SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 21, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Buckley, Catterson, McGuire, Acosta, JJ.

5147 Dwight Brown, an infant by his mother and natural guardian, Cynthia Johnson, individually,
Plaintiffs-Appellants,

-against-

Minerva G. Muniz, et al.,
Defendants-Respondents.

Index 24949/05

Arnold E. DiJoseph, III, New York for appellants.

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

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered August 10, 2007, which granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff, an infant, was struck by a vehicle driven by defendant driver on a street that has a parking lane on each side and one lane for west-bound traffic. Plaintiff testified at his deposition that he was playing on the sidewalk on the south side of the street when he ran between two parked cars into the street. He did not look to his right before running into the street and, as he was running through the middle of the street,

he looked to his right and saw defendants' vehicle only inches away from him. The driver testified at his deposition that, before the accident, two other children had run from the sidewalk into the street in front of his vehicle and, therefore, he was traveling approximately five miles per hour when plaintiff "came suddenly from between the [parked] cars." Asked when he saw plaintiff for the first time, the driver answered "[w]hen the accident happened"; asked to estimate the time that elapsed between his first seeing plaintiff and the accident, the driver answered "[l]ike a second"; subsequently asked "[d]id you actually see [plaintiff] come out from between the two parked cars," the driver answered "[w]hen I felt the impact nothing more."

Supreme Court correctly dismissed the action. The deposition testimony of both plaintiff and the driver establish that plaintiff, without warning and without looking in the direction of oncoming traffic, darted out between two parked vehicles directly into the path of defendants' vehicle, leaving the driver unable to avoid plaintiff (*see e.g. Afghani v Metropolitan Suburban Bus Auth.*, 45 AD3d 511 [2007]; *Sheppeard v Murci*, 306 AD2d 268 [2003]; *Wolf v We Transp.*, 274 AD2d 514 [2000]; *Miller v Sisters of Order of St. Dominic*, 262 AD2d 373 [1999], *lv denied* 94 NY2d 763 [2000]).

In concluding that a triable issue of fact exists as to

whether the driver was negligent, the dissent focuses only on an isolated snippet of the driver's testimony. Thus, the dissent writes that the driver testified that "he saw plaintiff running out 'seconds' before the accident." At one point during his deposition, the driver was asked, "[w]hen you say [plaintiff] came out running when did you see him come out running?", to which the driver responded "[w]hen he was coming out, seconds." This response, even assuming it was the only testimony on point and fairly must be taken literally, would not establish anything more than that the driver saw plaintiff two seconds before impact (*see Miller, supra*). In any event, it was clarified later when the driver testified that he saw plaintiff (1) "[l]ike a second" before the accident and (2) as the impact between plaintiff and the vehicle occurred. As is evident, we "interpret" and "usurp[]" nothing. Rather, we have recounted the relevant portions of the driver's testimony and, viewing that testimony in its entirety and in context (*see Mitchell v Route 21 Assoc.*, 233 AD2d 485, 486 [1996]; *see also Hoverson v Herbert Constr. Co.*, 283 AD2d 237, 237-238 [2001]), we conclude that defendants' submissions established as a matter of law that the driver did not have time to react to avoid plaintiff. "Any contention by the injured plaintiff that [the driver] failed to observe what he should have observed is merely an attempt 'to ferret out

speculative issues to get the case to the jury'" (*Brown v City of New York*, 237 AD2d 398, 399 [1997], quoting *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The dissent labors to make plaintiff's case for him, suggesting that we can, and should, take judicial notice of the "fact" that a driver can react to an emergency situation in less than a second.[1] A number of problems, however, plague that suggestion. First, fairness may require that we "afford the parties the opportunity to be heard as to the propriety of taking judicial notice in the particular instance" (Prince, Richardson On Evidence § 2-202 [Farrell 11th ed]). Here, neither party requested that we take judicial notice of the "fact" that a driver can react to an emergency situation in less than a second, and thus the parties have not had the opportunity to address this issue. The resulting prejudice is particularly acute because of the novelty of the issue in this State -- the dissent cites only a 1952 Eighth Circuit decision, a 1958 District Court decision from Delaware and a 1931 decision of the Supreme Court of Virginia. Second, and relatedly, the dissent cites no New York case law (and independent research has not disclosed any) indicating that we can take judicial notice of driver reaction time. In fact, New York authority cuts against the dissent's

---

[1]Our quarrel is not with the dissent's effort to make plaintiff's case for him, but only with the way the dissent endeavors to make that case.

position (*see Murray v Donlan*, 77 AD2d 337 [1980], *appeal dismissed* 52 NY2d 1071 [1981] [court cannot take judicial notice of stopping distance of an automobile traveling at certain rate of speed]). At bottom, whether human reaction time is a subject of which a New York State court may take judicial notice is unclear and, in the absence of any discussion of this issue by the parties, we decline to notice a particular response time.

The dissent's "*cf.*" cite to *Ferrer v Harris* (55 NY2d 285 [1982]) -- a case factually distinguishable from this one -- is not persuasive. In *Ferrer*, the driver of a vehicle struck a young girl who ran into the street. At trial, the driver testified that, as he was driving 15 to 20 miles per hour, he saw the girl step off the sidewalk and run between two parked cars and into the street. The driver also testified that he stopped his vehicle several feet away from the girl but that she ran into the driver's side door of the vehicle (*id.* at 290-291). Plaintiffs, the girl and her guardian, presented evidence that the girl was struck by the front of the vehicle and medical evidence that the injuries she sustained were not consistent with the driver's claim that she had run into his door (*id.* at 291). Plaintiffs claimed, citing New York City traffic regulations, that, while the posted speed limit on the road was 30 miles per hour, the speed at which the driver was traveling (15 to 20 miles per hour) was unreasonable because of the presence of children in

the area and a double-parked vehicle that reduced the driver's maneuverability (*id.*). In light of these facts, the Court of Appeals determined that the questions of whether the driver was negligent and whether he was faced with an emergency situation were for the jury (*id.* at 292-293). In the case before us, however, the uncontradicted evidence is that the driver did not see plaintiff leave the sidewalk and enter the street. According to the driver, plaintiff "came suddenly from between the [parked] cars," and plaintiff's testimony is consistent with the driver's account. Thus, unlike the facts in *Ferrer,* plaintiff darted into the street and the driver had no opportunity to avoid him.

All concur except Acosta, J. who dissents in a memorandum as follows:

ACOSTA, J. (dissenting)

I respectfully dissent because I think this 12-year-old plaintiff should not be denied his day in court based, not on what defendant driver said, but on what the majority, usurping the jury's fact-finding role, interprets the driver to have meant. The majority does not dispute that the driver testified that he slowed to 5 to 10 miles an hour and stopped in the middle of the street because he saw two children crossing the street approximately two car lengths ahead of him. He thereafter proceeded down the street at a speed of five miles an hour with his foot on the brake, while looking to his left for other children who might be crossing the street, when plaintiff suddenly ran out from between two parked cars on the left side of the street. The driver further stated that he saw plaintiff running out "seconds" before the accident, although he later stated that he saw plaintiff for "like a second."

Although I agree with the majority that defendants established their prima facie entitlement to summary judgment by the fact that plaintiff darted out between two parked cars, the driver's testimony raised triable issues of fact as to his own negligence, in particular, whether a reasonable person driving five miles an hour with his foot on the brake would be able to completely stop his vehicle after observing for

"seconds" a pedestrian running across the street (*see Hazel v Nika*, 40 AD3d 430 [2007] ["The issue of comparative negligence is 'almost always . . . a question of fact' and 'almost exclusively a jury function"] [citation omitted]).

In what can only be characterized as a "best defense is a good offense" strategy, the majority accuses me of making the case for plaintiff. It is the majority, however, that "interprets" the evidence to deny plaintiff his day in court. Whether the driver actually meant that he saw plaintiff for a time interval simply too short for the human body to react is a question for the jury, not this Court. Whatever the driver meant, he should have been able to react and stop his vehicle in no more than one second. Driver reaction time of no more than a second has been judicially noticed, although not in New York (*see Standard Oil v Crowl*, 198 F2d 580 [8th Cir 1952, applying Missouri law] ["in the absence of proof to the contrary the reaction time of a normal person is presumed to be 3/4 of one second"]; *Ryans v Blevins*, 159 F Supp 234, 236 [D Del 1958], *affd on other grounds* 258 F2d 945 [3d Cir 1958] [court takes "judicial notice of the fact that it takes the average driver from 3/4 to 4/5 of a second to press down upon his brakes after discovering a dangerous situation ahead"]; 29 Am Jur 2d, Evidence § 88 ["Some courts take judicial notice of an average driver reaction time

that falls within a range of half a second to a full second"]; B. Finberg, *Judicial notice of drivers' reaction time and of stopping distance of motor vehicles traveling at various speeds*, 84 ALR2d 979, § 2 [reaction time mostly taken to be "three-fourths of a second for the average man," although some cases have considered it to be one-half of a second, while others have held it to be at least one second"]).

The majority takes issue because neither party asked this Court to take judicial notice of normal human reaction time and because there are no New York cases on point. But that is wholly beside the point. This Court has the discretion to take judicial notice of facts (*First State Ins. Co. v J & S United Amusement Corp.*, 67 NY2d 1044, 1047 [1986], citing, inter alia, *Hunter v New York, Ontario & W. R.R. Co.*, 116 NY 615, 621 [1889] [on appeal, court may take judicial notice of facts "which are a part of the general knowledge of the country, and which are generally known and have been duly authenticated in repositories of facts open to all, and especially so of facts of official, scientific or historical character"]; *Matter of Persing v Coughlin*, 214 AD2d 145, 149 [1995] [an appellate court may take judicial notice for the first time on appeal of facts not brought to the trial court's attention and may do so for the purpose of reversing the judgment]). I have no doubt that human reaction time is the same in all parts of the country, including Missouri and Delaware.

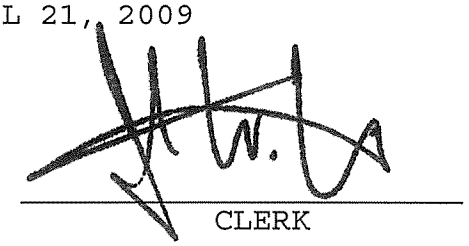
Murray v Donlan (77 AD2d 337 [1980] *appeal dismissed* 52 NY2d 1071 [1981]), relied on by the majority, is not dispositive of the issue in this case. In *Murray* the Court declined to take judicial notice of stopping distances, which are necessarily dependent on many factors. Common knowledge, however, informs that a car traveling at five miles an hour can stop "almost instantly" (*see Virginian R. Co. v Haley*, 156 Va 337, 347, 157 SE 776, 792 [1931]; *cf. Ferrer v Harris*, 55 NY2d 285, 293 [1982] [an emergency, such as a child running into the street, does not automatically absolve the driver from liability, rather the "standard . . . remains that of a reasonable man under the given circumstances, except that the circumstances have changed. Accordingly, the actor 'may still be found to be negligent if, notwithstanding the emergency, the acts are found to be unreasonable'" (Prosser, Torts [4th ed], p 169)]).

Nor do the four Second Department cases relied on by the majority require summary judgment in defendants' favor. In *Miller v Sisters of Order of St. Dominic* (262 AD2d 373 [1999], *lv denied* 94 NY2d 763 [2000]), the driver was traveling between 20 and 25 miles per hour and there is no indication that she had her foot on the brake pedal as the driver in this case did while traveling merely five miles per hour. The other three cases cited by the majority likewise do not indicate that the driver had his foot on the pedal or how fast the driver was traveling.

Viewing the evidence in the light most favorable to plaintiff, the party opposing summary judgment, there are triable issues of fact, including whether the driver had no more than one second to react to this emergency and stop his vehicle. Accordingly, I would reverse.

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

ENTERED: APRIL 21, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, McGuire, DeGrasse, JJ.

5390N Adama Njie, et al., Index 114265/04
Plaintiffs-Respondents,

Mustapha Ceesay,
Plaintiff,

-against-

Larry S. Thompson,
Defendant-Appellant.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for appellant.

Ginsberg & Broome, P.C., New York (Robert M. Ginsberg of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered September 11, 2007, which, to the extent appealed from, denied defendant's motion to compel a neurological examination of plaintiff Adama Njie, and for disclosure of his tax records, reversed, on the law and the facts, without costs, and Mr. Njie instructed to disclose his federal income tax returns and to appear for the requested neurological examination.

Plaintiffs' bill of particulars states that as a result of the subject accident plaintiff Adama Njie was "incapacitated from his employment" for five months. Njie provided a written authorization for defendant's review of his employment records to substantiate this fact, but his former employer is no longer in business and its records have not been made available to the defense. Plaintiff also agreed to give authorization for his tax

records, in a "so ordered" stipulation to that effect in open court on August 7, 2006. Under the circumstances, defendant should be allowed access to plaintiff's tax records to substantiate plaintiff's alleged incapacity.

Plaintiff Njie should also be directed to submit to the requested neurological examination. CPLR 3101(a) requires the "full disclosure of all matters material and necessary in the prosecution or defense of an action." While this plaintiff has submitted an affidavit stating that he is not asserting any specific claim for neurological injury, the record contains evidence that some of the injuries alleged by Njie, though not termed "neurological," may have a neurological etiology (CPLR 3121; see *Nappi v North Shore Univ. Hosp.*, 31 AD3d 509 [2006]). Thus, the results of a neurological examination will likely provide information relevant to issues in controversy at trial.

All concur except Mazzarelli, J., who dissents in part in a memorandum as follows:

MAZZARELLI, J. (dissenting in part)

I dissent from that part of the order compelling plaintiff Adama Njie to undergo a neurological examination because defendant has not established how plaintiff has placed any neurological injuries "in controversy" (CPLR 3121[a]; *see Koump v Smith*, 25 NY2d 287, 300 [1969]).

Plaintiff's bill of particulars alleged only tears of the labra in both shoulders. Although a nerve conduction test performed shortly after the accident revealed that plaintiff possibly had carpal tunnel syndrome in his left wrist, no claim for that injury was made. Thus, no neurological examination is "material and necessary in the...defense of [this] action" (CPLR 3101[a]; *see Kavanagh v Ogden Allied Maintenance Corp., 92* NY2d 952 [1998]). Further, plaintiff affirmatively clarified in an affidavit that he makes no claim for neurological injuries.

The statement by the majority that "some of the injuries alleged by [plaintiff], though not termed 'neurological,' may have a neurological etiology", is unsupported by any competent evidence in the record. Indeed, defendant's position that plaintiff's alleged pain is just as likely a manifestation of a neurological condition as an orthopedic condition, is advanced through nothing more than an attorney's affirmation. It is well accepted that

> "The burden of proving that the party's mental or physical condition is in

> controversy, of course, is on the party seeking the examination or hospital records. The affidavits must contain evidentiary matter and not mere conclusory statements. Because the affidavit must be sworn to by a person having knowledge of the facts, an affidavit by an attorney should be disregarded unless he happens to have personal knowledge of the facts" (*Koump*, 25 NY2d at 300).

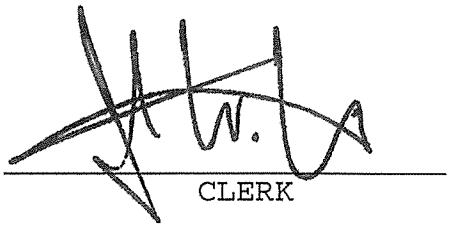
Certainly defendant's attorney here does not profess to have personal knowledge or medical expertise sufficient to opine that the pain alleged by plaintiff to originate from his torn shoulder labra is in fact the result of a neurological injury. Moreover, counsel's observation that the sensation of pain is transmitted by the nerves is irrelevant to the question of whether plaintiff sustained a neurological injury. Plainly, his affirmation is inadequate.

Further, defendants' motion sought the alternative relief, if the court declined to compel a neurological examination, of precluding plaintiff from offering any evidence at trial regarding neurological injuries. That is of course the practical result of plaintiff's decision to withdraw any claim based on such injuries and the implication of the order appealed. Accordingly, defendant is not aggrieved by the order. To the extent that defendant's argument on this appeal is that he cannot effectively defend plaintiff's pain and suffering claims *at all* without having both a neurological and an orthopedic examination,

such a position is inconsistent with his request for a preclusion order limited only to evidence related to neurological injuries, as well as unsupported in the record.

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

ENTERED: APRIL 21, 2009



CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, JJ.

4982 Michael F. Vukovich, Index 115989/05
Plaintiff-Respondent-Appellant,

-against-

1345 Fee, LLC, et al.,
Defendants,

Plaza Construction Corp.,
Defendant-Appellant-Respondent,

ADCO Electrical Corp.,
Defendant-Respondent.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Denis Farrell of counsel), for appellant-respondent.

James J. McCrorie, P.C., Jericho, for respondent-appellant.

French & Rafter, LLP, New York (Lance E. Benowitz of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered May 1, 2008, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, and denied the cross motion of defendant Plaza Construction Corp. (Plaza) for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims and on its claim for contractual indemnification against defendant ADCO Electrical Corp. (ADCO), unanimously modified, on the law, plaintiff's motion granted, and otherwise affirmed, without costs.

Plaintiff was injured when, while working as a pipe fitter at the premises being renovated, he received an electric shock and fell from the third or fourth rung of an unsecured A-frame ladder. There were no witnesses to the accident.

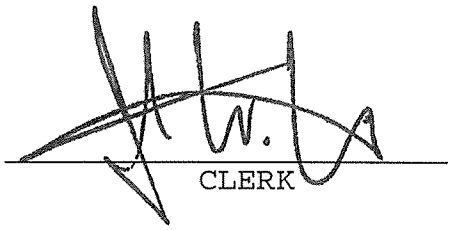
The evidence demonstrates that plaintiff was entitled to partial summary judgment on the issue of liability on his Labor Law § 240(1) claim. The ladder provided to plaintiff was inadequate to prevent him from falling five to seven feet to the floor after being shocked, and was a proximate cause of his injuries (*see Williams v 520 Madison Partnership*, 38 AD3d 464 [2007]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [2002]). That plaintiff had no recollection of falling to the floor does not alter this result (*see Felker v Corning Inc.*, 90 NY2d 219 [1997]).

Since there are questions of fact concerning Plaza's authority to control the activity in question, summary judgment was properly denied with respect to the Labor Law § 200 and common-law negligence causes of action (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505-506 [1993]). Those same issues of fact preclude an award of contractual indemnification in favor of Plaza at this time (*see Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [2004]).

The Decision and Order of this Court entered herein on January 6, 2009 is hereby recalled and vacated (*see* M-610 and M-791 decided simultaneously herewith).

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

ENTERED: APRIL 21, 2009



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5284 In re Myesha M.,
Petitioner-Respondent,

-against-

Omel McL.,
Respondent-Appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

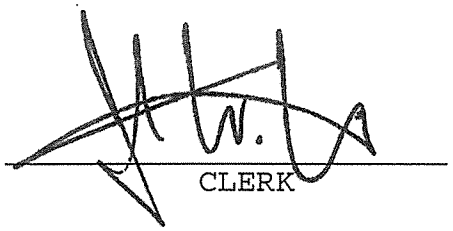
Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about May 21, 2007, which denied respondent's objections to the Support Magistrate's order directing respondent, inter alia, to pay child support of $131 per week for the two subject children, unanimously modified, on the law, to the extent of vacating the award of child support and remanding the matter for recalculation of respondent's child support obligation based upon his 2005 federal income tax return, taking into account his deductions for legitimate business expenses and self-employment taxes, and otherwise affirmed, without costs.

The Support Magistrate correctly found that respondent failed to establish an inability to work full time due to the need to care for a child not subject to the instant petition so as to warrant a reduction in his child support obligation. However, we find that the calculation of respondent's child support obligation, which was based on his 2005 federal tax return, failed to take into account deductions for legitimate

business expenses. When expenses for the lease of business property and utilities are deducted, the gross income determined by the Support Magistrate is reduced by almost half. Moreover, while respondent was only able to deduct 50% of self-employment taxes paid in 2005 on his federal income tax return, the full amount of self-employment taxes paid in that year is deductible from his income for the purpose of calculating his child support obligation (Domestic Relations Law § 240[1-b][b][5][vii][H]; *see Haas v Haas*, 265 AD2d 887 [1999], *Carlin v Carlin*, 217 AD2d 679 [1995]). Finally, we note that the Support Magistrate made no factual finding that income was unreported or under-reported, and a review of the record provides no basis for imputing additional income to respondent (*see Rosenberg v Rosenberg*, 44 AD3d 1022 [2007]; *LaBombardi v LaBombardi*, 220 AD2d 642 [1995]).

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

ENTERED: APRIL 21, 2009



CLERK

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

179 In re Leah F., and Others,

Children Under the Age of
Eighteen Years, etc.,

Durven D.,
Respondent-Appellant,

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

Susan Jacobs, New York (Jacob K. Maeroff of counsel), for appellant.

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

Lawyers for Children, New York (Lisa D. May of counsel), Law Guardian.

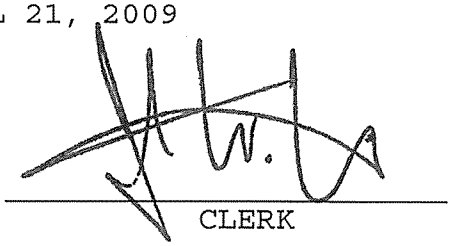
Appeal from order, Family Court, New York County (Jody Adams, J.), entered on or about January 4, 2008, which, in this neglect fact-finding proceeding, denied the motion by respondent-father to dismiss the petitions against him for failure to establish a prima facie case, unanimously dismissed, without costs.

Since it is conceded that the Family Court issued a subsequent order of disposition, the appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action, and the issues raised here may be brought up for review on appeal from that order (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

Therefore, we need not consider or address at this time the appealability of such an intermediate order under Family Court Act § 1112(a).

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

ENTERED: APRIL 21, 2009



CLERK

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

341 The People of the State of New York, Ind. 1230/07
Respondent,

-against-

Samuel Smith,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered February 14, 2008, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree, and sentencing him, as a second felony drug offender, to a term of 10 years, unanimously affirmed.

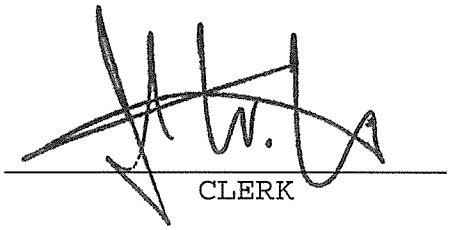
After sufficient inquiry (*see People v Frederick*, 45 NY2d 520 [1978]), the court properly denied defendant's motion to withdraw his guilty plea, which is premised solely on new counsel's statements about what defendant had told him. Defendant's assertions were refuted by the record, including the thorough plea allocution, which establishes that the plea was voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]), and that it was entered with effective assistance of counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]).

The surcharges and fees were properly imposed (*People v Guerrero*, 12 NY3d 45 [2009]), and the plea was not rendered involuntary by the court's failure to mention these assessments during the allocution (*People v Hoti*, __ NY3d __, 2009 NY Slip Op 1249).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 21, 2009



CLERK

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

346 Michael Ansour, Index 350436/03
Plaintiff-Respondent,

-against-

Kristen Kossman Ansour,
Defendant-Appellant.

The Barbara Law Firm, Garden City (Judith A. Ackerman of counsel), for appellant.

Teitler & Teitler, LLP, New York (Nicholas Lobenthal of counsel), for respondent.

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered February 28, 2008, to the extent appealed from as limited by the briefs, awarding defendant maintenance of $6,000 per month until the month she receives her first deferred-income payment due in 2010 as part of equitable distribution, ordering plaintiff to pay $6,343.75 per month in basic child support, to be recalculated in 2008 to include maintenance payments defendant has received, and ordering plaintiff to pay $80,000 to defendant's counsel and $15,000 to defendant's expert accountant, unanimously affirmed, with costs.

Income was imputed to defendant from her interest in a limited partnership, which she reports on her federal income tax return as tax-exempt. This was appropriate in light of the court's finding that defendant was not forthcoming about this interest (*cf. Brenner v Brenner*, 52 AD3d 322 [2008]).

The child support award was properly based on the children's actual needs and the amount required for a lifestyle appropriate for them (*see Matter of Vladlena B. v Mathias G.*, 52 AD3d 431 [2008]). As to the court's direction that child support be recalculated in 2008 to include defendant's income from maintenance, such maintenance payments received and reported on a party's most recently filed income tax return should be included as income for purposes of calculating child support (Domestic Relations Law § 240[1-b][b][5][I]; *Matter of Krukenkamp v Krukenkamp*, 54 AD3d 345 [2008]; *Matter of Diamond v Diamond*, 254 AD2d 288, 289 [1998]). Of course, upon expiration of the maintenance payments in 2010, defendant may seek to modify the child support award accordingly.

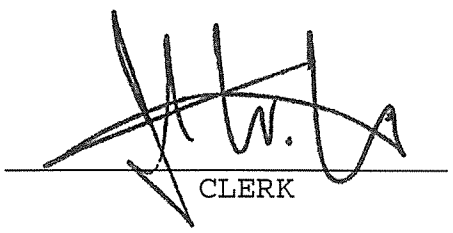
The amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its own unique facts (*Wortman v Wortman*, 11 AD3d 604, 606 [2004]). Here, including pendente lite maintenance, defendant was awarded seven years of maintenance, which is equivalent to the length of the marriage. In addition, as the trial court noted in considering all the relevant factors, the marital lifestyle was not lavish, defendant received over $2 million in equitable distribution, she was not forthcoming about her separate property, she was only 44 years old, and she held two masters degrees that would allow her to become gainfully

employed in the near future. Moreover, the court crafted the maintenance award to terminate when the children became 12 years old and defendant would begin receiving deferred income from the equitable distribution settlement. Defendant's comparison of this case to those in which lifetime maintenance was awarded is without merit, since those cases involved marriages of long duration (*see Hickland v Hickland*, 39 NY2d 1 [1976], *cert denied* 429 US 941 [1976]; *Kay v Kay*, 37 NY2d 632 [1975]), where the recipient spouse had little or no career experience (*Phillips v Phillips*, 182 AD2d 746, 747 [1992]; *Reingold v Reingold*, 143 AD2d 126 [1988]), or where the recipient spouse's age and medical condition were factors (*Loeb v Loeb*, 186 AD2d 174 [1992]).

In light of the considerable distributive award and defendant's conduct unnecessarily protracting and complicating this action, the trial court providently exercised its discretion in awarding defendant only a portion of her counsel and expert fees (*see Azizo v Azizo*, 51 AD3d 438 [2008]; *Kumar v Dudani*, 281 AD2d 178 [2001], *lv denied* 97 NY2d 603 [2001]).

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

ENTERED: APRIL 21, 2009



CLERK

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

347 The People of the State of New York, Respondent, Ind. 548/07

-against-

Shahana Taylor, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lisa A. Packard of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Frank Glaser of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael A. Corriero, J. at hearing; Gregory Carro, J. at jury trial and sentence), rendered January 16, 2008, convicting defendant of criminal possession of a weapon in the third degree, and sentencing her, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

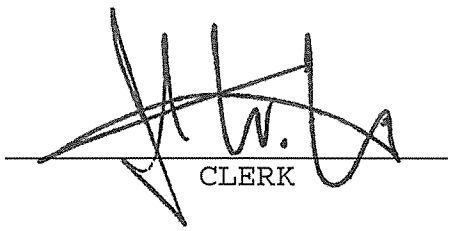
The court properly denied defendant's suppression motion. An identified citizen witness told the police that, in his presence, defendant had just engaged in activity constituting, at least, criminal trespass. This was enough to establish probable cause (*see People v Bigelow*, 66 NY2d 417, 423 [1985]; *Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]). The complainant's status as a citizen informant

satisfied the reliability prong of the *Aguilar/Spinelli* test (*see People v Hetrick*, 80 NY2d 344, 348 [1992]; *People v Hicks*, 38 NY2d 90 [1975]), and his accusation, whether true or not, was based on personal knowledge (*compare People v Parris*, 83 NY2d 342, 350 [1994]). Issues relating to the complainant's credibility were matters to be resolved at trial, and the circumstances presented to the arresting officers did not negate probable cause (*see People v Roberson*, 299 AD2d 300 [2002], *lv denied* 99 NY2d 619 [2003]). Moreover, the complainant's accusation was corroborated by another person present in the apartment.

We have considered and rejected defendant's remaining claims.

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

ENTERED: APRIL 21, 2009



Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

348-
348A Alisa Cirillo, Index 109598/07
Plaintiff-Appellant,

-against-

Macy's, Inc., etc., et al.,
Defendants-Respondents.

Antin, Ehrlich & Epstein, P.C., New York (Scott W. Epstein of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 8, 2008, which, in an action for personal injuries sustained in a slip and fall in defendants' department store, granted defendants' motion to compel acceptance of their late answer, and order, same court and Justice, entered January 7, 2008, which denied plaintiff's motion for a default judgment, unanimously affirmed, without costs.

Defendants served their answer on plaintiff 14 days after it was due and plaintiff rejected the answer two days after it was served. Approximately three weeks after the answer was rejected by plaintiff, defendants moved to compel plaintiff to accept the answer pursuant to CPLR 3012(d). Defendants' motion was supported by their attorneys' affirmation attributing the lateness of the answer to plaintiff's attorney's failure to return numerous telephone calls requesting an extension of time

to serve the answer. Plaintiff opposed with her attorney's affirmation that, while not denying the phone calls or attributing any prejudice to the 14-day delay, argued that the proffered excuse was unreasonable and that defendants' motion lacked a required affidavit of merit. Plaintiff also moved separately for a default judgment against defendants based on their failure to answer timely the action. In separate orders, Supreme Court granted defendants' motion and denied plaintiff's motion.

Defendants claim that plaintiff's notices of appeal are jurisdictionally defective and that the appeals must be dismissed. Plaintiff filed two notices of appeal, both dated February 27, 2008. One indicates that plaintiff is appealing an order of Supreme Court, Queens County, dated December 26, 2007 and entered January 7, 2008, which granted defendants' motion to vacate a note of issue or strike plaintiff's complaint. The other notice of appeal is identical to the first.

Plaintiff is appealing from orders granting defendants' motion to compel plaintiff to accept service of their answer and denying her motion for a default judgment, not from orders vacating a note of issue or striking plaintiff's complaint. To be sure, plaintiff could *only* have appealed from those orders: the only two orders that have been entered in the action are the ones granting defendants' motion to compel plaintiff to accept

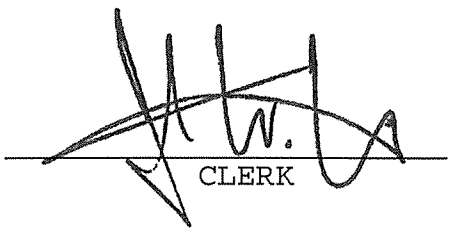
the answer and denying plaintiff's motion for a default judgment. Moreover, the orders granting defendants' motion pursuant to CPLR 3012(d) and denying plaintiff's motion for a default judgment were both dated December 26, 2007 and entered January 8, 2008, the dates listed in the notices of appeal as the dates the orders were executed and filed. That plaintiff inaccurately listed in both notices of appeal the county in which the orders were rendered as Queens is of no moment; the captions of the notices of appeal correctly listed New York County as the venue of the action and both notices correctly identified the judge who rendered the orders. At bottom, while sloppily drafted, the content of the notices of appeal did not mislead defendants or otherwise prejudice them, and we therefore exercise our discretion to disregard the inaccuracies and treat the notices of appeal as valid (*see* CPLR 5520[c]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C5520:1, at 226 [1995]; *cf. Copp v Ramirez*, ___ AD3d ___, 874 NYS2d 52 [2009]).

With respect to the parties' substantive arguments, Supreme Court has broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to serve timely an answer (*see Perellie v Crimson's Restaurant, Ltd.*, 108 AD2d 903, 904 [1985]). Here, Supreme Court did not improvidently exercise its discretion in concluding that defendants proffered a reasonable excuse. Defendants' counsel asserted that he

"contacted plaintiff's [counsel's] office numerous times seeking an extension of time to serve [defendants'] answer," but that plaintiff's counsel did not return any of those calls. Plaintiff's counsel does not challenge the veracity of that assertion. While the excuse is not overwhelming, we cannot conclude that defendants' counsel could not reasonably have expected his request for an extension of time to be granted. Accordingly, we decline to disturb Supreme Court's discretionary determination, particularly because defendants' delay both in serving the answer and seeking leave to compel plaintiff to accept the answer was brief and caused no prejudice (*see Jones v 414 Equities LLC*, 57 AD3d 65, 81 [2008]; *Spira v New York City Tr. Auth.*, 49 AD3d 478 [2008]). An affidavit of merit is not required on a motion for leave to serve a late answer where, as here, no default order or judgment has been entered (*Jones* at 81). In view of the foregoing, plaintiff's motion for a default judgment was properly denied.

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

ENTERED: APRIL 21, 2009



Andrias, J.P., McGuire, Acosta, DeGrasse, JJ.

349-
349A Sheila J. Brown, et al., Index 15028/03
Plaintiffs-Appellants,

-against-

Jay M. Bauman, M.D.,
Defendant,

Dorothy A. Przydzial, M.D., et al.,
Defendants-Respondents.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for appellants.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered August 5, 2008, granting summary judgment dismissing the complaint against defendants Przydzial and Mount Sinai, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 8, 2008, granting the motion for summary relief, unanimously dismissed, without costs, as subsumed in the appeal from judgment.

Plaintiff patient alleges medical malpractice injury during childbirth. In an earlier ruling, we held that defendant Bauman, the OB/GYN, was not negligent by reason of his failure to attend the patient personally. We found no evidence of causation by him based on the speculative allegation that if the patient had been properly examined, a "third/fourth degree laceration" would have

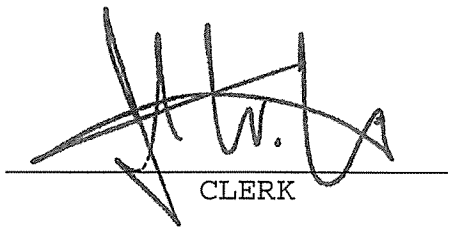
been found; the efforts of plaintiffs' experts at "'reasoning back' from the fact of injury to find negligence" amounted to "[h]indsight reasoning" that was "insufficient to defeat summary judgment" (42 AD3d 390, 392).

In granting summary dismissal herein, the court found the same fatal flaws in plaintiffs' case as to the remaining defendants. Plaintiffs' theory is that crucial nerves in the patient's sphincter were severed. Her perineal tear could not have caused her injuries unless it at least partly severed the sphincter, yet plaintiffs failed to refute the defense demonstration that a second-degree tear would not have extended into that muscle. Even assuming a relationship between the delivery and a weakening of the patient's mid-anal canal wall, plaintiffs did not offer proof of a causal connection between such possible weakening and any allegedly negligent act of the remaining defendants. Plaintiffs' express theory is that the weakening resulted from the remaining defendants' improper evaluation and negligently performed repair of the perineal laceration suffered during delivery. There is no explanation of how proper detection and repair of a tear -- even assuming it was "substantial" -- would have led to the detection of a weakening in the mid-anal canal and referral of the patient to a colorectal surgeon.

No issue of fact is raised by plaintiffs' allegation of lack of informed consent.

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

ENTERED: APRIL 21, 2009



CLERK

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

351 The People of the State of New York, ex rel. William Allen, Petitioner-Appellant, Ind. 75077/06

-against-

Warden, GMDC, New York State Division of Parole, et al., Respondents-Respondents.

Glenn A. Garber, P.C., New York (Angharad Vaughan of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Patrick J. Walsh of counsel), for respondents.

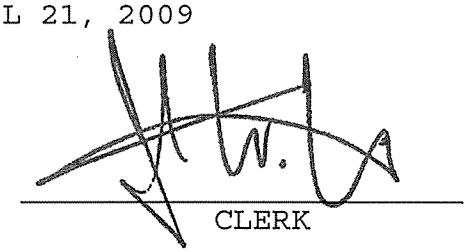
Appeal from an order of Supreme Court, Bronx County (Analisa Torres, J.), entered May 15, 2007, which dismissed the petition for a writ of habeas corpus, unanimously dismissed as moot, without costs.

After the order denying the petition was entered, the charges against petitioner were sustained following a final revocation hearing. This appeal is not moot only if the alleged defect with respect to the issuance of the warrant can be likened to a jurisdictional defect in an accusatory instrument filed in a criminal action (*see People v Alejandro*, 70 NY2d 133 [1987]). Here, however, at most the issuance of the warrant was inconsistent with a regulation of the Division of Parole, 9 NYCRR 8004.2(a) and (b), rather than a statute enacted by the Legislature. Without deciding the issue of whether the warrant

was issued in violation of the regulation, we conclude that the alleged defect cannot be likened to such a jurisdictional defect. Accordingly, "the rights of the parties cannot be affected by the determination of this appeal and it is therefore moot" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). Although the question of mootness is not raised by the parties, the prohibition against deciding "academic, hypothetical, moot, or otherwise abstract questions is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary." (*id.* at 713-714 [1980]) and we can and should resolve it sua sponte (*see Matter of Grand Jury Subpoenas*, 72 NY2d 307, 311 [1988]).

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

ENTERED: APRIL 21, 2009



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 April 21, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
Eugene Nardelli
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 3348/06
Respondent, 650/07

-against-

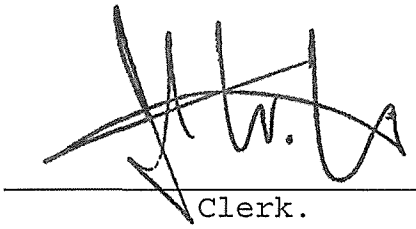
Anthony Gonzalez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about April 27, 2007,

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

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

ENTER:



Clerk.

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

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

353 Marc Nickolson, et al., Index 22385/06
Plaintiffs-Respondents,

-against-

Gerius T. Albishara, et al.,
Defendants-Appellants,

Melissa Anne Coogan, et al.,
Defendants.

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

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Christina N. Rieker of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 24, 2008, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint for lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against all defendants.

Plaintiff's expert radiologist failed to address, let alone rebut, defendants' radiologist's nonconclusory finding that plaintiff's disc bulges and herniations were caused by a preexisting degenerative condition, or even to relate the disc bulges and herniations to the accident; accordingly, plaintiff fails to raise an issue of fact as to whether his alleged

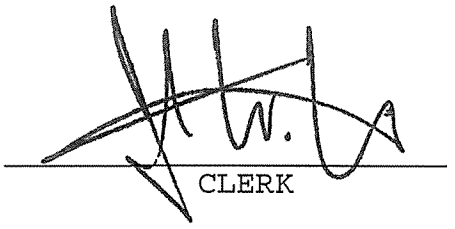
injuries were caused by the accident (*see Delfino v Luzon*, __ AD3d __, 812 NYS2d 24, 25 [2009]; *Valentin v Pomilla*, 59 AD3d 184, 185 [2009]). It does not avail plaintiff for his attorney to assert that defendants' radiologist's findings of preexisting conditions "is unfounded and not based on any medically conclusive findings, as she did not review any prior MRI films, or ever physically examine the plaintiff, or review any of plaintiff's medical records" (*cf. Ramirez v Miller*, 29 AD3d 310, 314 [2006]). We dismiss the complaint as against all defendants upon a search of the record pursuant to CPLR 3212(b) (*see Lopez v Simpson*, 39 AD3d 420 [2007]).

M-1229 ***Marc Nickolson, et al. v Gerius T. Albishara, et al.***

Motion seeking stay of trial dismissed as moot.

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

ENTERED: APRIL 21, 2009



Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

354 The People of the State of New York, Ind. 4653/06
Respondent,

-against-

Dana Booth,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered April 24, 2007, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 14 years, unanimously affirmed.

After sufficient inquiry (*see People v Frederick*, 45 NY2d 520 [1978]), the court properly denied defendant's motion to withdraw his guilty plea. The record establishes that the plea was voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). Since "the court had no reason to believe that the [attorney's] allegedly coercive conduct amounted to anything more than sound advice to accept the favorable plea offer" (*People v Torrence*, 7 AD3d 444 [2004], *lv denied* 3 NY3d 682 [2004]), there was no conflict of interest and no reason to assign new counsel. Furthermore, the record indicates that counsel rendered effective assistance by negotiating a favorable disposition in this felony

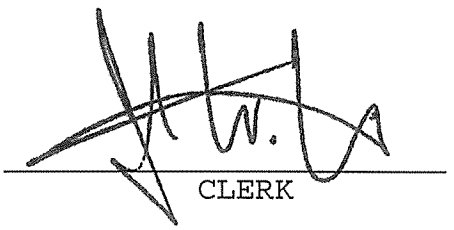
murder case (*see People v Ford*, 86 NY2d 397, 404 [1995]).

The plea was not rendered involuntary by the court's failure to mention the surcharges and fees during the allocution (*People v Hoti*, __ NY3d __, 2009 NY Slip Op 1249).

Defendant made a valid waiver of his right to appeal, which forecloses his excessive sentence claim. As an alternative holding, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 21, 2009



CLERK

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

355 Joselyn Liriano, et al., Index 104773/07
Plaintiffs-Respondents,

-against-

Ostrich Cab Corp.,
Defendant-Appellant,

John Doe,
Defendant.

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

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for respondents.

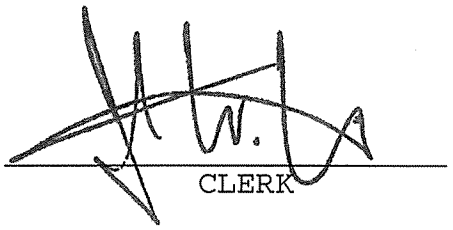
Order, Supreme Court, New York County (Paul Wooten, J.), entered December 1, 2008, which denied the corporate defendant's motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, the motion granted to the extent of dismissing any portion of the claims that might be based on the 90/180-day provision of Insurance Law § 5102(d), and otherwise affirmed, without costs.

Triable issues were presented as to whether both plaintiffs sustained serious injuries under § 5102(d) when the vehicle they were riding in was rear-ended by defendants' vehicle. Plaintiffs' medical experts and treating chiropractor raise issues of fact as to whether plaintiffs' cervical, thoracic and lumbar spinal injuries are permanent or significant, and not merely degenerative (*see Morris v Cisse*, 58 AD3d 455 [2009]).

The defense made a prima facie showing, however, that neither of the plaintiffs missed work or was otherwise unable to perform usual and customary daily activities for at least 90 of the 180 days following the accident (*see id.*).

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

ENTERED: APRIL 21, 2009



CLERK

Andrias J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

356 In re James A. Power, et al., Index 105760/06
Petitioners-Appellants,

-against-

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

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for appellants.

Gary R. Connor, New York (Martin B. Schneider of counsel), for respondent.

Order, Supreme Court, New York County (Charles Tejada, J.), entered March 7, 2007, which denied the petition seeking a writ of prohibition preventing DHCR from processing the owner's 2004 luxury deregulation proceeding and from demanding or verifying petitioner-roommate Hastings' 2002 tax information in connection therewith, and granted DHCR's cross motion to dismiss, unanimously affirmed, without costs.

A writ of prohibition will issue where there is a clear legal right and the body or officer "acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction" (*Forte v Supreme Court of New York*, 48 NY2d 179, 183 [1979], quoting *Dondi v Jones*, 40 NY2d 8, 13 [1976]) and, in the court's discretion, the remedy is

warranted (*see Town of Huntington v State Div. of Human Rights*, 82 NY2d 783, 786 [1993]; *Schumer v Holtzman*, 60 NY2d 46, 51 [1983]).

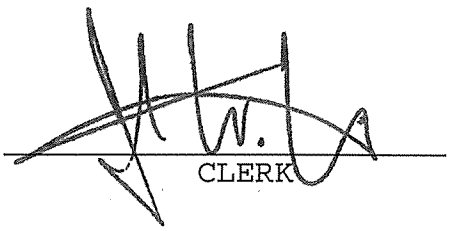
There can be no dispute that DHCR has jurisdiction to adjudicate luxury deregulation petitions and to request that the Department of Taxation and Finance verify the total annual income of all persons residing in housing accommodations as their primary residence in connection therewith (Tax Law §171-b(3)(b); *Matter of Doyle v Calogero*, 52 AD3d 252 [2008]; *A.J. Clarke Real Estate Corp. v New York State Div. of Hous. and Community Renewal*, 307 AD2d 841 [2003]). Furthermore, in *Doyle*, this Court held that in determining household income for purposes of luxury deregulation, DHCR may rationally take into consideration the income of occupants who reside in the apartment on the date the income certification form (ICF) is served, even if the occupant did not occupy the apartment during the two years preceding service thereof.

Accordingly, the writ of prohibition was providently denied. The petition was correctly dismissed for failure to exhaust

administrative remedies (*see Hawco v State Div. Of Hous. & Community Renewal*, 225 AD2d 469 [1996]).

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

ENTERED: APRIL 21, 2009



Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

357 The People of the State of New York, Ind. 4746/06
Respondent,

-against-

Pedro Pena,
Defendant-Appellant.

Richard M. Greenberg, Offices of the Appellate Defender, New York (Heather L. Holloway of counsel), for appellant.

Judgment, Supreme Court, New York County (Laura Ward, J.), rendered on or about March 22, 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.

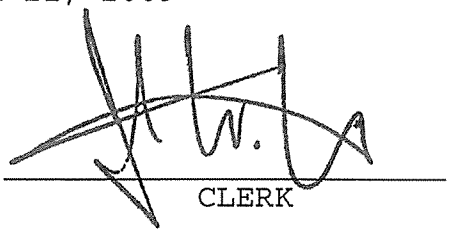
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: APRIL 21, 2009



CLERK

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

359-
360 Tray-Wrap, Inc., Index 26782/03
Plaintiff-Appellant,

-against-

Pacific Tomato Growers, Ltd., et al.,
Defendants-Respondents.

Linda Strumpf, South Salem, for appellant.

Trachteberg Rodes & Friedberg, LLP, New York (Len Rodes of counsel), for respondents.

Orders, Supreme Court, Bronx County (Nelson S. Roman, J.), entered on or about February 11, 2008, and same court (Stanley Green, J.), entered on or about March 7, 2008, which granted defendants' respective motions for summary judgment dismissing the complaint, unanimously affirmed, with costs.

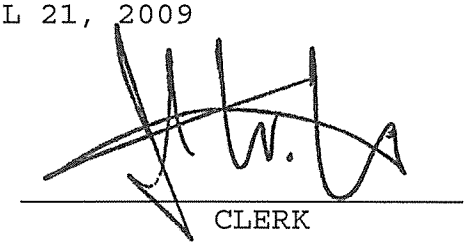
Plaintiff asserts that the instant motions should be denied as untimely because they were made without judicial leave more than 120 days after the filing of the note of issue (see CPLR 3212[a]). It is undisputed that defendants previously made timely motions for summary judgment. By decision dated February 6, 2007, Supreme Court denied the same, without prejudice to resubmission upon papers which were to include copies of the pleadings. Such motions were made within a reasonable time thereafter. Accordingly, the instant motions, although untimely, were made with leave of the court upon a showing of good cause

pursuant to the statute.

Plaintiff's claim for malicious prosecution was properly dismissed for the same reasons stated by this Court in *G & T Term. Packaging Co., Inc. v Western Growers Assn.* (56 AD3d 266 [2008]). Indeed, this very plaintiff made similar arguments based on materially indistinguishable facts. Accordingly, plaintiff's claim is barred by res judicata/collateral estoppel (*Matter of Reilly v Reid*, 45 NY2d 24 [1978]; *Smith v Russell Sage College*, 54 NY2d 185 [1981]). Plaintiff's claim for abuse of process was also properly dismissed for failure to show that the complaint in the underlying proceeding pursuant to the Perishable Agricultural Commodities Act, 1930 (7 USC § 499a *et seq.*) was filed without justification and with intent to do harm, or that the process was in any way perverted (*see Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *Williams v Williams*, 23 NY2d 592, 596 [1969]).

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

ENTERED: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Freedman, JJ.

363 The People of the State of New York, Ind. 1245/06
Respondent,

-against-

Robert Bowler,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Karen Swigger of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered March 20, 2007, convicting defendant, after a jury trial, of assault in the first and third degrees, criminal trespass in the second degree and endangering the welfare of a child, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

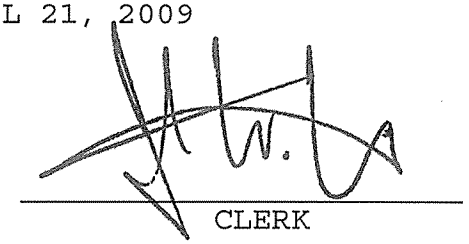
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence, including medical testimony regarding the victim's injuries, clearly established that the stabbing was

intentional and not accidental.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

366-
366A In re Chandel B., Jr., etc., and Another,

Children under the Age of
Eighteen Years, etc.,

Beverly O., etc.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

Julian A. Hertz, Larchmont, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Orders of disposition, Family Court, New York County (Jody Adams, J.), entered on or about March 12, 2008, which, inter alia, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed custody and guardianship of the children to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

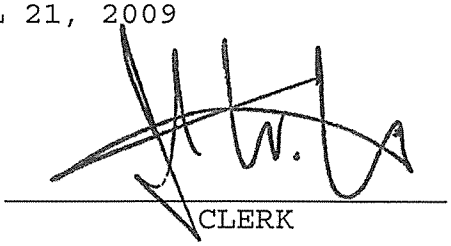
The court properly concluded that it was in the children's best interests to terminate respondent's parental rights, and that a suspended judgment was not warranted. Although respondent made some progress prior to the dispositional hearing, by completing parenting skills and domestic violence classes, such

progress was insufficient to warrant the further prolonging of the children's unsettled situation (see *Matter of Maryline A.*, 22 AD3d 227, 228 [2005]). Demonstrating a lack of understanding to the needs of the children, respondent continued to live in an abusive relationship with the children's biological father (*see Matter of Louise D.*, 227 AD2d 177 [1996]), and has shown no ability to plan for the needs of the children, remaining without a suitable home for many years. Respondent has also unilaterally ceased her mental health therapy and medication, has failed to submit to a psychological evaluation, and visits the children only sporadically.

Furthermore, the record demonstrates that Quintin O. has lived with his maternal great aunt for most of his life, while Chandel B., has lived in this same stable environment for his entire life, both in excess of five years. The good relationship between the maternal great aunt and the children was attested to by the agency and respondent alike (*see Matter of Milan N.*, 45 AD3d 358 [2007], *lv denied* 10 AD3d 703 [2008]; *Matter of Arriola Nicole S.*, 45 AD3d 407 [2007]).

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

ENTERED: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, JJ.

367-
367A Meyers Associates, L.P., Index 600824/07
Plaintiff-Appellant,

-against-

Conolog Corporation,
Defendant-Respondent.

Schrader & Schoenberg, LLP, New York (Bruce A. Schoenberg of counsel), for appellant.

Moses & Singer, LLP, New York (Kimberly Klein of counsel), for respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered March 11, 2008, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing claims for breach of contract and quantum meruit, and order, same court and Justice, entered July 14, 2008, which, to the extent appealable, denied plaintiff's motion for renewal, unanimously affirmed, with one bill of costs.

The Outline for Proposed Investment drafted by plaintiff summarized the terms by which defendant would issue and sell securities to potential investors in connection with a Regulation D offering (i.e., securities that are exempt from registration because they are sold by private placement rather than through a public offering), and gave plaintiff the right to procure purchasers and receive compensation in exchange for its services. This "Term Sheet" constituted nothing more than an agreement to

agree, and not an enforceable agreement between the parties (*see Chatterjee Fund Mgt., L.P. v Dimensional Media* Assoc., 260 AD2d 159 [1999]).

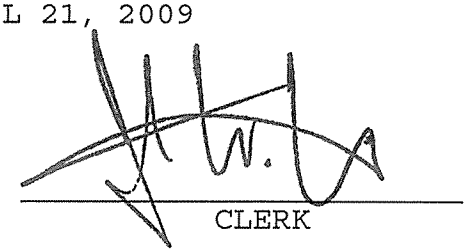
The breach of contract claim necessarily fails even were we to consider that the Term Sheet constituted a binding agreement between the parties, because the Term Sheet, by its own terms, expired on October 30, 2004. This was before defendant allegedly terminated the Regulation D offering in December of that year, and before any of defendant's securities were sold to investors (*see David Fanarof, Inc. v Dember Constr. Corp.*, 195 AD2d 346 [1993]). Plaintiff failed to establish that defendant had abandoned the Regulation D offering prior to the expiration of the Term Sheet or otherwise made an anticipatory breach of its obligations thereunder (*see IDT Corp. v Tyco Group, S.A.R.L.*, 54 AD3d 273 [2008]).

Plaintiff's claim for recovery in quantum meruit is barred by the statute of frauds (General Obligations Law § 5-701 [a] [10]). Furthermore, while a party may assert causes of action in both breach of contract and quasi contract where there is a bona fide dispute as to whether the contract exists or covers the dispute, or where one party has wrongfully prevented the other from performing thereunder, none of those exceptions is applicable in the instant situation.

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: APRIL 21, 2009



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 April 21, 2009.

Present - Hon. David Friedman, Justice Presiding
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 5717/06
Respondent,

-against- 368

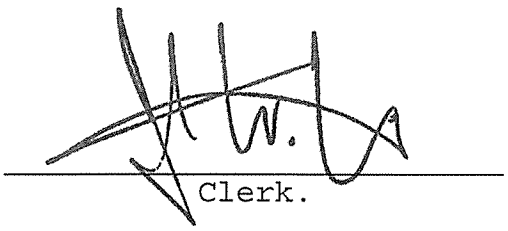
Daniel Powell,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about May 8, 2008,

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.

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

373 The People of the State of New York, Ind. 946/02
Respondent,

-against-

Donnie Caldwell,
Defendant-Appellant.

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

Order, Supreme Court, New York County (Renee White, J.), rendered on or about April 6, 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.

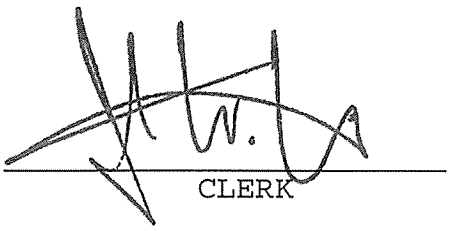
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

375 Nicole Glover, Index 14387/06
Plaintiff-Respondent,

-against-

Capres Contracting Corporation, et al.,
Defendants-Appellants.

The Sullivan Law Firm, New York (Timothy M. Sullivan of counsel), for appellants.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Christina M. Rieker of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered May 7, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants' orthopedic expert, Dr. Kerness, reported ranges of motion for the affected knee and compared them to the norm. According to these tables, plaintiff suffered no range-of-motion limitations. Dr. Kerness also performed numerous objective tests, all of which were negative, and his report established, prima facie, that plaintiff did not suffer a "significant" or "permanent consequential limitation" with respect to the functioning of the knee. Plaintiff, in turn, failed to raise a triable issue of fact with regard to these categories of "serious

injury" (Insurance Law § 5102[d]). The report of her chiropractor does not even address the knee injury, but focuses instead on spinal limitations that are not alleged in the bill of particulars.

Defendants also established that plaintiff's injury did not fall within the 90/180-day category of the statute. The bill of particulars states that plaintiff was confined to home or bed for a period of weeks, but does not indicate that such confinement was medically ordered. Plaintiff's self-serving deposition testimony regarding her inability to work for a period of time is insufficient to establish that she was prevented from performing her usual and customary activities for at least 90 of the 180 days following the accident (*see Rodriquez v Abdallah*, 51 AD3d 590, 592 [2008]).

A knee fracture is an independent category of serious injury under the statute (*see Joyce v Lacerra*, 41 AD3d 236 [2007]). Aware of this alleged fracture, Dr. Kerness not only found a normal range of motion, but diagnosed the injury as "resolved." Plaintiff argues that defendants failed to meet their initial burden because they never addressed the record evidence of a patellar fracture. That evidence, however, is equivocal. Only one of the unsworn X ray reports, dated seven months after the accident, notes a healing patellar fracture. The other (contemporaneous) reports were equivocal and call for

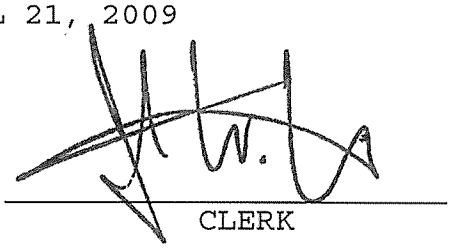
confirmation via clinical examination or further studies. The MRI report of Dr. Campbell, which defendants were entitled to rely on (*see Newton v Drayton*, 305 AD2d 303 [2003]), found a contusion, but no recognition of the clinically described patellar fracture, and no cortical offset was observed. He recommended correlation with radiograph or other CT scanning to detect the presence of a fracture not yet identified.

Dr. Campbell's report was sufficient to establish, prima facie, that plaintiff had not sustained a fracture. In turn, plaintiffs failed to raise a triable issue of fact. The affidavit of plaintiff's chiropractor did not address the injury to the right knee. The contemporaneous X ray reports are equivocal regarding the existence of a fracture and are in any event inadmissible (*Grasso v Angerami*, 79 NY2d 813 [1991]). The only reference to a fracture is in the September 15, 2006 report of the X ray of the right knee, which detects "a transverse sclerotic line . . . across the superior patella consistent with healing patellar fracture." The impression repeats: "Healing patellar fracture." In addition to this report being unsworn, it cannot be determined who interpreted the X ray or whether it became a part of plaintiff's medical record. There is no other evidence of a fracture, admissible or otherwise, since neither plaintiff's medical records nor those of her treating physicians are presented. There is no report referencing these findings,

adopting them or correlating them with physical findings. Plaintiff has thus failed to demonstrate that she sustained a serious injury (*see O'Bradovich v Mrijaj*, 35 AD3d 274 [2006]).

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

ENTERED: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

376 Claire Meadow, Index 100048/07
Petitioner-Appellant,

-against-

NYC Department of Finance, Motor Vehicles,
Respondent-Respondent.

Claire Meadow, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Judgment, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered March 28, 2008, denying the petition and dismissing this proceeding to challenge a parking violation determination and a $115 fine, unanimously reversed, on the law, without costs, the petition granted, and the matter remanded for a hearing.

After receiving notice of violation for illegally parking within five feet of a fire hydrant, petitioner timely mailed the ticket back to the Parking Violations Bureau (PVB), entering a plea of not guilty in the manner prescribed by applicable regulations (*see* 19 RCNY 39-04[b]). Expecting to receive a hearing date (*see* Vehicle and Traffic Law § 240[1]; NYC Admin Code § 19-206[a]), petitioner instead received a determination by an administrative law judge finding her guilty of the charged violation. Petitioner's husband promptly wrote to the PVB, explaining that they had expected an opportunity to present

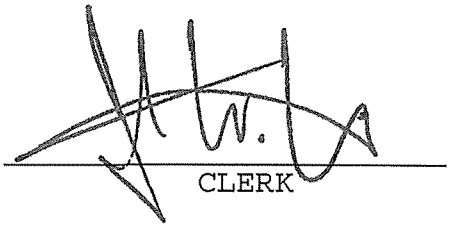
evidence at a hearing and requesting that the determination be vacated and either set down for a hearing or, alternatively, dismissed upon consideration of the accompanying factual statement detailing their defense. The PVB denied the request by letter, stating that "only one hearing is granted per summons," and the PVB Appeals Board subsequently denied petitioner's appeal, finding no error of fact or law.

The PVB abused its discretion in denying the request to vacate. Since petitioner showed she had inadvertently invoked the adjudication-by-mail procedure without intending to waive her right to a hearing, the determination was reached in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Pollock v Kiryas Joel Union Free School Dist.*, 52 AD3d 722, 724 [2008]). The notice on the back of the ticket indicates three ways "TO PLEAD 'NOT GUILTY' AND REQUEST A HEARING": adjudication by mail, on-line adjudication, or an in-person hearing at any hearing center without an appointment. This notice does not clearly state that by mailing the ticket back with a not-guilty plea, the person charged thereby consents to adjudication solely on the basis of the summons and any documents submitted by mail, without the "hearing" provided for in Admin Code § 19-206 and 19 RCNY 39-08. Given the credible assertion that petitioner misunderstood the procedure for entering a not-guilty plea as described on the

ticket, and was thus deprived of an opportunity to be heard, she should have been granted a hearing.

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

ENTERED: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

377 James Marsh, Index 18759/05
Plaintiff-Respondent,

-against-

City of New York, et al.,
Defendants,

Melido Cabrera, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Steven N. Feinman of counsel), for appellants.

Law Offices of Alvin M. Bernstone LLP, New York (Matthew A. Schroeder of counsel), for respondent.

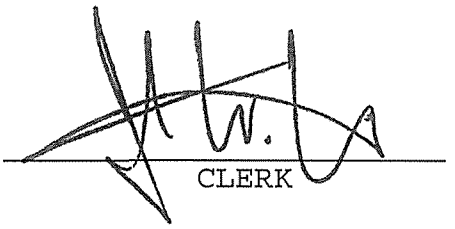
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 18, 2008, which, insofar as appealed from as limited by the briefs, denied defendants-appellants' motion for summary judgment dismissing the complaint for lack of a serious injury under the No-Fault Law, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of all defendants, dismissing the complaint in its entirety.

Defendants met their burden of establishing lack of causation by their expert's opinion that plaintiff's injuries were degenerative. The only opinion on causation submitted by plaintiff that was based on admissible evidence, that of his treating chiropractor, failed to address appellants' nonconclusory expert opinion that plaintiff's allegedly permanent

cervical and lumbar conditions are degenerative in nature (*see Valentin v Pomilla*, 59 AD3d 184, 185 [2009]); indeed, the chiropractor did not purport to provide any reason for his conclusion that such conditions were caused by the accident. Absent evidence sufficient to raise an issue of fact as to causation, plaintiff's 90/180 claim also lacks merit (*see id.* at 186). We dismiss the complaint as against all defendants upon a search of the record pursuant to CPLR 3212(b) (*see Rose v Citywide Auto Leasing, Inc.*, __ AD3d __, 2009 NY Slip Op 1913 [as reflected in the record, action dismissed against all defendants, including those who had not moved for summary judgment, citing *Lopez v Simpson*, 39 AD3d 420, 421 [2007] (action dismissed against nonappealing defendants who had moved for summary judgment)]).

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

ENTERED: APRIL 21, 2009



Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

379 The People of the State of New York, Ind. 2384/06
Respondent,

-against-

Eugenio Guance,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered November 2, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree and of criminal possession of a weapon in the third degree, and sentencing him to concurrent terms of 5 years and 2 years, respectively, unanimously affirmed.

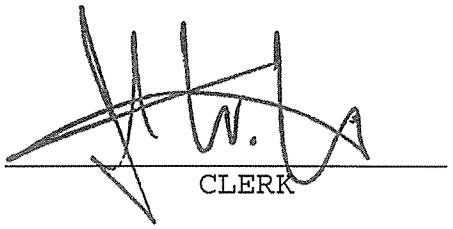
Since defendant did not move to withdraw his guilty plea or vacate the judgment, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, [1988]), his challenge to the validity of the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record establishes the voluntariness of the plea, and to the extent it was linked to a favorable disposition of charges against his girlfriend, the plea met constitutional

standards for that type of arrangement (*see People v Fiumefreddo*, 82 NY2d 536 [1993]). Since defendant did not move to withdraw his plea, the court was not under an obligation to make a sua sponte inquiry into defendant's post-plea claims of innocence and coercion (*see e.g. People v Santos*, 46 AD3d 365 [2007], *lv denied* 10 NY3d 844 [2008]). Defendant's present challenges to his plea are based entirely on his conclusory assertions at sentencing, as well as speculative inferences from the record.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

380 In re 462 Amsterdam, LLC, Index 107141/07
Petitioner-Appellant,

-against-

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

Lipsig Price, PLLC, New York (Joshua C. Price of counsel), for appellant.

Gary R. Connor, New York (Christina S. Ossi of counsel), for respondent.

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered April 25, 2008, which denied petitioner owner's application to annul respondent Division of Housing and Community Renewal's (DHCR) determination of a rent overcharge in the amount of $7,130 and treble damages in the amount of $21,690, and dismissed the petition, unanimously affirmed, without costs.

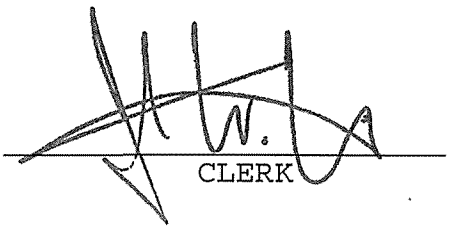
The determination that the value of petitioner's claimed costs for improvements on the subject apartment was $36,890, rather than $51,000, was rationally based upon the record, and was neither arbitrary nor capricious (*see BN Realty Assoc. v State of New York Div. of Hous. & Community Renewal*, 254 AD2d 7 [1998], *lv denied* 93 NY2d 806 [1999]). The $7,130 in overcharges was rationally based upon a 1995 rent reduction order which was in effect at the relevant time. Finally, where the ownership of the property had remained continuous and petitioner was in fact

aware of this order, the DHCR had a rational basis for concluding that the owner failed to establish that the overcharge was not willful or negligent, and thus, for imposing treble damages (*see Matter of Tockwotten Assocs., LLC v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 455 [2004]).

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

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

ENTERED: APRIL 21, 2009



Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

381 Broyhill Furniture Industries, Inc., Plaintiff, Index 109506/05

-against-

Hudson Furniture Galleries, LLC, et al., Defendants-Respondents,

Hudson United Bank, Defendant-Appellant.

Day Pitney LLP, New York (Jonathan M. Borg of counsel), for appellant.

Gerry E. Feinberg, White Plains, for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered March 7, 2008, which, inter alia, granted the motion of defendants Hudson Furniture Galleries, LLC (HFG), Edward Rosenfeld and Michael D. Rosenfeld (the Rosenfelds, and together with HFG, respondents) for summary judgment dismissing the cross claims of defendant TD Bank, N.A. f/k/a TD Banknorth, N.A., successor-by-merger to Hudson United Bank (TD Bank) against respondents, and denied the cross motion of TD Bank for summary judgment against respondents, unanimously affirmed, with costs.

This action arose out of a series of secured loan transactions between plaintiff Broyhill Furniture Industries, Inc., a furniture manufacturer, and HFG, a retail furniture business owned, operated and managed by the Rosenfelds, on the

one hand, and between HFG and TD Bank, on the other. The transactions resulted in Broyhill and TD Bank obtaining security interests in the same collateral. When Broyhill amended its complaint against respondents to name TD Bank as a defendant and TD Bank filed cross claims against respondents, the motion and cross motion at issue ensued. Broyhill's cause of action against TD Bank sought a declaratory judgment as to the priority of their respective security interests and to recover monies paid to TD Bank by respondents, alleging that such sums were subject to its superior security interest. TD Bank's cross claims against respondents sounded in, inter alia, unjust enrichment and indemnification. TD Bank had recently resolved its own action against respondents by written settlement agreement/general release nine months prior to the amended complaint in this action.

"As with contracts generally, the courts must look to the language of a release--the words used by the parties--to determine their intent, resorting to extrinsic evidence only when the court concludes as a matter of law that the contract is ambiguous" (*Wells v Shearson Lehman/American Exp., Inc.*, 72 NY2d 11, 19 [1988]). "The scope of a general release depends on the controversy being settled and the purpose for which the release is actually given" (*Commissioners of the State Ins. Fund v Fortune Interior Dismantling Corp.*, 7 AD3d 427, 428 [2004]).

However, "if from the recitals therein or otherwise, it appears that the release is to be limited to only particular claims, demands or obligations, the instrument will be operative as to those matters alone" (*Kaminsky v Gamache*, 298 AD2d 361, 361 [2002] [internal quotation marks and citations omitted]).

The clear, expansive language of Section 9 of the settlement agreement/general release at issue plainly indicates that it was intended as a complete accord and satisfaction between TD Bank and respondents regarding the subject secured loan transactions, barring any claim that either of them might ever conceivably have arising therefrom. As the Court of Appeals has stated, "words of general release are clearly operative not only as to all controversies and causes of action between the releasor and releasees which had, by that time, actually ripened into litigation, but to all such issues which might then have been adjudicated as a result of pre-existent controversies" (*Lucio v Curran*, 2 NY2d 157, 161-162 [1956]).

Consequently, based on the undisputed evidence that TD Bank was aware of the Broyhill lawsuit, including its claim for fraudulent conveyances and TD Bank's corresponding potential liability, TD Bank, at a minimum, should have preserved its rights by including appropriate limiting language in the settlement agreement. In the absence of such language, respondents are entitled to relief from all liability pertaining

to the loan documents. The mere fact that TD Bank had not been named as a party in the Broyhill lawsuit at that time does not avail TD Bank.

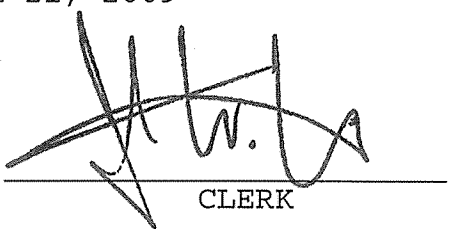
The motion court correctly granted summary judgment dismissal of TD Bank's cross claims. In the absence of an express agreement to indemnify, an obligation to indemnify may be implied to prevent unjust enrichment (*Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 23-24 [1985]). "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trump Village Section 3, Inc. v New York State Hous. Fin.*, 307 AD2d 891, 895 [2003], *lv denied* 1 NY3d 504 [2003]). Nonetheless, "an indemnity cause of action can be sustained only if the third-party plaintiff and the third-party defendant have breached a duty to plaintiff and also if some duty to indemnify exists between them" *(Rosado v Proctor & Schwartz, Inc.*, supra, at 24).

Applying these principles, TD Bank cannot claim that its liability to Broyhill, if any, is purely vicarious, since it left its interests exposed when it failed to timely re-file its financing statement after it learned of the HFG name change. Moreover, a review of TD Bank's cross claims and cross motion for summary judgment indicates that it failed to allege that

respondents owed a duty to Broyhill. Of course, to the extent TD Bank argues that respondents have a duty to them, based on their "contractual obligations to repay TD Bank pursuant to the Loan Documents," that argument fails as respondents' obligations under the loan documents were satisfied by the settlement agreement (*see* General Obligations Law § 15-501[1]). Hence, there is no legal basis for TD Bank's claim that its disgorgement of funds to Broyhill somehow reinstates respondents' obligations under the loan documents.

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

ENTERED: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

382N Valerie Vorontsova, Index 118999/03
Plaintiff-Appellant,

-against-

Louise Marie Priolo, M.D., et al.,
Defendants-Respondents.

Gravante & Looby, LLP, Brooklyn (Thomas Torto of counsel), for appellant.

Belair & Evans, LLP, New York (James B. Reich of counsel), for respondents.

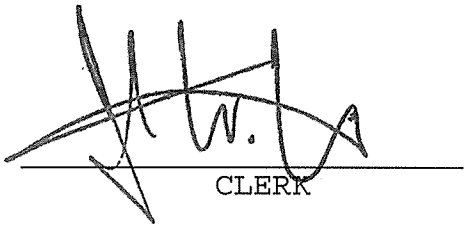
Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 13, 2008, which, in an action for medical malpractice, denied plaintiff's motion to vacate the court's dismissal of the action due to plaintiff's failure to proceed to trial, unanimously reversed, on the law and the facts, without costs, the motion granted, and the action restored to the trial calendar.

The court improvidently exercised its discretion in sua sponte dismissing the action for failure to proceed to trial rather than marking it off the trial calendar. The record shows that defendants had not moved for dismissal of the action, that this was the first time plaintiff had sought an adjournment, which the parties had agreed to due to the unavailability of plaintiff's expert, and that both parties appeared at the calendar call although plaintiff's counsel had to temporarily

leave to tend to another matter (*see* 22 NYCRR 202.27; *Danne v Otis El. Corp.*, 31 AD3d 599 [2006]; *Rodriguez v Pisa Caterers*, 146 AD2d 686 [1989]). Furthermore, in seeking restoration, plaintiff sufficiently demonstrated both a reasonable excuse and a meritorious cause of action (CPLR 5015[a]).

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

ENTERED: APRIL 21, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

383N Silva Swinton, et al., Index 113927/07
Petitioners-Appellants,

-against-

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

The Rambadadt Law Firm, P.C., New York (Robert M. Rambadadt of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered April 22, 2008, which denied the petition for leave to file a late notice of claim nunc pro tunc and dismissed the proceeding, unanimously affirmed, without costs.

Petitioners were convicted in May 2003 of assault in the first degree, reckless endangerment in the first degree and endangering the welfare of a child in Supreme Court, Queens County, in connection with their failure to provide their child with proper nourishment. The judgments were later modified to vacate the convictions of reckless endangerment in the first degree under count two of the indictment, to vacate the sentences imposed thereon and to dismiss that count of the indictment; the judgments were otherwise affirmed (*see People v Swinton,* 21 AD3d 1039 [2005]). The Court of Appeals further modified the

judgments by reducing the convictions of assault in the first degree to assault in the third degree and remitting the case to Supreme Court for resentencing (*People v Swinton,* 7 NY3d 776 [2006]). The Court held that the evidence was legally insufficient to prove beyond a reasonable doubt that petitioners acted with the culpable mental state of depraved indifference, but that the evidence was legally sufficient to support the determination that they acted recklessly *(see id.)*. Upon resentencing, petitioners were released from prison on July 18, 2006, after having served three years of their original sentence.

Petitioners served a notice of claim on June 27, 2007, stating that their child was improperly taken from them based on an anonymous tip, they were arrested without a warrant or probable cause and after extensive negative publicity, were convicted of assault in the first degree and reckless endangerment. Petitioners alleged false arrest, false imprisonment and malicious prosecution, and that their injuries included "civil rights violations, loss of services, physical injuries, emotional injuries and other damages." Petitioners then sought leave to file the late notice of claim nunc pro tunc.

Leave to file a late notice of claim should be denied where the claims are "patently meritless" (*see Matter of Catherine G. v County of Essex,* 3 NY3d 175, 178 [2004]). To the extent the subject notice of claim alleged false arrest and imprisonment and

malicious prosecution, these claims are not viable in light of petitioners' conviction of assault in the third degree, which was upheld by the Court of Appeals. "[A] conviction which survives appeal [is] conclusive evidence of probable cause" (*see Broughton v State of New York*, 37 NY2d 451, 458 [1975], *cert denied* 423 US 929 [1975]), and thus, the finding of probable cause is fatal to each of the aforesaid causes of action (*see e.g. Martinez v City of Schenectady*, 97 NY2d 78, 84-85 [2001]).

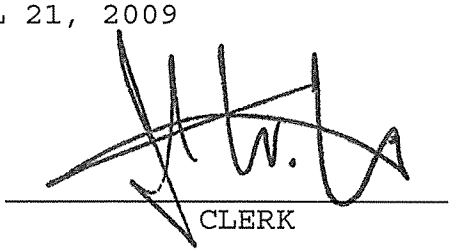
Petitioners' negligence claim, which is based on personal injuries they allegedly suffered when they were arrested, is fatally defective because there is no cause of action for false arrest or false imprisonment sounding in negligence (*see Simon v State of New York*, 12 AD3d 171 [2004]).

Furthermore, since a notice of claim is not required to assert a claim for civil rights violations, the court properly denied the requested relief as to this claim as well (*see Tannenbaum v City of New York*, 30 AD3d 357 [2006]).

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

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

ENTERED: APRIL 21, 2009



CLERK