SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 25, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Nardelli, Freedman, Richter, JJ.

513 Alexander Kudinov, et al., Index 114646/05
Plaintiffs-Respondents,

-against-

Kel-Tech Construction Inc., et al.,
Defendants-Appellants,

Fourth Avenue Enterprises
Piping Corp., et al.,
Defendants.

Massoud & Pashkoff, LLP, New York (Ahmed A. Massoud of counsel), for Kel-Tech Construction, Inc., appellant.

Feinstein & Nisnewitz, P.C., Bayside (Craig Nisnewitz of counsel), for Ianelli Construction Co., Inc., appellant.

Wolff & Samson P.C., New York (Jonathan Bondy of counsel), for Seaboard Surety Co., St. Paul Fire and Marine Ins. Co. and United States Fidelity and Guaranty Company, appellants.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Mark S. Gamell of counsel), for Fidelity and Deposit Company of Maryland, appellant.

Virginia & Ambinder LLP, New York (LaDonna M. Lusher of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 26, 2007, which, to the extent appealed from as limited by the briefs, inter alia, partially granted plaintiffs' motion for class certification, designated Alexander Kudinov as a

class representative and denied defendant Fidelity and Deposit's cross motion for summary judgment, affirmed, without costs.

The party seeking class certification bears the burden of establishing the criteria prescribed in CPLR 901(a) (*CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [2008]). This burden must be met by providing an evidentiary basis for class certification (*Matros Automated Elec. Const. Corp. v Libman*, 37 AD3d 313 [2007]; *Nachbaur v American Tr. Ins. Co.*, 300 AD2d 74, 75 [2002], *lv dismissed* 99 NY2d 576 [2003], *cert den sub nom Moore v American Tr. Ins. Co.*, 538 US 987 [2003]).

Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court. In exercising this discretion, a court must be mindful of our holding that the class certification statute should be liberally construed (*Englade v HarperCollins Publs.*, 289 AD2d 159 [2001]).

Here, the evidence is sufficient to establish numerosity, without determining the precise number, given the number of projects, the certified payroll records and the testimony and affidavits regarding the number of workers potentially affected by the allegations (*see, Globe Surgical Supply v Gieco Ins. Co.*, 59 AD3d 129 [2008]; *Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11 [1998]). While it is true that the exact number of the putative class has not been determined, and that some members of the

putative class have submitted affidavits affirmatively stating that they were not aggrieved by the allegations against defendants, the number of workers alleged to have been underpaid was high enough to justify the court's exercise of its discretion in certifying the class. This is particularly true in light of the fact that many workers were not members of any union, and were of different trades than that of the main plaintiff.

Moreover, the commonality of claims predominates, given the same types of subterfuges allegedly employed to pay lower wages. The fact that different trades are paid on a different wage scale and thus have different levels of damages does not defeat certification (*see Englade,* at 160). The ability to resolve such inquiries by referring to payroll and other documentary evidence distinguishes this case from those in which individualized inquiries defeat commonality (*see e.g. Batas v Prudential Ins. Co.*, 37 AD3d 320, 322 [2007]; *Gaidon v Guardian Life Ins. Co. Of Am.*, 2 AD3d 130 [2003]).

While it is appropriate in determining whether an action should proceed as a class action to consider whether a claim has merit, this "inquiry is limited" (*see Bloom v Cunard Line,* 76 AD2d 237, 240 [1980]), and such threshold determination is not intended to be a substitute for summary judgment or trial.

While Kudinov's testimony and his affidavit as to his record-keeping and the number of employees at the projects where

he worked contained inconsistencies, his claim has sufficient merit for the limited purposes of determining whether to certify this class. Those inconsistencies present, as the court correctly determined, issues for resolution by the trier of fact.

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

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

NARDELLI, J. (dissenting in part)

Although I agree with the majority that the court properly denied summary judgment dismissing the claims on the projects which Fidelity and Deposit Company of Maryland bonded, I dissent to the extent the majority affirms the grant of class certification on any of the projects at issue. Accordingly, I would modify to vacate those portions of the order which granted such status.

CPLR 901(a) permits a court to authorize a class action if the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class that predominate over any questions affecting only individual members, the claims or defenses of the class representative are typical of the class, the representatives will fairly and adequately protect the interest of the class, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The party seeking class certification bears the burden of establishing the criteria prescribed in the statute (*CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [2008]). This burden must be met by providing an evidentiary basis for class action certification (*Matros Automated Elec.*

Const. Corp. v Libman, 37 AD3d 313 [2007]; *Nachbaur v American Transit Ins. Co.*, 300 AD2d 74, 75 [2002], *lv dismissed* 99 NY2d 576 [2003], *cert denied sub nom. Moore v American Tr. Ins. Co.*, 538 US 987 [2003]).

Three projects at issue on this appeal were bonded by Fidelity and Deposit Company of Maryland. The class representative certified by the court on those projects was Alexander Kudinov, a union carpenter. He testified that aside from himself, five or six carpenters worked at P.S. 104, one worked at P.S. 114, and four or five worked at P.S. 198. Of this maximum total of 13 carpenters, 3 of them submitted affidavits stating, "I have always been paid the wages due, and all of my benefits have been paid to my union." Thus, at best, there are 10 carpenters in the aggregate on these three projects who have wage grievances. I respectfully submit that 10 does not meet the numerosity requirement required by the statute. Furthermore, when the projects are viewed on an individual basis, at best there are five other similarly situated carpenters on some of the projects, and as few as one other on the P.S. 114 project. I see no reason why resort to class action status is required to resolve any of the grievances that Kudinov or other carpenters may have regarding their wages on these particular projects.

Likewise, with regard to the larger number of projects bonded by the other insurers, defendants St. Paul Fire and Marine

Insurance Co., Seaboard Surety Co., and United States Fidelity and Guaranty Co., there are significant issues which militate against the grant of class action status. To begin, nine additional carpenters submitted affidavits similar to those submitted by the individuals in the three projects discussed above. They confirm that they do not have any contractual dispute with defendant Kel-Tech. Thus, there are at least 12 members of the putative class, the number of which has not even been established, who aver that they are not aggrieved. Aside from casting doubt that plaintiffs are meeting the numerosity requirements of the statute, these affidavits also strongly suggest that plaintiffs cannot show that there are common questions of law or fact which predominate over the claims of individual members. Indeed, the opposite is indicated - i.e., that plaintiffs' claims are specific to them.

Moreover, the nature of some of the claims, e.g., circumvention of contractual obligations by cash payments, forged names on sign-out logs, and payments of expenses in lieu of overtime, will require evidence on a case-by-case basis, especially since at least 12 carpenters on the projects have sworn that they are not aggrieved in any manner. Certainly, proof that any one carpenter received a cash payment is not proof that all the others did.

Furthermore, there is no evidence that numerosity has been

established. As the majority acknowledges, the exact number of members of the putative class has not been established. Moreover, at least 12 members of the putative class, whatever its number may be, have sworn that they do not have grievances. It is just as likely, on the record before us, that the purported class consists of nothing more than the named plaintiffs, as it is that there are many workers who were underpaid. Plaintiffs have not come close to meeting their burden of establishing numerosity.

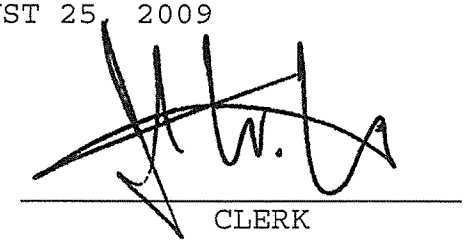
In *Englade v HarperCollins Publs., Inc.* (289 AD2d 159 [2001]), upon which the majority relies, this Court specifically stated, "[I]t is uncontested that the class is so numerous that joinder is impracticable" (*id. at* 160). In contrast, in this case, there is no such concession about numerosity, and the paucity of plaintiffs' showing strongly suggests that the potential class is very small, if not infinitesimal, and, whatever complaints plaintiffs may have are highly individualized.

Under such circumstances, where the number of people in the class is not identified, where members of the putative class have sworn that they do not have any grievances, and where the nature

of the claims requires evidence on an individual basis, it is difficult to discern how a class action is a superior, or even an appropriate, vehicle for resolution of the claims.

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

ENTERED: AUGUST 25, 2009



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Mazzarelli, J.P., Sweeny, Nardelli, Freedman, Richter, JJ.

516 The People of the State of New York, Ind. 1888/01
Respondent,

-against-

Mark Williams,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered December 15, 2003, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second degree, and sentencing him, as a second felony offender, to a term of 6 years to life, unanimously affirmed.

On March 24, 2001, NYPD Sergeant David Ehrenberg was supervising a group of detectives in an undercover narcotics operation, and, along with Detective Dino Polichetti, was parked in an unmarked van on Riverside Drive between 136th and 137th Streets, when a white Mazda with New Jersey license plates parked in front of them, next to a fire hydrant. The officers watched as defendant exited the Mazda's passenger side, and a man later identified as Willy Allison exited the driver's side. The two men walked north to a stairway which led to an underpass beneath Riverside Drive.

Approximately 15 minutes later, defendant and Allison returned to the Mazda, and looked around them before getting into the car and driving away. The Mazda drove north on Riverside Drive, then made a U-turn between 138th and 139th Streets, crossing over a double yellow lines and pavement "zebra striping," which designated that crossing and turning were not permitted.

Ehrenberg and Polichetti then pulled away from the curb, made a U-turn, placed a red turret light on the van's dashboard, and honked the van's horn (the van, a rental, had no siren).

Riding in the Mazda's passenger seat, defendant turned around and looked through the car's rear window at the unmarked van, which was following directly behind. Turning east onto 136th Street, Allison drove the Mazda toward Broadway, where it came to a halt because of other cars stopped at a red light. At that point, defendant jumped out of the Mazda and ran south down Broadway. When defendant exited the car, Ehrenberg - who was still inside the unmarked van - was approximately five feet away, and could see that in his right hand, defendant carried a clear plastic bag containing a white substance, which he suspected was cocaine. Ehrenberg jumped out of the van and gave chase on foot, displayed his shield and yelled that he was a police officer. As defendant ran past a laundromat located at 3357 Broadway, he threw the plastic bag through the open door. Continuing to give

chase, Ehrenberg did not see where the bag actually landed.

At 3333 Broadway, defendant ran toward a building entrance, but was stopped by a locked door and security guards. Ehrenberg drew his gun and ordered defendant to the ground, and defendant complied. With no prompting from Ehrenberg, defendant said, "What the f*** are you doing? I have no drugs on me."

After other officers arrived at the scene, Ehrenberg returned to the laundromat, where he was joined by Detective Edward Paris. An unidentified laundromat patron pointed to a nearby dryer, atop which sat a clear plastic bag containing a white substance which resembled the bag Ehrenberg had seen defendant throw into the laundromat. Subsequent testing revealed that the bag contained cocaine weighing slightly more than 2.25 ounces. There were other patrons in the laundromat at the time, including several children.

Meanwhile, Detective Polichetti continued to chase the Mazda as Allison drove it recklessly down Broadway, finally stopping the car after pointing his gun at Allison and pulling the van in front of the Mazda so that Allison could drive no farther.

Defendant did not testify, but Allison did. He testified that he and defendant had driven from Cliffwood, New Jersey, to New York City because Allison wanted to buy Timberland boots, which could be purchased for a good price in Manhattan. Allison parked his car on Riverside Drive between 136th and 139th Streets,

then walked down a stairway toward Broadway, stopping along the way to drink some hot chocolate. Deciding they wanted to go to a restaurant before shopping, the two men then returned to the parked car.

Driving south on Riverside Drive, Allison made a legal left turn onto 136th Street, when he heard a screeching sound behind him, and, looking back, saw a van approaching. Allison claimed that he did not make a U-turn while on Riverside Drive. The van pulled beside the Mazda, and its driver pointed a gun at Allison. The van did not display a red flashing light, and Allison had no reason to believe the two men inside of it were police officers.

Thinking he was being "carjacked," Allison attempted to escape. At some point, defendant jumped out of the Mazda and ran down the street. After attempting to elude the van for several blocks, the van cut off the Mazda, forcing it to stop, whereupon a man with a gun approached, forced Allison to the ground, and began to search him. Only then did Allison realize he was being pursued by police officers.

Though he was initially charged with traffic infractions and drug possession, the charges against Allison were eventually dismissed.

At trial, Detective Manuel Soto testified that after the bag of cocaine was retrieved from the laundromat, it was given to him for vouchering. Over objection, he also testified that the

cocaine had a value of approximately $2,000, and could be used to make somewhere between 126 and almost 200 packets of cocaine, which number would vary, according to the quality of the cocaine. He also testified, again over objection, that the cocaine could be made into crack by crystallizing it. Crystallization would result in over one hundred "rocks." He was also permitted to testify that two and one-half ounces of cocaine would likely result in death if consumed by one individual.

After testimony concluded for the day, and defense counsel voiced an objection for the record, stating:

> "[F]or the purposes of the record I'm objecting to the line of questioning pertaining to how much the street value of the cocaine is, how many bags or how many pieces it can be cut up into.... The defense in this case is not that these drugs were for [defendant's] own personal consumption. The defense is that these drugs did not belong to [defendant]. Therefore, because there is no charge in the indictment of sale of narcotics or criminal possession with intent to sell, I am noting my objection, for the record."

Thereafter, the People explained their position:

> "[I]f the defense is arguing that these are not the defendant's drugs, we believe it is very relevant to know the value of the drugs to explain how illogical it would be [that] another individual would have left over $2,000 worth of drugs in a laundromat unattended in that way. So it's in order to rebut the defense claim that these drugs that were in the laundromat were not the defendant's drugs is the reason we brought that out, your Honor."

The court then allowed the testimony.

On summation, defense counsel argued that the police work was "sloppy" because the police did not bring down to the station house an elderly man who had pointed out the cocaine in the laundromat. Defendant further argued:

> "[T]his is not a situation where a police officer stops a person and drugs are on the person. We know, we know whose drugs they are [in such a situation] if you believe that police officer. This is a situation where if you believe the lieutenant, the drugs were thrown. And you know what, they were not recovered until a substantial time later. And you know what, how, how do you even know these are the very same drugs if you believe [Sgt. Ehrenberg] that came out of the hand of [defendant], how do we know that?"

Counsel suggested that the story about the patron had been fabricated, and that police were actually combing the area in a random search for drugs, "looking for something to pin on somebody. And they chose [defendant] because he got away, got out of the car, and he was alone with the lieutenant."

Responding to counsel's summation, the prosecutor argued:

> "[D]efense counsel wants you to believe that they're not defendant's drugs. Ladies and gentlemen, they're not defendant's drugs. Some other drug dealer left $2000 worth of drugs in a laundromat on top of a machine. Somebody else decided to do that on a Saturday morning at ten o'clock in the morning. Does that make sense, ladies and gentlemen? No, it defies common sense. The drugs that were recovered are the exact same drugs the defendant threw in there just moments before."

Attempting to reconcile Sergeant Ehrenberg's testimony that

defendant threw the bag of cocaine into the entryway of the laundromat with the fact that the bag was recovered from atop a dryer, the prosecutor argued that, "Clearly, the drugs were moved. There were children in there. They were playing, running around." The prosecutor continued, "We don't want them getting into the hands of children that were there that morning."

In addition, the prosecutor argued that, contrary to defendant's claim, the police work underlying defendant's arrest was not sloppy, but rather removed a quantity of cocaine from "the streets of New York, probably, more likely, the streets of New Jersey, where he was going to take it." Defense counsel's objection to this statement was sustained. The prosecutor then continued, arguing that the police had done well not only in removing the drugs from the streets, but also "in removing the individual, the defendant, who was trying to place those drugs on the street." Defense counsel's objection to this statement was overruled. The prosecutor also stated with regard to the police conduct:

> "[The police] were out there ladies and gentlemen, specifically to detect whether or not drugs were being distributed. They were out there doing that. And they were going to try to remove the individuals that were possessing those drugs.... [W]e pay them to try and detect this kind of activity. And that's what they did on this day. They detected it and they removed the drugs from the streets."

Defendant argues that the prosecutor violated his

fundamental right to a fair trial by suggesting that he was guilty of a crime for which he was not accused, i.e., sale of drugs, and prejudiced him by inciting the jury to convict on the basis of supposition, rather than the evidence adduced at trial. We find that the People's summation comments, to the extent they were error, were harmless in light of the overwhelming evidence of defendant's guilt, and, in any event, although they could have been tempered, many were fair comment in response to defendant's charges that the police work was sloppy and that the police fabricated the charges.[1]

Clearly, it would have been more prudent for the People not to refer to defendant as a drug dealer, since he was only charged with possession. Nevertheless, when defendant accused the police of fabrication and sloppy work, because of the serendipitous discovery of a large amount of drugs in the laundromat into which defendant had just minutes before, during a pursuit, tossed the bag, the People were entitled to comment and respond. As much as anything, the ludicrousness of defendant's contention spurred the

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[1]Defendant also argues that the prosecutor's eliciting of testimony about the methods of cutting drugs when cocaine is obtained from a dealer and the toxicity, if ingested, was improper in this possession case. No basis exists on this record to have elicited such testimony, and, in any event, the probative value, if there were any, was outweighed by the potential prejudice. This line of questioning should have been excluded. Nonetheless, the permitting of such testimony does not warrant reversal because only a limited number of questions were involved in a lengthy trial, and we find the error to be harmless.

response in which the People commented derisively on the remarkable coincidence, at least according to defendant, that over two ounces of cocaine were found in plain view in a laundromat that defendant had just passed as he ran from the police.

The emphasis on defendant's status as a drug dealer, neither alleged nor proven, may have exceeded the bounds of fair comment and was better left unsaid, but "the over-all effect of the prosecutor's summation was within the range of acceptability ..." (*People v D'Alessandro*, 184 AD2d 114, 119 [1992], *lv denied* 81 NY2d 884 [1993]), particularly since it was defendant who suggested first that he was a random and innocent victim of police officers looking to connect the drugs to anybody in general. The comments certainly "did not amount to a persistent pattern of misconduct warranting reversal, particularly in light of the overwhelming evidence of defendant's guilt" (*People v Johnson*, 212 AD2d 362, 362 [1995], *lv denied* 85 NY2d 939 [1995]). Defendant and his cohort were first observed by police officers acting suspiciously both after they parked the car, and before they re-entered it. After they made an illegal turn and the police put on the warning light, they did not stop but hastened to make a getaway. After exiting the vehicle, and despite being warned of the presence of police officers, defendant continued to run, and discarded a plastic bag which he could just as easily

have left in his car, if it did not contain contraband. When the bag was located in the proximate area where it was discarded, it was found to contain cocaine. In light of such evidence, "there is not a significant likelihood" that the jury verdict, which was obviously the best barometer of the credibility of all the trial testimony, was unduly affected by the prosecutor's categorization of defendant as a drug dealer or any of the other questionable comments (*see People v Brown*, 208 AD2d 414 [1994]).

Defendant also argues that testimony elicited by the prosecutor as to the value of the cocaine and the yield it could produce was irrelevant to the crime for which defendant was being tried - criminal possession of a controlled substance in the second degree - and was "devastatingly prejudicial," as it suggested to the jury that defendant possessed the drugs with an intent to sell them. Yet, while irrelevant to the criminal charge against defendant, evidence of the cocaine's value and the number of doses it might yield was relevant to the question of whether and to what extent it was plausible (or, conversely, highly unlikely) that a person other than defendant might have left the bag of cocaine in the laundromat, as defendant claimed (*see People v Giles*, 11 NY3d 495, 499 [2008]).

In her summation, defense counsel argued that police had fabricated the claim that the Mazda made an illegal U-turn, and also argued that their stop of the Mazda was based upon a mere

hunch, and that what actually drew the officers' attention was defendant's race and the Mazda's features.

In charging the jury, the trial court gave the following instruction:

> "[W]here a police officer has probable cause to believe that a driver of a car has committed a traffic infraction, a stop does not violate the New York State Constitution. In making a determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant. Consequently, a violation of the Vehicle and Traffic Law can give the police probable cause to warrant a stop of the vehicle for a valid traffic infraction."

During deliberations, the jury sent out a note asking whether "the definition of 'beyond a reasonable doubt' applies to proving the 'probable cause' for attempting to pull [defendant and Allison] over." In response, the court recharged the jury:

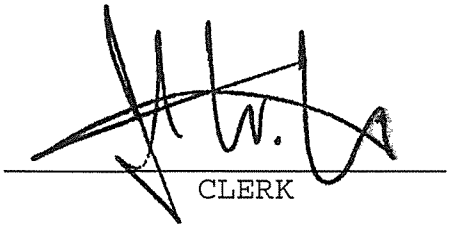
> "[The] People only have to prove the element[s] of the crime of criminal possession of [a] controlled substance in the second degree. And as I already instructed you, those elements must be proven beyond a reasonable doubt. The People at trial do not have to prove probable cause."

On appeal, defendant argues that the Supreme Court's charge that the police could stop the Mazda based upon their belief that a traffic infraction had occurred, without regard to whether there was a separate primary motive for the stop, requires reversal because it improperly required the jury to determine the

legal issue of probable cause, diverted the jury from a full consideration of the police officers' credibility, bolstered the People's case, and was unnecessary and unduly prejudicial. Yet, the jury charge was taken verbatim from *People v Robinson*, 97 NY2d 341, 349 [2001], and constitutes an accurate statement of the law. Moreover, since defendant had suggested in his opening statement that the stop was based upon racial profiling, the charge was necessary, since it explained that if the jury found credible the police testimony that the police observed an illegal U-turn, it could find that there was a legal justification for the stop. Otherwise, the jury might conclude that notwithstanding the traffic infraction, the stopping of the car by the police was unjustified because of racial profiling, to which defense counsel had made reference. We see no prejudice in a charge which permits the jury to understand the circumstances under which a police officer may stop a vehicle, particularly when defendant has suggested the possibility of illegal conduct.

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

ENTERED: AUGUST 25, 2009



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Mazzarelli, J.P., Sweeny, Nardelli, Freedman, Richter, JJ.

517N In re Anonymous, Index 112101/08
Petitioner-Appellant,

-against-

The New York State Department of Health, State Board for Professional Medical Conduct,
Respondent-Respondent.

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Lambda Legal Defense & Education Fund, Inc.,
Amicus Curiae.

Moritt Hock Hamroff & Horowitz LLP, Garden City (Robert L. Schonfeld and Benjamin Geizhals of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Richard Owen Jackson of counsel), for respondent.

Lambda Legal Defense & Education Fund, Inc., New York (Thomas W. Ude, Jr. of counsel), amicus curiae.

Order, Supreme Court, New York County (Nicholas Figueroa, J.), entered December 29, 2008, which, insofar as appealed from, denied petitioner physician's application to quash a subpoena issued by respondent State Board for Professional Medical Misconduct seeking the complete medical records of certain of petitioner's patients with HIV, and granted the Board's cross motion to compel compliance with the subpoena, unanimously modified, on the law, to direct that the disclosure be limited to such information as is relevant to the Board's investigation, that the court retain jurisdiction of the matter until such time as the parties reach agreement on the content of the disclosure,

or the court rules thereon, that the individuals whose files are sought be given the opportunity to submit objections before the court, and otherwise affirmed, without costs.

Petitioner is a licensed physician whose practice focuses on the care and treatment of HIV and HIV-related conditions. In 2008 he received letters from the New York State Department of Health, Office of Professional Medical Conduct (OPMC), requesting medical and billing records for nine of his patients. Petitioner's attorney sent a letter to the Deputy Counsel of OPMC stating that the requested records contained confidential information falling within the protection of Article 27-F of the Public Health Law, and that he was concerned about the confidentiality mandate of that article. In light of petitioner's dual obligations to cooperate with OPMC and to protect the confidentiality of this information, counsel requested guidance to assure that he did not act in violation of the Public Health Law.

Subsequently, respondent State Board for Professional Medical Conduct issued a subpoena seeking all records of the nine patients. Petitioner sent letters to each patient seeking consent to release the records, but none consented. Petitioner then commenced this proceeding, by order to show cause. He contended that the records sought contained confidential information protected under Public Health Law § 2782(1), and that

respondent was not contained within one of the statute's exceptions as a party to whom disclosure could be made.

Respondent answered that section 2782(1)(g) permits disclosure to a health officer when mandated by federal or state law, and that section 2782(6) permits such disclosure to a federal, state or local government agency which has oversight over a provider who possesses "confidential HIV related information." Respondent contended that the purpose of Article 27-F, within which section 2782 is found, was to protect the privacy of persons seeking treatment for HIV or AIDS, not to prevent the timely investigation of physicians when professional medical misconduct is alleged.

Petitioner submitted affidavits from two patients in which they objected to the release of their records, and averred that they would not have made the same disclosures regarding intimate details of their lives and behaviors, had they known that the information would not be kept confidential.

The court rejected petitioner's argument that respondent was not a federal, state or local health officer for the purposes of § 2782, and stated that a physician may not invoke patient privacy rights to shield himself from a misconduct investigation. It stated that the issue before it was not whether respondent had the power to issue the subpoena, but whether it demonstrated a foundation for it. It found that respondent met this burden with

its in camera submission of a complaint concerning a matter respondent was under a duty to investigate. It denied the petition, granted the cross motion to compel, and directed that the file in this matter be sealed. Compliance has been stayed by this Court pending determination of the appeal.

Public Health Law § 230(1) provides for the creation of a State Board for Professional Medical Conduct which is empowered to investigate misconduct as defined in Education Law §§ 6530, 6531. Section 230(10)(k) gives the Board the power to issue subpoenas requiring persons to appear before the Board, and section 230(10)(l) authorizes the Board to examine and obtain records of patients in any investigation or proceeding by the Board when it acts within the scope of its authorization.

Section 2785(2) of the Public Health Law permits disclosure of confidential HIV-related information upon an application showing, inter alia, a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding; upon application of a governmental health officer, where there is a clear and imminent danger to the public health; or where the applicant is lawfully entitled to the disclosure, and disclosure is consistent with the statute's provisions.

Our review of the confidential record in this matter impels the conclusion that the Board was acting within the purview of its legal authority when it issued the subpoena. Due to the

confidential nature of the matter, the specifics of the alleged misconduct need not be addressed here, but the contents of the documents show the allegations of physician misconduct relate directly to the treatment of patients with HIV. The Board has met its burden of showing that it had a good faith basis to issue the subpoena (*see Matter of Levin v Murawski*, 59 NY2d 35, 41 [1983]), and has shown disclosure is warranted under section 2785(2)(d).

The real issues, however, are not whether disclosure is mandated, but the extent of the disclosure, and whether the patients have any standing to challenge what part of their medical records can be produced. In this latter regard, in particular, the statute is anomalous.

For instance, section 2785(4)(a) gives the individual whose confidential HIV information may be sought the right to notice of the application, and the opportunity to appear personally or by writing for the purpose of providing evidence. On the other hand, section 2785(4)(c) specifically states, "Service of a subpoena shall not be subject to this subdivision." Review of the legislative history of the statute does not provide an explanation for the inapplicability of the subdivision to the issuance of subpoenas.

Notwithstanding this ambiguity, we note that section 2785(6)(a) requires that disclosure be limited to that

information which is necessary to fulfill the purpose for which the order is granted. It is thus obvious that the drafters did not authorize blanket and wholesale disclosure, simply because a legitimate investigation is being conducted. The statute makes clear that the disclosure is to be consistent with the aims of the investigation.

In recognition of the need for confidentiality in this matter, any disclosure order must provide for redactions of material that is not necessary for the conduct of the investigation and must otherwise comply with § 2785(6). At this preliminary stage, the redacted material would include the names and identifying information of the patients whose files are sought (their files can be identified by code), as well as the names and identifying information of other individuals whose names might appear in the file. We caution, however, that the redaction of the names at this stage of the investigation should not be construed to mean the names are to be permanently redacted. There may be a point in the future when the needs, or the results, of the investigation warrant disclosure of certain identities to the OPMC by court order. Respondent also proffers no reason why personal information such as sexual history should be disclosed.

Furthermore, notwithstanding the apparent anomaly in the statute and because the records now are being provided by court

order in response to a motion to compel, we direct that each of the nine patients whose files are being sought shall be given the opportunity before the court to submit any objections to the release of certain information in his or her file, and to request appropriate redactions. In weighing such objections the court must be mindful to balance the patients' privacy concerns with the nature of the investigation itself, which involves serious allegations.

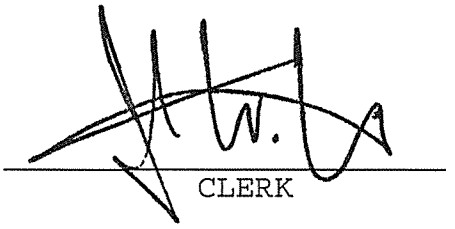
Finally, the motion to change the caption of the proceeding to reflect anonymity, and to which respondent consents, is granted.

M-1990 - Anonymous v NYS Dept. of Health

Motion to change caption granted.

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

ENTERED: AUGUST 25, 2009



CLERK

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

633-
634 Index 6880/06

Sapphire Simmons, etc., et al.,
Plaintiffs-Respondents,

-against-

Vito Sacchetti, et al.,
Defendants-Appellants,

Ambassador Fuel and Oil
Burner Corp., et al.,
Defendants-Appellants-Respondents,

Rudon Heating, Inc.,
Defendant.

Gannon, Rosenfarb & Moskowitz, New York (Max W. Gershweir of counsel), for appellants.

Arnold E. DiJoseph, New York, for Simmons respondents.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Ambassador Fuel and Oil Burner Corp., respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for F&B Fuel Oil Co., Inc., respondent.

Orders, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered October 20 and 21, 2008, which, in an action for personal injury to an infant, denied respective motions defendants building owner and management company, and by defendant boiler service contractor, for summary judgment dismissing the complaint and all cross claims against them, reversed, on the law, without costs, the motions granted, and the complaint and all cross claims against those defendants dismissed. The Clerk is directed to enter judgment accordingly.

This action arises from an accident on December 15, 2005 at 2513 Tratman Avenue in the Bronx, where plaintiff Sapphire Simmons, then 17 months old, was injured when she fell into a bathtub containing scalding hot water. The building complex was owned by defendant Vito Sacchetti, and managed by his son Michael, an employee of defendant TMS Management Company.

Defendant Ambassador Fuel and Oil Burner Corp. had an oral contract with Sacchetti. Sacchetti claims that Ambassador's obligations included maintaining and repairing the building's hot water system, while Ambassador asserts its only responsibilities were to supply fuel oil and conduct annual inspections of the boiler sufficient to satisfy New York City Building Department requirements. The complaint alleged that Sapphire's injuries were caused by defendants' negligence in failing to properly maintain the water system in the building.

At her deposition, Rosemary Simmons, Sapphire's mother, testified that she was in bed with Sapphire, watching televison, when she heard the steam coming up in the apartment. She told her 13-year-old son, Giovanni, that it was time for him to take a bath. Giovanni came into the room to get his underwear and left. A few seconds after he left, Sapphire got off the bed and left the room. Rosemary was still watching television. A few minutes later, she heard Sapphire scream. By the time she got to the bathroom, Giovanni was holding Sapphire. Sapphire's legs and the

front of her body were wet, and there was steam coming from her clothing. Rosemary yanked off Sapphire's clothes and saw that skin was coming off as well. She told her 18-year-old son, Anthony, to call 911.

Giovanni testified that Sapphire went to follow him, but he told her that he had to a take a shower, and he asked Anthony to watch her. Giovanni went to the bathroom and turned on the hot water only. He realized he had forgotten his shirt so he went back to his bedroom, but did not close the bathroom door and left the water running. At that time, Sapphire was in another bedroom with Anthony. Two minutes later, he heard Sapphire crying. His mother asked him to check on her, so he went into Anthony's room. When he did not see her, he knew she was in the bathroom. He heard the water still running in the tub. A minute later, he saw Sapphire in the tub with her body close to the faucet and he picked her up. Approximately five minutes had elapsed from the time he turned on the water until the time he saw Sapphire in the tub.

Wanda Baez, plaintiffs' neighbor and a tenant of the building, testified that her child had been burned by the hot water in the building in 1998. Another tenant, Arleen Delgado, testified that she had complained to building management about the water temperature in 2003, and that her daughter had been burned when she was taking a bath. Griselle Gonzalvo, also a

tenant, testified that before the accident she had complained many times about the water temperature.

The Sacchetti defendants and Ambassador moved separately for summary judgment dismissing the complaint. The court denied both motions, finding issues of fact as to the malfunctioning of the water system and as to Ambassador's responsibilities with regard to the system.

It is undisputed that this accident occurred when the unattended, 17-month-old child was scalded after getting or falling into a bathtub after her brother had turned on hot water only, and while her mother was in another room. As this Court has previously stated, "A landlord cannot be required to adjust the hot water temperature in order to protect children from adults who fail to do so" (*Williams v Jeffmar Mgt. Corp.*, 31 AD3d 344, 347 [2006], *lv denied* 7 NY3d 718 [2006]). "People using hot water . . . must be expected to monitor the mixture of hot and cold water to ensure a temperature that is safe for bathing" (*id.*).

The dissent's attempt to distinguish *Williams* by stating that this is not a case of a negligent mother leaving an infant alone in a tub is perplexing. The mother in this case concededly left her infant unsupervised, and, as a result, the child was injured when she entered or fell into a bathtub the mother knew was being used. The older brother's act of leaving the bathroom

did not negate the mother's negligence, or transpose liability to the landlord.

Even if the dissent's characterization of the mother's conduct were accurate, the result would be the same. There is no prescribed maximum temperature under the Administrative Code for the water that is supplied to an individual apartment (*id.* at 346). For that reason, we decline to follow the analysis of the dissent, even if New York City Building Code Reference Standard 16, P107.26(b) is applicable.

Consequently, we cannot find that there was any negligence on the part of either the buildings deendants or the fuel company that could be construed as the proximate cause of the infant's injuries.

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

ACOSTA, J. (dissenting)

I disagree with the majority and would vote to affirm inasmuch as there are issues of fact preventing summary dismissal of the complaint. With respect to the building defendants, there are issues of fact as to whether they violated their duty to ensure that the water temperature was at a level where it would not cause burns (*see e.g. Rosencrans v Kiselak*, 52 AD3d 492 [2008]; *Carlos v 395 E. 151 St., LLC, 41 AD3d 193, 195-196* [2007]; *Lindsey v H.B. Assoc., L.L.C.*, 24 AD3d 274 [2005]; *Greene v Simmons*, 13 AD3d 266 [2004]; *Parker v New York City Hous. Auth.*, 203 AD2d 345 [1994]). That duty is part of the responsibility of an owner of residential property to maintain the premises in a reasonably safe condition (*Rosencrans*, 52 AD3d at 492). Such issues are raised by evidence that, inter alia, 20 days after the accident, the water temperature in the apartment was measured at between 151 and 186 degrees; water temperature of 150 degrees will instantly scald an infant's skin; the building's hot water system did not have a temperature relief valve, in violation of New York City Building Code Reference Standard 16, P107.26(b), which would have prevented excessively hot water from flowing to the infant's apartment; the boiler contractor had previously issued a violation notice to the building defendants based on the absence of a temperature relief valve in a boiler that serviced other buildings in the complex, indicating that the

building defendants were on notice that such a valve was required; and other tenants had complained to building management about excessively hot water.

Issues of fact also exist as to whether the boiler contractor launched a force or instrument for harm, rendering it liable in tort to third persons (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Such issues are raised by evidence that, inter alia, the building defendants relied on the contractor to inspect the hot water system as well as the boiler system, and to report any problems (*see Gottlieb v 31 Gramercy Park S. Owners Corp.*, 276 AD2d 417 [2000] [issues of fact exist as to extent of defendant's obligation to inspect and/or repair boiler and "accessories"]), and the contractor's issuance of a violation for lack of a temperature relief valve on another boiler in the complex, tending to show that a check for this valve was part of its inspection process, and that reasonable care in the performance of its annual inspections would have resulted in its discovery of the missing valve and issuance of a citation.

Summary judgment is also inappropriate based on uncontested evidence that the infant was injured after her older brother, intending to take a bath, had turned on only the hot water and briefly left the bathroom. Whether the brother's act of turning on only the hot water was a superseding cause is a question of

fact for the jury (*Parker*, 203 AD2d at 346; *see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

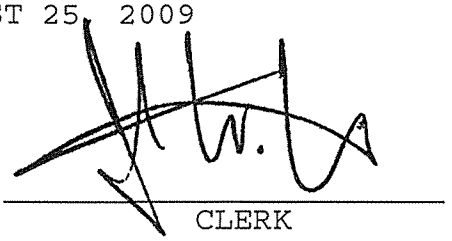
Finally, *Williams v Jeffmar Mgt. Corp.* (31 AD3d 344 [2006], *lv denied* 7 NY3d 718 [2006]), relied on by the majority for its proposition that a "landlord cannot be required to adjust the hot water temperature in order to protect children from adults who fail to do so," is inapposite to the facts of this case. Unlike *Williams*, where the mother, who left the infant child unattended in the tub, pleaded guilty to assault in the second degree, Administration for Children's Services found the abuse and neglect allegations against the mother in the instant case to be unfounded. This is not a case of a negligent mother leaving an infant alone in a tub. Rather, this was an accident where the older brother left the bathroom momentarily. Moreover, *Williams* is distinguishable because in that case "[n]othing in plaintiff's submissions permit[ted] a finding. . . that a maximum setting of 140 degrees [wa]s unsafe" (31 AD3d at 346-347). Here, however, plaintiffs' expert found soon after the incident that the water emanating from the hot water tap was in excess of 150 degrees (and as high as 186 degrees), and stated that water temperature of 150 degrees will instantly scald an infant's skin. And, as noted above, the building defendants in the present case knew that the hot water problem could result in injury since they had received numerous complaints from tenants as well as the

aforementioned violation issued by their own contractor.

Accordingly, I would affirm.

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

ENTERED: AUGUST 25, 2009



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

717-
717A Index 10.0358/06

Bender Burrows & Rosenthal, LLP,
Plaintiff-Appellant-Respondent,

-against-

Amy E. Simon,
Defendant-Respondent-Appellant.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for appellant-respondent.

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Debra A. James, J.), entered July 9, 2007, which, to the extent appealed from, denied plaintiff's motion to dismiss the counterclaims asserted against it, and denied defendant's cross motion for partial summary judgment on the counterclaim for the return of certain escrow funds, unanimously modified, on the law, to the extent of granting plaintiff's motion dismissing defendant's first counterclaim for legal malpractice, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 18, 2008, which granted plaintiff reargument and, upon reargument, adhered to its prior decision, unanimously dismissed, without costs, as academic.

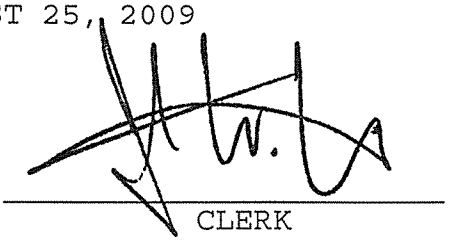
Defendant's first counterclaim for malpractice should have been dismissed since she failed to demonstrate that she would have succeeded on the merits of the underlying action for divorce but for plaintiff's negligence (*Maillet v Campbell*, 280 AD2d 526, 527 [2001]). Defendant was not prejudiced by plaintiff's mid-trial motion to withdraw. On defendant's earlier appeal from the judgment of divorce (55 AD3d 477 [2008]), this Court found that the trial court appropriately exercised its discretion in granting a five-day adjournment rather than the longer one requested by defendant's counsel since successor counsel had nearly a month to prepare for trial. Moreover, although this Court remanded the matter for recalculation of the parties' respective child support obligations and a finding as to the cost of health insurance for defendant at the predivorce level of coverage, it found defendant's arguments relating to the classification, valuation and distribution of property and the award of maintenance unavailing (*id.* at 478). *Cruciata v Mainiero* (31 AD3d 306 [2006]), which was decided on the specific facts of that case, is not to the contrary.

As to defendant's second counterclaim seeking recovery of her escrow funds, the motion court aptly concluded that there are triable questions of fact as to what agreement, if any, the parties had reached as to the disposition of those funds.

We have considered the parties' other arguments for affirmative relief and find them unpersuasive.

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

ENTERED: AUGUST 25, 2009



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Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

775 In re Leroy M.,

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

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

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 7, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that appellant had committed an act which, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed him with the Office of Children and Family Services for a period of 12 months, reversed, on the law and the facts, without costs, the motion to suppress granted, and the petition dismissed.

Appellant was charged with criminal possession of a laptop computer that had been stolen from a school. At the suppression hearing, the police officers testified that as a result of tracking software loaded on the laptop, they learned information suggesting that appellant possessed the computer. On January 30, 2008, in the middle of the afternoon, they went to appellant's

home, purportedly to investigate. The officers had neither a search warrant for the residence nor a warrant for appellant's arrest.

A total of five officers, some in uniform, approached the one-family dwelling, went up the front steps and entered the front door, which led to an inside foyer of the home. Prior to their entry into the residence, they did not ring the doorbell, knock or otherwise announce their presence, nor did anyone let them into the home. Once inside the dwelling, the officer leading the team observed a second door ajar which led into the living room. He knocked on that door and said "Police." A woman, later identified as appellant's sister, came down a staircase from the second floor and said, in substance, that she was glad they were there and to get "him" out of there. The officer asked "Where is he?" and the sister answered "up the stairs." The police went up to a second floor bedroom and observed a young man with a laptop matching the description of the missing computer. Appellant entered the room and stated, in substance, "That's mine, but a kid gave it to me." He was subsequently placed under arrest.

There is no dispute that prior to going through the front door of the residence, the police did not have anyone's consent or a search or arrest warrant. Furthermore, the presentment agency does not claim there were exigent circumstances.

Moreover, the hearing evidence, including the police testimony and the photographs of the house, clearly established that the team of officers went through the front door of what was obviously a private house and into the foyer of the residence. The photographs show the outside of the home, including the steps leading up to an opaque front door. That door has a single mail slot, a peephole, a deadbolt lock above the doorknob, and a single doorbell next to the door. The photographs also depict the area inside the front door, an enclosed foyer with a second door leading into the living room. In the absence of a warrant, exigent circumstances, or consent prior to the entry, the officers' intrusion over the threshold of the home was unlawful (*see Payton v New York*, 445 US 573, 590 [1980] ["the Fourth Amendment has drawn a firm line at the entrance to the house"]) and any evidence obtained as a result must be suppressed (*see People v Levan*, 62 NY2d 139 [1984]).

The fact that appellant's sister subsequently consented to the officers' presence is of no consequence. Where, as here, the consent to search follows an illegal entry, the presentment agency has the burden of showing both that the consent was voluntary and that it was acquired by means sufficiently distinguishable from the entry to be purged of the illegality

(*see People v Borges*, 69 NY2d 1031 [1987]; *People v Packer*, 49 AD3d 184 [2008], *affd* 10 NY3d 915 [2008]; *United States v Snype*, 441 F3d 119 [2d Cir 2006]). In determining whether there is sufficient attenuation, a court must consider the temporal proximity between the unlawful entry and the consent, the presence of any intervening circumstances and the purpose and flagrancy of the official misconduct (*see People v Conyers*, 68 NY2d 982, 983 [1986]; *Borges* at 1033; *Snype* at 132).

Here, regardless of the voluntariness of the sister's consent, we find that the taint of the illegal entry was not dissipated at the time the consent was given. With regard to the factor of temporal proximity, the sister's consent occurred virtually contemporaneously with the officers' unlawful entry into the home. In *Packer*, we noted that "this State's courts have categorically rejected prosecutorial reliance on consent to validate otherwise impermissible searches when consent was given in consequence of improperly initiated police inquiry or intrusion" (49 AD3d at 187). Here, the sister's consent occurred only moments after the officers' unlawful entry into the residence and thus stands in stark contrast to those cases where the passage of time led to a finding of attenuation (*see e.g. People v Santos*, 3 AD3d 317 [2004], *lv denied* 2 NY3d 746 [2004]; *People v Moore*, 269 AD2d 409 [2000], *lv denied* 94 NY2d 951 [2000]), or those where the attenuated act occurred outside the

residence (*see e.g. People v Padilla*, 28 AD3d 236 [2006], *lv denied* 7 NY3d 760 [2006]). And, because the entry and the consent here occurred almost instantaneously, there were no intervening events that could serve to purge the taint of the illegality.

Finally, the flagrancy of the police misconduct here must be considered. In response to a simple allegation that a school-aged child possessed a stolen laptop, five police officers, lacking any warrant or exigency, entered a private home without knocking, ringing a bell or otherwise announcing themselves. Although one of the officers gave sparse testimony suggesting that he believed it was difficult to determine if appellant's house was a one or three family home, none of the officers testified that they took any steps to determine the true nature of the dwelling before they entered. And, as noted earlier, the photographs undeniably show a private one-family house. Of greater significance, neither of the two officers who testified at the hearing could explain exactly how they got from the bottom of the steps outside the residence and into the foyer of the home. One merely stated that after arriving at the residence, he "found" himself inside. The other claimed not to know precisely how he got in because another officer was in front of him. Their lack of recollection on this issue raises further questions about the flagrancy of their conduct.

Under these specific circumstances, we conclude that the consent given by the sister was not acquired by means sufficiently distinguishable from the unlawful entry to be purged of the illegality (*see Borges*, 69 NY2d 1031; *Conyers*, 68 NY2d 982), and appellant was entitled to suppression of the laptop and the statement (*see United States v Lakoskey*, 462 F3d 965, 975 [8th Cir 2006], *cert denied* 549 US 1259 [2007]; *United States v Heath*, 259 F3d 522, 534 [6th Cir 2001]).

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

NARDELLI, J. (dissenting)

Regardless of whether the initial police entry into the dwelling was illegal, the ultimate determination of this appeal turns solely on whether the actions of the police in going up the stairs to appellant's room were attenuated by virtue of the unequivocally voluntary invitation by appellant's sister welcoming the police presence. Since I believe that the record fully supports a finding that these subsequent police actions were justified, I would affirm the order of disposition.

Appellant's sister, who was 23 years old, had every right to expect privacy in the house in which she lived, and certainly had the right to assert her expectations of privacy to an uninvited individual such as a uniformed police officer, who was the first person that she saw entering the living room as she came down the stairs.

Instead of saying "Stay out," or "What are you doing here?" she said, without hesitation, "Thank God you're all here." Equally revealing, she further testified:

> "Me and [the officer] started talking . . . And then he was, like . . . all right what's the matter, why did I say thank God that they're here. I was like me and my brother was arguing, he was disrespecting my mother and like eventually <u>I was going to call them anyway, if he kept it up so I was like thank God you're all here</u>." (Emphasis supplied)

This testimony came in a courtroom, two months after the

incident, at a time when her brother was facing delinquency charges. Notwithstanding the serious consequences for her brother, she did not attempt to dilute the circumstances surrounding her initial encounter with the police, by, for instance, intimating that she was intimidated by the police presence into inviting them upstairs. Indeed, even on cross examination, she acknowledged that she had been happy the police "were there."

There is no doubt that when law enforcement officials seek to justify a warrantless search, they are "not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over . . . the premises or effects sought to be inspected" (*United States v Matlock*, 415 US 164, 171 [1974]). Since the police were invited into the house by one of its occupants, a person who had reached the age of majority, the ensuing search was proper.

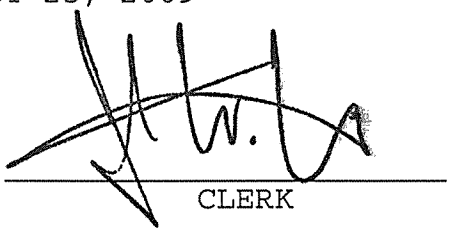
The majority concludes that the search was not attenuated by the sister's consent. The two cases it cites where the court found that attenuation did not exist, however, involved circumstances where the defendant himself gave the consent to police intrusion after initial illegal police conduct. For instance, in *People v Borges* (69 NY2d 1031 [1987]), the defendant was concededly arrested illegally, and the court directed a

suppression hearing to ascertain whether the consent he gave to a subsequent search of his apartment "was sufficiently an act of free will to purge the primary taint of the illegal arrest" (*id.* at 1033). Likewise, in *People v Packer* (49 AD3d 184 [2008], *affd* 10 NY3d 915 [2008]), the court granted suppression of a knife after a defendant had given consent to a search of his bag, after he himself had been the subject of an initial illegal frisk.

In this case the consent was given not by the subject of the police action, but by a party who clearly acted voluntarily and without intimidation. It is evident that there was no "official coercion, actual or implicit, overt or subtle" (*see People v Gonzalez*, 39 NY2d 122, 128 [2008]). Indeed, in this case, appellant's sister freely welcomed the police presence, and stated in her testimony that she was going to call the police anyway. I see no reason not to take her at her word, at least for purposes of ascertaining whether attenuation has been established.

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

ENTERED: AUGUST 25, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, JJ.

5073
Index 401832/07

x

In re Mark Oriole,
Petitioner-Respondent,

-against-

Terry Saunders, as Chief Administrative Law Judge of the New York State Division of Parole
Respondent-Appellant.

x

Respondent appeals from a judgment of the Supreme Court, New York County (Walter B. Tolub, J.), entered September 25, 2007, which granted the petition for a writ of prohibition precluding him from conducting a final parole revocation hearing with respect to petitioner's sentence on his 1998 conviction for burglary in the third degree.

Andrew M. Cuomo, Attorney General, New York (Michael S. Belohlavek and Richard O. Jackson of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Lester Helfman of counsel), for respondent.

FRIEDMAN, J.

The relief petitioner seeks in this proceeding is, in effect, a declaration that he is entitled to receive credit against his 3-to-6-year sentence on a third-degree burglary conviction for a period of approximately 20 months during which he absconded from his parole. Petitioner argues that this benefit should be conferred on him by reason of his conviction of a new felony (attempted assault in the second degree) committed while he was absconding. Although Supreme Court accepted this argument, we find nothing in the governing statute (Executive Law § 259-i) that compels us to apply the law so as to reward an already-delinquent parolee for committing a new felony. We therefore reverse, deny the petition and dismiss the proceeding.

Before setting forth the relevant facts, a brief review of the relevant aspects of the sentencing and parole system is in order. A convicted person released from incarceration on parole continues to serve his or her sentence while on parole and earns credit toward the maximum expiration date of the sentence unless and until the Division of Parole declares that person to be delinquent and revokes parole (Penal Law §70.40[1], [3][a]). If parole is not revoked, a parolee is deemed to be in the legal custody of the Division of Parole "until expiration of the maximum term or period of sentence" (Executive Law § 259-

i[2][b]). When a parolee is declared delinquent, however, the sentence is interrupted as of the date of delinquency, and the interruption continues until the parolee's return to an institution under the jurisdiction of the Department of Correctional Services (Penal Law § 70.40[3][a]). As a result, the term of the interrupted sentence is extended, beyond the original maximum expiration date, for a period of time equal to the delinquency period (*see Matter of Tineo v New York State Div. of Parole*, 14 AD3d 949, 950 [2005]; *People ex rel. Melendez v Bennett*, 291 AD2d 590, 590-591 [2002], *lv denied* 98 NY2d 602 [2002]; *Matter of Cruz v New York State Dept. of Correctional Servs.*, 288 AD2d 572, 573 [2001], *appeal dismissed* 97 NY2d 725 [2002]; *People v Hanna*, 219 AD2d 792, 792-793 [1995]).

The Court of Appeals has explained the operation of the foregoing statutory scheme as follows:

> "As a general rule, when a prisoner is committed to prison, his sentence begins to run and continues until it has been fully served . . . After he has been imprisoned for the minimum term of his sentence the Parole Board may ameliorate the conditions of his sentence by allowing him to serve the remainder of it outside the walls of the prison on parole. While a prisoner is on parole, his sentence continues to run until its maximum term has expired. However, if a prisoner commits some new violation of the conditions of his parole, and the Parole Board declares him a parole delinquent, the running of his sentence is halted until his return to prison where he may be required to serve the maximum amount of his sentence remaining, dating from the time of his act of delinquency" (*People ex rel. Petite v Follette*, 24 NY2d 60, 62-63 [1969] [citations omitted]).

Generally, a finding of delinquency is made after a final parole revocation hearing conducted pursuant to Executive Law § 259-i(3)(f) and 9 NYCRR part 8005, after compliance with the procedural prerequisites set forth elsewhere in the statute and in 9 NYCRR part 8004. Where, however, a parolee is convicted of committing a new felony while on parole and is sentenced to a new determinate or indeterminate term of imprisonment for that crime, he or she is subject to revocation of parole by operation of law based on the new felony, without any further hearing (Executive Law § 259-i[3][d][iii]). Executive Law § 259-i(3)(d) provides in pertinent part:

> "If a finding of probable cause [that a condition of parole has been violated] is made pursuant to this subdivision either by a determination at a preliminary hearing [*see* section 259-i(3)(c)] or by the waiver thereof, or if the releasee has been convicted of a new crime while under . . . parole . . . , the board's rules shall provide for (i) declaring such person to be delinquent as soon as practicable and shall require reasonable and appropriate action to make a final determination with respect to the alleged violation or (ii) ordering such person to be restored to . . . parole . . . under such circumstances as it may deem appropriate or (iii) when a . . . parolee . . . has been convicted of a new felony committed while under such supervision and a new indeterminate or determinate sentence has been imposed, the board's rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked on the basis of the new conviction and a copy of the commitment shall accompany said notification. The inmate's next appearance before the board shall be governed by the legal requirements of said new indeterminate or determinate sentence, or shall occur as soon after a final reversal of the conviction as is practicable."

Pursuant to Penal Law § 70.25(2-a), a parolee's sentence for a new conviction must run consecutively to the undischarged term of the sentence for the prior conviction.

Having set forth the relevant statutory scheme, we now turn to the facts of this case, which are essentially undisputed. In February 1998, petitioner was convicted of third-degree burglary and sentenced to a term of 3 to 6 years. He was released to parole in August 2004, and was to remain subject to parole supervision until the undischarged term of his sentence expired in January 2007.[1] On November 22, 2004, the Division of Parole issued a Violation of Release Report, charging that petitioner had committed five violations of the conditions of his release during September and October of 2004.[2] On the same date, the Division issued a warrant for petitioner's detention (*see* Executive Law § 259-i[3][a]; 22 NYCRR 8004.2). Petitioner,

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[1]The record and briefs do not disclose why more than two years of the 3-to-6-year sentence remained undischarged in August 2004, about six and a half years after the sentence was imposed. The reason for this need not concern us, as there is no dispute as to the time the sentence had left to run when petitioner was released to parole.

[2]Petitioner was charged with failing to report to his parole officer, changing his residence without notifying his parole officer, failing to provide a urine sample for a substance abuse test, failing to participate in a substance abuse treatment program (which was a condition of his release agreement), and being arrested for avoiding a subway fare (for which he received a 15-day jail sentence after pleading guilty).

however, had absconded, and his whereabouts remained unknown to the Division for the following 20 months.

On July 22, 2006, the Division finally learned of petitioner's whereabouts when he was arrested on new felony charges of assault and burglary. Two days after the arrest, the Division served petitioner with the November 2004 Violation of Release Report and a Notice of Violation. A preliminary hearing on the matter of petitioner's parole violation was held on August 1, 2006 (*see* Executive Law § 259-i[3][c]), and resulted in a determination that there was probable cause to believe that he had violated his parole. A final parole revocation hearing was scheduled, but was adjourned pending resolution of the new felony charges against petitioner.

On January 3, 2007, petitioner pleaded guilty to attempted assault in the second degree in satisfaction of the new felony indictment; on January 26, he was sentenced to an indeterminate term of 1½ to 3 years. On February 16, 2007, the Division of Parole served petitioner with a Final Declaration of Delinquency, dated February 6, 2007, which, pursuant to Executive Law § 259-i(3)(d)(iii), declared that his January 2007 felony conviction established his delinquency on his parole obligations as of July 22, 2006, the date of his arrest on the new charge.

The February 2007 Final Declaration of Delinquency made no reference to the violations charged in the November 2004 Violation of Release Report. To resolve those charges -- which were unrelated to the incident underlying the January 2007 guilty plea and were not at issue in the prosecution leading to that conviction -- the Division of Parole scheduled a parole revocation hearing. Before the hearing was held, petitioner commenced this proceeding under CPLR article 78, seeking a writ of prohibition precluding respondent, the Chief Administrative Law Judge of the Division of Parole, from conducting a parole revocation hearing based on the November 2004 charges. Supreme Court granted the petition, holding that the automatic revocation of parole triggered by the January 2007 conviction, pursuant to Executive Law § 259-i(3)(d)(iii), somehow precluded the Division of Parole from taking any further action on the preexisting November 2004 charges. We do not find this reasoning persuasive.

The statutory provision for the automatic revocation of parole upon the parolee's "convict[ion] of a new felony committed while under such supervision" (Executive Law § 259-i[3][d][iii]) simply does not address whether the new conviction has any impact on delinquency proceedings based on parole violations that allegedly took place *before* the new felony was committed. Petitioner points to nothing in the statute or its legislative

history indicating that the Legislature, in enacting section 259-i(3)(d)(iii), intended a parolee's conviction of a new crime committed while on parole to have the effect of abrogating delinquency proceedings based on prior alleged violations, thereby allowing the parolee to receive credit against his prior sentence for time during which he was actually delinquent in the observance of his parole obligations or, as here, was absconding from parole entirely. Stated otherwise, nothing in section 259-i(3)(d) indicates that the triggering of subparagraph (iii) by a parolee's new felony conviction cuts off the operation of subparagraph (i) with respect to ordinary parole violations committed before the commission of the new felony.

The Court of Appeals has recognized that the automatic revocation provision of Executive Law § 259-i(3)(d)(iii)

> "was intended to dispense with the requirement of a final revocation hearing in only the one instance where the hearing served no apparent purpose -- that is, where the parolee has been convicted of a new felony and has been sentenced to a new . . . sentence. In those circumstances, a final parole revocation hearing would be a vain gesture because no fact finding by the Board of Parole would be necessary to ascertain that the parolee has in fact violated the conditions of his parole. The court of conviction and sentence would have already indisputably established that reality" (*People ex rel. Harris v Sullivan*, 74 NY2d 305, 310 [1989]).

Here, petitioner's January 2007 conviction does not change

the fact that a final revocation hearing with respect to the violations charged in November 2004 will serve the purpose of determining whether petitioner had become delinquent in observing his parole obligations -- thereby interrupting the running of his sentence on the 1998 conviction -- as of November 2004, 20 months before the commission of the crime underlying the January 2007 conviction. After all, the January 2007 conviction established nothing with regard to the November 2004 charges. Hence, a final revocation hearing with regard to the earlier charges will in no way constitute a "vain gesture" of the kind the Legislature intended to avoid by enacting Executive Law § 259-i(3)(d)(iii).

The construction of Executive Law § 259-i(3)(d) urged by petitioner, besides failing in any way to further the legislative intent and lacking any compelling support in the statutory language, would essentially reward petitioner for his commission of a new felony by requiring the Division of Parole to credit him for the 20 months during which he was absconding. Even if petitioner's reading of the statute were otherwise tenable, we would reject it as running afoul of the rule that a court "will not blindly apply the words of a statute to arrive at an unreasonable or absurd result" (*People v Santi*, 3 NY3d 234, 242 [2004] [internal quotation marks and citation omitted]).

This Court's decision in *Matter of King v Keefe* (268 AD2d 308 [2000]) does not require the illogical result urged by petitioner. Although *King* affirmed the grant of a writ of prohibition precluding the Division of Parole from conducting a final parole revocation hearing under circumstances bearing a superficial resemblance to those presented here, the record of *King* indicates that the Division sought a final revocation hearing in that case due solely to a concern that the parolee's new conviction, for which he had been sentenced to 50 years to life, might be overturned on appeal. Given that the new conviction resulted in such a lengthy sentence, it is not surprising that the Division in *King* did not make the argument it makes here, namely, that failing to permit a final revocation hearing would result in crediting the parolee for time during which he was delinquent. Moreover, by the time this Court decided the Division's appeal in *King*, the new conviction had been affirmed (*see People v King*, 259 AD2d 763 [1999], *lv denied* 93 NY2d 926 [1999]), thereby obviating the Division's sole motivation for holding a final revocation hearing. To the extent, if any, *King* can be read to require affirming the grant of the petition here, we decline to follow it, for the reasons discussed above.

Finally, although the case has not been cited by petitioner and was not cited by Supreme Court, we note that the Second Department's decision in *Matter of Pierre v Rodriguez* (131 AD2d 763 [1987]) does not support affirming the grant of a writ of prohibition against the Division's holding a final revocation hearing based on the November 2004 charges. The situation in *Pierre* was the opposite of the scenario here, in that the *Pierre* parolee, who had absconded before being arrested and convicted for a new felony, unsuccessfully argued that the Division of Parole was *required* to hold a final parole revocation hearing before declaring his parole to have been revoked *based on his new felony conviction*. By contrast, in this case, petitioner seeks to *bar* the Division from conducting a final parole revocation hearing *based on charges unrelated to the new felony conviction*. It appears from the *Pierre* decision that the Division, in the exercise of its administrative discretion, chose not to seek a declaration of delinquency based on the parolee's absconding in that case, and deemed it sufficient to declare him delinquent based on the new crime. Nothing requires the Division to make the same choice here.

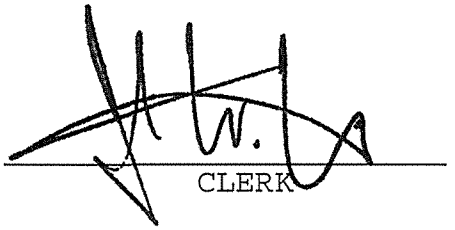
Accordingly, the judgment of the Supreme Court, New York County (Walter B. Tolub, J.), entered September 25, 2007, which granted the petition for a writ of prohibition precluding

respondent from conducting a final parole revocation hearing with respect to petitioner's sentence on his 1998 conviction for burglary in the third degree, should be reversed, on the law, without costs, the petition denied and the proceeding dismissed.

All concur.

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

ENTERED: AUGUST 25, 2009



CLERK

AUG 25 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
John W. Sweeny, Jr.
Rolando T. Acosta
Helen E. Freedman, JJ.

118-118A-119N
Index 113366/05

Ramona Ortiz,
Plaintiff-Respondent-Appellant,

-against-

The City of New York,
Defendant-Respondent-Appellant,

240 West 98th Street Associates, et al.,
Defendants-Appellants-Respondents.

- - - - - -

Ramona Ortiz,
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Respondent,

240 West 98th Street Associates, et al.,
Defendants-Appellants.

Defendants 240 West 98th Street Associates and Weinreb Management appeal from the order of the Supreme Court, New York County (Karen S. Smith, J.), entered February 25, 2008, which denied their motion for summary judgment

dismissing the complaint and all cross claims as against them. Cross appeals from an order, same court and Justice, entered February 25, 2008, which granted defendant City's motion for summary judgment dismissing the complaint and all cross claims as against it only to the extent of finding that the City had not received prior written notice of the hole in the ramp over which plaintiff allegedly tripped, and denied the motion to the extent of finding that issues of fact exist as to whether the City had caused or created the hole. Defendants 240 West 98th Street Associates and Weinreb Management appeal from the order, same court and Justice, entered February 25, 2008, which denied their motion to vacate the note of issue.

Flynn, Gibbons & Dowd, New York (Ann Teresa McIntyre of counsel), for 240 West 98th Street Associates and Weinreb Management, appellants-respondents/appellants.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner and Barry P. Schwartz of counsel), for municipal respondent-appellant/respondent.

Brian J. Isaac, New York, and Gersowitz, Libo & Korek, P.C., New York (Edward H. Gersowitz and Julie T. Mark of counsel), for Ortiz, respondent-appellant/respondent.

ACOSTA, J.

At issue in this case is whether a corner pedestrian ramp leading down a sidewalk onto the street is part of the "sidewalk" for purposes of Administrative Code of the City of New York § 7-210, which imposes tort liability on property owners who fail to maintain City-owned sidewalks in a reasonably safe condition. We hold that § 7-210 does not impose tort liability on abutting property owners for defects on pedestrian ramps. The City of New York is responsible for maintaining the pedestrian ramps, and there is evidence that the City was partially responsible for creating the hole in this particular ramp.

Background

On February 3, 2005, plaintiff tripped and injured her knee when she stepped into a triangle-shaped hole in the bottom edge of a pedestrian ramp connected to the sidewalk adjacent to property owned by defendant 240 West 98th Street Associates and managed by defendant Weinreb Management, at 98th Street and Broadway in Manhattan. A missing street curb formed the base of the triangular hole. Plaintiff's expert conducted an inspection of the area of the accident and found several purported defects that, in his opinion, represented departures from City regulations and engineering standards. In particular, the expert found "no protective curb surrounding the concrete sidewalk curb

ramp," that is, "[t]he street asphalt [met] the curb ramp directly." He thus concluded that either the City or its agents had constructed the curb ramp without a protective curb in place and without ensuring that the ramp was flush with the street, or the curb had sunk relative to the ramp and had been paved over. He opined, without contradiction by the City, that "the City . . . had actual knowledge of the missing or depressed protective curb as the street was paved directly to the curb ramp without a curb in place as required."

Defendant 240 moved for summary judgment, arguing, inter alia, that Administrative Code § 7-210, the new sidewalk law, did not apply to this case since the pedestrian ramp was not part of the sidewalk for which the adjacent property owner was liable. Section 7-210, it argued, requires only repair and maintenance of the "sidewalk flags," which are different from pedestrian ramps.

The City opposed the motion and cross-moved for summary judgment, arguing that, aside from the fact that Administrative Code § 7-210 transferred liability to the adjacent property owner, it was also not liable because there was no prior written notice of the defect causing plaintiff's injury. The City also noted that the record contained no evidence of any fact that would bring the case within any exception to the prior written

notice requirement. The City attached the deposition testimony of Sherry Johnson of the Department of Transportation, who stated that the City had searched the records and found no written notice, complaints or work performed at that location. The City also attached a map prepared by the Big Apple Pothole and Sidewalk Protection Corporation (the Big Apple map), which had been served on the City prior to plaintiff's accident. This map contained no notation indicating a hole or cracked sidewalk at that location.

The court denied defendant 240's motion for summary judgment, holding that the pedestrian ramp was part of the sidewalk for which adjacent land owners were liable for maintenance and repair pursuant to Administrative Law § 7-210. The City's cross motion for summary judgment was granted solely to the extent of finding that the City had not received written notice of the hole. The court found, however, that issues of fact existed as to whether the City had caused or created the defect (not in the construction of the ramp itself, but in creating a height differential when it repaved the street). The court noted plaintiff's expert's finding that the average height differential at the base of the ramp edge measured 1½ to 2 inches, which provided an abrupt vertical transition creating a

recognized tripping hazard. The expert also found (and photographs of the hole confirm) that the base of the triangular hole was caused by a missing curb. The court noted the expert's uncontradicted finding of no protective curb surrounding the concrete sidewalk curb ramp, and the City's actual knowledge of the missing or depressed protective curb, having paved the street directly to the curb ramp without a curb in place as required. The court noted that if the only claim were the premature failure of the concrete, under *Bielecki v City of New York* (14 AD3d 301 [2005]), the City would prevail.

Administrative Code § 7-210

At common law, prior to enactment of § 7-210, the City, and not the abutting landowner, was liable for injuries sustained by a pedestrian as a result of defects in the sidewalk, unless the owner created the defective condition or caused it through some special use. In addition, while the statutory scheme prior to enactment of § 7-210 required an abutting landowner to "install, construct, repave, reconstruct and repair the *sidewalk flags* in front of or abutting such property" (Administrative Code § 19-152[a] [emphasis added]), and to remove snow, ice, dirt or other material from the sidewalk (§ 16-123 [a]), the failure to abide by these provisions would expose the landowner to fines or

require the landowner to reimburse the City for its expense in performing these acts (*Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]), but would not expose the landowner to tort liability (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520 [2008]; *see also Muniz v Bacchus*, 282 AD2d 387 [2001]; *Nicholson v City of New York*, 257 AD2d 532 [1999]).

In 2003, the New York City Council enacted § 7-210, which states in part:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk . . .
>
> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks . . . in a reasonably safe condition.

Applicable to incidents occurring on or after September 14, 2003, § 7-210 transferred liability for defective sidewalk flags from the City to all nonexempt adjacent property owners (*see Klotz v City of New York*, 9 AD3d 392, 393 [2004]).[1] The primary intent of § 7-210 and the related amendments to the Code was to alleviate the practical and financial burdens the City faced in maintaining its sidewalks, while preserving an injured person's access to recovery (*see Gangemi v City of New York*, 13 Misc 3d 1112, 1121 [2006], citing Mayor Bloomberg's statement in signing Local Laws 49 and 54 of 2003).

Another intent of the new sidewalk law was to address an anomaly in the prior statutory scheme, which ostensibly required property owners to maintain the sidewalks abutting their properties in good repair, but imposed no tort liability for their passive failure to do so (*Vucetovic*, 10 NY3d at 519).

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[1]Exemptions exist for owners of one-, two-, or three-family owner-occupied dwellings used exclusively for residential purposes, as well as City-owned property (Administrative Code § 7-210[b] and [c]). Neither exemption is claimed here. Along with § 7-210, the City Council enacted §§ 7-211 and 7-212 to protect individuals injured on defective sidewalks covered by the new sidewalk law. Section 7-211 requires owners of real property, other than public corporations, to purchase liability insurance covering personal injury occurring on the sidewalks abutting the property. If the adjoining landowner does not have insurance, §7-212 authorizes the Comptroller, after consultation with the Corporation Counsel, to pay up to $50,000 for uncompensated medical expenses if certain conditions are met.

Liability was only incurred by the property owner for injuries arising from the negligent repair of the sidewalk, creation of the defective condition, or use of the sidewalk for a special purpose (*id.* at 520, *citing Hausser*, 88 NY2d at 453). Therefore, the intent of the new sidewalk law, aside from financial considerations, was to encourage owners to comply with their pre-existing obligations under Administrative Code §§ 16-123(a) and 19-152(a), and ultimately to improve the condition of sidewalks City-wide (*see* 2003 NY City Legis Ann, at 330-334).

Although the City clearly had the authority to transfer tort liability to abutting property owners under the new scheme (*Hausser*, 88 NY2d at 452-453), § 7-210 of the Code is nonetheless in derogation of the common law and must thus be strictly construed (*Vucetovic*, 10 NY3d at 521; *see generally* McKinney's Statutes § 301,[a]). Therefore, if the City desired, with the enactment of the new sidewalk law, to shift liability for accidents on pedestrian ramps, "it needed to use specific and clear language to accomplish this goal" (10 NY3d at 522).

As quoted above, § 7-210(b) states that the abutting landowner is liable for injuries caused by a failure to maintain the "sidewalk" in a reasonably safe condition, and the "[f]ailure to maintain such sidewalk in a reasonably safe condition shall

include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk." While the section states "but not limited to," the Court of Appeals has held that "this clause applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk" (*Vucetovic*, 10 NY3d at 522). Therefore, the abutting landowner's liability, as it relates to its failure to maintain the "sidewalk," is limited to its failure to repair, replace, etc. "sidewalk flags." There is simply no indication anywhere in the amendments, or for that matter in the legislative history of § 7-210, that the City Council intended to include pedestrian ramps as part of the sidewalk that the abutting property owner would be responsible for maintaining. As the Court of Appeals noted in *Vucetovic*, Administrative Code § 7-210 mirrors § 19-152, which merely required the abutting property owner to "install, construct, repave, reconstruct and repair the sidewalk flags" abutting the property (10 NY3d at 519).

Moreover, the City's Highway Rules regarding "Sidewalk, Curb and Roadway Work" mandate the specific construction requirements of sidewalk "flags" (34 RCNY § 2-09[f][4][vii]) and "Pedestrian

ramps" (§ 2-09[f][4][xiv]), clearly indicating that the City views the two as separate and distinct items. Additionally, Administrative Code § 19-112 (Ramps on Curbs) provides in pertinent part:

> In the construction and installation of all new and reconstructed curbs at corner located street intersections and pedestrian crosswalks not located at street intersections, provision shall be made for the installation of the following: two ramps at corners located at street intersections and one ramp at pedestrian crosswalks not located at street intersections . . . [continuing to discuss the specific requirements for the construction of such ramps].

Thus, § 19-112 includes ramps as part of the curb, not the sidewalk, in both its title heading and its text. The abutting landowner is not responsible for maintaining and repairing these ramps *(see Rodriguez v Sequoia Prop. Mgt. Corp.*, 878 NYS2d 606 [Sup Ct, Queens County, 2009]), and the motion court thus improperly denied defendant 240's motion for summary judgment.[2]

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[2]Aside from our holding that § 7-210 does not encompass pedestrian ramps, it is not entirely clear that the City would have been permitted to transfer its obligations to private property owners in any event, under the Americans with Disabilities Act of 1990 (Pub L 101-336), which prohibits discrimination in the provision of public services. Specifically, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity" (42 USC § 12132). Pursuant to this section,

a public entity's failure to install pedestrian ramps when it resurfaces a street is in violation of the ADA (*Kinney v Yerusalim*, 9 F3d 1067 [3rd Cir 1993]). As the court there noted, Congress's concerns with physical barriers led to a "particular emphasis on the installation of curb cuts" (*id.* at 1071). Indeed, the House Report for the legislation noted that "The employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets" (HR Rep 485 [II], 101st Cong, 2d Sess, at 84, reprinted in 1990 US Code Cong & Admin News, at 367). As such, "*under this title, local and state governments are required to provide curb cuts on public streets*" (*id.*, emphasis added; see also 28 CFR 35.151[e] [regulation mandating the installation of pedestrian ramps whenever a city "alters" a street]).

Consistent with the language of the regulations and the legislative history, the Federal Highway Administration of the United States Department of Transportation opined in a Question and Answer format (*see* United States Department of Justice's website) that a public agency may not "make" private individuals or businesses responsible for ADA Title II (as well as Rehabilitation Act of 1973 [§ 504]) mandated pedestrian access. This opinion, however, is inconsistent with opinion letters issued by the Department of Justice, which has opined that "the ADA does not regulate the manner in which a covered entity, such as [a city], should finance changes it must make in order to bring itself into compliance with the ADA" (Department of Justice, Civil Rights Division, Advisory Opinion No. 797 [August 5, 1999]). Therefore, "public entities are free to allocate these costs among their residents in any manner authorized by state law," as long as a "surcharge is not imposed against a particular individual or group of individuals with disabilities" (*id.* at 2 [DOJ opined that City of Lancaster, PA was not in violation of Title II of the ADA by requiring house owner to replace curb ramps and/or sidewalks adjacent to house as part of City's annual street improvement project]; *see also* Advisory Opinion No. 472 [March 15, 1994] [same opinion]). Significantly, unlike the statute in Lancaster, Administrative Law § 7-210 exempts owners of one-, two-, or three-family owner-occupied dwellings used exclusively for residential purposes. Regardless of whether the City can transfer its obligation to install and maintain pedestrian ramps to private entities, it cannot, by

Notice

Contrary to plaintiff's assertions, the City did not receive prior written notice of the hole that allegedly caused plaintiff to trip (Administrative Code § 7-201[c][2]). The Big Apple map on which plaintiff relied did not constitute such notice because the "awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident" (*Roldan v City of New York*, 36 AD3d 484 [2007]). In other words, markings showing a crack on the sidewalk do not give notice of a hole at the end of that crack. The markings on a Big Apple map must give notice of the particular defect alleged to have caused the injury (*see D'Onofrio v City of New York*, 11 NY3d 581 [2008]; *Laughton v City of New York*, 30 AD3d 472 [2006]; *Waner v City of New York*, 5 AD3d 288 [2004]).

There are issues of fact, however, as to whether the City caused or created the hole. On a motion for summary judgment, "Where the City establishes that it lacked prior written notice . . ., the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the

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Administrative Law § 7-210, shift its liability for ADA Title II violations to private entities (*see Pickern v Pier 1 Imports (U.S.), Inc.*, 457 F3d 963 [9th Cir 2006]).

[requirement of written notice] -- that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Furthermore, "the affirmative negligence exception . . . [is] limited to work by the City that immediately results in the existence of a dangerous condition" (*Bielecki*, 14 AD3d at 301, quoted in *Yarborough*).

Here, plaintiff submitted evidence through her expert that the City was partly responsible for creating the hole. Indeed, there is evidence that the City repaved the street and either buried the curb or simply failed to install one, which created a 1½-to-2-inch vertical drop from the ramp to the street. The expert further noted, and the photographs confirm, that the missing curb, which was the City's responsibility, accounted for the base of the triangular hole. And, as the court below found, the City never opposed these facts. We thus respectfully disagree with the dissent on this issue.

Accordingly, the order of Supreme Court, New York County (Karen S. Smith, J.), entered February 25, 2008, which denied the motion of defendants abutting property owner and property manager for summary judgment dismissing the complaint and all cross claims as against them, should be reversed, on the law, without

costs, the motion granted, and the complaint and all cross claims dismissed as against them. Order, same court and Justice, also entered February 25, 2008, which granted defendant City's motion for summary judgment dismissing the complaint and all cross claims as against it only to extent of finding that the City had not received prior written notice of the hole in the ramp over which plaintiff allegedly tripped, and denied the motion to the extent of finding that issues of fact exist as to whether the City had caused or created the hole, should be affirmed, without costs. Appeal from order, same court and Justice, also entered February 25, 2008, which denied the motion of the property owner and manager to vacate the note of issue, should be dismissed, without costs, as academic. The Clerk is directed to enter judgment in favor of defendants property owner and property manager dismissing the complaint and all cross claims.

All concur except Tom, J.P. and Sweeny, J. who dissent in part in an Opinion by Sweeny, J.

Sweeny, J. (dissenting in part)

I dissent on one issue: whether the plaintiff has raised a question of fact that the City can be held responsible for plaintiff's accident. She has not; therefore, the complaint should be dismissed in its entirety.

The majority correctly notes that because there was no written notice of the defect, the burden is on plaintiff to establish the City's liability. The majority is also correct that the City can only be responsible if it created the defect by its negligent construction or repair, and if the work immediately results in the existence of a dangerous condition (*Yarborough v City of New York*, 10 NY3d 726 [2008], quoting *Bielecki v City of New York*, 14 AD3d 301[2005])[1]

The majority relies primarily on the plaintiff's expert's report, which dealt primarily with the following alleged defects:

> the curb ramp provides an "*abrupt vertical transition*" which is dangerous and hazardous to users at the base of the ramp creating a significant tripping hazard... The difference in heights creates a trap and snare due to the change in levels...Either the curb has sunk relative to the ramp and was paved over or the curb is missing entirely. In either

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[1]There is a second ground to establish liability, namely, the creation of a special use by the City, which concededly does not apply here.

> case, there is no protective curb in place, thereby permitting the raised concrete ramp to be exposed to impact traffic...[T]he concrete ramp was improperly constructed too thin at the base of the ramp at only 1½" to 2" thick, which permitted premature failure of the concrete

Even accepting the expert's observations, they are completely irrelevant to the issue before us. Plaintiff never stated any of these conditions were the cause of her fall. She stated, unequivocally, that the fall resulted from her stepping into a hole. Although the report makes reference to a hole leading from a crack in the pavement, nowhere in the expert's report does he state the actions of the City resulted in the immediate creation of that hole. At best, the report indicates there may have been a layer of pavement that gradually wore away or cracked because of constant traffic, thereby creating the hole over time. However, there is nothing but pure speculation to say that hole was an immediate result of the City's work.

Accordingly, plaintiff failed to meet her burden under *Yarborough* that the actions of the City resulted in the immediate creation of the hazard that caused her injury.

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

ENTERED: AUGUST 25, 2009