of causation in this medical malpractice action was a novel one (*see Frye v United States*, 293 F 1013 [DC Cir 1923]) and thus warranted a *Frye* hearing (*see Zito v Zabarsky*, 28 AD3d 42, 44 [2006]). However, the court erred in concluding that plaintiffs failed to establish that there is general acceptance in the medical community of a causal link between Altace and the development of pemphigus vulgaris. The medical literature cited by plaintiffs'

expert, which included a Food and Drug Administration mandate that pemphigus be added to the manufacturer's list of adverse reactions to Altace, supported his theory that Altace can cause pemphigus, thus satisfying the *Frye* standard (*see Zito*, 28 AD3d at 45-46; *DieJoia v Gacioch*, 42 AD3d 977, 978-980 [2007]; *Marsh v Smyth*, 12 AD3d 307 [2004]).

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

ENTERED: MAY 1, 2008

Andrias, J.P., Nardelli, Buckley, Catterson, JJ.

2470 Hooters of Manhattan, Ltd., Index 601529/04
Plaintiff-Respondent,

-against-

211 West 56 Associates,
Defendant-Appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Reed Smith, LLP, New York (Gil Feder of counsel), for respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered July 11, 2007, which granted defendant's motion for summary judgment only to the extent of dismissing the first cause of action for breach of the covenant of quiet enjoyment, and granted plaintiff's motion for summary judgment to the extent of dismissing the second, third and fourth counterclaims, unanimously modified, on the law, to dismiss plaintiff's remaining causes of action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

It is clear from a reading of the lease that plaintiff-tenant waived any right to recover consequential damages from defendant-landlord and was, in fact, required to insure itself against such losses. Section 17.01 of the lease provides: "If at any time any windows of the Premises are temporarily closed, darkened or bricked up (or permanently closed, darkened or bricked up, if required by law) or if there is erected any

scaffolding on the exterior of the Building for any reason whatsoever including, but not limited to, Landlord's own acts, *Landlord shall not be liable for any damage Tenant may sustain thereby and Tenant shall not be entitled to any compensation therefor nor abatement or diminution of rent nor shall the same release Tenant from its obligations hereunder nor constitute an eviction"* (emphasis added).

Moreover, Section 21.01(A) of the lease unequivocally states, in pertinent part, that the "[t]enant waives, to the full extent permitted by law, any right it might otherwise have to claim consequential damages in connection with the tortious acts or negligence of the [Landlord]." In addition, Section 18.01(A)(iii) requires the tenant to "keep in full force and effect throughout the Term [of the lease], at Tenant's sole cost and expense, Business Interruption or Extra Expense coverage, with a minimum 12 month indemnity period, on an 'all risks' basis ... reimbursing Tenant for direct and indirect loss of earnings..." Since such waiver clauses, which shield the landlord from liability for consequential damages by requiring plaintiff to procure insurance, are valid and not in violation of public policy (*see Duane Reade v 405 Lexington, L.L.C.*, 22 AD3d 108, 111-112 [2005]), and because the damages sought by plaintiff are clearly consequential in nature and arise primarily out of scaffolding which allegedly obscured its trademark orange awning

and blocked the public's view into the restaurant, we conclude that the foregoing provisions of the lease require the dismissal of plaintiff's complaint.

We disagree with plaintiff's contention that Section 21.01(B) of the lease exposes the landlord to liability, for that subsection specifically provides that it operates "[w]ithout limiting the generality of Section 21.01 A..."

Finally, the motion court properly dismissed the counterclaims because there has been no default by plaintiff that would invoke the lease provisions authorizing the payment of legal fees, and the competent evidence fails to support defendant's claims that plaintiff was given signage permission not authorized by the lease in exchange for a waiver of any claims resulting from the repair work on the building.

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

ENTERED: MAY 1, 2008

CLERK

Mazzarelli, J.P., Saxe, Gonzalez, Acosta, JJ.

2992-
2993 New York City Health and Hospitals Corp., Index 451/00
Petitioner-Appellant,

-against-

Brian H., A Patient Admitted to Jacobi Medical Center,
Respondent-Respondent.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellant.

Marvin Bernstein, New York (Namita Gupta of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered August 29, 2007, which, after a hearing pursuant to Mental Hygiene Law § 9.31, directed respondent's release from Jacobi Medical Center (JMC), unanimously reversed, on the facts, without costs, and the petition for an order retaining respondent for involuntary care and treatment in said hospital granted.

Respondent was admitted to JMC on July 9, 2007, five days after an M-80 firecracker exploded in his hands, causing severe injuries. Doctors were forced to amputate his left hand and three fingers on his right hand on July 11, because of potentially fatal infection. The need to amputate was partially due to respondent's delay in seeking medical attention. Two days after the surgery, respondent left the hospital, against medical advice. He was later returned by the police.

On July 17, 2007, respondent was admitted to the psychiatric unit of JMC on an emergency basis pursuant to Mental Hygiene Law § 9.39. Two medical certifications supported the admission. The first, by a physician, described respondent and his immediate medical history as follows:

> "Mr. H[] is a 48 year old single male with long psychiatric history and history of multiple admissions. He was brought to ER by police when found wandering the street with hand injury sustained from firecracker. Patient is delusional and incoherent. He was treated and stabilized surgically before being transferred to Psychiatry for being dangerous to self due to psychosis."

The second certification, by a member of the psychiatric staff, noted that respondent had a "history of bipolar disorder and multiple admissions," and that he appeared "[d]isheveled, unkempt, disorganized in thoughts process and behavior." It described his speech as "pressured, circumstantial with flight of ideas," and his affect as "angry, inappropriate." The certification further described respondent as "guarded, irritably manic," and diagnosed him as having bipolar disorder, as manic, and as an alcohol dependent in remission.

On July 23, 2007, the hospital applied to have respondent involuntarily admitted pursuant to Mental Hygiene Law § 9.27. The application was signed by Dr. Faynblut, respondent's treating psychiatrist, who stated:

> "48 year old single white male brought from surgery s/p left hand amputation and three

> right fingers as he refused treatment there and tried to elope. Patient had firecrackers explosion on July 4th and did not seek any help. He remains irritable, labile, easily agitated to labile affect, pressured speech, disorganized, intrusive. Insight/Judgment - poor. Patient needs acute care."

The application was supported by two physicians who had examined respondent. One of the physicians described respondent as having had "multiple prior psychiatric hospitalizations," and being "easily agitated and hostile." He further asserted that respondent's insight and judgment were "significantly impaired," that respondent is "acutely manic" and "cannot function safely in the community and needs longer inpatient treatment." The second physician offered the same diagnosis and further certified that respondent "remains markedly pressured, circumstantial, intrusive, and still with complete impairment of insight and judgment." He further stated that respondent was a risk to himself.

On July 29, 2007, respondent gave written notice to JMC that he wanted to be released from the hospital within 72 hours. In his notice he acknowledged his bipolar disorder but asserted that he had reached maximum medical improvement. The next day, the director of psychiatry at JMC applied for court authorization to retain respondent. He claimed that respondent had "a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so

impaired that he . . . is unable to understand the need for such care and treatment," and as a result of this mental illness, "poses a substantial threat of harm to self or others."

On August 15, 2007 a hearing was held on the issue of whether JMC could retain respondent. JMC presented the testimony of Dr. Faynblut, and respondent testified on his own behalf. There were no other witnesses. At the outset of the hearing, the parties stipulated that Dr. Faynblut qualified as an expert. They further stipulated to the admission of respondent's hospital records. The court explained that the latter stipulation meant that "the hospital record is admitted as a business record, but if there are other objections to specific contents, they'll be raised." At no point during the hearing did either party object to any specific entries in the hospital records.

Dr. Faynblut testified that respondent had been admitted for extensive hospitalization four times since November 2006, and that prior thereto he was hospitalized approximately once every three years. She testified that over time, respondent's level of function had decreased. She confirmed her diagnosis of bipolar disorder, which she explained was based on his history of manic and depressive episodes. Dr. Faynblut described her concern for respondent's well-being should he be released. She explained that he resides alone in a house without help, and that based on his history of self-neglect, he would not comply with any follow-

up medical plan necessitated by the amputation surgery.

Dr. Faynblut further testified that the structured setting of the hospital benefited respondent insofar as it provided necessary encouragement for him to attend to his own hygiene and take the various medications prescribed to treat his bipolar disorder. She expressed concern that he would decompensate without the hospital's support.

JMC's counsel attempted to elicit testimony from Dr. Faynblut regarding what she had been told by respondent's family and outpatient treatment providers regarding his prospects for complying with a discharge plan. After Dr. Faynblut stated she was told that respondent has difficulty managing his finances, however, respondent's counsel objected and the court sustained the objection on hearsay grounds. The court made no evidentiary rulings concerning the medical records.

In respondent's testimony, he acknowledged that he had been hospitalized several times over the past year, although he claimed to have volunteered for, and complied with, outpatient treatment. He stated that he sought medical assistance from a doctor two days after the July 4 accident, and that the doctor "helped" him and suggested that the following week he have another doctor re-examine the injury. However, he at first refused to disclose the name of the doctor who "helped" him, and asserted he did not remember the doctor's name. He claimed that

shortly thereafter, he went to a regularly scheduled appointment with his psychiatrist, and that the psychiatrist suggested he go to the emergency room. He testified that he went to his sister's house that evening, and she called an ambulance for him. He claimed that he left the hospital after two days because a doctor told him he could. He further testified that the medication he was given at the hospital to address his mental disorder was not appropriate and caused him to decompensate. However, he testified that he was feeling good on his current medication and believed he could take care of himself outside of the hospital. He acknowledged that he lives alone and stated he is a retired custodial engineer, receiving $25,000 per year from the New York City Board of Education. Also, he denied that his family helps him pay his bills.

At the close of testimony, the IAS court denied the petition and directed respondent's release. The court stated:

> "It is true that the Doctor concluded that [respondent] would be unable to manage himself if not involuntarily hospitalized, and he would be at high risk and decompensate."
>
> "But, there is absolutely no evidentiary basis for those conclusions. She did testify that he required supervision or assistance for his hygiene, but was absolutely unspecific. Did she mean wound care, because of the use of only one hand? And no testimony as to the unavailability for family visits or visiting nurse to assist him with wound care and medication."

In its ruling, the court made no reference to the extensive hospital records in evidence pursuant to the parties' stipulation. The court did stay respondent's release for one week pending formulation of a discharge plan, over JMC's counsel's objection that any discharge plan would be futile if respondent was unwilling to cooperate in its execution.

We now reverse and grant JMC's petition. For a hospital to detain a patient for involuntary psychiatric care, it must demonstrate, by clear and convincing evidence, that the patient is mentally ill and in need of continued, supervised care and treatment, and that the patient poses a substantial threat of physical harm to himself and/or others (*Matter of Ford v Daniel R.*, 215 AD2d 294, 295 [1995]). Here, respondent does not dispute that he suffers from mental illness. Moreover, the very circumstances requiring respondent's initial admission to JMC on July 9, 2007 are evidence enough that his mental illness substantially threatens his well-being (*see Matter of Consilvio v Diana W.*, 269 AD2d 310 [2000] [granting order of retention in part based on evidence that patient failed to seek treatment for a broken ankle]). Respondent failed to seek immediate medical treatment for a severe injury that no person of sound mental health would have ignored. While his testimony suggests that he went to JMC voluntarily after his psychiatrist recommended that he seek treatment for his injury, the admission chart reflects

that he refused this advice, that his sister called 911 after he showed up at her house, and that he refused medical care and was deemed lacking capacity by the emergency room doctor. Moreover, he left the hospital against medical advice two days after a traumatic and life-changing surgery.

In any event, Dr. Faynblut's testimony, coupled with respondent's medical chart, the entirety of which was admitted into evidence without objection, contained more than enough evidence to establish the need for respondent to be retained. For example, in the two-week period preceding the hearing, respondent's chart indicated that he was "restless, pacing. . . talking to himself, making bizarre gestures, very labile switching from overly pleasant to extremely hostile." He was described during that same period as not having insight into his illness, as being irritable and easily agitated, and manic and disorganized. While repeated nursing notes stated that respondent was "maintaining good control," complying with his medications and permitting treatment of his wounds, those same notes indicated that he was under close observation. Moreover, respondent's compliance was consistent with Dr. Faynblut's testimony that the hospital environment benefited respondent.

Respondent's medical records contain documentation of hospitalizations prior to the one at issue, which strongly support JMC's position that respondent's immediate well-being is

dependent on his being retained in the hospital. For example, in November 2006, respondent was admitted to JMC after his sister became concerned about his behavior, which included creating a disturbance at a polling place such that the police were summoned, and calling her repeatedly in the middle of the night to inquire after her children. His sister reported at the time that he had ceased attending to his activities of daily living, and that his apartment was a "mess." She further reported that respondent had attempted to grill hot dogs in their plastic wrapping.

Although the records for that hospitalization indicate respondent was released after showing improvement, he was admitted to North Central Bronx Hospital two months later for treatment of severe depression. At the time of that admission, there was garbage in his refrigerator, three weeks of unopened mail, and the odor of gas in his apartment. After again being released in a much-improved condition, he was returned to the hospital less than four weeks later, in a manic and psychotic state, having not slept for two days. Again, he was released in much better condition, only to be hospitalized, one month later, in connection with the firecracker accident. Finally, the records state that as few as eight days before the hearing, respondent was minimizing his psychiatric symptoms and "not address[ing] what happened to his hands prior to admission."

This recent history clearly and convincingly demonstrates that notwithstanding respondent's position that he has achieved maximum improvement in the hospital, he is unlikely to be rehabilitated from the amputations and be able to adapt to life with only two fingers, without the direct medical supervision the hospital setting would ensure (*see Ford,* 215 AD2d at 295-296). Respondent's argument to this Court that he has the financial support of his family is belied by his own testimony that his parents only pay his bills when he is in the hospital. We note, too, that the parents live in Florida part of the year, and that his sister has demonstrated difficulty being with him when he is symptomatic. More importantly, hospital records reveal that respondent's family objected to his release to his home "as they feel he is unsafe [there] alone." Significantly, respondent offered no testimony from expert or - at the very least - disinterested witnesses to establish that he is able to attend to himself at home.

Because we find Dr. Faynblut's admitted testimony, as well as respondent's medical records, provided overwhelming support for JMC's determination that respondent should be retained, we

find it unnecessary to reach the issue of whether Dr. Faynblut's testimony concerning respondent's ability to manage his finances was properly excluded.

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

ENTERED: MAY 1, 2008

CLERK

Mazzarelli, J.P., Saxe, Gonzalez, Acosta, JJ.

3001 In re Bruce and Alida Porter, et al., Index 118327/06
Petitioners-Respondents,

-against-

New York State Division of Housing and Community Renewal,
Respondent-Respondent,

Duane Street Realty, LLC,
Respondent-Appellant.

Buchanan Ingersoll & Rooney, P.C., New York (Barry I. Slotnik of counsel), for appellant.

Robert Petrucci, New York, for Bruce and Alida Porter, Donna Dennis, James Haughton, Ellen Pearson, John Devine, Nancy Barber and William Stone, respondents.

Gary R. Connor, New York (Caroline M. Sullivan of counsel), for New York State Division of Housing and Community Renewal, respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 7, 2007, which, to the extent appealed from, granted the cross motion of respondent Division of Housing and Community Renewal (DHCR) for an order remitting the matter to itself for further consideration, unanimously affirmed, without costs.

Rent Stabilization Code (9 NYCRR) § 2527.8 provides that "DHCR, on application of either party, or on its own initiative, and upon notice to all parties affected, may issue a superseding order modifying or revoking any order issued by it under this or any previous Code where the DHCR finds that such order was the

result of illegality, irregularity in vital matters or fraud." The Court of Appeals has confirmed DHCR's broad powers and authority to alter its prior determinations on remission (*see e.g. Matter of Yasser v McGoldrick*, 306 NY 924 [1954], *affg* 282 App Div 1056 [1953]; *see* also McKinney's Uncons Laws of NY § 8608 [Local Emergency Housing Rent Control Act § 8608, as added by L 1962 ch 21, § 1, as amended]), and this Court has held that remission for further fact-finding and determination is appropriate where, as here, DHCR concedes an error in the issuance of its determination (*see Matter of Hakim v Division of Hous. & Community Renewal*, 273 AD2d 3 [2000]), *appeal dismissed* 95 NY2d 887 [2000]), and where the determination resulted from an "irregularity in vital matters" (*see Matter of Sherwood 34 Assoc. v New York State Div. of Hous. & Community Renewal*, 309 AD2d 529, 532 [2003]).

Here, DHCR has conceded that its review of several issues raised by the tenants was inadequate, including whether the owner's plans constitute a demolition under the Rent Stabilization Law, whether certain protections of the Loft Law extend to these rent-stabilized tenancies, and whether the owner was obligated to timely obtain a work permit or offer lease renewals prior to DHCR's determination of the instant demolition

application (*see Hakim* at 4; *Matter of 47 Clinton St. Co. v New York State Div. of Hous. & Community Renewal*, 161 AD2d 402, 403 [1990] [remission proper where DHCR conceded that determination was made without benefit of complete necessary documentation of owner and full opposition by tenants]).

Moreover, DHCR's determination that the owner satisfied its requirement to show the financial ability to complete the demolition project by demonstrating it had a $5 million credit line reflects an irregularity, given DHCR's own finding that the owner had greatly underestimated the required relocation expenses. Accordingly, remission was appropriate (*Sherwood 34 Assocs.* at 532; *Matter of Alcoma Corp. v New York State Div. of Hous. & Community Renewal*, 170 AD2d 324 [1991], *affd* 79 NY2d 834 [1992]).

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

ENTERED: MAY 1, 2008

Saxe, J.P., Sweeny, McGuire, Acosta, JJ.

3254 In the Matter of the Adoption of,
Female Infant B., etc.,

Mr. and Mrs. "Anonymous,"
Petitioners-Respondents,

-against-

Khatuna B.,
Respondent-Appellant.

Elisa Barnes, New York, for appellant.

Magovern & Sclafani, New York (Frederick J. Magovern of counsel), for respondents.

Andrew J. Baer, New York, Law Guardian.

Order, Family Court, New York County (Mary E. Bednar, J.), entered January 19, 2007, which awarded custody of Female Infant B. to petitioners, unanimously affirmed, without costs.

Female Infant B., the subject child of this private placement adoption, was born November 9, 2003. The following day, Infant B. was placed in the care of petitioners, the adoptive parents, with whom she has continuously lived since that time. On November 18, 2003, a surrender agreement was executed by respondent, the biological mother, and, on January 30, 2004, petitioners filed a petition for adoption. Respondent was served approximately 26 months later after a search to ascertain her whereabouts. On May 15, 2006, respondent filed a document stating that she was revoking her consent to the adoption, and

she subsequently filed a writ of habeas corpus seeking the return of her child, which the court converted into an order to show cause. At a hearing on the order to show cause, respondent and the adoptive mother testified, as did the doctor who delivered Infant B. and the notary public who witnessed the execution of the surrender agreement. A friend of respondent was called as a rebuttal witness.

At the time of this proceeding respondent was a 38-year-old immigrant from the Republic of Georgia. She worked as a home health aide, and spoke at least some English. She came to the United States on a tourist visa in 1998, leaving behind her husband and three children, ages 1½, 2½ and 3½. Her Georgian husband divorced her in 2001. She maintains contact with her children and sends money to her relatives in Georgia for the children's care. She remained in the United States after her tourist visa expired; she married a United States citizen in March 2001.

Respondent learned in September 2003 she was pregnant as the result of an extramarital relationship and sought an abortion, but was unable to have one since she was seven months pregnant. A worker at the clinic where she had sought treatment arranged a meeting with the adoptive mother, a colleague whom the worker knew was trying to adopt a child with her husband.

Because respondent did not want her husband to find out she

was pregnant, petitioners found her an apartment in Manhattan. Respondent told her husband that she had found a job in New Jersey taking care of an older woman. Despite her later claim that the arrangement with petitioners was to be temporary, respondent admitted at the hearing that she knew petitioners intended to adopt her baby.

Petitioners helped respondent find an obstetrician who spoke Russian and also came from Georgia. When respondent gave birth on November 9, 2003, petitioners brought an unsigned "adoption document" to the hospital. Respondent, however, would not sign it, stating that "she wanted to confer with her new attorney that she had just found out of the Russian phone book in the hospital room that morning." When mother and baby left the hospital, however, petitioners took respondent to her apartment in Manhattan and took the baby to their home.

Nine days later, on November 18, 2003, the parties met at respondent's apartment in Manhattan, where they signed the surrender agreement before notary public Donald Zuniger. Zuniger testified that he reviewed the document with respondent; he specifically asked her to acknowledge to him that she understood what she was signing, and she told him that she did. Zuniger testified that respondent was upset and crying, but that he heard her tell the adoptive mother she "was worried that her boyfriend would find out about the adoption and that it wouldn't be

confidential." There were no discussions as to any conditions attached to the arrangement. Zuniger did not see any threats made to respondent or any reluctance on respondent's part when she signed the agreement.

Respondent testified that between the time Infant B. was born and the day she signed the surrender agreement, petitioners threatened her with deportation on the ground that her marriage was "fake." As of the date of the signing of the surrender agreement, however, respondent had completed the process of obtaining her green card and was waiting for its receipt. She admitted at the hearing that when she signed the agreement she knew she would have no rights to the baby if she did not revoke or change her mind within 40 or 45 days.

On February 3, 2004, petitioners and respondent met at a restaurant in Manhattan. At first, the meeting was friendly; respondent held Infant B. for about two minutes while her friend Svetlana, who had accompanied her to the meeting, took pictures. Then, respondent testified, the mood of the meeting changed, and the adoptive mother again threatened her with deportation. Respondent claimed that she was frightened and did not know her legal rights. After that occasion, respondent called petitioners' home "many times," but once they heard her voice they would hang up. She testified that she also went to petitioners' apartment building "many times," but only went to

the apartment door twice, when she left balloons on the door for the child on her first and second birthdays.

By contrast, the adoptive mother testified that petitioners never received anything from respondent, such as balloons, cards, letters or presents. Other than the meeting on February 3, 2004, respondent never asked to see the child again. The adoptive mother testified that at that meeting respondent began to threaten that she would kidnap the baby unless petitioners helped her get her other children out of Georgia. With regard to telephone calls, the adoptive mother testified that there may have been a "few messages," but after the "unnerving" meeting, she told respondent that petitioners would not take any more hostile telephone calls and would only meet respondent with an attorney present.

After the hearing, the court credited the adoptive mother's testimony that respondent intended to give up the child for adoption, but found that the surrender agreement was invalid because some of the requirements of Domestic Relations Law § 115-b had not been met. These included the absence of 18-point type, which the court deemed insignificant, and, more substantively, the failure to give notice that if petitioners were to contest respondent's revocation, Infant B. would not necessarily be returned to respondent and a hearing could be directed as to the best interests of the child. The court also found a significant

defect in the document's failure to advise respondent of her right to an attorney and counseling, as required by Domestic Relations Law § 115-b(4)(a)(v).

The court concluded, however, that a best interests hearing was not required because there was sufficient credible testimony to make a finding of abandonment pursuant to Domestic Relations Law § 111(2)(a). In making that finding the court concluded that respondent's contacts with the child in the months after the delivery were insubstantial and ineffectual, and that she had failed to offer financial support or take timely legal action to oppose the adoption.

As the parties agree, and Family Court found, the surrender agreement did not comply with Domestic Relations Law § 115-b. Aside from the improper-sized type, which, if it were the only deficiency, could be overlooked, the document failed to advise respondent of her right to an attorney and to counseling, or to notify her that even if she revoked her consent, and petitioners objected, she would not necessarily regain custody of the child.

While "[n]ot every violation of Domestic Relations Law § 115-b will necessarily invalidate a consent" (*Matter of Gabriela*, 273 AD2d 940 [2000]), the substantial defects here include ones designed to ensure that respondent was "fully informed of [the]

consequences" of the consent (*Matter of Sarah K.*, 66 NY2d 223, 240 [1985], *cert denied sub nom. Kosher v Stamatis*, 475 US 1108 [1986]; *see also Matter of De Filippis v Kirchner*, 217 AD2d 145 [1995]). To be sure, she evinced an understanding that she only had 40 or 45 days to revoke her consent to the adoption. It is not clear, however, that she also was aware that even a revocation within 45 days would not guarantee the return of her baby, or that she might first have to prevail at a hearing.

Nevertheless, we need not determine whether these defects rendered the surrender agreement invalid as we conclude that respondent's inactivity for 30 months estopped her from opposing the adoption. Infant B. was born on November 9, 2003. Respondent refused to sign the surrender agreement at that time because she claimed she wished to consult with an attorney. She did, however, sign the agreement nine days later. During the intervening time period, the baby had resided with petitioners, and the child has lived with them ever since. Respondent made no attempt to have the child returned to her, either during the nine days before she signed the agreement or during the period prior to the date the petition was served on her on April 6, 2006, 2½ years after she signed the surrender agreement. Although she testified that she conferred with an attorney, she took no subsequent steps to revoke her consent, or even to seek visitation. As noted, respondent also admitted that she knew she

had 40 to 45 days from the signing of the surrender agreement to revoke her consent.

"Equitable estoppel is commonly invoked in matters of paternity, child custody, visitation and support . . . [but] will be applied only where its use furthers the best interests of the child or children who are the subject of the controversy" (*Matter of Charles v Charles*, 296 AD2d 547, 549 [2002]). It is clearly not in the child's best interests to be removed from the only parents she has ever known.

As has been observed, "[t]he Legislature enacted Domestic Relations Law § 115-b to provide a legal framework within which future adoptions can be undertaken with reasonable guarantees of permanence and with the humane regard for the rights of the child, the biological parents and the adoptive parents" (*De Filippis*, 217 AD2d at 147). Although the surrender agreement is not in compliance with all of the statutory requirements, the same public policy concerns are no less applicable. Permitting respondent, who has not contributed any support for the child, to seek a revocation at such a late date does not further these policy goals. Furthermore, as in *De Filippis*, the surrender agreement here was executed after the birth of the child, when respondent had sufficient opportunity to reflect on whether she wished to cede her parental rights. As was noted in *De Filippis*, a prebirth consent is less likely to be the result of a fully

deliberative act.

In sum, the 30 month hiatus in seeking a revocation, the failure to provide support and the best interests of the child, compel the conclusion that respondent is estopped from challenging the surrender agreement.

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

ENTERED: MAY 1, 2008

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

3556 The People of the State of New York, Ind. 1442/03
Respondent,

-against-

Angel Perez,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about January 8, 2006, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant did not establish special circumstances warranting a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). The mitigating factors cited by defendant were generally taken into account by the Risk Assessment Guidelines.

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

ENTERED: MAY 1, 2008

CLERK

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

3558 In re Andrew B.,

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

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

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

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about May 17, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree and menacing in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court's fact-finding determination 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 identification and credibility. The testimony of the

victim and eyewitness clearly established that appellant was a participant in the crimes and not a bystander.

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

ENTERED: MAY 1, 2008

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

3559 Joseph Parisi, et al., Index 603030/05
Plaintiffs-Respondents-Appellants,

-against-

Metroflag Polo, LLC, et al.,
Defendants-Appellants-Respondents.

Rosenberg Calica & Birney LLP, Garden City (William J. Birney of counsel), for appellants-respondents.

Goodman & Saperstein, Garden City (Martin I. Saperstein of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered December 4, 2006, which, to the extent appealed from, denied defendants' motion for summary judgment on the second cause of action and granted the motion as to the first cause of action, unanimously modified, on the law, to grant the motion for summary judgment dismissing the second cause of action, and otherwise affirmed, without costs.

Defendants established their entitlement to summary judgment on the second cause of action, for negligent misrepresentation, by demonstrating that they were non-professionals who negotiated an arm's length commercial contract with plaintiffs and had no special relationship with them (*see Kimmell v Schaefer*, 89 NY2d 257, 264 [1996]). Plaintiffs failed to raise a triable issue in this regard.

The first cause of action, for fraud, is based on alleged

misrepresentations of future intention. Plaintiffs failed to raise a triable issue whether defendants made the statements without any present intention of acting in conformity therewith (*see Elghanian v Harvey*, 249 AD2d 206 [1998]).

We have reviewed plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: MAY 1, 2008

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

3560 Suri Katebi, Index 100320/06
Plaintiff-Appellant,

-against-

Paul Fink, et al.,
Defendants-Respondents.

Ronemus & Vilensky, Garden City (Lisa M. Comeau of counsel), for appellant.

Kaufman Borgeest & Ryan, LLP, New York (Andrew S. Kowlowitz of counsel), for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 22, 2007, which granted defendants' motion to dismiss the complaint for failure to state a cause of action for legal malpractice, unanimously affirmed, without costs.

While "[a] claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1990]), here, the complaint is contradicted by the evidentiary material submitted on the motion to dismiss (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Plaintiff testified that she did not wish to proceed with the trial of the matrimonial action, that she decided instead to enter into the stipulation of settlement because she wanted no further connection with her husband, that she understood that by settling

the action before the completion of the trial she was foregoing the right to pursue the funds allegedly dissipated by him, and that she was satisfied with the services provided by her attorney.

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

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

ENTERED: MAY 1, 2008

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, JJ.

3561 Cecile Campbell Pryce, et al., Index 25283/98
Plaintiffs-Respondents,

-against-

Victor Gilchrist, et al.,
Defendants-Respondents,

Cecilia Michelle Ashmeade, et al.,
Defendants-Appellants.

Rivkin Radler LLP, Uniondale (Melissa M. Murphy of counsel), for appellants.

Charles R. Strugatz, Hicksville, for Pryce respondents.

Thomas M. Bona, P.C., White Plains (Stephanie Bellantoni of counsel), for Victor Gilchrist, respondent.

Phillips Lytle LLP, Buffalo (Craig A. Leslie of counsel), for Ford Motor Credit Corporation, respondent.

Callan, Koster, Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for Diego Poveda and Diversified Glass & Store Front, Inc., respondents.

Mead Hecht Conklin & Gallagher, LLP, Mamaroneck (Elizabeth M. Hecht of counsel), for Alfred J. Scharschmidt and Blanche H. Hewitt, respondents.

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered September 5, 2006, in an action for personal injuries sustained when a vehicle owned and operated by defendants-appellants, in which plaintiff was a passenger, crossed over a double yellow line into oncoming traffic, inter alia, awarding plaintiff, after a jury trial, prestructured damages of, inter alia, $500,000 for future pain and suffering,

$1,500,000 for future lost earnings, and $229,760 for past medical expenses after reductions for collateral source payments totaling $146,524, unanimously modified, on the law, to reduce the collateral source reduction to $50,000, the matter remanded for resettlement of the judgment, and otherwise affirmed, without costs.

Under no reasonable view of the evidence was appellants' vehicle confronted with an emergency when, as they claim, their vehicle was hit in the rear by an unidentified vehicle. Even appellants' own expert did not find any impact damage to the rear of their vehicle (*cf. Kizis v Nehring*, 27 AD3d 1106 [2006]). Appellants' argument that the trial court improperly limited the rebuttal testimony of a codefendant's expert is unpreserved (*see Inwood Sec. Alarm, Inc. v 606 Rest.*, 35 AD3d 194 [2006]). In any event, the matters that would have been raised in the proposed rebuttal relating to a codefendant's video could have been brought out on cross-examination of the codefendant's expert as well as on direct examination of appellants' own expert, who was called after the video had been admitted into evidence (*see Rosseland v Hospital of Albert Einstein Coll. of Medicine*, 158 AD2d 409 [1990]; *compare Vinci v Ford Motor Co.*, 45 AD3d 335 [2007]). Appellant driver was properly questioned concerning her prior accident as the intent of the questioning was to impeach her credibility with regard to her assertion that she had no

trouble operating the vehicle she was driving (*see Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980]).

The weight of the evidence supports a finding that plaintiff's cognitive and other disabilities permanently prevent her from future employment, and the award for future lost earnings, based on the testimony of plaintiff's economist, does not deviate from what would be reasonable compensation (*see Tassone v Mid-Valley Oil Co.*, 5 AD3d 931, 932 [2004], *lv denied* 3 NY3d 608 [2004]). The $500,000 award for future pain and suffering also does not deviate from what would be reasonable compensation. Plaintiff, 31 years old at the time of the verdict, sustained permanent, painful injuries to her pelvic bone, will experience a lifetime of being unable to sit, bend, squat, climb stairs without pain, or walk with a normal gait, has three permanent scars, and permanent cognitive disabilities (*cf. Watanabe v Sherpa*, 44 AD3d 519, 520 [2007]). Appellants did not carry their burden of showing that plaintiff's hospital bills were paid by a collateral source (*see Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81, 89 [1995]). The trial court erred in reducing the award by $96,524 for a Department of Social Services Medicaid lien in that amount (CPLR 4545[c]), and we

accordingly modify to limit the collateral source offset to the $50,000 paid for basic economic loss. We have considered appellants' other arguments and find them unavailing.

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

ENTERED: MAY 1, 2008

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

3563 The People of the State of New York Ex Rel. Anthony Smallwood, Petitioner-Appellant, Index 404973/06

-against-

Warden, Ulster Correctional Facility, Respondent.

Steven N. Feinman, White Plains, for appellant.

Appeal from an order, Supreme Court, New York County (Michael R. Ambrecht, J.), entered February 2, 2007, unanimously dismissed, as moot, without costs.

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.

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

ENTERED: MAY 1, 2008

CLERK

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

3565 Yvonne Velasquez-Spillers, et al., Index 117371/05
Plaintiffs-Appellants,

-against-

Infinity Broadcasting Corporation,
doing business as WNEW-FM,
Defendant-Respondent,

Frank Macchiaroli also known
as "Frankie Blue," et al.,
Defendants.

Antin, Ehrlich & Epstein, P.C., New York (Joseph L. Ehrlich of counsel), for appellants.

Epstein Becker & Green, P.C., New York (Barry A. Cozier of counsel), for respondent.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered September 26, 2006, which, insofar as appealed from as limited by the briefs, granted defendant Infinity Broadcasting Corporation's motion to dismiss the causes of action sounding in intentional tort (first through sixth) and plaintiff Brian Spillers' cause of action for loss of services (thirteenth), unanimously modified, on the law, to deem the dismissal of the twelfth cause of action (employment discrimination) to be a dismissal of the tenth cause of action (negligent hiring), and otherwise affirmed, without costs.

We modify to the extent indicated because the motion court's decision shows that when detailing the complaint's 13 causes of action, the court inadvertently omitted mention of the sixth

cause of action for slander, which resulted in the misnumbering of the remaining claims. It is clear from the order that the court sustained the employment discrimination claims (the complaint's eleventh and twelfth causes of action) while dismissing the claims sounding in negligence (seventh through tenth), which plaintiff does not challenge on appeal.

The court properly dismissed the complaint's causes of action sounding in intentional tort, where plaintiffs' allegations that Infinity was vicariously liable for the actions of its supervisor defendant Macchiaroli, are conclusory, and otherwise belied by factual allegations that Macchiaroli verbally and physically assaulted plaintiff in front of coworkers. Such alleged tortious conduct could not be reasonably construed to be in furtherance of Infinity's interest, nor within the scope of Macchiaroli's employment (*see N. X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]). Accordingly, plaintiff is subject to the exclusive remedy provisions of the Workers' Compensation Law (*see* Workers' Compensation Law § 11, § 29[6]; *Acevedo v Consolidated Edison Co. of N.Y.*, 189 AD2d 497, 500-501 [1993], *lv dismissed* 82 NY2d 748 [1993]). The complaint also did not contain requisite allegations that Infinity had knowledge of, or acquiesced in, the tortious conduct of Macchiaroli (*see Hart v Sullivan*, 84 AD2d 865 [1981], *affd* 55 NY2d 1011 [1982]), and the motion court appropriately rejected plaintiff's assertion that in light of his

high-level position within the company, Macchiaroli "was Infinity." Inasmuch as the intentional tort claims were properly dismissed, the derivative claim for loss of services (thirteenth cause of action) was also properly dismissed (*see Paisley v Coin Device Corp.*, 5 AD3d 748, 750 [2004]).

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

ENTERED: MAY 1, 2008

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

3567 Wooster 76, LLC, Index 111970/04
Plaintiff-Respondent,

-against-

David Ghatanfard, et al.,
Defendants-Appellants.

Neal S. Comer, White Plains, for appellants.

Robinowitz Cohlan Dubow & Doherty, LLP, White Plains (Alan M. Dubow of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered on or about June 25, 2007, which granted, in part, plaintiff's motion for summary judgment and denied defendants' motion for summary judgment, unanimously affirmed, with costs.

An issue of fact as to whether there was delivery of a fully executed lease is raised by, inter alia, defendants' signed assignment of lease and their letter attempting to cancel the lease (*cf. 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 511-512 [1979]). The motion court correctly determined that if the lease is ultimately determined to have been effective, the individual defendant would, at a minimum, be liable under the guaranty for rent and additional rent accruing to the time that plaintiff received the notice of termination. The counterclaim for fraud was properly dismissed on the ground that information regarding the alleged misrepresentation could have been ascertained by available means including examination of public

records (*see Fiorilla v County of Putnam*, 1 AD3d 475, 476 [2003]). There was no evidence of a modification extending the time for cancelling the lease. We have considered defendants' other arguments and find them without merit.

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

ENTERED: MAY 1, 2008

CLERK

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

3568 Pawel Boruch, Index 106625/04
Plaintiff-Appellant,

-against-

Marek Morawiec,
Defendant-Respondent.

Seligson, Rothman & Rothman, New York (Martin S. Rothman of counsel), for appellant.

MacCartney, MacCartney, Kerrigan & MacCartney, Nyack (Catherine H. Friesen of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered February 28, 2007, after a jury trial, determining, inter alia, that defendant did not violate Industrial Code (12 NYCRR) § 23-1.12(c), unanimously affirmed, without costs.

Plaintiff construction worker was injured when his forearm and wrist came into contact with the blade of a miter saw. Although expert testimony on the question of whether a certain condition or omission was in violation of a statute or regulation is permissible (*see Franco v Jay Cee of N.Y. Corp.*, 36 AD3d 445, 448 [2007]), the subject saw was unavailable and could not be examined by plaintiff's expert engineer. As a result, the engineer could not definitely state whether the saw had been equipped with proper, functioning guards that would have prevented the operator from coming into contact with its blade.

Under these circumstances, the trial court appropriately limited the engineer's testimony by allowing him to testify regarding the operation of miter saws generally, their component parts, and the meaning of the terms used within the Industrial Code provision.

It cannot be said that the jury could not have reached the verdict on any fair interpretation of the evidence (*see Claridge Gardens v Menotti*, 160 AD2d 544 [1990]). The deposition testimony of the owner of the saw was that he purchased the saw approximately six months before the accident; that when he brought it to the accident site it was equipped with a clear plastic guard; and that "as of the day of the accident" the guard completely covered the saw blade when it was in the raised position. Moreover, plaintiff's testimony as to how the accident occurred was confusing and at times contradictory. The record provides no basis upon which to disturb the jury's finding that plaintiff had not sustained his burden of proving a violation of 12 NYCRR 23-1.12(c).

While it was improper for defense counsel to comment, during summation, that the relevant Industrial Code provision was a "stupid law," the court sustained an objection to the comment and provided an appropriate curative instruction. The instruction promptly cured whatever prejudice plaintiff claims to have suffered from the isolated remark (*compare Brooks v Judlau Contr., Inc.*, 39 AD3d 447, 449 [2007]).

Having failed to object to the verdict sheet at trial, plaintiff's argument that the interrogatories created confusion for the jury is unpreserved. Were we to consider the argument, we would find that the interrogatories were not confusing and were in conformity with the appropriate legal principles conveyed to the jury concerning the liability of a general contractor where there are Industrial Code violations committed by contractors or subcontractors at a work site (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-350 [1998]).

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

ENTERED: MAY 1, 2008

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

3569 Michelle Lamb, Index 108129/05
Plaintiff-Respondent,

-against-

Singh Rajinder, et al.,
Defendants-Appellants.

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

George Poulos, Astoria, for respondent.

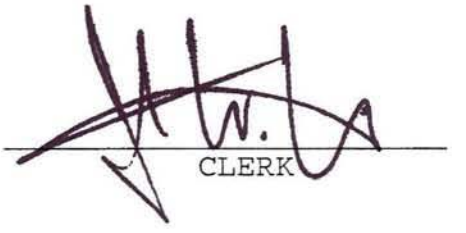
Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered November 29, 2007, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to meet their initial burden of establishing, prima facie, that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). The affirmed report of defendants' examining neurologist failed to set forth the objective tests performed supporting his claims that there was no limitation of range of motion, and their otologist's affirmed report, finding, inter alia, that plaintiff's external auditory canals and tympanic membranes were within normal limits, suffered from the same infirmity (*see Nix v Yang Gao Xiang*, 19 AD3d 227 [2005]). Defendants' failure to meet

their initial burden of establishing a prima facie case renders it unnecessary to consider plaintiff's opposition to the motion (*see Offman v Singh*, 27 AD3d 284 [2006]).

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

ENTERED: MAY 1, 2008



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

3570 Javier Pol, Index 23647/01
Plaintiff-Appellant,

-against-

Our Lady of Mercy Medical Center, et al.,
Defendants,

Kamran Tabaddor, M.D.,
Defendant-Respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Schiavetti, Corgan, DiEdwards & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered January 9, 2007, which, in an action for medical malpractice, granted defendant-respondent's motion for judgment notwithstanding the verdict, unanimously affirmed, without costs.

Viewing the evidence in the light most favorable to plaintiff and affording him the benefit of every favorable inference, there is no competent, nonspeculative expert evidence that defendant, who was the assistant surgeon and played no direct role in plaintiff's care, committed any departures from accepted medical practice or could have prevented the alleged departures committed by the lead surgeon, with whom plaintiff has settled. Although plaintiff's expert testified that defendant had a duty to advise the lead surgeon during the operation that

his methods were not in accordance with accepted practice, the expert conceded that the lead surgeon had ultimate responsibility for making all decisions with respect to the operation and could not have been compelled to follow any such advice. In the absence of evidence that defendant exercised any control over the lead surgeon (*see generally Kavanaugh v Nussbaum*, 71 NY2d 535, 546-547 [1988]), no valid line of reasoning (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]) could have led a rational jury to conclude that any such advice, if given, would have been followed.

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

ENTERED: MAY 1, 2008

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

3571 Martin Rothstein, Index 105186/03
Plaintiff-Respondent-Appellant,

-against-

400 East 54th Street Company, et al.,
Defendants-Appellants-Respondents,

Starbucks Coffee Company, et al.,
Defendants-Respondents-Respondents,

400 East 54th Street Condominium Association,
Defendant.

Thomas D. Hughes, New York (David D. Hess and Richard C. Rubinstein of counsel), for appellants-respondents.

Law Offices of Louis Grandelli, P.C., New York (John J. Rapaw of counsel), for respondent-appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (George N. Tompkins, III of counsel), for Starbucks Coffee Company, respondent-respondent.

Brody, Benard & Branch, LLP, New York (Mary Ellen O'Brien of counsel), for Berkeley Associates, respondent-respondent.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered January 3, 2007, which granted the motions of defendants Berkeley Associates and Starbucks Coffee Company for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Plaintiff was injured when, while descending stairs outside the Starbucks' premises located in a condominium building owned by defendant 400 East 54th Street Co., he slipped and fell on an icy condition. Starbucks leased the premises from Berkeley, and

there was a 10-foot-wide plaza area between the entrance to Starbucks and the stairs leading to the sidewalk.

The court properly granted summary judgment in favor of Berkeley because as unit owner of the premises, it owed no duty to plaintiff inasmuch as the common areas of the condominium, in this instance the plaza area and steps, were solely under the control of the condominium board of managers, and owners of individual units are not liable for injuries sustained as a result of defects in the common elements (*see Pekelnaya v Allyn*, 25 AD3d 111, 121 [2005]). Nor were the common elements part of the premises Berkeley leased to Starbucks, who bore no contractual responsibility for maintaining the stairs, which were not for its exclusive benefit. Even if such a contractual duty existed, the record shows that there are no triable issues of fact as to whether Starbucks, in failing to exercise reasonable care in the performance of its duties, launched a force or instrument of harm, whether plaintiff detrimentally relied on the continued performance of the contracting party's duties, or whether Starbucks entirely displaced the owner's duty to maintain the premises safely (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139-140 [2002]). Furthermore, even assuming that an

employee of Starbucks had indeed salted the steps prior to the accident, there was no showing that this made the steps more dangerous *(see Williams v KJAEL Corp.*, 40 AD3d 985 [2007]).

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

ENTERED: MAY 1, 2008

CLERK

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

3572 The People of the State of New York, Respondent, Ind. 2238/05

-against-

Ralph Jacocks, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about February 24, 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: MAY 1, 2008

CLERK

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

3573N Eleanore Lennon, Index 102753/05
Plaintiff-Respondent,

-against-

Metro North Commuter Railroad Company, et al.,
Defendants,

Mark S. Arginteanu, M.D.,
Defendant-Appellant.

Savona & Scully, New York (Raymond M. D'Erasmo of counsel), for appellant.

Law Offices of Greenberg & Massarelli, LLP, Purchase (William Greenberg of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered March 1, 2007, which, after presentation of argument at a conference, insofar as appealed from, refused to strike defendant-appellant's deposition taken before his joinder, unanimously affirmed, without costs.

We deem the notice of appeal to be a motion for leave to appeal and grant such leave (CPLR 5701[c]; *see Serradilla v Lords Corp.*, 12 AD3d 279 [2004]). Plaintiff commenced an action against her employer pursuant to the Federal Employees Liability Act. An IME was conducted by defendant-appellant, then a nonparty. Thereafter, plaintiff took the nonparty deposition of appellant, who, without a lawyer present, testified that he altered his medical reports of the IME at the behest of a certain

then nonparty. Plaintiff then instituted a separate action against appellant and others, which was consolidated with the original FELA action against the employer. We reject appellant's arguments that his nonparty deposition should be stricken because it had not been directed by court order and was taken without his lawyer present. It appears that plaintiff served a notice to take appellant's deposition as a nonparty, together with a subpoena, upon the employer, then the only defendant in the action, and appellant, who appeared at the deposition without counsel and testified with respect to his medical examination of plaintiff. Since plaintiff properly noticed the deposition in accordance with CPLR 3106(b) and 3107, and since neither the employer nor appellant sought a protective order, and as there are no policy proscriptions against physicians appearing at depositions without lawyers (*cf. Arons v Jutkowitz*, 9 NY3d 393, 401-402, 409-410 [2007] [attorneys may interview an adverse party's treating physician privately]), no basis exists for striking the deposition.

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

ENTERED: MAY 1, 2008

CLERK

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

3574N John Burr, Index 313648/93
Plaintiff-Respondent,

-against-

Romona Burr,
Defendant-Appellant.

Robert W. Abrams, New York, for appellant.

Cooper, Brown & Behrle, P.C., New York (Sandra Gale Behrle of counsel), for respondent.

Order, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered on or about August 13, 2007, which, insofar as appealed from, granted plaintiff's application pursuant to 22 NYCRR 130-1.1 for attorney's fees in the amount of $7,461, of which $5,000 was to be paid by defendant's attorney and the balance paid by defendant, unanimously affirmed, without costs.

The court providently exercised its discretion in granting plaintiff's application to impose a sanction against defendant and her attorney. In support of her motion to vacate a 1994 judgment of divorce, defendant advanced arguments that were without merit and asserted factual statements that were contradicted by the evidence. The arguments' lack of merit were apparent or should have been apparent, at a minimum, upon receipt of plaintiff's opposition. Furthermore, defendant and her counsel unnecessarily delayed the withdrawal of defendant's motion for two months, and only withdrew the motion at a court

appearance, although it could have been withdrawn much earlier and without the need for the additional court appearance (*see Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 70 [2006]; *see also Timoney v Newmark & Co. Real Estate*, 299 AD2d 201, 202 [2002], *lv denied* 99 NY2d 610 [2003]).

We have considered defendant's remaining contentions, including that the amount of fees awarded was unreasonable, and find them unavailing.

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

ENTERED: MAY 1, 2008

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 May 1, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
John W. Sweeny, Jr.
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 4810/03
Respondent,

-against- 3566

Nikkolaz Van Honand, also known as
Admir Hoornaert,
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 (Bonnie Wittner, J.), rendered on or about February 10, 2005,

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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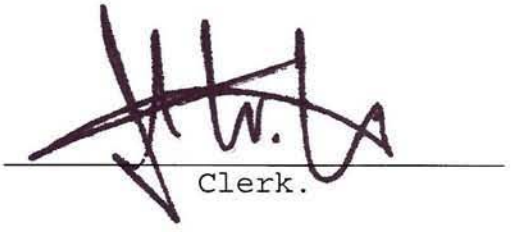

Clerk.

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