SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 20, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4601-
4601A The People of the State of New York, Respondent, Ind. 37791C/05 39324C/05

-against-

Hector Rasuk,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Alexis Pimentel of counsel), for respondent.

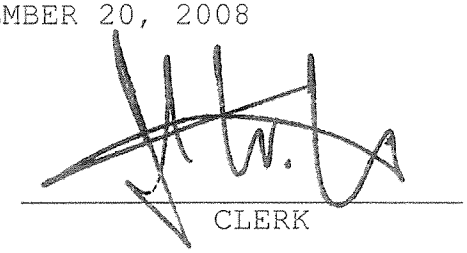
Judgments, Supreme Court, Bronx County (Richard Lee Price, J.), rendered October 18, 2007, convicting defendant, upon his pleas of guilty, of criminal possession of a weapon in the third degree and leaving the scene of an incident without reporting, and sentencing him to an aggregate term of 6 months, with 5 years' probation, unanimously affirmed.

At least when taken together, defendant's written and oral waivers establish that he made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]). That waiver forecloses review, including interest of justice review, of his suppression claims. We note as well that defendant's counsel

expressly stated that defendant was withdrawing "any and all . . . decision[s] that may be pending." As an alternative holding, we also reject defendant's suppression claims on the merits.

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

ENTERED: NOVEMBER 20, 2008



CLERK

Lippman, P.J., Mazzarelli, Buckley, DeGrasse, JJ.

4602-
4602A Philip Friedman, Index 110522/05
Plaintiff-Appellant,

-against-

Eenimon Corp., et al.,
Defendants-Respondents,

190 Riverside Drive, LLC,
Defendant.

Morrison Cohen LLP, New York (Malcolm I. Lewin of counsel), for appellant.

Goldberg Weprin & Ustin LLP, New York (Matthew Hearle of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 9, 2007, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Eenimon Corp. and WSC Riverside Owners LLC for summary judgment dismissing the complaint as against them, and upon a search of the record, granted summary judgment dismissing the complaint as against defendant 190 Riverside Drive, LLC, unanimously modified, on the law, to declare that defendants were not in default of the Offering Plan as amended, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered August 8, 2007, which denied plaintiff's cross motion for summary judgment as moot, unanimously dismissed, without costs, as abandoned.

The motion court properly determined that plaintiff tenant did not timely exercise the exclusive right to purchase his apartment under the August 1999 offering plan, and that plaintiff's "acceptance" to purchase submitted in June 2004 was materially defective in that it failed to comport with the offering plan's acceptance requirements of an executed purchase agreement accompanied by a 10% down payment. Furthermore, under the clear terms of the offering plan, a submitted acceptance was to be deemed rejected if it was not expressly accepted within 30 days. Plaintiff's argument that defendants waived their rights under the offering plan is not supported by any evidence that would indicate an intentional waiver of a known right (*see generally Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]).

We modify solely to declare in defendants' favor (*Lanza v Wagner*, 11 NY2d 317 [1962], *cert denied* 371 US 901 [1962]).

We have considered plaintiff's remaining contentions, including that there was a breach of good faith and fair dealing, and find them unavailing.

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

ENTERED: NOVEMBER 20, 2008

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4603 In re Wilfredo A.M.,

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

Myrna M.P.,
Respondent-Appellant,

MercyFirst,
Petitioner-Respondent.

Anne Reiniger, New York, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about October 3, 2006, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). Despite the diligent efforts of the agency to encourage and strengthen the parental relationship, which included arranging frequent visitation with the child and scheduling service plan reviews, respondent failed to adequately address the problems that led to

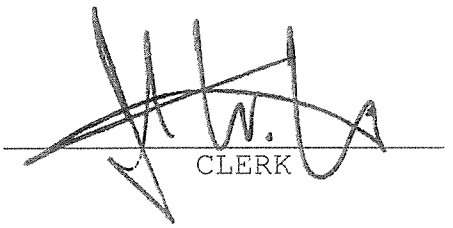
the removal of her son (*see Matter of Tashona Sharmaine A.*, 24 AD3d 135 [2005], *lv denied* 6 NY3d 715 [2006]). Respondent's attendance at individual therapy, anger management counseling and parenting-skills classes does not require a finding that she planned for her son's return (*see Matter of Nathaniel T.*, 67 NY2d 838, 841-842 [1986]; *Matter of Violeta P.*, 45 AD3d 352 [2007]). Furthermore, case records demonstrate that respondent continued to use corporal punishment inappropriately on the subject child (*see Matter of Joquan Jomaine-Anthony V.*, 39 AD3d 868 [2007]). Nor is the finding of permanent neglect undermined by the evidence that the agency took steps to arrange for a trial discharge of the child to respondent, which never materialized due to respondent's violent behavior (*see Matter of Star Leslie W.*, 63 NY2d 136, 145-146 [1984]).

The evidence at the dispositional hearing was preponderant that the best interests of the child would be served by terminating respondent's parental rights so as to facilitate the child's adoption by his foster mother with whom he has lived

almost his entire life and who tended to his special needs (*see Matter of Star Leslie W.*, 63 NY2d at 147-148; *Matter of Olivia F.*, 34 AD3d 234 [2006]). The circumstances presented do not warrant a suspended judgment.

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

ENTERED: NOVEMBER 20, 2008



Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4604 In re Cris Place, Inc., Petitioner, Index 260212/08

-against-

New York State Liquor Authority, Respondent.

Reback & Potash, LLP, Mount Vernon (Eileen J. Potash of counsel), for petitioner.

Thomas J. Donohue, New York (Scott A. Weiner of counsel), for respondent.

Determination by respondent State Liquor Authority, dated July 2, 2008, revoking petitioner's liquor license and imposing a $1000 bond forfeiture and $8,500 civil penalty, unanimously modified, on the law, the finding that petitioner suffered or permitted the licensed premises to become disorderly by engaging in or suffering or permitting the storage, possession, use or trafficking of marijuana on the licensed premises vacated, the penalty vacated, specification number 1 dismissed, the matter remanded to respondent for reconsideration of the penalty, the petition otherwise denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, Bronx County [Nelson S. Roman, J.], entered on or about July 28, 2008), otherwise disposed of by confirming the remainder of the determination, without costs.

Substantial evidence supports the findings that petitioner

permitted after-hours drinking on the premises (Alcoholic Beverage Control Law § 106[5]), and failed to conform with local ordinances and regulations (9 NYCRR 48.3) regarding locked exits (Administrative Code § 27-4259), cabaret activity (Administrative Code §§ 20-359 *et seq.*), overcrowding and hazardous conditions. No basis exists to disturb the ALJ's findings of fact as to those specifications (*see Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [2007]). By contrast, the finding that petitioner permitted disorderliness on the premises (Alcoholic Beverage Control Law § 106[6]), namely, the use of marijuana, is not supported by substantial evidence (*Matter of Albany Manor, Inc. v New York State Liq. Auth.*, __ AD3d __, 2008 NY Slip Op 08282 [Oct 30, 2008]). Petitioner was not improperly denied its right to have counsel present when the ALJ refused an adjournment based on counsel's failure to appear due to his appearance in another case, where counsel failed to provide an affidavit of actual engagement (9 NYCRR 54.3[f]) and respondent had appeared with a witness prepared to testify. Respondent properly considered petitioner's past history of sustained violations in determining the penalty, where the penalty imposed

was not for these past "causes or violations" (Alcohol Beverage Control Law § 118[2]), nor were they used to determine petitioner's guilt (*compare Greenberg v O'Connell*, 276 App Div 901 [1950]).

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

ENTERED: NOVEMBER 20, 2008

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4608 Salvatore LaMasa, et al.,
Plaintiffs-Respondents,

Index 129996/93

-against-

John K. Bachman,
Defendant-Appellant.

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for appellant.

Flomenhaft & Cannata, LLP, New York (Benedene Cannata of counsel), for respondents.

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered August 11, 2006, after a jury trial, in favor of plaintiffs and against defendant in the total amount of $2,774,460, unanimously affirmed, without costs.

On the issue of fault, the trial court correctly directed a verdict in plaintiffs' favor based on defendant's own testimony that he saw the injured plaintiff's car stopped at a red light, braked hard and shifted to low gear, but his pick-up truck skidded on the wet roadway and hit the rear of plaintiff's car. A rear-end collision with a stationary vehicle creates a prima facie case of negligence requiring a judgment in favor of the stationary vehicle unless defendant proffers a nonnegligent explanation for the failure to maintain a safe distance (*Mitchell v Gonzalez*, 269 AD2d 250, 251 [2000]). A wet roadway is not such an explanation. A driver is expected to drive at a sufficiently

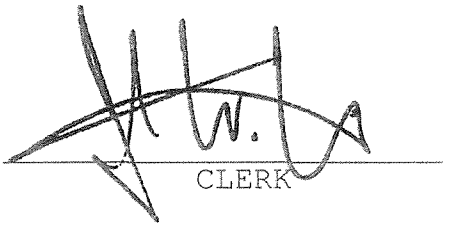
safe speed and to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions (*id.*).

On the issue of serious injury, plaintiffs' experts, relying on objective medical tests, testified to brain damage and other injuries that they attributed to trauma, and the conflicting medical evidence and opinions of defendant's experts concerning the permanence and significance of plaintiff's injuries simply raised issues of fact for the jury (*see Noble v Ackerman*, 252 AD2d 392, 395 [1998]). Concerning defendant's motion to preclude expert testimony, with respect to the nonproduction of raw data produced in tests conducted by the experts, defendant fails to show either prejudice or willful and contumacious conduct. With respect to the experts whose designations were made shortly before trial, CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time, and the court allowed defendant appropriate additional disclosure. With respect to the discrepancies between the trial testimony of some of plaintiffs' experts and their reports, defendant did not show a willful attempt to deceive or prejudice, and such discrepancies, which defendant was free to raise on cross-examination, go only to the weight, not the admissibility, of the testimony (*see Hageman v Jacobson*, 202 AD2d 160, 161 [1994]; *Dollas v Grace & Co.*, 225 AD2d 319, 321 [1996]). On the issue of foundational support for

expert opinion, while some of plaintiffs' experts relied on new technology or methodologies, the same experts also opined based on well-established and recognized diagnostic tools, and we find that they provided reliable causation opinions (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). We have considered defendant's other arguments and find them unavailing.

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

ENTERED: NOVEMBER 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 November 20, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
John T. Buckley
James M. McGuire
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 3018/06
Respondent,

-against- 4610

Raymond Richline,
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 (Renee A. White, J.), rendered on or about October 3, 2006,

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

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

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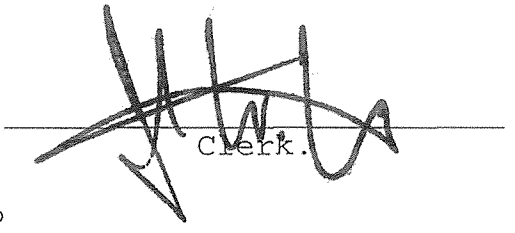


Clerk.

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

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4611 The People of the State of New York, Respondent, Ind. 19070C/05

-against-

Juan Acevedo, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered July 5, 2007, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 22 years, unanimously affirmed.

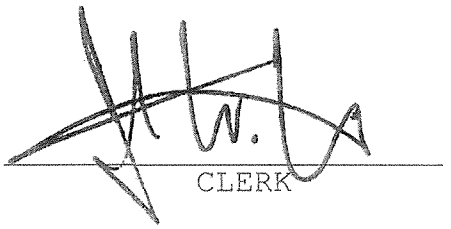
The court properly declined to submit to the jury the affirmative defense of extreme emotional disturbance. There was insufficient evidence, viewed in a light most favorable to defendant, from which the jury could find, by a preponderance of the evidence, that the elements of that defense were satisfied (*see People v Roche*, 98 NY2d 70, 75 [2002]; *People v White*, 79 NY2d 900, 903 [1992]). On the contrary, the evidence failed to establish that defendant had any reasonable excuse or explanation for his actions, which evince the planned and deliberate character of the attack; nor did the evidence show that defendant was actually influenced by an emotional disturbance at the time

of the stabbing (*White*, 79 NY2d at 903). Furthermore, defendant's post-crime conduct did not suggest extreme emotional distress, but instead suggested that he was in full command of his faculties and had consciousness of guilt (*see e.g. People v Henriquez*, 233 AD2d 268 [1996], *lv denied* 89 NY2d 942 [1997]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 20, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 20, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
John T. Buckley
James M. McGuire
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 884/03
Respondent,

-against- 4613

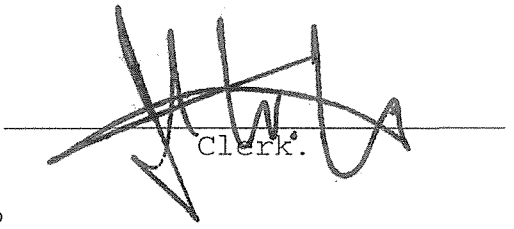
Orlando Rodriguez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered on or about July 27, 2007,

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

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

ENTER:



Clerk.

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

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4614-
4615 The People of the State of New York, Ind. 6655/06
Appellant,

-against-

Kenny Campos,
Defendant-Respondent.

Robert M. Morgenthau, District Attorney, New York (Sarah M. Zausmer of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (William A. Loeb of counsel), for respondent.

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about October 31, 2007, which, upon reargument, adhered to a prior order granting defendant's motion to suppress physical evidence and identification testimony, unanimously reversed, on the law and the facts, the motion denied, and the matter remanded for further proceedings. Appeal from the prior order, same court and Justice, entered on or about August 13, 2007, unanimously dismissed as superseded by the appeal from the later order.

A detective, who was alone and on his way to work, saw two men having an altercation. Defendant fled from the other man, stopped, turned, reached into his back pants pocket and swiped at the other man three times, causing the other man to raise his hands and back away from defendant, who then ran away. The detective pursued, stopped and handcuffed defendant; within some

15 seconds the other participant in the altercation arrived and told the detective that defendant had robbed him. An ensuing search revealed a cell phone stolen from the robbery victim and a nail file.

The hearing court concluded that the detective was entitled to stop and question defendant, but that the situation was too "ambiguous" to permit handcuffing. Accordingly, it suppressed the physical evidence and out-of-court identification as fruits of that action.

We conclude that based on his observations, the detective reasonably suspected that defendant possessed a concealed weapon (*see generally People v Cantor*, 36 NY2d 106, 112-113 [1975]), and that, upon lawfully stopping him, the detective appropriately handcuffed defendant to ensure his own safety (*see People v Foster*, 85 NY2d 1012, 1014 [1995]). The fact that the detective could not see a weapon in defendant's hand is not controlling, because the actions of the two men clearly suggested the presence of a knife or other sharp object. While defendant claims that the information presented to the detective at the time of the forcible detention suggested that defendant may have been merely defending himself with a lawfully possessed object, the circumstances were such that the detective was entitled to

protect himself before investigating that possibility (*see People v Allen*, 73 NY2d 378, 380 [1989]; *People v Benjamin*, 51 NY2d 267, 271 [1980]).

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

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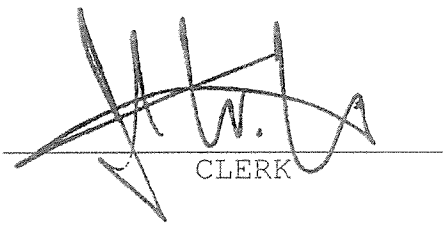


Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4616-
4616A John Coratti, et al., Index 106168/01
Plaintiffs-Appellants,

-against-

The Wella Corporation, et al.,
Defendants-Respondents.

Godosky & Gentile, P.C., New York (Brian J. Isaac of counsel), for appellants.

Segal McCambridge Singer & Mahoney, Ltd., New York (Robert R. Rigolosi of counsel), for Wella respondents.

Harris Beach PLLC, New York (Judi Abbott Curry of counsel), for L'Oreal and Cosmair, Inc., respondents.

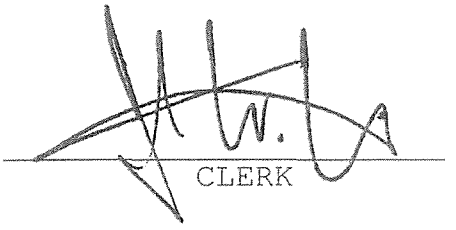
Order, Supreme Court, New York County (Walter B. Tolub, J.), entered on or about January 11, 2007, which, in an action by a hairdresser for personal injuries allegedly caused by his occupational exposure to defendants' hair coloring products, granted defendants' motions for summary judgment dismissing the complaint, and order, same court and Justice, entered on or about August 3, 2007, which, insofar as appealable, denied plaintiff's motion to renew, unanimously affirmed, without costs.

The motion court correctly found that plaintiff failed to raise an issue of fact in response to defendants' prima facie showing that the scientific community has not generally accepted plaintiff's theory that his ailments can be caused by daily, occupational exposure to the chemicals contained in defendants'

hair dyes (*see Marso v Novak*, 42 AD3d 377, 378-379). Moreover, as the motion court also pointed out, plaintiff's experts do not even attempt to show how much exposure to which chemical or chemicals, whether phenylenediamine, resorcinol or some other substance, will render an individual susceptible to toxic poisoning, the extent of plaintiff's exposure to each chemical or the quantity of each present in defendants' products (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 448-449 [2006]). Indeed, it does not even appear that any objective tests were ever performed on plaintiff to diagnose the presence of toxic agents in his body (*see Edelson v Placeway Constr. Corp.* 33 AD3d 844, 845 2006]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: NOVEMBER 20, 2008



Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4617-
4617A In re Mark Anthony McQ., II, etc.,
and Another,

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

Mark McQ.,
Respondent-Appellant,

-against-

SCO Family of Services,
Petitioner-Respondent.

Neal D. Futerfas, White Plains, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

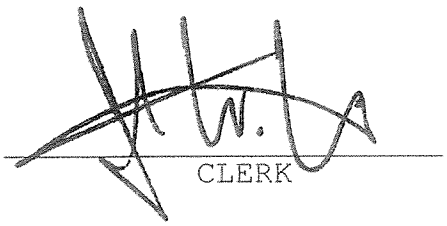
Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Colella of counsel), Law Guardian.

Appeal from orders of disposition (two papers), Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 6, 2007, which, upon respondent-appellant's default and after conducting hearings, terminated respondent's parental rights to the subject children upon findings that he violated the terms of a suspended judgment, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for purposes of adoption, unanimously dismissed, without costs.

The orders from which respondent purports to appeal were entered upon his default, and therefore are not appealable (CPLR 5511; *see e.g. Matter of Perla B.*, 48 AD3d 261 [2008]).

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

ENTERED: NOVEMBER 20, 2008



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Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4618 The People of the State of New York, Ind. 2880/06
Respondent,

-against-

Gregory Reddick,
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 (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J. on motions; Daniel P. FitzGerald, J. at plea and sentence), rendered April 12, 2007, convicting defendant of criminal possession of a forged instrument, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The motion court properly denied, without granting a hearing, defendant's motion to suppress physical evidence. The allegations in defendant's moving papers, when considered in the context of the detailed information provided to defendant, were insufficient to create a factual dispute requiring a hearing (*compare People v Long*, 36 AD3d 132 [2006], *affd* 8 NY3d 1014 [2007], *with People v Bryant*, 8 NY3d 530, 533-534 [2007]). The discovery information set forth, in detail, a sequence of events leading up to a valid search, pursuant to the automobile

exception (*see People v Cruz*, 7 AD3d 335 [2004], *lv denied* 3 NY3d 672 [2004]), of the car in which defendant was riding, and defendant failed to "either controvert the specific information that was provided by the People . . . or to provide any other basis for suppression" (*People v Arokium*, 33 AD3d 458, 459 [2006], *lv denied* 8 NY3d 878 [2007]).

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

ENTERED: NOVEMBER 20, 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 November 20, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
John T. Buckley
James M. McGuire
Leland G. DeGrasse, Justices.

The People of the State of New York, SCI 61152C/05
Respondent,

-against- 4619

Samuel Lewis,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Darcel D. Clark, J. at plea; John P. Collins, J. at sentence), rendered on or about December 21, 2006,

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

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

ENTER:

Clerk.

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

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

3562 The People of the State of New York, Ind. 877/02
Respondent,

-against-

Joseph Covel,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Elizabeth A. Walsh of counsel), for appellant.

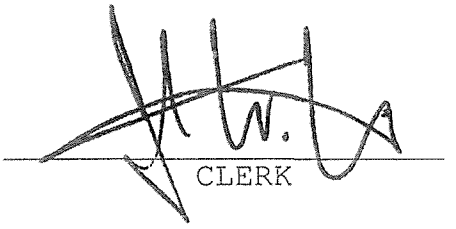
Robert M. Morgenthau, District Attorney, New York (Jessica Slutsky of counsel), for respondent.

Order, Supreme Court, New York County (James A. Yates, J.), entered on or about July 20, 2006, which denied defendant's motion for resentencing pursuant to the 2005 Drug Law Reform Act (L 2005, ch 643), unanimously affirmed.

The court properly determined that defendant was ineligible for re-sentencing (*see* Correction Law § 851[2], [2-b]; *People v Barber*, 46 AD3d 359 [2007]).

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

ENTERED: NOVEMBER 20, 2008



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

4154 The People of the State of New York, Ind. 855/05
Respondent,

-against-

Antoine Gumbs,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J., at suppression hearing; Maxwell Wiley, J., at jury trial and sentence), rendered October 18, 2006, convicting defendant of murder in the second degree, attempted murder in the second degree, and assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 25 years to life, consecutive to concurrent terms of 25 years and 7 years, respectively, unanimously affirmed.

On January 5, 2005, defendant suggested to Chad Knight and Jude Myrthil that they go to buy sneakers and other items at a particular store in Manhattan. Myrthil drove defendant's car to West 27th Street and the three men went up to the second floor of a warehouse-type building containing several stores. Defendant purchased sneakers and boots from Ali Nasserdine and began to leave with Knight and Myrthil. However, he turned around and

walked back to the store as Knight and Myrthil waited by the stairwell.

Ximena Rodriguez, an employee of Nasserdine, testified that a man fitting defendant's description tried to return a pair of sneakers but Nasserdine refused, offering instead a store credit. Defendant became enraged, drew a gun and shot Nasserdine. Although Rodriguez did not see anyone with defendant when he returned to the store, Samer El-Nader, who worked at another store some 20 feet away, testified that Knight and Myrthil were about four feet away from defendant at the time of the shooting. El-Nader also testified that he thought Knight and Myrthil were with defendant but that they did not "do or say anything at all." Rodriguez testified that the shooter stepped back in the direction of Knight and Myrthil before drawing the gun and then stepped back toward Nasserdine and shot him.

Knight testified he had not been paying much attention until defendant drew the gun. He claimed he was talking on his cell phone but did not recall with whom he had been speaking. In stark contrast to El-Nader's testimony, however, Knight swore that he and Myrthil were approximately 14 feet away from defendant when defendant drew the gun. Nasserdine died from five gunshot wounds to the head and El-Nader was shot once in the back. Knight testified that when defendant fired the first shot, he and Myrthil ran down the stairs, out of the building and

toward defendant's car. He stated that although he and Myrthil did not want to accompany defendant, they did speak with defendant in his car before they took the subway back to the Bronx without him. Knight later gave a statement to the police but omitted any mention of meeting defendant and Myrthil at defendant's car after the shooting.

A security guard in the lobby of the building testified that after hearing shots, he saw two black males run from the stairway toward the street. He heard two more shots and saw another black male exit the stairway and place a revolver in his waistband. He also testified that he thought the man with the gun caught up with the first two men and that all three walked toward Fifth Avenue.

One of the issues on this appeal concerns the denial of defendant's request to instruct the jury to deliberate whether Knight was an accomplice-in-fact whose testimony would thus require corroboration under CPL 60.22. We find that the court erred in declining to submit that issue to the jury. Such an instruction is properly denied only if there is no reasonable view of the evidence that the witness "participated in an offense based upon some of the same facts or conduct which make up the offense on trial" (*People v Berger*, 52 NY2d 214, 219 [1981]). "[I]f different inferences may reasonably be drawn from the proof regarding complicity, . . . the question should be left to

the jury" (*People v Basch*, 36 NY2d 154, 157 [1975]).

Whether the foregoing testimony was sufficient to require an accomplice-in-fact instruction is an issue we need not resolve, for there was additional highly relevant evidence. The People elicited the testimony of an informant who testified that he had gotten to know defendant well while they were in prison. In essence, the informant testified that defendant had admitted his involvement in the crime as the shooter and provided various details regarding the aftermath of the crime, details the informant himself could not have known. More importantly for our purposes, however, the informant testified that defendant "told me that he did a robbery; that his mens put him down with it" and that he, defendant, had shot two individuals.

The statement by defendant that his "mens" had "put him down with" a robbery reasonably can mean that Knight and Myrthil had alerted defendant to a robbery opportunity or that they had accused him of robbery. It is enough, however, that a reasonable understanding of that statement is that Knight and Myrthil alerted defendant to this robbery opportunity and, viewed in conjunction with the other evidence, accompanied defendant and acted as his accomplices. Indeed, the People conceded as much at oral argument. Asked if there was a reasonable view of the statement that defendant was saying his "mens" had alerted him to this robbery scenario, the assistant district attorney responded,

that, "Yes, you could look at it that way." This answer reflects appropriate candor and not any imprudent concession.

However, we also find that under the applicable standard for non-constitutional error, the refusal to give an accomplice-in-fact instruction was harmless because "the proof of guilt was overwhelming and there was no significant probability that the jury would have acquitted had the error not occurred" *People v Grant*, 7 NY3d 421, 424 [2006]. [1] Here, defendant admitted his involvement in the crime as the shooter and related details of the aftermath of the crime, as corroborated by evidence independent of Knight's testimony. Moreover, there was a wealth of other evidence aside from Knight's testimony, the cumulative effect of which was that the People provided overwhelming evidence satisfying New York's corroboration requirement, which requires "only enough nonaccomplice evidence to assure that the accomplices have offered credible probative evidence" (*People v Breland*, 83 NY2d 286, 293 [1994]).

Defendant moved to suppress a showup identification as fruit of an allegedly unlawful arrest. Any error by the motion court

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[1]Defendant never suggested at trial that there was a constitutional dimension to his claim that the issue of whether the witness Knight was an accomplice should be submitted to the jury, and thus the appellate claim of constitutional error is not preserved for review (*see People v Angelo*, 88 NY2d 217, 222 [1996]). Moreover, it is meritless in any event as the Federal Constitution does not require corroboration of an accomplice's testimony (*see Caminetti v United States*, 242 US 470, 495 [1917]).

in summarily denying the motion without granting a *Dunaway* hearing was harmless under the circumstances of the case. Defendant did not move to suppress Knight's in-court identification, and would have had no basis upon which to do so, since Knight (the same companion defendant argued should have been the subject of an accomplice charge) was well acquainted with defendant. Thus, even if the court had granted defendant a *Dunaway* hearing, and had he prevailed at the hearing, his only gain would have been suppression of the showup itself, which added precious little to the People's case.

Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. Were we to review those claims, we would find no basis for reversal (*see People v Overlee*, 236 AD2d 133, 141 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). However, some comment is warranted concerning the prosecutor's statement of personal outrage at arguments made by defense counsel on summation, where she had asserted that the prosecutors had both elicited the testimony from a witness that "they want[ed] to hear" and had failed to seek phone records that might have corroborated Knight's claim that he was talking on his cell phone "because they don't really want to know whether he really was on the phone." The prosecutor responded in his summation: "I am

outraged and insulted that [defense counsel] actually suggested this, that I have something to do with hiding evidence, in trying to frame an innocent man. That is an outrage."

Without question, defense counsel was suggesting that the prosecutors were complicit in what amounted to an effort to convict an innocent person. That suggestion invited a response, the terms of which otherwise would not be proper, by permitting the prosecutor to respond to the specter of prosecutorial misconduct injected into the case by defense counsel (*see People v Marks*, 6 NY2d, 67, 77-78, [1959], *cert denied* 362 US 912 [1960]). The prosecutor thus could not be faulted if he had characterized as outrageous defense counsel's effort to impugn his integrity in the course of advancing an argument based on rank speculation. Had he done so, the jury might well have inferred that he was outraged. But the expressed statement of his subjective state of outrage was not proper, albeit not rising to the level of reversible error.

We also reject defendant's ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *cf. Strickland v Washington*, 466 US 668 [1984]).

Finally, we see no basis for reducing the sentences imposed.

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

ENTERED: NOVEMBER 20, 2008

CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4291 The People of the State of New York, Respondent, Ind. 1440/01

-against-

Bernardo Martinaj, Defendant-Appellant.

Law Office of Richard A. Rehbock, Jericho (Richard A. Rehbock of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 23, 2002, convicting defendant, after a jury trial, of murder in the second degree and assault in the first degree, and sentencing him to consecutive terms of 25 years to life and 12½ to 25 years, unanimously affirmed.

In July, 2005, defendant moved in Supreme Court, pursuant to CPL 440.10(1)(b), (c), (g) and (h), for an order vacating the judgment of conviction. In support of the motion, defendant argued that contrary to their obligations under *Brady v Maryland* (373 US 83 [1963]), the People failed to disclose exculpatory material consisting of a police complaint follow-up report (form DD5) reciting the statement of an uncalled witness, as well as the witness's handwritten statement. As additional grounds for the motion, defendant argued that the People knowingly relied upon false testimony and that his trial attorney failed to

provide effective representation. After conducting an evidentiary hearing, Supreme Court denied the motion. In so doing, the court found that the DD5 had been turned over to the defense and, in any event, was not exculpatory.[1] The court rejected defendant's additional grounds as well. By certificate entered September 27, 2007, this Court (Kavanagh, J.) denied defendant's application for leave to appeal the CPL 440.10 determination.

In February, 2008, the People moved for an order striking defendant's brief, appendix and note of issue on the ground that the instant appeal is based upon the same grounds advanced in support of defendant's unsuccessful CPL 440.10 motion. As opposition to the motion, defendant's present counsel submitted an affidavit which reads, in part, as follows:

> "The defendant/appellant submits that the issues contained in defendant/appellant's brief previously submitted are based upon the record of the proceedings pre-trial and at the trial of this indictment which has been filed with the Court. We submit that all four issues contained therein are properly before this Court as they are all derived from the trial record and are not based upon the record of the motions filed by defendant pursuant to CPL § 440.10 and the hearings held by order of the trial court. The fact that these issues were argued in the 440 motions does not change the fact that they are before this Court as derived from the trial record below."

On February 26, this Court denied the motion to strike without

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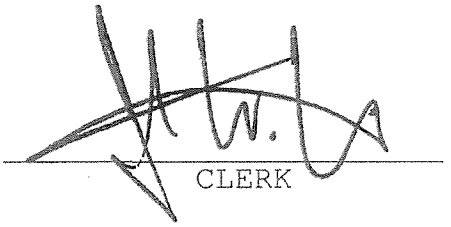
[1]Defendant's trial counsel testified at the hearing that he was in possession of a legible copy of the DD5 prior to trial.

prejudice to addressing the issue on appeal.

Defendant now raises the same arguments he unsuccessfully made in support of the CPL 440.10 motion in 2005. Moreover, the appendix he proffers consists of the record developed on the motion as opposed to the trial record. On this score, we note our displeasure with the patent falsity of counsel's affirmation as set forth above. To the extent that any of defendant's ineffective assistance of counsel claims could be viewed as based on the trial record itself, we conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: NOVEMBER 20, 2008



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

4622-
4623 The People of the State of New York, Ind. 3515/01
Respondent,

-against-

Maribel Otero,
Defendant-Appellant.

Steven M. Banks, The Legal Aid Society, New York (Andrew C. Fine of counsel), and Cahill Gordon & Reindel LLP, New York (Paul F. Millen of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered November 18, 2002, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing her to concurrent terms of 5 years, unanimously affirmed.

The court properly exercised its discretion (*see People v Williams*, 63 NY2d 882, 885 [1984]) when it granted the prosecutor's challenge for cause to a prospective juror. Although the panelist gave a general assurance of impartiality, she expressly stated her agreement with another panelist who had been unable to give an assurance of his ability to follow the court's instruction that the People were not required to prove defendant's motive (*see People v Santana*, 27 AD3d 308, 309 [2006], *lv denied* 7 NY3d 794 [2006]). The court properly

determined that the panelist at issue was just as unqualified as the other panelist, whom the prosecutor also challenged for cause, and whom defendant agreed to excuse.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory employment-based reason provided by the prosecutor for the challenge in question was not pretextual. This finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). Defendant did not establish disparate treatment by the prosecutor of similarly situated panelists.

Defendant is not entitled to reversal, or any other corrective action, as the result of the People's loss of a 911 tape that was admitted at trial as an excited utterance (*see People v Yavru-Sakuk*, 98 NY2d 56 [2002]). The content of the call is undisputed, and the speaker's excited tone of voice is sufficiently described on the present record. Accordingly, defendant has not identified any issue that this Court could not decide without listening to the tape. In any event, even if we found the tape inadmissible, we would find the error to be harmless.

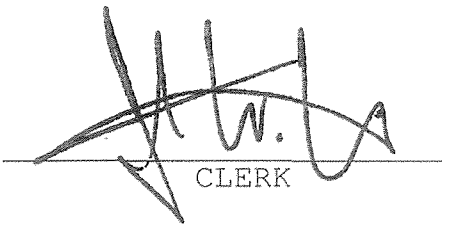
The court properly exercised its discretion in denying defendant's mistrial motion made when the prosecutor, while cross-examining defendant, asked an inappropriate question about

defendant's husband's conviction of a crime. The question, which was not inflammatory, went unanswered, and the court prevented any prejudice by way of a strong curative instruction (*see People v Santiago*, 52 NY2d 865 [1981]) that the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4624 Yong Wong Park, et al., Plaintiffs-Appellants, Index 109090/06

-against-

Wolff and Samson, P.C., et al., Defendants-Respondents.

Raymond J. Aab, New York, for appellants.

Curtis, Mallet-Prevost, Colt & Mosle LLP, New York (T. Barry Kingham of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 12, 2007, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs.

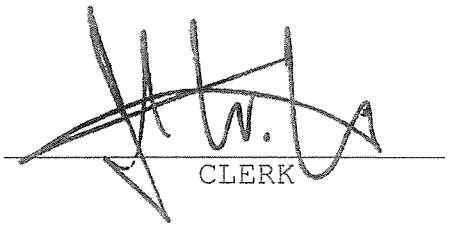
Plaintiffs' claim that defendants committed legal malpractice by advising plaintiff Yong Wong Park to plead guilty to a federal charge of trafficking in counterfeit goods without advising him of the immigration consequences of his guilty plea, or by giving him wrong legal advice about such consequences, is barred by Park's undisturbed guilty plea (*see Carmel v Lunney*, 70 NY2d 169, 173 [1987]). We reject plaintiffs' argument that innocence need not be alleged where, as here, the alleged malpractice related to a collateral matter (deportation) rather

than the core of the criminal action (*see Biegen v Paul K. Rooney, P.C.*, 269 AD2d 264 [2000], *lv denied* 95 NY2d 761 [2000]; *see also Casement v O'Neill*, 28 Ad3d 508 [2006] [guilty plea bars malpractice claim regardless of plaintiff's subjective reasons for pleading guilty]). There are other deficiencies in the legal malpractice claim requiring its dismissal: it does not allege that "but for" defendants' alleged malpractice Park would not have pleaded guilty (*see Carmel*, 70 NY2d at 173); and to the extent the claim is based on the allegation that defendants affirmatively gave Park wrong advice about the immigration consequences of a guilty plea, such allegation conflicts with, and is precluded by, contrary factual findings made in the federal proceedings in which Park sought to vacate his plea on the ground of ineffective assistance of counsel (*see Siddiqi v Ober, Kaler, Grimes & Shriver*, 224 AD2d 220 [1996], *lv denied* 88 NY2d 812 [1996]). Plaintiffs' claim for breach of fiduciary duty, based on the allegation that one of defendants falsely testified in the federal hearing that he never gave Park any advice as to the immigration consequences of a guilty plea, is likewise barred by collateral estoppel. Plaintiffs' claim for negligent infliction of emotional distress, which alleges that Park's wife and children suffered emotional distress as a result of Park's conviction, was properly dismissed for lack of an allegation showing any kind of duty owed by defendants to Park's

wife and children (*see Sheila C. v Povich*, 11 AD3d 120, 130 [2004]), and also because the alleged malpractice is not so extreme and outrageous as to be utterly intolerable in a civilized community (*see id.; Wilson v City of New York*, 294 AD2d 290, 295 [2002]).

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4625-
4625A-
4625B In re Robert K., and Others,

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

Tanya L.J.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

Randall Carmel, Syosset, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

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

Order, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about January 4, 2007, which, to the extent appealed from, upon a finding of mental illness, terminated respondent's parental rights to the subject children and committed their custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

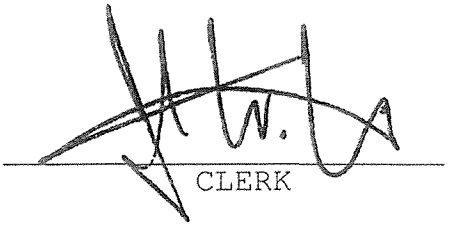
Clear and convincing evidence, including expert testimony from a court-appointed psychologist, who examined respondent for several hours and reviewed all of her available medical records, supported the determination that respondent is presently and for the foreseeable future unable, by reason of mental illness, to

provide proper and adequate care for her children (*see* Social Services Law § 384-b[4][c]; 6[a]). The psychologist testified that respondent suffered from, inter alia, a longstanding depressive disorder with chronic psychotic features. She lacked insight into her condition, was noncompliant with her medication and the prognosis for improvement in her condition was characterized as poor (*see Matter of Shanta* C., 47 AD3d 422, 423 [2008]; *Matter of Mitchell Randell K.*, 41 AD3d 119 [2007]).

Although the psychologist examined respondent almost two years prior to the fact-finding hearing, his detailed testimony supported his conclusions that due to respondent's mental illness, she was unable to parent in the present and for the foreseeable future (*see Matter of Joyce T.*, 65 NY2d 39, 45-46 [1985]). Furthermore, respondent's testimony that at the time of the hearing, she had recently participated in psychiatric counseling and started complying with drug therapy does not warrant a different conclusion.

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4626 Neal Milano, Index 103910/03
Plaintiff-Appellant,

-against-

Laboratory Corporation of America, et al.,
Defendants-Respondents.

Beranbaum Menken Ben-Asher & Bierman LLP, New York (Mark H. Bierman of counsel), for appellant.

Duane Morris LLP, Newark, NJ (Demetrios C. Batsides of counsel), for respondents.

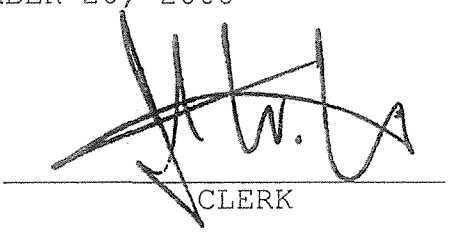
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 24, 2007, which, in an action by a former cab diver alleging negligence by defendants, a drug testing company and its employee, in administering a drug test that found cocaine in plaintiff's urine and resulted in the revocation of plaintiff's taxicab operator's license, granted defendants' motion to dismiss the complaint on the ground of collateral estoppel, unanimously affirmed, without costs.

Plaintiff raises the same issues in this action that he unsuccessfully raised and were necessarily decided in the prior fitness hearing before the Taxi and Limousine Commission (*Matter of Milano v New York City Taxi & Limousine Commn.*, 305 AD2d 326 [2003], *lv denied* 5 NY3d 707 [2005]), namely, that defendants allowed his urine specimen to become contaminated and failed to

properly document the chain of custody (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 499, 500-502 [1984]). We reject plaintiff's argument that collateral estoppel should not be applied here because TLC's determination was based on an unrebutted presumption of the test's validity (*see Matter of Wai Lun Fung v Daus*, 45 AD3d 392, 393 [2007]; *see also Matter of Allen v Police Dept. of City of N.Y.*, 240 AD2d 229 [1997]) that would not be applied by a court of law. It suffices that plaintiff was given a full and fair opportunity at the fitness hearing to show that the test was invalid because he had dropped the cup into the toilet bowl before giving the sample. We also reject plaintiff's argument that considerations of fairness weigh against application of collateral estoppel because he was "forced" to litigate in the first instance in an administrative tribunal. Nor does it avail plaintiff to argue that he did not have an opportunity to conduct discovery when he never requested discovery.

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

ENTERED: NOVEMBER 20, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 20, 2008.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
John W. Sweeny, Jr.
James M. Catterson,
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 6123/05
Respondent,

-against- 4629

Jason Hooks,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena Uviller, J.), rendered on or about March 30, 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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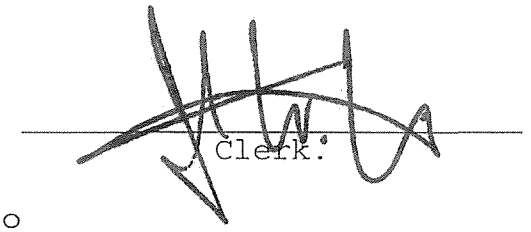


Clerk.

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

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

4630-
4630A The People of the State of New York, Ind. 41978C/05
Respondent, SCI 2437/06

-against-

Iva Gist, etc.,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

Judgments, Supreme Court, Bronx County (Troy Webber, J. and John Byrne, J. at pleas; Denis Boyle, J. at sentence), rendered on or about September 15, 2006, unanimously affirmed.

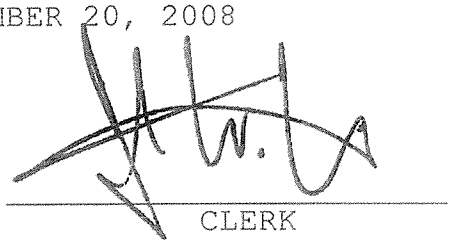
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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: NOVEMBER 20, 2008



CLERK

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

4631 Bri-Den Construction Co., Inc., Plaintiff-Appellant, Index 601513/06

-against-

Kapell & Kostow Architects, P.C., et al., Defendants-Respondents.

Feinstein & Nisnewitz, P.C., Bayside (Sheldon Feinstein of counsel), for appellant.

Wasserman Grubin & Rogers, LLP, New York (Richard Wasserman of counsel), for respondents.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered September 12, 2007, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

There is admittedly no contractual privity between the parties, and the court properly found that plaintiff contractor failed to state a cause of action under any of the theories set forth in the complaint because it failed to demonstrate the "functional equivalent of contractual privity" under the three prong test set forth in *Ossining Union Free School Dist. v Anderson LaRocca Anderson* (73 NY2d 417, 419 [1989]). In *Ossining* the Court of Appeals rejected the argument that reliance on plans and specifications included in the bid package constituted the functional equivalent of privity, holding that any asserted reliance must be by a known party and not a class of potential parties, such as future bidders. Even were we to find that a

class composed of prequalified bidders was sufficiently known for purposes of *Ossining*, the prequalified bidders were simply not "known" at the time of the complained-of conduct.

Because the complaint was properly dismissed for these reasons, we need not address the statute of limitations issue.

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

ENTERED: NOVEMBER 20, 2008

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

4632 Constantinos Mihelis, Index 120857/03
Plaintiff-Respondent-Appellant,

-against-

i.park Lake Success, LLC, et al.,
Defendants-Appellants-Respondents,

The VSA Group,
Defendant-Respondent.

- - - - -

i.park Lake Success, LLC, et al., 590346/05
Third-Party Plaintiffs-Appellants,

-against-

Professional Waterproofing & Restoration, Inc.,
Third-Party Defendant-Respondent.

- - - - -

[And a Second Third-Party Action]

Conway, Farrell, Curtin & Kelly P.C., New York (Keith D. Grace of counsel), for appellants-respondents/appellants.

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

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Douglas R. Halstrom of counsel), for The VSA Group, respondent.

Torino & Bernstein, PC, Mineola (Vincent J. Battista of counsel), for Professional Waterproofing & Restoration, Inc., respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 24, 2007, which, insofar as appealed from, denied plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim and denied the motion of defendants/third-party plaintiffs i.park Lake Success and Ball Construction for summary judgment dismissing plaintiff's common-

law negligence and Labor Law § 200 and § 240(1) claims and on their claim for contractual indemnification against second third-party plaintiff Professional Waterproofing & Restoration, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff and a coworker were working on a construction project when the roof panel on which they were standing snapped in half and collapsed, and the two men crashed to the floor below. Plaintiff was severely injured; his coworker was killed. The evidence establishing that plaintiff was not provided with any safety devices demonstrates prima facie his entitlement to judgment as a matter of law on his Labor Law § 240(1) claim (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]). In opposition, defendants failed to raise a triable issue. That there may have been safety devices "somewhere at the worksite does not establish 'proper protection'" (*id.*).

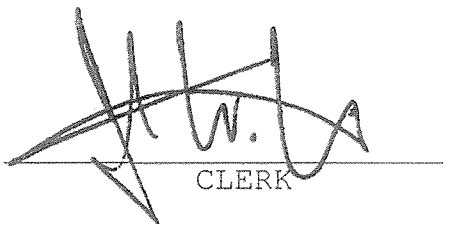
This Court's recent decision in *Jones v 414 Equities* (__ AD3d __, 2008 NY Slip Op 8197) is inapplicable to this matter. That case involved the collapse of an interior permanent floor which was not part of the demolition and renovation work being performed, and there was no evidence showing that the condition of the floor placed the workers at an elevation-related risk. Here, in contrast, the assigned task by its very nature created an elevation-related risk, in that it involved replacing

substandard precast concrete panels on the roof of a building.

In view of the evidence that defendants proceeded with the construction project despite their knowledge that the roof was in a defective condition and that at least some of the workers were not adequately protected against the dangers of the job, the court correctly denied dismissal of plaintiff's common-law negligence and Labor Law § 200 claims and denied as premature defendants' claims for contractual indemnification against Professional Waterproofing & Restoration.

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4633 Laura Mike, Index 25671/04
Plaintiff-Respondent,

-against-

Riverbay Corporation,
Defendant-Appellant.

Malapero & Prisco, LLP, New York (Glenn E. Richardson of counsel), for appellant.

Silbowitz, Garafola, Silbowitz & Schatz LLP, New York (Mitchell L. Perry of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered August 29, 2007, which, in an action for personal injuries sustained in a trip and fall on defendant premises owner's grounds, granted plaintiff's motion to reargue and renew a prior order, same court and Justice, entered January 16, 2007, granting defendant's motion for summary judgment dismissing the complaint, and, upon reargument and renewal, denied defendant's motion for summary judgment, unanimously reversed, on the law, without costs, reargument and renewal denied and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Defendant's motion for summary judgment was based on evidence that it regularly inspects its grounds for dangerous conditions, including broken keep-off-the-grass signs, and did not have notice of an object that, as described by plaintiff in

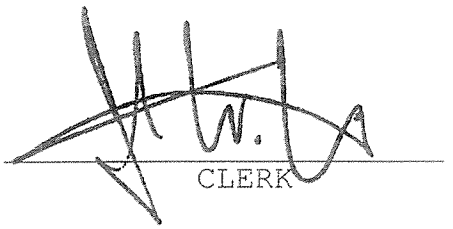
her deposition, "looked like a pipe" with jagged and rusty edges, and was "firmly embedded" in and diagonally "sticking out of the ground" in such a way as to be "camouflaged" and unnoticeable. In opposition, plaintiff submitted the affidavits of two persons stating that a "prominent and obviously dangerous" "broken metal sign pole" had been "protruding from the grass" for a period of five years before the accident. The motion court granted defendant summary judgment, observing that the affidavits of plaintiff's notice witnesses described an object different from the object described by plaintiff at her deposition. In support of reargument, plaintiff's attorney argued, in effect, that the court should have realized that the camouflaged, pipe-like object described by plaintiff, and the prominent, obviously dangerous, broken sign pole described by her notice witnesses, were one and the same. In support of renewal, plaintiff submitted affidavits of herself and the individual who was with her when she fell, to the effect that the object she tripped over was a protruding metal pole that was obscured by overgrown grass, and was therefore invisible to plaintiff. The motion court apparently granted both reargument and renewal with the single finding that "the issue of whether Defendant properly inspected its premises and should have discovered a defect that may or may not have been visible is a question of fact appropriate for a jury." Neither reargument nor renewal should have been granted. The original

motion was granted because, in opposition thereto, plaintiff's witnesses described an object that, the motion court found, was different from the object plaintiff allegedly tripped over. In support of reargument, plaintiff's attorney pointed to nothing in the record that was overlooked by the court or that indicated that the objects described by plaintiff and her notice witnesses were the same. Nor should renewal have been granted absent explanations why the evidence that the broken sign pole was so overgrown with grass as to be invisible had not been presented on the original motion, and why this purported new evidence was inconsistent with the statements of plaintiff's notice witnesses that the pole was a prominent and obvious danger (CPLR 2221[e]; *see Rubinstein v Goldman*, 225 AD2d 328, 328-329 [1996], *lv denied* 88 NY2d 815 [1996] [reargument does not provide opportunity to advance arguments different from those made on original motion, and renewal is not a second chance freely given to parties who did not exercise due diligence in making their first factual presentation]; *American Audio Serv. Bur. Inc. v AT&T Corp.*, 33 AD3d 473, 476 [2006] [no need to determine whether asserted new facts would change prior determination where due diligence not exercised on first factual presentation]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000] [no issue of fact raised

by self-serving affidavits that contradict earlier deposition testimony and were clearly tailored to avoid the consequences of earlier testimony]).

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4634 Mintz & Gold, LLP, Index 102758/07
Plaintiff-Respondent-Appellant,

-against-

Daniel Zimmerman, et al.,
Defendants-Appellants-Respondents,

Dean Evan Hart,
Defendant.

Daniel A. Zimmerman and Steven Cohn, Carle Place, appellants-respondents pro se.

Lax & Neville, LLP, New York (Barry R. Lax of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 3, 2007, which granted so much of the motion by defendants Zimmerman and Steven Cohn, P.C. to dismiss the second cause of action but denied that portion seeking dismissal of the first cause of action, unanimously affirmed, without costs.

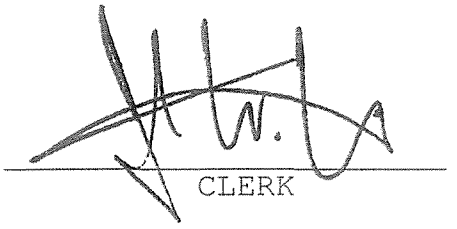
The amended complaint sets forth a cognizable cause of action under Civil Rights Law § 70. Defendants had commenced an action against plaintiff in the name of a corporation at the direction of defendant Hart, who was elected president of that corporation solely as the result of an arbitration award, enforcement of which had been stayed. During the pendency of that action, the Appellate Division, Second Department, vacated the order granting Hart's motion to compel arbitration, finding

he had waived his right to arbitration by commencing an action in court. Once the Second Department rendered its decision, the rights and duties of the parties were re-established as if no order had been made (*Golde Clothes Shop v Loew's Buffalo Theatres, Inc.*, 236 NY 465, 470 [1923]). Hart was thus no longer the elected president and lacked the authority to continue prosecuting the action. The allegation that Zimmerman and Steven Cohn, P.C. proceeded with the action maliciously, without the consent of the corporation, states a cause of action under the statute.

As to the cause of action for libel, the statements were made in the course of judicial proceedings, were pertinent to that litigation, and thus were privileged (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 172 [2007]).

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4635 The People of the State of New York, Ind. 29/07
Respondent,

-against-

Michael McCray,
Defendant-Appellant.

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

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

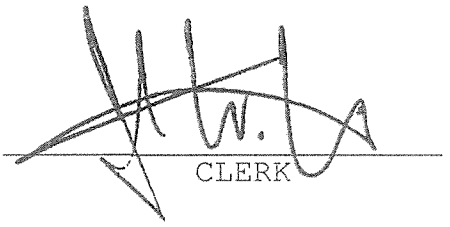
Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 25, 2007, convicting defendant, after a jury trial, of criminal sexual act in the first degree (two counts), rape in the first degree and assault in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 22 years to life, unanimously affirmed.

The court properly denied defendant's request for an intoxication charge. The evidence, viewed in the light most favorable to defendant (*see People v Farnsworth*, 65 NY2d 734, 735 [1985]), was insufficient for a reasonable person to entertain a doubt as to the element of intent on the basis of intoxication (*see People v Gaines*, 83 NY2d 925, 926-27 [1994]). While there was evidence of defendant's alcohol and marijuana consumption prior to the incident, it did not support an inference that, at

the actual time of the incident, defendant was so intoxicated as to be unable to form the requisite intent, especially since his "overall course of conduct showed that he was behaving purposefully" (*People v Manning*, 1 AD3d 241, 242 [2003], *lv denied* 1 NY3d 630 [2004]). Furthermore defendant's testimony went beyond a mere assertion "that he was aware of his actions" (*People v Perry*, 61 NY2d 849, 850 [1984]), but completely negated any intoxication defense.

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

ENTERED: NOVEMBER 20, 2008



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

4636 In re William Seery, Petitioner, Index 109156/07

-against-

The Waterfront Commission of New York Harbor, Respondent.

Silberman Law Firm, New York (Martin N. Silberman of counsel), for petitioner.

Eric Bradley Fields, New York, for respondent.

Determination of respondent Waterfront Commission of New York Harbor, dated March 23, 2007, denying petitioner's application for registration as a longshoreman and revoking his temporary registration, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Marcy S. Friedman, J.], entered February 11, 2008), dismissed, without costs.

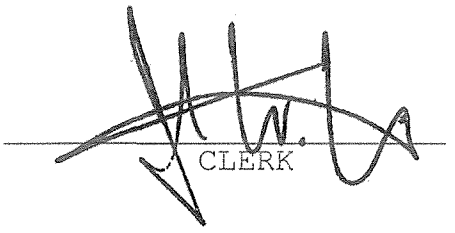
The determination is supported by substantial evidence. Respondent had the authority to deny petitioner's application and revoke his temporary registration based solely upon his prior felony conviction (*see* McKinney's Unconsolidated Laws of NY § 9829[a]; *Matter of Malverty v Waterfront Commn. of N.Y. Harbor*, 133 AD2d 558 [1987], *affd* 71 NY2d 977 [1988]; *Schultz v Waterfront Commn. of N.Y. Harbor*, 35 AD2d 373 [1970]). In light

of the above, we need not consider whether there was support for the finding that petitioner's presence at the waterfront was a danger to the public peace or safety (*see* Uncons Laws § 9829[c]). There exists no basis to disturb the hearing officer's evaluation of the evidence and the witnesses' testimony (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 444 [1987]), and, contrary to petitioner's contention, the hearing officer considered the mitigating evidence that was presented on his behalf.

The penalty imposed does not shock the judicial conscience (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237 [1974]; *Matter of Malverty v Waterfront Commn. of N.Y. Harbor*, 133 AD2d 558 [1987], *affd* 71 NY2d 977 [1988], *supra*).

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

ENTERED: NOVEMBER 20, 2008



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

4637 Amanda Williams, Index 119238/06
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent,

"John Doe," etc.,
Defendant.

Scott Baron & Associates, P.C., Howard Beach (Andrea R. Palmer of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered September 7, 2007, which granted defendant's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff was shot while she was talking to a friend on the grounds of the housing complex where she lived. Dismissal of the complaint was appropriate where, under the circumstances presented, defendant had no opportunity to control the conduct of the perpetrators (*see Hairston v New York City Hous. Auth.*, 238 AD2d 474 [1997], *lv denied* 91 NY2d 802 [1997]). Furthermore, inasmuch as the shooting occurred in the outdoor common area of the housing complex, defendant did not owe a duty to protect

plaintiff (*see Daly v City of New York*, 227 AD2d 432 [1996], *lv denied* 89 NY2d 803 [1996]; *Concepcion v New York City Hous. Auth.*, 207 AD2d 857 [1994]).

We have considered plaintiff's remaining arguments, including that the poor lighting conditions in the area where she was shot was the proximate cause of her injuries, and find them unavailing.

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

ENTERED: NOVEMBER 20, 2008

CLERK

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

4638 The People of the State of New York, Ind. 2034/04
Respondent,

-against-

Fabian Arthur,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

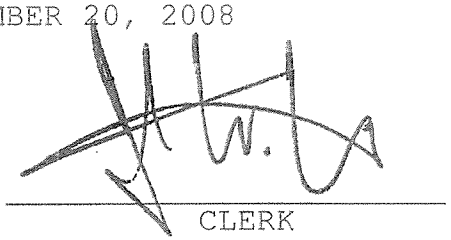
Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered March 27, 2007, convicting defendant, after a nonjury trial, of murder in the second degree, and sentencing him to a term of 15 years to life, unanimously affirmed.

The court's verdict, finding that defendant failed to meet his burden of establishing by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance (*see* Penal Law § 125.25[1] [a]), 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 credibility determinations and its evaluation of conflicting expert testimony.

Defendant's ineffective assistance of counsel argument is without merit.

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4640-
4641 The People of the State of New York, Respondent, :: Ind. 7162/03 4442/05

-against-

Courtney Wall,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki A. Scherer, J. at calendar calls; Edward J. McLaughlin, J. at plea and sentence), rendered November 18, 2005, convicting defendant of burglary in the second degree and bail jumping in the second degree, and sentencing him to concurrent terms of 6 years and 1⅓ to 4 years, respectively, unanimously affirmed.

Defendant was not deprived of his right to counsel at any stage of the proceedings. He was represented at all times by competent retained counsel. At several calendar appearances, defendant expressed his desire to retain different counsel, but did not advance any legitimate complaints about his representation. In particular, his complaint about the fact that the firm he hired supplied several different attorneys to cover calendar appearances was meritless, since there is no indication that any of these attorneys was unprepared to handle the matter

at hand. In any event, the court accorded defendant repeated opportunities to hire new counsel (*cf. People v Wilburn*, 40 AD3d 508, 509 [2007], *lv denied* 9 NY3d 883 [2007]), but he failed to do so.

It was not until the eve of trial that defendant, through his retained counsel, first requested the assignment of counsel pursuant to article 18-b of the County Law. Under the circumstances presented, the calendar court properly denied that application without inquiring into defendant's finances. Defendant never attempted to make an adequate showing of entitlement to assigned counsel (*see* CPLR 1101[a]), beyond conclusory assertions. Discharging retained counsel does not necessarily or presumptively render a client "indigent," especially since the departing lawyer is required to "refund promptly any part of a fee paid in advance that has not been earned." (Code of Professional Responsibility DR 2-110[a][3] [22 NYCRR 1200.15(a)(3)]). Furthermore, defendant did not advance any valid reason for rejecting his retained attorney's services, and, in particular, for a last-minute substitution that would have created undue delay (*see People v Arroyave*, 49 NY2d 264, 271 [1980]).

Defendant then chose to accept a plea offer, and the record establishes that the plea was entered voluntarily, with the effective assistance of the retained attorney he had sought to

discharge (*see People v Ford*, 86 NY2d 397, 404 [1995]). The sentencing court properly exercised its discretion when it denied defendant's meritless motion to withdraw his plea and properly declined to assign new counsel for purposes of that application (*see e.g. People v Rivera*, 34 AD3d 240, 241 [2006], *lv denied* 8 NY3d 926 [2007]; *People v Quintana*, 15 AD3d 299 [2005], *lv denied* 4 NY3d 856 [2005]). The purported conflicts of interest with his retained counsel were of defendant's own making (*see People v Linares*, 2 NY2d 507, 511-512 [2004]; *People v Walton*, 14 AD3d 419 [2005], *lv denied* 5 NY3d 796 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 20, 2008

CLERK

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

4642 The People of the State of New York, Ind. 418/05
Respondent,

-against-

Izmehel Marrero,
Defendant-Appellant.

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

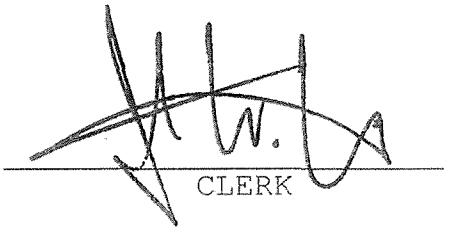
Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered December 21, 2006, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of 2 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]), particularly in view of his failure to complete a residential drug treatment program despite multiple opportunities to do so.

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4643 The People of the State of New York, Ind. 3526/81
Respondent,

-against-

Steven Callaghan,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Ruth L. Sussman, J.), entered on or about March 1, 2005, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in denying defendant a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). Defendant's conduct following his release from custody did not warrant such a departure, given the seriousness of the underlying crime and defendant's overall criminal record.

Defendant's challenges to his total presumptive risk factor score are unpreserved and, in any event, unavailing, since it is undisputed that even with the reductions he seeks, he would still qualify as a level three offender.

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

ENTERED: NOVEMBER 20, 2008

CLERK

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

4644N-
4645N Nancy Esperanza Mann, etc., et al., Index 21426/02
Plaintiffs,

-against-

The Cooper Tire Company, et al.,
Defendants.

- - - - -

Raman Mann, an Infant, by His Guardian ad litem George S. Akst, et al., 21427/02
Plaintiffs-Appellants,

-against-

The Cooper Tire Company, et al.,
Defendants-Respondents,

Nancy Esperanza Mann, etc., et al.,
Defendants.

Trief & Olk, New York (Barbara E. Olk of counsel), for appellants.

Gibson, McAskill & Crosby, LLP, Buffalo (Malcolm E. Wheeler of the New Jersey bar, admitted pro hac vice, and Brian Crosby of counsel), for respondents.

Order, Supreme Court, Bronx County (Allison Y. Tuitt, J.), entered January 14, 2008, which, in an action for personal injuries sustained in an automobile accident allegedly caused by a defective tire manufactured and distributed by defendants, granted defendants' motion to modify a "protective order of confidentiality" so as to comport with the directives of this Court on a prior appeal (33 AD3d 24 [2006], *lv denied* 7 NY3d 718 [2006], *rearg denied* 8 NY3d 956 [2007]), unanimously affirmed,

without costs. Order, same court and Justice, entered January 10, 2008, which denied plaintiffs' motion to strike defendants' answer, unanimously affirmed, without costs.

Plaintiffs contend that defendants' answer should be stricken because, consistent with defendants' previous, repeated and willful failures to comply with their disclosure obligations, defendants' motion to modify the protective order of confidentiality reviewed by this Court on the prior appeal amounted to a willful disregard of this Court's prior order directing defendants to produce requested documents forthwith and of the parties' subsequent stipulation in which defendants agreed to produce all documents required by this Court's prior order by February 28, 2007. Plaintiffs appear not to appreciate that our prior order recognized the need for a confidentiality agreement in this case, specified nine categories of documents that were not subject to confidentiality treatment, and directed certain modifications be made to the then existing confidentiality agreement (*id.* at 36-37); in short, that the confidentiality order, as originally drafted by defendants and "adopted wholesale" by the motion court, was too "draconian" in that it "permitted defendant[s] to unilaterally designate any document it chose as confidential," and should be modified as indicated. Thus, plaintiffs' claim that defendants engaged in bad faith by seeking to again impose a confidentiality order after this Court

had vacated the prior confidentiality order misconstrues our prior order. We did not vacate the original confidentiality order in its entirety, and it was not our intent, in directing defendants to produce certain documents "forthwith" (*id.* at 34), that defendants produce such documents without any confidentiality protections in place.

Nor can defendants be found to have wilfully disregarded the stipulation that required them to produce documents by February 28, 2007, where there is no evidence that defendants have willfully failed to produce documents that this Court's prior order required them to produce (*see Pimental v City of New York*, 246 AD2d 467, 468 [1998]). We reject plaintiffs' attempt on appeal to infer such willfulness by pointing to the huge discrepancy between the number of pages of documents that defendants had estimated they might have to produce to comply with this Court's prior order, offered in support of defendants' motion to reargue the prior order, and the number of pages they actually produced pursuant to the stipulation. First, the deadline in the stipulation for producing documents in compliance with this Court's prior order had not yet expired when plaintiffs made their motion to strike, and thus the motion was premature. While plaintiffs may have anticipated that defendants were not going to fully comply with the stipulation, it is speculative to argue, as plaintiffs do, that defendants' motion to modify the

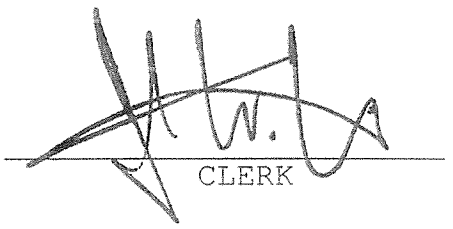
confidentiality order was a bad faith attempt to delay production of documents. What plaintiffs should have done was wait for the deadline to expire and then move to compel disclosure if they had reason to believe that identifiable documents were being withheld. Second, there is no evidence of any failure to produce identified documents required under this Court's prior order.

We also reject plaintiffs' claim that the modified confidentiality order is contrary to this Court's prior order because defendants are still permitted to designate any document they choose as confidential. The modified order, in compliance with the prior order, does not allow defendants to designate as confidential any document in any of the nine non-confidential categories specified in the prior order. The initial designation of other documents as confidential neither deprives plaintiffs of nor delays their access to any documents, since even though initially designated by defendants as confidential, the documents must be produced for plaintiffs' immediate use. If plaintiffs disagree with any of defendants' designations, they are free, under the order, to challenge defendants' designations and obtain a ruling from the court. Confidentiality orders with similar designation and challenge procedures have been routinely approved and enforced (*see e.g. Matter of World Trade Ctr. Bombing Litig.*, 298 AD2d 72, 76-77 [2002]).

We have considered plaintiffs' other arguments and find them unavailing.

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

ENTERED: NOVEMBER 20, 2008



CLERK

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

4646N Manuel De La Cruz, et al.,
Plaintiffs-Respondents,

Index 26220/02

-against-

Caddell Dry Dock & Repair Co., Inc., et al.,
Defendants-Appellants.

Blank Rome LLP, New York (Richard S. Meyer of counsel), for appellants.

Barnes, Iaccarino, Virginia, Ambinder & Shepherd PLLC, New York (James Emmet Murphy of counsel), for respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 7, 2008, which, in an action to recover prevailing wages allegedly owed to plaintiffs employees as third-party beneficiaries of contracts between defendant employer and various municipal agencies of the City of New York, denied defendants' motion to change venue to New York County, unanimously affirmed, without costs.

Although plaintiff employees may be third-party beneficiaries of the contracts between defendant employer and the City (*see* 22 AD3d 404, 405 [2005]), and, as such, bound by the terms of those contracts, the New York County forum selection clauses contained in the contracts simply do not apply to this action because, by their express terms, the clauses apply only to "claims asserted by or against the City" (*see Milnor Constr. Corp. v Board of Educ. of City of N.Y.*, 163 AD2d 282 [1990]; *L-3*

Communications Corp. v Channel Tech., 291 AD2d 276 [2002]). The parties to the contracts could easily have included language in the forum selection clauses stating that all claims by or against the employer, or all claims "arising under or related to" the contracts, must be brought in New York County, in which event the venue of this action would have to be changed to New York County (*see Buhler v French Woods Festival of Performing Arts*, 154 AD2d 303, 305 [1989]), but they did not.

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

ENTERED: NOVEMBER 20, 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, JJ.

4147-4147A-4147B
Index 109838/06
109845/06
109847/06

Michael Devore, et al.,
Plaintiffs-Appellants,

-against-

Pfizer Inc.,
Defendant-Respondent.

Plaintiffs appeal from orders of the Supreme Court, New York County (Martin Shulman, J.), entered March 22, 2007, which granted defendant's motions to dismiss the respective complaints.

Law Offices of Mark Jay Krum, New York (Mark Jay Krum of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Mark S. Cheffo, Barbara Wrubel and Mara Cusker Gonzalez of counsel), for respondent.

SAXE, J.P.

This consolidated appeal presents a choice of law question relating to three actions brought by Michigan residents, all alleging that they were physically injured in Michigan as a result of taking Lipitor, a drug manufactured by defendant Pfizer Inc., a pharmaceutical company headquartered in New York. Pfizer contends that Michigan law must be applied, while plaintiffs argue that New York law ought to be applied because the alleged tortious conduct took place in New York. If Michigan law applies, we must further consider whether a cause of action can be sustained based upon the application of an exception contained in the Michigan statute.

Plaintiffs' claim is that they suffered debilitating side effects and conditions from taking Lipitor, including myopathy, peripheral neuropathy, memory loss, and depression, which were not identified on Lipitor's label. Plaintiffs assert six causes of action against Pfizer: (1) fraud; (2) negligent representation; (3) products liability (failure to warn); products liability (design defect); (5) breach of the implied warranty of merchantability; and (6) fraudulent concealment.

Pfizer moved to dismiss the complaints, asserting that Michigan law governed plaintiffs' claims under New York choice of law rules because plaintiffs were Michigan residents claiming personal injury in their home state resulting from their use of

Lipitor in Michigan. The application of Michigan's drug products liability statute, Mich Comp Laws § 600.2946(5), Pfizer argued, requires that the actions be dismissed as a matter of law, because the statute shields pharmaceutical companies from liability in products liability actions if the suit involves an FDA-approved drug such as Lipitor.

The Michigan statute creates an immunity against a claim that an FDA-approved drug is defective, unless the plaintiff can establish that: (1) the FDA revoked its approval of the drug; or (2) the manufacturer secured FDA approval through either (a) fraud or (b) bribery. The statute provides:

> "In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller. However, this subsection does not apply to a drug that is sold in the United States after the effective date of an order of the United States food and drug administration to remove the drug from the market or to withdraw its approval. *This subsection does not apply if the defendant at any time before the event that allegedly caused the injury does any of the following*:
>
> "(a) Intentionally withholds from or misrepresents to the United States food and drug administration information concerning the drug that is required to be submitted under the federal food, drug, and cosmetic act . . . and the drug would not have been approved, or the United States food and drug administration would have withdrawn approval for the drug if the information were accurately submitted.

> "(b) Makes an illegal payment to an official or employee of the United States food and drug administration for the purpose of securing or maintaining approval of the drug" (Mich Comp Laws § 600.2946[5] [emphasis added]).

New York's choice of law analysis, commonly referred to as an "interest analysis," involves several steps and focuses on determining which jurisdiction, "because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation" (*Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993], quoting *Babcock v Jackson*, 12 NY2d 473, 481 [1963]). This analysis addresses two inquiries: "(1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law is to regulate conduct or allocate loss" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994], citing *Schultz v Boy Scouts of Am.*, 65 NY2d 189, 197 [1985]).

Loss-allocating rules apply once there is admittedly tortious conduct, while conduct-regulating rules are those which people use as a guide to governing their primary conduct (*see Schultz*, 65 NY2d at 198; *K.T. v Dash*, 37 AD3d 107, 112-113 [2006]). The Michigan statute in question, since it in effect dictates the standard of care required for a product liability claim against a pharmaceutical company (*see Taylor v Smithkline Beecham Corp.*, 468 Mich 1, 19, 658 NW2d 127, 137 [2003]), falls within the category of conduct-regulating rather than loss-

allocating. When the purpose of the statute is to regulate conduct, "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders" (*see Cooney v Osgood Mach.*, 81 NY2d at 72). The locus of a tort is generally defined as the place of the injury (*see Schultz v Boy Scouts of Am.*, 65 NY2d at 195).

Michigan has far greater significant contacts with the litigation. Not only do plaintiffs live and work there, but in addition, it is the jurisdiction where the alleged injuries occurred.

Moreover, we must recognize that the Michigan Legislature made a policy judgment intending to shield drug manufacturers from liability, and its "interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future assume critical importance and outweigh any interests of [New York State]" (*Schultz*, 65 NY2d at 198; *see also Garcia v Wyeth-Ayerst Labs.*, 385 F3d 961, 967 [6th Cir 2004]; *Rowe v Hoffman-La Roche, Inc.*, 189 NJ 615, 629, 917 A2d 767, 776 [2007]).

To the extent plaintiffs rely on *Carlenstolpe v Merck & Co., Inc.* (638 F Supp 901 [SD NY 1986], *appeal dismissed*, 819 F2d 33 [2d Cir 1987]), for the proposition that the locus of the tort is

the place where the tortious conduct occurred, their reliance is misplaced. The district court in *Carlenstolpe*, while acknowledging controlling New York law that "in a situation where the place of the allegedly wrongful behavior and the place of the injury are different, the place of the wrong is defined as the place of the injury," nevertheless applied a different rule, treating the place of the wrong as that where the defendant is present and where its allegedly wrongful behavior occurred (at 910). Not only is this reasoning unsupported in other cases, but in addition, the case the *Carlenstolpe* court cited in support, *Long v Pan Am. World Airways* (16 NY2d 337 [1965]), involved circumstances that rendered the usual "place of the injury" rule incongruous. The case arose out of an airplane crash, and the court declined to treat the location of the crash as the locus of the tort because it perceived that spot as "purely adventitious"; the court reasoned that the place of manufacture of the planes should be treated as the locus of the tort (at 342-343). Here, however, the place of injury was *not* "adventitious," and application of the general rule that the locus of the tort is the place of plaintiffs' injury is fully warranted.

Moreover, as the motion court observed, the district court's reasoning in dicta in the later case of *Doe v Hyland Therapeutics Div.* (807 F Supp 1117 [SD NY 1992]) is far more persuasive. There, in granting a forum non conveniens motion, the court

remarked:

> "Where rules of product liability are involved, we think the forum where the products are sold and consumed has the predominant interest in implementing the rules that form the basis for the "reasonable expectation of the parties" involved . . . [F]rom the perspective of influencing primary conduct, the forum where the product is sold is uniquely qualified to determine the controlling standards that reflect an equilibrium between its need for the product, and its desire to deter the sale of potentially harmful products to its citizens. Therefore . . . under a true application of the "interest analysis" approach, the law of the forum in which the products are sold should govern" (at 1130 n 16; *see also Ledingham v Parke-Davis Div.*, 628 F Supp 1447, 1452 [ED NY 1986]).

Indeed, the conclusion that Michigan law governs plaintiffs' claims is consistent with this Court's holding that where an out-of-state plaintiff was exposed to DES in states other than New York, "the substantive laws of the respective Foreign States are applicable" (*Kush v Abbot Labs.*, 238 AD2d 172, 173 [1997], quoting *Matter of New York County DES Litig.*, 223 AD2d 427, 428 [1996], *lv denied* 88 NY2d 801 [1996] ["the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred"]).

Having concluded that Michigan law applies in this action, we decline plaintiffs' request that this Court defer a ruling while the Michigan Legislature considers proposed legislation that would repeal the Michigan products liability statute (*see Rowe v Hoffman-La Roche*, 189 NJ at 630 n 1, 917 A2d at 776 n 1).

We therefore turn to plaintiffs' contention that even if

Michigan law governs their claims, Pfizer's motions to dismiss should have been denied as premature in that plaintiffs must be given the opportunity to obtain pretrial discovery in order to defeat Pfizer's immunity defense by demonstrating the applicability of a statutory exception to the liability shield.

Pfizer correctly points out that plaintiffs did not argue before the motion court that either of the exceptions applied here. Indeed, their amended complaints merely added allegations relevant to plaintiffs' contention that Pfizer's conduct and residency in New York supported their position that New York law should govern their claims. The motion court therefore had every reason to assume that no such claim was being asserted by plaintiffs. However, the failure to make such an argument is not the legal equivalent of a waiver, as Pfizer suggests, and the issue may be reviewed by this Court as a purely legal issue apparent from the face of the record (*see e.g. Bonilla v Rotter*, 36 AD3d 534, 535 [2007]).

A court considering a motion pursuant to CPLR 3211 is required to accept the allegations as true and determine whether those facts are sufficient to plead *any* cause of action (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Therefore, the motion court had the authority to determine whether the complaint's allegations were sufficient to plead that the Michigan statute did not apply because one of its exceptions was applicable,

regardless of the legal theory pressed by plaintiffs as grounds to deny the motion.

Neither the allegations of plaintiffs' complaints nor any other submissions contained in the record before us suffice to set forth a claim that Pfizer fraudulently obtained the FDA approval on which it relies. The bare assertion that Pfizer engaged in deceptive marketing and other fraudulent and/or negligent conduct in the marketing of Lipitor without adequately disclosing health risks is insufficient to entitle plaintiffs to proceed with discovery on a claim of fraud in the agency approval process. Plaintiffs take the position that their complaints "implicitly" allege that Pfizer did not fully disclose Lipitor's dangerous side effects during the FDA approval process. These assertions and suggestions neither offer the requisite particularity for a fraud claim (*see* CPLR 3016[b]) nor establish that the necessary facts are solely within Pfizer's knowledge and possession. Plaintiffs will not be allowed to use pretrial discovery as a fishing expedition when they cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions (*see Orix Credit Alliance v R.E. Hable Co.*, 256 AD2d 114, 116 [1998]).

Nor may plaintiffs rely on *Desiano v Warner-Lambert & Co.* (467 F3d 85 [2d Cir 2006], *affd sub nom Warner-Lambert Co., LLC v Kent*, __ US __, 128 S Ct 1168 [2008]) to justify their failure to

plead fraud in the FDA approval process so as to raise the applicability of the exception to the Michigan immunity statute. Even though under *Desiano* plaintiffs may not have had reason to plead fraud in the FDA approval process before defendant raised the Michigan statute's immunity defense, that defense was raised in the underlying motions, and plaintiffs failed to interpose, either by amended pleading or in opposing submissions on the motion, factual assertions that would support the application of any exception to that defense (*see Cole v Mandell Food Stores, Inc.*, 93 NY2d 34, 40 [1999]). Accordingly, we need not determine whether we agree with the Second Circuit's or the Sixth Circuit's analysis of the federal preemption issue (*compare Garcia v Wyeth-Ayerst Labs.*, 385 F3d 961 [6th Cir 2004], *with Desiano*, 467 F3d 85 [2d Cir 2006]).

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

Accordingly, the orders of the Supreme Court, New York County (Martin Shulman, J.), entered March 22, 2007, which granted defendant's motions to dismiss the respective complaints, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 20, 2008

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Angela M. Mazzarelli, J.P.
James M. Catterson
James M. McGuire
Rolando T. Acosta
Dianne T. Renwick, JJ.

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Olga Nevarez, et al.,
Plaintiffs-Respondents,

-against-

S.R.M. Management Corp., et al.,
Defendants-Appellants.

x

Defendants appeal from an order of the Supreme Court, Bronx County (Alan Saks, J.), entered October 24, 2007, which denied their motion for summary judgment dismissing the complaint.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck and Michael I. Josephs of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac and Diane K. Toner of counsel), for respondents.

RENWICK, J.

Plaintiff Olga Nevarez commenced this action seeking to recover for personal injuries sustained following a two-car accident in the vicinity of Monroe Avenue, in the Bronx, on April 9, 2006. Plaintiff testified, during her examination before trial, that immediately prior to the accident she was driving her vehicle on Monroe Avenue, a one-way street, with her daughter as a front-seat passenger and a third person as a rear seat passenger. She came to a full stop at the stop sign at the 175th Street intersection. While stopped, plaintiff looked to the right and to the left and observed no cars approaching the intersection from 175th Street. After making sure it was safe to continue, plaintiff proceeded to drive on Monroe Avenue across the intersection. As she crossed the double yellow line into the far side of 175th Street, she heard her daughter say that a car was approaching "mad fast." As plaintiff looked to the right, the front of defendants' car struck the passenger side of plaintiff's car. Plaintiff described the impact as "very heavy" and estimated that the vehicle, driven by defendant J.R. Nina Rodriguez and owned by defendant SRM Management Corp., had been traveling at approximately 40 mph.

Following joinder of issue and discovery, defendants moved for summary judgment dismissing the complaint. In support, defendants relied upon the aforementioned testimony of plaintiff

and that of Rodriguez, who provided a different version of the accident. Rodriguez testified that he was traveling on 175th Street, which was not controlled by any traffic control device. Having the right-of-way, he entered the intersection, traveling at no more than 10-15 mph. He looked straight ahead and did not observe any cars. Immediately upon entering the intersection, his vehicle struck the passenger side of plaintiff's vehicle toward the rear door. Defendants argued that plaintiff was negligent as a matter of law as the evidence established that plaintiff allegedly failed to yield the right-of-way in violation of Vehicle and Traffic Law §1140. Supreme Court denied the motion, and this appeal ensued. We now affirm.

Defendants argue that Supreme Court erred in denying summary judgment dismissing the action because plaintiffs did not rebut the presumption of exclusive liability that must be imputed to plaintiff as the driver who approached an intersection controlled by a traffic device. With regard to automobile accidents, however, this Court has repeatedly held that "[i]t cannot be said as a matter of law that [one driver's] conduct was the sole proximate cause of the accident simply because his approach into the intersection was regulated by a stop sign whereas no traffic control devices regulated [the other driver's]

approach" (*Wilson v Trolio*, 30 AD3d 255, 256 [2006]; *see also Pappalardi v Jones*, 29 AD3d 391 [2006]; *Hernandez v Bestway Beer & Soda Distrib.*, 301 AD2d 381 [2003]).

This is particularly so in this case where the conflicting deposition testimony of plaintiff and Rodriguez raises several issues of fact that preclude the granting of summary judgment. One fallacy in defendants' argument, accepted by the dissent herein, is that Rodriguez had the right-of-way. Of course, when a driver, who approaches an intersection with a stop sign, fails to yield the right-of-way to another driver who approaches the same intersection from another street without a traffic control device, he/she violates Vehicle and Traffic Law §1140 and is thus guilty of negligence as a matter of law (*see e.g. Perez v Brux Cab Corp.*, 251 AD2d 157, 159-160 [1998]).

Here, however, plaintiff has raised an issue of fact as to whether Rodriguez had the right-of-way. Plaintiff testified not only that she stopped at the stop sign, but that she observed no cars at or near the other side of the intersection before she proceeded to drive into the intersection. While Rodriguez testified that he had the right-of-way at the time he entered the intersection, the dispute about which car arrived at and left the intersection first raises factual issues to be resolved by the trier of fact. The jury is free to reject Rodriguez's allegations that plaintiff failed to properly yield to crossing

traffic before proceeding into the intersection and attribute the cause of the accident to Rodriguez's conduct of entering the intersection when he did not have the right-of-way.

Even if defendants had presented irrefutable evidence that Rodriguez had the right-of-way, they would not have been entitled to summary judgment because the record demonstrates questions of fact as to Rodriguez's comparative negligence. "[U]nder the doctrine of comparative negligence, 'a driver who lawfully enters an intersection . . . may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection'" (*Romano v 202 Corp.*, 305 AD2d 576, 577 [2003], quoting Siegel v. Sweeney, 266 AD2d 200, 202 [1999]; *see also Wilson,* 30 AD3d at 256).

These conflicting versions of the accident also raise issues of fact as to whether Rodriguez failed to use reasonable care to avoid the collision. Indeed, it is undisputed that Rodriguez's vehicle broadsided plaintiff's vehicle, which creates a reasonable probability that plaintiff's car had crossed the intersection first. If plaintiff's vehicle had already started to enter the intersection when Rodriguez approached it, Rodriguez had a duty to use reasonable care to avoid the collision.

While Rodriguez testified that he approached the intersection at no more than 10-15 mph, plaintiff has raised questions about the reliability of Rodriguez's testimony as to

his "slow" traveling speed, as suggested by plaintiff's description of the "very heavy" impact and the condition of her car after the collision. In addition, immediately prior to the collision, plaintiff's daughter observed Rodriguez's car approaching "mad fast." Under the circumstances of this case, it is for the jury to decide whether Rodriguez exercised such care as required.

Furthermore, the cases relied upon by defendants do not mandate a different result. For instance, defendants' reliance on *Dinham v Wagner* (48 AD3d 349 [2008]) is misplaced. In *Dinham*, the plaintiff was a passenger in a vehicle driven by the defendant Dinham when the vehicle collided at an intersection with a vehicle operated by the defendant Kim. Kim made a prima facie showing of entitlement to summary judgment by submitting the accident report in which Dinham admitted that she had run the red light, as well as an affidavit from Kim denying that she did anything wrong and claiming that she could not have avoided the vehicle that ran the red light. This Court found that Kim was entitled to summary judgment since the plaintiff failed to raise an issue of fact as to whether Kim was comparatively negligent. The plaintiff merely submitted an affirmation by her counsel who had no personal knowledge of the action.

Here, unlike *Dinham*, plaintiff never signed a motor vehicle accident report admitting that she ran the stop sign; instead,

she testified that she had in fact stopped at the stop sign and looked both ways before proceeding into the intersection. Moreover, plaintiff testified that it was not until she had crossed the intersection that she noticed Rodriguez's car traveling at approximately 40 mph. Thus, unlike the plaintiff in *Dinham,* plaintiff here clearly raised issues of fact as to whether she had the right-of-way when she entered the intersection and whether Rodriguez was solely at fault or comparatively negligent.

Namisnak v Martin (244 AD2d 258 [1997]), also relied upon by defendants, is readily distinguishable. In *Namisnak*, the defendant Martin testified that he did not observe Namisnak's car until it hit his truck's "rear side." This Court found the fact that Namisnak's car hit the rear side of Martin's truck "suggests that the cab of the truck had passed beyond the intersection before the accident, making it unlikely that Martin would have been unable to see the car coming off the exit ramp" [*id.* at 259]. Thus, this Court held that even if Martin was speeding, "this could not have caused the accident." (*id.* at 260).

Here, unlike *Namisnak*, the evidence suggests that plaintiff entered the intersection before Rodriguez since it is undisputed that defendant's vehicle hit the passenger's side of plaintiff's vehicle. Plaintiff also testified that she had in fact stopped at the stop sign and looked both ways before proceeding into the

intersection. Thus, unlike *Namisnak*, the evidence clearly raised issues of fact as to whether plaintiff had the right-of-way as she entered the intersection and whether Rodriguez was solely at fault or comparatively negligent.

Accordingly, the order of the Supreme Court, Bronx County (Alan Saks, J.), entered October 24, 2007, which denied defendants' motion for summary judgment dismissing the complaint, should be affirmed, without costs.

All concur except Catterson and McGuire, JJ.
who dissent in an opinion by Catterson, J.

CATTERSON, J. (dissenting)

Extensive and consistent precedent of this Court establishes that the driver of a car traveling on a dominant or through street with the right of way is entitled to presume that a driver approaching an intersection on the subservient street controlled by a stop sign will yield. Because the plaintiff failed to come forward with evidence of negligence on the part of the driver on the dominant street, I respectfully dissent.

In my view, the motion court erred in denying the defendants' summary judgment motion. The evidence establishes that the defendants' vehicle had the right-of-way and that, in violation of the Vehicle and Traffic Law, the plaintiff negligently proceeded across the roadway despite the presence of a stop sign controlling her crossing. The law is clear that:

> "[E]very driver of a vehicle approaching a stop sign shall stop ... in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two" (Vehicle and Traffic Law § 1172[a]), and "every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection." Vehicle and Traffic Law § 1142[a].

In Shea v. Judson (283 N.Y. 393, 398, 28 N.E.2d 885, 887 [1940]), cited by the plaintiff, the Court stated that:

> "Even though [the defendant] was authorized to proceed in the face of the green light, if he observed [the co-defendant] in the intersection or so near as to render it likely that a collision would occur unless [the defendant] reduced his speed or stopped his car or if the circumstances and conditions were such that, in the exercise of ordinary prudence, [the defendant] ought to have made such an observation, he was not authorized to proceed blindly and wantonly without reference to the [co-defendant's] car but was bound to use such care to avoid the collision as an ordinarily prudent man would have used under the circumstances."

The Court subsequently stated in Healy v. Rennert (9 N.Y.2d 202, 210, 213 N.Y.S. 44, 50, 173 N.E.2d 777, 781 [1961]) that:

> "A right of way, like a burden of proof, will establish precedence when rights might otherwise be balanced. It is for that reason that, even though it be established as matter of law that one party had the right of way over the other, the issue of negligence or contributory negligence may still be a question of fact inasmuch as right of way rules are seldom absolute and are usually factors entering into the general context of reasonable care" (internal quotation marks and citations omitted).

The Court in Healy cited Ward v. Clark (232 N.Y. 195, 198, 133 N.E. 443, 443 [1921]), in which Judge Cardozo noted that "[t]he supreme rule of the road is the rule of mutual forbearance."

One of the treatises on New York tort law, in citing Ward, summarizes the duties of drivers with a right-of-way as follows:

> "[W]hen statutes, regulations, or ordinances speak in terms of the 'right of way' and the duty to yield to that right, they do not set down an inflexible rule, such as when they impose speed limits or duties to stop at certain locations. Rather, the notion of a right of way is part of the common law, common-sense 'rules of the road.' Under these flexible rules, drivers must remain vigilant of other drivers, but may generally assume, absent evidence to the contrary, that another driver will also exercise vigilance and reasonable care. The granting of the right of way to a driver in a specific situation generally gives that driver a priority

> over the way in relation to other drivers in the area. Even drivers with the right of way must continue to exercise vigilance and reasonable care. Thus, if an accident occurs, the right of way acts somewhat like a rebuttable presumption of negligence on the part of the driver who did not have the right of way." Kreindler, Rodriguez, Beekman & Cook, New York Law of Torts § 12.71 (15 West's NY Prac. Series 1997).

The applicable PJI charge on this issue, 2:80A, which is based on Shea, states that:

> "As the driver traveling on the through highway, [the driver] had the right to assume that vehicles traveling on intersecting streets would obey the provisions of Vehicle and Traffic Law, Section 1142(a). However, a driver traveling on a through highway is still required to use reasonable care and may not proceed recklessly into the intersection in disregard of a vehicle traveling on an intersecting street. A driver proceeds recklessly after (he, she) knows or has reason to know that the other vehicle has entered or is about to enter the intersection without stopping."

The defendant driver, as the operator of the vehicle with the right of way, was entitled to assume that the plaintiff would obey the traffic laws requiring that she yield the right of way. Perez v. Brux Cab Corp., 251 A.D.2d 157, 159-160, 674 N.Y.S.2d 343, 345 (1st Dept. 1998); see Dinham v. Wagner, 48 A.D.3d 349, 851 N.Y.S.2d 535 (1st Dept. 2008); Aiello v. City of New York, 32 A.D.3d 361, 820 N.Y.S.2d 579 (1st Dept. 2006); Jordon v. City of New York, 12 A.D.3d 326, 784 N.Y.S.2d 861 (2004); Espinoza v. Loor, 299 A.D.2d 167, 753 N.Y.S.2d 29 (1st Dept. 2002); Namisnak v. Martin, 244 A.D.2d 258, 664 N.Y.S.2d 435 (1st Dept. 1997).

The defendant driver testified that he was driving at a reasonable rate of speed (10 to 15 miles per hour) as he

approached the intersection; that he intended to drive straight through the intersection; that the road was flat and nothing obstructed his view or distracted him as he approached the intersection; that he was looking straight ahead as he neared the intersection; and that he did not see plaintiff's vehicle before the accident. There is no evidence that the defendant knew the plaintiff's vehicle was about to enter the intersection, and, in light of the defendant's testimony indicating that he was operating his vehicle in an attentive and prudent manner, there is no evidence that he should have known that she was going to do so. In short, the mere fact that the defendant testified that he did not see the plaintiff's vehicle is not sufficient to infer, let alone establish, that he should have seen her vehicle. Thus, the defendant had no obligation to reduce his speed or take evasive action to avoid plaintiff's vehicle.

The defendants made out a prima facie case that they were not negligent and are entitled to judgment as a matter of law. See Jenkins v. Alexander, 9 A.D.3d 286, 780 N.Y.S.2d 133 (1st Dept. 2004); Murchison v. Incognoli, 5 A.D.3d 271, 773 N.Y.S.2d 299 (1st Dept. 2004). The burden then fell to the plaintiff to raise a triable issue of fact.

To the extent that the majority believes that the defendant's speed created just such an issue of fact precluding summary judgment, there simply is no support in the record for

such a claim. In her EBT, the plaintiff testified that she did not see the defendant prior to the impact; that her belief that the defendant had to be traveling in excess of 40 mph was not based on her own observations; and, that her daughter (who was not deposed) exclaimed that the defendant was "coming mad fast."

The plaintiff's daughter's statement that the defendant was "coming mad fast" is patently insufficient to raise a triable issue of fact regarding the speed of defendant's vehicle. See Murchison, 5 A.D.3d at 271 ("Plaintiff's bare speculation that defendant driver was 'going fast' is insufficient to create an issue of fact requiring trial"); Sheppeard v. Murci, 306 A.D.2d 268, 269, 761 N.Y.S.2d 244, 244 (2nd Dept. 2003) ("Contrary to the plaintiffs' contention, they failed to present evidence that the defendant operated his vehicle in a negligent manner, and any assertion that the defendant was driving 'too fast' was unsubstantiated and wholly subjective") (internal citations omitted); Wolf v. We Transp., 274 A.D.2d 514, 514, 711 N.Y.S.2d 484, 484-485 (2nd Dept. 2000) (witness' statement that vehicle "seemed to be going a little too fast... was wholly subjective, unquantifiable, and conclusory. It was thus insufficient to defeat the defendants' prima facie showing of entitlement to judgment as a matter of law") (internal citations omitted). All of this is clearly insufficient to overcome the long-established presumption that the plaintiff had the duty to yield the right of

way.

The majority errs in determining that a triable issue of fact exists regarding which driver had the right of way. Both the plaintiff and the defendant testified that the road on which the plaintiff was traveling was controlled by a stop sign and the road on which the defendant was traveling was not controlled by a traffic control device. Thus, no issue of fact exists regarding which driver had the right of way - the defendant had it (Vehicle and Traffic Law § 1172[a]; § 1142[a]) - and the only question is whether a triable issue of fact exists concerning whether the defendant was comparatively negligent. Indeed, the plaintiff's comprehensive brief focuses all but exclusively on the issue of comparative fault.

Furthermore, Wilson v. Trolio (30 A.D.3d 255, 816 N.Y.S.2d 355 [1st Dept. 2006]) and Hernandez v. Bestway Beer & Soda Distrib. (301 A.D.2d 381, 753 N.Y.S.2d 467 [1st Dept. 2003]), relied upon by the plaintiff, do not dictate a contrary result. Both cases merely stand for the benign proposition that issues of fact surrounding an accident will preclude summary judgment. Absent proof that the defendant was traveling at an excessive rate of speed or was otherwise negligent, the defendant was

entitled to summary judgment. To read anything more into either decision would put them in direct contravention of the Vehicle and Traffic Law as well as the precedent cited above.

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

ENTERED: NOVEMBER 20, 2008