SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 21, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3437 Christopher Hotaling, et al., Index 110790/00
Plaintiffs-Respondents-Appellants,

-against-

The City of New York, et al.,
Defendants-Appellants-Respondents.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for appellants-respondents.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for respondents-appellants.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered September 12, 2006, upon a jury verdict in favor of plaintiffs and against defendants, unanimously reversed, on the law, without costs, and the complaint dismissed.

Plaintiff Christopher Hotaling was severely injured while employed as a guidance counselor at Martin Luther King, Jr. High School in Manhattan, when he was hit in the head with a door while in the process of exiting the building for a fire drill. He had walked through the swinging door on the left side of a double doorway leading to a stairwell, and, as he veered right toward the down staircase, a student pushed open the swinging

door on the right side of the same double doorway, and that door struck plaintiff as it swung to the right. The basis for the jury's verdict against defendants was plaintiffs' claim that the swinging double doors were negligently designed.

The legal issue is not whether there was a way to construct the building in order to avoid any possibility of people being hit by opening doors in the manner experienced by plaintiff; it is whether the design of the building violated building safety standards applicable at the time it was built. Because such standards must take into account numerous safety concerns, they will not always be able to eliminate every source of possible injury. If a building was constructed in compliance with code specifications and industry standards applicable at the time, the owner is under no legal duty to modify the building thereafter in the wake of changed standards (*see Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1996], *affd* 89 NY2d 824 [1996]).

Plaintiffs' expert, Leonard Lustbader, did not assert that the design of the doors leading to the stairwell violated the New York City Building Code in effect when the school was constructed in 1970. Rather, the expert asserted that the design of the double doors was unsafe, because the swing of the right-hand door as it opened placed that door into the path of a person going through the left-hand door and heading to the stairwell. He further asserted that the rate of speed at which the doors opened

was excessive, because they lacked a snubbing or restricting mechanism to slow them down, and that the narrow viewing panel in the door, made of wire-reinforced glass, was unsafe because a person pushing the door open could not see clearly through it to determine whether there was a person in the way on the other side. He relied on "human factors" design standards.

Defendants' expert established, without challenge, that the building design, including the doors leading from the hallway to the stairwell, fully complied with the Building Code as it existed in 1970 when the building was built. He disputed the assertions of plaintiffs' expert that the design of the double door violated any other industry standards.

The absence of a violation of the New York City Building Code may not always establish, as a matter of law, the absence of negligent design. Especially if there is no Building Code provision directly applicable to a particular design feature, other types of industry-wide standards may be applicable to determine whether a party was negligent. In either event, however, in this matter there is insufficient support for plaintiffs' negligent design claim. Before a claimed industry standard is accepted by a court as applicable to the facts of a case, the expert must do more than merely assert a personal belief that the claimed industry-wide standard existed at the time the design was put in place. Nor are mere non-mandatory

guidelines and recommendations sufficient (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]; *Capotosto v Roman Catholic Diocese of Rockville Ctr.*, 2 AD3d 384, 386 [2003]). The expert must offer concrete proof of the existence of the relied-upon standard as of the relevant time, such as "a published industry or professional standard or . . . evidence that such a practice had been generally accepted in the relevant industry" at the relevant time (*Jones v City of New York*, 32 AD3d 706, 707 [2006]).

In *Buchholz v Trump 767 Fifth Ave., LLC* (5 NY3d 1 [2005]), the Court affirmed a grant of summary judgment dismissing the complaint of a plaintiff who had accidentally fallen through a 13th-floor window in the course of roughhousing, where the plaintiff's expert had asserted that industry standards required installation of either tempered glass or a protective barrier bar, because "[p]laintiff's expert cited no authority, treatise, standard, building code, article or other corroborating evidence to support his assertion that good and accepted engineering and building safety practices" required these measures (*id.* at 8-9).

The essence of plaintiffs' claim was the assertion by Lustbader that the design of the doors at issue deviated from "human factors" design standards. Lustbader primarily relied upon the Human Factors Design Handbook, by Woodson and Tillman, for the industry standards he applied. However, he failed to

establish that these purported standards were published, generally accepted, or even in existence in 1970. His testimony on that point was limited to his asserted "belief" that the first edition of the handbook "goes back some 30, 40 years," and that "the early versions predate 1970." However, not only did he fail to establish the existence of any such pre-1970 version, but also he did not verify that any such purported pre-1970 version contained the same standards as the later edition upon which he relied. Indeed, defendants established in their posttrial motion that the first edition of the Woodson handbook was published in 1981, rendering Lustbader's reliance on the standards set forth in the handbook inapplicable as a matter of law.

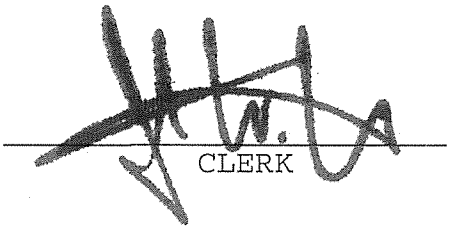
As to plaintiffs' contention that, although the handbook had not yet been published, the underlying principles were widely accepted prior to 1970, they merely cite three cases that discuss the admissibility of testimony regarding human factors standards without addressing whether the standard existed at the relevant time so as to be applicable to the facts at issue (*see Wichy v City of New York*, 304 AD2d 755 [2003]; *Nowlin v City of New York*, 182 AD2d 376 [1992], *affd* 81 NY2d 81 [1993]; *Elmlinger v Board of Educ. of Town of Grand Is.*, 132 AD2d 923, 924 [1987]). While expert testimony as to human factors design standards has been ruled admissible, nevertheless, plaintiffs' expert failed to establish that the human factors design industry standards he

relied upon were published or in general acceptance in the building construction industry in 1970.

Since the testimony of plaintiffs' expert failed to support plaintiffs' claim that the design of the doors in question violated accepted industry standards at the time the school was built, plaintiffs failed as a matter of law to make out a prima facie case of negligent design. The judgment must therefore be reversed and the complaint dismissed.

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

ENTERED: OCTOBER 21, 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 October 21, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
James M. Catterson
John M. McGuire
Rolando T. Acosta
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 5023/06
Respondent,

-against- 4306

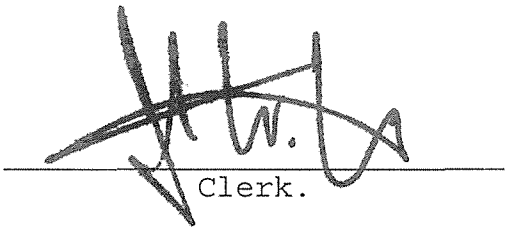
Renato Cabral, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about July 24, 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.

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4307 Annmarie Bovino, et al., Index 107005/06
Plaintiffs-Respondents,

-against-

J.R. Equities, Inc., et al.,
Defendants-Appellants,

160 West 22nd Street, LLC,
Defendant.

Law Offices of Steven G. Fauth, LLC, New York (D. Bradford Sessa of counsel), for appellants.

Frank V. Kelly, Bronx, for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered March 11, 2008, which denied defendant J.R. Equities' motion for summary judgment, unanimously affirmed, without costs.

There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises (*Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165 [2000]). The motion court properly concluded that summary judgment was inappropriate since a triable issue of fact exists regarding whether the alleged defect is actionable (*see generally Trincere v County of Suffolk*, 90 NY2d 976 [1997]). Notably, two height differentials were present at the threshold of the lobby and the stairwell, one between the lobby floor and the door saddle and another between the door saddle and the stairwell floor; there is conflicting

evidence regarding the precise degree of the height differential between the door saddle and the stairwell floor; and plaintiff's deposition testimony regarding the appearance of the threshold, which plaintiff did not see prior to her accident since the door had been closed, and pictures of the area support plaintiff's contention that the threshold of the lobby and the stairwell presented an actionable defect (*see id.* at 978; *Fasano v Green-Wood Cemetery*, 21 AD3d 446, 446 [2005] ["defendant failed to make a prima facie showing that the condition upon which the plaintiff tripped and fell, a difference in elevation between the landing of a concrete staircase and the adjoining walkway, which ranged up to two inches, for a length of approximately two feet, was trivial and nonactionable as a matter of law. The plaintiff's testimony together with photographs of the defective condition as well as all other relevant factors and surrounding circumstances demonstrated that there exist triable issues of fact"]).

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

ENTERED: OCTOBER 21, 2008

CLERK

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4308 Scharmel White, Index 116088/04
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

Joelson & Rochkind, New York (Geofrey C. Liu of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered October 9, 2007, which, in an action by plaintiff tenant against defendant landlord for personal injuries allegedly caused by wetness on an interior stairway in the parties' building, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, who allegedly slipped on a wet substance in an interior stairwell of her building, failed to adduce sufficient proof of a specific dangerous condition which caused her injury. The evidence fails to demonstrate a recurring dangerous condition, as opposed to a mere "general awareness" of such a condition, for which defendant is not liable (*see Talavera v New York City Transit Authority*, 41 AD3d 135 [2007]). Defendant's janitor testified that he strictly followed the janitorial

schedule that was marked as an exhibit as his deposition, according to which, on the day of the accident (the accident occurred that evening), he would have "swept down" all the staircases in the morning, removing "gum, feces, etc.," and "walked down" the stairs in the afternoon, removing "any and all debris" and informing his supervisor "of any and all unusual conditions in the building." The supervisor submitted an affidavit stating that he searched his logbooks for the three-month period prior to the accident and found no reports of any wet conditions in the stairwells by either his staff or the tenants. Moreover, the affidavits which were submitted to rebut defendant's prima facie showing of summary judgment were "conclusory and bereft of any detail" (*see Kelly v Berich*, 36 AD3d 475 [2007), insufficient to raise a triable issue of fact regarding constructive notice, and conflicted with plaintiff's previous sworn testimony (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [2000]).

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

ENTERED: OCTOBER 21, 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 October 21, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
James M. Catterson
James M. McGuire
Rolando T. Acosta
Dianne T. Renwick, Justices.

In re Matthew M.,

A Person Alleged to be
a Juvenile Delinquent, 4310
Appellant.

- - - - - -

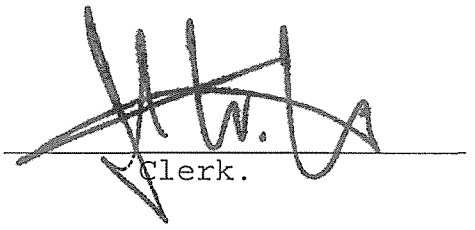
Presentment Agency

An appeal having been taken to this Court by the above-named appellant from an order of disposition of the Family Court, New York County (Mary E. Bednar, J.), entered on or about February 4, 2008,

And upon the stipulation of the parties hereto dated October 3, 2008,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:



Clerk.

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4311 The People of the State of New York, Ind. 6192/00
Respondent,

-against-

Stokley Davis,
Defendant-Appellant.

Michele Hauser, New York, for appellant.

Order, Supreme Court, New York County (Edwin Torres, J.), entered on or about February 9, 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: OCTOBER 21, 2008

CLERK

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4313 The People of the State of New York, ex rel. Darrell Clinton, Petitioner-Appellant, Ind. 51114/06

-against-

Warden, Rikers Island Correctional Facility, et al., Respondents-Respondents.

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

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

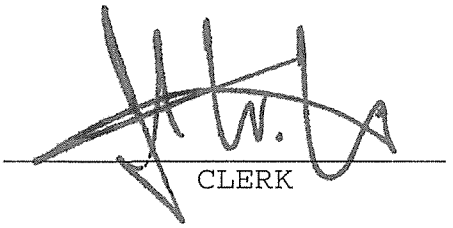
Order, Supreme Court, Bronx County (Judith Lieb, J.), entered May 30, 2006, which denied and dismissed petitioner's application for a writ of habeas corpus, unanimously affirmed, without costs.

On December 13, 2005, respondent Division of Parole requested an adjournment of petitioner's final parole revocation hearing. When the court proposed adjourning the hearing to January 9, 2006, petitioner's counsel informed the court he would be away that week, and did not object when the court stated that the next available date was January 30 and that the 21-day period from January 9 to January 30 would be charged to petitioner. Accordingly, petitioner's claim that the 21-day period was improperly excluded in determining whether his final hearing was held within 90 days of his waiver of his right to a preliminary

hearing, is unpreserved (*see People ex rel. Williams v Allard*, 19 AD3d 890 [2005]), and we decline to review it.

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

ENTERED: OCTOBER 21, 2008



CLERK

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4314 Gail Silberman, Index 104261/05
Plaintiff-Appellant,

-against-

Reisman, Abramson, P.C., et al.,
Defendants-Respondents.

Sylvain R. Jakabovics, New York, for appellant.

The McDonough Law Firm, L.L.P., New Rochelle (Michael J. Raneri of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered July 20, 2007, which, in an action for legal malpractice arising out of defendants' representation of plaintiff in a workers' compensation proceeding, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

While an issue of fact exists as to whether defendants were negligent in failing to obtain plaintiff's medical records relating to the intervening 1990 accident, plaintiff adduces no evidence that but for such negligence the Board would not have rejected her reopened claim for the 1983 accident (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 67 [2002]). There is simply nothing in the record to indicate the content of the medical records in question, and whether, as plaintiff claims, they would have shown that the intervening accident had no effect on her claimed present inability to work.

Failure to demonstrate an issue of fact as to proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent (*id.*). We have considered plaintiff's other arguments, including that defendants' failure to obtain the medical records should be sanctioned as a form of spoliation, and find them unavailing.

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

ENTERED: OCTOBER 21, 2008

CLERK

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4315 In re Heather G.,

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

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

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

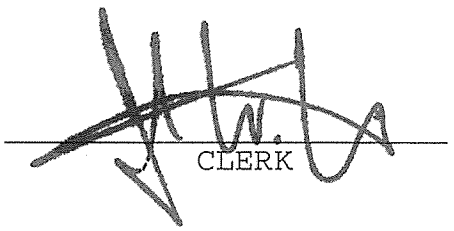
Order of disposition, New York County (Mary E. Bednar, J.), entered or about December 20, 2006, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she committed an act which, if committed by an adult, would constitute the crime of attempted assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

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

appellant attacked the victim with intent to cause injury and without justification.

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

ENTERED: OCTOBER 21, 2008



Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4317 Carlton Foster, Index 111489/07
Petitioner,

-against-

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

Beldock Levine & Hoffman LLP, New York (Jonathan C. Moore of counsel), for petitioner.

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

Determination of respondent Commissioner, dated April 26, 2007, terminating petitioner's employment as a police officer, unanimously confirmed, the petition denied, and this CPLR article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Shirley Werner Kornreich, J.], entered March 3, 2008), dismissed, without costs.

The findings that petitioner made false and misleading statements to Department investigators and attempted to influence the testimony of a witness in an official investigation are supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). There is no basis for disturbing the hearing officer's findings of credibility (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). The penalty of dismissal from employment does not shock

the judicial conscience (*see Matter of Kelly v Safir*, 96 NY2d 32 [2001]).

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

ENTERED: OCTOBER 21, 2008

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4319 The People of the State of New York, Ind. 2279/03
Respondent,

-against-

Sultan Al Sabah Dantata,
Defendant-Appellant.

Jason L. Russo, Hempstead (Patrick Michael Megaro of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 13, 2004, convicting defendant, after a jury trial, of grand larceny in the second and third degrees and scheme to defraud in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 11 to 22 years, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence of defendant's guilt, including his own admissions, and there is no basis for disturbing the jury's determinations concerning credibility. The evidence established that defendant made

misrepresentations to his victims as to his status for the purpose of obtaining loans that he never intended to repay, as well as making other thefts.

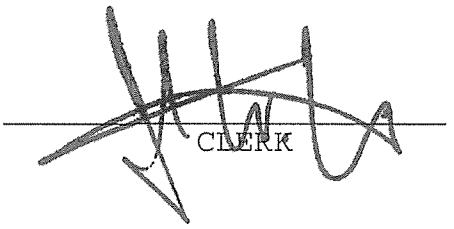
Defendant did not preserve his claim that the People failed to lay a satisfactory foundation for the introduction of physical evidence found in his apartment and identified by the victims as items he used in misrepresenting his status and identity, and we decline to review it in the interest of justice. As an alternative holding, we find it without merit. Since the victims' testimony sufficiently authenticated these items, there was no need to also establish a chain of custody (*see People v Javier*, 210 AD2d 118 [1994], *lv denied* 85 NY2d 863 [1995]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters outside the record concerning counsel's strategic decisions (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective

assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 21, 2008



Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4320 Graham, Campaign P.C., et al., Index 117568/05
Plaintiffs-Appellants,

-against-

Cynthia Fareed,
Defendant-Respondent.

Susan E. Esterhay, New York (David Arens of counsel), for appellants.

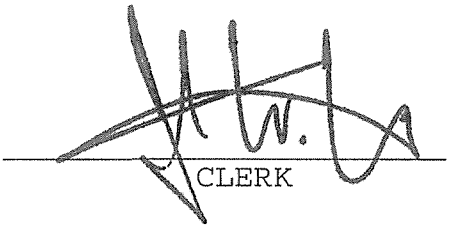
Morelli Ratner, P.C., New York (Scott J. Kreppein of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered April 13, 2007, which, to the extent appealed from, granted defendant's motion to dismiss the first cause of action, unanimously reversed, on the law, without costs, the motion denied and the first cause of action reinstated.

Plaintiffs' allegations are not "inherently incredible" and thus do not warrant dismissal at the pleading stage.

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

ENTERED: OCTOBER 21, 2008



Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4321 Adelaida Santos, Index 23983/04
Plaintiff-Appellant,

-against-

Tomas Taveras,
Defendant-Respondent.

Joseph T. Mullen, Jr. & Associates, New York (Neil A. Zirlin of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered May 21, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly granted defendant's motion for leave to move for summary judgment more than 120 days after the filing of the note of issue (CPLR 3212[a]; *see Pippo v City of New York*, 43 AD3d 303, 303-304 [2007]).

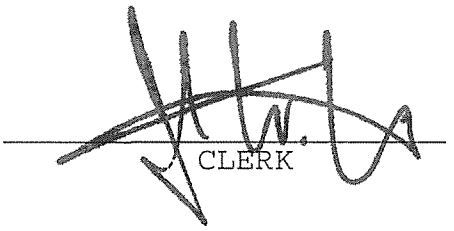
Defendant established prima facie that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d), by submitting a physician's affirmation reporting findings of a normal range of motion of the cervical spine and a mild "self-imposed" limitation of range of motion of the lumbar spine (*see Style v Joseph*, 32 AD3d 212, 214 n [2006]). In opposition, plaintiff failed to raise a triable factual issue.

She presented no objective medical evidence of any injury to her lumbar spine. The only MRI study thereof was performed in July 2005, nearly one year after the accident, and the first documentation of any limitation corresponding to the findings of that study was made in December 2006, two years and four months after the accident and thus too remote to raise an inference that the limitation was caused by the accident (*see Lopez v Simpson*, 39 AD3d 420, 421 [2007]). Moreover, plaintiff failed to explain adequately the cessation of her treatment (*see Pommells v Perez*, 4 NY3d 566, 574-575 [2005]). Plaintiff's small, well-healed scars do not constitute a "significant disfigurement" within the meaning of the statute (*see Hutchinson v Beth Cab Corp.*, 207 AD2d 283, 283-284 [1994]).

Plaintiff also failed to submit competent medical evidence substantiating her 90/180-day claim.

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

ENTERED: OCTOBER 21, 2008



Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4323 Myrtle Kaplan, Index 102080/06
Plaintiff-Appellant,

-against-

New York Mercantile Exchange,
Defendant-Respondent.

Charlotte Croman, New York, for appellant.

Law Offices of Bruce A. Lawrence, Brooklyn (William J. Balletti of counsel), for respondent.

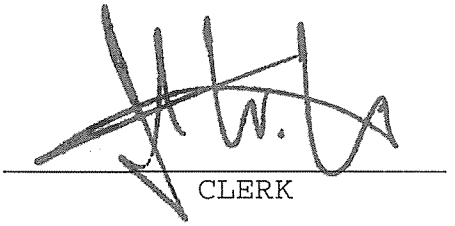
Order, Supreme Court, New York County (Louis B. York, J.), entered February 20, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant leased commercial property from Battery Park City. Defendant owed no duty to plaintiff to maintain the area outside the boundaries described in the lease. Absent evidence that defendant occupied, controlled or was responsible for maintaining the area where plaintiff fell, it cannot be liable for plaintiff's injuries (*see Richardson v Lennox Terrace Dev. Assoc.*, 41 AD3d 108, 109 [2007]; *Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [2005]).

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

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

ENTERED: OCTOBER 21, 2008



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Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4325 The People of the State of New York, Ind. 914/07
Respondent,

-against-

Robert K. Warfield,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Edward A. Jayetileke of counsel), for respondent.

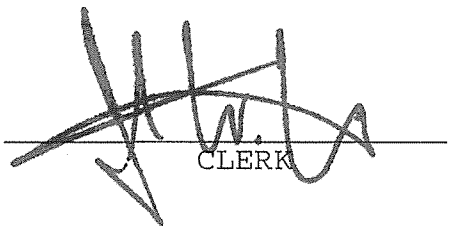
Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered October 9, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). We do not find the police testimony at the suppression hearing to be implausible or materially inconsistent with the testimony before the grand jury. Defendant's behavior provided a sufficient basis for the

protective actions taken by the officers (*see People v Benjamin*, 51 NY2d 267, 271 [1980]).

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

ENTERED: OCTOBER 21, 2008



Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4326 Double Fortune Property Investors Corp., etc.,
Plaintiff-Respondent,

-against-

Michael R. Gordon,
Defendant-Appellant. Index 602568/07

K&L Gates LLP, New York (Michael R. Gordon of counsel), for appellant.

Raymond W.M. Chin, New York (Joseph Milano of counsel), for respondent.

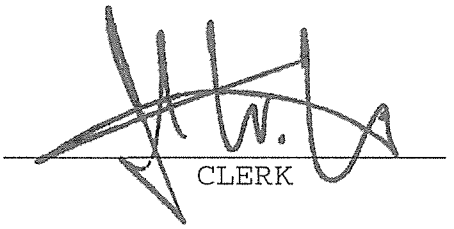
Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 10, 2008, which denied defendant escrow agent's motion to strike the complaint and granted plaintiff's cross motion for summary judgment on its claim for return of the escrowed funds, unanimously affirmed, with costs.

The escrow agreement contained no definite term and therefore was terminable at will (*Interweb, Inc. v iPayment, Inc.*, 12 AD3d 164 [2004], *lv dismissed* 4 NY3d 776 [2005]). Defendant failed to identify any facts in plaintiff's exclusive possession that might have precluded summary judgment pursuant to CPLR 3212(f). Given that plaintiff merely terminated an at-will contract, defendant failed to raise an issue of fact as to his affirmative defenses of estoppel, waiver, laches, or unclean hands (*see id.*). Defendant's contentions concerning his defense of failure to state a cause of action are unavailing.

Plaintiff having responded to defendant's discovery requests, the proper course for defendant, rather than moving to strike the complaint pursuant to CPLR 3126, was first to move to compel further discovery pursuant to CPLR 3124 (*see Barber v Ford Motor Co.*, 250 AD2d 552 [1998]).

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

ENTERED: OCTOBER 21, 2008



CLERK

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4327 Anthony J. DeCintio, etc., et al., Index 20837/98
Plaintiffs-Appellants,

-against-

Lawrence Hospital, et al.,
Defendants,

Richard DeLuca, M.D., et al.,
Defendants-Respondents.

Anthony J. DeCintio, Tuckahoe, appellant pro se and for appellants.

Bower & Lawrence, P.C., New York (Carol S. Blatt of counsel), for respondents.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered December 8, 2006, granting the motion of defendants DeLuca, Albin and Klapper for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Plaintiffs' expert's conclusory affidavit in response to defendants' prima facie showing of entitlement to summary judgment failed to raise a triable issue of fact as to whether decedent was treated by defendants without informed consent (*see* Public Health Law § 2805-d[1], [3]; *Aharonowicz v Huntington Hosp.*, 22 AD3d 614, [2005]). The affidavit offered no particulars as to how the failure to inform decedent's health care representative of alleged instances of anaphylactic shock or ventricular fibrillation might have impacted on decedent's

medical treatment and proximately caused her injury (*see DeCintio v Lawrence Hosp.*, 33 AD3d 629 [2006]).

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

ENTERED: OCTOBER 21, 2008

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4329 Clara Caldwell, et al., Index 108531/06
Plaintiffs-Appellants,

-against-

Gumley-Haft L.L.C.,
Defendant-Respondent.

William D. Fireman, P.C., New York (William D. Fireman of counsel), for appellants.

Braverman & Associates, P.C., New York (Andreas E. Theodosiou of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 5, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

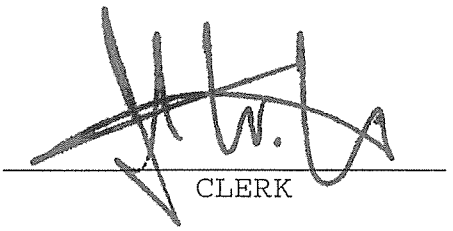
Plaintiffs failed to present evidence raising a triable issue of fact as to whether defendant was affirmatively negligent or in complete and exclusive control of the building (*see Pelton v 77 Park Ave. Condominimum*, 38 AD3d 1, 11-12 [2006]; *Gardner v 1111 Corp.*, 286 App Div 110 [1955], *affd* 1 NY2d 758 [1956]). Defendant established it did not have complete and exclusive control of the sponsor's building, it acted solely as the sponsor's agent, and was not liable for potentially negligent acts of the sponsor.

Plaintiffs failed to plead a cause of action for fraud with sufficient particularity (CPLR 3016[b]). Although they alleged

defendant's representations were false, there was no factual support for that assertion, or for any of the other elements of fraud (*see Friedman v Anderson*, 23 AD3d 163, 166-167 [2005]).

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

ENTERED: OCTOBER 21, 2008



CLERK

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4330-
4330A Peter A. Lusk, Index 350151/98
Plaintiff-Appellant,

-against-

Catherine G. Lusk,
Defendant-Respondent.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for appellant.

Mayerson Stutman Abramowitz Royer LLP, New York (Alton L. Abramowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered November 13, 2007, awarding defendant recovery from plaintiff in the amount of $649,901.79, plus interest, and bringing up for review an order, same court and Justice, entered August 22, 2007, which, inter alia, granted defendant's motion to direct plaintiff to remit to her 50% of the parties' 1997 federal income tax refund, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Section 8.4 of the parties' separation agreement provides, "If a tax refund or credit is due for any joint return filed by the parties, such refund or credit shall be divided equally by the parties." The subject refund was issued for the 1997 tax year, for which year the parties filed a joint federal income tax return. Accordingly, defendant is entitled to half of the refund

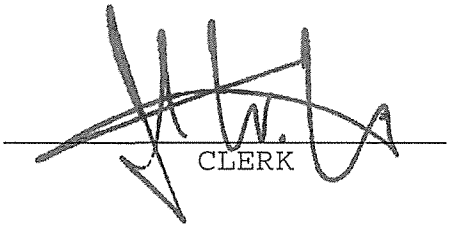
(*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

We reject plaintiff's argument that, because the refund resulted from post-divorce business losses that were carried back to 1997, the refund is his separate property and not marital property to which defendant has a claim. The disposition of the tax refund is governed by the parties' separation agreement (*see Matter of Meccico v Meccico*, 76 NY2d 822 [1990]). Nor is the agreement ambiguous merely because it does not address the specific contingency of a tax refund obtained as a result of the filing of a post-divorce, amended return (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Extrinsic evidence as to the parties' intent is therefore inadmissible (*id.*).

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

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

ENTERED: OCTOBER 21, 2008



Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4331 Henderson Greaves, Index 107729/06
Plaintiff-Appellant-Respondent,

-against-

Obayashi Corporation, et al.,
Defendants-Respondents-Appellants,

EIC Associates, Inc.,
Defendant.

[And a Third-Party Action]

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

Zaklukiewicz Puzo & Morrissey, LLP, Islip Terrace (Stephen Zaklukiewicz of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 19, 2007, which, to the extent appealed from, denied the motions by the respective parties to this appeal for summary judgment as to Labor Law § 240(1) liability, and granted summary judgment to defendants on plaintiff's Labor Law §§ 200 and 241(6) claims, unanimously modified, on the law, plaintiff granted summary judgment as to liability on his § 240(1) claim, and otherwise affirmed, without costs.

Plaintiff was standing on a scaffold, while working on a portion of a concrete wall, when the wall collapsed. Concrete blocks fell against the scaffold, knocking it over and causing plaintiff to fall to the ground, where blocks fell on top of him, causing injury. The portion of the wall where plaintiff was

working was neither braced nor secured.

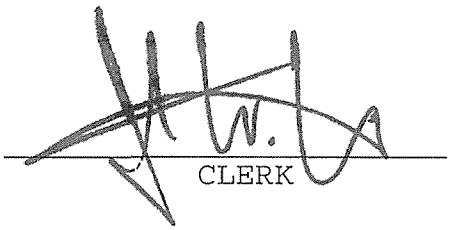
The accident clearly fell within the scope of Labor Law § 240(1), as the evidence shows plaintiff was struck by falling objects that could have been, but were not, adequately secured by one of the devices enumerated in the statute (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513-514 [1991]). His prima facie showing was not rebutted by defendant property owners and general contractor, thus entitling him to summary judgment against them (*Williams v 520 Madison Partnership*, 38 AD3d 464 [2007]; *Boyle v 42nd St. Development Project Inc.*, 38 AD3d 404 [2007]; *LaFleur v Consolidated Edison Co. of N.Y.*, 221 AD2d 250 [1995]).

Plaintiff's claim under § 241(6) may not be premised upon alleged violations of Industrial Code (9 NYCRR) §§ 23-5.1(c) and 23-5.4(a). The first of these Code sections is insufficiently specific to support a § 241(6) claim (*see Moutray v Baron* (244 AD2d 618, 619 [1997], *lv denied* 91 NY2d 808 [1998]), and the second addresses standards for a tubular welded frame scaffold, which plaintiff failed to demonstrate was in use at the time of his injury. None of plaintiff's remaining arguments regarding § 241(6), nor his claim against the general contractor under Labor Law § 200, were raised in Supreme Court, and are thus

unpreserved for appellate review (*see Laboda v VJV Dev. Corp.*, 296 AD2d 441 [2002]; *Charles v City of New York*, 227 AD2d 429, 430 [1996], *lv denied* 88 NY2d 815 [1996]). Were we to review them at this time, we would find them unavailing.

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

ENTERED: OCTOBER 21, 2008



Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4332 In re Hitachie S.,

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

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

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

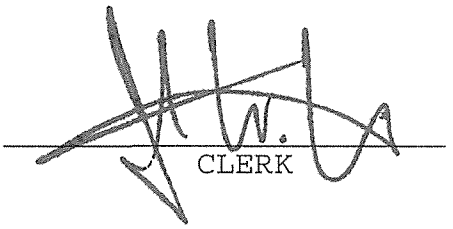
Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about November 5, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she had committed an act, which, if committed by an adult, would constitute assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

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

that the assault was intended to cause physical injury and was without justification.

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

ENTERED: OCTOBER 21, 2008



Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4333 Bryan Stephens, et al., Index 124384/02
Plaintiffs-Respondents,

-against-

The Triborough Bridge and Tunnel Authority,
Defendant-Appellant.

Lifflander & Reich LLP, New York (Kent B. Dolan of counsel), for appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 22, 2007, which denied defendant's motion for summary judgment dismissing plaintiffs' Labor Law §§ 240(1) and 241(6) causes of action, unanimously modified, on the law, to reflect the court's denial in its decision of defendant's motion for summary judgment on the § 241(6) claim only with respect to Industrial Code (12 NYCRR) §§ 23-1.7(b)(1)(iii)(c), 23-1.16(b), and 23-5.1(j)(1), and otherwise affirmed, without costs.

Plaintiff Bryan Stephens, while working at the Triborough Bridge, allegedly fell from a prefabricated temporary stairway as he and his foreman were attempting to attach the stairwell to the bridge's anchorage. Plaintiff maintains that the stairway moved away from the anchorage, causing him to fall partially into the gap created between the anchorage and the stairway. An injured plaintiff is not required to show that the he fell completely off

an elevation device to the floor (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [2004]; *Pesca v City of New York*, 298 AD2d 292, 293 [2002]); however, plaintiff's inconsistent statements regarding how this incident occurred present issues of fact that cannot be resolved on a motion for summary judgment (*see Jones v West 56th St. Assoc.*, 33 AD3d 551 [2006]).

The court properly found issues of fact precluding summary judgment on plaintiffs' § 241(6) claim to the extent it was based on still contested violations of Industrial Code (12 NYCRR) §§ 23-1.7(b)(1)(iii)(c), 23-1.16(b), and 23-5.1(j). We note, however, that the court's decretal paragraph included these sections among those on which defendant's motion to dismiss was granted.

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

ENTERED: OCTOBER 21, 2008

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4334 In re Veronica C., Index 101815/08
Petitioner,

-against-

Gladys Carrión, as Commissioner of the New York State Office of Children and Family Services, et al.,
Respondents.

Debevoise & Plimpton LLP, New York (Claudio D. Salas of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (David Lawrence III of counsel), for respondents.

Decision after hearing on behalf of respondent Commissioner, dated October 4, 2007, finding petitioner to have committed maltreatment of a child, unanimously annulled, on the law and the facts, the petition in this CPLR article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Walter B. Tolub, J.], entered May 12, 2008), granted, without costs, and the report of maltreatment amended to "unfounded" and sealed.

The administrative determination was not supported by substantial evidence. While there was sufficient evidence that the child suffered an injury that would not ordinarily occur without a failure to supervise him (*see* Family Court Act § 1046 [a][ii]), there was no evidence to demonstrate how or when the injury occurred, and it could not be determined on this record

who the child's caretaker was at the time of the injury. Since the evidence at the hearing established that both the child's parents and petitioner acted as the caretakers within the 24 hours preceding the diagnosis of multiple lacerations to his hands, ACS failed to establish a prima facie case against anyone in particular (*Matter of Tony B.*, 41 AD3d 1242, 1243 [2007]).

The only evidence submitted at the hearing to support the conclusion that the injury occurred while the child was in petitioner's care was hearsay. Specifically, the evidence consisted of case notes provided by the Administration for Children's Services, which contained an unsworn account from the child's father. Notably, neither the ACS caseworker nor the father testified at the hearing.

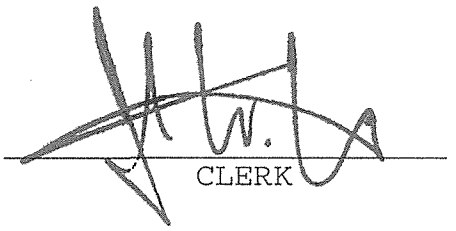
While it was proper for respondents to rely on hearsay evidence that is relevant and probative, on this record, such hearsay did not constitute substantial evidence of child maltreatment (*see Matter of Hattie G. v Monroe County Dept. of Social Servs.*, 48 AD3d 1292, 1294 [2008]). Indeed, since ACS's hearsay evidence was seriously controverted by petitioner's sworn testimony, which was subject to cross-examination, it did not amount to the substantial evidence necessary to support respondents' determination (*see Matter of Ridge, Inc. v New York State Liq. Auth.*, 257 AD2d 625, 626 [1999]; *Matter of Diotte v Fahey*, 97 AD2d 653 [1983]). Furthermore, the Administrative Law

Judge's decision to credit the father's account was improper because there was no basis for assessing his credibility.

By contrast, petitioner's hearing testimony established that she never noticed any injury to the child's hands, and stated that when she released him to his father he was uninjured. There was no discernible basis for finding her account incredible, and the ALJ inexplicably gave no weight to the evidence of her impeccable record as a well-trained, dedicated and highly regarded childcare provider (*see Jacqueline G. v Peters*, 292 AD2d 785, 786 [2002]).

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

ENTERED: OCTOBER 21, 2008



Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4335 The People of the State of New York, Ind. 5291/01
Respondent,

-against-

Julian Marquez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Dana Levin of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J. at hearing; Caesar Cirigliano, J. at jury trial and sentence), rendered January 16, 2004, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 12 years, unanimously affirmed.

Defendant did not preserve his challenge to the sufficiency of the evidence and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The evidence established that the weapon at issue was a firearm within the meaning of Penal Law § 265.00(3). Furthermore, counsel's failure to raise this issue did not deprive defendant of effective assistance (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The court properly denied defendant's motion to suppress his

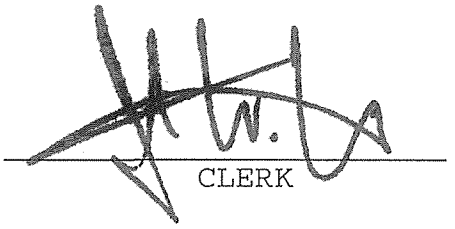
statements. Initially, we find no merit to defendant's right to counsel claim. There was a brief communication between defendant and a detective concerning a pending federal matter in which defendant was represented. The federal case was unrelated to the instant case, the detective did not ask defendant any questions about either case, and there was clearly no exploitation of the federal case to obtain defendant's confession within the purview of *People v Cohen* (90 NY2d 632, 638-642 [1997]). With regard to defendant's remaining claim, the record establishes that neither of the detectives who spoke to defendant prior to the second detective's administration of *Miranda* warnings engaged in any interrogation or its functional equivalent (*see Rhode Island v Innis*, 446 US 291, 300-301 [1980]; *People v Boyd*, 21 AD3d 1428 [2005], *lv denied* 6 NY3d 773 [2006]). Furthermore, we conclude that defendant's post-*Miranda* statements were admissible in any event (*see People v White*, 10 NY3d 286 [2008]).

The trial court delivered a sufficient jury instruction on the issue of the voluntariness of defendant's confession. Since the trial evidence failed to raise a factual dispute as to

whether *Miranda* warnings were given, the court properly declined to submit that issue to the jury (*see People v Cefaro*, 23 NY2d 283, 288-289 [1968]).

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

ENTERED: OCTOBER 21, 2008



CLERK

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4336 The People of the State of New York, Ind. 2777/06
Respondent,

-against-

Anthony Mattey,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered on or about July 16, 2007, unanimously affirmed.

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

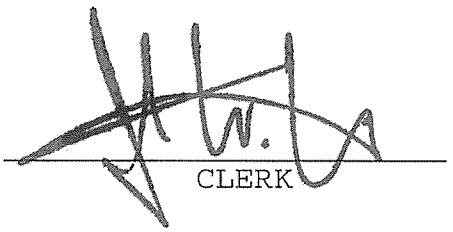
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 21, 2008



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Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4337 Ricky Taylor, Claimant-Appellant, Claim 1132/07

-against-

The State of New York, Defendant-Respondent.

Michael G. O'Neill, New York, for appellant.

Andrew M. Cuomo, Attorney General, Albany (Kathleen M. Arnold of counsel), for respondent.

Order of the Court of Claims of the State of New York (Faviola A. Soto, J.), entered on or about September 6, 2007, which, in a proceeding pursuant to Court of Claims Act § 8-b for unjust conviction and imprisonment, granted defendant's motion to dismiss the claim as time-barred, unanimously affirmed, without costs.

Claimant initially filed a timely claim that was dismissed because it was verified only by his attorney and thus failed to comply with the verification requirement of Court of Claims Act § 8-b(4) (*Taylor v State of New York*, 33 AD3d 438 [2006], citing *Long v State of New York*, 7 NY3d 269 [2006]). Contrary to claimant's argument, CPLR 205(a), which allows re-commencement of actions that were terminated not on the merits within six months of the dismissal, does not apply to claims under Court of Claims § 8-b, the requirements of which must be strictly construed and

the terms of which make no reference to the CPLR (*see Long*, 7 NY3d at 276). Since claimant's second filing was made after the expiration of the two-year limitations period (Court of Claims Act § 8-b[7]), the second claim is time-barred.

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

ENTERED: OCTOBER 21, 2008

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4338 Local 798 Realty Corp., Index 602077/04
Plaintiff-Respondent,

-against-

152 West Condominium, et al.,
Defendants,

152 Union Realty, Inc., et al.,
Defendants-Appellants.

McLaughlin & Stern, LLP, New York (Richard L. Farren of counsel), for appellants.

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

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered on or about August 3, 2007, which granted plaintiff's motion for partial summary judgment, inter alia, dismissing defendants' second and third counterclaims and declaring all contracts of sale and lease between the parties void, unanimously affirmed, with costs.

Plaintiff, a realty holding corporation owned by Local 798, a labor union, established that although defendant Vincent Callaghan, its assistant secretary and a business representative for Local 798, lacked the authority to enter into any leases or contracts of sale, he participated in a scheme to defraud plaintiff of its assets by converting a commercial building it owns into a condominium and selling or leasing the units to his brother, defendant Richard Callaghan, and defendant Maureen

McGuckin, Richard's live-in companion and the owner of defendants 152 Union Realty, Inc., and Low's Express, LLC. The attempted conversion never took place, it having become known that Vincent Callaghan had made numerous false representations in the "affidavit of owner" and "affidavit of tenants" included in the submission to the Attorney General for approval of a condominium declaration. Vincent Callaghan eventually pleaded guilty to the Class E felonies of falsifying business records in the first degree and offering a false instrument for filing in the first degree. Under the circumstances, the motion court correctly concluded that all the alleged leases and contracts of sale between the parties are null and void (*see* 37 AD3d 239, 240 [2007]).

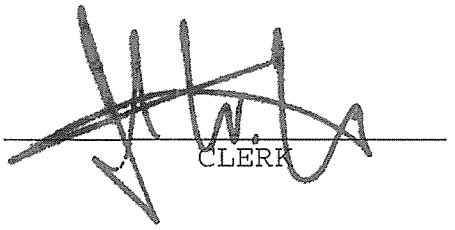
The court correctly dismissed defendants' second counterclaim for quantum meruit, since plaintiff never sought, or agreed to accept, the work that defendants were performing on the property, and the services were rendered strictly to benefit defendants (*see Soumayah v Minnelli*, 41 AD3d 390, 391 [2007]). The court correctly dismissed defendants' third counterclaim for unjust enrichment, since defendants failed to demonstrate either that plaintiff was enriched at their expense or that "it is against equity and good conscience" to permit plaintiff to retain the benefit of the renovation work that was undertaken in connection with an attempt to defraud it of its assets (*see*

Sperry v Crompton Corp., 8 NY3d 204, 215 [2007] [internal quotation marks and citation omitted]).

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

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

ENTERED: OCTOBER 21, 2008



Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4339 Caroline Nicholson, etc., et al., Index 109438/03
Plaintiffs-Respondents,

-against-

Leila Hadley Luce, et al.,
Defendants-Appellants.

Carter Ledyard & Milburn LLP, New York (William H. Sloane of counsel), for appellants.

John A. Aretakis, New York, for respondents.

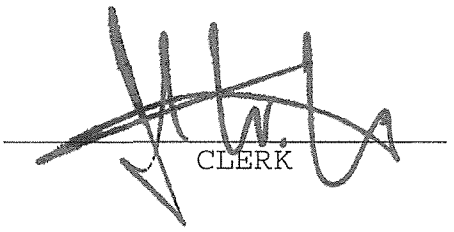
Order, Supreme Court, New York County (Debra A. James, J.), entered August 8, 2008, brought up for review pursuant to CPLR 5517(b) by appeal from an order, same court and Justice, entered October 30, 2007, which, upon reargument, inter alia, granted defendants' motion for summary judgment dismissing the complaint only to the extent of dismissing the claims for battery, libel, and intentional infliction of emotional distress, unanimously affirmed, without costs.

A claim for sexual assault may be framed as a claim for either assault or battery (*see generally Waxter v State of New York*, 33 AD3d 1180, 1182 [2006]; *Physicians' Reciprocal Insurers v Loeb*, 291 AD2d 541, 542-543 [2002]; *N.X. v Cabrini Med. Ctr.*, 280 AD2d 34, 36 [2001], *mod* 97 NY2d 247 [2002]; *Dolback v Reeves*, 265 AD2d 625, 625 [1999]). Plaintiffs pleaded both. On defendants' prior motion addressed to the sufficiency of the pleadings, the court dismissed the claim for battery because

there was no allegation of offensive bodily contact (*see Charkhy v Altman*, 252 AD2d 413, 414 [1998]). On the instant motion, the court correctly declined to dismiss the claim for assault because the record presents issues of fact whether defendant Leila Hadley Luce's "physical conduct plac[ed] [her minor granddaughter] in imminent apprehension of harmful contact" (*Fugazy v Corbetta*, 34 AD3d 728, 729 [2006] [internal quotation marks and citation omitted]; *see Charkhy* at 414; *Reichle v Mayeri*, 110 AD2d 694 [1985]).

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

ENTERED: OCTOBER 21, 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 October 21, 2008.

Present - Hon. Peter Tom, Justice Presiding
Luis A. Gonzalez
Milton L. Williams
Karla Moskowitz
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 90131/05
Respondent,

-against- 4340

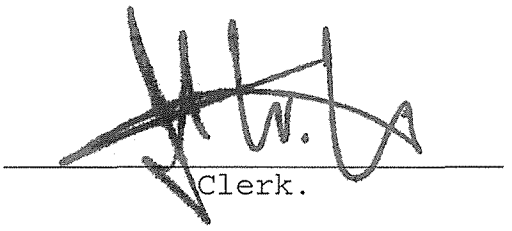
Adrian Rivera,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about March 22, 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.

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4342 Manhattan Church of Christ, Inc., Index 603664/05
Plaintiff-Appellant,

-against-

40 East 80 Apartment Corporation,
Defendant-Respondent.

Troutman Sanders LLP, New York (Clement H. Berne of counsel), for appellant.

Sonnenschein Nath & Rosenthal LLP, New York (Martin J. Schwartz of counsel), for respondent.

Judgment, Supreme Court, New York County (Herman Cahn, J.), entered August 20, 2007, awarding plaintiff an annual rental of $569,730 from April 1, 2002, rather than the $947,460 annual rental claimed by plaintiff, unanimously affirmed, without costs.

Plaintiff is the owner of a zoning lot with an area of 9,716.71 square feet. The zoning lot, which has a floor area ratio of ten, is divided into two parcels. On one of the parcels, plaintiff built a building with a floor area of 18,214.3 square feet. Plaintiff leased the other parcel to defendant's predecessor. The leased parcel, which has an area of 5,426 square feet, is referred to as the "demised premises." Section 21.1 of the lease states that after 32 years and 9 months, the basic rent will be "an amount per annum equal to 6% of the fair market value . . . of the land constituting the demised premises, considered as vacant, unimproved and unaffected by this lease."

"Fair market value" means "the price for which the property would sell if there was a willing buyer who was under no compulsion to buy and a willing seller under no compulsion to sell" (*Keator v State of New York*, 23 NY2d 337, 339 [1968]). Obviously, the price would be affected by what the buyer could build on the demised premises. The parties have stipulated that the floor area value of the land constituting the demised premises is either 54,260 square feet (ten times the square footage of the demised premises) or 78,955 square feet (the floor area for the entire zoning lot minus the square footage of plaintiff's building). The latter figure assumes that the buyer of the demised premises would definitely have the right to use the air rights for the entire zoning lot.

Property law supports defendant's position that the buyer of the demised premises would have air rights only to the demised premises, not to the entire zoning lot, unless the buyer also acquired plaintiff's air rights (*see Macmillan, Inc. v CF Lex Assoc.*, 56 NY2d 386, 392-393 [1982]). Therefore, the motion court correctly granted summary judgment to defendant and declared that the demised premises should be valued based on a floor area of 54,260 square feet.

The fact that plaintiff actually gave the lessee its air rights in section 9.3 of the lease does not help plaintiff, since section 21.1 (governing valuation of the demised premises) says

that the land must considered as "unaffected by this lease" (*see e.g. Ruth v S.Z.B. Corp.*, 2 Misc 2d 631, 636 [1956], *affd* 2 AD2d 970 [1956], *lv denied* 2 NY2d 710 [1957]). Plaintiff's reference to documents other than the lease is also unavailing. If the lease is unambiguous, as both parties apparently agreed below, one should look only to its four corners to interpret it, without resort to extrinsic evidence (*see e.g. New York Overnight Partners v Gordon*, 217 AD2d 20, 28-29 [1995], *affd* 88 NY2d 716 [1996]).

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

ENTERED: OCTOBER 21, 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 October 21, 2008.

Present - Hon. Peter Tom, Justice Presiding
Luis A. Gonzalez
Milton L. Williams
Karla Moskowitz
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 46148C/05
Respondent,

-against- 4344

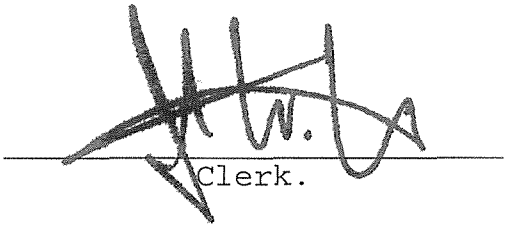
Marcos Bermeo,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about January 9, 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.

Tom, J.P., Gonzalez, Williams, Freedman, JJ.

4345N Dr. Alex Greenberg, DDS, PC, et al.,
Plaintiffs-Appellants,

-against-

SNA Consultants, Inc., et al.,
Defendants-Respondents.

Index 600414/08

Ellenoff Grossman & Schole LLP, New York (Donald G. Davis of counsel), for appellants.

Dunnington Bartholow & Miller, LLP, New York (Carol A. Sigmond of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered March 19, 2008, which granted defendants' cross motion to compel arbitration, unanimously reversed, on the law, without costs, and the cross motion denied.

In New York, any threshold issue of arbitrability is a matter for the court (*Cheng v Oxford Health Plans, Inc.*, 15 AD3d 207, 208 [2005]). Only a person licensed or otherwise authorized to practice architecture may do so and use the title "architect" (Education Law § 7302), and only a professional corporation formed to practice architecture or other related professions may contract with another party to perform architectural services (Business Corporation Law § 1503[a]; *see SKR Design Group v Yonehama*, 230 AD2d 533 [1997]).

In this breach-of-contract action, the overwhelming documentary evidence establishes that defendants' services,

including repeated characterizations of their work as "architectural" in their own agreements, work product and invoices, as well as their design of numerous detailed plans for electrical, HVAC, plumbing and related mechanical functions, and their supervision of the engineer and general contractor, constituted the unauthorized practice of architecture and not "interior design," as defendants claim (*see Park Ave. & 35th St. Corp. v Piazza*, 170 AD2d 410 [1991]; *Marshall-Schule Assoc. v Goldman*, 137 Misc 2d 1024 [1987]). Inasmuch as the agreements are unenforceable because defendants were engaged in the unauthorized practice of architecture, so are the arbitration clauses contained therein (*see JMT Bros. Realty, LLC v First Realty Bldrs., Inc.*, 51 AD3d 453 [2008]; *Al-Sullami v Broskie*, 40 AD3d 1021 [2007]).

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

ENTERED: OCTOBER 21, 2008

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Luis A. Gonzalez
John W. Sweeny, Jr.
James M. McGuire, JJ.

1094
Index 350250/01

Sharon Wechsler,
Plaintiff-Respondent,

-against-

Norman Wechsler,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Judith J. Gische, J.), entered February 3, 2006, inter alia, equitably distributing marital property.

Blank Rome LLP, New York (Leonard G. Florescue, Heidi A. Tallentire and Tara Jones-Willecke of counsel), for appellant.

Bernard G. Post LLP, New York (Bernard G. Post and Williams S. Hockenberg of counsel), for respondent.

McGUIRE, J.

The course of this appeal, like the underlying divorce action itself, has not been smooth. The judgment of divorce from which the defendant husband appeals was entered on February 3, 2006. Between the entry of the judgment and the date the appeal was argued, the parties made numerous motions in both Supreme Court and this Court. The plaintiff-respondent wife sought to compel the husband to comply with certain terms of the judgment and ensuing orders, and the husband sought to stay enforcement of the judgment and those orders pending the determination of his appeal. The wife's motions were granted and the husband's motions were denied.

Shortly after oral argument, the wife moved to dismiss the appeal on the ground that the husband was a fugitive from this jurisdiction and barred from maintaining the appeal under the fugitive disentitlement doctrine. The husband separately moved to stay enforcement of the judgment pending determination of this appeal. By an order dated November 27, 2007, we granted the wife's motion and dismissed the appeal with leave to the husband to move to reinstate the appeal on the condition that, within a certain time frame, he post an undertaking of approximately $10 million (45 AD3d 470 [2007]). The husband posted the undertaking and moved to reinstate the appeal. We granted the husband's

motion on January 31, 2008 (2008 NY Slip Op 62578[U]), and subsequently granted the husband's renewed motion for a stay of the enforcement of the judgment pending determination of this appeal (2008 NY Slip Op 83492[U]).

I

The principal issue on this appeal, apparently one of first impression in this state, is the extent to which the value of a holding company, Wechsler & Co., Inc. (WCI), a Subchapter C corporation, all the shares of which are owned by the husband, should be reduced to reflect the federal and state taxes embedded in the securities owned by WCI, securities that constitute virtually all of its assets, due to the unrealized appreciation of those securities. As of the valuation date, the date the divorce action was commenced, WCI had essentially ceased trading securities for the accounts of customers and bought and sold securities solely for its own account. All of the experts who testified at trial -- the neutral expert jointly chosen by the parties and the two experts separately retained by each -- agreed that WCI should be valued on a net asset basis by determining what a willing buyer would pay a willing seller, with neither being under a compulsion to buy or sell, and with both having reasonable knowledge of the relevant facts (*see generally Eisenberg v Commissioner of Internal Revenue*, 155 F3d 50, 53 [2d

Cir 1998]). Supreme Court adopted a "baseline" value of WCI of $70,848,107 on the date the action was commenced, the baseline value determined by the neutral expert before any deduction for embedded taxes -- that amount is not disputed on this appeal -- and then made adjustments to it that differed in various ways, most significantly for present purposes with respect to the extent of the reduction for the embedded taxes, from the adjustments made by the neutral expert.[1]

On the issue of the extent of the reduction for embedded taxes, Supreme Court rejected the approach of the Fifth Circuit in *Matter of Dunn v Commissioner of Internal Revenue* (301 F3d 339 [5th Cir 2002]), the approach embraced by the neutral expert. Pursuant to that approach, consistent with the assumption inherent in the net asset valuation methodology -- an actual sale of the corporation's assets is assumed to occur on the valuation date, here, the date of commencement of the action -- the value of the corporation is reduced on a dollar-for-dollar basis by the full amount of the tax liability that would arise from the sale of the assets by the hypothetical buyer on the valuation date.

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[1]In its written opinion, Supreme Court adopted a "baseline" value of $51,100,000, an amount that reflects the after-tax value of WCI under the approach of both the neutral expert and the husband's expert. Because it will be easier to follow our analysis, the "baseline" value to which we refer is the pre-tax value of WCI.

Both the neutral expert and the husband's expert testified, and the wife's expert did not dispute, that if the securities were sold as of the date of commencement, the effective tax rate would be 41.74% of the baseline value of $70,848,107. Accordingly, under the valuation methodology adopted in *Dunn*, the date-of-commencement value of WCI would be reduced by $29,572,000 (41.74% of $70,848,107). Instead, Supreme Court accepted the approach of the wife's expert and reduced the baseline value of WCI by 11% of $70,848,107 ($7,793,292). That percentage approximates what Supreme Court and the wife's expert denominated the "historical" rate of the annual taxes paid by WCI, a rate determined by comparing the average annual taxes paid by WCI to its average annual gross revenue, i.e., its revenue before all applicable deductions for its various costs of doing business (including the salaries of its employees).

In a comprehensive, thoughtful and painstaking, 129-page written opinion, Supreme Court relied in significant part on the decision of the Tax Court in *Matter of Jelke v Commissioner of Internal Revenue* (TC Memo 2005-131 [2005]),[2] a decision that was reversed by a divided panel of the Eleventh Circuit after this

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[2]As discussed below, however, the approach adopted by Supreme Court differs significantly from the one adopted by the Tax Court in *Jelke*.

appeal was argued (507 F3d 1317 [2007]). In *Jelke*, the Eleventh Circuit adopted the approach of the Fifth Circuit in *Dunn* and concluded that, on the assumption that a sale of the corporation's assets occurs on the valuation date, the value of the corporation's assets should be reduced by the full amount of the embedded taxes that would be payable as a result of the sale (507 F3d at 1331-1333).

The crux of the majority's analysis in *Jelke* is captured by an illuminating example it cited (507 F3d at 1326 n 25), one the Second Circuit posited in *Eisenberg* (155 F3d at 58 n 15; *see also Dunn*, 301 F3d at 352 n 23). To simplify the example, suppose that a corporation's sole asset is a machine with a market value of $1,000, a basis of $200 and a tax rate of 25% on the gain from the sale of the machine. If A, the sole shareholder of the corporation, offers to sell all of the corporation's shares to Z, what would Z pay to own those shares and thus own the machine? Clearly, Z would not pay $1,000, because he would be saddled with the corporation's basis in the machine and thus would be buying an asset as to which he would have a tax liability of $200 (25% of the $800 in appreciation) if he were to sell it for $1,000. The only rational decision for Z would be to buy the machine itself in the market for $1,000 rather than indirectly buy the machine by paying $1,000 for the stock of the corporation, as Z's

basis in the machine then would be $1,000 and Z would have no tax liability if Z were to sell it for $1,000 or less (and a smaller tax liability to the extent the machine appreciated in value after Z purchased it). As discussed below, however, it does not follow that under no circumstances would Z be willing to pay more than $800 for the stock of the corporation.

In his dissenting opinion in *Jelke*, Judge Carnes concluded that the position of the Commissioner was more reasonable (507 F3d at 1333). Under the Commissioner's approach, the period of time over which the appreciated assets of the corporation would be sold should be estimated and the value of the corporation should be reduced only after discounting to present value as of the valuation date the taxes that would come due over that period. The Commissioner's approach recognizes that because of the time value of money, a reasonable buyer who does not plan on immediately liquidating the assets of the corporation could pay more for the stock of the corporation than an amount equal to the market value of its assets minus the taxes that would be payable if the assets were sold immediately. The majority in *Jelke* did not dispute that point with Judge Carnes, but concluded that the approach of the Fifth Circuit in *Dunn* avoids the need for and uncertainties of "prophesying as to when the assets will be sold"

(507 F3d at 1332),[3] conserves judicial resources as it "has the virtue of simplicity" (*id.* at 1333), is consistent with the basic premise of valuing a corporation on a net asset basis, i.e., the sale of its assets on the relevant valuation date (*id.* at 1332-1333) and has much else to recommend it (*id.* at 1333).[4]

The merits and demerits of the two approaches are elucidated by the majority and dissenting opinions in *Jelke*, and each opinion surveys the history and evolution of the law on this complex subject. This appeal, however, does not require us to reach a conclusion about which of the two approaches is

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[3]Although not mentioned by the Eleventh Circuit, the Commissioner's approach also would seem to require uncertain prognostications about the value of the assets in each of the years it is predicted they will be sold. Alternatively, the Commissioner's methodology may assume that the market value of the assets remains constant over the predicted period during which they are sold. If so, the justification for the Commissioner's approach -- greater accuracy by valuing assets in light of an economic reality, the time value of money -- is undermined to the extent of the volatility of the market price of the particular assets to be valued.

[4]In *Eisenberg*, the Second Circuit concluded, contrary to the position then espoused by the Commissioner, that a reduction in value of the corporation to account for embedded capital gains taxes was appropriate. However, as the Eleventh Circuit noted in *Jelke* (507 F3d at 1326), dicta in *Eisenberg* states without explanation that "it would be incorrect to conclude that the full amount of the potential capital gains tax should be used" to reduce the corporation's value (155 F3d at 58 n 15). For various reasons, the Eleventh Circuit decided not to adopt the position presumably inherent in that dicta that would require complex prognostications for which the judiciary is ill suited.

preferable with respect to the issue of embedded taxes.[5] At trial, Supreme Court was not asked to choose between the approach of the Fifth Circuit in *Dunn* and subsequently embraced by the Eleventh Circuit in *Jelke* and the approach advanced by the Commissioner in *Jelke* (and embraced by Judge Carnes). Rather, Supreme Court was asked to choose between the approach of the Fifth Circuit and an approach different from the one advanced by the Commissioner in *Jelke*. The latter approach, the one Supreme Court adopted, does not attempt to ascertain the period of time over which the assets of a corporation would be sold by a reasonable buyer and discount the taxes that would be due over that period to present value as of the date of commencement. Rather, it adopts a baseline value of the assets as of the commencement date and reduces that value by an "historical" tax

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[5]In matrimonial actions in other states, some courts have accepted and some have rejected the validity of a reduction in value for embedded capital gains (*see* Shannon P. Pratt et al., Valuing a Business: The Analysis and Appraisal of Closely Held Companies at 463-464 [5th ed 2008]). According to the authors, however, "most decisions in family law courts to date have not allowed a discount for trapped-in capital gains unless a sale was imminent" (*id.* at 463). In this regard, we note that the Court of Appeals has stated that "uncertainty concerning future events should not bar attempts to assign value to an asset" (*Burns v Burns*, 84 NY2d 369, 375 [1994]). That is not to suggest, however, that the Court of Appeals thereby has ruled that judges in matrimonial actions never may conclude that a future event is too fraught with uncertainties to be grappled with and taken into account.

rate of the corporation.

Both the neutral expert and the husband's expert vehemently disagreed with the "historical" approach espoused by the wife's expert. For his part, the neutral expert testified that this "historical" tax rate was a "meaningless percentage to apply to the capital gains." He explained that it ignored the difference between an effective tax rate and an "incremental" or marginal tax rate, and stressed that if in any given year WCI sold securities for a $10 million capital gain, it would incur incremental taxes in the amount of 41.7% of that gain. Similarly, the husband's expert testified that this "historical" tax rate was "incredibly inaccurate," explaining that "[t]he correct way to calculate a tax rate is a percentage of pretax income after expenses." Indeed, he added that he had "never before seen anyone ... calculate a tax rate as a percentage of [gross] revenues rather than as a percentage of pretax earnings [after expenses]." The common sense of the view of both the neutral expert and the husband's expert is apparent. Notably, the wife offered nothing by way of precedent to support her expert's position. Nor, for that matter, does the dissenter.[6]

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[6]As noted below, Supreme Court recognized in its written decision a particular reason to regard as "somewhat skewed" the approach advocated by the wife's expert.

We do not reject the approach of the wife's expert solely because it does not accord with common sense, conflicts with the reasoned testimony of both the neutral expert and the husband's expert and is without precedential support, although these are collectively sufficient reasons to do so. Rather, there are other sound reasons to reject this "historical" approach. The approach of the wife's expert not only assumes that the assets will not be sold as of the valuation date, but also that WCI would operate in the future as it had in the past so that each year it both would sell assets to the same extent it annually had sold assets in the past and would be able to offset income generated by the sale of assets with the same deductions for salaries and other expenses that it had been able to take in prior years. The assumption that WCI would continue to be able to take the same deductions for salaries was at least brought into question by proceedings in Tax Court that were pending as of the trial. In that action, the Internal Revenue Service was challenging precisely those deductions, contending that they were excessive. For this very reason, Supreme Court recognized that the approach of the wife's expert "may be somewhat skewed in this case."

Furthermore, the assumption that WCI would sell assets in the future to the same extent that it had sold assets in the past

is even more questionable. After all, Supreme Court ruled that the marital estate should be divided equally between the parties. Indisputably, given the size of the distributive award (which is payable over a period of years) and that Supreme Court distributed 88% of the other marital assets to the wife, the husband necessarily will have to sell assets of WCI every year to meet his distributive award obligations. Doing so, of course, will result in annual tax liabilities greater than those WCI historically had incurred.

Moreover, by also assuming that the securities owned by WCI will not depreciate in value over time, the approach of the wife's expert requires the husband to bear all the risk of a decline in their value. To the extent they do decline in value, the loss in value would not of course be offset dollar for dollar by a decrease in WCI's tax liability. To be sure, it is possible that the securities might appreciate. But the possibility that they might depreciate is of particular concern in this case. After all, because Supreme Court distributed 88% of all the other marital assets to the wife, the husband is left without any substantial cushion of assets to protect himself in the event the securities depreciated significantly. Accordingly, the consequences for the husband of the approach of the wife's expert could be calamitous.

By way of defending her expert's approach, the wife objects that Supreme Court determined not to grant pre-judgment or post-judgment interest on the distributive award to her, and maintains that the effect of that determination is to reduce substantially the economic value of her 50% interest in the marital component of the appreciation in value of WCI. But that determination must be evaluated in light of the alternative. If Supreme Court had directed that this 50% interest be payable immediately, the wife would have received the full value of that interest on or about the date of the decree. The husband, however, would have been constrained to liquidate WCI, thus triggering the very tax liabilities that also would have substantially reduced the value of the wife's interest, unless the husband unfairly was required to pay all of the taxes. The economic effect of the determination that the distributive award should be payable over a period of years is that the husband, too, will not realize as of the date of the decree the full value of his 50% interest in the marital component of the appreciation in value of WCI. If the value of the securities owned by WCI depreciates over the period of years in which the distributive award is payable, the husband but not the wife will be adversely affected. An award of interest on the distributive award would have caused the husband to shoulder another significant burden, one that could result in

additional disparate treatment of the husband. Even if the securities owned by WCI did not depreciate over that period of years, the husband but not the wife would be adversely affected to the extent that the appreciation in value of the securities was insufficient to offset the required interest payments. Finally, the wife has not provided us with any persuasive support for adopting the "historical" tax rate methodology propounded by her expert.

For all these reasons, we find only that as between the competing methodologies advanced by the parties at trial, under all the factual circumstances of this case Supreme Court should have adopted the one accepted by the Fifth Circuit in *Dunn*.[7] Of course, our authority in this regard is as broad as that of Supreme Court (*Majauskas v Majauskas*, 61 NY2d 481, 493-494 [1984]). Accordingly, we conclude that Supreme Court overvalued

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[7]Without explanation, the dissenter attributes to us a "recogn[ition]" that the valuation methodology adopted in *Dunn* and *Jelke* "may not be appropriate for matrimonial valuation." On the other hand, the dissenter recognizes that "although *Dunn* and *Jelke* are not matrimonial cases, the principles of taxation, capital gains and valuation are the same." In any event, even if we were of the view that the approach of the dissent in *Jelke* is more appropriate in a matrimonial action, we would not remand for what would amount to a new valuation trial. Compared to the approach the wife advocated at trial, we think both that the approach advocated by the husband is clearly more appropriate and that this protracted and bitterly contested action must come to an end.

WCI by $21,778,708 (the difference between the $7,793,292 reduction in value based on the "historical" tax rate methodology and the $29,572,000 reduction that would result under the methodology adopted in *Dunn*). That amount should be subtracted from the total value of WCI at the time of the commencement of this action found by Supreme Court ($74,387,630),[8] leaving a total value of $52,608,922.

Referring to the same treatise we cite, the dissenter relies on it in part, noting that "most courts which have faced this issue have not allowed a discount for trapped-in capital gains in a matrimonial context." But the cases cited in the treatise were decided before the Eleventh Circuit's decision in *Jelke*. In any event, counting the number of cases that have not allowed a dollar-for-dollar discount for embedded taxes is surely less illuminating than the reasoning of the cases. As the dissenter appears to recognize, the validity of the net asset valuation methodology adopted in *Jelke* and *Dunn* does not depend upon whether it is applied in an estate tax case, another type of tax

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[8]This amount differs from the "baseline" value noted above of $70,848,107 because of other valuation adjustments made by Supreme Court. The husband does not dispute all of these adjustments. With respect to those he does dispute, we reject his contentions except to the extent indicated below. Accordingly, the discrepancy between the two "baseline" values is of no moment.

case or a matrimonial action. Although we find persuasive the reasoning of the Fifth and Eleventh Circuits -- the dissenter does not come to grips with the analysis of the majority in *Jelke* criticizing the methodology urged by the IRS -- we conclude only that Supreme Court should have adopted the methodology of *Jelke* and *Dunn*, the one used by the neutral expert and the husband's expert, rather than the "historical" approach urged by the wife's expert.

Although we would disagree, we would understand if the dissenter believed that the appropriate resolution of this appeal was to adopt the approach of the IRS, the one adopted by the dissent in *Jelke*, and remand for a determination of the number of years over which the assets of WCI would be sold with the tax liability discounted to present value. We are at a loss to understand, however, why the dissenter expressly rejects not only the approach of the majority in *Jelke* but also implicitly rejects the approach of the dissent and the IRS (without explaining why).

The dissenter maintains that "unlike *Dunn* and *Jelke*, there is no indication that defendant's interest in WCI will cease or that WCI will cease operations with the entry of the decree." The dissenter is simply wrong in attempting to distinguish *Dunn* and *Jelke* on this ground. To be sure, as a result of the death

of the decedent in *Jelke*, taxes were owed to the IRS (and, of course, the decedent's minority interest in the investment holding company ceased). But the amount of the taxes that were owed is a function of the value of the holding company itself. Accordingly, what was at issue in *Jelke* was the appropriate methodology for valuing the company itself. Just as the divorce in this case occasioned the need for valuing WCI, the death of the decedent in *Jelke* occasioned the need for valuing the investment holding company. Contrary to the dissenter's position, there is no indication at all in *Jelke* that the investment holding company was about to cease operations or sell the securities it owned. More importantly, the Eleventh Circuit's holding and analysis could not be clearer: in valuing an investment holding company under the net asset valuation methodology, whether or not the company actually will liquidate its assets (and perforce cease operations) is irrelevant (*Jelke*, 507 F3d at 1332 ["It is more logical and appropriate to value the shares of the [investment holding company ... based upon an *assumption* that a liquidation has occurred, without resort to present value or prophecies"] [emphasis added]).

In *Dunn*, the Tax Court found that the likelihood the closely-held corporation would be liquidated was "slight" (301 F3d at 356). The corporation, however, was an operating company,

not an investment holding company like WCI and the corporation in *Jelke*, and the parties agreed that it should be valued on both an income-based approach and an asset-based approach (*id.* at 351). With respect to the asset-based approach, the Fifth Circuit could not have been clearer in holding that a dollar-for-dollar reduction for the built-in tax liability of the assets was required precisely because "the likelihood of liquidation is inapposite to the asset-based approach to valuation" (*id.* at 354; *see also id.* at 352 [criticizing the Tax Court for having followed the "'no imminent liquidation' red herring" advanced by the IRS]). As the Fifth Circuit went on to explain, "the probability of a liquidation's occurring affects *only* ... the relative *weights* to be assigned" to the separate values of the corporation determined under the asset-based and income-based approaches (*id.* at 354-355 [first emphasis added]).[9]

Two final aspects of the dissenter's position warrant a brief response. To the extent the dissenter means to suggest that the wife would have received a permanent maintenance award if Supreme Court had valued WCI in accordance with the approach of the neutral expert and the husband's expert, we make two

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[9]Here, there is no dispute that by the time of trial WCI was only an investment holding company.

points. First, Supreme Court declined to award permanent maintenance in part because the wife would be "vastly wealthy in her own right." As noted below, however, because the wife did not perfect her cross appeal, we have no occasion to decide whether a permanent maintenance award would be appropriate in light of our reduction of the distributive award. Assuming it might be warranted, the fault lies not in our disposition of the arguments raised by the husband on his appeal. Second, without deciding the issue, in light of the dissenter's suggestion we note that even putting aside the considerable but reduced distributive award payments, Supreme Court awarded the wife over $27 million in assets, reflecting approximately 88% of the other marital assets. It is far from obvious that Supreme Court or anyone would have regarded the award of $27 million in assets as insufficient to render the wife "vastly wealthy in her own right."

II

A related issue stems from the husband's contention at trial that was espoused by his expert, but not the neutral expert, that the value of WCI also should be reduced by the non-tax costs of liquidating the corporation. Notably, the parties do not alert us to any testimony from the neutral expert explaining his apparent belief that no such reduction is appropriate. On

appeal, the husband argues that, consistent with the approach adopted in *Dunn*, pursuant to which the hypothetical buyer is assumed to liquidate the assets of the corporation upon acquiring it, an additional reduction in value is warranted to account for the non-tax costs of liquidating the corporation that the buyer would incur. The husband's expert computed those costs by assuming that WCI's assets would be liquidated over a six-month period after the valuation date (the date the action was commenced), an assumption that results in higher non-tax liquidation costs than would be incurred if the assets were liquidated on the date of commencement. Although the parties do not discuss the issue, the assumption by the husband's expert of a six-month liquidation period is not consistent with the assumption, for purposes of determining the extent of the reduction for embedded taxes, that the corporation's assets are liquidated on the valuation date.

The wife urges that the husband's expert overstated the operating costs, understated liquidation costs and ignored the net income that would be generated if WCI were not liquidated. In addition, the wife argues with considerable force that it makes no sense to conclude that a hypothetical purchaser who has the cash to purchase WCI would buy it only to liquidate it and

generate the cash that the buyer already has on hand.[10] Supreme Court held that no such reduction in the value of WCI was appropriate.

Supreme Court stated that it was "not persuaded that liquidation is WCI's highest and best use," and concluded both that the husband's "projection of liquidation versus operating expenses ... is skewed" and that in any event "there is no basis to conclude that it is more profitable to shut WCI down than to continue to operate it." Consistent with this latter conclusion, Supreme Court did not make any specific findings on what the non-tax liquidation costs of WCI would be.

In his briefs on appeal, the husband argues not only, albeit in passing, that a reduction in value for the non-tax costs of liquidating WCI is inherent in the net asset valuation approach adopted by the Fifth Circuit, but also hedges on that argument by contending that it is reasonable to conclude on the particular facts of this case (including factual developments that occurred after the trial) that a buyer of WCI would liquidate its assets over a six-month period. At trial, the husband's expert

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[10]We recognize that the same objection could be raised with respect to the methodology adopted by the Fifth and Eleventh Circuits pursuant to which the value of the corporation is reduced by the full amount of embedded taxes on the assumption that the hypothetical buyer contemporaneously liquidates the corporation's assets.

testified, consistent with the report submitted by his firm, that a willing buyer would be more likely to liquidate WCI "considering the level of expenses in relation ... to income." We are unable to determine on the present record whether the husband argued in his post-trial brief that as a matter of law a reduction in value for the non-tax liquidation costs always is required under the net asset valuation methodology adopted by the Fifth Circuit.[11] The wife, however, does not contend that the husband failed to preserve this argument for our review.

Determining whether and the extent to which a reduction in value for non-tax liquidation costs is warranted is complicated

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[11]In *Dunn*, the Fifth Circuit did not address the issue of whether a reduction in value for non-tax liquidation costs also is required. Although such a reduction might appear to be entailed by the valuation methodology adopted by the Fifth Circuit, the issue may not have been raised by the parties. Nor did the Eleventh Circuit address the issue in *Jelke*, although the Eleventh Circuit did observe that the Fifth Circuit had "held, as a matter of law, that as a *threshold assumption* liquidation must always be assumed when calculating an asset under the net asset value approach" (*Jelke*, 507 F3d at 1328 [emphasis in original; footnote omitted]). Again, however, the issue may not have been raised in *Jelke*. We note, too, that the corporation in *Jelke* was not, like the corporation in *Dunn*, both an operating and an investment company (*Jelke*, 507 F3d at 1332). Rather, much like WCI, the corporation was a closely-held investment holding company owning appreciated, marketable securities (*id.*). It is conceivable, accordingly, that the non-tax liquidation costs of the corporation in *Jelke* were de minimis; by contrast, at least some of the securities owned by WCI were not readily marketable. Another possibility is that the parties in both *Dunn* and *Jelke* were of the view that no reduction in value on account of the non-tax liquidation costs was appropriate.

further by the parties' contentions about those costs. Although the husband contends in his brief that his expert determined that the liquidation costs would be approximately $4.4 million, the husband cites only to the page of Supreme Court's written opinion in which Supreme Court stated that the husband's expert reduced WCI's value by that amount on account of the non-tax liquidation expenses. In fact, the report submitted by the husband's expert concluded that these expenses would be about $4.4 million on a pretax basis or $2.6 million after taxes and that "a rational seller of WCI would agree to reduce the purchase price by about $2.5 million." In her brief, the wife correctly notes that the husband's expert posited an after-tax cost of some $2.5 million but, as noted above, contends that the husband's expert *understated* these liquidation costs by as much as $5 million.[12]

We are confronted with other complications that the parties do not discuss. First, although a hypothetical buyer of WCI

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[12]This contention by the wife is a two-edged sword. If we accept her argument that a reduction for non-tax liquidation costs is warranted only if it is likely that a hypothetical buyer would liquidate WCI, her position is strengthened if, as she maintains, the husband's expert overstated WCI's operating costs and understated both its net revenues and liquidation costs. On the other hand, if we accept the husband's argument that as a matter of law the net asset valuation methodology always requires such a reduction, a greater reduction in the value of WCI (and thus of the marital estate in which the wife is to share) would be necessary.

could avoid all taxes embedded in the unrelated appreciation of the securities owned by WCI by purchasing the same securities in the market, it seems plain that the hypothetical buyer could not avoid all the costs of liquidating the securities, whenever that would occur, by purchasing the same securities in the market. Surely a buyer of securities in the market cannot reasonably hope to persuade the seller to accept less than the fair market value of the securities on the ground that the buyer will incur costs when the securities are sold. Thus, although a purchaser of securities need not be saddled with the seller's basis, incurring costs when securities are sold is a necessary incident of ownership. On this record, suffice it to say, we cannot determine the extent to which the husband's expert included costs in the posited non-tax liquidation costs other than those necessarily incident to owning the securities. Second, the securities owned by WCI could generate revenues during the six-month liquidation period that would offset at least in part the non-tax liquidation costs. The husband's expert, however, appears not to have accounted for any such revenues.

In another case we might request supplemental briefs from the parties and, to the extent that we concluded that factual issues remained that we could not resolve, remand to Supreme Court. Given the passage of more than seven years since the

commencement of this action and the enormous litigation costs incurred by the parties, as well as the possibility of both another, albeit more limited, fact-finding proceeding and another appeal, we think the only sensible course of action is to decide this issue on the existing record and despite the failures of the parties to address the subsidiary issues noted above (*cf. Dunn*, 301 F3d at 358). For two reasons we conclude that the value of WCI should not be reduced by any non-tax liquidation costs. First, we have no rational basis for determining what the amount of the non-tax liquidation costs are, assuming that we were to hold that the value of WCI should be reduced by some such costs. Second, we think that the amount of any of the costs we might recognize is small relative to the overall value of the marital property and might not exceed the costs of additional briefing and the possible fact-finding proceeding. We hasten to add what should be obvious: our resolution of this issue sets no precedent on the question of whether or the extent to which a reduction in value for non-tax liquidation costs is appropriate in other circumstances.

III

The husband also argues, and we agree, that Supreme Court erred in concluding that his right pursuant to a subscription agreement to purchase additional shares of the common stock of

WCI's predecessor entity at a price of $4,900 per share, a right that when exercised entitled him to 12 additional shares of preferred stock for each share of common stock, was not his separate property. The subscription agreement was entered into prior to the marriage and, as amended prior to the marriage, entitled the husband to purchase 10 additional shares of common stock and thereby acquire 120 shares of preferred. Prior to the marriage, the husband purchased pursuant to the subscription agreement 2.65 shares of the common stock, thereby also acquiring 31.8 shares of preferred. Supreme Court concluded, and the wife does not contend otherwise, that these shares and fractional shares constitute separate property of the husband. The remaining 7.35 shares of common stock, and the attendant 88.2 shares of preferred, were paid for and acquired during the marriage. Because marital property is defined to include "all property acquired by either or both spouses during the marriage" (Domestic Relations Law § 236[B][1][c]), Supreme Court concluded that these shares were marital property.

The flaw in Supreme Court's reasoning is that it does not recognize that, especially given the broad meaning of the term property in the Domestic Relations Law (*see O'Brien v O'Brien*, 66 NY2d 576, 583-584 [1985]), the husband's right to acquire the 7.35 shares of common stock and 88.2 shares of preferred is

itself property that he acquired before the marriage. The neutral expert and the husband's expert agreed that at the time of the commencement of the marriage the husband's right to acquire the shares was tantamount to an "in-the-money option" as the purchase price of the shares was far below their fair market value. Thus, although the husband does not contend on appeal that Supreme Court erred in concluding that the appreciation in value during the marriage of these shares of common stock is marital property, he correctly contends that he is entitled to a credit in the amount of the value as of the date of the marriage of his right to acquire the additional shares of stock pursuant to the subscription agreement.

Using the values Supreme Court adopted for the common and preferred shares of the predecessor entity as of the date of marriage ($22,176.51 per share of common stock and $791.63 per share of preferred), the value of the 7.35 shares of common stock and the 88.2 shares of preferred, assuming the right was exercised as of the date of marriage, is approximately $232,800. Consistent with the approach of the neutral expert and the husband's expert in valuing the husband's right as of the date of the marriage to acquire the shares pursuant to the subscription agreement, the value of that right is approximately $196,800 ($232,800 minus the approximately $36,000 purchase price of the

7.35 shares of common stock).[13]

In point VIII of his brief, the husband advances a confusing claim that Supreme Court "erred in failing to hold that [his] preferred shares were passive assets." He maintains that the preferred shares are redeemable only at their stated par value plus their accumulated unpaid dividends and that for this reason their value could not be affected by his actions. Supreme Court's error, according to the husband, extends not only to the preferred shares he owned prior to the marriage but also to the

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[13]We reject both the wife's claim that the husband raised on appeal for the first time his argument that Supreme Court failed to account for the value of his subscription rights and thus that it is not preserved for our review, as well as her claim that there is no evidence in the trial record that the husband attempted to value those rights. As to the first claim, the wife merely asserts it without referring us to the parties' post-trial briefs (which are not before us, with the exception of a few pages excerpted from the husband's brief that were included in the record on appeal) or to anything else in the voluminous trial record. Although the husband counters that he did press this argument before Supreme Court, he similarly fails to direct our attention to any portion of the trial record or to his post-trial brief. The husband, however, does correctly note that Supreme Court ruled on the issue of whether the 7.35 shares of common and the 88.2 shares of preferred were the husband's separate property. Indeed, Supreme Court stated that it "rejects the argument that such shares ... constitute separate premarital property." Moreover, the reports of the neutral expert and the husband's expert, both of which were in evidence, considered and valued these shares as though they were beneficially owned by the husband. The wife's second claim is refuted by the reports of the neutral expert and the husband's expert, and by the testimony given by the representatives of both experts who testified at trial.

preferred and common shares he acquired under the terms of a shareholders' agreement providing that upon the death of a shareholder WCI was required to repurchase the shareholder's preferred shares at their redemption price and the shareholder's common shares at book value. He urges that Supreme Court should not have regarded these preferred and common shares as marital property. Apart from merely citing to the shareholders' agreement, the husband does not otherwise cite to anything in the record indicating either that he raised this claim or that it was addressed by any of the experts in their reports or their testimony. Moreover, we are left to scour the record on our own to quantify the principal and the alternative relief the husband seeks on account of this claim.

In response, the wife contends that the husband raises this claim for the first time on appeal, and also asserts that the husband's brief does not contain a single reference to the record supporting the claim because he never presented any evidence bearing on it at trial. In his reply brief, the husband does not mention either this claim or the wife's contentions that it is not preserved for review, that no evidence was presented in support of it and that it is without merit as the preferred shares are not a passive asset because they represent an interest in a business actively managed by the husband.

Even assuming the husband has not abandoned this argument, we need not come to grips with it on the merits. We conclude that it is in any event not preserved for appellate review.

IV

The husband's main brief claims two other valuation errors by Supreme Court: (1) that an alleged accrued bonus owed to him by WCI should have been deducted from the value of WCI as of the commencement date of the action; and (2) that Supreme Court erroneously included in the value of WCI both the value of certain securities that were sold prior to the commencement date of the action but which did not settle until after that date, and the amount of the receivable owed to WCI on account of the sale of the same securities. In his reply brief, however, the husband does not mention either of these arguments let alone address the wife's arguments that Supreme Court did not err in either respect.

To the extent the bonus was a legal obligation of WCI, as the husband maintains, even assuming it should have been deducted from the value of WCI, the wife would share equally in the value of the enforceable right to receive it as that right would constitute marital property.[14] As for the alleged double-

[14]Our resolution of this issue assumes what is improbable: that the after-tax consequences of deducting the bonus from the

counting, Supreme Court merely included in the value of WCI the after-tax value of the proceeds of the sale of the securities to rectify the failure of the neutral expert and the husband's expert to account for either the value of the securities or the proceeds of the sale. For these and other reasons, we reject -- with one qualification -- both of these claims of error.

The qualification is that Supreme Court determined the after-tax value of the proceeds of the securities sold by using the 11% "historical" rate. Thus, Supreme Court reduced the amount of the proceeds ($506,477.51) by 11% ($55,712.53), and increased the value of WCI by the remainder ($450,764.98). Consistent with our rejection of this "historical" rate, we reduce the amount of the proceeds by 41.74% ($211,403.71). Accordingly, Supreme Court's valuation of WCI should be reduced by $155,691.18 (the difference between the reduction for the taxes made by Supreme Court and the reduction for taxes that should have been made).

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value of WCI do not differ from the after-tax consequences of treating the bonus as earned income to be split equally between the parties. The parties, however, do not address this subject and we could not on this record determine what the different tax consequences would be. Moreover, given the size of the marital estate, we think it likely that the extent of the differential tax consequences would not be significant.

V

The husband argues that he is entitled to a credit of $3,124,330 against the distributive award for interim counsel and expert fees he paid on behalf of the wife. The record on appeal, however, does not include an order adjudicating adversely to the husband a motion for reallocation of the interim counsel and expert fee awards awarded pendente lite. In essence, the husband's contention is that there should have been an order reallocating the interim fee awards and that Supreme Court wrongfully deprived him of the opportunity to make a motion for that relief that could have been adjudicated prior to the entry of judgment.

Thus, in his main brief the husband claims that Supreme Court erred when, as the trial was ending, it advised the parties, in response to an inquiry on the subject by the wife's attorney, that it was severing the issue of reallocation of the interim fee awards. Supreme Court went on to inform the parties that any motions on the issue should be made after it issued its decision and order resolving the trial issues and that any such motion would be referred to another Justice. This oral ruling was incorporated in Supreme Court's written decision and order. Thereafter, in accordance with the oral ruling and the written decision and order, the husband moved for an order reallocating

the expert, counsel and other fees he paid on the wife's behalf. In his moving papers, the husband noted that the motion was to be referred to another Justice and did not protest. The motion was referred to another Justice, and we are informed by the parties that this Justice determined that the reallocation issue should be deferred until the appeal was decided. The record on appeal, however, does not include any written order to that effect or the transcript of a proceeding reflecting that determination.

Notwithstanding that the husband both filed the motion knowing that it would be referred to another Justice and voiced no objection, the husband now claims that Supreme Court should not have severed the issue because of the court's extensive knowledge of the case. The result of severing the issue, the husband further complains, is that whatever decision is made by the Justice to whom the matter was referred will be subject to a separate appeal to this Court that would compound the parties' costs and burden this Court.

We reject this claim. When Supreme Court advised the parties that it was severing the issue and that it would be referred to another Justice, the husband voiced no objection. Accordingly, as the wife correctly observes, this claim is not preserved for appellate review (*Jimenez v Regan*, 248 AD2d 510 [1998]). Indeed, the husband waived it when he moved for an

order reallocating the fees with knowledge that it would be referred to another Justice (*cf. Lieblich v Solomon*, 7 AD2d 638 [1958]). Moreover, as is true of other of the husband's claims of error by Supreme Court, in his reply brief the husband does not mention this claim and does not mention let alone address any of the wife's arguments in response, including her contention that it is not preserved for review. Particularly given that Supreme Court had no occasion to explain its decision to sever the issue and refer it to another Justice, we cannot perceive any error in that decision. In addition, the record before us is completely inadequate to permit review of the husband's contention that the wife is not entitled to any fee award and he is entitled to a credit of over $3 million. We cannot resolve, for example, whether the appellate contention of the husband or the wife about the amount of the interim fees he paid is correct.[15] To the extent the husband is arguing that the equal

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[15]In his motion, the husband sought a credit against the equitable distribution award of $1,562,165, an amount that, according to his attorney, consisted of $1.4 million in legal and accounting fees paid on the wife's behalf, plus $162,165 representing one half of other fees paid on his and the wife's behalf (including the fees paid to the neutral expert). There is no statement or suggestion in his attorney's affirmation that the $1.4 million figure reflects only half of the legal and accounting fees the husband assertedly paid on the wife's behalf. The husband offers no explanation in his brief for the fact that he asks this Court to award him a credit exactly double the amount of the credit he seeks in his motion.

distribution of the marital property alone is a sufficient basis for determining that the wife is not entitled to any fee award, that argument should be considered by the Justice before whom the matter is pending.

VI

As noted above, in part because of its conclusion that the wife would be "vastly wealthy in her own right" as a result of the equal distribution of the marital assets, Supreme Court denied the wife's request for permanent maintenance. However, Supreme Court awarded conditional, durational maintenance to the wife, with the husband being obligated both to make monthly payments of $46,666 to the wife, a portion of which is deductible by the husband, and to pay various expenses, including the mortgage payments and taxes relating to the home awarded to the wife. Pursuant to the terms of the judgment, this maintenance award continues until the wife receives both the specific assets awarded to her and the first payment on account of the distributive award (an award we discuss below).

Relying on our decisions in *Gad v Gad* (283 AD2d 200 [2001]) and *Pickard v Pickard* (33 AD3d 2002 [2006], *appeal dismissed* 7 NY3d 897 [2006]), the husband argues that because Supreme Court did not make a permanent maintenance award he is entitled to a credit against the distributive award in the amount of all the

temporary maintenance payments he made. The husband contends that he paid a total of $3,000,987 in temporary maintenance. The wife argues that the husband is not entitled to any credit and disputes the husband's claim that he in fact paid over $3 million in temporary maintenance.

We agree with the wife that the husband's reliance on *Gad* and *Pickering* is misplaced and that he is not entitled to any credit for the temporary maintenance payments he made, regardless of the amount of those payments. The mere determination by Supreme Court not to award permanent maintenance cannot be equated with a finding that the pendente lite maintenance award was excessive. Supreme Court did not make such a finding either expressly or implicitly. To the contrary, as is clear from Supreme Court's written decision, the determination not to award permanent maintenance was based in part on the ground that permanent maintenance was unnecessary given the wife's vastly different economic circumstances as a result of the equal distribution of the marital property. In addition, Supreme Court also based this determination on the consequences of the distribution of the overwhelming preponderance of the liquid marital assets to the wife. As a result, a permanent maintenance award would have required the husband to tap into the income generated by WCI or liquidate securities it owned even though he

was awarded this asset. Accordingly, Supreme Court cogently observed that an award of permanent maintenance would entail an element of "double dipping" by the wife into the principal asset awarded to the husband. In light of our conclusion that the husband is not entitled to a credit simply because Supreme Court did not award permanent maintenance, we need not resolve the parties' competing contentions about whether the record is adequate to determine the amount of the temporary maintenance payments. To the extent the husband asserts that we should find the pendente lite maintenance award excessive, we find that assertion unpersuasive.[16]

VII

In determining the date-of-commencement value of the marital interest in WCI, Supreme Court found that the value of the husband's separate property interest in the predecessor entity as of the date of the marriage in 1971 was $646,271. The parties do not now take issue with this finding or with either Supreme

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[16]Conceivably, Supreme Court might have awarded permanent maintenance to the wife if it had valued WCI in accordance with the methodology adopted in *Dunn*. As noted earlier, however, the wife does not ask us to accord her any relief relating to permanent maintenance in the event we were to accept the husband's argument concerning the extent of the appropriate deduction for embedded taxes. Because she has not cross-appealed, we could not in any event grant such relief to her (*Kay v Kay*, 302 AD2d 711, 714 [2003]).

Court's conclusion that the common and preferred stock of the predecessor entity that the husband inherited in 1986 upon his father's death was his separate property, or Supreme Court's finding that the value of the inherited stock in 1986 was $3,523,904.80. Because the inherited stock, coupled with the stock the husband already owned prior to his father's death, constituted a controlling block, Supreme Court found that the value of the common stock the husband owned prior to the inheritance should be increased by 35% (or $752,769.36) to eliminate the discount in the value of those shares attributable to the fact that they constituted only a minority interest. The parties do not dispute this finding or Supreme Court's conclusion that this 35% increase in value represented "passive appreciation" that was the husband's separate property. With respect to the preferred stock the husband owned prior to the inheritance, Supreme Court found for similar reasons that its value increased by $201,707.71 as a result of the inheritance. The parties do not dispute this finding by Supreme Court or its conclusion that this increase in the value of the preferred shares represented "passive appreciation" that was the husband's separate property.[17]

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[17]The husband does not contend that Supreme Court erroneously failed to include as his separate property the

Accordingly, we find that the date-of-commencement value of the marital interest in WCI is $47,131,777.95 -- $52,608,922 minus the sum of the adjusted, after-tax value of the proceeds of the securities sold prior to the commencement date ($155,691.18), the value of the husband's property interest in WCI as of the date of the marriage ($646,271), the value of the husband's subscription right ($196,800), the value of the common and preferred stock he inherited from his father ($3,523,904.80) and the amount of the increase in value of the husband's equity interest at the time of the inheritance stemming from the controlling interest in the corporation acquired as a result of the inheritance ($954,477.07).

VIII

With respect to the other marital assets, including securities (virtually all of which were in the husband's name), cash accounts, a home and an apartment, Supreme Court valued them at $30,548,556. Except for his contention, discussed below, that Supreme Court erred in valuing the securities as of the date of commencement and the cash as of the date of trial, the husband does not contest Supreme Court's valuation of the other marital

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increase in value of the common and preferred stock acquired pursuant to the subscription agreement stemming from the inherited stock.

assets.

After considering the statutory factors (Domestic Relations Law § 236[B][5][d]), Supreme Court determined that the parties should share equally in all of the marital assets. The husband does not now contest this determination. Given its conclusion that the husband should retain his ownership of WCI, Supreme Court was constrained to award to the wife approximately 88% of the other marital assets, collectively valued at $27,135,154. The husband was awarded his Colorado residence (valued at $1.95 million) and, to provide him with "some liquid cash assets," certain securities Supreme Court had valued at $1,463,422.

The result of these discrete awards was a deficiency in the wife's share of the assets of $22,770,623 ($49,905,776, one half of the total value of $99,811,533 that Supreme Court assigned to the marital assets, minus $27,135,154, the value of the specific marital assets awarded to the wife). Accordingly, Supreme Court granted a distributive award to the wife in the amount of the deficiency, and directed that the husband pay the award over a period of 15 years, with annual payments of $1,518,042 payable in quarterly installments of $379,510.50. Supreme Court did not grant pre-judgment or post-judgment interest on the distributive award to the wife, but ruled that interest would accrue in the event and to the extent of a default in any of the required

payments.[18]

Contrary to the husband's contention, Supreme Court did not err in valuing the parties' cash accounts as of the date of trial. As of the date of commencement of the action, the wife had cash accounts in the amount of $3,023,424, which had dwindled to $297,047, a decrease of $2,726,337, by the time of trial. According to the husband, by valuing the wife's cash accounts as of the date of trial, Supreme Court erroneously relieved the wife of any obligation to account for the $2,726,377 she apparently spent between the date of commencement and the date of trial.[19]

We reject the husband's claim that he is entitled to a credit against the distributive award in the amount of one half of the decline in value of the wife's cash accounts. As the wife notes, Supreme Court also found that between the date of commencement and the date of trial, the husband's cash accounts had declined by $2,781,086 (from $4,170,253 to $1,389,167). The husband does not dispute this finding. Nor does he address

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[18]The wife maintains that Supreme Court erred in declining to award pre-judgment and post-judgment interest and that the economic effect of not awarding post-judgment interest is a diminution in the value of the distributive award of nearly $9 million. The wife, however, withdrew her cross appeal and we may not review this or any of the other claims for affirmative relief that she raises in her brief (*Kay v Kay, supra*, 302 AD2d at 714).

[19]Supreme Court found that the decline in value was $2,726,377; the husband asserts that the decline was $2,698,402.

Supreme Court's implicit conclusion that it mattered little which date was used given that the difference between the decline in value of the parties' cash accounts was relatively minor. Moreover, defendant was the one who spent more from his cash accounts and he was similarly relieved of any obligation to account for the $2,781,086 decline in the value of his cash accounts. Supreme Court further observed, and the husband does not dispute, that there was "no evidence establishing exactly what happened to the monies each party had in his or her possession while the case was pending."

The husband's argument that the securities of WCI (and thus WCI itself) and the other securities he owned or controlled should have been valued as of the date of trial also is without merit. While some "courts have concluded that 'active' assets should be valued only as of the date of the commencement of the action, while the valuation date for 'passive' assets may be determined more flexibly," these "formulations" are but "helpful guideposts" and not "immutable rules of law" (*McSparron v McSparron*, 87 NY2d 275, 287-288 [1995]). Thus, although securities commonly are "passive assets" that are valued at the date of trial as they may "change in value suddenly based on market fluctuations" (*Grunfeld v Grunfeld*, 94 NY2d 696, 707 [2000]), they may be active assets when, as here, they are

actively managed by the titled spouse (*Ferraioli v Ferraioli*, 295 AD2d 268, 270 [2002]).

Apart from finding what is undisputed, that the securities owned by WCI and by the husband required his "specialized knowledge in order to be appropriately invested," Supreme Court's conclusion that the securities should be valued as of the date of commencement was appropriate for another reason. In rejecting the husband's claim that the securities should be valued as of the date of trial, Supreme Court stressed that:

> "The parties, by their actions throughout prior proceedings herein, charted a course of litigation that accepted a [date of commencement] valuation of WCI ... When this trial began defendant agreed, by words and deeds, that the court should utilize a [date-of-commencement] valuation. Thus, when, during discovery, [the wife] demanded up to date financial information about WCI, defendant refused to produce such information arguing that it was irrelevant to a [date-of-commencement] valuation."

All of the experts, moreover, adopted a date-of-commencement valuation date. And, as Supreme Court also observed -- and the husband also does not dispute -- "[o]nly toward the close of the evidence on WCI's valuation did the husband advance his contention that the court should utilize a trial date valuation."

IX

Having disposed of all the husband's claims regarding the value of the marital property and for various credits against the

distributive award, we turn to the modifications to the distributive award that are required by our findings and conclusions of law. As is evident, the overvaluation of WCI has significant consequences for the distributive award. Under our analysis, and using the same valuation dates adopted by Supreme Court, the total value of the marital property is $77,680,333.95 ($47,131,777.95 plus $30,548,556), and thus each party's share is $38,840,167. We are not unmindful of the husband's protest that Supreme Court's distribution to the wife of 88%, $27,135,154, of the more or less liquid assets -- the marital property other than the marital component of WCI -- is inequitable. The burden of this distribution of those assets, however, is mitigated by the substantial reduction in the distributive award. In addition, as is discussed below, it appears that the husband sold some of the securities in his name after commencement of the action and before Supreme Court's decision and order resolving the trial issues. We do not know, however, which securities were sold. Moreover, any redistribution of the liquid assets would require a correlative increase in the distributive award. The economic value of any such increase, however, would be reduced by virtue of the fact that interest does not accrue on the distributive award.

For these reasons, we decline to disturb Supreme Court's

allocation of the marital assets other than the marital component of WCI. Accordingly, a distributive award of $11,705,013 ($38,840,167 minus $27,135,154) is necessary to effectuate the equal division of the marital property. In accordance with the payment terms fixed by Supreme Court, the $11,705,013 distributive award is payable over a period of 15 years, with quarterly payments of $195,083.55.

X

One last issue, and a ministerial matter, remain to be discussed. During the pendency of this action, the wife sought an injunction preventing the husband from selling or transferring the securities in his control. That application was denied. As the husband argues, he thus was free to sell securities he controlled on the date of commencement. In his brief, the husband states that he did sell some of those securities and purchased others, paying taxes on the gains realized on the sale of the securities he sold. In her brief, the wife does not challenge these statements by the husband in his brief or argue that we should ignore them as dehors the record.

A problem arises because the written decision and order direct that the husband transfer to the wife all of the securities owned or controlled by the husband (other than those owned by WCI) and listed in the decision and order along with

their date-of-commencement market value. Indeed, the decision expressly notes that by crediting against the distributive award the full value of the securities as of the date of commencement, "the risks of gains and/or losses since the valuation date [were passed] over to [the wife]." Even assuming that there is some ambiguity in the relevant terms of the judgment on this score, the decision controls (*Madison III Assoc. Ltd. Partnership v Brock*, 258 AD2d 355 [1999]).

With respect to any of the securities the husband sold while he was free to do so after the wife's motion for an injunction was denied, the husband argues that he is required to provide the wife with "the proceeds of re-investment less the costs of the sale, taxes and reinvestment."[20] The wife argues simply that the husband is required to transfer to her the assets acquired with the sale proceeds. Although the husband suggests in his main brief that the wife does so argue, we do not understand the wife to argue that the husband is required to transfer to her a sum of money equivalent to the date-of-commencement market value of the

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[20]By "proceeds of re-investment," we understand the husband to refer to the actual asset or assets acquired with the cash generated by the sale. To the extent any securities were sold and the cash was not reinvested in another security or other asset, the husband argues that he is required to transfer to the wife the cash proceeds plus, either the actual interest earned or imputed interest if none was earned, less the costs of the sale including any taxes paid by the husband.

securities sold. The dispute between the parties on this score, accordingly, reduces to whether the husband is entitled to a credit against the distributive award in the amount of the costs he incurred, including taxes he paid, in selling and reinvesting the securities sold.

We conclude that it would be inequitable not to grant the husband such a credit given that he was free to sell the securities during the pendency of the action.[21] Accordingly, we unfortunately must direct a hearing to determine which securities the husband sold, what he did with the proceeds, what costs he incurred and the amount of the resulting credit to which he may be entitled. However, we direct that the hearing take place as expeditiously as possible and, in the event of another appeal, encourage either party to move this Court for an order expediting the appeal.

As noted earlier, during the pendency of this action, the Internal Revenue Service asserted a tax deficiency against WCI

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[21]Whether the husband sold any of the securities after the date of Supreme Court's written decision and order but before the judgment is a matter about which we are not advised. Nor do the parties address the issue of whether the husband remained free to sell the securities during that period. Accordingly, we express no opinion regarding whether the credit the husband is entitled to would be affected in the event such sales occurred. Similarly, we express no opinion on that issue in the event the husband sold any of the securities after the judgment was entered.

for having deducted during various tax years excess compensation that it had paid to the parties. An action thereafter was commenced in Tax Court. As of the time of Supreme Court's written decision and order, the tax proceeding was fully tried and sub judice. Supreme Court concluded in its decision and order that in the event of a final adjudication of tax liability against WCI on account of excess compensation that it had paid to the parties during the years they were married, it would be inequitable not to require the wife to share in that liability. Supreme Court determined that the wife's share of the potential liability was 46.7%, which it computed by dividing 50% of the date-of-commencement value of the marital interest in WCI by the full date-of-commencement value of WCI. Because the extent of the liability was unknown, Supreme Court determined that after the final adjudication of the tax proceeding, either party was permitted to "apply to the court for further direction on how the [wife] shall pay her share of the tax liability." The judgment incorporates this determination, and the husband does not contend that Supreme Court erred in computing the wife's share of the tax liability.

After the judgment was entered but before this appeal was perfected, the proceeding in Tax Court was decided (*Wechsler & Co., Inc. v Commissioner of Internal Revenue*, TC Memo 2006-173

[2006]). The husband maintains in his brief, and the wife does not dispute, that as a result of the Tax Court decision, WCI faces a tax liability to the federal government and to New York State for as much as $19,000,000. We do not know whether any final judgment of liability has been entered against WCI or whether, if a final judgment has been entered, an application has been made in Supreme Court with respect to the payment by the wife of her share of the liability. We simply observe that in the event no such application has been made and resolved, our reduction in the date-of-commencement value of the marital interest in WCI would entail a reduction of the wife's proportionate share of the tax liability, from 46.7% to 44.8% (50% of $47,131,777.95 divided by $52,608,921).

To the extent we have not expressly or implicitly addressed all the husband's arguments for affirmative relief, we find them unavailing.

Accordingly, the judgment of Supreme Court, New York County (Judith J. Gische, J.), entered February 3, 2006, inter alia, equitably distributing marital property, should be modified, on the law and the facts, the provisions thereof (1) reducing the base line value of WCI by $7,793,292 pursuant to the "historical" rate of annual taxes paid by WCI, (2) determining that the husband's right pursuant to a subscription agreement to purchase

additional shares of stock in WCI's predecessor was not his separate property, (3) reducing by $55,712.53 the after-tax value of the proceeds of the securities sold prior to the commencement date of the action but not settled until after that date, (4) determining that the marital interest in WCI is $69,262,977, (5) determining that the value of the marital estate is $99,811,533, (6) directing the husband to pay the wife a distributive award of $22,770,623, payable in quarterly installments of $379,510.50, and (7) determining that the wife's share of the tax liability of WCI is 46.7%, should be vacated and replaced by provisions (1) reducing the base line value of WCI by $29,572,000 pursuant to the approach of the neutral expert and the husband's expert, (2) determining that the husband's right pursuant to a subscription agreement to purchase additional shares of stock in WCI's predecessor was his separate property and reducing the base line value of WCI by the value of that right, $196,800, (3) reducing by $211,403.71 the after-tax value of the proceeds of the securities sold prior to the commencement date of the action but not settled until after that date, (4) determining that the marital interest in WCI is $47,131,777.95, (5) determining that the value of the marital estate is $77,680,333.95, (6) directing the husband to pay the wife a distributive award of $11,705,013, payable in quarterly installments of $195,083.55, and (7)

determining that the wife's share of the tax liability of WCI is 44.8%, and otherwise affirmed, without costs, and the matter remanded to Supreme Court both for a hearing to determine which securities the husband sold, what he did with the proceeds, what costs he incurred selling and reinvesting securities and the amount of the resulting credit to which he is entitled against the distributive award and, following that hearing and a determination of the amount of the credit, entry of an amended judgment consistent with this opinion.

All concur except Sweeny, J. who dissents in part in an Opinion.

SWEENY, J. (dissenting in part)

I agree with the majority on all but one point. I cannot agree that a discount for "trapped-in capital gains" should be applied in arriving at a value of Wechsler & Co., Inc. (WCI), defendant's closely held Subchapter C corporation. The *Dunn*[1] and *Jelke*[2] valuation methodology used by the majority recognizes the trapped-in capital gains discount for C corporations and applies dollar-for-dollar discount for such capital gains in arriving at a value for estate tax purposes. I also appreciate that the IRS has taken the position that a discount for built-in capital gains tax liabilities could be applied when valuing a closely-held stock, depending on the facts presented in each case (1999-4 I.R.B. 4). Depending on the facts, the IRS applies this discount whether the corporation under consideration is going to continue in business or whether it is winding up its operations.

As the majority recognizes, this valuation methodology, which arose out of valuations for estate tax purposes, may not be appropriate for matrimonial valuation purposes. In fact, as the majority notes, although Tax Court decisions are generally followed in the Family Law arena, most courts that have faced

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[1] *Matter of Dunn v Commissioner*, 301 F3d 339 (5th Cir., 2002)

[2] *Matter of Jelke v Commissioner*, 507 F3d 1317 (11th Cir., 2007)

this issue have not allowed a discount for trapped-in capital gains in a matrimonial context (*see* generally, Shannon P. Pratt, et al., Valuing a Business: The Analysis and Appraisal of Closely Held Companies, 463-464 [5th ed., 2008]). An analysis of the cases cited therein shows that the courts in other jurisdictions have looked at the facts of each case, and where the tax consequences are immediate and arise as a result of the decree, or within an ascertainable time that is neither hypothetical nor imaginary[3], the tax consequences of the trapped-in capital gains must be taken into account. However, where there is no indication that the party will be selling the property or the party's interest in the property will continue, the dollar-for-dollar discount for trapped-in capital gains methodology may not be appropriate.[4]

This is not say that uncertainty regarding a party's future dealing with the asset should prevent attempts to value it,[5] and I agree with the majority that the issue here involves the appropriate valuation methodology to use under the facts and

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[3]*Liddle v Liddle*, 140 Wis.2d 132, 410 N.W.2d 196 (Wis. Ct. App., 1987).

[4]*In re the Marriage of Hay*, 80 Wash. App. 202 907 P.2d 334 (Wash. Ct. App., 1995).

[5]*Burns v Burns*, 84 NY2d 369, 375 [1994].

circumstances of this case. Where I must part company with my colleagues is in finding that the trial court erred in accepting plaintiff's expert's methodology of valuation by using the "historical" tax rate of the corporation.

Although the neutral expert found this approach "meaningless" there is insufficient support in the record for this conclusion. The majority accepts this conclusion based on what they consider the neutral's "common sense" view of the valuation methodology he utilized, rather than on the facts as they appear in the record. Essentially, the neutral **dismissed the** "historical approach" out of hand, but did not demonstrate to the trial court that this approach is inherently improper or should not be applied in this case where the amount of capital gains actually to be paid is uncertain.

Initially, unlike *Dunn* and *Jelke*, there is no indication that defendant's interest in WCI will cease or that WCI will cease operations with the entry of the decree. This is clearly demonstrated by the fact that the equitable distribution award was to be paid out over a period of time and that the payments would in large part be from defendant's earnings from WCI. Hence, there is no real "willing seller and willing buyer" but rather a hypothetical one: a legal fiction created solely to establish a value for WCI for equitable distribution purposes and

to compute tax consequences that do not arise immediately as a result of the decree. As noted, other jurisdictions have found that under such circumstances, this is simply too speculative to create an immediate tax impact requiring the dollar-for-dollar discount for trapped-in capital gains. For example, in *Jelke*, the decedent held a minor percentage interest in an ongoing concern which was to continue into the future. The decedent's interest terminated at his death and was valued accordingly. It was also to be paid out immediately, and thus had an immediate tax impact on the estate. Under those circumstances, it was reasonable to apply the dollar-for-dollar discount. This is not the case here. Defendant's interest will continue in WCI and he does not have an immediate tax impact as the payments will be made over a period of time from the earnings of WCI. There is simply nothing here which distinguishes the facts of this case from those of other jurisdictions which rejected the *Dunn* methodology, and I submit there is no reason to reject the rationale of those jurisdictions.

Illustrative in this regard is *In re Marriage of Hay*, (80 Wash. App. 202, *supra*). The trial court adjusted the gross value of the real estate partnership in question from $119,049 to $101,000 to reflect the capital gains tax that would be paid if the interest were sold. The appellate court reversed, holding

that "[b]ecause a sale was not imminent, the trial court erred in considering the capital gains tax consequence when valuing the parties' interest in the real estate partnership" (at 206). In those cases where potential tax consequences on sale have been deducted in valuing the marital estate, even where no immediate sale was contemplated, the property in question had a limited shelf life. In *Liddle v Liddle* (140 Wis.2d 132, *supra*), the court found capital gains tax considerations were appropriate where the assets was a tax shelter which would lose its desirability in five to seven years and would most likely be sold. The court concluded that, under those circumstances, the sale date was neither imaginary nor hypothetical. Thus, it seems that, absent an intent to immediately terminate operation, or a reasonably foreseeable date for such termination, most jurisdictions do not find it appropriate to factor in capital gains tax consequences in arriving at the value of the asset for equitable distribution purposes.[6]

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[6]While some states are not as restrictive concerning an immediate or likely sale (e.g. Colorado, Missouri and Virginia), "Courts have generally found that consideration of tax consequences is either required or at least appropriate where they [the consequences] are immediate and specific and/or arise directly from the court's decree, but find they are not an appropriate consideration where speculation as to a party's future dealing with property awarded to him or her would be required" (Tracy A. Bateman, Annotation, *Divorce and Separation: Consideration of Tax Consequences in Distribution of Marital*

I am mindful of the fact that *Jelke* was decided after these cases. The principles set out in *Jelke* may or may not have had an impact on those decisions. Moreover, although *Dunn* and *Jelke* are not matrimonial cases, the principles of taxation, capital gains and valuation are the same. The controlling principle here is whether the valuation, which will ultimately find its way into a decree embodying the equitable distribution of the assets of this marriage, will have a present and immediate impact and this, in turn, depends on the facts of the case. The issue before us is not whether New York courts should adopt the dollar-for-dollar discount for trapped-in capital gains but rather whether the valuation adopted by the trial court was properly utilized in valuing WCI.

There is no single set methodology for valuing a closely held business (*see Matter of Seagroatt Floral Co.*, 78 NY2d 439, 445 [1991]). Here, the valuation that the trial court adopted has support in the record. Mindful of the fact that we have the power to review the record de novo, issues of credibility and contrary interpretations of fact are not sufficient to warrant disturbing the court's determination (*see Matter of Cohen v Four Way Features*, 240 AD2d 225 [1997], citing *Matter of Penepent*

Property, 9 ALR 5th, 568, 592 2[a]).

Corp., 198 AD2d 782, 783 [1993], *lv denied in part, lv dismissed in part* 83 NY2d 797 [1994]).

Notwithstanding the majority's lengthy and eloquent argument for its position, on the record before us, there is no reason to substitute our judgment for that of the trial court with respect to the methodology selected to value this corporation. During the extensive trial, the court viewed the witnesses, carefully examined the evidence and wrote a detailed and thoughtful decision. The majority reduces plaintiff wife's award considerably; an award which, notwithstanding a dollar amount which appears large by itself, is significantly less than she was entitled to under the trial court's careful analysis of Domestic Relations Law § 236 (B). It must also be emphasized that plaintiff was denied any maintenance because of the valuation the court placed on her share of WCI. To place the burden on plaintiff's counsel for not cross moving for maintenance at this stage misses the point of the effect of the disposition.

There was a sound factual and legal basis for the court's exercise of its discretion and there is no reason for us to disturb it.

I would therefore affirm the trial court's valuation of WCI.

M-4774 ***Wechsler v Wechsler***

Motion seeking leave to reargue stay pending determination of this appeal dismissed, as moot.

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

ENTERED: OCTOBER 21, 2008

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CLERK