SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 28, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

403 The People of the State of New York, Respondent, Ind. 4576/07

-against-

Remy Smith,
Defendant-Appellant.

Levitt & Kaizer, New York (Richard W. Levitt of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 13, 2008, convicting defendant, after a jury trial, of assault in the first degree (two counts), attempted coercion in the first degree and criminal possession of a weapon in the second degree, and sentencing her to an aggregate term of 8 years, unanimously affirmed.

The court instructed the jury that "if you find [the victim] was truthful and accurate in her testimony to you, her testimony without any other eyewitness to what happened inside the car, under the law satisfies the proof beyond a reasonable doubt." Viewed in isolation, this was incorrect, because it omitted any reminder to the jury that such testimony, even if truthful and

accurate, would still have to satisfy the elements of the crime beyond a reasonable doubt; in particular, intent was a major issue in the case. However, the charge as a whole conveyed the proper standard and was not constitutionally defective (*see People v Umali*, 10 NY3d 417, 426-427 [2008]; *People v Drake*, 7 NY3d 28, 33 (2006). The challenged language was both immediately preceded and immediately followed by thorough instructions on the requirement that every element be proven beyond a reasonable doubt. The charge was not contradictory, because the offending language was plainly delivered in the context of explaining that the People were not obligated to call more than one witness. Intent was the subject of a detailed instruction by the court as well as extensive summation comment, and the isolated language at issue could not have misled the jury into believing that in this case the issue of intent turned only on the victim's credibility.

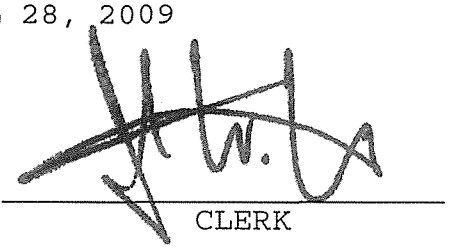
The court properly exercised its discretion in precluding defense counsel from making a summation argument positing an alternate scenario that would have required the jury to draw excessively speculative inferences from the evidence (*see People v Charles*, 61 NY2d 321, 329 [1984]; *People v Blount*, 286 AD2d 649 [2001], *lv denied*, 97 NY2d 701 [2002]). Since defendant never asserted a constitutional right to make this argument, her present constitutional claim is unpreserved (*see People v Umali*, 10 NY3d at 428-429; *People v Lane*, 7 NY3d 888, 889 [2006]), and

we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. In any event, any error, constitutional or otherwise, was harmless. Defendant was not prejudiced by the court's ruling, because the precluded argument had little or no chance of persuading the jury, and because it would have opened the door to damaging uncharged crimes evidence that the court had excluded.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: APRIL 28, 2009



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Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

404-
405 In re Syed I., and Others,

Children Under the Age of
Eighteen Years, etc.,

Sheika I.,
Respondent-Appellant,

Syed I.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for ACS, respondent.

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

Order of fact-finding and disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about August 20, 2007, which released the subject children to their parents under the supervision of petitioner Commissioner of Administration for Children's Services of the City of New York upon a finding that the mother neglected the two older children and derivatively neglected the infant, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's findings that the father neglected the two older children by, inter alia, inflicting excessive corporal punishment on them

(Family Court Act § 1012[f][i][B]) and that the mother neglected the two older children by failing to take appropriate measures to protect them from the father's excessive corporal punishment (*see Matter of Alysha M.*, 24 AD3d 255 [2005], *lv denied* 6 NY3d 709 [2006]). This evidence supports the finding of derivative neglect as to the infant (*see Matter of Joshua R.*, 47 AD3d 465, 466 [2008], *lv denied* 11 NY3d 703 [2008]).

The children's out-of-court statements that the father punished them by hitting them, making them do knee bends, and threatening to withhold food if they did not memorize written passages were amply corroborated by the father's medical records and the mother's statements that she feared the father, was aware of his deteriorating mental health, and could not protect the children when he hit them (*see* FCA § 1046[a]; *Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]).

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

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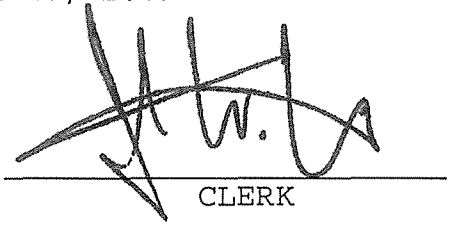


CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

406 In re Brandon C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

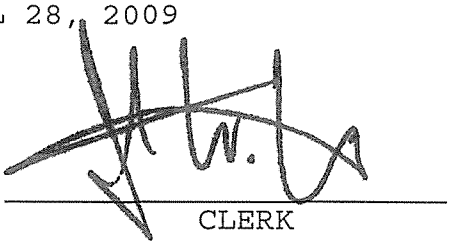
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 28, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the third degree and attempted assault in the third degree, and placed him on probation for a period of 15 months, unanimously affirmed, without costs.

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

and credibility. The victim had a sufficient opportunity to view her assailant, and she spontaneously recognized appellant minutes after the robbery.

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

ENTERED: APRIL 28, 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 28, 2009.

Present - Hon. David B. Saxe, Justice Presiding
David Friedman
Karla Moskowitz
Helen E. Freedman
Rosalyn H. Richter, Justices.

---x

The People of the State of New York, Ind. 3386/02
Respondent, 7101/02

-against- 407

Narayanan Appukkutta,
Defendant-Appellant.

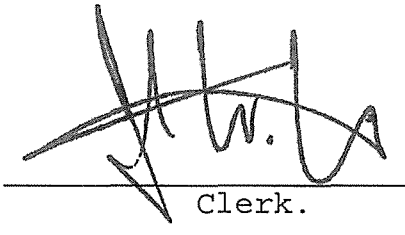
---x

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about October 19, 2007,

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

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

ENTER:



Clerk.

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

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

409 Mary Christian, Index 17714/06
Plaintiff-Appellant,

-against-

George Waite, et al.,
Defendants-Respondents.

Orlow, Orlow & Orlow, P.C., Flushing (Adam M. Orlow of counsel), for appellant.

Law Office of Thomas K. Moore, White Plains (Nick Migliaccio of counsel), for George Waite, respondent.

Barrett Lazar, LLC, Forest Hills (Marc B. Schuley of counsel), for Janine Garfield, respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered February 14, 2008, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established a prima facie entitlement to summary judgment by submitting evidence demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of an automobile accident. Specifically, defendants submitted the affirmed report of a neurologist who, upon examining plaintiff and performing objective tests with range of motion calculations, concluded that she had a normal range of motion of the lumbar and cervical spine, despite positive MRI findings (*see Thompson v Abbasi*, 15 AD3d 95, 96 [2005]). They also submitted plaintiff's bill of particulars and

deposition testimony, which reveal that plaintiff was confined to bed and home for only a few weeks after the accident.

Plaintiff failed to raise a triable issue of fact as to whether a serious injury was sustained. Despite the positive MRI report, there were no admissible objective findings immediately following the accident to demonstrate any initial range of motion restrictions on plaintiff's cervical and lumbar spine, or any detailed explanation for their omission (*Thompson*, 15 AD3d at 98). The quantitative range of motion assessment plaintiff did submit was made some two years after the accident by a physician who examined her for the first time on that occasion, apparently for purposes of litigation (*see Atkinson v Oliver*, 36 AD3d 552, 552-553 [2007]). We also note that there was a significant gap in treatment.

Plaintiff also failed to raise a triable issue of fact as to whether she was incapacitated from performing substantially all of her usual and customary activities for at least 90 of the first 180 days after the accident. The subjective claims of pain

and "unsubstantiated claim of inability to perform [her] customary daily activities are insufficient to raise a triable issue of fact" (*Thompson*, 15 AD3d at 101).

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

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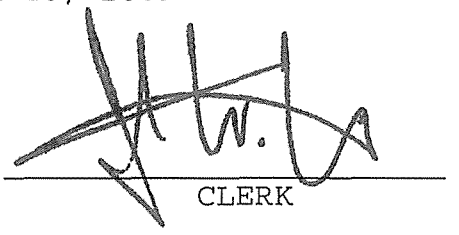

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Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

410 Hugo Matas, Index 109519/05
Plaintiff-Appellant,

-against-

Clark & Wilkins Industries, Inc.,
Defendant-Respondent.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for appellant.

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

Order, Supreme Court, New York County (Louis B. York, J.), entered March 26, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

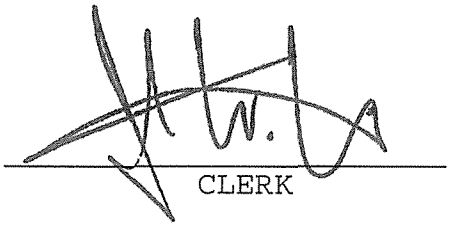
Through the testimony of its vice president of operations that he was aware of no complaint about the fence before it allegedly fell onto plaintiff and the statement of its treasurer that the company had no record of any similar incidents in the two years preceding plaintiff's accident, defendant, a general contractor that performed maintenance on the fence, established prima facie that it did not have notice of a defect in the fence (*see Marszalkiewicz v Waterside Plaza, LLC*, 35 AD3d 176 [2006]). Plaintiff failed to raise a triable issue of fact in that regard.

The motion court properly declined to consider the affidavit of a witness who had not been produced or identified before

plaintiff submitted his papers in opposition to defendant's motion (*see Masucci-Matarazzo v Hoszowski*, 291 AD2d 208 [2002]). Plaintiff's affidavit submitted in opposition contradicted his deposition testimony and thus raised only a feigned issue of fact (*see Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327, 327-328 [2006]).

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

ENTERED: APRIL 28, 2009



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Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

412 Luckner Bazne, et al., Index 102071/06
Plaintiffs-Appellants,

-against-

The Port Authority of New York
and New Jersey, et al.,
Defendants-Respondents.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Jennifer Alampi of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered January 8, 2008, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

This action arose from an incident that occurred at the Port Authority Bus Terminal. Plaintiffs alleged that while they were on Motor Stairs No. 13 at the bus terminal, the escalator shook suddenly and stopped, causing them to fall backwards. Plaintiffs commenced this action against the Port Authority and Otis alleging claims of negligence and res ipsa loquitur.

On their motion for summary judgment, defendants met their initial burden with prima facie evidence that, even assuming a mechanical defect, they were not liable, since there was no record of prior complaints about the escalator, Otis performed regular bimonthly preventive maintenance and no problems were

indicated in the service maintenance records it kept (*Parris v Port of New York Auth.*, 47 AD3d 460, 460-61 [2008]). In opposition, plaintiffs' expert opined that the escalator could have jerked due to deterioration or wearing of various parts, and inferred that Otis had not performed necessary maintenance by replacing certain parts. However, his affidavit was not probative, since it was not based upon the depositions or documents produced, but rather on speculation, conjecture, and purported "missing documents" (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Finally, plaintiffs' "reliance on the doctrine of res ipsa loquitur is unavailing because [they] failed to demonstrate that the escalator, which was subject to extensive public contact on a daily basis, was in defendant's exclusive control" (*Parris*, 47 AD3d at 460-61; *Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]), and the undisputed testimony established that the escalator could have stopped for any number of reasons that would not entail liability on the part of defendants.

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

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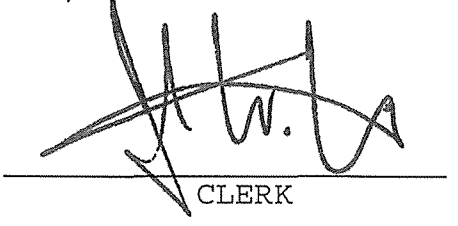

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Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

413 In re The City of New York, et al., Petitioners, Index 405629/07

-against-

The New York City Civil Service Commission, et al., Respondents.

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

Alina A. Garcia, New York, for NYC Civil Service Commission, respondent.

In this article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Marylin G. Diamond, J.], entered February 27, 2008), petition unanimously granted, and decision of respondent Civil Service Commission (CSC), dated March 19, 2007, which reversed a determination by petitioner Police Department (NYPD) that had disqualified respondent Elias as medically unsuitable for the position of police officer, annulled, on the law, without costs, and the NYPD determination reinstated.

The CSC decision was arbitrary and capricious because it was irrational and disregarded relevant facts (*cf. Matter of Valle v Buscemi*, 233 AD2d 334 [1996]). Specifically, CSC erroneously found that NYPD had no written standard on the condition of sleep apnea. Indeed, a written standard was given to CSC, stating that the disorder "can be detrimental to job performance when

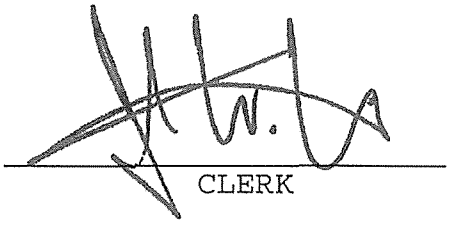
vigilance is necessary." There was substantial medical evidence about the dangers of sleep apnea and blood oxygen desaturation, and the extreme risks posed by this condition, especially with respect to a police officer's duties. Petitioners' medical expert, who testified at the hearing, concluded that Elias's condition could lead to dire health consequences in the future.

"An appointing authority has wide discretion in determining the fitness of candidates . . . particularly . . . in the hiring of law enforcement officers, to whom high standards may be applied" (*Matter of Verme v Suffolk County Dept. of Civ. Serv.*, 5 AD3d 498 [2004]). "In determining whether a candidate is medically qualified to serve as a police officer, the appointing authority is entitled to rely upon the findings of its own medical personnel, even if those findings are contrary to those of professionals retained by the candidate, and the judicial function is exhausted once a rational basis for the conclusion is found" (*Matter of Thomas v Straub*, 29 AD3d 595, 596 [2006]). CSC's decision was irrational because it disregarded the informed medical opinions of NYPD's doctors and was based instead on the brief and conclusory statement of Elias's physician, which did not address in detail the condition at issue as it might affect the physical demands of police duty. Furthermore, Elias failed

to offer convincing evidence as to his future fitness for the job (*see Matter of City of New York v New York City Civ. Serv. Commn.*, 6 NY3d 855 [2006]).

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

ENTERED: APRIL 28, 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 28, 2009.

Present - Hon. David B. Saxe, Justice Presiding
David Friedman
Karla Moskowitz
Helen E. Freedman
Rosalyn H. Richter, Justices.

The People of the State of New York, Ind. 3607/07
Respondent,

-against- 414

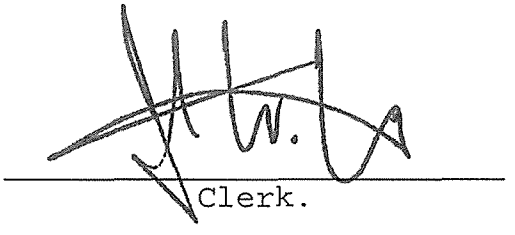
Keith Grant,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel Conviser, J.), rendered on or about March 5, 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.

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

415 The People of the State of New York, Ind. 5368/97
Respondent,

-against-

Julian Brooks,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

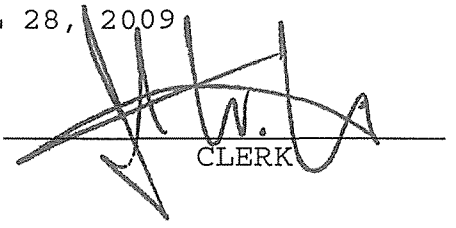
Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about January 29, 2007, which adjudicated defendant a level three sex offender and a sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sex offender adjudication. The grand jury minutes and other reliable documents established the basis for each of the factors at issue (*see e.g. People v*

Bailey, 52 AD3d 336 [2008], *lv denied* 11 NY3d 707 [2008]). 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 28, 2009



Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

418 Carlos Araujo, Claim #97238
Claimant-Appellant,

-against-

The State of New York,
Defendant-Respondent.

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

Andrew M. Cuomo, Attorney General, Albany (Frank K. Walsh of counsel), for respondent.

Judgment of the Court of Claims of the State of New York (Terry Jane Ruderman, J.), entered December 12, 2007, after a nonjury trial, awarding claimant the principal sum of $65,000 for past pain and suffering, unanimously affirmed, without costs.

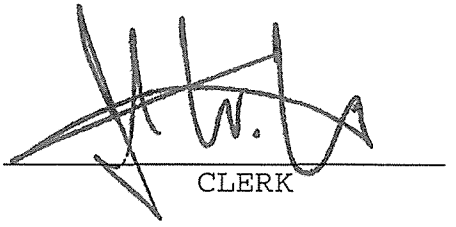
The court's determination that the worsening condition of claimant's knee after his 1997 accident was caused not by the accident but by a degenerative condition that had its nascency in a surgery pre-dating the accident by more than nine years was a result of the resolution of credibility issues presented by conflicting expert testimony, and there is no basis to disturb that determination (*see Watts v State of New York*, 25 AD3d 324 [2006]). Accordingly, the determination to make no award for future pain and suffering will not be disturbed (*see Mejia v JMM Audubon*, 1 AD3d 261 [2003]).

The award of $65,000 for past pain and suffering does not

deviate materially from what would be reasonable compensation under the circumstances presented (CPLR 5501[c]; *see e.g. Lopez v Consolidated Edison Co. of N.Y., Inc.*, 40 AD3d 221 [2007]).

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

ENTERED: APRIL 28, 2009



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Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

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Index 601183/08
105584/08
601187/08
105575/08
105466/08
601099/08

GFI Securities, LLC,
Petitioner-Appellant,

-against-

Tradition Asiel Securities, Inc., et al.,
Respondents-Respondents.

- - - - -

[And Other Actions]

- - - - -

Michael Babcock,
Petitioner-Respondent,

-against-

GFI Securities, et al.,
Respondents-Appellants.

- - - - -

Donald P. Fewer,
Plaintiff-Respondent,

-against-

GFI Group, et al.,
Defendants-Appellants.

Carter Ledyard & Milburn LLP, New York (Jeffrey S. Boxer and Lawrence F. Carnavale of counsel), for appellants.

Schnader Harrison Segal & Lewis LLP, New York (Daniel J. Brooks of counsel), for respondents.

Orders, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 29, 2008, which denied GFI Securities' application for a preliminary injunction, unanimously affirmed, with one bill of costs.

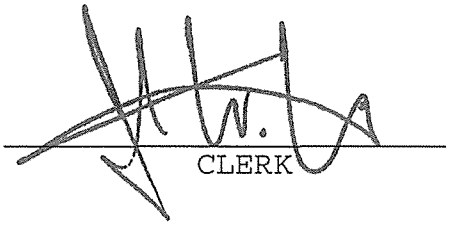
In these five arbitrations and an action to determine whether an inter-dealer firm raided another firm's brokers and whether the brokers violated the restrictive covenants in their employment agreements, GFI failed to show irreparable harm in support of its motion for a preliminary injunction pursuant to CPLR 7502(c) (*see Orasure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348 [2007]; *National Educ. Prod., Inc. v Educational Reading Aids Corp.*, 34 AD2d 769 [1970]), since it failed to submit evidence showing that its defecting brokers were irreplaceable or that its losses, other than the speculative claim of lost good will, were not compensable by money damages (*see e.g. Famo, Inc. v Green 521 Fifth Ave. LLC*, 51 AD3d 578 [2008]).

Although, as admitted in the reply of a GFI executive for purposes of the relief sought (*see Ficus Invs., Inc. v Private Capital Mgt, LLC*, _AD3d_, 872 NYS2d 93, 100 [2009]), most of the restrictive covenants at issue have expired, rendering the appeal with respect to their enforcement academic (*see Mitel Telecomm. Sys., Inc. v Napolitano*, 226 AD2d 165 [1996]; *Benco Intl. Importing Co. v Krooks*, 53 AD2d 536 [1976]), dismissal is not warranted in light of the unexpired restrictive covenant of respondent Wallack and GFI's breach of contract, tortious interference and other claims.

We have considered appellants' other contentions and find them unavailing.

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

ENTERED: APRIL 28, 2009



Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

426N 10 Sheridan Associates LLC, Index 103540/06
Plaintiff-Appellant,

-against-

Jose Monfort,
Defendant-Respondent.

Renee Digrugilliers, Long Island City, for appellant.

Vernon & Ginsburg, LLP, New York (Yoram Silagy of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered March 26, 2008, which, to the extent appealed from as limited by the brief, granted defendant's motion for attorneys' fees, unanimously affirmed, with costs.

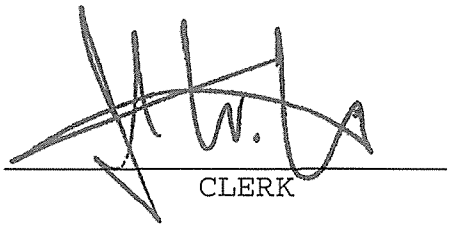
The record supports the court's finding that plaintiff's default under the terms of the parties' stipulation of settlement was willful and that therefore, pursuant to an express term of the stipulation, defendant was entitled to recover the attorneys' fees he incurred in restoring the case to the court calendar to enforce the stipulation's terms. Plaintiff purposefully and deliberately failed to apply to the court, as expressly required by the stipulation, for an extension of time to complete the repair work on defendant's terrace, once it determined that it would be unable to complete the work within the 30-day time frame provided for in the stipulation. Moreover, plaintiff intentionally misrepresented to defendant that it only obtained

oral approval from the New York City Landmarks Commission to make the proposed structural changes in January 2007, when in fact it had received oral approval in November 2006 and written approval during the week of December 18, 2006, and it purposefully waited to apply for a building permit until March 2, 2007 - the date on which defendant threatened to return to court. While plaintiff maintained that the reason for the delay was unseasonably cold temperatures, the record supports the inference that plaintiff was waiting to have the work on the building facade done before beginning the repair to defendant's terrace. Even after the court directed plaintiff, in the order restoring the case to the calendar, to complete the facade work on the area around defendant's apartment and immediately commence the repairs to his terrace, plaintiff waited approximately one month to begin work, and then it performed the facade work on all other parts of the building before starting on the area around defendant's terrace. As a result, the terrace repair work was not completed until September 2007 - a full year after the parties entered into the stipulation to settle this action, which plaintiff initiated, in

March 2006, claiming that the terrace had to be repaired immediately because it was in imminent danger of collapsing.

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

ENTERED: APRIL 28, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

427 The People of the State of New York, Ind. 977/07
Respondent,

-against-

Jeffrey William,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Susan A. Hensler and Felix Weinacht of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered September 17, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender, to an aggregate term of 5 years, unanimously affirmed.

The indictment charged defendant with selling cocaine to a named person, without specifying the manner in which the drug was sold. The People's theory at trial was that defendant gave this person a plastic twist of cocaine in exchange for money. In his testimony, defendant denied making that exchange, but admitted that at the time and place at issue he passed a crack pipe containing cocaine to this person. When the deliberating jury

asked whether sharing a crack pipe constituted a sale, the court did not constructively amend the indictment by repeating its charge that to sell a controlled substance means to "sell, exchange, give or dispose of to another" (*see* Penal Law § 220.00[1]), and it properly declined to instruct the jury that it could only consider whether defendant exchanged the drug for money, as alleged by the People. Any variance from the People's theory resulted from defendant's testimony that he committed a different version of the same crime for which he was indicted (*see People v Spann*, 56 NY2d 469, 474 [1982]; *People v Fuller*, 252 AD2d 353 [1998], *lv denied* 92 NY2d 897 [1998]). There was no change in the material elements of the indicted crime, which contain no requirement that the drugs be transferred in any particular manner or for any particular reason. The principle set forth in *Spann* is clearly applicable, and we reject defendant's arguments to the contrary.

The surcharges and fees were properly imposed (*see People v Guerrero*, 12 NY3d 45 [2009]).

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

ENTERED: APRIL 28, 2009

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

428 Robert Palmer, Index 117302/06
Plaintiff-Respondent,

-against-

WSC Riverside Drive, LLC, et al.,
Defendants-Appellants.

Sperber Dennenberg & Kahan, P.C., New York (Steven B. Sperber of counsel), for appellants.

Jack L. Lester, New York, for respondent.

Judgment, Supreme Court, New York County (Lottie E. Wilkins, J.), entered July 30, 2008, dismissing this action seeking declaratory and other relief after nonjury trial, unanimously modified, on the law, to declare plaintiff has no leasehold possessory rights to the roof area, and otherwise affirmed, with costs in favor of defendants.

The scope of our review of a nonjury trial is as broad as that of the trial judge (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]), and permits us to substitute our own judgment where the evidence fails to support an important element of the trial court's findings (*Jossel v Filicori*, 235 AD2d 205, 206 [1997]). The trial court limited its declaration to stating that plaintiff was entitled to possession of the entire apartment under the current lease, and found an ambiguity as to whether this included the adjacent outdoor area, thus sidestepping the issue of rights thereto.

This was due to a dearth of evidence that defendant WSC, the shareholder in the cooperative and holder of the proprietary lease appurtenant to the apartment, had any rights to the roof area.

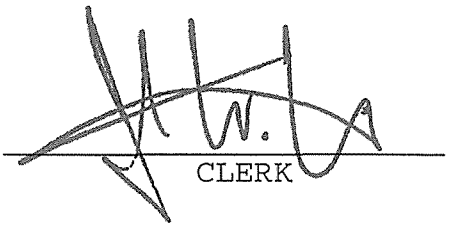
There was no ambiguity in the lease, which controls the parties' rights and obligations. The lease referred only to the "Apartment," not the roof, except in a standard-form provision in the attached Rules prohibiting tenants from drying their clothes there (*see Hazlett v Rahbar*, 27 AD3d 384 [2006]). Nothing in the admitted documents or the parties' conduct allows an interpretation permitting plaintiff to use the roof/terrace area (*see 1050 Fifth Ave. v May*, 247 AD2d 243 [1998]; *Jossel*, 235 AD2d at 206).

In an action for declaratory judgment, where a disposition on the merits is against granting certain relief, the court should make a declaration rather than simply dismissing that aspect of the complaint (*Hirsch v Lindor Realty Corp.*, 63 NY2d 878 [1984]; *see also Real Bidder v St.Luke's-Roosevelt Hosp. Ctr.*, 254 AD2d 123 [1998]). Accordingly, we declare that plaintiff has no possessory rights under the lease to the roof area.

We have considered the balance of plaintiff's argument and find it unavailing.

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

ENTERED: APRIL 28, 2009



Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

429-
430 In re Penny B.,
Petitioner-Appellant,

-against-

Gary S.,
Respondent-Respondent.

Kliegerman & Joseph, LLP, New York (Michael P. Joseph of counsel), for appellant.

Patricia Ann Fersch Family Law Center, New York (Patricia Ann Fersch of counsel), for respondent.

Lawyers for Children, Inc., New York (Nancy Dunbar of counsel), Law Guardian.

Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about August 31, 2007, which denied petitioner mother's motion for the appointment of an additional forensic evaluator, and order, same court and Referee, entered on or about February 15, 2008, which, inter alia, granted respondent father's petition for custody of the subject child, unanimously affirmed, without costs.

The totality of the circumstances establish that the award of custody to the father was in the best interests of the child and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [2006], *lv denied* 7 NY3d 717 [2006]). In making its determination, the court considered the appropriate

factors and recognized that the mother would not be willing or able to foster an optimum relationship between the father and his child. Indeed, the record shows that the mother engaged in a repeated pattern of interference in the father's relationship with the child following the parties' separation, and the father was limited to supervised visitation in the early stages of the proceedings due to the mother's unfounded allegations of sexual misconduct by him while he was with the child (*see Matter of Osbourne S. v Regina S.*, 55 AD3d 465 [2008]).

The mother also completely disregarded the best interests of the child by her repeated false allegations of sexual abuse at the father's hands, which subjected this young child to repeated examinations by medical and mental health personnel. Indeed, the evidence shows that the mother's focus on the father's purported sexual desire for the child actually caused harm to the child. She failed to recognize that her reactions to the child's behavior were a factor in the exacerbation of such behavior. Furthermore, the record demonstrates that the father established his clear involvement and concern for his child and that he had

been significantly involved with raising the child both pre-separation and throughout the proceedings. There was also no evidence that the father would not foster a relationship between the mother and child (*see James Joseph M.*, 32 AD3d at 726).

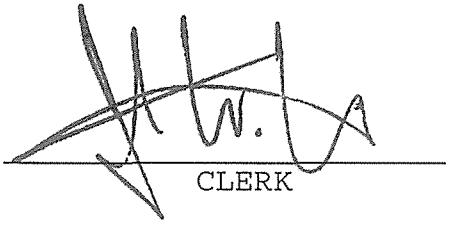
The court providently exercised its discretion in denying the mother's motion for the appointment of an additional expert in child sexuality (*see Matter of Jessica R.*, 78 NY2d 1031 [1991]; *Matter of Fatima M.*, 16 AD3d 263, 272-273 [2005]). The court was sufficiently informed about the child's behavioral problems and the parties' psychological makeup, and had an extensive amount of medical evidence showing that no sexual abuse had occurred. There was no demonstrated need for the additional appointment, and the court reasonably found that the child had already been subjected to numerous examinations and would be harmed by additional testing.

The court did not improvidently exercise its discretion when it refused to compel the father's therapist to testify or to release his records to the mother (*see People ex rel. Hickox v Hickox*, 64 AD2d 412 [1978]). Indeed, the court acted properly when it conducted an in camera review of the therapist's notes, and then, in order to satisfy the mother's concern about whether the father had been consistently attending therapy sessions, the court permitted her to review the therapist's appointment sheets.

Furthermore, the court informed the parties that the therapist had determined that the father did not pose a risk to the child, and it was unnecessary to release the therapist's notes or for him to testify since the court had sufficient information about the father from other sources. Nor did the court err when it denied the mother's request to call the child's therapist as a witness, since it was apparent that the mother only sought to call the therapist in order to advance her own interests.

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

ENTERED: APRIL 28, 2009



CLERK

Mazzarelli J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

432 Cantrese Alloway, Index 23044/05
Plaintiff-Respondent,

-against-

Jose A. Rodriguez, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Robert D. Grace of counsel), for Jose A. Rodriguez, appellant.

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck (Elizabeth M. Hecht of counsel), for Jeffrey and Emmanuel Hiles, appellants.

Friedman, Levy, Goldfarb & Weiner, P.C., New York (Ira H. Goldfarb of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 31, 2008, which denied defendant Rodriguez's motion and defendants Hiles's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion and cross motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants met their initial burden of demonstrating the absence of any permanent or significant physical limitation of plaintiff's lumbar or cervical spine by submitting a report from Rodriguez's expert, a neurologist, supported by specific tests indicating that plaintiff had no restrictions in her range of motion, and stating that there was "no finding of any neurologic residual or permanency based upon her physical examination." In

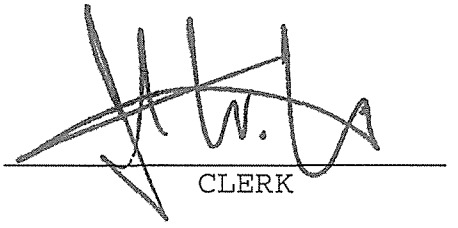
response, plaintiff submitted an affirmation from her treating internist showing that she had a restricted range of motion in both the cervical and lumbar portions of her spine. She also submitted an MRI report showing a cervical bulge and herniation in a lumbar disc. However, the expert's examination and the MRI report were insufficient to raise an issue of fact as to serious injury, as they failed to adequately address, in other than speculative and conclusory terms (*see Innocent v Mensah*, 56 AD3d 379, 380 [2008]), either the radiological findings or the effect of a motor vehicle accident in which plaintiff had previously been involved four years before the subject accident (*see Style v Joseph*, 32 AD3d 212, 214 [2006]).

With respect to the 90/180-day serious injury claim, defendants met their initial burden by relying on plaintiff's deposition testimony stating that she missed only one week of work after the accident, and was not confined to bed for any period afterward. In opposition, plaintiff submitted an affidavit stating she was, in fact, confined to bed for a period of time after the accident. Plaintiff's affidavit clearly contradicts her deposition testimony, and appears to have been tailored to avoid its consequences (*see Blackmon v Dinstuhl*, 27 AD3d 241 [2006]). In any event, plaintiff's subjective claims of pain and a limitation on sports and exercise activities do not prove a restriction on her usual and customary daily activities

for at least 90 days of the 180 days following the accident (*see* *Becerril v Sol Cab Corp.*, 50 AD3d 261 [2008]).

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

ENTERED: APRIL 28, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

434 The People of the State of New York, Ind. 45036C/05
Respondent,

-against-

Rohan Banner,
Defendant-Appellant.

The Bronx Defenders, Bronx (Amy Gallicchio and Matthew Kadushin of counsel), and Covington & Burling LLP, New York (Meghann Donahue of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Frances Y. Wang of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered September 10, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and also convicting him, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to concurrent terms of 15 years and 8 years, respectively, unanimously affirmed.

The court properly granted the People's application, made before it had rendered any decision, to reopen the suppression hearing in order to adduce additional testimony curing a deficiency in the proof establishing probable cause for defendant's arrest (*see People v Cestalano*, 40 AD3d 238, 238-239 [2007], *lv denied* 9 NY3d 921 [2007]). The risk of tailoring or prejudice was minimal, particularly since the additional

information had already been provided to defendant in a police report. There is no merit to defendant's argument that, even with the additional testimony, the People still failed to establish probable cause.

The totality of the circumstances establishes the voluntariness of defendant's written and videotaped statements, in which he admitted shooting the deceased but claimed self-defense (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). Although defendant was in custody for a total of approximately 15 hours between his arrest and the conclusion of his videotaped statement, this period was not excessive, the circumstances were not unduly coercive, and only a few hours were actually spent on interrogation. The hearing evidence, including the videotape, fails to support defendant's contention that the coldness of the room in which he was kept affected the voluntariness of his statements.

The court properly exercised its discretion in denying defendant's mistrial motions made when the prosecutor attempted to introduce evidence that the deceased lacked a criminal history. The court's curative actions were sufficient to prevent any prejudice.

Of defendant's remaining arguments concerning his trial, the only claims that are arguably preserved are his challenges to the

prosecutor's summation comments on defendant's familiarity with firearms, on an alleged connection between defendant and his companions and a certain vehicle, and on an inconsistency in defendant's statements, as well as defendant's challenges to alleged testimonial hearsay in an autopsy report, to a photograph of the deceased while alive, and to a detective's testimony relating actions of other officers. As to these summation and evidentiary claims, we find any errors harmless.

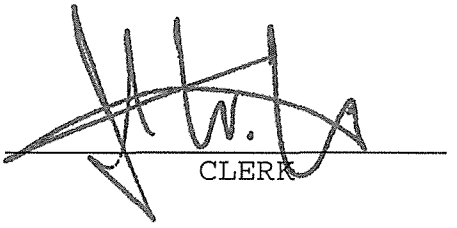
Defendant's remaining contentions, including those concerning alleged errors to which he made general objections, are unpreserved (*see People v Tevaha*, 84 NY2d 879 [1994]), and we decline to review them in the interest of justice. As an alternative holding, we likewise find any errors harmless. With regard to both the preserved and unpreserved issues, while there were improprieties, they did not deprive defendant of a fair trial or affect the verdict. The jury acquitted defendant of murder and failed to reach a verdict on manslaughter. It only convicted defendant of criminal possession of a weapon in the second degree, which, at the relevant time, constituted possession with intent to use unlawfully. Possession was undisputed, and the evidence, viewed in light of the presumption of unlawful intent (Penal Law § 265.15[4]), overwhelmingly established intent to use the weapon unlawfully against another,

regardless of whether defendant's actual use of the weapon against the deceased was justified (*see People v Pons*, 68 NY2d 264 [1986]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 28, 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 28, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 106/07
Respondent,

-against- 435

Joell Johnson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about January 3, 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.

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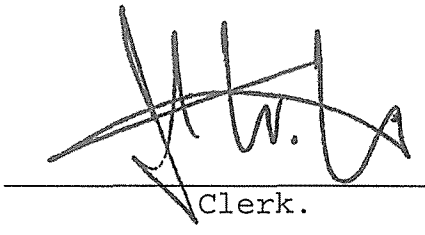


Clerk.

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

CORRECTED ORDER - JULY 31, 2009

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

436-
436A Index 113633/07

Myron Zuckerman,
Plaintiff-Respondent,

-against-

Sydell Goldstein, et al.,
Defendants-Appellants.

Lance A. Landers, New York, for appellants.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (I. Michael Bayda of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 29, 2008, which granted reargument and adhered to the prior determination granting plaintiff's motion for summary judgment to the extent of dismissing the counterclaims of defendant Sam-Fay Realty Corp. accruing prior to October 17, 2002 and dismissing the counterclaims of the remaining defendants in their entirety, and denying defendants' cross motions for summary judgment, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 23, 2008, unanimously dismissed, without costs, as superseded by the appeal from the October 29, 2008 order.

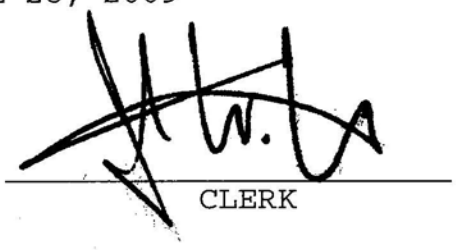
The court correctly ruled that the counterclaims accruing prior to October 17, 2002 were barred by releases in paragraph 8

of the agreement of that date ("2002 Agreement"). The parties' releases acknowledged that the distributions made in connection with the 2002 Agreement were in full settlement of the disputes that existed between plaintiff and the individual defendants as shareholders in the four family corporations with respect to prior personal and/or business transactions that involved or affected the assets, liabilities and business of the corporations and/or the shareholders individually. The only exclusion was "claims, if any, that are purely personal in nature and do not arise from the operations and business of the four corporations and do not arise from an individual's status as a shareholder of any one of the four [family] corporations." The court also properly rejected defendants' argument that their claims for breach of fiduciary duty and as beneficiaries of a family trust were personal in nature and thus not extinguished by the releases. The loans in connection with the purchase of the property in Maspeth, N.Y., the management agreement, the loan repayments, and the sale and distribution of the proceeds with respect to the Maspeth properties were all related to the business of four family corporations, and thus covered by the

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

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

ENTERED: APRIL 28, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

437 In re Cesar P.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

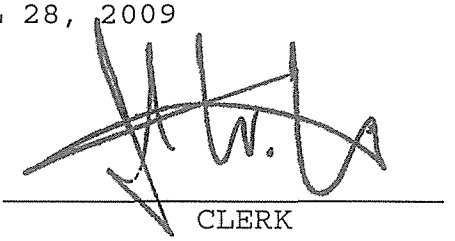
Order, Family Court, Bronx County (Robert R. Reed, J.), entered on or about August 11, 2008, which adjudicated appellant a juvenile delinquent, upon his admission that he had committed an act which, if committed by an adult, would constitute the crime of attempted assault in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

Given the seriousness of the offense, which involved injury to an assistant principal, as well as appellant's poor performance in school and chronic truancy, the court properly exercised its discretion in placing appellant on probation under the enhanced supervision program. This was the least restrictive dispositional alternative consistent with appellant's needs and the need for protection of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Appellant's argument that the court

should have granted him an adjournment in contemplation of dismissal is unpreserved and without merit.

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

ENTERED: APRIL 28, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

438 The People of the State of New York, Ind. 8273/97
Respondent,

-against-

Harold Thompson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

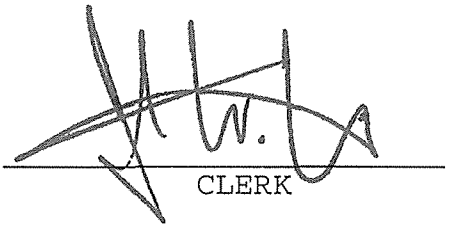
Order, Supreme Court, New York County (Bruce Allen, J.), entered July 12, 2006, which adjudicated defendant a level three sex offender and a sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sex offender adjudication. For sex offender registration purposes, there were two current offenses. Accordingly, the point assessments under the risk factors for number of victims and relationship with victim were correct. Defendant has not established special circumstances warranting a discretionary downward departure, particularly in

light of his pattern of violent sexual offenses (*see generally People v Guaman*, 8 AD3d 545 [2004]).

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

ENTERED: APRIL 28, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

439 The People of the State of New York, Respondent, Ind. 6190/02

-against-

Norgado Vazquez, Defendant-Appellant.

Bernard V. Kleinman, White Plains, for appellant.

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

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered May 14, 2003, convicting defendant, after a jury trial, of rape in the first degree (two counts), rape in the second degree, sodomy in the second degree, sexual abuse in the first degree (three counts), sexual abuse in the second degree (five counts), and endangering the welfare of a child (two counts), and sentencing him to an aggregate term of 15 years, unanimously affirmed.

Defendant's challenge to the legal sufficiency of the evidence supporting the first-degree rape convictions is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. There is no basis for disturbing the jury's determinations concerning credibility. The victim's testimony established all the elements of the offense,

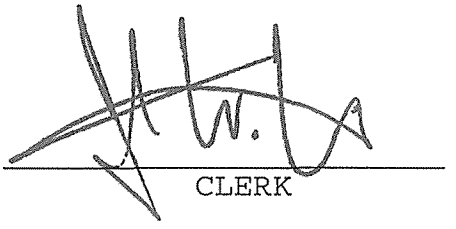
including penetration (*see e.g. People v Collins*, 166 AD2d 270, 271 [1990], *lv denied* 76 NY2d 1020 [1990]).

The court properly excluded evidence containing multiple levels of hearsay. Since defendant offered hearsay in oral form and did not offer any documents, his reliance on the business records exception is misplaced. In any event, defendant could not have been prejudiced because the evidence he sought to introduce had no exculpatory value.

We have considered and rejected defendant's remaining argument.

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

ENTERED: APRIL 28, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

441 Trevor Ram, Index 117696/06
Plaintiff-Appellant,

-against-

64th Street-Third Avenue Associates, LLC,
Defendant-Respondent.

Gary E. Rosenberg, P.C., Forest Hills (Gary E. Rosenberg of counsel), for appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 6, 2008, which granted defendant's motion for summary judgment dismissing the cause of action for negligence, unanimously affirmed, without costs.

Plaintiff was injured when, attempting to turn off a ceiling-mounted box fan, he placed his right hand within the area of the revolving blades. The fan was located in a parking garage that was operated by plaintiff's employer under a lease with defendant, the building's owner. The motion court correctly granted defendant's motion for summary judgment on the ground that defendant was an out-of-possession landlord that could not be held liable for any dangers posed by the fan where its lease with plaintiff's employer required the latter to keep all fixtures in good working order and to make any nonstructural repairs at its own expense (*see generally Reyes v Morton Williams*

Associated Supermarkets, Inc., 50 AD3d 496, 497 [2008] [given right to reenter, liability must be based on a "significant structural or design defect that is contrary to a specific statutory safety provision]; *cf. Javier v Ludin*, 293 AD2d 448 [2002] [dangerous fluorescent light fixture hanging from ceiling not a significant structural defect]). Plaintiff's reliance on Administrative Code of City of NY §§ 27-756 and 27-772, which relate to the installation and operation of HVAC systems, and Reference Standards RS-13, §§ 2-2.3.1, 2-2.3.3, and 2-3.7.3(b), which relate to the fans and air inlets of HVAC systems, is misplaced; these provisions do not apply given no evidence that the fan was ducted or connected to the building's air distribution system (*see* RS-13 § 1.5, defining, inter alia, "air distribution system" and "air inlet"). Administrative Code §§ 27-127 and 27-128 are general safety provisions that cannot support a claim of liability against an out-of-possession landlord based on a significant structural defect (*Boateng v Four Plus Corp.*, 22 AD3d 323, 324 [2005]; *Reddy v 369 Lexington Ave. Co., L.P.*, 31 AD3d 732, 733 [2006]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: APRIL 28, 2009

CLERK

Andrias, J.P., Catterson, DeGrasse, Richter, JJ.

442N Dale Kleinser, Index 116844/06
Plaintiff-Respondent,

-against-

Mark Astarita, et al.,
Defendants-Appellants.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Barry Jacobs of counsel), for appellants.

Dale Kleinser, respondent pro se.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered December 9, 2008, which, in an action for legal malpractice, granted plaintiff's motion to join additional parties, unanimously affirmed, with costs.

Plaintiff pro se served an amended complaint without leave of the court in which he named as additional defendants four partners of the law firm that had represented him in the underlying action. Defendants moved to dismiss the amended complaint on the ground that the newly added partners had no connection with the underlying action or contact with plaintiff. The motion court, after noting that the amended complaint was improperly served without court leave, dismissed it as against the newly added partners for failure to state a cause of action as against them "in their individual capacity." Several months later, plaintiff moved for leave to add the same four partners, submitting a proposed second amended complaint that was the same

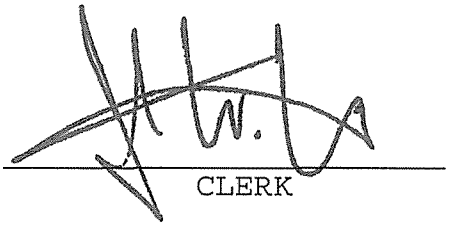
as the first except that it added an allegation that the four were partners of the firm at the time of the alleged malpractice "and are each individually, jointly and severally, liable for the acts and omissions of their partners." The motion court characterized the claim against the proposed four new defendants as "colorable," citing Partnership Law § 26, and granted plaintiff leave to add them.

On appeal, defendants do not argue that the amended complaint fails to state a cause of action as against the four newly added defendants, but rather that the court, in permitting their joinder, violated the law of the case doctrine, exceeded its authority by exercising appellate jurisdiction to sua sponte vacate its own order, and erroneously granted what was actually an untimely motion to reargue. The law of the case doctrine, however, is not implicated because the court did not alter a ruling by another court of coordinate jurisdiction but rather its own ruling (*Wells Fargo Bank, N.A. v Zurich Am. Ins. Co.*, 59 AD3d 333 [2009]). "[E]very court retains continuing jurisdiction to reconsider its [own] prior interlocutory orders during the pendency of the action" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]), and may do so "regardless of statutory time limits concerning motions to reargue" (*id.*). Thus, even if plaintiff's motion for leave to add the four partners were a belated motion to reargue the prior order dismissing the action as against those

partners for failure to state a cause of action, the court had discretion to reconsider its prior order, sua sponte, and correct it. Such discretion was properly exercised here in view of plaintiff's pro se status.

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

ENTERED: APRIL 28, 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 28, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, Justices.

Michael Davis
Plaintiff-Respondent,

Index 116761/05

-against-

443N

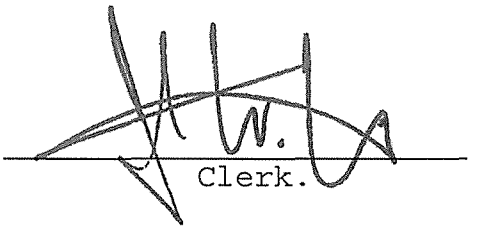
Xiomara Minier, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered August 5, 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 order so appealed from be and the same is hereby affirmed for the reasons stated by Kaplan, J., without costs and disbursements.

ENTER:



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 28, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, Justices.

In re Diane Word,
Petitioner,

Index 402060/08

445
[M-1254]

-against-

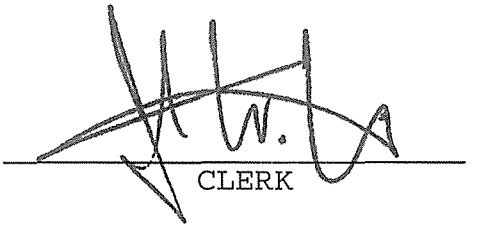
Hon. Karen Smith, etc.,
Respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTER:



CLERK

APR 28 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
John W. Sweeny, Jr.
James M. Catterson
Karla Moskowitz, JJ.

4787-4788
Index 122974/02

x

John Melfi, etc.,
Plaintiff-Respondent,

-against-

Mount Sinai Hospital, et al.,
Defendants-Appellants,

New York City Police Department, et al.,
Defendants.

x

Mt. Sinai Hospital and New York City Health and Hospitals Corporation appeal from an order of the Supreme Court, New York County (Joan B. Carey, J.), entered May 5, 2008, which, to the extent appealed from as limited by the briefs, denied the motion by defendant Health and Hospitals Corporation to dismiss the cause of action for loss of sepulcher and the motion by defendant Mount Sinai to strike plaintiff's demands for punitive damages related to the claims of malpractice and loss of sepulcher, and granted plaintiff's motion

to amend the complaint to plead a cause of action for gross negligence and related punitive damages against Mount Sinai in connection with the malpractice claim.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for Mount Sinai Hospital, appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo and Stephen J. McGrath of counsel), for New York City Health and Hospitals Corporation, appellant.

Tacopina, Seigel & Turano, P.C., New York (Brian King of counsel), for respondent.

CATTERSON, J.

The plaintiff, John Melfi, brings this action for, inter alia, loss of sepulcher after his brother's body was sent to a community college for embalming practice and then for burial in a mass grave in Potter's Field.

On October 28, 2001, playwright Leonard Melfi, best known for his one-act play Birdbath and contributions to the Broadway hit Oh! Calcutta!, collapsed in his room at the Narragansett Hotel, a welfare hotel, on the upper west side of Manhattan. The ambulance call report prepared by EMS personnel contained a preliminary diagnosis of respiratory distress, and identifying information including Mr. Melfi's address, date of birth, and social security number. The report also listed his friend Joann Tedesco as next of kin together with her phone number.[1]

Mr. Melfi was fitted with an oxygen mask and taken by ambulance to Mt. Sinai Hospital where a staff member in the emergency room prepared a patient registration form containing

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[1]The record reflects that Mr. Melfi was unmarried and had no children, and that his only surviving family members were a brother (plaintiff) who resided upstate, and a niece who lived outside of the City. At the 50-h hearing in this action, John Melfi testified that although he and his brother were close, there were periods when there was no contact between them. These occurred when Leonard Melfi checked himself into rehab clinics without telling anyone, or when he visited writer friends in California.

the identifying information and the contact information for Joann Tedesco. A triage assessment was performed in the emergency room but the record does not show that any treatment was administered. Mr. Melfi was next assessed by attending physician John Joseph Bruns, Jr., M.D., who made a preliminary diagnosis of congestive heart failure and atrial fibrillation.

Subsequently, at trial, Dr. Bruns testified to administering a drug to reduce the heart rate and conceded that additional treatment would typically be administered in light of Mr. Melfi's critical symptoms. However the record does not reflect any additional treatment. Further, although Dr. Bruns testified that Mr. Melfi received nursing care, no documentation was generated to that effect either. The only documentation that showed any treatment was a billing sheet indicating that pulse oximetry, catheter placement and an electrocardiogram were performed. Mr. Melfi's condition quickly deteriorated, and, despite the fact that he stopped breathing and became unresponsive, there is nothing in the medical records to indicate that any life-saving treatment was initiated.

Mr. Melfi died at 6:20 p.m. that evening. The death certificate prepared by the hospital included Mr. Melfi's name and age, but omitted any additional identifying information such as his address, social security number, and Joann Tedesco's

contact information, which had been listed on the EMS Report and in the Patient Registration Form. Although Dr. Bruns testified that he made two phone calls in an effort to reach Ms. Tedesco, these attempts are also undocumented in the records.

Mr. Melfi's body remained in Mt. Sinai Hospital's morgue for 30 days. On November 21, 2001, a death certificate was filed with the NYC Department of Health. Shortly thereafter a burial permit was issued, and on November 28, 2001, Mr. Melfi's body was transferred to the City morgue at Bellevue Hospital.

The record is silent as to any effort made to identify or locate the next of kin during the period the body was at the City morgue. Mr. Melfi's body was subsequently sent for embalming practice by students of the Nassau County Community College's Mortuary Science Department before it was finally transferred on December 20, 2001 to the City cemetery on Hart Island also known as "Potter's Field."[2] Mr. Melfi's body was interred in a mass

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[2]The New York City Department of Corrections maintains and operates the City Cemetery, called Potter's Field, on Hart Island, the Bronx, in Long Island Sound. Burials are done with inmate labor. Hart Island was purchased by the City in 1868 and a year later was established as the City's public cemetery for the burial of those persons who died indigent or whose bodies went unclaimed. Hart Island began as a prison camp for confederate soldiers and was subsequently home to a charity hospital for women, an insane asylum, reformatory, and a jail for prisoners who worked on the Potter's Field burial detail. During World War II, the Navy used the island for disciplinary barracks. In the 1940s, inmates on Hart Island appealed to the warden and

grave with 150 unclaimed bodies.

Two months after Mr. Melfi's burial, on or about February 2, 2002, his niece, Dawn Kosilla, a New York State Trooper, was contacted by the manager of the Narragansett Hotel who informed her of her uncle's death. Ms. Kosilla, who had visited her uncle approximately a week before his death, notified her father, the decedent's brother, John Melfi. The family then contacted Ms. Tedesco who advised them that she had not been informed about Leonard Melfi's death.

John Melfi immediately started making inquiries at Mt. Sinai Hospital and the City morgue in an effort to locate his brother's body. After several unsuccessful encounters with employees of the hospital and the morgue, he enlisted the assistance of the local media and shortly thereafter, in mid-February, learned that his brother had been buried in Potter's Field.

John Melfi arranged for the exhumation of the body on April

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offered to build a monument to the unbefriended dead. The 30-foot high memorial was completed in 1948. On one side is engraved a simple cross; on the other the word "Peace." The likely origin of the term "Potter's Field" as meaning a public burial place for poor and unknown persons is a passage from the Gospel of St. Matthew (27:3-8): "Then Judas, which had betrayed Him, saw that he was condemned, repented himself, and brought again the thirty pieces of silver to the chief priests [...] and they took counsel, and bought with them the potters field to bury strangers in."
http://www.correctionhistory.org/html/chronicl/nycdoc/html/hart.html.

10, 2002 and had it transported to a Manhattan funeral home where he identified his brother's naked corpse which was visibly scarred with incisions and holes made by the students who had practiced on him. Leonard Melfi was finally laid to rest in the family burial plot in his hometown of Binghamton, New York on April 18, 2002.

On or about May 2, 2002, John Melfi served a notice of claim on the defendants. The notice of claim stated in the entry required for "the time when, the place where, and the manner in which the claim arose," that due to Mt. Sinai's negligence and medical malpractice, Mr. Melfi expired at the hospital on October 28, 2001. The notice of claim further stated that "no notification was made to anyone regarding Mr. Melfi's death," and that prior to his burial on December 20, 2001, "his body was illegally embalmment (sic) without the permission of the next of kin."

On October 21, 2002, the plaintiff commenced this action against the City defendants and Mt. Sinai asserting causes of action for medical malpractice, wrongful death, loss of sepulcher, fraudulent concealment and punitive damages. Following discovery, defendant New York City Health and Hospitals Corporation, sued here as Bellevue Hospital and Health and Hospitals Corporation (hereinafter referred to as "HHC") moved

for dismissal of the action as time-barred by the 90-day requirement for service of notice of claim. The defendant Mt. Sinai Hospital moved to dismiss the claims for punitive damages and fraudulent concealment. The plaintiff moved for leave to amend his complaint to add claims for negligent and intentional infliction of emotional distress.

By decision and order dated April 30, 2008, the court denied HHC's motion for dismissal. The court reasoned that, "[a]s the defendant's conduct is not immediately apparent to a plaintiff, the time in which to file a notice of claim in such a case should begin to run only when the wrongdoing has been discovered, such as in a medical malpractice case in which a foreign object is discovered in the body of a patient." The court also denied Mt. Sinai's motion to dismiss the punitive damages claim; it dismissed the plaintiff's fraudulent concealment claim.

The plaintiff's motion for leave to amend was granted to the extent of permitting him to assert a cause of action for gross negligence in the claim against Mt. Sinai and to seek punitive damages in connection therewith; leave to amend was not granted to add claims of negligent and intentional infliction of emotional distress as these were determined by the court to be duplicative of the loss of sepulcher claim. All claims against the New York City Police Department, Department of Corrections

and Department of Health were dismissed as the court determined that they had no duty to identify Mr. Melfi or locate his next of kin.

For the reasons set forth below, we modify and dismiss the claim for punitive damages on the loss of sepulcher cause of action against Mt. Sinai, and affirm Supreme Court's determination to deny dismissal of the action against HHC on the grounds that the notice of claim for loss of sepulcher was untimely filed.

It is well established that the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body. Darcy v. Presbyterian Hosp. in City of N.Y., 202 N.Y. 259, 95 N.E. 695 (1911); Estate of Scheuer v. City of New York, 10 A.D.3d 272, 274-275, 780 N.Y.S.2d 597, 600 (1st Dept. 2004), lv. denied, 6 N.Y.3d 708, 813 N.Y.S.2d 44, 846 N.E.2d 475 (2006); Booth v. Huff, 273 A.D.2d 576, 708 N.Y.S.2d 757 (3rd Dept. 2000); Lott v. State of New York, 32 Misc.2d 296, 297, 255 N.Y.S.2d 434, 436 (Ct.Cl. 1962).

Actions against HHC are governed by McKinney's Unconsolidated Laws of NY § 7401(2) which, in relevant part,

provides that such action may not be commenced "unless a notice of intention to commence such action and of the time when and the place where the tort occurred and the injuries or damage, were sustained [...] shall have been filed with a director or officer of the corporation within ninety days after such cause of action shall have accrued."

HHC argues that the motion court erred because the plaintiff's notice was untimely. HHC asserts that the cause of action accrued on December 20, 2001, the day Leonard Melfi's body was sent to the Mortuary Science Department of Nassau Community College, and thus the day of the alleged tortious interference with the plaintiff's right to immediate possession of the body.

We reject HHC's argument on the grounds that it fails to recognize the essential nature of the right of sepulcher, a unique cause of action among the torts recognized at common law.

For thousands of years, the right of sepulcher has encompassed a solely emotional injury, a concept that, in general, did not gain currency in New York until the late 1950s. During its evolution in the common law, therefore, claims for the loss of sepulcher have compelled courts to struggle with the legal concepts and theories underpinning the compensable wrong. At this point, the courts have recognized that the right of sepulcher is less a quasi-property right and more the legal right

of the surviving next of kin to find "solace and comfort" in the ritual of burial. Consequently, we find that a cause of action does not accrue until interference with the right directly impacts on the "solace and comfort" of the next of kin, that is, until interference causes mental anguish for the next of kin. Further, because the injury is emotional or mental, it is axiomatic that a plaintiff must be aware of the interference giving rise to his/her distress before he/she can actually experience distress.

The right of sepulcher, evoking the mystery and sorrow of death and the hope for an afterlife, has been ritualized since the earliest pre-Christian civilizations. From the Egyptian mummification process to the Roman civil law's imposition of a duty of burial, virtually every faith and society has exhibited a reverence for the dead. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 235-36 (1872). Numerous Biblical references to burial shaped the Christian belief that proper burial in consecrated ground was essential to resurrection. See, e.g., Genesis 50:26 (describing Joseph's burial); Deuteronomy 34:6 (describing Moses' burial).

Moschion, a Greek poet from the third century B.C., opined that mankind began to bury the dead to remove all traces of a former savage existence or the cannibalism of the Titans:

> "The earth, once barren, began to be ploughed by yoked oxen, towering cities arose, men built sheltering homes and turned their lives from savage ways to civilized. From this time they made it a law to bury the dead or give unburied bodies their portion of dust, leaving no visible reminder of their former imperious feasts." W.K.C. Guthrie, The Sophists, at 82 [Cambridge Univ. Press 1971], W.B. Tyrrell and F.S. Brown, Athenian Myths and Institutions, at 81, [Oxford Univ. Press 1991].

In the Greek tragedy Antigone, Sophocles ascribed the right to bury the dead as given by the gods. Creon, who ascended to the throne of Thebes after Oedipus was expelled for killing his father and marrying his mother, decreed that Polynices, son of the incestuous union between Oedipus and Jocasta, was not to be buried but rather remain above the ground to rot. The blind prophet Teiresias railed against Creon's decision:

> "Know, then, and know it well, that thou shalt see not many winding circuits of the sun, before thou giv'st a quittance for the dead, a corpse by the begotten; for that thou hast trampled to the ground what stood on high, and foully placed within a charnel-house a living soul. And now thou keep'st from them, the Gods below, the corpse of one unblest, unwept, unhallowed." Harvard Classics Vol. VIII, Part 6, Lines 1223-1231 [P.F. Collier & Son, N.Y.].

Hugo Grotius, the great jurist of the 17th century Dutch Republic, in a commentary about the right of sepulcher, expounded on the ancient sources:

> "Isocrates treating of the war of Theseus against Creon speaks thus:
>
> > "Who does not know, who has not learned, even in

> the Dionysiac festivals from the writers of tragedies, what evils befell Adrastus before Thebes, when, wishing to reinstate the son of Oedipus, his son-in-law, he lost the most of his Argive troops and saw the leaders themselves lying slain; when he himself, disgracefully surviving, could not obtain a truce to bury the dead, he came as a suppliant to Athens, which Theseus then was ruling, and besought Theseus not to count it a trivial matter that such men lay unburied, and not to allow the contemptuous disregard of the ancient custom and ancestral right, which all men have in common, not as if established by man, but ordered by a divine power; and Theseus, when he heard this, without delay sent an embassy to Thebes.
>
> "Later the same author censured the Thebans because they had put the decrees of their own state above the divine laws. He mentions the same story also elsewhere, in the Panegyric, in the Praise of Helen, and in the Plataic Oration. Herodotus, too, mentions it in his ninth book, Diodorus Siculus in his Histories, Book IV, Xenophon in his Greek History, Book VI, and Lysias in the oration in honor of the dead; finally, Aristides has the story in his PanAthenian Oration, and he says that this war was undertaken on behalf of the common nature of men." On the Law of War and Peace, Book 2, Ch. 19 [1625].

The ancient concept that every person is entitled to a proper burial continued through the evolution of English common-law and provides the origins of American jurisprudence concerning the right of sepulcher.[3] In 17th century England the burial of bodies was performed primarily by churches which had a duty to

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[3] Richard Burn, an early English author on the topic of ecclesiastical law, wrote of the right of every parishioner to a Christian burial in the churchyard of his parish. He further explained that this right to burial cannot be denied as a result of debt, clearly indicating the societal concern with timely burial. Burn, Ecclesiastical Law Vol. 1 at 258-58 (7th ed. 1809).

In that case, the defendant argued that the plaintiff widow had no legal interest in or right to the body of her deceased husband. The defendant asserted that the mental suffering and nervous shock because of the body's mutilation and dissection were not actionable because they were not dependent upon actual injury to person or property since the body was not property.

The court, rejected the ubiquitous "nullius in bonis" phrase, stating that it made sense only in a period in history when *sepulture* and custody of the body remains were within the exclusive jurisdiction of the church and ecclesiastical courts. Id. at 310. Instead, the court held that "the right to possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties." Id. at 309. As a consequence, the court observed, "the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term." Id. at 310.

Significantly, however, the court shied away from holding that the compensable wrong arose because interference with the right was a form of injury to property. Instead, it characterized the "possessory" right as a legal right with damages recoverable upon the tortious invasion of such legal

right. Id. The court then concluded that "where the wrongful act constitutes an infringement on (sic) a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act." Id. at 311. From there, it was hardly a stretch for the court to hold that emotional injury to next of kin can be presumed in a loss of sepulcher action. Id. at 312 (It "is too plain to admit of argument" that "mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated.").

Over the next few decades, New York courts cited frequently to Larson in recognizing the legal right of the next of kin to possess the corpse for preservation and burial. They appeared compelled, however, to restate at every turn, Lord Coke's misapplied dictum that no property rights existed in the corpse. See Darcy, 202 N.Y. at 262, citing Larson v. Chase, with "approval" (right of sepulcher cannot be maintained by an executor or administrator of an estate because it is not a property right); Hasselbach v. Mount Sinai Hosp., 173 App. Div. 89, 92, 159 N.Y.S. 376, 379 (1st Dept. 1916) ("no property rights, in the ordinary commercial sense, in a dead body, and the damages allowed [...] are never awarded as a recompense for the injury done to the body as a piece of property"); Foley v.

Phelps, 1 App. Div. 551, 554-555, 37 N.Y.S. 471, 473-474 (1st Dept. 1896).

The Foley court, while holding that the plaintiff widow did not have an action based on a property right for the unauthorized dissection of her husband's corpse nevertheless found a "quasi property" right. To reach this result, the court observed that "'the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property.'" Foley, 1 App. Div. at 555, 37 N.Y.S. at 474, quoting Pierce, 10 R.I. at 237-238. A "quasi property" right, however, was to be found in the "duty imposed by the universal feelings of mankind to be discharged by some one toward the dead." Foley, 1 App. Div. at 555, 37 N.Y.S. at 473 (internal quotation marks and citation omitted). In Cohen v. Congregation Shearith Israel (85 App. Div. 65, 67, 82 N.Y.S. 918, 919 (2nd Dept. 1903)), the court explained that according the next of kin a "quasi property" right in the decedent's body was "equitable recognition of the natural sentiment, affection, or reverence which exists for the mortal remains of those we have loved long since and lost a while" (internal quotation marks and citation omitted).

The Foley court, however, had stopped short of agreeing with the finding of the Larson court that damages would "allow a

recovery for mental suffering and for injury to the feelings." Foley, 1 App. Div. at 556, 37 N.Y.S. at 474. Establishing a "quasi property" right therefore, still left unanswered the issue of what precisely constituted the actionable wrong if a next of kin was deprived of a decedent's body for burial or if the right was interfered with in some other fashion, and thus how damages were to be calculated; but not for long.

In 1911, about four decades before the Court of Appeals recognized in unequivocal terms that "[f]reedom from mental disturbance is now a protected interest" (Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 176 N.Y.S.2d 996, 999 (1958)), it had recognized compensable emotional injury in right of sepulcher cases. See Darcy v. Presbyterian Hospital in the City of N.Y., 202 N.Y. 259, supra. In that case, the Court finally looked with "approval" to the rule adopted by the Larson court. Id., at 263. The court held that even though there was no property right in a body, a mother whose decedent son was subjected to an unauthorized autopsy was entitled to recover "for her wounded feelings and mental distress." Id.

Subsequently, in 1916, this Court found that for a violation of the right to sepulcher "damages may be recovered for the injury to the feelings and the mental suffering resulting from the unlawful act." Hasselbach, 173 App. Div. at 91, 159 N.Y.S. at

378. In 1917, the Court of Appeals found that the burial of a father's body at sea deprived the next of kin "of the solace of giving the body a decent burial on land." Finley v. Atlantic Transp. Ltd., 220 N.Y. 249, 257, 115 N.E. 715, 718 (1917) (damages properly recoverable solely for mental anguish, suffering and nervous shock). A year later, this Court observed: "next of kin [...] are entitled to such right of possession as a solace and comfort in their time of distress." Stahl v. William Necker Inc., 184 App. Div. 85, 90-91, 171 N.Y.S. 728, 732 (1st Dept. 1918). The Court concluded: "One who deprives a party thus entitled [...] from the solace and comfort arising from the privilege of such burial [...] is liable in damages for the mental suffering and anguish to the surviving relative by reason of such deprivation." 184 App. Div. at 91, 171 N.Y.S. at 732.

In 1933, the Second Department stated that "damages are recoverable for injury to the feelings and mental suffering resulting directly [...] from the wrongful act of deprivation although no actual or pecuniary damages be proven." Gostkowski v. Roman Catholic Church, 237 A.D. 640, 642, 262 N.Y.S. 104, 106 (2d Dept. 1933), aff'd, 262 N.Y. 320, 186 N.E. 798 (1933).

By 1975 the Court of Appeals, in the meantime, having squarely addressed the issue of compensable emotional harm, recognized that the mishandling of a corpse was one of two

exceptions permitting recovery for emotional harm *alone*. Johnson v. State of New York, 37 N.Y.2d 378, 372 N.Y.S.2d 638 (1975). The Court observed: "Recovery in these cases has ostensibly been grounded on a violation of the relative's quasi-property right in the body. It has been noted [...] that [...] such a property right is little more than a fiction; in reality, the personal feelings of the survivors are being protected." 37 NY2d at 382, 372 N.Y.S.2d at 641 (internal quotation marks and citations omitted).

Courts in other jurisdictions also recognized that a "quasi property" right was a legal fiction to enable recovery of damages for injury to the feelings of the next of kin. See Property, Privacy and the Human Body, 80 B.U. L. Rev. 359, 385-386 (2000), citing Carney v. Knollwood Cemetery Assn., 33 Ohio App.3d 31, 36, 514 N.E.2d 430, 435 (1986) (plaintiff brings the action for the mental anguish undergone "from the realization that disrespect and indignities have been heaped upon the body of one who was close to him in life."); citing Culpepper v. Pearl St. Bldg., 877 P.2d 877, 880 (Colo. 1994) (it is not injury to the dead body "but whether the improper actions caused emotional or physical pain or suffering to surviving family members"); citing Keyes v Konkel, 78 N.W. 649, 649 (Mich. 1899) (recovery is for damage to the next of kin by infringement of his right to have the body

delivered to him for burial). The court in Scarpaci v. Milwaukee County (96 Wis.2d 663, 672, 292 N.W.2d 816, 820-21 (1980)) explained succinctly:

> "The basis for recovery of damages is found not in a property right in a dead body but in the personal right of the family of the deceased to bury the body [...] The law is not primarily concerned with the extent of the physical injury to the bodily remains but with whether there were any improper actions and whether such actions caused emotional or physical suffering to the living kin."

Based on the foregoing analysis, we find HHC's argument that John Melfi's right of sepulcher claim accrued on December 20, 2001 to be without merit. The decedent's brother in this case is not seeking to vindicate any quasi-property right that was interfered with on December 20, 2001 when HHC released Leonard Melfi's body for practice embalming and burial in Potter's Field. John Melfi brings the action against HHC because of the mental anguish he suffered upon the realization that his brother was dead and that the failure to notify the next of kin deprived the family of giving him a proper burial.

Hence, we find that for a right of sepulcher claim to accrue 1) there must be interference with the next of kin's immediate possession of decedent's body *and* 2) the interference has caused mental anguish, which is generally presumed. Interference can arise either by unauthorized autopsy (Darcy, 202 N.Y. at 262-

263), or by disposing of the remains inadvertently (Finley, 220 N.Y. at 257-258; Correa v. Maimonides Med. Ctr., 165 Misc. 2d 614, 629 N.Y.S.2d 673 (Sup. Ct., Kings County 1995)), or, as in this case, by failure to notify next of kin of the death. The next of kin's mental anguish in these situations is then generally presumed but, in any event, cannot be felt until the next of kin is aware of the interference with his/her right of possession of the loved one's body for burial.

Right of sepulcher cases, then, are not akin to "foreign object" cases, as Supreme Court observed here, where the statute of limitations is tolled rather than accruing at the date of the surgeon's negligent act. In those cases, it is indisputable that actual injury occurs when the foreign object is left inside the body but the statute of limitations is tolled until plaintiff discovers the existence of the foreign object.

Here, because the injury is solely emotional, it is axiomatic that a next of kin cannot be injured emotionally until he or she becomes aware or has knowledge that his or her right of sepulcher has been interfered with unlawfully.

Thus, while HHC is correct that the wrongful act that interfered with possession occurred on December 20, 2001, it did not become an actionable wrong until the plaintiff was, in fact, emotionally injured by the knowledge of that interference in or

around February 2002. In other words, sending a corpse to Potter's Field or for practice embalming is not actionable per se; it is not actionable until a claimant next of kin has suffered emotional anguish as a result of the wrongful act.

Contrary to the defendant's assertions, the accrual of claim in right of sepulcher actions belongs in that small body of case law where a claim does not accrue with the negligent act but at the time a plaintiff is *actually* injured by the negligent act. See Sexstone v City of Rochester, 32 A.D.2d 737, 301 N.Y.S.2d 887 (4th Dept. 1969) (90-day period for filing a notice of claim did not run from date of negligent issuance of certificate but from the date the negligent act produced injury to the plaintiffs), citing Konar v. Monro Muffler Shops of Rochester, 28 A.D.2d 642, 280 N.Y.S.2d 812 (4th Dept. 1967); see also Thomas v. Grupposo, 73 Misc.2d 427, 431, 341 N.Y.S.2d 819, 824 (Civ. Ct. N.Y. County, 1973) (cause of action did not arise on day of negligent sale but when plaintiff demanded his property and was notified that it was sold); see also Distel v. County of Ulster, 107 A.D.2d 994, 996, 484 N.Y.S. 715, 717 (3rd Dept. 1985) (stating that the 90-day notice requirement under section 50-e of the General Municipal Law began to run when plaintiffs received an affidavit stating that defendant could not locate portions of organs of decedent, affording them sufficient notice to cut off the tolling of the

statute).

As the plaintiff correctly asserts, the cases relied on by HHC are inapposite. Jensen v. City of New York (288 A.D.2d 346, 734 N.Y.S.2d 88 (2nd Dept. 2001)) and Moore v. City of New York (291 A.D.2d 386, 736 N.Y.S.2d 889 (2nd Dept. 2002)), are actions in gross negligence and negligent infliction of emotional distress, not loss of sepulcher cases. Moreover, like the third case, Cally v. New York Hosp. Med. Ctr. of Queens (14 A.D. 3d 640, 788 N.Y.S.2d 620 (1st Dept. 2005)), Jensen and Moore concern the timeliness of the commencement of the actions and thus speak to the statute of limitations in actions against the city rather than the timeliness of notices of claim.

It may well be that were we determining the timeliness of commencement of a right of sepulcher action, we would disagree with the Second Department and find, like the motion court in this case, that a violation of the right of sepulcher is a continuing wrong, with the statute of limitations tolled until a loved one's body is returned or the next of kin is informed that the body will never be returned. Indeed, we could be swayed by the court's reasoning that a finding other than that of continuing wrong would reward, if not necessarily encourage, a tortfeasor's delay in acknowledging misidentification of remains (see Jensen, 288 A.D.2d at 347, 734 N.Y.S.2d at 90), or the

inadvertent disposal of remains until the statute of limitations had run. But we need not reach the merits of that issue in this case.

As to a notice of claim, the 90-day clock starts to run upon the accrual of the claim, that is, the moment a wrong becomes actionable. A statute of limitations speaks to the latest point in time that an action for a wrongful act may be commenced. In this case, John Melfi's claim accrued upon the painful realization in February 2002, that his brother's body had been mutilated and buried in a mass grave of unclaimed bodies. Therefore the filing of the notice of claim on May 2, 2002 was timely within the statutorily permissible 90 days.

HHC also appeals the order denying summary judgment as to the loss of sepulcher claim on the basis that it had no statutory duty to locate the next of kin and cannot be held liable for its discretionary delivery of the unclaimed body to Nassau County Community College's Mortuary Science Department where students practiced embalming on the body. Section 4211 (1) of the New York Public Health Law sets forth the requirements for the delivery of unclaimed cadavers to schools. Specifically, "[no] body of a deceased person shall be delivered to [...] any university, college, or school [...] if the deceased person is known to have a relative whose place of residence is known or can

be ascertained after reasonable and diligent inquiry." Public Health Law § 4211(3)(c).

The motion court correctly concluded that the morgue had a statutory obligation to make appropriate efforts to locate a next of kin and that a question of fact exists as to whether it conducted a "reasonable and diligent inquiry" to locate the next of kin of Leonard Melfi. Given the paucity of evidence that even one person attempted to locate the next of kin during the decedent's sad journey through the City morgue to Potter's Field, it is conceivable that a jury could find that HHC conducted no inquiry at all, much less one that is reasonable and diligent.

Finally, although punitive damages may be awarded in a loss of sepulcher claim, Mt. Sinai Hospital argues that punitive damages are not appropriate in this case because the wrongful conduct did not demonstrate such a "'*conscious and deliberate disregard of the interests of others [so] that the conduct may be called wilful or wanton.*'" Liberman v. Riverside Mem. Chapel, 225 A.D.2d 283, 291, 650 N.Y.S.2d 194, 200 (1st Dept. 1996) (quoting Prosser and Keeton, Torts § 2, at 9-10 [5th ed. 1984]); see also Plunkett v. NYC Downtown Hosp., 21 A.D.3d 1022, 801 N.Y.S.2d 354 (2nd Dept. 2005); Liendo v. Long Is. Jewish Med. Ctr., 273 A.D.2d 445, 711 N.Y.S.2d 741 (2nd Dept. 2000).

The record reflects that the defendant, Mt. Sinai Hospital,

has extensive protocols in place to make certain that a next of kin is located to claim the body of a deceased patient. The steps taken by every hospital department are required to be documented. The treating physician who pronounces the death is initially responsible for notifying the next of kin. If he is not successful, he informs the nurse manager, who then continues contact efforts by making repeated phone calls, sending a telegram, and contacting the New York City Police Department to request visits to potential addresses of the next of kin. If all of these efforts are unsuccessful, the nurse manager contacts yet another hospital director who conducts her own investigation before formally requesting a police investigation. Once the body is transferred down to the hospital morgue, there are even more inter- and intra-departmental procedures in place to ascertain a next of kin. Only after every source has been exhausted in attempting to identify a next of kin, is the body transferred to the City morgue.

Other than the two phone calls purportedly placed by Dr. Bruns that were not documented, there is nothing in the record to suggest that these precautionary procedures were followed by Mt. Sinai in this case. The personnel to whom Dr. Brun may have delegated this duty made no documented attempt to contact a next of kin, nor was the New York Police Department contacted.

Critical identifying information was omitted from the death certificate prepared by the hospital despite the fact that this information was easily obtainable from its own records.

While it is possible to view this conduct as willful and in conscious disregard of others, in order for Mt. Sinai to be held vicariously liable for punitive damages arising from the conduct of its employees, it must have "authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant" such that it is complicit in that conduct. Loughry v. Lincoln First Bank, 67 N.Y.2d 369, 378, 494 N.E.2d 70, 74, 502 N.Y.S.2d 965, 969 (1986); 1 Mott Street, Inc. v. Con Edison, 33 A.D.3d 531, 532, 823 N.Y.S.2d 375, 376 (1st Dept. 2006). Complicity is evident when "a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct." Loughry, 67 N.Y.2d at 378, 502 N.Y.S.2d at 970. A "superior officer" is one who holds "a high level of general managerial authority in relation to the nature and operation of the employer's business." 67 N.Y.2d at 380, 502 N.Y.S.2d at 971. Dr. Bruns is an assistant professor and attending physician in the emergency department at Mt. Sinai. However, even as the highest level administrator in charge of Leonard Melfi's emergency room care, Dr. Bruns cannot be considered someone with a "high level of general managerial

authority" over the business of the entire hospital. See e.g., 1 Mott Street, 33 A.D.3d at 532, 823 N.Y.S.2d at 376 (holding that a field representative who terminated plaintiff's gas service was not a manager of Con Edison). Further, it cannot be said that Dr. Bruns's and his colleagues' conduct reflects the "corporate culture" or "institutional conscience" as the extensive policies and procedures promulgated by the hospital expressly belie this inference. Swersky v. Dreyer and Traub, 219 A.D.2d 321, 329, 643 N.Y.S.2d 33 (1st Dept. 1996).

However, at this stage in the proceedings we cannot rule, as a matter of law, that the plaintiff has failed to put forth a prima facie case of gross negligence and punitive damages against Mt. Sinai concerning medical malpractice. Given the paucity of evidence presented by the hospital in the course of discovery, the plaintiff has at least raised a triable issue of fact in this regard.

Accordingly, the order of the Supreme Court, New York County (Joan B. Carey, J.), entered May 5, 2008, which, to the extent appealed from as limited by the briefs, denied the motion by defendant HHC to dismiss the cause of action for loss of sepulcher and the motion by defendant Mount Sinai to strike plaintiff's demands for punitive damages related to the claims of malpractice and loss of sepulcher, and granted plaintiff's motion

to amend the complaint to plead a cause of action for gross negligence and related punitive damages against Mount Sinai in connection with the malpractice claim, should be modified, on the law, Mount Sinai's motion to strike plaintiff's demand for punitive damages in connection with the loss of sepulcher claim granted, and otherwise affirmed, without costs.

All concur.

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

ENTERED: APRIL 28, 2009