SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 20, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, JJ.

9318 The People of the State of New York, Respondent, Ind. 5297/01

-against-

Alexander Pasley, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Upon remittitur from the Court of Appeals (9 NY3d 342 [2007]), judgment, Supreme Court, New York County (Joan C. Sudolnik, J.), rendered April 29, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence, as viewed in light of the court's jury charge. The court charged the jury with respect to depraved indifference murder in accordance with the law at the time, as reflected in *People v Register* (60 NY2d 270 [1983], *cert denied* 466 US 953 [1984]) and *People v Sanchez* (98 NY2d 373 [2002]). Although, in response to

a note from the deliberating jury, the court briefly referred to depraved indifference as a "mental state," this was in the context of identifying the distinguishing feature of each of the numerous homicide charges and explaining the order in which they were to be considered. In its main and supplemental charges, the court repeatedly instructed the jury that it had to view the circumstances objectively to determine whether defendant acted with depraved indifference, and it never defined depraved indifference subjectively, as now required pursuant to *People v Feingold* (7 NY3d 288 [2006]). After weighing conflicting testimony and the conflicting inferences that could be drawn from the evidence, we conclude that defendant's unprovoked slashing with a box cutter at the victim's jugular vein, with enough force to slice through two major vessels, and after he had already taken the victim's chain, demonstrated circumstances evincing a depraved indifference to human life (*see People v Sanchez*, 98 NY2d at 384-386).

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

ENTERED: MAY 20, 2008

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

3623-
3623A Ronald V. Pomerance,
Plaintiff-Appellant,

Index 115877/06

-against-

Roger Paul McTiernan, Jr., Esq.,
Defendant-Respondent.

Ronald V. Pomerance, Suffern, appellant pro se.

Kaufman, Borgeest & Ryan, LLP, New York (A. Michael Furman of counsel), for respondent.

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered July 30, 2007, dismissing the complaint pursuant to an order, same court and Justice, entered June 13, 2007, which, in an action for defamation between attorneys, granted defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the above judgment.

The action arises out of statements made by attorney defendant (McTiernan) about attorney plaintiff (Pomerance) in an affidavit McTiernan submitted in support of a motion to quash subpoenas issued by Pomerance to enforce a judgment in an underlying personal injury action. In that action, Pomerance's firm represented the plaintiff (McCarthy) and McTiernan's firm represented two of the defendants. After entry of the McCarthy judgment, McTiernan proposed to Pomerance that he defer efforts

to collect on the judgment until resolution of a third defendant's appeal, against whom McTiernan's clients had been awarded full indemnification. In consideration for that forbearance, McTiernan's clients would waive their right on the appeal to argue against the part of the judgment in favor of McCarthy. McTiernan would also limit his appellate argument to the indemnification issue. Pomerance alleges that, in response to this proposal, he told McTiernan that he was not familiar with applicable law in deferring collection of a sizeable judgment, and that he needed the consent of his client and his partner.

In his affidavit in support of the motion to quash Pomerance's subpoenas, McTiernan contended that Pomerance "said he saw no problem with my proposal but would run it by [his trial counsel, who was not plaintiff's partner], and that I should follow-up with [trial counsel]." McTiernan further asserted that after numerous discussions with trial counsel, the latter accepted the proposal on condition that McTiernan's clients not file any appeal whatsoever.

After reaching an agreement with trial counsel, the subpoenas were served directly on McTiernan's clients. After service of the subpoenas, McTiernan spoke to trial counsel, who said he was unaware of the subpoenas and was "angry and embarrassed" by Pomerance's actions. McTiernan affirmed that "in all my years of practice, I have never encountered such a

duplicitous, under-handed, unprincipled and unprofessional act by a member of this bar ... in breach of an acknowledged agreement, at the embarrassment of his own co-counsel and at the cost of his own professional reputation and integrity. "McTiernan demanded that sanctions should be imposed against plaintiff for "outrageous conduct" that, inter alia, "reflects poorly on our entire profession and the integrity of [the] judicial process."

In the complaint and affidavit in opposition to the motion to dismiss, Pomerance alleged that he never told McTiernan to discuss the proposal with trial counsel, who had already been removed from the case; that he never authorized trial counsel to enter into the agreement; and that he had no knowledge of the agreement until after the subpoenas were served. Pomerance contended that he and his partner agreed to the proposal out of concern that "possibly we did inadvertently mislead [defendant]" and "in the interest of professional courtesy." In addition, Pomerance stressed in his opposition that at no time did McTiernan ever so much as claim to have made any agreement with Pomerance directly or that Pomerance was even aware of McTiernan's agreement with trial counsel prior to Pomerance serving the subpoenas.

Initially, we note that "[i]t is well established that a statement made in the course of legal proceedings is absolutely

privileged if it is at all pertinent to the litigation (*Youmans v Smith*, 153 NY 214, 219 [1897]). In this seminal case, the Court made clear that the rule rests on the policy that counsel should be able 'to speak with that free and open mind which the administration of justice demands' without the constant fear of libel suits" (*Lacher v Engel*, 33 AD3d 10, 13 [2006], quoting *Youmans*, 157 NY at 223). Furthermore, "[t]he proper inquiry is whether the statements sustained as defamatory by the motion court 'may possibly be pertinent' to the malpractice litigation" (*Lacher* 33 AD3d at 14, quoting *People ex rel. Bensky v Warden of City Prison*, 258 NY 55, 59 [1932]). The privilege "embraces anything that may possibly be pertinent or which has enough appearance of connection with the case" (*Seltzer v Fields*, 20 AD2d 60, 63 [1963], *affd* 14 NY2d 624 [1964]).

On this CPLR 3211(a)(7) motion to dismiss, we necessarily accept plaintiff's factual allegations as true. Therefore, we accept that Pomerance never told McTiernan to discuss the matter with the trial counsel. However, we cannot assume that McTiernan believed that trial counsel had not been authorized to enter into the agreement. The offending statements, although clearly reprehensible and possibly deliberately false insofar as they alleged instructions by Pomerance to discuss the matter with trial counsel, were nonetheless pertinent to the motion to quash and therefore absolutely privileged. This is true no matter how

great McTiernan's personal malice toward Pomerance (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 172-173 [2007]). The test of pertinence is "extremely liberal"; the offending statements "need be neither relevant nor material to the threshold degree required in other areas of the law, and the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices" (*id.* at 173 [internal quotation marks omitted]; *Lacher*, 33 AD3d at 13). While Pomerance correctly argues that he was not a party to the agreement that was the focus of the motion to quash, McTiernan's statements nonetheless satisfy the "extremely liberal" standard as possessing the "barest rationality."

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

ENTERED: MAY 20, 2008

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

3632 In re Kimberly Kaminester, etc., Index 500160/05
Petitioner-Respondent,

-against-

Inalee Foldes,
Respondent-Appellant.

Friedman, Harfenist, Langer & Kraut, Lake Success (Steven J. Harfenist of counsel), for appellant.

Novick & Associates, Huntington (Donald Novick of counsel), for respondent.

Order, Supreme Court, New York County (William P. McCooe, J.), entered October 30, 2007, which voided a marriage and several financial transactions between respondent Foldes and petitioner's allegedly incapacitated person (AIP), and held said respondent in civil and criminal contempt of a temporary restraining order issued during the pendency of the AIP's guardianship proceeding, unanimously modified, on the law and the facts, the findings of civil and criminal contempt vacated and the matter remanded for a new hearing, and otherwise affirmed, without costs.

The IAS court properly maintained jurisdiction over this matter after the AIP's death, as Supreme Court and Surrogate's Court have concurrent jurisdiction in matters involving a decedent's estate (*see Williams v Williams*, 36 AD3d 693, 695 [2007]). Here, the IAS court signed the temporary restraining

order and had authority to enforce it (Judiciary Law § 753[A][3]). Even if the IAS court were divested of jurisdiction, "a Supreme Court Justice is vested with inherent plenary power (NY Const, art VI, § 7) to fashion any remedy necessary for the proper administration of justice" (*People ex rel. Doe v Beaudoin*, 102 AD2d 359, 363 [1984]). The IAS court was not bound by the form of the proceeding (CPLR 103[c]), and in this case it properly issued a declaratory finding (*see Cahill v Regan*, 5 NY2d 292, 298 [1959]) that the AIP lacked the capacity to enter into the marriage and engage in financial transactions.

Revocation of transactions is an available remedy under Mental Hygiene Law § 81.29(d). Where there is medical evidence of mental illness or defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document in question possessed the requisite mental capacity (*Matter of Rose S.*, 293 AD2d 619, 620 [2002]). Based on the medical reports and the hearing testimony, the IAS court properly found evidence of cognitive deficits, and respondent failed to rebut that finding with medical evidence of her own. Annulment of marriage is also an available remedy in an article 81 proceeding (*Matter of Joseph S.*, 25 AD3d 804, 806 [2006]; *Matter of Dot E.W.*, 172 Misc 2d 684, 693-694 [1997]).

"To sustain a finding of either civil or criminal contempt based on an alleged violation of a court order it is necessary to

establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect" (*Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]). The record is presently insufficient to support a finding that respondent was guilty of civil contempt based on her knowledge of the explicit language of the restraining order. Moreover, to be found guilty of criminal contempt, the contemnor usually must be shown to have violated the order with a higher degree of willfulness than need be shown in a civil contempt proceeding (*id.*). The matter is necessarily remanded for a determination of the scope of the order as well as her knowing violations of the order -- the change in life insurance beneficiary, conveyance of the Westhampton property, and her marriage to the AIP after he was determined to be incapacitated -- in addition to her conduct subsequent to those alleged violations, including failing to disclose these transactions at a court hearing where the parties stipulated to the AIP's incapacity.

Finally, we reject respondent's contention that the court's hearing was improperly conducted. The record is replete with examples in which the court appropriately asked her to clarify her vague, indirect responses (*Messinger v Mount Sinai Med. Ctr.*, 15 AD3d 189 [2005], *lv dismissed* 5 NY3d 820 [2005]). Even if the court's questioning regarding her attorney's knowledge of her

marriage to the AIP was improper, we conclude that any error was harmless in light of the remaining evidence (*Matter of Levinson*, 11 AD3d 826, 828 [2004], *lv denied* 4 NY3d 704 [2005]).

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

ENTERED: MAY 20, 2008

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

3668N Solomon Rapoport, Plaintiff-Respondent, Index 105141/06 590328/07

-against-

Cambridge Development, LLC doing business as Atria Retirement Living, Defendant-Appellant.

[And a Third-Party Action]

Ruffo Tabora Mainello & McKay, P.C., Lake Success (Damien Bielli of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered March 29, 2007, which denied defendant's motion for the appointment of a guardian ad litem for plaintiff and to continue plaintiff's deposition, unanimously modified, on the law and the facts, the motion granted to the extent of continuing the deposition under the supervision of a referee or judicial hearing officer, subject to reasonable limitations on questioning not relating to liability or damages to be imposed by Supreme Court prior to the deposition, and otherwise affirmed, without costs.

The court erred in denying that aspect of defendant's motion seeking to continue plaintiff's deposition. The transcript of the deposition shows that plaintiff's attorney repeatedly obstructed defendant's attorney's examination of plaintiff by unilaterally restricting defense counsel's line of questioning to matters

"directly relate[d] to liability or damages," and requesting numerous, unnecessary breaks (*see* 22 NYCRR part 221; *Orner v Mount Sinai Hosp.*, 305 AD2d 307, 309 [2003]; *Mora v Saint Vincent's Catholic Med. Ctr. of N.Y.*, 8 Misc 3d 868 [Sup Ct, New York County 2005]). In light of the unique circumstances of this case, the continued deposition must occur under the supervision of a referee or judicial hearing officer (*see* CPLR 3104[a]), and Supreme Court should impose reasonable limitations on questioning not relating to liability or damages prior to the deposition.

The evidence in the slim record before us does not support defendant's assertion that Supreme Court erred in denying that aspect of its motion seeking the appointment of a guardian ad litem for plaintiff. The transcript of plaintiff's deposition indicates that he is capable of understanding the proceedings in this personal injury action, prosecuting his rights and assisting counsel (*see Matter of Philip R.*, 293 AD2d 547 [2002]). In the event new evidence suggests that plaintiff is incapable of adequately prosecuting his rights, Supreme Court is free to revisit the issue of whether the appointment of a guardian ad

litem is appropriate (*see* CPLR 1201, 1202; *see also Brewster v John Hancock Mut. Life Ins. Co.*, 280 AD2d 300 [2001]).

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

ENTERED: MAY 20, 2008

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

3685 The People of the State of New York, Respondent,

-against-

David Torres, Defendant-Appellant. Ind. 1117/82

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

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

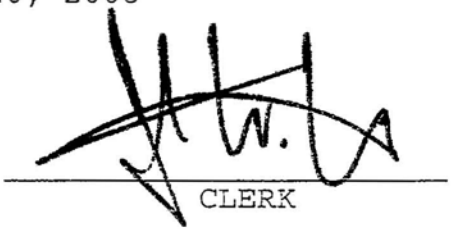
Order, Supreme Court, New York County (Ruth L. Sussman, J.), entered on or about March 9, 2005, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's claim that he does not qualify as a sex offender is similar to the claim made by the defendant in *People v Cintron* (46 AD3d 353 [2007], *lv denied* __NY3d__, 2008 NY LEXIS 799 [Mar 25, 2008]). For the reasons stated in *Cintron*, we find this claim to be both unpreserved and without merit (*see also People v Windham*, 37 AD3d 571 [2007], *affd* __NY3d__, 2008 Slip Op 02679 [2008]). To the extent that defendant is asserting that it is unconstitutional to determine his qualification as a sex offender on the basis of an administrative computation of his aggregate sentence made in accordance with Penal Law § 70.30, we likewise find that claim to be unpreserved and meritless.

Defendant did not establish any special circumstances warranting a downward departure from his risk level (*see People v Guaman*, 8 AD3d 545 [2004]).

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

ENTERED: MAY 20, 2008



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

3687 In re Victoria Rodriguez, Index 400071/07
Petitioner-Appellant,

-against-

Tino Hernandez, as Chair of the
New York City Housing Authority, et al.,
Respondents-Respondents.

Victoria Rodriguez, appellant pro se.

Ricardo Elias Morales, New York (Corina L. Leske of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 5, 2007, which denied the petition brought pursuant to CPLR article 78 seeking to annul respondents' determination, dated September 13, 2006, dismissing petitioner's grievance seeking to succeed to the tenancy of the deceased tenant as a remaining family member, unanimously affirmed, without costs.

Respondents' determination that petitioner was not a remaining family member and therefore, not entitled to succession rights to the subject apartment, is neither arbitrary nor capricious (*see Jamison v New York City Hous. Auth.-Lincoln Houses*, 25 AD3d 501, 502 [2006]). The record reveals that petitioner was denied permanent residency prior to the death of her mother-in-law, and evidence, including the deceased tenant's affidavits of income attesting that she was the sole occupant of

the subject apartment, shows that petitioner failed to establish that respondent agency was aware of her residency and took no preventive action (*see Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [2004]).

Petitioner's contention that respondents' determination was not supported by a rational basis because respondents relied on the occupancy standard set forth in the Housing Authority's Management Manual rather than its Applications Manual is unpreserved, as it is raised for the first time on appeal (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [2007]). Were we to review the argument, we would find that respondents' interpretation of its regulations is entitled to deference (*see Matter of Nelson v Roberts*, 304 AD2d 20, 23 [2003]). Nor is respondent agency estopped from denying petitioner remaining family member status on the basis that when it approved her temporary residency in 2001 for a period of four months to care for her ailing mother-in-law it failed to provide the tenant of record or petitioner with a permanent permission request form (*see Matter of Hutcherson v New York City Hous. Auth.*, 19 AD3d 246 [2005]; *Matter of Stokely v Franco*, 251 AD2d 97 [1998]).

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

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

ENTERED: MAY 20, 2008

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

3688 Trocom Construction Corp., Index 603566/03
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

Goetz Fitzpatrick LLP, New York (Donald J. Carbone of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 22, 2006, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the matter remanded for further proceedings.

This case concerns a contract between the parties for the reconstruction of Sixth Avenue in Manhattan, from West 56th Street to Central Park South. Under the contract, plaintiff was to perform soil borings to locate and determine the size of underground voids believed to be contributing to sidewalk and pavement subsidence and to appropriately remediate the voids identified in these boring operations. Because defendant contemplated that work on the project would interfere with vehicular and pedestrian traffic, adversely affecting local

residences and businesses, it provided various payment incentives for early completion. Pursuant to section HW-901 of the contract, plaintiff was eligible to receive early completion bonuses if work on both sides of the avenue was completed within 30 days.

Delays, principally over disputes concerning the boring operation, hampered timely completion of the work on the avenue's west side. Defendant insisted that plaintiff bore through boulders, which plaintiff insisted was not required by the contract specifications. Plaintiff added that if it were required to drill through boulders, such an operation would be better performed using an air-driven impact system, which causes vibrations. Defendant initially insisted that plaintiff drill through boulders using the hollow auger drill specified in the contract specifications. This dispute was partially resolved in a proceeding before the Contract Dispute Resolution Board (CDRB), which found that plaintiff's interpretation of the contract specifications was the reasonable one, thus entitling plaintiff to compensation for the extra work performed. The Board lacked jurisdiction, however, over plaintiff's claim for the incentive bonus for early completion of the work on the west side of the avenue. Plaintiff commenced this lawsuit for payment it allegedly would have received but for defendant's interference with the boring operation.

It has already been determined that plaintiff was entitled to a substantial change order on account of this extra work. However, plaintiff has not been fully compensated for the breach, since plaintiff expected to earn a significant incentive bonus for completing the west side work within 30 days. This bonus was bargained for by both parties and was known to the parties at the time of contracting. The bonus is thus an element of damages, naturally flowing from the breach, to which plaintiff is entitled upon a proper evidentiary showing. It cannot be said, as the motion court held, that plaintiff has already been fully compensated for the breach.

We reject defendant's argument that the bonus is barred by the "no damages for delay" provision of the contract. Compensation for loss of an incentive bonus is not "damages for delay" within the meaning of such a provision. As the Court of Claims reasoned in *Nigro Bros. v New York State Thruway Auth.* (1998 WL 1181900 at *9, *affd* 270 AD2d 321 [2000]),

> "[W]hat is sought here is a bid item of the contract. 'Extra' compensation or monies outside the scope of the contract, which the delay clause would perhaps prohibit, is not sought. The [bonus] monies at issue here were clearly contemplated by both parties and explicitly included as a pay item in the contract. Claimant was required by the contract to attempt early completion and, if accomplished, would receive $16,000.00 for each day it completed specified work prior to June 30, 1989. Thus, [delay] damages in the traditional sense of the term is not at issue and ... the delay clause would not operate to

bar recovery."

Even if the "delay for damages" clause were applicable, there are exceptions to the enforcement of such a clause. Damages are recoverable for delays caused by a contractee's bad faith or willful, malicious or grossly negligent conduct, as are damages for uncontemplated delays, irrespective of such a clause (*Spearin, Preston & Burrows v City of New York*, 160 AD2d 263, 264 [1990]). On this record, factual issues exist concerning the applicability of these exceptions.

The inquiry next shifts to whether plaintiff has shown it had the capability of completing the work on the avenue's west side within the 30-day period specified in the contract in order to earn the west side bonus. There is considerable record evidence that the delays in the work were attributable in large part to defendant. The CDRB has already determined that plaintiff's interpretation of the contract specifications as not requiring it to bore through boulders was the reasonable one. There is also record evidence that defendant prevented plaintiff from performing the boring work with the air-driven impact boring system over a six-week period.

The motion court found that plaintiff's assessment of the damage it suffered by defendant's delays as equaling the maximum amount of the incentive was speculative. The court found that the delays in the completion of the west side work could have

been attributable to other factors, such as lack of availability of equipment or manpower, subcontractor failures or elements unique to the project site.

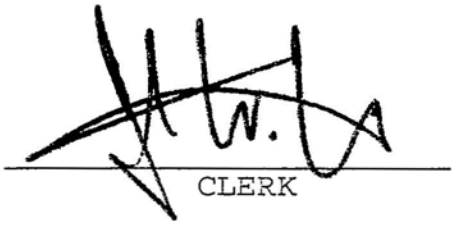
However, the court overlooked plaintiff's evidence, which raises an issue of triable fact as to whether plaintiff could have completed the west side work within 30 days but for defendant's delays. Anthony Santoro, plaintiff's vice-president and project executive, opined that but for defendant's delays, plaintiff would have completed the work within 30 days; this was based on an analysis of plaintiff's actual performance of the east side work using only the air-driven impact boring system, and the latter stages of the west side work after plaintiff had been allowed to use the air-driven impact system. Santoro relied on project records indicating that plaintiff performed 3128 vertical feet of boring on the east side in 8 days, or 391 vertical feet per day, and that there were a total of 4908 vertical feet of borings on the west side. Applying this rate of progress, Santoro opined that plaintiff would have completed its boring on the west side within 13 days. To be more conservative, Santoro used the lesser rate of 260.31 vertical feet per day actually achieved by plaintiff's subcontractor, WGI, once it switched to using only the air-driven impact boring system. Using this more conservative number, plaintiff would still have completed the west side work in roughly 19 days (4908 divided by

260.31). Santoro added to this time span the three days plaintiff used to complete its placement of maintenance and protection of traffic devices, as well as an additional day plaintiff used to finish its backfilling or grouting of the bore holes (which was being performed simultaneously with the actual drilling). Based on this data, Santoro opined that plaintiff would have completed the west side work in no more than 23 days.

Since plaintiff raised issues of material fact as to whether it could have completed the west side work within 30 days, summary dismissal of the claim was unwarranted.

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

ENTERED: MAY 20, 2008



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

3689 The People of the State of New York, Respondent,

Ind. 6983/02

-against-

Sergio Gutierrez, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Mark Dwyer of counsel), for respondent.

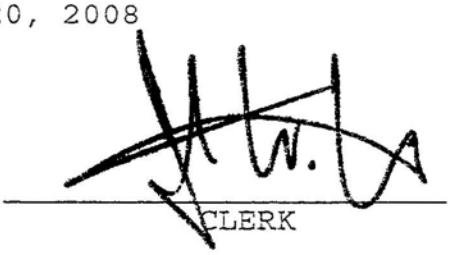
Order, Supreme Court, New York County (Edwin Torres, J.), entered on or about May 23, 2007, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Act (L 2005, ch 643), unanimously reversed, on the law, and the matter remanded for a de novo determination in accordance with the decision herein.

The record does not establish any compliance with the statutory mandate (L 2005, ch 643, § 1) that "[t]he court shall offer an opportunity for a hearing and bring the applicant before it" (*see People v Figueroa*, 21 AD3d 337 [2005], *lv denied* 6 NY3d 753 [2005]). Additionally, by merely reciting that "substantial justice requires that this motion be denied," the court's order denying the motion did not comply with the requirement that any such order "must include written findings of fact and the reasons

for such an order" (L 2005, ch 643, § 1, *supra*; *see People v Williams*, 45 AD3d 1377 [2007]). Accordingly, we remand for a new determination to be made in compliance with these requirements.

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

ENTERED: MAY 20, 2008



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

3691 The People of the State of New York, Respondent, Ind. 546/05 6521/05

-against-

Joseph Zimmerman, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Judgments, Supreme Court, New York County (James A. Yates, J.), rendered on or about June 8, 2006, unanimously affirmed. No opinion. Order filed.

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

3692 In re Stanley Jefferson, Index 103125/06
Petitioner-Appellant,

-against-

Raymond Kelly, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II, et al.,
Respondents-Respondents.

Jeffrey L. Goldberg, P.C., Lake Success (Jeffrey L. Goldberg of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Lottie E. Wilkins, J.), entered December 11, 2006, dismissing this proceeding brought pursuant to CPLR article 78 seeking to annul respondent Commissioner's determination denying accidental disability retirement benefits, unanimously affirmed, without costs.

The court properly declined to annul respondent's determination and remand for reconsideration on the issue of the claimed causal connection between petitioner's psychiatric disability and his alleged line-of-duty injury. Credible evidence rebuts the World Trade Center presumption (Administrative Code of City of NY § 13-252.1[1][a]), assuming it applies (*see Matter of Mulet v Kelly*, __ AD3d __, 852 NYS2d 762 [2008]), and supports the Medical Board's determination that petitioner's disability was not the natural and proximate result

of a line-of-duty accident (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139 [1997]). Inasmuch as the challenged determination is rationally based, is not arbitrary, capricious, an abuse of discretion or contrary to law, and the record before us does not support, as a matter of law, petitioner's theory of causation, we are obliged to affirm (*Matter of Picciurro v Board of Trustees of N.Y. City Police Pension Fund, Art. II*, 46 AD3d 346, 348 [2007]).

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

ENTERED: MAY 20, 2008

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

3693 Fisnik Metus, Index 112861/05
Plaintiff-Respondent, 590831/06

-against-

Ladies Mile Inc., et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

Prestige Construction Services, Inc.,
Third-Party Defendant-Appellant-Respondent.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for Ladies Mile Inc, VJB Construction Corp. and Regional Scaffolding & Hoisting Co., Inc., appellants.

French & Rafter, LLP, New York (Tom E. Byrne of counsel), for Prestige Construction Services, Inc., appellant-respondent.

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

Order and judgment (one paper), Supreme Court, New York County (Rolando T. Acosta, J.), entered October 15, 2007, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, denied the motions of defendants VJB Construction Corp. and Regional Scaffolding & Hoisting Co., Inc. and third-party defendant Prestige Construction Services, Inc. for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as against VJB and Regional, and denied VJB's and Regional's motion for summary

judgment on their claims for contractual and common-law indemnification against Prestige, unanimously affirmed, without costs.

As plaintiff handed a sheet of corrugated tin up to a coworker standing on top of a scaffold under construction, a beam (known as a "junior beam") on which the tin sheet was to be placed became dislodged, fell from the scaffold, and struck plaintiff in the face. Although there was conflicting testimony on whether the beam at issue should have been secured, that question of fact is immaterial in the circumstances of this case. It is uncontroverted that at the time the scaffold was being erected, the junior beam was simply not clamped to the header beam on which it rested. Thus, the junior beam, situated eight to nine feet above the ground, was a "falling object" for purposes of Labor Law § 240(1) protection (*see Outar v City of New York*, 5 NY3d 731 [2005], *affg* 286 AD2d 671 [2001]; *Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404 [2007]; *see also Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 621-622 [2003]). Similarly, it is beyond cavil that § 240(1) protection applies not only to workers utilizing scaffold or hoisting devices in the performance of their work, but also to "'the very same (and other) workers when they erect and demolish such devices'" (*Kyle v City of New York*, 268 AD2d 192, 197 [2000], *lv denied* 97 NY2d 608 [2002],

quoting *Alderman v State of New York*, 139 Misc 2d 510, 515 [1988]).

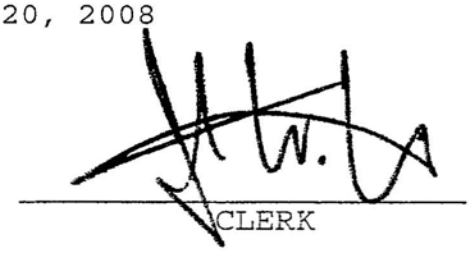
Regional's and VJB's arguments that their responsibility for overseeing the work and for site safety supervision did not rise to the level necessary to support a Labor Law § 200 or common law negligence claim is misplaced since these defendants were responsible for the design of the scaffold and the method of its construction (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202-203 [2005]).

In light of the unresolved liability issues, the court did not err in denying Regional's and VJB's motion for summary judgment on their claims for contractual and common-law indemnification against Prestige.

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

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

ENTERED: MAY 20, 2008



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

3697 In re Ian Garnes, Index 112105/06
Petitioner-Appellant,

-against-

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

Martin Druyan & Associates, New York (Martin Druyan of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel), New York (Mordecai Newman of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered March 20, 2007, which dismissed the petition brought pursuant to CPLR article 78 seeking to annul respondents' determination, dated May 4, 2006, terminating petitioner's probationary employment as a New York City police officer, and for a name-clearing hearing, unanimously affirmed, without costs.

Petitioner, a probationary employee who was terminable without a hearing and without a statement of the reason for his dismissal, failed to demonstrate that his termination was in bad faith, unlawful, or for an impermissible reason (*see Matter of York v McGuire*, 63 NY2d 760 [1984]; *Matter of Johnson v Kelly*, 35 AD3d 297 [2006]). Contrary to petitioner's

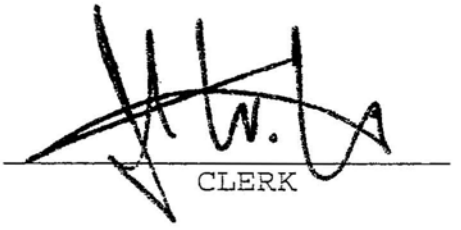
contention, his termination was not based solely on alcohol-related incidents that occurred prior to his appointment as a probationary officer, but was primarily based on his conduct while off-duty at a party in July 2005, clearly calling into question his ability to competently perform his job. There is no issue as to petitioner's probationary status at the time of termination. Although he was appointed to a two-year probationary period on July 1, 2003 and the incident resulting in the charges and specifications against him occurred on July 8, 2005, petitioner's probationary period was extended by the use of, inter alia, vacation days and his placement on modified duty, and there is no requirement that petitioner be notified of the extension of the probationary period (*see Matter of Garcia v Bratton*, 90 NY2d 991, 993 [1997]).

The court properly denied petitioner's request for a name-clearing hearing, since the reasons for petitioner's termination are not "stigmatizing in the constitutional sense," but instead constitute instances of "bad judgment or incompetent performance of duties" (*Matter of Swinton v Safir*, 93 NY2d 758, 763 [1999]).

We have considered petitioner's remaining contentions, including that the termination of his employment was unduly harsh, and find them unavailing.

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

ENTERED: MAY 20, 2008



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

3698 The People of the State of New York, Respondent, Ind. 3197N/05 SCI 00480/06

-against-

Derek Smith, Defendant-Appellant.

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

Judgments, Supreme Court, New York County (Arlene Goldberg, J. at hearing; Charles Tejada, J. at plea and sentence), rendered on or about February 21, 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.

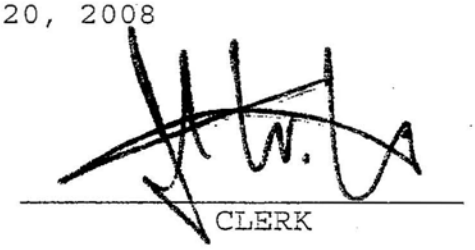
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 20, 2008



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MAY 20 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Richard T. Andrias
Milton L. Williams
James M. McGuire, JJ.

3054
Index 7229/05

x

Tara Baker, etc.,
Plaintiff-Appellant,

-against-

Bronx Lebanon Hospital Center, et al.,
Defendants-Respondents.

x

Plaintiff appeals from an order of the Supreme Court, Bronx County (Alan J. Saks, J.), entered December 7, 2006, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's wrongful death cause of action as time-barred.

Wallace & Associates, P.C., White Plains (Larry Wallace of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (David Kaplan, Christopher Simone and Deirdre E. Tracey of counsel), for Bronx Lebanon Hospital Center, respondent.

Kanterman, O'Leary & Soscia, LLP, New York (Kenneth A. Laub of counsel), for Larry Ham, M.D., Aruna Mishra, M.D., Angrzej Riess, M.D., and Rich Deveaux, M.D., respondents.

ANDRIAS, J.

On February 6, 2002, three days after she gave birth to her third child in defendant hospital, Trina Baker died intestate, leaving three infant children, Anthony, Damien, and the newborn Katrina, as her sole distributees. As pertinent to this appeal, plaintiff, who is the decedent's sister, was appointed by the Bronx County Family Court as the guardian of Katrina's person on April 17, 2002. Thereafter, on August 20, 2004, she was appointed as the guardian of Katrina's property by the Bronx County Surrogate, and on November 4, 2004, she was appointed as administrator of her late sister's estate by the Surrogate. This action for medical malpractice and wrongful death was commenced by filing on February 1, 2005.

In granting defendants summary judgment dismissing plaintiff's causes of action for medical malpractice and wrongful death, both of which accrued on the date of the decedent's death, the motion court, in a decision that is not contested on appeal, correctly held that the infancy toll of CPLR 208 did not apply to the medical malpractice cause of action, which belongs to the decedent's estate, and that that cause of action was not revived by the fact that no representative for the estate was appointed until November 4, 2004, three months after the expiration of the two-and-one-half-year limitations period. As to plaintiff's

cause of action for wrongful death, the court, citing *Hernandez v New York City Health & Hosps. Corp.* (78 NY2d 687, 693 [1991]), held that the infancy toll of CPLR 208 terminated April 17, 2002, when plaintiff was appointed as guardian of the person of Katrina by the Family Court and thus that that cause of action was also untimely, having been commenced almost 10 months after the limitations period expired.

On appeal, plaintiff argues for the first time that the court erred in finding that the infancy toll of CPLR 208 terminated upon her appointment as guardian of the person, rather than upon her appointment as guardian of the property, which would have made this action timely. Defendants respond that plaintiff's argument is unpreserved and argue that, in any event, there is no distinction between a "guardian of the person" and a "guardian of the property" insofar as it relates to the tolling of the limitations period for wrongful death actions. Plaintiff's arguments, they contend, stem from a misinterpretation of *Hernandez* and its progeny. They argue that the Court of Appeals identified the occasion of there being a *potential* personal representative and not the issuance of letters of administration as the controlling event for determining when the toll ceased and that when plaintiff was appointed as guardian of the infant's person that potential existed and ended the toll.

For the following reasons, we disagree and reinstate plaintiff's cause of action for wrongful death.

Surrogate's Court "has power over the property of an infant and is authorized and empowered to appoint a guardian of the person or of the property or of both of an infant whether or not the parent or parents of the infant are living" (SCPA 1701). "The same person may be appointed guardian of both the person and the property of the infant or the guardianship of the person and of the property may be committed to different persons" (SCPA 1707[1]). Family Court's jurisdiction, however, is limited by the Constitution to the guardianship of the person of a minor (Art 6, § 13 [b][7]), and there is no provision in the Family Court Act for the appointment of guardians of the property of infants. Whereas guardianship of the person of an infant implies custody and control over the person of the infant with a concurrent duty to watch over the general welfare of the infant, a guardian of an infant's property is required to "protect, preserve and manage" the infant's property throughout minority so as to provide for the infant's personal, health and educational necessities (*see* SCPA 1723).

Pursuant to EPTL 5-4.1, the personal representative of an estate has two years, measured from the date of death, in which to commence an action for damages for the wrongful death of the

decedent on behalf of the decedent's distributees. Where there is no representative to commence a wrongful death action on behalf of an infant intestate distributee before that time, CPLR 208 tolls the two-year limitations period for commencing such action. Such toll has been construed "to apply until the earliest moment there is a personal representative or potential personal representative who can bring the action, whether by appointment of a guardian or majority of the distributee, whichever occurs first" (*Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d 687, 693 [1991]).

An action for wrongful death may be brought by the decedent's "personal representative" (EPTL 11-3.2[a][1]), which term includes a person who has received letters to administer the decedent's estate, but not a guardian during minority (EPTL 1-2.13). In setting the order of priority for granting letters of administration, SCPA 1001(2) provides that if the sole distributee is an infant, his or her "fiduciary shall be granted letters of administration." However, while "fiduciary" is defined as including a guardian (SCPA 103[21]), there is no express statutory preference in the granting of letters of administration as between the guardian of the person and the guardian of the property of an infant distributee. Nevertheless, the general legislative intention to give only persons interested

the right to administer indicates a preference in this respect in favor of the guardian of the infant's property (*Matter of Blowstein*, 147 Misc 111 [1933]). To that end, SCPA 1001(2) provides that the Surrogate may deny letters to the guardian of the person only (*cf. Weed v St. Joseph's Hosp.*, 245 AD2d 713 [1997] [putative father denied letters of administration for mother's estate, to bring wrongful death action on behalf of her infant distributee, because he lacked appointment as guardian of infant's property). A similar rationale is reflected in SCPA 402(1), which provides that "[a]n infant may appear by the guardian of his property," and CPLR 1201, which provides that, "[u]nless the court appoints a guardian ad litem, an infant shall appear by the guardian of his property."

To the extent that defendants rely on *Baez v New York City Health & Hosps. Corp.* (80 NY2d 571 [1992]) for the proposition that once appointed guardian, a person becomes a potential personal representative of the decedent's estate due to her or his immediate availability to receive letters of administration, such reliance is misplaced. The Court there found that, where the plaintiff's deceased daughter's will named the plaintiff as the executor of the daughter's estate and stated that she should be appointed guardian of the daughter's infant children, CPLR 208 did not apply to toll the limitations period because the

plaintiff could have timely sought appointment as the personal representative of the decedent's estate and commenced the actions on the infants' behalf after the death of their mother. Likewise, in *Ortiz v Hertz Corp.* (212 AD2d 374 [1995]), a decision presumably based upon the premise that ordinarily a surviving parent becomes the child's general guardian by operation of law (*see* Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 81), this Court held that as the natural mother of the decedent's infant children, the plaintiff was duty bound to seek letters of administration on behalf of the decedent's infant distibutees before the running of the limitations period, particularly since she had retained counsel on behalf of such distributees within sixty days of the decedent's death. That decision has been criticized as resting on "the incorrect premise that the mother and 'natural guardian' of the infant distributee was, even before being appointed his 'legal guardian,' 'duty bound' to seek letters of administration on behalf of the distributee" (*Matter of Boles v Sheehan Mem. Hosp.*, 265 AD2d 910, 912-913 [1999]). As pointed out by the Fourth Department,

> "[t]he legal office of 'fiduciary' (*see*, SCPA 1001[2]) does not include a parent or other 'natural guardian' of an infant, but refers to a court appointed legal guardian of the infant's property or person. Under *Hernandez*

> (*supra*), it is court appointment as legal guardian that is dispositive, not blood ties or natural guardianship. We thus reject defendants' assertion that plaintiff's mother was 'duty bound' to commence the action within two years of death" (*id.* at 912 [citations omitted]).

Here, even if the rationale of *Ortiz* were deemed correct, having been appointed solely as the guardian of the infant's person by the Family Court, plaintiff had no such ability to obtain letters of administration. Thus, before a personal representative of her sister's estate could be appointed, a guardian of Katrina's property first had to be appointed.

Defendants argue that relevant cases such as *Weed v St. Joseph's Hosp.* (245 AD2d 713 [1997]) and *Matter of Rivera v Westchester County Med. Ctr.* (222 AD2d 680 [1995], *lv denied* 88 NY2d 808 [1996]) do not discuss or make any distinction between guardians of the person and guardians of the property. However, there was no need to, because the operative date used in both cases was the date of the plaintiff's appointment as guardian of the property for the infant. While other cases speak of "guardians" without differentiating between the different types (*see e.g. Tuyet Ngoc Nguyen v 230 Park Invs., LLC*, 19 AD3d 295 [2005]), it is clear that the guardians referred to are considered guardians of the infant's property. Since judicial opinions should generally be read in light of their facts

(Hernandez, 78 NY2d at 691), we note that the record in *Hernandez* reflects that, although the plaintiff was simply referred to as the "guardian" in the Court's opinion, she had been appointed by the Surrogate as the guardian of both the person *and* the property of the infant.

As explained by the Court in *Henry v City of New York* (94 NY2d 275, 283 [1999]):

> "*Hernandez* concerned an 'unusual situation' where there was no personal representative of the decedent's estate and the infant sole distributee was not eligible to receive letters of administration pursuant to SCPA 707(1)(a). *No one* could commence a wrongful death action until a guardian was appointed for the infant sole distributee. Thus, the infant's disability was directly linked to identifying a prospective plaintiff (an administrator) and only the appointment of a guardian or the infant's eighteenth birthday could resolve the dilemma."

This is one of those "unusual" situations.

Since at the time of her mother's death Katrina was an infant, no one was qualified or eligible to receive letters of administration until a guardian was actually appointed for her. Thus, it is apparent that before a personal representative could be appointed for her mother's estate in order to bring the wrongful death action, a guardian of the property had to be appointed for Katrina. Upon such appointment, there existed for the first time "a potential personal representative entitled to

'commence an action' (*see*, CPLR 208; SCPA 1001[2], [6]" (*Hernandez*, 78 NY2d at 694). Thus, the infancy toll of CPLR 208 terminated August 20, 2004 upon plaintiff's appointment by the Surrogate as guardian of the property of the decedent's infant child, not April 17, 2002, when she was appointed guardian of the child's person by the Family Court. The wrongful death action filed on February 1, 2005, less than two years after plaintiff was appointed, was therefore timely commenced.

As to defendants' lack of preservation argument, plaintiff raises a legal argument that appears on the face of the record and could not have been avoided if brought to defendants' attention at the proper juncture, the record on appeal is sufficient for its resolution, and the issue is determinative (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). We decline, however, to consider the issue, again not raised below, of the effect, if any, of the adoption of Katrina's siblings in 2002 and 2004, respectively.

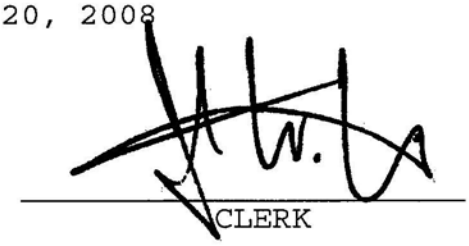
Accordingly, the order of the Supreme Court, Bronx County (Alan J. Saks, J.), entered December 7, 2006, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's wrongful death cause of action as time-barred, should be reversed, on the law,

without costs, defendants' motion denied, the cause of action for wrongful death reinstated, and the matter remanded for further proceedings.

All concur.

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

ENTERED: MAY 20, 2008



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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 20, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
James M. Catterson
James M. McGuire
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 546/05
Respondent, 6521/05

-against- 3691

Joseph Zimmerman,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (James A. Yates, J.), rendered on or about June 8, 2006,

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

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

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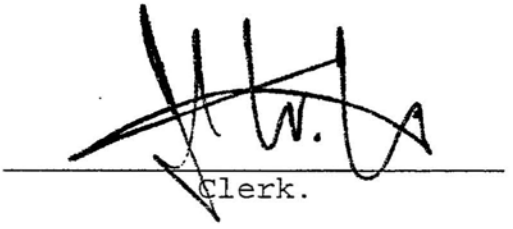

Clerk.

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