SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 7, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4509 William June, et al., Index 17427/06
Plaintiffs-Respondents,

-against-

Sheikh Ali Akhtar, et al.,
Defendants-Appellants.

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

Richard M. Altman, Bronx, for respondents.

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Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered on or about March 20, 2008, which denied defendants' motion for summary judgment dismissing the complaint for lack of a serious injury as required by Insurance Law § 5102(d), affirmed, without costs.

Defendants' examining physician noted limitations in range of motion with respect to plaintiff June's left knee and lumbar spine and with respect to plaintiff Smalls' right shoulder and cervical and lumbar spines, and plaintiffs' MRI results showed disc herniations and bulges, a tear to June's left meniscus, and a labral tear in Smalls' right shoulder. The cited impairments are consistent with plaintiffs' description that June hit his left knee against the dashboard, and that Smalls' upper body hit

the steering wheel, when defendants' car collided with them, and the doctor's notes and the MRI results support a finding of serious injury within the meaning of Insurance Law § 5102 (*see Guerrero v Bernstein*, 57 AD3d 845 [2008]; *Noriega v Sauerhaft*, 5 AD3d 121, 122 [2004]).

In the circumstances presented, particularly the fact that plaintiffs were relatively young (June was 31 years old and Smalls 25 at the time of the accident), defendants' claim that the abnormal MRI findings and restricted ranges of motion were due to degenerative changes unrelated to the accident requires further elaboration to satisfy defendants' burden on the motion, to establish prima facie entitlement to summary judgment (*see Coscia v 938 Trading Corp.*, 283 AD2d 538 [2001]).

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

McGUIRE, J. (dissenting)

I disagree with the majority's conclusion that the order denying defendants' motion for summary judgment dismissing the complaint should be affirmed. Accordingly, I respectfully dissent.

Plaintiffs were the driver and passenger of a vehicle involved in a motor vehicle accident on November 28, 2004 with a vehicle owned and operated by defendants. Plaintiffs commenced this action against defendants seeking to recover damages; June alleged that he sustained injuries to his left knee and the cervical and lumbar portions of his spine, and Smalls alleged that he sustained injuries to his right shoulder and the cervical and lumbar portions of his spine. Defendants moved for summary judgment dismissing the complaint in its entirety, arguing that neither of the plaintiffs sustained a "serious injury" under Insurance Law § 5102(d). Notably, defendants asserted that both plaintiffs had preexisting conditions and that defendants' alleged negligence was not a proximate cause of the injuries of either of plaintiffs.

In support of their motion, defendants submitted the affirmation of a radiologist who reviewed MRI films of June's spine taken on December 18, 2004, approximately three weeks after the accident. The radiologist stated that

> "Review of the lumbar spine MRI examination performed three weeks following the accident reveals desiccation

> at the L5-S1 intervertebral disc level. This is a drying out of disc material, a degenerative process, which could not have occurred in less than three [weeks] time and clearly predates the 11/28/04 accident. Bulging at this level is seen. Bulging is not a traumatic abnormality. It is degeneratively induced, related to ligamentous laxity. No osseous, ligamentous, or intervertebral disc abnormalities are seen attributable to the 11/28/2004 accident. No post-traumatic changes are seen."

With respect to the MRI films of June's cervical spine, the radiologist stated that the films showed "cervical straightening, a nonspecific finding, frequently related to patient position and comfort for the examination," and that "[n]o recent or post-traumatic changes" were present.

The radiologist also reviewed MRI films of June's left knee taken approximately one month after the accident. Her review of those films

> "reveale[d] [a] grade II mucoid degenerative signal change in the posterior horn of the medial meniscus. As the name implies, this is a[n] intrasubstance, degenerative process without traumatic basis or causal relationship to the 11/28/04 accident. The chronicity is further evident by the associated out-pouching of the synovial lining, the parameniscal cyst which is indicative of a long term process."

An orthopedic surgeon examined June at defendants' behest. The surgeon opined, among other things, that June's spinal condition was the result of degenerative changes. The surgeon also opined that June did not suffer from any limitation in the range of motion in his cervical spine, had only minor limitations in the range of motion in his lumbar spine and an approximately

40% limitation in the range of motion in his left knee.

The radiologist also reviewed MRI films of Smalls' spine taken on December 18, 2004. With respect to Smalls' cervical spine, the radiologist averred that the MRI films

> "reveale[d] desiccation at the C4-5 and C5-6 intervertebral disc levels. This is a drying out of disc material, a degenerative process, which could not have occurred in less than three [weeks] time. Bulging is seen at the C5-6 intervertebral disc level. Bulging is not a traumatic abnormality. It is related to ligamentous laxity. No osseous, ligamentous, or intervertebral disc abnormalities are seen attributable to the 11/28/2004 accident. No post-traumatic changes are seen."

With respect to the films of Smalls' lumbar spine, the radiologist concluded that "[n]o post-traumatic abnormalities [we]re seen" and that the lumbar spine structure was "entirely normal." After reviewing MRI films of Smalls' right shoulder taken approximately eight weeks after the accident, the radiologist stated that the shoulder was "entirely normal" and no "post-traumatic changes" were noticed.

The orthopedic surgeon also examined Smalls. The surgeon determined that Smalls had limitations in the range of motion in both the cervical and lumbar portions of his spine, and a limitation in the range of motion of his right shoulder. The surgeon opined that the limitations in the range of motion Smalls exhibited in his spine were "grossly out of context from what is seen by objective MRI evaluation and is more likely a non-organic finding"; the physician also noted that Smalls drove from Georgia

to New York City for the evaluation and that such a trip "would be inconsistent with someone who has severe ongoing neck and lower back symptoms[, and that Smalls] is ... well-developed, quite muscular, and this is also inconsistent with a claim of significant disability or ongoing pain."

With respect to the limitation in the range of motion in Smalls' right shoulder, the surgeon stated that a similar limitation in Smalls' left shoulder, which was not injured in the accident, indicated that the limitations in the range of motion in the shoulders were based on Smalls' "poor effort." The surgeon also stated that no substantial injury to the right shoulder was caused by the accident -- Smalls did not exhibit traditional symptoms of a shoulder injury immediately after the accident, the MRI films of his right shoulder taken approximately eight weeks after the accident did not indicate any significant injury to that shoulder, and a surgical procedure on that shoulder, performed approximately four months after the accident, revealed that his rotator cuff was intact and that the torn labrum that was repaired during the surgery was "an anatomic variant" that is considered to be congenital condition.

In opposition, June submitted the affirmation of a radiologist who reviewed the previously noted MRI films of June's spine and left knee. The radiologist concluded that June sustained a "Focal Central Herniation at L5-S1." With respect to

June's left knee, the radiologist saw a "(a) Signal in the posterior horn of the Medial Meniscus, consistent with an intra meniscal tear; (b) Small popliteal cyst posteriorly which can be associated with Internal derangement of left knee." The radiologist stated that the disc herniation and knee injury "appear[ed] to be of non [*sic*] long-standing duration," and opined that those injuries were "traumatically related" to the accident.

June also submitted the affirmation of the orthopedic surgeon who operated on his left knee in 2005. The surgeon averred that June

> "suffered a meniscal injury with resultant synovitis and scar tissue formation in the left knee when he was involved in a motor vehicle accident on November 28, 2004. The patient suffers from continued deconditioning, stiffness, and weakness of the left lower extremity. The current conditions and the initial injury are causally related to [the] motor vehicle accident..."

The surgeon also averred that, while the physician who authored the MRI report based on the films of June's left knee believed that June suffered a torn meniscus, June actually suffered a stretched meniscus.

Smalls submitted the affirmation of a radiologist who reviewed the MRI films of his right shoulder. The radiologist stated that Smalls sustained a labral tear and effusion that "appear to be of non [*sic*] long-standing duration ... [and] were traumatically related" to the accident. Smalls also submitted

the affirmation of an orthopedic surgeon who operated on his right shoulder in 2005. The surgeon averred that Smalls sustained minor limitations in the range of motion in his right shoulder -- 10 degrees of flexion, 15 degrees of abduction and 5 degrees of external rotation -- due to a labral tear that was caused by the accident.

Defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing June's claims related to his left knee and lumbar spine on the ground that any abnormalities to those portions of his body were not caused by the accident. Defendants adduced expert evidence that June experienced desiccation, i.e., drying out of disc material, at the L5-S1 intervertebral disc level, which defendants' radiologist classified as a degenerative process that could not have occurred in the three-week period between the accident and the date the MRI films of June's spine were taken. Defendants also adduced expert evidence that a degenerative condition was present in June's left knee. Thus, defendants' radiologist affirmed that the MRI of June's left knee, taken approximately one month after the accident, "reveale[d] [a] grade II mucoid degenerative signal change in the posterior horn of the medial meniscus. As the name implies, this is a intrasubstance, degenerative process without traumatic basis or causal relationship to the 11/28/04 accident. The chronicity is further

evident by the associated out-pouching of the synovial lining, the parameniscal cyst which is indicative of a long term process." The burden therefore shifted to June to adduce evidence addressing defendants' evidence that degenerative conditions were present in his spine and left knee (*see Valentin v Pomilla*, 59 AD3d 184 [2009]; *Ronda v Friendly Baptist Church*, 52 AD3d 440, 441 [2008]; *Becerril v Sol Cab Corp.*, 50 AD3d 261, 261-262 [2008]; *see also Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007]; *Shinn v Catanzaro*, 1 AD3d 195 [2003]).

In opposition, June failed to raise a triable issue of fact because neither of his experts addressed defendants' expert evidence that June suffered from degenerative conditions in his lumbar spine and left knee (*see e.g. Valentin, supra*; *Eichinger v Jone Cab Corp.*, 55 AD3d 364 [2008]; *Reyes v Esquilin*, 54 AD3d 615 [2008]; *Becerril, supra*; *see also Charley v Goss*, 54 AD3d 569 [2008], *affd* 12 NY3d 750 [2009]; *Lattan v Gretz Tr. Inc.*, 55 AD3d 449 [2008]; *Page v Rain Hacking Corp.*, 52 AD3d 229 [2008]; *Ronda, supra*).

Defendants are also entitled to summary judgment dismissing June's claim with respect to alleged injuries to his cervical spine. Defendants adduced expert evidence that June did not sustain an injury to that portion of his spine as a result of the accident. However, neither of June's experts addressed the condition of his cervical spine.

Defendants also made a prima facie showing of entitlement to judgment as a matter of law dismissing Smalls' claim related to his right shoulder on the ground that any injuries to that shoulder were not caused by the accident. Defendants adduced expert evidence that the torn labrum in Smalls' right shoulder was "an anatomic variant" that is considered a congenital condition. In opposition, Smalls failed to raise a triable issue of fact. Neither of Smalls' experts addressed defendants' expert evidence that the torn labrum in his right shoulder was a congenital condition and was not caused by the accident (*see e.g. Eichinger, supra; Reyes, supra; see also Page, supra*). While Smalls' orthopedic surgeon did aver that the accident caused that tear, the surgeon did not address the points made by defendants' orthopedic surgeon. Specifically, defendants' expert stated that the location of the tear was not an area of the labrum that would typically tear as a result of a traumatic event and that the area of the tear was "consistent with a sub labral hole which is an anatomic variant and can typically be seen during a routine shoulder arthroscopy outside the context of any traumatic injury and is felt to be a congenital finding."

Smalls also failed to raise a triable issue of fact with respect to his claim based on injuries to his spine. In opposition to defendants' prima facie showing that no injuries to the cervical and lumbar portions of Smalls' spine were caused by

the accident, neither of Smalls' experts offered an opinion regarding the condition of his spine.

The majority asserts that "[i]n the circumstances presented, particularly the fact that plaintiffs were relatively young (June was 31 years old and Smalls 25 at the time of the accident), defendants' claim that the abnormal MRI findings and restricted ranges of motion were due to degenerative changes unrelated to the accident requires further elaboration to satisfy defendants' burden on the motion, to establish a prima facie entitlement to summary judgment." Unsurprisingly, the majority cites no authority supporting its implicit conclusion that on account of these respective ages it is unlikely that plaintiffs suffered from degenerative changes.[1] Nor does it cite to anything in the

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[1]Although the majority cites *Coscia v 938 Trading Corp.* (283 AD2d 538 [2001]), *Coscia* does not remotely support the majority's position. The decision, in its entirety, reads as follows:

> "The Supreme Court properly denied the defendants' motion for summary judgment. In support of their motion, the defendants submitted evidence that the plaintiff Phyllis Coscia was suffering from restrictions of motion in her lumbar spine. Furthermore, the defendants submitted contradictory proof as to whether the injured plaintiff's lumbar spine condition was caused by the subject accident or a degenerative disease (*see, Julemis v Gates,* 281 AD2d 396; *DeVeglio v Oliveri,* 277 AD2d 345). Accordingly, the defendants failed to establish a prima facie case that the injuries allegedly sustained by Phyllis Coscia were not serious within the meaning of Insurance Law § 5102(d) (*see, Mariaca-Olmos v Mizrhy,* 226 AD2d 437; *Mendola v Demetres,* 212 AD2d 515). Under these circumstances, it is not necessary to consider whether the plaintiffs' papers in opposition to the defendants'

record that supports that implicit conclusion. Of course, the members of this panel are not competent to opine about whether, the extent to which or the frequency with which individuals between the ages of 25 and 31 suffer from degenerative conditions. In opposition to defendants' expert evidence stating that both plaintiffs suffered from degenerative conditions, it was incumbent upon plaintiffs to offer expert medical evidence raising a triable issue of fact. They failed to do so, we cannot properly cure their failure and we should reverse.

In light of my conclusion that the complaint should be dismissed for the reasons stated above, I need not and do not pass on defendants' additional arguments. I note, however, that defendants make persuasive arguments that the 90/180 claims of

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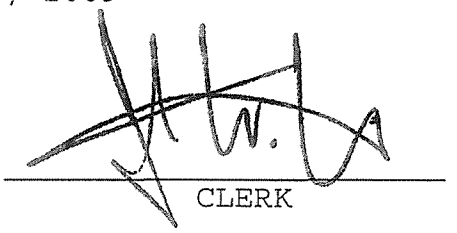
motion were sufficient to raise a triable issue of fact (*see, Chaplin v Taylor*, 273 AD2d 188; *Mariaca-Olmos v Mizrhy, supra*)."

both plaintiffs should be dismissed, but the majority does not discuss those arguments.[2]

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

ENTERED: MAY 7, 2009



CLERK

[2]The majority's failure to grant defendants partial summary judgment dismissing Smalls' claims for injuries to his spine is inexplicable. In opposition to defendants' prima facie showing that no injuries to Smalls' spine were caused by the accident, Smalls submitted no expert evidence regarding the condition of his spine.

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

4305 John R. Linton, et al., Index 104906/04
Plaintiffs-Respondents,

-against-

Muhammad Nawaz, et al.,
Defendants-Appellants.

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

Law Offices of Mark S. Gray, New York (Peter J. Eliopoulos of counsel), for respondents.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered December 26, 2007, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff John Linton did not sustain a serious injury within the meaning of Insurance Law § 5102(d), modified, on the law, to grant the motion to the extent of dismissing plaintiff's claim that he sustained a medically determined injury of a non-permanent nature that prevented him from performing substantially all of his usual and customary activities for 90 of the 180 days immediately following the accident, and otherwise affirmed, without costs.

This action arises out of a motor vehicle accident which occurred on August 29, 2002. Plaintiff, a pedestrian, was struck by a taxicab owned by defendant Chire Taxi, Inc. and operated by defendant Muhammad Nawaz. After striking plaintiff, the cab

jumped the curb and, in the process, pushed plaintiff's body into a mailbox. Bleeding from his right knee and right ankle, plaintiff was transported by ambulance to Mt. Sinai Hospital, where he was examined and prescribed pain medication before being released. Plaintiff was unable to stand or walk in the days immediately following the accident, and experienced radiating neck and back pain.

Eight days after the accident, plaintiff consulted with Noel Fleischer, M.D., a neurologist, who examined him and made an initial diagnosis of traumatic cervical and lumbar radiculopathy and internal derangements of the left knee and right shoulder. MRIs prescribed by Dr. Fleischer revealed a tear of the right rotator cuff, a tear of the left medial meniscus, and multiple cervical disc herniations. Plaintiff continued to treat with Dr. Fleischer and to receive physical therapy. However, as of four years after the accident, Dr. Fleischer considered plaintiff's prognosis for full recovery to be "guarded" and found him to be "functionally impaired." Plaintiff missed three and one-half months of work immediately after the accident.

Plaintiff alleged in his bill of particulars that as a result of the accident he sustained permanent injuries to his lumbosacral and cervical spines, his left knee and his right shoulder. He claimed that his injuries met the definition of "serious injury" in Insurance Law § 5102 because he suffered a

permanent consequential limitation of use of a body organ or member and/or a significant limitation of a body function or system. He also stated that he had medically determined injuries of a non-permanent nature that prevented him from performing his usual and daily activities for more than 90 of the first 180 days following the accident.

Defendants moved for summary judgment on the basis that plaintiff did not sustain a serious injury. Their motion relied on the affirmed reports of Audrey Eisenstadt, M.D., a radiologist, and Nicholas Stratigakis, M.D., an orthopedist who had performed an examination of plaintiff. In her report, Dr. Eisenstadt stated that she had reviewed MRI films taken within five weeks of the accident of plaintiff's right shoulder, left knee and cervical spine. She said that the MRI of the left knee revealed:

> "a small area of a bone contusion. The bone contusion should heal without sequela. The grade II mucoid degenerative signal change is as the name implies, an intrasubstance, degenerative process without traumatic basis of causal relationship to the accident. Not even a joint effusion to suggest any significant trauma to this knee is noted. I agree...as to the presence of a contusion of the medial femoral condyle and medial tibial plateau. I agree with the presence of grade II linear signal change in the medial meniscus. However, no abnormality is seen in the medial collateral ligament. No joint effusion is noted. No post-traumatic changes are seen."

As to the cervical spine, Dr. Eisenstadt interpreted the MRI as containing "evidence of longstanding, pre-existing, degenerative disc disease." She stated that bony changes along the spine were "greater than six months in development and due to [the] extent are more likely years in origin. These changes could not have occurred in the time interval between examination and injury and clearly predate the accident." She acknowledged the presence of disc bulges but opined that they were chronic and degenerative in nature, and that they pre-dated the accident.

Finally, Dr. Eisenstadt wrote that the MRI revealed a partial tear of the distal supraspinatus tendon in the right shoulder but that the shoulder was otherwise normal. Although she stated that "[t]he etiology is uncertain based on this single study," she found that the "absence of a joint effusion is clearly indicative of the lack of significant recent trauma."

In his report, Dr. Stratigakis stated that plaintiff denied a history of injury to, or pain in, the spine, right shoulder or left knee. Dr. Stratigakis wrote that he examined plaintiff's neck, back, right shoulder and left knee. He compared the ranges of motion in the neck, back and shoulder to the normal ranges of motion and concluded that plaintiff had full range of motion in all planes. His examination of the knees revealed "flexion to 130 degrees, extension to 0 degrees and internal and external [*sic*] to 10 degrees." However, he did not state the normal

ranges of motion for the knees. Moreover, Dr. Stratigakis failed to identify what objective tests he performed on plaintiff which led him to conclude that he had full ranges of motion in the spine, right shoulder and left knee. Dr. Stratigakis concluded that plaintiff had sustained sprains and strains to the injured body parts, all of which had resolved. He further found there to be no objective evidence of disability and no residual effects or permanency.

In opposition to the motion, plaintiff submitted his own affidavit, as well as the affirmation of Dr. Fleischer. Dr. Fleischer explained in his affirmation that plaintiff first came to see him on September 6, 2002, 8 days after the accident. He related that plaintiff complained to him during that initial consultation of injuries to his left knee and right shoulder, of neck pain radiating into his right shoulder and right arm with numbness. He also said he had lower back pain radiating to his left leg, and difficulty walking and sleeping. All of the complaints plaintiff made to Dr. Fleischer were related to the accident.

Dr. Fleischer stated that he examined plaintiff and found cervical and dorsal spasm and tenderness with impaired range of motion, especially on extension, lateral flexion and rotation. He also noted lumbosacral spasm and tenderness with impaired range of motion on all planes, as well as tenderness and swelling

of the left knee, right shoulder and right ankle. Dr. Fleischer performed the straight leg raising test, which was positive bilaterally at 45 degrees. He found that plaintiff's gait and station were antalgic and that his heel/toe walk demonstrated weakness.

Dr. Fleischer further recounted that he prescribed physical therapy, MRI scans and an EMG test. The MRIs of plaintiff's right shoulder, left knee and cervical spine were taken in September 2002 and October 2002. He explained that the MRI of plaintiff's right shoulder revealed a tear of the rotator cuff, that the MRI of the left knee revealed a tear of the medial meniscus, and that the MRI of plaintiff's cervical spine showed multiple disc herniations at C3 through C7. The EMG, he noted, confirmed evidence of a right C6-C7 radiculopathy and bilateral carpal tunnel syndrome.

The affirmation detailed the subsequent history of plaintiff's treatment and recovery. In that regard, Dr. Fleischer stated that plaintiff continued to receive physical therapy, although the frequency of his sessions had decreased over time. He further stated that plaintiff continued to complain to him of intermittent headaches, dizziness and neck pain radiating towards his right shoulder and arm. He also complained that his lower back pain was becoming progressively worse. Indeed, Dr. Fleischer asserted that he had examined

plaintiff at a recent office visit and that there was tenderness in the cervical and lumbar spines and an impaired range of motion. He also found tenderness in the right shoulder and left knee. The straight leg raising test was again positive.

Dr. Fleischer concluded by stating that plaintiff's prognosis for a full recovery is poor, and that his injuries are permanent. He further stated that

> "It is my professional opinion, with a reasonable degree of medical certainty that given the findings of my exam, plaintiff, John Linton's, injuries were causally related to his motor vehicle accident of August 29, 2002 and consistent with the type of injury that he sustained. Plaintiff, John Linton, requires further treatment, including additional physical therapy for pain management, and surgical debridement and/or other intervention. Further, it is very likely that plaintiff, John Linton, will develop arthritis as a result of his injuries.
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> "Based upon my examination of Mr. Linton, my review of his medical records, and the long duration of his pain and injuries, I can state with a reasonable degree of medical certainty that the foregoing injuries which were proximately and directly caused by the motor vehicle accident of August 29, 2002 are of a permanent nature. Mr. Linton has sustained a significant, consequential, permanent limitation and permanent impairment of his neck, back, left knee and right shoulder."

The motion court denied defendants' motion.[1] It held that

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[1] Defendants' motion was initially granted upon plaintiff's default. Plaintiff moved to vacate the default and restore the

defendants failed to meet their initial burden of submitting proof in admissible form demonstrating the absence of any material issues of fact and their entitlement to judgment as a matter of law. This, the court stated, was because Dr. Stratigakis failed to address the MRIs or to describe any of the objective medical tests that led him to conclude that plaintiff had full range of motion in each of the body parts at issue. While the court allowed that Dr. Eisenstadt's affirmed report may have cured Dr. Stratigakis's failure to address the MRIs, it held that her report did not cure his failure to identify the objective tests he utilized. The court further stated that while defendants' failure to meet their initial burden rendered any consideration of plaintiff's papers unnecessary, Dr. Fleischer's affirmation created a genuine issue of fact by stating that "[h]e found impaired range of motion in the spine and other deficits and permanent conditions arising from the injuries sustained by the plaintiff in the subject accident."

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold

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action pursuant to CPLR 5015(a)(1) and CPLR 2005 based on the existence of a reasonable excuse and a meritorious claim. Defendants did not contest the motion other than to reiterate their position that plaintiff did not sustain a serious injury and so they were entitled to summary judgment.

(*see Wadford v Gruz*, 35 AD3d 258 [2006]). The defendant cannot satisfy that burden if it presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts but does not specify the objective tests performed to arrive at that conclusion (*see Lamb v Rajinder*, 51 AD3d 430 [2008]). Here, Dr. Stratigakis failed to state what, if any, objective tests he utilized when examining plaintiff which led him to conclude that plaintiff had full ranges of motion in his cervical and lumbar spines, right shoulder and left knee and that the alleged injuries to those body parts had fully resolved. Accordingly, defendants failed to shift the burden to plaintiff to demonstrate that an issue of fact existed as to whether any of plaintiff's alleged injuries constituted a permanent consequential limitation of use a body organ or member and/or a significant limitation of a body function or system.

Defendants did shift the burden, however, on the question of whether the injuries to plaintiff's cervical spine and left knee were caused by the accident. This they accomplished by submitting the affirmation of Dr. Eisenstadt, to the extent that it asserted that the abnormalities appearing on the MRIs of the cervical spine and left knee of those body parts were degenerative in nature and pre-existed the accident. However, they did not shift the burden on the question of whether the partial tear in plaintiff's right shoulder was precipitated by

the accident. Her acknowledgment that the "etiology is uncertain" and her inability to attribute a reason for the tear rendered her opinion that it was not caused by the accident "too equivocal to satisfy defendant's prima facie burden to show that [the tear] was not caused by a traumatic event." (*Glynn v Hopkins*, 55 AD3d 498 [2008]).

Nevertheless, the motion court properly denied summary judgment to defendants because plaintiff raised an issue of fact regarding causation. Specifically, Dr. Fleischer concluded that plaintiff's symptoms were related to the accident. This was not a speculative or conclusory opinion (*compare Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). To the contrary, it was based on a full physical examination of plaintiff made within days of the onset of plaintiff's complaints of pain and other symptoms, which plaintiff told him ensued after he was involved in a traumatic accident. Clearly, this was sufficient to raise a triable issue as to whose medical opinion was worthy of greater weight - Dr. Fleischer's or Dr. Eisenstadt's (*see Etminan v Sasson*, 51 AD3d 623 [2008]; *Harper v St. Luke's Hosp.*, 224 AD2d 350, 351 [1996]).

Defendants argue that Dr. Fleischer's affirmation failed to create an issue of fact because it did not expressly address Dr. Eisenstadt's opinion that the left meniscal tear and cervical bulges and herniations were degenerative in nature. However, Dr.

Fleischer's affirmation did reject Dr. Eisenstadt's opinion by attributing the injuries to a different, yet altogether equally plausible, cause, that is, the accident. Moreover, Dr. Fleischer's affirmation is entitled to considerable weight here. Because Dr. Stratigakis's affirmation lacked any probative value, Dr. Fleischer's affirmation is the only competent evidence before us of plaintiff's injuries that is based on an actual physical examination.

The trilogy of cases decided in *Pommells v Perez* (4 NY3d 566 [2005]) governs this area of the law. An examination of those cases clearly shows that Dr. Fleischer's affidavit was sufficient to create an issue of fact as to causation.

In the second of the three *Pommells* cases, *Brown v Dunlop*, MRIs taken of the plaintiff's lumbar spine revealed disc herniations. The plaintiff's treating doctor diagnosed the plaintiff with a permanent spinal injury sustained as a direct result of a motor vehicle accident. However, in support of a motion for summary judgment, the defendants submitted the affirmation of a radiologist which stated that the spinal abnormalities were "chronic and degenerative in origin" (4 NY3d at 576). In opposition to the motion, the plaintiff provided the affirmation of his treating physician, which opined,

> "with a reasonable degree of medical certainty, that plaintiff's 'inability to move his spine (lower back and neck) to the full range of what is normal [constituted

> a]...definite severe and permanent injury' that was causally related to the accident" (*id.*).

There is no indication in the opinion that the affirmation directly addressed the defendants' radiologist's opinion that the injuries were unrelated to the accident.

The Court of Appeals held that the defendants met their initial burden on the motion. However, the Court denied the motion, finding that plaintiff raised a triable issue of fact when his doctor identified measurements of loss of range of motion which led him to believe "that plaintiff suffered severe and permanent injuries as a result of the accident" (4 NY3d at 577). Addressing the defendants' position that the plaintiff's injury was the result of a pre-existing condition, the Court stated that

> "there is only [the defendant's radiologist's] conclusory notation, itself insufficient to establish that plaintiff's pain might be chronic and unrelated to the accident. As opposed to the undisputed proof of plaintiff's contemporaneous, causally relevant kidney condition in *Pommells*, here even two of defendants' other doctors acknowledged that plaintiff's (relatively minor) injuries were caused by the car accident. On this record, plaintiff was not obliged to do more to overcome defendants' summary judgment motions" (4 NY3d at 577-578).

In this case, defendants' expert's opinion that plaintiff's knee and spinal injuries were degenerative in nature is no less "conclusory" than the *Brown* radiologist's statement that the

spinal abnormalities in that case were "chronic and degenerative in origin." In addition, the plaintiff's doctor's opinion as to causation in *Brown*, like Dr. Fleischer's opinion here, did not appear to specifically rebut the radiologist's opinion as to causation.

The case before this Court contrasts with the first case in the *Pommells* trilogy, *Pommells v Perez*. In *Perez*, the plaintiff's doctor attributed plaintiff's symptoms to the motor vehicle accident and an unrelated kidney problem which manifested itself after the accident and which led to the removal of the kidney. The Court of Appeals held that the plaintiff failed to raise an issue of fact because his doctor acknowledged the kidney problem as a potential cause of the symptoms. In this case, there is no such statement by Dr. Fleischer that plaintiff's symptoms may have been caused by disc degeneration, that they were chronic or that they were caused by anything other than the accident.

Finally, in *Carrasco v Mendez*, the third case in the *Pommells* trilogy, the defendant submitted, among other things, reports from the doctor who treated the plaintiff immediately after the accident. These noted the existence of a degenerative condition that pre-existed the accident and may have caused his symptoms. The plaintiff opposed the motion with the affidavit of a doctor who did not begin to treat the plaintiff until one year

after the accident, and which failed to address the previous treating physician's observation of a preexisting condition. The Court found that summary judgment was properly granted to the defendant because he presented "*persuasive* evidence that plaintiff's alleged pain and injuries were related to a preexisting condition" (4 NY2d at 580 [emphasis added]), and plaintiff failed to refute it. In this case, Dr. Eisenstadt's opinion, standing alone, that plaintiff had a pre-existing condition, is not "persuasive." This is especially true in the face of Dr. Fleischer's equally, if not more weighty, opinion, that the injuries were caused by the accident.

The cases cited by the dissent are on their face inapposite and are all readily distinguishable. Unlike this case, the evidence presented by the defendants in those cases of a pre-existing injury was "persuasive" (*Pommells*, 4 NY2d at 580). Also unlike here, the plaintiffs' experts in those cases showed no reliable basis for opining that it was just as likely that the motor vehicle accident caused the injuries.

Reviewing the dissent's cases individually, this is clear. In *Valentin v Pomilla* (59 AD3d 184 [2009]), the defendants' motion for summary judgment relied on an affirmation from a radiologist stating that the plaintiff's back and knee injuries pre-existed the accident. The defendants also introduced evidence that the plaintiff's own doctors reported after their

initial evaluations that his meniscal tears were degenerative in nature. In opposition, the plaintiff submitted an affidavit by his chiropractor stating that the plaintiff had limited motion in his lumbar and cervical spines which was related to the accident. This Court held that the plaintiff failed to raise an issue of fact because the chiropractor's opinion was not based on an examination of the plaintiff made contemporaneously with the accident, but rather on an examination which occurred two months thereafter, when the link between the trauma and the reported symptoms would not have been as readily discernable. Here, of course, Dr. Fleischer examined plaintiff within eight days of the accident, when the trauma was still fresh. Accordingly, his ability to link plaintiff's symptoms to the accident was far superior to the ability of the doctor in *Valentin*. The complaint in *Shinn v Catanzaro* (1 AD3d 195 [2003]), also relied on by the dissent, was similarly dismissed because the plaintiff's expert's opinion that a motor vehicle accident caused his herniated discs was based on an examination performed four and a half years after the accident occurred.

In *Style v Joseph* (32 AD3d 212 [2006]), it was not disputed that the plaintiff had been in two prior accidents, in which she suffered debilitating injuries to the same body parts allegedly injured in the subject accident. Three of the four experts who submitted affirmations on behalf of the plaintiff in opposition

to the defendant's motion for summary judgment ignored this fact. The expert who did address it acknowledged that the plaintiff experienced neck and back pain prior to the accident but stated in conclusory fashion that the plaintiff was improving from those injuries at the time of the latest accident and that the latest accident exacerbated those injuries. This Court found this to be insufficient to raise a triable issue of fact. Here, plaintiff reports no prior medical history. To the contrary, he claims that he had no symptoms before the subject accident.

*Becerril v Sol Cab Corp.* (50 AD3d 261 [2008]) and *Brewster v FTM Servo, Corp.* (44 AD3d 351 [2007]) also involved plaintiffs who were undisputedly involved in a prior accident in which the same body parts were injured but failed to address why the prior accidents were not a possible cause of their current symptoms.

All of these cases are consistent with the notion introduced in *Pommells v Perez* (4 NY3d 566 [2005], *supra*). Again, *Pommells* stands for the proposition that where the defendant submits "persuasive" evidence of a pre-existing injury and the plaintiff's doctor has no reliable basis for linking the symptoms to the accident, an issue of fact cannot be created by the plaintiff's doctor's simply repeating the mantra that the injuries were caused by the accident.

The instant matter is not such a case. Defendants' sole competent evidence in favor of summary judgment was a doctor's

opinion that plaintiff's injuries pre-existed the accident. Plaintiff submitted the affirmation of a treating physician, based on a physical examination performed within days of the accident, opining that the injuries were caused by the accident. There is no basis on this record to afford more weight to defendants' expert's opinion and there are no "magic words" which plaintiff's expert was required to utter to create an issue of fact. If anything, plaintiff's expert's opinion is entitled to more weight. Moreover, that opinion constituted an unmistakable rejection of defendants' expert's theory.

Finally, we hold that defendants did establish their entitlement to summary judgment dismissing plaintiff's 90/180-day claim based upon the evidence that the period between the accident and plaintiff's return to work on a part-time basis was only 79 days. Plaintiff's reduced work schedule fails to raise a triable issue of fact as to whether he sustained a 90/180-day injury (*see Cartha v Quinn*, 50 AD3d 530 [2008]).

All concur except Catterson and McGuire, JJ. who dissent in part in a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting in part)

I agree with the majority that plaintiffs' claim under the 90/180-day provision of Insurance Law § 5102(d) must be dismissed. However, I would also dismiss the claims premised on injuries to plaintiff John R. Linton's spine and left knee.

Plaintiffs allege that John Linton sustained injuries to his spine, left knee and right shoulder when he was struck by a vehicle driven by defendant Muhammad Nawaz and owned by defendant Chire Taxi, Inc. In support of their motion for summary judgment dismissing the complaint, defendants submitted, among other things, the affirmation of a radiologist who reviewed MRI films of John Linton's left knee and spine taken between five and eight weeks after the accident. The radiologist affirmed that, with respect to the left knee, "[t]here is a grade II degenerative signal change seen in the posterior horn of the medial meniscus." She concluded that "[t]he grade II mucoid degenerative signal change is as the name implies, an intrasubstance, degenerative process without traumatic basis or causal relationship to the accident." With respect to the spine, the radiologist affirmed that "[d]egeneration of all the cervical intervertebral discs is noted." She found that the films:

> "reveal[] evidence of longstanding, pre-existing, degenerative disc disease. There is osteophyte formation, discogenic ridging, endplate signal change and uncinate joint hypertrophy seen. These bony changes are greater than six months in development and due to the extent are more likely years in origin.

> These changes could not have occurred in the time interval between examination and injury and clearly predate the accident. There is disc degeneration throughout the cervical spine. This drying out and loss of disc substance is also longstanding, chronic, and pre-existing. Disc bulging is seen. Bulging is not traumatic but degeneratively induced, related to ligamentous laxity. No ossesous, ligamentous, or intervertebral disc abnormalities are seen attributable to the ... accident."

Supreme Court denied defendants' motion in its entirety, and this appeal ensued.

The disposition of this appeal turns on the summary judgment standards regarding a claim of serious injury where a defendant has submitted on its motion for summary judgment evidence that the plaintiff suffered from a preexisting condition. We have repeatedly held that where the defendant submits evidence in admissible form indicating that the plaintiff suffered from a preexisting degenerative condition in the area of the body that the plaintiff claims was injured as a result of the motor vehicle accident giving rise to the action, the defendant has made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint on the ground that the accident was not a proximate cause of the plaintiff's injuries. To raise a triable issue of fact and withstand summary judgment in opposition to such a prima facie showing, it is incumbent upon the plaintiff to submit evidence specifically addressing the defendant's evidence that the plaintiff suffered from a preexisting degenerative condition.

*Valentin v Pomilla* (59 AD3d 184 [2009]), recently decided by this Court, highlights these principles. In *Valentin*, we stated that:

> "Defendants established prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) by submitting a radiologist's affirmed report that plaintiff's MRI films revealed evidence of degenerative disc disease predating the accident and no evidence of post-traumatic injury to the disc structures (*see Perez v Hilarion*, 36 AD3d 536, 537 [2007]). In opposition, plaintiff failed to raise an inference that his injury was caused by the accident (*see Diaz v Anasco*, 38 AD3d 295 [2007]) *by not refuting defendants' evidence of a preexisting degenerative condition of the spine*. Missing from all of plaintiff's submissions is any mention of the congenital defect at the S1 vertebral level and degenerative condition of plaintiff's lumbar spine reported by Dr. Eisenstadt or the preexisting degenerative changes in his right knee and degenerative meniscal tears in both posterior horns of both menisci reported by plaintiff's own experts, Drs. Lubin and Rose, in their initial evaluation of plaintiff's right knee shortly after the accident (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]).
>
> "With regard to his claim that the evidence submitted by him was sufficient to raise an inference that he suffered injuries that were caused by the accident, plaintiff asserts that his MRIs of the cervical and lumbar spine revealed disc herniation at L4-5 and L5-S1 and disc bulging at C4-C5, and that EMGs revealed L5-S1 radiculopathy. However, '[a] herniated disc, by itself, is insufficient to constitute a "serious injury"; rather, to constitute such an injury, a herniated disc must be accompanied by objective evidence of the extent of alleged physical limitations resulting from the herniated disc' (*Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]). Plaintiff also contends that the MRI of his right knee revealed a medial meniscal tear, for which he ultimately underwent arthroscopy. *Again, he makes no mention of the degenerative nature of that condition.*

"In addition, plaintiff argues that his chiropractor Dr. Zeren's affidavit set forth objective quantified evidence of the degree of limitation and permanency of the injuries sustained by him. Notably, he contends Dr. Zeren found positive straight-leg testing during plaintiff's May 30, 2007 examination (*see Brown v Achy,* 9 AD3d 30, 31-32 [2004]), and that plaintiff was also noted to have decreased limitation of motion of the lumbar and cervical spine (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]).

"However, plaintiff's reliance on Dr. Zeren's affidavit is misplaced. Although he presumably saw plaintiff just days after the accident, Dr. Zeren failed to provide documentation regarding that visit or any contemporaneous evidence of limitations. In this regard, there were no contemporaneous limitations shown regarding the accident - at most, some limitations were purportedly measured by Dr. Hausknecht two months after the accident (*see Thompson v Abbasi,* 15 AD3d 95, 98 [2005])... Even if Dr. Hausknecht's report was considered contemporaneous, the limitations concerned only lateral flexion of the cervical spine and forward flexion of the lumbar spine, and were minor. In addition, *Dr. Hausknecht failed to address whether plaintiff's condition was causally related to the motor vehicle accident at issue.*

"The most significant flaw in plaintiff's arguments is his failure to address causation. 'To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is "serious" within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident. Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation, insufficient to support a finding that such a causal link exists' (*Diaz v Anasco,* 38 AD3d at 295-296).

"Here, not only did plaintiff's experts fail to refute defendants' evidence of a preexisting congenital and degenerative condition of the spine, his own doctors reported a degenerative condition of the right knee. *Dr. Rose's failure even to mention, let alone explain, why he ruled out degenerative changes as the cause of plaintiff's knee and spinal injuries rendered his opinion that they were caused by the accident speculative* (*see Gorden v Tibulcio,* 50 AD3d 460, 464 [2008]). Consequently, there is no objective basis for concluding that the present physical limitations and continuing pain are attributable to the subject accident rather than to the degenerative condition (*see Jimenez v Rojas,* 26 AD3d 256, 257 [2006]). In *Pommells v Perez* (4 NY3d 566 [2005], *supra*), where, as here, there was persuasive evidence that the plaintiff's alleged pain and injuries were related to preexisting degenerative conditions, the Court held that plaintiff had the burden of coming forward with evidence addressing the defendants' claimed lack of causation. In the absence of such evidence, the defendants are entitled to summary dismissal of the complaint" (59 AD3d at 184-186 [emphasis added]).

*Valentin* is hardly an aberration from our "serious injury" jurisprudence. In *Becerril v Sol Cab Corp.* (50 AD3d 261, 261-262 [2008]), another panel of this Court determined that:

"Defendants established a prima facie entitlement to summary judgment by submitting ... the affirmed report of a radiologist who opined that plaintiff's MRI films revealed degenerative disc disease, and no evidence of post-traumatic injury to the disc structures (*see Montgomery v Pena,* 19 AD3d 288, 289 [2005]). Defendants also submitted plaintiff's deposition testimony, where he stated that he missed no work as a result of his accident.

"In opposition, plaintiffs failed to raise a triable issue of fact as to whether he sustained a serious injury. Although plaintiff submitted an affirmed report from his treating chiropractor detailing the objective testing employed during plaintiff's examination and revealing limited ranges of motion, *no adequate explanation was provided that plaintiff's injuries were caused by the subject*

*accident* (*see Style v Joseph*, 32 AD3d 212, 215 [2006]). Notably, plaintiff conceded at his deposition that he sustained injuries to his neck and back in a prior accident, and an MRI conducted shortly after the subject accident showed degenerative disc disease. In these circumstances, *it was incumbent upon plaintiff to present proof addressing the asserted lack of causation* (*see Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007])."

This Court's decision in *Brewster v FTM Servo, Corp.* (44 AD3d 351 [2007]), cited by the Court in *Becerril*, is also instructive as to the law in this Department regarding summary judgment standards in no-fault cases. In *Brewster*, we noted that:

> "Brewster conceded at his deposition that he had sustained injuries to his neck, back and shoulder in a prior automobile accident. Once a defendant has presented evidence of a preexisting injury, even in the form of an admission made at a deposition (*see Alexander v Garcia*, 40 AD3d 274 [2007]), it is incumbent upon the plaintiff to present proof to meet the defendant's asserted lack of causation (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566, 574 [2005]). *Brewster's submissions totally ignored the effect of his previous mishap on the purported symptoms caused by the latest accident.* The fact that [defendant's] expert discerned some minor loss of motion in Brewster's lumbar spine is irrelevant where the objective tests performed by this physician were negative, and Brewster had testified to a pre-existing injury in that part of his body (*see Style v Joseph*, 32 A.D.3d 212, 214 [2006]; *Montgomery v Pena*, 19 AD3d 288, 289-290 [2005])" (44 AD3d at 352 [emphasis added]).

Another decision out of this Court that demonstrates the principles discussed above is *Shinn v Catanzaro* (1 AD3d 195 [2003]). In *Shinn*, the plaintiffs were injured when the car they

were traveling in was struck by a vehicle driven by the defendant. The plaintiffs commenced an action against the defendant and the defendant sought summary judgment dismissing the complaint. With respect to the claims of one of the plaintiffs, James Shinn, the defendant submitted the affirmation of a radiologist who reviewed an MRI film of James Shinn's spine that was taken two months after the accident. The radiologist "noted a 'dessication or drying out' of disc material at the L4-5 level, and a disc herniation at the L3-4 level," and "concluded that the disc abnormalities were not traumatically induced, but rather were the result of preexisting degenerative conditions" (*id.* at 196).

In reversing an order of Supreme Court denying the defendants' motion to dismiss the complaint in its entirety, we determined with respect to the claims of James Shinn that the radiologist's "report reveals that [his] disc abnormalities were the result of preexisting degenerative conditions, and thus not causally related to the February 1997 accident. This evidence, submitted in proper form, was sufficient to establish prima facie entitlement to dismissal for failure to meet the serious injury threshold" (*id.* at 197). While we found that James Shinn's expert's affirmation demonstrated that he suffered from disc herniations in his cervical spine and had a 40% restriction of range of motion of the cervical spine, we concluded that:

> "[w]hat plaintiffs' submissions fail to do ... is demonstrate that the cervical disc herniations or any other serious injury suffered by [James Shinn] are causally related to the ... accident. The record shows that after the accident, [James Shinn] did not miss any work except a few hours for medical appointments. [He] received chiropractic treatment for approximately nine months after the accident, and, according to the unsworn chiropractor's reports from 1997, [he] had some limitations of range of motion in the cervical and lumbar spine. However, [James Shinn] was [not] diagnosed with cervical disc herniations [at that time]. Moreover, despite [the] 1997 MRI showing James Shinn as having herniated and bulging discs in his lumbar spine, *plaintiffs failed to address defendant's medical evidence attributing those injuries to preexisting degenerative conditions* (*see Lorthe v Adeyeye*, 306 AD2d 252 [2d Dept 2003])" (*id.* at 198 [emphasis added]).

Because defendant's evidence established that John Linton had preexisting degenerative injuries to his left knee and spine, defendants made a prima facie showing of entitlement to summary judgment with respect to those claims (*see Valentin*, 59 AD3d at 184; *Becerril*, 50 AD3d at 261-262; *Brewster*, 44 AD3d at 352; *Shinn*, 1 AD3d at 198). In opposition, plaintiffs failed to raise a triable issue of fact with respect to their claims premised on injuries to John Linton's left knee and spine. Their expert failed to address how John Linton's "current medical problems, in light of h[is] past medical history, are causally related to the subject accident" (*Style v Joseph*, 32 AD3d 212, 214 [2006]). Indeed, plaintiffs' neurologist did not discuss the degenerative conditions at all (*see Valentin*, 59 AD3d at 184; *Becerril*, 50 AD3d at 261-262; *Brewster*, 44 AD3d at 352; *Shinn*, 1 AD3d at 198;

*see also Charley v Goss*, 54 AD3d 569, 571-572 [1st Dept 2008] [plaintiff's expert's "report addresses plaintiff's subjective complaints of recurring discomfort, tenderness and pain, but fails to list any objective orthopedic tests performed, and neglects to adequately, or in some cases, even peripherally explain plaintiff's cessation of treatment, or the preexisting degenerative changes to plaintiff's cervical and lumbar spine and right shoulder delineated in [defendant's expert's report"], *affd* 12 NY3d 750 [2009]).

According to the majority, plaintiffs raised a triable issue of fact with respect to causation even though they did not present expert evidence specifically addressing defendants' evidence that John Linton had preexisting degenerative conditions in both his spine and knee. As the majority sees it, plaintiffs' expert's conclusory opinion that John Linton's injuries were caused by the accident is sufficient to withstand summary judgment despite the expert's failure to address the evidence of preexisting degenerative conditions. As is evident from the above-quoted language from *Valentin*, *Becerril*, *Brewster* and *Shinn*, the majority's conclusion is inconsistent with those decisions. In an effort to avoid that consistent case law, the majority attempts to distinguish *Valentin*, *Becerril*, *Brewster* and *Shinn*. Those attempts are not successful.

With respect to *Valentin*, the majority writes that the

> "Court held that the plaintiff failed to raise an issue of fact because the chiropractor's opinion was not based on an examination of the plaintiff made contemporaneously with the accident, but rather on an examination which occurred two months thereafter, when the link between the trauma and the reported symptoms would not have been as readily discernable. Here, of course, [plaintiff's expert] examined plaintiff within eight days of the accident, when the trauma was still fresh. Accordingly, his ability to link plaintiff's symptoms to the accident was far superior to the ability of the doctor in *Valentin*."

As is clear from the above-quoted portion of our decision in *Valentin*, the majority's discussion of that case is incomplete and misleading. As noted, in *Valentin*, we determined that:

> "Defendants established prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) by submitting a radiologist's affirmed report that plaintiff's MRI films revealed evidence of degenerative disc disease predating the accident and no evidence of post-traumatic injury to the disc structures. In opposition, plaintiff failed to raise an inference that his injury was caused by the accident *by not refuting defendants' evidence of a preexisting degenerative condition of the spine*. Missing from all of plaintiff's submissions is any mention of the congenital defect at the S1 vertebral level and degenerative condition of plaintiff's lumbar spine reported by Dr. Eisenstadt or the preexisting degenerative changes in his right knee and degenerative meniscal tears in both posterior horns of both menisci reported by plaintiff's own experts, Drs. Lubin and Rose, in their initial evaluation of plaintiff's right knee shortly after the accident" (*id.* at 184-185 [internal citations omitted; emphasis added]).

With respect to the opinion of the plaintiff's chiropractor, we rejected the chiropractor's opinion that the plaintiff sustained a serious injury as a result of the subject accident

for a number of reasons. One of the reasons we rejected it was because the plaintiff failed to establish that the chiropractor's findings were made contemporaneously with the accident (*id.* at 185) -- the reason noted by the majority. Another reason we rejected it, indeed, the principal reason,[1] was that

> "not only did plaintiff's experts fail to refute defendants' evidence of a preexisting congenital and degenerative condition of the spine, his own doctors reported a degenerative condition of the right knee. [Plaintiff's doctor's] failure even to mention, let alone explain, why he ruled out degenerative changes as the cause of plaintiff's knee and spinal injuries rendered his opinion that they were caused by the accident speculative" (*id.* at 186).

What was true in *Valentin* -- that the defendants submitted the report of a radiologist who averred that the plaintiff's MRI films revealed evidence of a preexisting degenerative condition and that the plaintiff failed to refute that evidence -- is true here. Nevertheless, the majority does not mention this portion of our holding.

The majority dismisses both *Becerril* and *Brewster* on the ground that those cases "involved plaintiffs who were undisputably involved in ... prior accident[s] in which the same body parts were injured but failed to address why the prior accidents were not a possible cause of their current symptoms."

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[1] "The most significant flaw in plaintiff's argument is his failure to address causation" (*id.* at 186).

That the plaintiffs in *Becerril* and *Brewster* suffered preexisting conditions as a result of other accidents and John Linton suffered preexisting degenerative conditions is a distinction without a difference. Regardless of the *cause* of the preexisting condition, the legal principle remains the same: once a defendant has presented evidence of a preexisting condition the plaintiff must present evidence specifically addressing that condition (*e.g. Becerril,* 50 AD3d at 261-262).

Like its discussion of *Valentin*, the majority's discussion of *Shinn* is both incomplete and misleading. The majority writes that the complaint in *Shinn* was "dismissed because the plaintiff's expert's opinion that a motor vehicle accident caused his herniated discs was based on an examination performed four and a half years after the accident occurred." One of the grounds on which we rejected the plaintiff's expert's opinion in that case was that the expert did not examine the plaintiff until four and a half years after the accident. But the majority ignores everything in our decision in *Shinn* that precedes the discussion regarding the issue of gap in treatment. Thus, the majority fails to mention the relevant portions of that decision as it relates to this appeal, namely, that the radiologist's "report reveal[ed] that [the plaintiff's] disc abnormalities were the result of preexisting degenerative conditions, and thus not causally related to the February 1997 accident. This evidence,

submitted in proper form, was sufficient to establish prima facie entitlement to dismissal for failure to meet the serious injury threshold" (1 AD3d at 197). The majority also fails to mention that, while the plaintiff's expert's affirmation demonstrated that he suffered from disc herniations in his cervical spine and had a 40% restriction of range of motion of the cervical spine, we concluded that:

> "[w]hat plaintiffs' submissions fail to do ... is demonstrate that the cervical disc herniations or any other serious injury suffered by [James Shinn] are causally related to the ... accident. The record shows that after the accident, [James Shinn] did not miss any work except a few hours for medical appointments. [He] received chiropractic treatment for approximately nine months after the accident, and, according to the unsworn chiropractor's reports from 1997, [he] had some limitations of range of motion in the cervical and lumbar spine. However, [James Shinn] was [not] diagnosed with cervical disc herniations [at that time]. Moreover, despite [the] 1997 MRI showing James Shinn as having herniated and bulging discs in his lumbar spine, plaintiffs failed to address defendant's medical evidence attributing those injuries to preexisting degenerative conditions" (*id.* at 198).

In short, the majority's claim that *Valentin*, *Becerril*, *Brewster* and *Shinn* "are on their face inapposite and are all readily distinguishable," cannot withstand scrutiny.

The majority also writes that "[t]he trilogy of cases decided in *Pommells v Perez* (4 NY3d 566 [2005]) governs this area of the law." This statement is only partially correct. *Pommells*, along with the case law of this Court, e.g., *Valentin*,

*Becerril*, *Brewster* and *Shinn*, "governs this area of the law." In any event, both *Pommells* and our case law dictate that John Linton's claims regarding injuries to his left knee and spine must be dismissed.

In *Pommells*, the Court of Appeals addressed three cases in which the plaintiffs claimed to have suffered soft-tissue injuries caused by car accidents. Noting the objectives of the No-Fault Law -- to promote prompt resolution of injury claims, limit costs to consumers and alleviate unnecessary burdens on the courts -- the Court concluded "that, even where there is objective medical proof [of a serious injury], when additional contributory factors interrupt the chain of causation between the accident and claimed injury - such as a gap in treatment, an intervening medical problem or a preexisting condition - summary dismissal of the complaint may be appropriate" (*id.* at 572). The Court then applied this principle to each of the three cases before it.

In the first case, *Pommells v Perez*, the Court determined that the defendants' motion for summary judgment dismissing the complaint was properly granted because (1) the plaintiff failed to offer an explanation for ceasing treatment shortly after the accident and (2) the "plaintiff failed to address the effect of [a] kidney disorder [he suffered after the accident] on his claimed accident injuries" (*id.* at 574). With respect to the

second point, the Court held that because "[p]laintiff's submission left wholly unanswered the question whether the claimed symptoms diagnosed by [plaintiff's physician] were caused by the accident" (*id.* at 575, citing, among other cases, *Shinn*), the plaintiff failed to raise a triable issue of fact regarding whether his injuries were proximately caused by the accident.

The majority concludes that *Pommells* is distinguishable from the case before us because in *Pommells* the plaintiff's physician acknowledged that his kidney aliment was a potential cause of his injuries, and here John Linton's physician did not acknowledge that he suffered from preexisting degenerative conditions. This "distinction" is unpersuasive. By the majority's reasoning, no defendant in an action such as this one can obtain summary judgment on the ground that a plaintiff had a preexisting condition unless the plaintiff (or his or her physician) concedes that the plaintiff has a preexisting condition. Nothing in the Court's decision in *Pommells* supports that notion. Rather, the Court stated that Pommells' opposition to the motion was insufficient because he "failed to address the effect of [a] kidney disorder [he suffered after the accident] on his claimed accident injuries" (*id.* at 574). Moreover, our case law both prior to and following *Pommells* has made plain that a defendant satisfies its initial burden on a motion for summary judgment dismissing a complaint in a serious injury case where the

defendant submits evidence in admissible form that the plaintiff suffered from a preexisting condition, and, if that showing has been made, the burden shifts to the plaintiff to submit evidence specifically addressing the evidence of a preexisting condition (*see Valentin*, 59 AD3d at 184; *Becerril*, 50 AD3d at 261-262; *Brewster*, 44 AD3d at 352; *Shinn*, 1 AD3d at 197).

In the second case decided by the Court in *Pommells*, *Brown v Dunlap*, the Court reversed an order of the Appellate Division affirming an order of Supreme Court granting the defendants' motion for summary judgment dismissing the complaint. The Court of Appeals rejected the contentions that the plaintiff failed to provide an adequate explanation for a gap in treatment and that plaintiff failed to address evidence that he suffered from a chronic disc condition. Concerning the second point, the Court essentially found that the defendants failed to make a prima facie showing of entitlement to summary judgment on the ground that the plaintiff's injuries were caused by a preexisting degenerative condition, and, therefore, the burden never shifted to the plaintiff to submit evidence specifically addressing that condition. Thus, the Court wrote:

> "as to an alleged preexisting condition, there is only [the defendant's examining physician's] conclusory notation, itself insufficient to establish that plaintiff's pain might be chronic and unrelated to the accident. As opposed to the undisputed proof of plaintiff's contemporaneous, causally relevant kidney condition in *Pommells*, here even two of defendants'

> other doctors acknowledged that plaintiff's (relatively minor) injuries were caused by the car accident. On this record, plaintiff was not obliged to do more to overcome defendants' summary judgment motions" (4 NY3d at 577-578).

The majority asserts that defendants' radiologist's "opinion[s] that plaintiff's knee and spinal injuries were degenerative in nature are no less 'conclusory' than the *Brown* radiologist's statement that the spinal abnormalities in that case were 'chronic and degenerative in origin.'" Once again, the majority is wrong.

In *Brown*, the defendants' radiological expert reviewed MRI films of the plaintiff's spine and "noted - without more - that 'the disc desiccation and minimal diffuse disc bulge' were 'chronic and degenerative in origin'" (*id.* at 576 [internal brackets omitted]). Here, however, defendants' radiologist provided a far more detailed opinion regarding the preexisting degenerative conditions in John Linton's left knee and spine, demonstrating that he, like the plaintiff in *Pommells*, had a "contemporaneous, causally relevant" condition (*id.* at 578). Thus, the radiologist affirmed with respect to the left knee that "[t]here is a grade II degenerative signal change seen in the posterior horn of the medial meniscus," and she concluded "[t]he grade II mucoid degenerative signal change is as the name implies, an intrasubstance, degenerative process without traumatic basis or causal relationship to the accident." With

respect to the spine, the radiologist affirmed that "[d]egeneration of all the cervical intervertebral discs is noted." She found that the films:

> "reveal[] evidence of longstanding, pre-existing, degenerative disc disease. There is osteophyte formation, discogenic ridging, endplate signal change and uncinate joint hypertrophy seen. These bony changes are greater than six months in development and due to the extent are more likely years in origin. These changes could not have occurred in the time interval between examination and injury and clearly predate the accident. There is disc degeneration throughout the cervical spine. This drying out and loss of disc substance is also longstanding, chronic, and pre-existing. Disc bulging is seen. Bulging is not traumatic but degeneratively induced, related to ligamentous laxity. No ossesous, ligamentous, or intervertebral disc abnormalities are seen attributable to the ... accident."

Thus, *Brown* is plainly distinguishable.

The third and final case addressed by the Court in *Pommells* was *Carrasco v Mendez*. In *Carrasco*, the Court affirmed an order of the Appellate Division affirming an order of Supreme Court granting the defendant's motion for summary judgment dismissing the complaint. The Court determined that the defendant's evidence was sufficient to sustain his initial burden on the motion and shift the burden to the plaintiff to raise a triable issue of fact with respect to causation. The defendant's evidence included a report of a physician who treated the plaintiff that indicated that the plaintiff suffered from a preexisting degenerative condition in his spine (which he claimed

was injured as a result of the motor vehicle accident giving rise to the action), and a report by an orthopedic surgeon who reviewed MRI films taken of the plaintiff's spine and opined that the films demonstrated that the plaintiff suffered from a preexisting degenerative condition in his spine (*id.* at 578). The Court also determined that the plaintiff's evidence, which included the affidavit of a physician who treated the plaintiff for the injuries he allegedly sustained in the accident, was insufficient to raise a triable issue of fact. Although the plaintiff's physician opined that the plaintiff's spinal injuries were caused by the motor vehicle accident, the physician failed to "refute defendant's evidence of a preexisting degenerative condition" (*id.* at 580).

The majority asserts that *Carrasco* is distinguishable from the case before us because the defendant in *Carrasco* submitted "'*persuasive* evidence that plaintiff's alleged pain and injuries were related to a preexisting condition'" (quoting *Pommells* at 580; emphasis in majority's writing), and defendants' evidence -- the report of the radiologist -- is "not 'persuasive.'" What the majority fails to acknowledge is that the evidence on which defendants rely to establish that John Linton suffered from preexisting degenerative conditions in his left knee and spine is the same evidence this Court has found "persuasive" in several other cases, to wit, the affirmed report of a radiologist opining

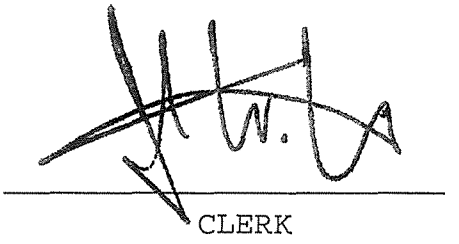
that the plaintiff's MRI films revealed degenerative conditions (*see e.g. Valentin*, 59 AD3d at 184; *Becerril*, 50 AD3d at 261-262; *Shinn*, 1 AD3d at 197; *see also Brewster*, 44 AD3d at 352). Thus, *Carrasco* supports defendants' claim that they are entitled to partial summary judgment.

In sum, where the defendant submits evidence in admissible form indicating that the plaintiff suffered from a preexisting degenerative condition in the area of the body that the plaintiff claims was injured as a result of the motor vehicle accident, the defendant has made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint on the ground that the accident was not a proximate cause of the plaintiff's injuries. In opposition to such a showing, the plaintiff must submit evidence specifically addressing the defendant's evidence that the plaintiff suffered from a preexisting degenerative condition. Because defendants met their initial burden and plaintiffs failed to address defendants' evidence that John Linton suffered from preexisting degenerative conditions, I would grant those portions of defendants' motion seeking summary judgment dismissing plaintiffs' claims premised

on injuries to John Linton's spine and left knee (as well as plaintiffs' claim under the 90/180-day provision of Insurance Law § 5102[d], which the majority dismisses), and otherwise affirm.[2]

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

ENTERED: MAY 7, 2009



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[2]Defendants failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing the claims premised on injuries to John Linton's right shoulder.

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4407 In re Madeline Acosta, Index 400475/07
Petitioner-Appellant,

-against-

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

- - - - -

Community Service Society, The Bronx
Defenders, Legal Action Center, The Fortune
Society, Osborne Association and STRIVE,
Amici Curiae.

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MFY Legal Services, Inc., New York (Jadhira V. Rivera of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for municipal respondents.

Kaufman Dolowich Voluck, LLP, Woodbury (Matthew J. Minero of counsel), for Cook Center for Learning and Development, respondent.

Juan Cartagena, New York (Paul Keefe of counsel), for Community Service Society, The Bronx Defenders, Legal Action Center, The Fortune Society, Osborne Association and STRIVE, amici curiae.

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Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered July 6, 2007, which denied the petition and dismissed this proceeding brought pursuant to CPLR article 78

seeking to annul the October 12, 2006 determination of respondent Department of Education denying petitioner's application for employment as an administrative assistant at respondent Cooke Center for Learning and Development and to reinstate her to her position with back pay, reversed, on the law, without costs, and the petition granted to the extent of annulling the Department of Education's determination and remanding the matter to Supreme Court to fashion an appropriate remedy consistent herewith.

It is undisputed that, since her release on parole in December 1996 after achieving an exemplary record while serving 46 months in prison on her 1993 convictions for robbery in the first degree, petitioner has attended college at night and, in June 2001, earned a Bachelor of Science degree in legal assistant studies. Since then, in addition to starting a family, she has worked as a paralegal/administrative assistant at two environmental law firms before leaving to take a part-time position as an administrative assistant coordinating schedules for teachers and students at the Cooke Center for Learning and Development, a nonprofit organization that contracted with the Department of Education to provide special education services to disabled preschoolers. After satisfactorily working at the Cooke Center for three months, petitioner was subjected to security clearance procedures administered by the Department of Education, including a fingerprint check, as required by the Cooke Center's

contract with the Department. At that time petitioner disclosed that she had been convicted in 1993 of four counts of robbery in the first degree, which, according to petitioner, resulted from a series of armed robberies committed when she was a 17-year-old high school senior. Petitioner alleges, and it is not refuted, that she became involved in a physically abusive relationship and was forced to participate in the robberies by her boyfriend, with whom she severed all ties after their arrest.

Despite the foregoing overwhelming evidence of the rehabilitation of petitioner, a then 31-year-old, college-educated wife and the mother of a two-year-old boy, and undisputed evidence that her duties did not involve or require any contact with young children ("I worked alone in an office which I shared with a caseworker"), the Department of Education nevertheless denied her application for employment with the Cooke Center, stating that the specific reason for the denial was her thirteen year old criminal record and that granting her application "will pose an unreasonable risk to the safety and welfare of the school community."

In *Matter of Arrocha v Board of Educ. of City of N.Y.* (93 NY2d 361, 364-365 [1999]), relied upon by the IAS court and the dissent, the Court of Appeals upheld the denial of a license to teach high school Spanish to a person convicted at the age of 36 for selling cocaine - one of six specifically enumerated crimes

deemed by the then Board of Education to be of special concern with respect to carrying out its duty to protect the welfare of New York City schoolchildren. Here, by contrast, Correction Law § 753 requires the Department of Education, in making a determination pursuant to Corrections Law § 752 to deny employment by reason of the applicant's having been previously convicted of one or more criminal offenses, to consider, among other factors, "[t]he specific duties and responsibilities necessarily related to the license or employment sought" (subd [1][b]). The Department merely alleged that petitioner's position with the Cooke Center "would bring her into contact with young children" and give her "access to sensitive student information."

In that there is no showing that the nature of the serious crimes for which she was convicted is relevant in any respect to her present duties or poses an unreasonable danger to those involved in the preschool program, the Department of Education's determination that petitioner's convictions for armed robberies committed when she was a 17-year-old high school student more than 13 years earlier would "pose an unreasonable risk to the safety and welfare of the school community," without more, was arbitrary and capricious, i.e., "without sound basis in reason"

and "without regard to the facts" (*see Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 Of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Finally, to the extent that petitioner seeks reinstatement and back pay, since she was not directly employed by the Department of Education but by an independent agency under contract to the Department, we remand the matter to Supreme Court for further proceedings to fashion an appropriate remedy in accord with our decision.

***M-4544 - Acosta v. NYC Dept. of Education, et al.,***
Motion seeking leave to file amici curiae brief granted.

All concur except Nardelli and Buckley, JJ.
who dissent in a memorandum by Nardelli, J.
as follows:

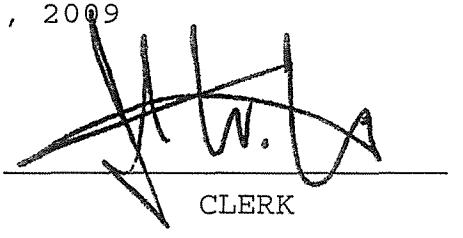
NARDELLI, J. (dissenting)

The Department of Education's (DOE) determination denying petitioner's application had a rational basis. The record demonstrates that in considering petitioner's application, DOE weighed the relevant factors under Correction Law § 753(1) (*see Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 364-365 [1999]), before concluding that petitioner "would pose an unreasonable risk to the safety and welfare of the young children with whom she would come into contact and whose confidential information she would have access to." Contrary to petitioner's contention, the record shows that DOE gave appropriate consideration to those factors that were favorable to petitioner before denying the application. To overturn DOE's determination, as petitioner would have this Court do, would require the Court to engage "in essentially a re-weighing of the [statutory] factors, which is beyond the power of judicial review" (*Arrocha*, 93 NY2d at 367).

Accordingly, I would affirm the denial of the petition.

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

ENTERED: MAY 7, 2009



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

140 Jenexy Esponda, etc., et al., Index 13245/06
Plaintiffs-Respondents,

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellants.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Ralph Gavin Bell of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about December 21, 2007, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiffs' negligence action is premised on allegedly inadequate supervision by the infant plaintiff's elementary school. In September 2005, plaintiff, a student in the third grade, injured her wrist during a fire drill when two other students bumped into her from behind, causing her to fall. The

evidence established that the school's entire population of about 1,000 students, teachers, administrators and others participated in the drill. Plaintiff's classroom teacher testified that, before the drill began, he instructed the children in his class that, when the alarm rang, they were to line up in pairs, exit the classroom on the school's third floor, proceed downstairs to the school's ground floor using the stairwell, exit the school from the main door, go down the front steps onto the public sidewalk in front of the school, and then cross to the other side of the street. The teacher further instructed the class to walk quickly but not to run, and to behave, remain quiet, and not to do anything inappropriate.

When the alarm rang and the drill commenced, the teacher went to the head of the line and led the children out of the school. He testified that when he reached the sidewalk he looked to make sure no cars were coming down the street and looked back before crossing to check that the entire class had exited. He estimated that the line of children he led was about 15 feet long, and that from the time the class exited the classroom until they reached the other side of the street, he looked back about five times to check on his students.

At a hearing conducted pursuant to General Municipal Law § 50-h in January 2006, plaintiff testified that she was still on the sidewalk in front of the school when the teacher reached the

other side of the street. She was running to catch up with her teacher and her class when she either stopped or slowed down to a walk, at which point "two big kids" who were not in her class bumped into her. In an affidavit dated September 6, 2007, plaintiff stated that she fell "as a result of being pushed from behind by two older students who were running." She also stated that she did not tell her teacher that she had hurt her wrist until the drill ended and she returned to her classroom.

Plaintiff asserts that her injury was caused by the school's inadequate supervision. According to plaintiff, her teacher should not have been leading the line of students crossing the street, but instead should have been in the middle or rear of the line to "enable [the teacher] to observe the actions of his students and assure that none of his students were left behind."[1]

The motion court erred by denying defendants's motion for summary judgment. A teacher's duty to supervise his or her charges requires "such care of them as a parent of ordinary

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[1]The bulk of the claims that plaintiff's mother makes in her testimony and affidavit in connection with the school's conduct of fire drills are inadmissible. Her statements as to what plaintiff told her had happened during prior fire drills at the school, especially that students were injured every time there was a fire drill, are unsupported hearsay. The mother's claim that she had provided notice to defendants by registering a complaint about the school's conduct of its fire drills is of no value since the mother did not know when and to whom she complained.

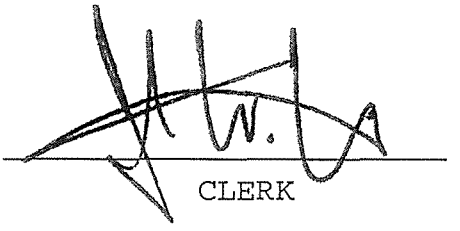
prudence would observe in comparable circumstances" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994], quoting *Hoose v Drumm*, 281 NY 54, 58 [1939]). Plaintiff's argument that the teacher should have been in the middle or at the end of the line defies common sense. If the teacher had not been at the front of the line, third graders would have been responsible for leading the way out of the school building and judging whether it was safe to cross a trafficked street. No reasonably prudent person would endorse that procedure.

In any event, the alleged lack of supervision, which is solely based on the position of the teacher, could not have been the proximate cause of the injury. Supervision would not have prevented the larger pupils from coming into contact with plaintiff. "Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the [defendant school district] is warranted" (*Convey v City of Rye School Dist.*, 271 AD2d 154, 160 [2000]; *see Ronan v School Dist. of City of New Rochelle*, 35 AD3d 429, 430 [2006] [summary judgment granted to school district where student, who was running ahead of plaintiff in a school gym, collided with a wall and fell to the ground, causing plaintiff to trip over him]; *Ceglia v Portledge School*, 187 AD2d 550 [1992] [summary judgment granted to school where

plaintiff was tripped in a hallway by another student]). Here, plaintiff's fall was the result of her actions and those of the two students directly behind her.

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

ENTERED: MAY 7, 2009



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

505 The People of the State of New York, Ind. 39251C/05
Respondent,

-against-

Daniel Rodriguez,
Defendant-Appellant.

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

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

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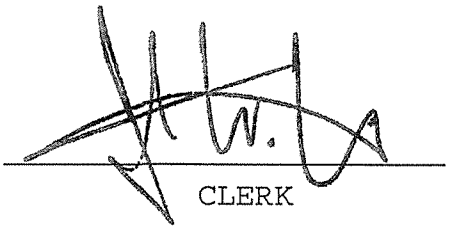
Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered November 8, 2006, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of 1 year, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, and the fact that the jury acquitted defendant of another charge does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). The credible evidence

disproved defendant's justification defense beyond a reasonable doubt.

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

ENTERED: MAY 7, 2009



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

506-
507 In re Mildred S.G.,
Petitioner-Respondent,

-against-

Mark G.,
Respondent-Appellant.

- - - - -

In re Mark G.,
Petitioner-Appellant,

-against-

Mildred S.G.,
Respondent-Respondent.

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George E. Reed, Jr., White Plains, for appellant.

Safe Horizon Domestic Violence Law Project, Brooklyn (Shelly Agarwala of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), Law Guardian.

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Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about August 31, 2007, which vacated an earlier order awarding joint custody of the child to the parents and instead granted sole legal and physical custody to the mother with supervised visitation to the father, unanimously affirmed,

without costs. Order, same court and Judge, entered on or about June 12, 2008, which dismissed with prejudice the father's proceeding for modification of the custody order, unanimously modified, on the law, the provision that dismissal is with prejudice deleted, and otherwise affirmed, without costs.

Although this Court's authority in custody matters is as broad as that of the trial court, the latter's findings and determination are accorded great deference on appeal (*Victor L. v Darlene L.*, 251 AD2d 178 [1998], *lv denied* 92 NY2d 816 [1998]), since that court had the opportunity to assess the witnesses' demeanor and credibility (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). Here, there was a sound basis for the court's determination that the circumstances had changed sufficiently to modify the original joint custody order. It was clear from the record that the parties' relationship had deteriorated to such an extent that they were no longer able to co-parent their minor child. The father continually filed frivolous petitions against the mother and reported her to ACS -- with none of the reports resulting in any findings of wrongdoing -- and once had her arrested while the child was in her care. Those actions by the father justified the court's modification of the joint custody award (*see David K. v Iris K.*, 276 AD2d 421, 422 [2000]; *Gaudette v Gaudette*, 262 AD2d 804, 805 [1999]). Moreover, the father appeared to misunderstand completely the concept of "joint

custody" and made unilateral decisions without consulting the mother. His actions in this regard called into question whether he would support and encourage an appropriate relationship between mother and child (*see Bliss v Ach*, 56 NY2d 995, 998 [1982]; *see also Vernon v Vernon*, 296 AD2d 186, 192-193 [2002], *affd* 100 NY2d 960 [2003]).

The father's argument that the court improperly relied upon the forensic report lacks merit. Even without the forensic report, the court would have had ample basis to award the mother full custody (*see Matter of D'Esposito v Kepler*, 14 AD3d 509 [2005]).

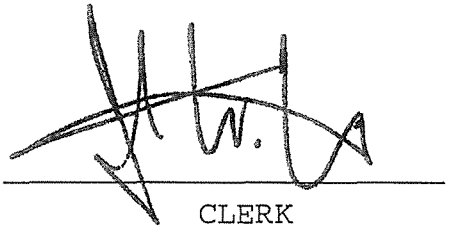
Family Court Act § 1046 provides an exception to the rule against hearsay testimony for prior statements made by children relating to allegations of abuse and neglect, which is applicable here (*see Matter of Albert G. v Denise B.*, 181 AD2d 732 [1992]). Furthermore, those statements were properly corroborated with photographs (*see* § 1046[a][vi]; *Matter of Pratt v Wood*, 210 AD2d 741, 742 [1994]).

With respect to the appeal from the later order, dismissal with prejudice was improper because the court never reached the merits of that petition. That provision should be deleted from the order (*see Tico, Inc. v Borrok*, 57 AD3d 302 [2008]).

We have considered the father's remaining contentions and find them without merit.

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

ENTERED: MAY 7, 2009



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

508 Gail Burko, Index 15632/05

Plaintiff-Appellant,

-against-

Lawrence Friedland, et al.,

Defendants-Respondents.

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

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Michael L. Boulhosa of counsel), for Lawrence and Melvin Friedland, respondents.

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

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Judgment, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered February 29, 2008, which granted defendants' motion and cross motion for summary judgment dismissing the complaint in this trip and fall action, unanimously affirmed, without costs.

In support of summary judgment, defendant owners and lessee met their prima facie burden of proving the absence of a material issue of fact concerning creation of the defective condition and actual or constructive notice of it. Defendants testified that they had no knowledge of prior, similar accidents on the sidewalk in front of the premises, never saw the defective condition of

the sidewalk and did not make any alterations to the sidewalk.

The motion court correctly determined that plaintiff failed to raise a triable issue of fact that the defective condition was actionable. Plaintiff testified that she tripped and fell due to a hole in the sidewalk abutting the line between two sidewalk flags. Plaintiff's expert testified that the defect, identified for him by plaintiff more than three years after the accident, measured 5/8th of an inch deep, 4 inches long and 2 inches wide. The defect, which did not appear to be a trap or snare by reason of its location, adverse weather or lighting conditions or other circumstances, was trivial (*see Tricere v County of Suffolk*, 90 NY2d 976, 977 [1997]). In any event, the opinion of plaintiff's expert, based on the condition of the cited defect more than three years after the accident, would be insufficient to raise a triable issue of fact (*see Kruimer v National Cleaning Contrs., Inc.*, 256 AD2d 1, 2 [1998]).

In view of the foregoing, plaintiff's remaining contentions need not be addressed.

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

ENTERED: MAY 7, 2009

CLERK

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

510 Alania Hughes, an infant by her mother and natural Guardian, Lotrina Kinsey, Plaintiff-Appellant, Index 13291/05

-against-

Concourse Residence Corp., et al., Defendants-Respondents.

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

Wilson, Bave, Conboy, Cozza & Couzens, P.C., White Plains (Erin M. Cola of counsel), for Concourse Residence Corp. and Webster Tremont Equities Corp., respondents.

Carol R. Finocchio, New York (Marie R. Hodukavich of counsel), for Home Life Services, respondent.

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Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered January 30, 2008, which granted defendants' motion and cross motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion to amend the verified bill of particulars, unanimously reversed, on the law, without costs, defendants' motion and cross motions denied and plaintiff's cross motion granted.

On March 10, 2002, the infant plaintiff, who resided with

her family in a single room in a homeless shelter owned and operated by defendants, was burned when she fell onto an exposed pipe, carrying either steam or hot water, which had a portion of its insulation missing.

The court erred in denying plaintiff's motion to amend her bill of particulars to add a violation of Administrative Code § 27-809, which requires that pipes carrying steam or hot water at temperatures exceeding one hundred sixty-five degrees Fahrenheit be insulated (*see Isaacs v West 34th Apts. Corp.*, 36 AD3d 414, 415 [2007], *lv denied* 8 NY3d 810 [2007]). The amendment will not prejudice defendants since it does not raise any new factual allegations or theories of liability (*see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479 [2007]; *Walker v Metro-North Commuter R.R.*, 11 AD3d 339 [2004]).

In granting summary judgment, the motion court relied on *Rivera v Nelson Realty, LLC* (7 NY3d 530 [2006]) and *Rodriguez v City of New York* (20 AD3d 327 [2005], *appeal withdrawn* 7 NY3d 751 [2006]), which held that the failure to provide radiator covers is not actionable. The court's reliance was misplaced, since this case involves an injury caused by an uninsulated pipe, regulated by Administrative Code § 27-809, not an allegedly unsafe radiator cover, which is not so regulated (*see Isaacs* at 415-416).

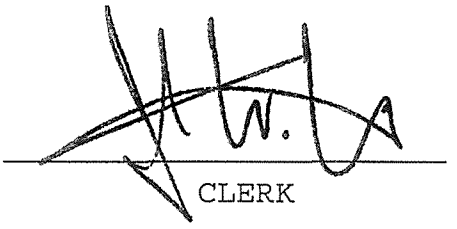
Defendants have failed to establish that Administrative Code § 27-809 does not apply to this case. Significantly, Concourse's witness testified that in 1996 or 1997 all of the radiators in the building were changed and the building was required at that time to insulate all of the pipes.

Nor have defendants established a lack of notice. While their witnesses stated that they had no personal knowledge of the exposed pipe and agreed that the rooms were routinely checked by Home Life - the inspection included a check of the pipes to make sure they were insulated - plaintiff's file was devoid of routinely maintained home assessment forms and/or room inspection reports as well as an incident report. Furthermore, plaintiff testified that she had complained about the condition of the pipe and that her room had never been inspected (*see Moore v 793-797 Garden St. Hous. Dev. Corp*, 46 AD3d 382 [2007]).

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

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

ENTERED: MAY 7, 2009



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

511 The People of the State of New York, Ind. 70/06
Respondent,

-against-

Benito Acevedo,
Defendant-Appellant.

- - - - -

512 The People of the State of New York, Ind. 70/06
Respondent,

-against-

Eddie Cotto,
Defendant-Appellant.

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

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for Eddie Cotto, appellant.

Eddie Cotto, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered November 14, 2006, convicting defendant Acevedo, after a jury trial, of criminal sale of a controlled substance in

the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to concurrent terms of 6 years, unanimously affirmed. Judgment, same court, (Rena K. Uviller, J. at suppression hearing; Renee A. White, J. at jury trial and sentence), rendered November 28, 2006, convicting defendant Cotto of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 6 years, unanimously affirmed.

Defendants did not preserve any claim that the court's ruling permitting the two undercover detectives to testify under their shield numbers violated defendants's constitutional rights, including their right of confrontation. At a *Hinton* hearing (*People v Hinton*, 31 NY2d 71 [1972], *cert denied* 410 US 911 [1973]), defendants stated their opposition to closure of the courtroom. In that connection, defendants expressed, at most, a perfunctory opposition to concealment of the officers' names. In particular, neither defendant asserted any need to know the officers' names for purposes of impeachment or investigation. Accordingly, defendants' present constitutional arguments (*see Smith v Illinois*, 390 US 129 [1968]), including Cotto's pro se claim, are unpreserved and we decline to review them in the

interest of justice. As an alternative holding, we also reject them on the merits (*see United States v Rangel*, 534 F2d 147, 148 [9th Cir 1976], *cert denied* 429 US 854 [1976]). The People's showing of an overriding interest justifying partial closure of the courtroom also satisfied their burden, under *People v Waver* (3 NY3d 748 [2004]), of establishing a need for the officers' anonymity. Moreover, in addition to that showing, both officers provided particularized explanations for their fear of disclosing their true names to defendants and their relatives. Defendants have not established that learning the officers' true names, as opposed to their shield numbers, would have had any impeachment or investigatory value (*see People v Washington*, 40 AD3d 228 [2007], *lv denied* 9 NY3d 927 [2007]).

We reject defendant Cotto's challenges to the sufficiency and weight of the evidence against him (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. His argument that the evidence only established that he sold drugs to defendant Acevedo, who then made a separate sale to an undercover officer, is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The chain of events, viewed as a whole, warrants the inference that Cotto and Acevedo had acted as a team to sell drugs to the officer, and that they jointly possessed, with

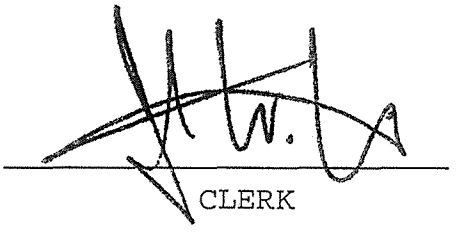
intent to sell, the eight additional glassine envelopes of heroin recovered from Acevedo (*see e.g. People v Roman*, 83 NY2d 866 [1994]).

The court properly denied Cotto's request to exclude from evidence $146 in one-dollar and five-dollar bills recovered from him at the time of his arrest. This evidence was highly probative of Cotto's intent to sell the drugs recovered from Acevedo (*see People v White*, 257 AD2d 548, 548-49, *lv denied*, 93 NY2d 930 [1999]). To the extent that Cotto is presently arguing that the money was irrelevant because he did not act in concert with Acevedo in possessing the drugs, that was a question for the jury. As noted, the jury could properly resolve that issue against Cotto.

We have considered and rejected Cotto's pro se claims regarding the hearing court's suppression ruling and the trial court's response to a jury note.

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

ENTERED: MAY 7, 2009



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

514 Maritza Pena, Index 107207/02
Plaintiff-Appellant

-against-

Stahl Bros,
Defendant-Respondent.

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Seligson, Rothman & Rothman, New York (Martin S. Rothman of counsel), for appellant.

Dollinger, Gonski & Grossman, Carle Place (Matthew Dollinger of counsel), for respondent.

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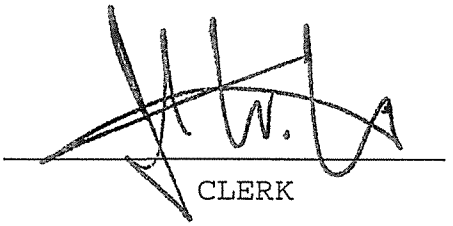
Order, Supreme Court, New York County (Debra A. James, J.), entered March 21, 2008, which, in an action for personal injuries, granted defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

The motion court properly granted the motion and determined that a traverse hearing was not warranted. The record establishes that plaintiff failed to meet her burden of showing that defendant was served in accordance with the requirements of CPLR 310(b). The affidavit of service averred that the "managing agent" of defendant was served, but not that the summons and complaint were mailed to the partnership's place of business or

the last known home address of the member of the partnership to be served (CPLR 310[b]; *see also Tadir Air v FGH Realty*, 297 AD2d 230 [2002]; *Persaud v Teaneck Nursing Ctr.*, 290 AD2d 350 [2002]).

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

ENTERED: MAY 7, 2009



CLERK

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

515 Olivia Ward, Index 103982/06

Plaintiff-Respondent,

-against-

Cross County Multiplex Cinemas, Inc., et al.,

Defendants-Appellants,

Tiesha Chambers,

Defendant.

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Law Offices of John W. Manning, Tarrytown (John W. Manning of counsel), for appellants.

Law Offices of Jay H. Tanenbaum, New York (Laurence Warshaw of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 18, 2008, which, in an action for personal injuries, denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for leave to serve a supplemental summons and amended complaint naming Quincy Amusements, Inc. (Quincy) as a defendant, unanimously reversed, on the law, without costs, defendants' motion granted and the cross motion denied. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

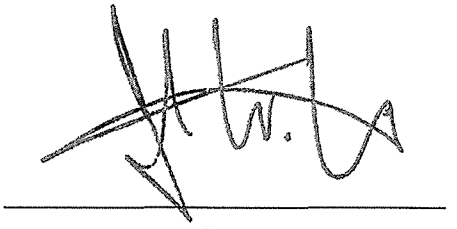
The complaint should have been dismissed as against National Amusements, Inc. (NAI), the parent corporation of Quincy, the owner of the theater where plaintiff's accident occurred. Plaintiff fails to allege the type of domination which must be shown to pierce the corporate veil so as to hold NAI liable for the purported negligence of Quincy (see *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [2005]). Moreover, since defendant Cross County Multiplex Cinemas, Inc. (Cross County) had no legally cognizable existence at the time of plaintiff's accident in February 2004, having merged into Quincy in January 2002, the complaint is dismissed as against it as well.

Nor may plaintiff rely on the relation-back doctrine to assert claims against Quincy. The fact that Quincy is a wholly-owned subsidiary of NAI, without more, does not demonstrate that they are united in interest (*see Achtziger v Fuji Copian Corp.*, 299 AD2d 946, 948 [2002], *lv dismissed in part and denied in part* 100 NY2d 548 [2003]). Furthermore, although a surviving corporation succeeds to the liabilities of the merged corporation, Cross County ceased to exist more than two years

prior to plaintiff's accident and thus, Quincy could not have assumed liabilities which had not yet arisen.

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

ENTERED: MAY 7, 2009



CLERK

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

518N In re Barbara Lauray, Index 302869/07
Petitioner-Respondent,

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for appellants.

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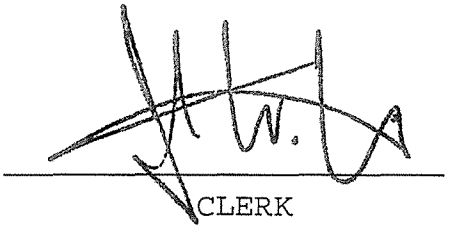
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 28, 2008, which granted the petition for leave to file a late notice of claim and deemed the notice of claim timely filed nunc pro tunc, unanimously reversed, on the law, without costs, and the petition denied.

As petitioner's counsel concedes, there is no viable cause of action against defendants. The location of petitioner's alleged trip and fall on the sidewalk was in front of a commercial business and not in front of a one-, two-, or three-family residence (*see* Administrative Code of the City of New York § 7-210[c]). The record further shows that leave to file a late notice of claim was improperly granted. Petitioner failed to meet her burden of demonstrating a reasonable excuse for the delay, the timely receipt by respondents of actual notice of the

defect, and the lack of prejudice (*see e.g. Ocasio v New York City Health & Hosps. Corp. [Morrisania Neighborhood Family Care Ctr.]*, 14 AD3d 361 [2005]; General Municipal Law § 50-e[5]).

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

ENTERED: MAY 7, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
David B. Saxe
David Friedman
James M. McGuire, JJ.

2871
Ind. 6694/05

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The People of the State of New York,
Respondent,

-against-

Umberto Fernandez,
Defendant-Appellant.

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Defendant appeals from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered November, 17, 2006, convicting him, after a jury trial, of manslaughter in the second degree and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky and Jessica A. Yager of counsel), for appellant.

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

McGUIRE, J.

In reversing the defendant's conviction in *Morissette v United States* (342 US 246 [1952]), Justice Jackson stated for a unanimous Supreme Court that "[t]his would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law" (*id.* at 247). We conclude that essentially the same fundamental error was made in this case when defendant's request that criminally negligent homicide be submitted to the jury was denied.

The uncontroverted evidence at trial established that the victim, Luis Gomez, died as a result of a single stab wound to the left side of his chest that was some three to four inches deep and penetrated his aorta by three-eighths of an inch. The undisputed proof also established that defendant caused that wound while wielding a large knife, one with a 10½-inch serrated blade, that he obtained from the kitchen in his apartment after an earlier altercation with Gomez during which Gomez punched him in the nose. Defendant was charged in a single-count indictment with second-degree manslaughter (Penal Law § 125.15[1]) for recklessly causing Gomez' death. Thus, the People contended that in wielding the knife and inflicting the fatal wound, defendant

was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that [death would] occur" (Penal Law § 15.05[3]). After a jury trial, defendant was convicted of that crime. On appeal, he contends that the trial court erred in denying his request for the submission of a charge of criminally negligent homicide (Penal Law § 125.10) as a lesser included offense of the second-degree manslaughter charge. In relevant part, the elements of the two offenses differ solely with respect to the requisite mens rea, with criminally negligent homicide requiring proof that in wielding the knife and inflicting the fatal wound, defendant "fail[ed] to perceive a substantial and unjustifiable risk that [death would] occur" (Penal Law § 15.05[4]).[1]

The propriety of the denial of a request for the submission

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[1]Under the statutory definition of the term "lesser included offense" (CPL 1.20[37]), a lesser offense is a lesser included offense of a greater offense only when it is "theoretically impossible to commit the greater crime without at the same time committing the lesser" (*People v Glover*, 57 NY2d 61, 64 [1982]). Under this test, criminally negligent homicide is a lesser included offense of reckless manslaughter only if it is impossible to be "aware of and consciously disregard[]" a risk of death without at the same time "fail[ing] to perceive" that risk. Obviously, just the opposite is the case. A person who acts while aware of and consciously disregarding a risk of death *cannot* simultaneously fail to perceive that risk. Nonetheless, the Court of Appeals has made clear that criminally negligent homicide is a lesser included offense of reckless manslaughter (*People v Green*, 56 NY2d 427, 432 [1982]; *see also People v Heide*, 84 NY2d 943, 944 [1994]).

of a lesser included offense turns on "whether, under any reasonable view of the evidence, it is possible for the trier of facts to acquit defendant on the higher count and still find him guilty of the lesser one" (*People v Van Norstrand*, 85 NY2d 131, 136 [1995]). "In determining whether such a reasonable view exists, the evidence must be viewed in the light most favorable to defendant" (*People v Martin*, 59 NY2d 704, 705 [1983]). Accordingly, "it is well settled that a refusal to charge a lesser included crime is warranted only where every possible hypothesis but guilt of the higher crime [is] excluded" (*People v Johnson*, 45 NY2d 546, 549 [1978] [internal quotation marks omitted; brackets in original]). Moreover, "the jury's freedom to accept or reject part or all of the defense or prosecution's evidence" is "[e]qually well established" (*id.* [internal quotation marks omitted]).

Because the sole relevant difference between the crimes of reckless manslaughter and criminally negligent homicide is the mens rea of the actor, another settled principle of law is highly relevant to the resolution of this appeal. In *People v Flack* (125 NY 324 [1891]), Judge Andrews addressed the respective roles of the jury and the judge on the issue of criminal intent. Sixty years later, in *Morissette*, Justice Jackson quoted Judge Andrews' "well stated" (342 US at 274) words at length. Judge Andrews

wrote:

> "However clear the proof may be, or however incontrovertable [*sic*] may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury" (*People v Flack*, 125 NY at 334).

What is true of the specific mens rea of criminal intent is true of mens rea generally: it is quintessentially a question for the jury.

Judge Andrews' statement of the law is not inconsistent with the settled principle that a lesser included offense may be submitted only when there is a reasonable view of the evidence that the defendant committed the lesser but not the greater crime. When the only relevant difference between the greater and lesser crime is the required mens rea, "the question of intent," or mens rea generally, can be ruled as a question of law and need not be submitted to the jury when there is no such reasonable view. Judge Andrews' statement of the law is not to the contrary, as in the two sentences immediately preceding those quoted above he spoke of the "general rule of law" and acknowledged the existence of "exceptional cases" (125 NY at

334). The crux of the position staked out for the Court by Judge Andrews is that, given the distinct role and competence of the jury on the factual question of mens rea, judges must be particularly chary about invading the province of the jury by ruling on mens rea as a matter of law. As discussed below, this principle of deference to the jury on questions of mens rea is not an anachronism.

Mens rea is the particular province of the jury because it is elusive as well as subjective, and all but invariably is determined by drawing from objective facts -- which may be inconsistent, fraught with ambiguity or both -- inferences about a subjective matter that are informed by human experience. As Chief Judge Cardozo stated for a unanimous Court of Appeals in reversing a conviction for murder in the first degree because of the trial court's refusal to submit lesser homicide charges:

> "Whenever intent becomes material, its quality or persistence -- the deranging influence of fear or sudden impulse or feebleness of mind or will -- is matter for the jury if such emotions or disabilities can conceivably have affected the thought or purpose of the actor" (*People v Moran*, 246 NY 100, 103 [1927]).

The common sense inherent in Chief Judge Cardozo's observation is manifest, and is reflected in the colloquial expression that a person was "out of his mind" with anger or fear. That common-sense, albeit not literal, truth is one the criminal law has been

mindful of in asking juries to look *into* the mind of the accused.

This principle of judicial deference with respect to mens rea was reaffirmed by the Court of Appeals 55 years later in *People v Butler* (57 NY2d 664 [1982]) when the Court reversed a panel of this Court that had concluded that a charge of first-degree manslaughter should not have been submitted to the jury at the prosecution's request as a lesser included offense of an intentional murder count (86 AD2d 811 [1982]). In reversing on the dissenting memorandum of Justice Sandler (*id.* at 812), the Court embraced Justice Sandler's view that the above-quoted statement by Chief Judge Cardozo was "the definitive comment on the essential issue presented" (*id.* at 815), i.e., whether the jury properly was permitted to determine whether the defendant had acted with a less culpable mens rea (*see also People v Martin, supra; People v Lee*, 35 NY2d 826 [1974]). As is clear from *People v Butler,* moreover, this principle of judicial deference is not one that operates only to benefit defendants (*see also People v Mussenden*, 308 NY 558, 562 [1955] [noting that the submission of lesser offenses than those charged in the indictment was "originally 'intended merely to prevent the prosecution from failing where some element of the crime charged was not made out'"], quoting *People v Murch*, 203 NY 285, 291 [1934]).

Defendant, who was 53 years old at the time of trial, testified that upon returning to his apartment building from his job at a restaurant in the early morning of December 21, 2005, he encountered Mr. Gomez and another man, Michael Fernandez, as he was about to enter the building. Defendant had had a problem with Gomez on a prior occasion, after which Gomez started looking at him the "wrong way." According to defendant, he first saw Gomez, who was 22 years old at the time of his death, when the latter was about 15 years old. After not seeing him for "a while," defendant then saw Gomez "a lot" as he "use[d] to go in and out of the building a lot and he used to do wrong things." Although defendant testified both about the prior problem he had with Gomez and the "wrong things," the details are not important.

As defendant was entering the vestibule of his building on December 21, Gomez stood in front of him and insulted him, using an expletive. After defendant said that he was going to take "the bad word" as a joke, Gomez took "something," a "piece of metal," out of his pocket and punched defendant in the face.[2] Defendant went into his building bleeding "a lot" from his nose; when he touched his nose he could hear a noise. Without looking

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[2]Defendant expressly testified that the object was "brass knuckles." In a written statement he gave to a detective, however, he stated that he was not sure whether he was "hit with a fist or an object."

back, he went upstairs to his apartment. Defendant washed up in the bathroom and removed his bloody shirt. He was in "a lot of pain," and because "the blood didn't stop" he "didn't have enough strength anymore." He went into the kitchen and grabbed a knife from an open cabinet. Defendant's sister, Clara Fernandez, who had awoken, did not want him to go back downstairs and tried to stop him. Ms. Fernandez testified that defendant was "bleeding a lot," his face was "totally swollen," he was not "coordinating well" and was "confused." However, defendant concealed the knife under his coat and went back downstairs. According to defendant, his purpose in going back was "since I know the guy I wanted from him at least to say I'm sorry to me." He brought the knife with him for his own protection, "because that group was very tough and dangerous," but "not to do harm to anyone."[3]

With respect to the issue upon which this appeal turns, the most critical testimony defendant gave concerned the events that occurred as he was about to exit the building. According to defendant, Gomez and Michael Fernandez stopped him, blocking him

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[3]The jury heard other relevant evidence from defendant about his intentions in going back downstairs. As discussed below, however, none of the evidence about defendant's intentions in going back downstairs is dispositive of defendant's mental state -- i.e., whether he was aware of and consciously disregarded a substantial and unjustifiable risk of death or instead failed to perceive such a risk -- when he actually did go downstairs and pulled out the knife upon being confronted by Gomez.

from leaving. With the knife still concealed under his coat, defendant twice asked Gomez why he had hit him. In response, Gomez "started making fun, he was laughing." According to defendant, Gomez then "went to attack me again." Specifically, Gomez "loosened his jacket like a boxer," raised his hands and "went to lunge at me with his hand."[4] Although Gomez moved both of his arms, he moved his left arm more. Gomez' left hand was clenched into a fist. He did not have the brass knuckles in his left hand, and defendant did not know whether he had them in his right hand, which was not the one he used to "lunge" at defendant.

When Gomez raised his hands, defendant pulled out the knife and "quickly ... lunged at his hand." As defendant so testified, the prosecutor stated that defendant was indicating that defendant used his left arm to lunge at Gomez' hand. The trial court then stated that defendant had been swinging his arm at shoulder level and described the motion as a "roundhouse." For his part, defendant's attorney stated without contradiction that "the witness is indicating not straight out but around." According to defendant, the knife "unfortunately ... did not hit

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[4]Defendant also testified that when Gomez swung at him, Gomez "was in front here to the side and he went like this with all his body, then I lunged at his hand." The movement defendant thus indicated, however, is not described in the transcript.

the hand and I felt I scratched his jacket." After "lunging" with the knife in this fashion at Gomez' left hand and missing, Gomez and Michael Fernandez "took off running from in between the two doors." In a statement he made to a detective following his arrest that morning, defendant repeatedly stated, consistent with his trial testimony, that after pulling out the knife when Gomez moved his hands and body to strike him, defendant "lunged at his hand" with the knife.

If the jury credited the foregoing testimony -- for the reasons stated below, we are obligated to conclude that it could have -- the jury reasonably could have concluded that in lunging at Gomez' hand, defendant "failed to perceive" that in attempting to strike Gomez' hand, his conduct created "a substantial and unjustified risk that [death would] occur" (Penal Law § 15.05[4]). As the Court of Appeals stated in *People v Heide* (84 NY2d at 944) in affirming the Appellate Division's holding that the trial court properly submitted a charge of criminally negligent homicide as a lesser included offense, "the fact that defendant intentionally stabbed [the decedent] does not preclude a finding that defendant committed criminally negligent homicide." As is clear from the dissenting opinion in the Appellate Division, as in this case the decedent was stabbed once, not repeatedly (206 AD2d at 875). Moreover, unlike this

case, Heide "testified that he intentionally stabbed the victim in the groin with [the] knife" (*id.*).

In other respects, the facts of this case provide more support for the submission of criminally negligent homicide than those of *Heide*. Defendant was not, unlike Heide, the initial aggressor in the fatal stabbing (206 AD2d at 875); Heide did not, unlike defendant, wield the knife in an immediate response to what he perceived to be an imminent attack against him. Rather, Heide "intentionally stabbed the victim ... so that he would release his grip on [him]" (*id.*). By contrast, when Gomez raised his hands as if to strike defendant again, defendant pulled out the knife and "quickly ... lunged at his hand." Because a reflexive action is an unthinking action, surely a jury reasonably could have concluded that defendant was not "aware of and consciously disregard[ing] a substantial and unjustifiable risk that [death would] occur." The relevant part of Chief Judge Cardozo's eloquent statement of the key legal principle and the matters of common experience underlying it bears repetition: "[w]henever intent becomes material, its quality or persistence -- the deranging influence of fear or sudden impulse ... -- is matter for the jury if such emotions ... can conceivably have affected the thought or purpose of the actor" (*People v Moran*, 246 NY at 103).

Apart from the reflexive or sudden nature of the fatal act and the reasonable inference that it was borne of fear, the jury heard defendant's sister's testimony that defendant was "confused" and "not coordinating well." In addition, the jury heard defendant's testimony that he was "all tormented in pain" and his statements to the detective to the effect that he had begun to "panic" from losing so much blood and thought he was going to die.

Finally, there is an additional evidentiary basis from which the jury reasonably could have concluded that defendant indeed was trying to strike only at Gomez' hand and unintentionally stabbed him in the chest. That is, defendant not only testified that Gomez was moving both his hands as he prepared to attack, defendant also described, as noted above, a movement Gomez made at the same time "with all of his body" as defendant "lunged at his hand." For all of these reasons, and because the mens rea elements of the crimes of reckless manslaughter and criminally negligent homicide are "but shades apart on the scale of criminal culpability" (*People v Stanfield*, 36 NY2d 467, 471 [1975]), criminally negligent homicide should have been submitted to the jury.

Of course, particularly given the other evidence at trial, a jury reasonably could have concluded that defendant was "aware of

and consciously disregard[ed] a substantial and unjustifiable risk that [death would] occur" (Penal Law § 15.05[3]). But as Judge Fuld stated in explaining the scope of a defendant's right to the submission of a lesser offense, "it does not matter how strongly the evidence points to guilt of the crime charged in the indictment, or how unreasonable it would be, as a court may appraise the weight of the evidence, to acquit of that crime and convict of the less serious" (*People v Mussenden*, 308 NY at 562; *see also People v Van Norstrand*, 85 NY2d at 136 ["(o)ur inquiry is not directed at whether persuasive evidence of guilt of the greater crime exists, as it does here, but whether, under any reasonable view of the evidence, it is possible for the trier of facts to acquit defendant on the higher count and still find him guilty of the lesser one"]; *Morissette*, 342 US 246 [reversing criminal conviction because the "court refused to submit or to allow counsel to argue to the jury whether Morrissette acted with innocent intentions" (*id.* at 249), and observing that "juries are not bound by what seems inescapable logic to judges" (*id.* at 276)]). For the same reason, and because the jury may not have credited it (*People v Johnson*, 45 NY2d at 549), the testimony of the prosecution's principal witness, Michael Fernandez, does not warrant denial of defendant's request that the jury consider a charge of criminally negligent homicide even though it "strongly

... points to guilt of the crime charged" (*Mussenden*, 308 NY at 562).

That we are obligated to conclude that the jury could have credited defendant's testimony is clear. At least where, as here, the defendant testifies and no incontrovertible evidence conclusively refutes the defendant's testimony, that obligation is a corollary of our fundamental obligation to view the evidence in the light most favorable to the defendant. It is supported as well by a basic reality of trials: whether a jury determines to credit the testimony of a defendant (or any witness) is in part a function of the demeanor of the defendant. Ninety years ago, Judge Andrews elegantly drove home the point for appellate courts:

> "The jurors saw the witnesses. The claims of the People and the defendant were presented to them with force and ability. Evidently they considered the case with care. Better than a court which reviews but the printed record are they fitted to pass upon the guilt or innocence of the accused" (*People v Cohen*, 223 NY 406, 423 [1918]).

Albeit in a different context, the Court of Appeals more recently made essentially the same point in *People v Sloan* (79 NY2d 386 [1992]). The Court held that defendants have a right to be present during side bar questioning of prospective jurors relating to "attitudes and feelings concerning some of the events and witnesses involved in the very case to be heard" (*id.* at

392). The key to the Court's analysis was that the "[d]efendants' presence at the questioning on such matters and the resultant opportunity for them to assess the jurors' facial expressions, demeanor and other subliminal responses as well as the manner and tone of their verbal replies so as to detect any indication of bias or hostility, could ... be[] critical in making proper determinations in the important and sensitive matters relating to challenges for cause and peremptories" (*id.*). These same factors are at least as critical to the ability of juries to "mak[e] proper determinations in the important and sensitive matter[] relating to" the credibility of testimony by defendants. On this score, finally, there is the obvious point made by Judge Andrews in *People v Cohen*: "Criminals may tell the truth" (233 NY at 422).

To be sure, as noted above, the jury heard other significant evidence bearing on defendant's intentions in grabbing the knife and going back downstairs. As defendant conceded on cross-examination, he told the detective that while he was still in the apartment he thought to himself that "[i]f I'm going to die, I am at least going to scar the person who killed me" and that his intent was not to kill but to wound. And defendant also conceded he had told the detective that while still in the apartment he thought to himself, "[i]f I don't do something now they are going

to do this every day."

The probative force of this testimony depends in large part on the inference -- which certainly is not unreasonable -- that the intention of scarring, wounding or "do[ing] something" persisted when defendant actually did go downstairs and encountered Gomez anew. That inference, however, is not ineluctable. To quote yet again Chief Judge Cardozo's words, "[w]henever intent becomes material, its quality or *persistence* ... is matter for the jury" (*People v Moran*, 246 NY at 103 [emphasis added]). In short, mens rea can be ephemeral as well as elusive.

Moreover, that same statement to the detective gave the jury a basis for concluding that defendant's intentions had changed when he got downstairs. That is, as defendant also acknowledged on cross-examination, he told the detective that when he saw Gomez and asked him why he had hit him, he was "thinking that if the guy said, 'I'm sorry,' I would leave it alone and go back upstairs." Three other points should be underscored. First, whatever defendant's intentions may have been while in the apartment and when he first encountered Gomez again, the jury reasonably could have concluded that once Gomez acted to strike him again, defendant acted unthinkingly, without perceiving that he was creating any, let alone a substantial, risk of death in

lunging once with the knife. Second, when he testified, consistently with his statement to the detective, that he lunged at Gomez trying to strike his hand, defendant's demeanor could have been such as to lead the jury to find that testimony credible (*People v Cohen*, 223 NY at 423). Third, the persuasiveness of arguments based on defendant's statements to the detective about intending to scar or wound are irrelevant as it does not matter how strongly the evidence may support the conclusion that defendant was aware of and consciously disregarded such a risk of death (*People v Mussenden*, 308 NY at 562; *People v Van Norstrand*, 85 NY2d at 136).

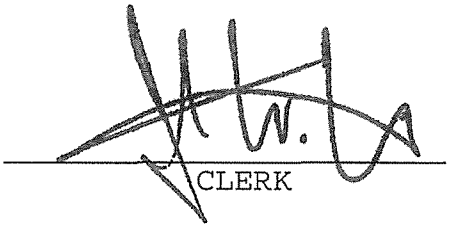
Accordingly, the judgment of Supreme Court, New York County (Carol Berkman, J.), rendered November 17, 2006, convicting defendant, after a jury trial, of manslaughter in the second degree, and sentencing him to a term of 5 to 15 years, should be reversed, on the law, and the matter remanded to Supreme Court

for a new trial.

All concur.

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

ENTERED: MAY 7, 2009



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Rolando T. Acosta
Dianne T. Renwick, JJ.

48
Index 115851/07

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Howard Hoffman,
Plaintiff-Appellant,

-against-

Parade Publications, et al.,
Defendants-Respondents.

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Plaintiff appeals from the order of the Supreme Court, New York County (Martin Shulman, J.), entered July 7, 2008, which granted defendants' motion to dismiss the complaint.

Cohen, Weiss and Simon LLP, New York (James L. Linsey, Robin H. Gise and Oriana Vigliotti of counsel), for appellant.

Proskauer Rose LLP, New York (Elise M. Bloom and Alychia L. Buchan of counsel), for respondents.

SAXE, J.

This appeal raises the issue of New York courts' subject matter jurisdiction over claims of discrimination under the New York State Human Rights Law (NYSHRL) (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (NYCHRL) (Administrative Code of the City of New York § 8-101 *et seq.*) arising from the termination of plaintiff's employment where the decision to terminate was made in this state, and the call to the employee was made from this state, but the employee worked out of an office located in another state, resided in another state, and received the call communicating his termination while in another state.

According to the complaint, plaintiff was employed by defendants from 1992 until his termination on January 1, 2008, at which time he was 62 years old. From the beginning of the employment, except for the period of July 2001 to September 2002, when he worked in New York, plaintiff was almost exclusively based in defendants' Atlanta, Georgia office. In September, 2002, plaintiff was promoted to managing director for the newspaper relations group, a position he held until his termination. His responsibilities consisted of developing newspaper accounts for defendants' Parade Magazine in 12 states located in the South and West.

Plaintiff describes his responsibilities as that of a "traveling salesmen" who had "frequent in-person meetings in New York City." While defendants maintain that he operated from the Atlanta office, plaintiff characterizes the Atlanta office as a "mail-drop office" and denies that he could be characterized as an Atlanta employee. It appears from the allegations that plaintiff reported to, and occasionally traveled to meet with, Parade's management in New York.

On October 2, 2007, while in Atlanta, plaintiff received a telephone call from Randy Siegel, president and publisher of Parade in New York, informing him that defendants had decided to close the Atlanta office and terminate both plaintiff's and his assistant's employment. On October 12, 2007, plaintiff went to New York to meet with Siegel to discuss the termination and to suggest an alternative to discharge. On October 16, 2007, Siegel telephoned plaintiff, then in West Virginia on business, and told him that his alternative plan had been rejected and that the Atlanta office would be closed on January 1, 2008, at which time plaintiff's employment would end.

Plaintiff commenced this age discrimination action under the NYSHRL and the NYCHRL, alleging that he was the oldest employee in the newspaper relations group and the only one who was terminated, that the economic rationale given for his termination

was pretextual, and that he had indisputably been an exemplary employee. Plaintiff also alleges that his former responsibilities were transferred to an employee in defendants' New York office who, at the age of 56, was "considerably younger" than plaintiff.

Defendants moved to dismiss the complaint under CPLR 3211(a)(2) for lack of subject matter jurisdiction and under CPLR 3211(a)(7) for failure to state a cause of action. The motion court agreed that it lacked subject matter jurisdiction over plaintiff's claims under the NYCHRL and NYSHRL, holding as a matter of law that the impact of defendants' alleged misconduct was not felt inside either New York City or New York State, as required by *Shah v Wilco Sys., Inc.* (27 AD3d 169 [2005], *lv dismissed in part, denied in part* 7 NY3d 859 [2006]).

We conclude that the complaint should not have been dismissed on a CPLR 3211 motion. The so-called "impact" rule as expressed in *Shah* should not be applied so broadly as to preclude a discrimination action *where the allegations support the assertion that the act of discrimination, the discriminatory decision, was made in this state.*

The New York State and New York City Human Rights Laws were enacted to combat discrimination within this state and city respectively (*see* Executive Law § 296[1][a] [NYSHRL];

Administrative Code of City of NY § 8-107[1][a] [NYCHRL]). The issue of subject matter jurisdiction arises where the alleged discrimination occurs in more than one state.

The assertion of this Court in *Shah*, that the NYCHRL is "limited to acts occurring within the boundaries of New York" (27 AD3d at 175), remains true in its essence, but does not resolve the question of subject matter jurisdiction in the case of acts occurring in this as well as other jurisdictions. To add a complication to the issue, I note that the NYSHRL by its terms may be applied to acts committed outside New York State if committed against a New York State resident (*see* Executive Law § 298-a[1]) -- although this provision is inapplicable in this instance, since plaintiff is a non-resident.

The issue here is how we define the concept of "acts occurring within [] New York." Under what, if any, circumstances may a non-resident be entitled to the coverage of the NYSHRL?

"When a non-resident seeks to invoke the coverage of the New York City and State human rights laws, he or she must show that the alleged discrimination occurred within New York City and New York State respectively" (*Rylott-Rooney v Alitalia-Linee Aeree Italiane-Societa Per Azioni*, 549 F Supp 2d 549, 551 [SD NY 2008]). Application of logic and common sense alone would dictate that if an employer located in New York made

discriminatory hiring or firing decisions, those decisions would be properly viewed as discriminatory acts occurring within the boundaries of New York. In fact, early case law from this Court supports that view.

The first such case involved a 1970 claim of sex discrimination brought before the New York City Commission of Human Rights (*see Matter of Walston & Co. v New York City Commn. on Human Rights*, 41 AD2d 238 [1973]). In *Walston*, an Illinois resident applied to the Gary, Indiana office of a securities trading firm to open a commodity futures account for her, and was initially told that the firm did not handle commodity accounts for women. When she expressed her displeasure, the manager of the Gary office sought approval for opening the account from the vice president in charge of commodity accounts, who was located in Chicago. The Gary office then sent her three forms to complete; one of the three was a "woman's commodity account form," a form that male applicants were not required to sign. The customer signed and returned the other two forms to the firm's New York City office but refused to sign the woman's commodity account form. When she called the New York City office the following month to inquire, she was informed that her application was refused because of her failure to sign that form.

After the customer filed a complaint with the New York City

Commission on Human Rights, the firm challenged the Commission's jurisdiction; the Commission rejected the challenge and ordered a hearing. Supreme Court granted the firm's article 78 petition challenging the Commission's assertion of jurisdiction through its holding a hearing. This Court reversed and dismissed the firm's petition, observing that the issue of jurisdiction was one of fact, because there was a factual dispute about the location from which the denial of the application emanated, and the record was "too incomplete to make an informed determination" as to "whether the allegedly discriminatory acts occurred in New York or elsewhere" (*id.* at 241-242).

The second applicable case is *Iwankow v Mobil Corp.* (150 AD2d 272 [1989]), in which this Court dismissed the NYSHRL claim of age discrimination on grounds of lack of subject matter jurisdiction, because the asserted jurisdictional nexus to New York did not include a discriminatory act. The plaintiff, who had been employed by the defendant corporation in London, alleged that his termination was "part of a world-wide reduction in force which was decided upon at corporate headquarters in New York"; however, he did *not* allege "that the decision to implement this reduction in an age-discriminatory manner originated at corporate headquarters" (*id.* at 273-274). This Court explained that "*absent an allegation that a discriminatory act was committed in*

*New York* or that a New York State resident was discriminated against, New York's courts have no subject matter jurisdiction over the alleged wrong" (*id.* at 274 [emphasis added]).

Following *Walston* and *Iwankow*, it seems apparent that a supportable allegation by an out-of-jurisdiction resident that a discriminatory employment decision was made against him or her in New York may be treated as a discriminatory act committed in New York and therefore as an act covered by New York's Human Rights Law. Yet, as the motion court recognized, this Court recently said that the place where the act of discrimination occurred is irrelevant (*see Shah*, 27 AD3d at 176). In granting summary judgment dismissing a discrimination claim brought under NYCHRL, the Court in *Shah* stated that "the locus of the decision to terminate [the plaintiff] is of no moment. What is significant is where the impact is felt" (*id.*).

After consideration of the *Shah* decision and the federal case law it cites in support, we decline to apply that portion of the *Shah* decision as the settled law of this State. Initially, we observe that the quoted language is not necessary to the holding, and therefore constitutes obiter dictum. As the *Shah* Court acknowledged, the plaintiff in that case, like the plaintiff in *Iwankow*, did not even "allege that the decision to terminate her was made in New York City" (*id.* at 175, citing

*Iwankow v Mobil Corp., supra*).

The *Shah* Court's grant of summary judgment dismissing the discrimination claim for lack of subject matter jurisdiction relied on the facts pointing exclusively to New Jersey events. Shah resided in New Jersey, and was working for a client located in New Jersey, was informed of her termination at that New Jersey office, and the reasons she was given for her termination -- insubordination, poor or inappropriate attitude, and inability to work in a team environment -- concerned her conduct at that New Jersey office. Indeed, the Court asserted that it could be "fairly inferred" from Shah's own account that the explanation for her termination was based upon her conduct at the New Jersey site; in fact, the majority explicitly rejected the dissenting Justice's suggestion that there were allegations from which it could be inferred that the termination decision was made in New York City (27 AD3d at 176).

Accordingly, we do not take issue with the result in *Shah*, insofar as it says it is based on facts exclusively pointing not only to an impact in New Jersey but also to a termination decision made in New Jersey, and the absence of an allegation that a discriminatory employment decision was made in New York. However, we view that portion of the *Shah* decision that asserts that "the locus of the decision to terminate her is of no

moment," as overbroad and unnecessary, lacking sufficient support in prior case law. We adopt and employ the reasoning of the District Court in *Rylott-Rooney v Alitalia-Linee Aeree Italiane-Societa Per Azioni* (549 F Supp 2d 549, 551-552 [SD NY 2008]), in which the court pointed out that the aspect of *Shah* precluding subject matter jurisdiction unless the impact was within this jurisdiction was dictum, and that prior New York case law had turned on whether it was alleged that a discriminatory act occurred in New York.

Examination of the Southern District Court case relied upon in *Shah*, as well as other federal cases employing a similar "impact" rule, fails to disclose any convincing reason to support adoption of a rule that a New York court does not have subject matter jurisdiction where a discriminatory decision was made here, but the impact may be said to have been felt elsewhere. Indeed, the reasoning of those federal cases has been convincingly challenged elsewhere.

While the *Shah* decision provided no direct citation for its assertions that "the locus of the decision to terminate [the plaintiff] is of no moment" and that "[w]hat is important is where the impact is felt," that aspect of its discussion ended with a citation to *Wahlstrom v Metro-North Commuter RR Co.* (89 F Supp 2d 506 [SD NY 2000]).

*Wahlstrom* concerned a female railroad conductor's claim of verbal and physical assault and sexual harassment by a coworker. While some of her numerous causes of action were upheld, the court granted summary judgment dismissing her causes of action against Metro-North Railroad under the NYSHRL and the NYCHRL. Relying on evidence that the employer had reasonably investigated the complaint of discriminatory conduct and taken corrective action, the court concluded that no reasonable finder of fact could conclude that Metro-North supported or condoned the coworker's conduct (*id.* at 527).

As to the claim under the NYCHRL, the District Court dismissed it because the incidents arguably comprising sexual harassment by the coworker that formed the basis for the discrimination claim took place in White Plains, outside of New York City. The court observed that "[t]he only allegation of sexual harassment that occurred in New York City was [the harasser's] final statement to plaintiff: 'You better shape up ... or you're going to get it,'" and that "[t]his statement, standing alone, hardly constitutes sexual harassment, let alone a hostile work environment" (*id.*).

The *Wahlstrom* court properly rejected the plaintiff's suggestion that subject matter jurisdiction under the NYCHRL could be based on the facts that Metro-North's equal employment

opportunity policies are distributed from its New York City offices, and the decisions to schedule, adjourn, and reschedule the coworker's disciplinary hearing were made there (*id.* at 527-528). Importantly, there was no claim that a *discriminatory* decision had been made in the employer's New York City office. Since decisions to adjourn or reschedule a disciplinary hearing or the issuance of equal opportunity policy statements cannot be permitted to alone form the basis for an assertion of discrimination, the court could have granted summary judgment dismissing the NYCHRL claim without further analysis. Yet, it went on to gratuitously assert that the NYCHRL only applies where the actual impact of the discriminatory conduct or decision is felt within the five boroughs, even if a discriminatory decision is made by an employer's New York City office, citing *Duffy v Drake Beam Morin, Harcourt Gen., Inc.* (1998 US Dist LEXIS 7215, *32-34, 1998 WL 252063, *11 [SD NY May 19, 1998]) and *Lightfoot v Union Carbide Corp.* (1994 US Dist LEXIS 6191, *16-18, 1994 WL 184670, *5 [SD NY May 12, 1994], *affd* 110 F3d 898 (2d Cir 1997).

However, neither *Duffy* nor *Lightfoot* provides appropriate support for our adoption of the "impact" rule. In *Lightfoot*, the plaintiff was employed in Connecticut by Union Carbide when his job was terminated as part of a "reduction in force" program effectuated by a "forced ranking" system; the plaintiff offered

proof establishing that his age was a factor in his termination. Notably, while the court upheld the plaintiff's federal and state age discrimination claims, it dismissed the plaintiff's claims under the NYCRHL "because there are no allegations that the defendants intentionally discriminated against him within the boundaries of New York City" (1994 US Dist LEXIS 6191, *17, 1994 WL 184670, *5). Of course, it was not enough that the company's use of the reduction-in-force program had been approved at a meeting in New York City; it had to be alleged that the decision to implement the program in a discriminatory manner had been made in New York. That pleading failure would have been sufficient to justify a dismissal if the claim had been by a nonresident. However, the court in *Lightfoot*, while acknowledging that the plaintiff was living in New York City at the time and occasionally worked at home, also went on to employ the "impact" analysis, and found that the impact on the plaintiff had "occurred while he was employed in Connecticut" (*id.*). This remark is puzzling, to say the least. In fact, under *Shah*, the plaintiff's residence in New York City would have been a critical consideration.

Following the *Lightfoot* decision, in *Duffy*, the Southern District Court dismissed the New York City and New York State Human Rights Law claims of a plaintiff who worked in New Jersey

and the New York City Human Rights Law claims of another plaintiff who worked on Long Island. It observed that the Human Rights Laws were limited to discriminatory acts occurring within their respective jurisdictions and that "nothing in the record suggest[ed] that either [plaintiff] was subjected to discriminatory conduct by [the defendant] in New York City" (1998 US Dist LEXIS 7215, *35; 1998 WL 252063, *12). It went on to reason that "even if, as [the plaintiffs] claim, the decision to fire them was made by [the defendant employer] at its headquarters in New York City, that fact, standing alone, is insufficient to establish a violation of the City Human Rights Law when the employees affected by that decision did not work in New York City" (*id.*).

The *Lightfoot* and *Duffy* cases remind us of the important distinction between a mere decision to terminate an employee and a *discriminatory* decision to terminate an employee. For instance, a nationwide or worldwide corporate staff-reduction policy may be decided on in a corporate headquarters in New York but implemented in a discriminatory manner only in an out-of-town branch office. Only if a discriminatory decision was made in New York may a claim of discrimination be actionable here. Thus, the allegations of a complaint must include a founded assertion that a firing decision was discriminatory in nature.

The *Duffy* decision is far from clear as to whether the plaintiffs asserted that the decision to fire them was made on a discriminatory basis. Other grounds for declining to apply *Duffy*'s ruling are discussed in a decision by the U.S. Court of Appeals for the District of Columbia (*see Schuler v Pricewaterhousecoopers, LLP*, 514 F3d 1365 [DC Cir 2008]). The *Schuler* court begins its analysis by pointing out that the New York State Human Rights Law itself "contains no requirement that the unlawful discriminatory impact occur in New York" (at 1377). It points out that the NYSHRL even specifically applies to acts committed outside New York State if committed against a New York State resident (citing Executive Law § 298-a[1]). Finally, it observes that the cases upon which the *Duffy* court relied "merely require[] [plaintiffs] to allege an in-state discriminatory act" and "say[] nothing about where plaintiffs may 'suffer[] discrimination'" (*id.* at 1378), and concludes, "[N]o New York authority ... suggest[s] that the impact of a discriminatory act must be felt within New York for the NYHRL to apply" (*id.* at 1379).

We agree with the *Schuler* court's view, and find nothing in the cited federal cases to convince us that an out-of-jurisdiction plaintiff is precluded from interposing claims under the NYSHRL and NYCHRL when the New York employer is alleged to

have made its employment decisions in a discriminatory manner here. We also note that the impact analysis suggested in *Duffy* and *Lightfoot* has not been uniformly adopted in federal decisions under New York law; a number of cases have held that the place where a discriminatory employment decision was made is the focus of the subject matter jurisdiction analysis (*see Hart v Dresdner Kleinwort Wasserstein Sec LLC*, 2006 US Dist LEXIS 56710, 2006 WL 2356157 [SD NY 2006]; *Tebbenhoff v Electronic Data Sys. Corp.*, 2005 US Dist LEXIS 29874, 2005 WL 3182952 [SD NY 2005], *affd* 244 Fed Appx 382 [2d Cir 2007]; *Torrico v International Bus. Machs. Corp.*, 319 F Supp 2d 390 [SD NY 2004]; *Launer v Buena Vista Winery, Inc.*, 916 F Supp 204 [ED NY 1996]).

Finally, we observe that it would be contrary to the purpose of both statutes to leave it to the courts of other jurisdictions to appropriately respond to acts of discrimination that occurred here.

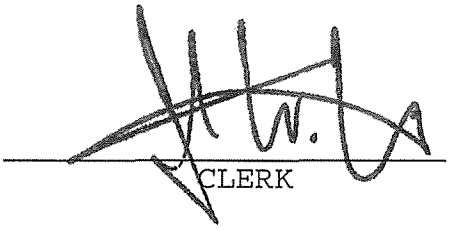
Since for purposes of this motion pursuant to CPLR 3211 we must accept as true the allegations that the decision to terminate plaintiff's employment was made in New York City *and* that the economic reasons given by the employer for the decision to terminate him were a pretext for discrimination on the basis of his age (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), we cannot reject as a matter of law at this

juncture plaintiff's claim that a New York City and State employer made a discriminatory decision here. If that assertion is ultimately established, it will be enough to demonstrate that the New York court has subject matter jurisdiction over his claims.

Accordingly, the appeal from the order of the Supreme Court, New York County (Martin Shulman, J.), entered July 7, 2008, which granted defendants' motion to dismiss the complaint, is deemed to be an appeal from the judgment, same court and Justice, entered July 24, 2008 (CPLR 5501[c]), dismissing the complaint, and, the appeal so considered, the judgment should be reversed, on the law, without costs, and the complaint reinstated.

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

ENTERED: MAY 7, 2009



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