SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 19, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Nardelli, Buckley, JJ.

1786 The People of the State of New York, Ind. 3115/04
Respondent,

-against-

Alfred Ford,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

Upon remittur from the Court of Appeals (11 NY3d 875 [2008]) for consideration of the facts, judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 16, 2005, convicting defendant, after a jury trial, of robbery in the first degree (two counts), robbery in the second degree (two counts) and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of 10 years, unanimously affirmed.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349

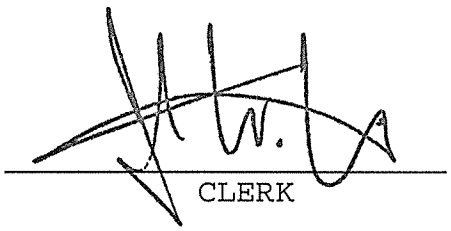
[2007]), the verdict was not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The complainant gave unrefuted testimony that he was in an elevator with defendant, who demanded $20 and stated, "I got a knife," while simultaneously moving his hand toward his pants pocket. Defendant then placed the complainant in a headlock and repeatedly punched him in his face, jaw and temple. After the incident, the complainant immediately flagged down a police officer and told him he was robbed. The officer then accompanied the complainant back to the building, where the complainant identified defendant. Based on the weight of this credible evidence, the jury was justified in finding the defendant "used or threatened the immediate use" of a knife in the course of the robbery, as the trial court charged, and in finding defendant guilty beyond a reasonable doubt.

The Court of Appeals has determined as a matter of law that the evidence, viewed in light of the court's unprotested charge, was sufficient to establish defendant's guilt of first-degree robbery (11 NY3d at 878). There is no basis for this Court to perform interest of justice review of defendant's sufficiency claim, which was fully preserved. Defendant's present argument

conflates interest of justice review of an unpreserved sufficiency claim with interest of justice review of an unpreserved claim of charging error.

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

ENTERED: NOVEMBER 19, 2009



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

509 Susan Midler, Index 116891/04
Plaintiff-Respondent,

-against-

Richard Crane, M.D.,
Defendant-Appellant.

Shaub Ahmuty Citrin & Spratt, LLP, Lake Success (Steven J. Ahmuty, Jr., of counsel), for appellant.

Ruskin Moscou Faltischek, P.C., Uniondale (Douglas A. Cooper and Dina Karman of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered March 19, 2008, upon a jury verdict, awarding plaintiff the principal sums of $500,000 for past pain and suffering and $2,000,000 for future pain and suffering, and bringing up for review an order, same court and Justice, entered December 17, 2007, which denied defendant's post-trial motion to set aside or reduce the verdict, affirmed.

The testimony at the trial of this medical malpractice action established the following relevant facts. Plaintiff's gynecologist referred her to defendant, a rheumatologist, after she began to experience pain in her joints. During her first visit to defendant in October 2000, he administered certain diagnostic tests. One of those tests yielded a false positive result for syphilis, and another showed the presence of an

antinuclear antibody. Those two results were significant because they constituted two of the eleven criteria the American College of Rheumatology (ACR) has determined should be used to diagnose lupus erythematosus, which is an autoimmune disease that can affect vital organs. When it involves the kidneys, it is termed lupus nephritis. According to the ACR, a person must have 4 of the 11 criteria before a definitive diagnosis of lupus can be made. Defendant also performed a urinalysis during the first visit. That test did not indicate any kidney disorder, which is another of the lupus criteria.

After plaintiff's initial visit, defendant diagnosed her with degenerative arthritis. He wrote a letter in November 2000 to the referring doctor, plaintiff's gynecologist, in which he stated that while plaintiff "lack[ed] the necessary specific criteria for the diagnosis of lupus or connective tissue disease[, c]ontinued monitoring will be required in order to make a more definitive diagnosis should there be any change in her symptom complex."

In February 2001, defendant diagnosed plaintiff with inflammatory arthritis, another of the ACR criteria for lupus. Over the next two years, defendant continued to treat plaintiff for the arthritic condition he had diagnosed. He also performed physical examinations and blood tests on plaintiff. At no time,

however, did defendant again do a urinalysis.

In October 2002, plaintiff was experiencing hair loss and visited Dr. Joel Curtis, an endocrinologist. Dr. Curtis performed several tests, including a urinalysis. The urinalysis results were positive for protein, which indicates a renal problem, another of the lupus criteria. Dr. Curtis instructed plaintiff to follow up with Dr. Crane. However, she did not see defendant again until January 2003. Dr. Curtis also directed his secretary to fax the lab results to defendant, but only the endocrine test results were received. Defendant denied ever having received the urinalysis results.

During plaintiff's January 2003 visit to defendant, she complained of swollen feet and ankles. For the first time since plaintiff's initial visit in October 2000, defendant performed a urinalysis. The urinalysis was positive for renal disease, and a biopsy confirmed to defendant that plaintiff had lupus and specifically, lupus nephritis. Defendant prescribed medications, which he told plaintiff would save her kidneys. However, plaintiff discontinued one of the medications and reduced the prescribed dosage of another because of their side effects. Thereafter, plaintiff's kidneys began to fail, requiring five months of dialysis treatment. In December 2003, plaintiff received a kidney transplant.

Plaintiff and defendant each offered the expert testimony of a rheumatologist concerning her treatment. Plaintiff's expert, Dr. Peter Barland, testified that defendant's failure to administer a urinalysis to plaintiff constituted a departure from good medical care because that test was the most effective for detecting kidney problems, one of the lupus criteria. He further testified that defendant should have been closely monitoring for this and other lupus indications because he already knew plaintiff had exhibited three of the criteria. He stated that urinalysis was a finer and more sensitive method of detecting kidney damage than the creatinine testing performed by defendant. Indeed, Dr. Barland testified that creatinine testing is nonspecific for kidney damage, and is only a preliminary step in discovering renal problems. Defendant's expert, Dr. Allan Gibofsky, testified that it was not necessary for defendant to perform urinalysis because prior to October 2002, plaintiff had exhibited no symptoms indicating possible kidney damage. However, he made clear that urinalysis was necessary to satisfy the renal disorder criteria.

At the charge conference plaintiff proposed a verdict sheet that asked the jury to separately consider whether defendant committed malpractice by failing to diagnose her lupus and/or by failing to properly monitor her for a fourth lupus criterion by

the administration of urinalysis. These two questions were consistent with plaintiff's pleadings; in her bill of particulars, she separately alleged those two theories of liability, as follows:

> Dr. Crane violated the accepted medical practices, customs and medical standards by failing to diagnose Plaintiff with Latent Lupus despite the clear signs and symptoms that she was suffering from that condition ... by failing to perform close clinical monitoring of Plaintiff's condition, including the failure to perform the appropriate and necessary lab studies that would have more clearly revealed Plaintiff's condition of systemic Lupus Erythematosus ... by failing to properly and appropriately follow-up, monitor and investigate Plaintiff's condition ... by failing to properly diagnose or recognize the deterioration, injury and/or damage that was occurring to Plaintiff's kidneys ... by failing to perform the proper and appropriate lab tests to recognize the deterioration.

Defendant objected to the verdict sheet, arguing it was redundant because, in his view, the failure-to-monitor theory was subsumed within the failure-to-diagnose theory. However, the trial court overruled the objection, stating that plaintiff presented two separate theories at trial and should be entitled to a separate verdict on each theory.

Also at the charge conference, defendant asked the trial court to instruct the jury that it could find for defendant if it determined he had committed an "error in professional judgment."

This request was based on defendant's theory that his decision to administer certain diagnostic tests other than urinalysis that he reasonably believed could reveal the presence of lupus was merely an incorrect choice between two viable options. The court declined to charge the jury on that theory, holding that it was not supported by the expert testimony, which the court viewed as establishing urinalysis as the only reliable diagnostic test for lupus.

The jury rendered a verdict finding that defendant did not depart from good and accepted medical practice in "not diagnosing and treating lupus at any time prior to January 31, 2003" and in "not diagnosing and treating the plaintiff ... for lupus nephritis at any time between October, 2002 and January 29, 2003." The jury also found that defendant did depart from good and accepted medical practice "in the manner in which he monitored the plaintiff ..., including not performing urinalysis tests between October 20, 2000 and January 29, 2003," and that this was a substantial factor in causing injury to plaintiff.

The jury decided that Dr. Curtis was negligent in not ensuring that the results of the urinalysis he performed on plaintiff reached defendant, but that this was not a substantial factor in causing plaintiff's injury. The jury also determined that plaintiff herself was negligent in failing to promptly heed

Dr. Curtis's instruction that she consult with defendant, and that this was a contributing factor in causing her injury. The jury further decided that plaintiff contributed to her own injury by waiting until February 24, 2003 to see a nephrologist, even though defendant had made that recommendation after diagnosing her with lupus in January 2003. While the jury found that plaintiff's decisions not to take prescribed medications as directed were negligent, it did not find that such negligence contributed to her injuries. The jury apportioned 40% of the responsibility for her injuries to plaintiff herself and the remaining 60% to defendant.

In moving to set aside the verdict, defendant argued that the verdict was inconsistent insofar as it found he was not negligent in failing to diagnose plaintiff's lupus but was negligent in failing to monitor her for additional criteria necessary to make a diagnosis of lupus. He further claimed that the jury's decision that Dr. Curtis failed to properly alert him as to the abnormal urinalysis result in October 2002 but was not responsible for plaintiff's injuries was against the weight of the evidence. Defendant also asserted that plaintiff failed to establish a prima facie case of medical malpractice because his decision to forego urinalysis in favor of different tests was an exercise of medical judgment. Finally, defendant argued that the

monetary award to plaintiff was excessive.

In evaluating the arguments of defendant, we must be guided by the principles stated by this Court in *McDermott v Coffee Beanery, Ltd.* (9 AD3d 195, 206 [2004]):

> [I]n the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Indeed, the court must cautiously balance the great deference to be accorded to the jury's conclusion ... against the court's own obligation to assure that the verdict is fair, and the court may not employ its discretion simply because it disagrees with a verdict, as this would unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty [internal citations and quotation marks omitted].

The jury's determination that defendant committed malpractice by failing to monitor plaintiff for the development of lupus was not inconsistent with its finding that he was not negligent in failing to diagnose and treat plaintiff for lupus. An inconsistency in a verdict exists "only when a verdict on one claim necessarily negates an element of another cause of action" (*Barry v Manglass*, 55 NY2d 803, 805 [1981]). Here, the verdict that defendant failed to diagnose lupus does not negate any element of the verdict that defendant failed to monitor plaintiff. The jury could reasonably have found, based on the evidence presented, that defendant could not have made a lupus

diagnosis based on the tests he did administer to plaintiff, because there was no evidence that in June 2002, the last time he performed any tests, plaintiff had a problem with her kidney. At the same time, and on the same evidence, it could reasonably have found that defendant failed in his obligation to continue administering the tests that would have eventually permitted the diagnosis. There was strong evidence, the results of the urinalysis performed by Dr. Curtis, that plaintiff had kidney damage in October 2002. Therefore, the jury would have been justified in determining that had defendant performed a urinalysis around that time, he would have diagnosed plaintiff with lupus and specifically, lupus nephritis, in time to treat the disease and prevent kidney loss.

The holding in *McPhillips v Herzig* (172 AD2d 427 [1991]), relied on by defendant and the dissent, does not affect this analysis. In that case, the plaintiff visited the defendant doctor upon experiencing acute abdominal pain. The doctor diagnosed her with pelvic inflammatory disease without doing a pelvic examination. Six days later the plaintiff was admitted to a hospital, where it was determined that the initial pain was caused by diverticulitis of the sigmoid colon, which the defendant would have discovered had he performed a pelvic exam. After trial, a jury found the defendant negligent in failing to

perform the pelvic examination when the plaintiff was in his office. However, the jury also found the defendant not negligent in failing to make a correct diagnosis and institute appropriate treatment. This Court remanded for a new trial based in part on what it determined was an inconsistent verdict.

McPhillips is distinguishable because, on the facts of that case, it was impossible for the jury to separate the failure to diagnose from the failure to monitor. The defendant's malpractice occurred in one single act of omission. In one office visit, the defendant failed to diagnose an actual illness or condition the plaintiff had at the time, because he failed to carry out a particular diagnostic procedure. Here, in contrast, the facts were such that the jury could reasonably have viewed the failure-to-monitor theory as diverging from the failure-to-diagnose theory after plaintiff's visit in June 2002, the last time defendant administered diagnostic tests. In contrast to *McPhillips*, the evidence at trial did not establish that plaintiff had lupus at that time. The evidence clearly established, however, that defendant had a continuing obligation to test for a fourth lupus criterion. Therefore, the jury could reasonably have determined that the failure-to-diagnose theory fell by the wayside in June 2002, but that defendant had the continuing duty to monitor plaintiff, and thus the failure-to-

monitor theory of liability was applicable. Even defendant, as early as his letter of November 6, 2000 to plaintiff's gynecologist, recognized this duty when he wrote that "Continued monitoring will be required in order to make a more definitive diagnosis should there be any change in [plaintiff's] symptom complex."

Nor is the jury's finding that Dr. Curtis was negligent in not imparting to defendant the results of the urinalysis he performed on plaintiff inconsistent with its finding that this was not a substantial factor in causing plaintiff's injuries. The issue of Dr. Curtis's negligence was not inextricably intertwined with the issue of proximate cause such that the former could not exist without the latter (*see Brown v New York City Tr. Auth.*, 50 AD3d 377 [2008]). For example, the jury could reasonably have believed that defendant, being the physician in the better position to have diagnosed lupus in time to successfully treat it, was solely responsible for ensuring that the proper diagnostic tests were administered (*see Ledogar v Giordano*, 122 AD2d 834, 836-837 [1986]).

Further, plaintiff established her prima facie entitlement to judgment by presenting expert evidence that urinalysis was the most appropriate method for diagnosing lupus in this case. Defendant had suspected lupus as early as plaintiff's first visit

with him, and acknowledged to her gynecologist that monitoring for the disease was necessary. The trial court did not err by refusing to charge the jury on the professional judgment doctrine. Nor was the jury's verdict against the weight of the evidence, since based on the expert testimony, both the court and the jury would have been justified in concluding that urinalysis was the most direct method for diagnosing kidney damage. Indeed, considering that strong signs of lupus existed at the very outset of plaintiff's treatment, the trial court and the jury appropriately found that defendant had an obligation to take all available diagnostic measures, including urinalysis. Since urinalysis was the most relevant test, the court and the jury could reasonably have found that defendant's failure to perform urinalysis was malpractice per se, and not merely a choice among medically acceptable alternatives (*see Nestorowich v Ricotta*, 97 NY2d 393, 399 [2002]).

Finally, the awards for past and future pain and suffering do not deviate materially from what would be reasonable compensation under the circumstances (CPLR 5501[c]).

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

SWEENY, J. (dissenting)

Because the jury's finding that defendant departed from good and accepted medical practice in failing to monitor plaintiff for lupus was inconsistent with its finding that there was no such departure in failing to diagnose and treat her for that disease, I must dissent.

Plaintiff was referred to defendant, a board certified rheumatologist, by her gynecologist, Dr. Grossman, in October 2000. At that time, she complained of pain in her knees, wrists and ankles. After reviewing plaintiff's lab results, defendant performed a urinalysis in order to check for possible kidney disease. The test results revealed normal findings, thus presenting no evidence of kidney disease. Defendant diagnosed plaintiff at that time with degenerative arthritis.

Defendant sent a letter to Dr. Grossman, dated November 6, 2000, in which he stated:

> Laboratory tests indicate a positive ANA although patient lacks the necessary specific criteria for the diagnosis of lupus or connective tissue disease. Continued monitoring will be required in order to make a more definitive diagnosis should there be any change in her symptom complex.

Defendant treated plaintiff for inflammatory arthritis in 2001 and 2002. He performed physical evaluations and blood testing, and continued to monitor plaintiff for signs of lupus.

During this time he did not perform further urinalysis.

In October 2002, plaintiff saw Dr. Joel Curtis, an endocrinologist, with complaints of hair loss. Dr. Curtis attributed this condition to the type of shampoo plaintiff was using. As part of his examination, he conducted a urinalysis. The results were abnormal, and he instructed plaintiff to return to defendant for follow-up care.

Dr. Curtis testified at trial that he directed his secretary to send the abnormal urinalysis results to defendant. His secretary testified at her EBT that she believed she faxed all six pages of plaintiff's lab results to defendant.

In November 2002, plaintiff sent a fax to defendant advising him that she stopped taking her arthritis medication, she was feeling better, that her hair was growing back, and that her recovery was "a miracle."

In early 2003, plaintiff made an appointment to see defendant, who conducted examinations on January 23 and 29. At those appointments, defendant performed a blood test and urinalysis. Based upon those test results and his examination, defendant diagnosed plaintiff with renal disease, pending the results of a biopsy to confirm his suspicion that plaintiff had lupus. He prescribed medication for plaintiff, and on January 29 he directed plaintiff to consult with a nephrologist.

On March 20, 2003, plaintiff sent defendant a fax stating that she wished to discontinue her Cytoxan medication because she was concerned about her hair loss. Plaintiff took this step despite the fact that she had been told that the Cytoxan would save her kidneys. Defendant then prescribed Imuran and Prednisone, which plaintiff self-tapered because of its effects on her face.

In June 2003, plaintiff was hospitalized for kidney failure and underwent five months of dialysis. In December 2003, she underwent kidney transplant surgery.

At trial, defendant testified that there are 11 criteria set forth by the American College of Rheumatology for a diagnosis of lupus. The presence of any 4 of those criteria indicates the patient has lupus.

The lab tests from plaintiff's first visit on October 2000 showed a high ANA and false positive syphilis test, which are two of the 11 criteria. Defendant's diagnosis of inflammatory arthritis in February 2001 constituted a third criterion. Defendant acknowledged that he had a responsibility to continue to monitor plaintiff for the fourth criterion, which he stated he did by blood testing.

Defendant testified that he received a two-page fax from Dr. Curtis, but those pages were endocrine test results and did not

contain any information regarding abnormal urinalysis test results. He also stated that until January 2003, plaintiff did not show any symptoms that would have necessitated further urinalysis.

Plaintiff testified that she called defendant a number of times to ensure he had received Dr. Curtis's test results. She sent defendant a fax on October 30, 2002, asking him to call her after reviewing those results. In that fax, she stated:

> Dr. Curtis informed me that . . . the cause of the problem is not related to the endocrine system. Could the problem of the hair loss have been the Minocin medication?

This is consistent with defendant's testimony that he received only a two-page fax report concerning endocrine test results from Dr. Curtis. Neither plaintiff's fax nor the two pages defendant testified he received from Dr. Curtis mentioned anything about a urinalysis.

Plaintiff also testified that defendant told her to see an nephrologist on January 29, 2003, but she did not see one until she returned from her vacation to Hawaii on February 20.

Plaintiff's experts testified that defendant should have performed frequent urinalyses because he should have suspected that plaintiff had lupus. They opined that blood testing, as defendant had been doing, was not the correct way to detect

kidney disease. Moreover, plaintiff's expert rheumatologist testified that there are situations where a patient presents enough characteristic findings of lupus that the treating doctor need not wait until the fourth criterion presents itself in order to diagnose lupus. One expert stated, however, that the testing performed by defendant in June 2002 did not evidence any signs of kidney disease.

Defendant's rheumatology expert testified that urinalysis was not required until January 2003, when plaintiff showed specific signs of kidney disease. He also testified that blood testing was appropriate, and there was no indication in the laboratory findings up to August 2002 that required urinalysis. He opined that had urinalysis testing been performed in the summer of 2002, the results would likely have been normal.

Defendant objected to the verdict sheet proposed by plaintiff, which required specific answers for multiple interrogatories. These interrogatories were based on two theories - one being the failure to timely diagnose lupus and the other being the failure to properly monitor plaintiff's condition, specifically by failing to conduct further urinalysis. Defendant argued that the failure to monitor and failure to diagnose were two overlapping theories and would result in inconsistent verdicts. He instead sought a verdict sheet asking

whether defendant had departed from good and accepted medical practice in failing to diagnose lupus prior to January 2003. The court ruled that the two issues were "related, but I do think they're separate" and submitted the plaintiff's proposed verdict sheet to the jury.

The jury found that defendant did not depart from good and accepted medical practice "in not diagnosing and treating lupus at any time prior to January 31, 2003" (interrogatory 1[a]) and "in not diagnosing and treating . . . lupus nephritis at any time between October, 2002 and January 29, 2003" (interrogatory 3[a]). The jury did find, however, that defendant departed from good and accepted medical practice in his monitoring of plaintiff, including not performing urinalysis tests between October 20, 2002 and January 29, 2003 (interrogatory 2[a]) and that this departure was a substantial factor in causing plaintiff's injuries (interrogatory 2[b]).

The jury also found that nonparty Dr. Curtis departed from good and accepted medical practice by not ensuring that defendant actually received the abnormal urinalysis results of October 2002 (interrogatory 5[a]) and by not including those results in his consult letter of November 6, 2002 which was forwarded to Dr. Grossman (interrogatory 6[a]), but that these departures were not a substantial factor in causing injury to plaintiff

(interrogatories 5[b] and 6[b]).

As to plaintiff, the jury determined she was negligent in not returning to defendant's office prior to January 23, 2003 after being directed to do so by Dr. Curtis in October 2002 (interrogatory 7[a]), and further negligent when she did not consult with a nephrologist until February 24, 2003 (interrogatory 8[a]) and that both instances of negligence were substantial factors in causing her injuries (interrogatories 7[b] and 8[b]). Plaintiff was further found to be negligent in discontinuing her Cytoxan medication (interrogatory 9[a]) and in self-tapering her Prednisone medication in April and May 2003 (interrogatory 10[a]) although the jury found this negligence was not a substantial factor in causing her injury (interrogatories 9[b] and 10[b]).

Where a jury's responses to interrogatories "are inconsistent with each other and one or more is inconsistent with the general verdict," the trial court's options are to order either reconsideration by the jury or a new trial (CPLR 4111[c]). These statutory alternatives are the only available options under

those circumstances (*Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 40 [1980]; *Sobie v Katz Construction Corp.*, 189 AD2d 49, 53 [1993]).

An examination of the jury's answers to the interrogatories demonstrates an inconsistency that mandates a new trial. The jury's finding in interrogatory 2(a) that defendant departed from good and accepted medical practice in not monitoring plaintiff's condition, including not performing urinalysis testing from October 20, 2000 through January 29, 2003, is inconsistent with its findings that there was no departure in diagnosing and treating plaintiff for lupus prior to January 31, 2003 (interrogatory 1[a]) or at any time between October 2002 and January 29, 2003 (interrogatory 3[a]). The finding that there was no departure in defendant's failure to diagnose at any time covers the same period in which defendant was found to have departed from accepted practice in failing to monitor plaintiff's condition. Such monitoring is not merely "related" to the diagnosis question, as the trial court found, but is, as defendant argued, part and parcel of the diagnosis process. Indeed, plaintiff's experts opined that urinalysis was the only proper way to make an early diagnosis of lupus, i.e., before the disease had progressed so far as to have an irreversible impact on the patient's kidneys. Thus, for the jury to conclude that

defendant did not depart from accepted practice in failing to diagnose lupus at any time prior to January 2003, it could not have consistently found that his failure to conduct urinalysis testing in order to promptly arrive at his diagnosis was a departure from accepted medical practice during part of that time frame.

In addition, the jury finding that nonparty Dr. Curtis departed from good and accepted medical practice by not ensuring that defendant received the abnormal findings of the urinalysis conducted by him on October 3, 2002 (interrogatory 5[a]) but that this was not a substantial factor in causing plaintiff's injury (interrogatory 5[b]) is inconsistent with the findings relating to defendant. Dr. Curtis was found to have departed from accepted practice during the same period that the jury found defendant also departed from the standard in failing to monitor plaintiff's condition. Yet the jury inexplicably found defendant's departure to be a cause of plaintiff's injuries while at the same time finding that Dr. Curtis's departure was not. This inconsistency cannot be explained by a reasonable view of the evidence submitted at trial.

The interrogatories and issues here are strikingly similar to those submitted to the jury in *McPhillips v Herzig* (172 AD2d 427 [1991]). *McPhillips* involved theories of medical malpractice

predicated, as here, on failure to diagnose and failure to monitor. The *McPhillips* jury found the defendant physician did not depart from good and accepted medical standards of treatment in failing to diagnose and treat the disease condition in question, i.e., diverticulitis of the sigmoid colon. However, it also found the defendant did depart from such standard in failing to perform a pelvic exam, which was a specific diagnostic test used to diagnose the plaintiff's condition. We held (at 428) that the special verdict was "inconsistent [in] finding both that defendant was negligent in failing to do a pelvic examination and then responding 'no' to the question[:] 'Was defendant negligent in failing to make a correct diagnosis and institute appropriate treatment?'"

While the facts of *McPhillips* differ slightly, the principle remains the same. I cannot agree with the majority statement that in *McPhillips* "it was impossible for the jury to separate the failure to diagnose from the failure to monitor." It is true that the malpractice in *McPhillips* occurred in one office visit, as opposed to here, where it took place over a period of time. However, both juries found the respective defendants liable for failing to conduct specific diagnostic tests, but not liable for failing to diagnose the condition that the test was designed to identify.

I do not dispute the majority's conclusion that defendant had a duty to monitor plaintiff's condition. I must take issue however, with the conclusion that "the jury could reasonably have viewed the failure-to-monitor theory as diverging from the failure-to-diagnose theory," especially since, at the time of the first diagnostic testing, plaintiff exhibited three markers for lupus, a situation that was certainly serious enough to warrant further monitoring and testing, which was not done here.

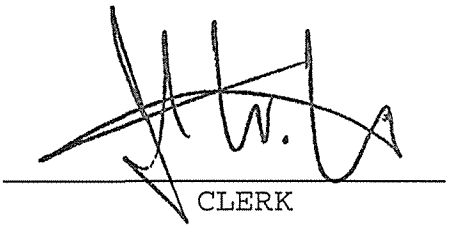
Nor can I agree with the majority's conclusion that the jury's determination that Dr. Curtis's negligence in not imparting to defendant the results of the urinalysis he performed on plaintiff is not inconsistent with its finding that such negligence was not a substantial factor in causing plaintiff's injuries. This conclusion assumes that defendant knew he only received a partial set of lab results. His testimony at trial was that plaintiff showed no symptoms warranting further urinalysis until January 2003; Dr. Curtis's examination took place in October 2002, so defendant would have had no reason to assume that Dr. Curtis performed a urinalysis test. While the majority faults defendant for not making further inquiry into Dr. Curtis's examination, based upon his testimony, it is apparent that he had no reason to make such inquiry.

In short, the verdicts are fatally inconsistent. As a

result, the judgment should be vacated, the order denying defendant's motion for a new trial should be reversed, and the motion granted.

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

ENTERED: NOVEMBER 19, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Abdus-Salaam, JJ.

695 The People of the State of New York, Ind. 3800/06
Respondent,

-against-

Luis Parada,
Defendant-Appellant.

Glenn A. Garber, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 18, 2007, convicting defendant, after a jury trial, of course of sexual conduct against a child in the first degree, and sentencing him to a term of 20 years, affirmed.

The court properly admitted the victim's disclosure to her cousin, as it was made during the period wherein she was being sexually abused. We have held that "the prompt outcry exception" is applicable to "an outcry made . . . at the end of a course of sexual conduct" (*People v Stuckey*, 50 AD3d 447, 448 [2008], *lv denied* 11 NY3d 742 [2008]). Although the victim's disclosure to her aunt did not qualify under that exception, any error in admitting that evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]; *see also People v Leon*, 209 AD2d 342, 343 [1994], *lv denied*, 84 NY2d 1034 [1995]).

Defendant did not preserve his other challenges to prior consistent statements by the victim, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. The statements at issue, contained in medical records, were sufficiently related to diagnosis and treatment to be admissible (*see People v Rogers*, 8 AD3d 888, 892 [2004]; *People v Bailey*, 252 AD2d 815 [1998]), *lv denied* 92 NY2d 922 [1998]). A statement made by the victim to a detective was rendered admissible by the prior defense cross-examination of the detective regarding the same matter (*see People v Melendez*, 55 NY2d 445, 451-452 [1982]; *People v Torre*, 42 NY2d 1036, 1037 [1977]). A trial court has the discretion to decide "door opening" issues "by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression" (*People v Massie*, 2 NY3d 179, 184 [2004]). Here, the court's ruling was within its discretion and should not be disturbed.

Defendant's challenges to the People's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also find that the challenged portions of the summation constituted permissible

argument (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]), with the exception of arguments that tended to treat the expert testimony on typical victim behavior as evidence that the alleged sexual conduct actually occurred (*see People v Banks*, 75 NY2d 277, 293 [1990]). While the prosecutor improperly cited expert testimony to suggest that the victim's change in behavior was indicative of her having been abused, we find no basis to disturb the jury's determination regarding the credibility of the victim's strong testimony, and find the error to be harmless in any event (*see People v Bennett*, 273 AD2d 108 [2000], *lv denied* 96 NY2d 797 [2001]).

To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defense counsel's failure to object, or to make specific objections to the prosecutor's summation and to certain prior consistent statements by the victim, did not cause defendant any prejudice or deprive him of a fair trial. Even if trial counsel had successfully objected to the evidence and summation comments

that defendant now challenges on appeal, we do not find any reasonable probability that the outcome of the trial would have been different.

All concur except Acosta and Abdus-Salaam, JJ. who dissent in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting)

I would reverse the conviction based on the trial court's erroneous admission of improper expert testimony as well as clearly hearsay evidence. Given that the only evidence of defendant's guilt was the testimony of the 11-year-old complaining witness and that there was no physical evidence, I believe the errors were not harmless and that defendant is entitled to a new trial. I cannot agree with the majority's conclusion that there is no reasonable probability these errors, which were substantial, affected the outcome of the trial. Furthermore, to the extent that certain evidentiary errors were not preserved for our review, I believe we should exercise our power to address them as a matter of discretion in the interest of justice, given the cumulative effect of the errors committed here.

In July 2006 the grand jury returned an indictment against defendant with a single count of course of sexual conduct against a child based on the allegations of a girl, then age 10, that defendant, her stepfather's best friend, had sexually molested her two or more times between December 2002 and December 2004, while he was babysitting for her and her brothers. These allegations were made in the summer of 2006. At the trial in May 2007, the girl testified that defendant had touched her "front

[private] part" and "put his front part in my back part." Defendant was 36 years old and had no prior criminal history. He testified in his defense and asserted his innocence throughout the case.

The majority acknowledges it was error for the prosecutor to use the expert testimony of the psychologist to prove that abuse occurred, but concludes this error was harmless. While my colleagues find no basis to disturb the jury's determination regarding the credibility of the victim's "strong testimony," I believe that this error, along with the other errors, tainted the trial. The rationale for the rule that expert testimony cannot be used to show that the victim demonstrated behavior consistent with other victims of abuse is that "the admission of such testimony would be *unduly prejudicial* since, although the presence of behavioral symptoms does not necessarily indicate that an act of sexual abuse took place, the clear implication of such testimony is that it was more likely than not that the child had been sexually abused" (*People v Shay*, 210 AD2d 735, 736 [1994, emphasis added], *lv denied* 85 NY2d 980 [1995]). I am not persuaded that this unduly prejudicial testimony did not affect the outcome of the trial.

I disagree with the majority's conclusion that there is no merit to defendant's challenges to the admission of prior

consistent statements by the victim. There was no proper basis to admit these prior statements, which were offered to the jury through the testimony of several witnesses.

It was error to permit the pediatric nurse to testify about statements the child had made to her in the course of a forensic examination conducted at the Children's Advocacy Center in July 2006, and to admit the unredacted records containing the nurse's notes about descriptions of the alleged abuse given by the child. Contrary to the majority's conclusion that the statements at issue were sufficiently related to diagnosis and treatment to be admissible, it is evident that the purpose of the nurse's examination, which was arranged by law enforcement and was conducted over a year after the alleged abuse had ended, was for the purpose of a criminal investigation.

Therefore, all of the statements made by the child during the course of the forensic examination were inadmissable (see *People v Ballerstein*, 52 AD3d 1192 [2008]). In contrast, both *People v Rogers* (8 AD3d 888 [2004]) and *People v Bailey* (252 AD2d 815 [1998], *lv denied* 92 NY2d 922 [1998]), relied upon by the majority, involved statements contained in a hospital record made to hospital staff and were deemed to be germane to the victims' medical treatment and diagnosis.

Reversible error was also committed by the admission of

bolstering pretrial statements (*see People v McDaniel*, 81 NY2d 10, 18 [1993]; *People v Shay*, 210 AD2d 735, *supra*). The trial court permitted both the child and her aunt to testify about the child's May 2006 disclosure of the abuse to the aunt. As conceded by the People, this disclosure, made over a year after the period of abuse had ended, cannot qualify as a "prompt outcry" exception (*see McDaniel*, 81 NY2d at 18, where it was held that statements made by the complainant days later could not be admitted as a prompt outcry because they were not made "at the first suitable opportunity"; *People v O'Sullivan*, 104 NY 481, 486 [1887]); *see also* this Court's opinion in *People v Leon*, 209 AD2d 342, 343 [1994], *lv denied* 84 NY2d 1034 [1995], where we noted that a child's report to her mother in June 1988 of abuse that had occurred in the winter of 1987 and the spring of 1988 was "insufficiently prompt").

Nor should the prior consistent statement have been admitted to rebut a claimed recent fabrication, because the girl's statement to her aunt in May 2006 did not predate whatever motive the girl may have had to fabricate in the first place. "[F]or the prior consistent statement to have been admissible it would have to have been shown that it preceded the making of the plan [to bring trumped up charges]. But there was no such showing" (*People v Davis*, 44 NY2d 269, 278 [1978]); *cf. People v Cardona*,

60 AD3d 493, 494 [2009], *lv denied* 12 NY3d 924 [2009]). The error was magnified when this testimony was read back to the jury upon the jury's specific request during deliberations.

Additionally, the trial court committed error by permitting a detective, on redirect questioning, to testify in detail about the child's statement to him concerning the alleged abuse. There was no applicable hearsay exception and no legitimate non-hearsay purpose for which this testimony was admissible. The People argue that the prosecutor had taken care not to elicit on direct examination the contents of the girl's statement to the detective, but that on cross-examination defendant opened the door by questioning the detective about a portion of the statement. However, the cross-examination pertained to the complainant's testimony that none of her brothers had been in the apartment when she was alone with defendant, and whether she had told the detective that during or immediately after the incident one of her brothers had entered the apartment. This cross-examination did not open the door to specific testimony about the details of the abuse.

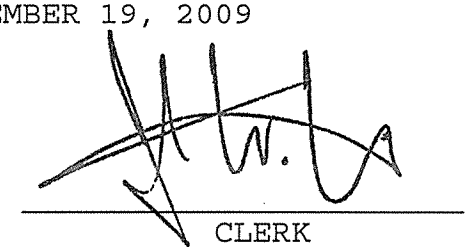
Accordingly, the cross-examination opened the door to some, but not all of the hearsay testimony (*see People v Massie*, 2 NY3d 179 [2004]), and it was error to permit the detective to testify as to the full graphic details of the girl's statement describing

the abuse. While the majority points out that the trial court has discretion to decide "door-opening" issues, I believe it was an abuse of discretion to permit this testimony.

At bottom, the cumulative effect of these evidentiary errors on a conviction that rests essentially on the credibility of an 11-year-old child cannot be termed harmless, and this conviction should be reversed and the matter remitted for a new trial (*see People v Mercado*, 188 AD2d 941 [1992]).

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

ENTERED: NOVEMBER 19, 2009



CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1494 The People of the State of New York, Ind. 4139/06
Respondent,

-against-

Keke Cuffee,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner and Jan Hoth of counsel), for appellant.

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

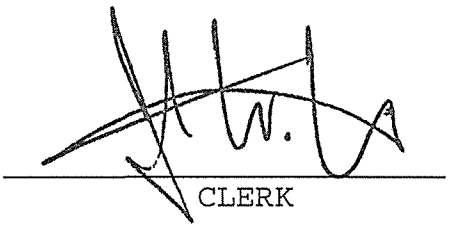
Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered January 28, 2008 convicting defendant, after a jury trial, of assault in the second degree, and sentencing her to a term of 20 days, with 5 years' probation, unanimously affirmed.

Defendant's challenge to the court's reasonable doubt charge is of a type that requires preservation (*see People v Thomas*, 50 NY2d 467, 472 [1980]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal. The instruction was not constitutionally deficient, because it unequivocally informed the jury that the People had the burden of proving every element of the crime beyond a reasonable doubt (*see* CPL 300.10[2]; *People v Bonilla*, 51 AD3d 585 [2008], *lv denied* 11 NY3d 734 [2008]). We similarly conclude that the absence of any objection to the

charge by trial counsel did not deprive defendant of effective assistance.

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

ENTERED: NOVEMBER 19, 2009



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Friedman, J.P., Moskowitz, Freedman, Abdus-Salaam, JJ.

1495 Calogero Logiudice, Index 313093/07
Plaintiff-Respondent,

-against-

Adele Logiudice,
Defendant-Appellant.

Field Lomenzo, P.C., New York (David A. Field of counsel), for appellant.

Blangiardo & Blangiardo, Cutchogue (Frank J. Blangiardo of counsel), for respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered March 3, 2009, which denied defendant's motion to rescind a stipulation of settlement, unanimously affirmed, without costs.

The courts "encourage[] property settlements through stipulation and will exercise judicial review sparingly" (*Lockhart v Lockhart*, 159 AD2d 283, 283 [1990]). Because of the fiduciary relationship between husband and wife, separation agreements may be set aside "under circumstances that would be insufficient to nullify an ordinary contract" (*Levine v Levine*, 56 NY2d 42, 47 [1982]). Nonetheless, efforts to set aside such agreements will be subject to a "'far more searching scrutiny'" and will be "less likely to prevail where the party had the benefit of independent representation during the negotiation and execution of the agreement" (*id.* at 48 [citations omitted]).

Defendant asserts that the stipulation should be set aside on the grounds of duress, overreaching, and unconscionability. However, the stipulation at issue was negotiated and executed by the parties' counsel, before a special referee, and in none of defendant's submissions is there any allegation that plaintiff demanded that she sign the stipulation, that he insisted on any particular financial provision, or that he made any other demand relating to the divorce proceedings. Defendant's assertions that she lacked the mental capacity to enter into the stipulation (*see Blatt v Manhattan Med. Group,* 131 AD2d 48, 51-52 [1987]) were not advanced below, hence are unpreserved on this appeal (*Levi v Levi*, 46 AD3d 520, 521 [2007], *lv dismissed* 10 NY3d 882 [2008]; *State of N.Y. Higher Educ. Servs. Corp. v Sferrazza*, 84 AD2d 874, 875 [1981]), and belied by the record.

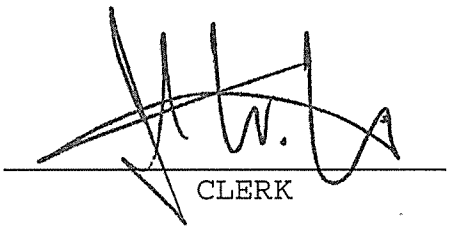
An unconscionable agreement is one which no person in his or her senses and not under delusion would make on the one hand, and which no honest and fair person would accept on the other (*Christian v Christian*, 42 NY2d 63, 71 [1977]; *McCaughey v McCaughey*, 205 AD2d 330, 331 [1994]). The stipulation provided for defendant to receive approximately 60% of the marital assets, as well as exclusive possession of the marital residence, and made no provision for payment of maintenance. The parties had been married for 42 years. Plaintiff was 76 years old and had

been retired for 15 years. Defendant was 61 years old and was still employed as a legal secretary. Under these circumstances, the stipulation was not so "manifestly unjust" as to require it to be set aside as unconscionable *(Santini v Robinson*, 57 AD3d 877, 880 [2008]).

Likewise, because the stipulation was not unfair on its face, it should not be set aside for overreaching (*see Levine*, 56 NY2d at 48-49). As noted, the parties were each represented by counsel during the negotiation and execution of the agreement (*see id.* at 48).

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

ENTERED: NOVEMBER 19, 2009



CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1496-
1497 Henderson J. Prescod, Index 16327/05
Plaintiff-Appellant,

-against-

Betty Leggiero O'Brien, etc.,
Defendant-Respondent.

Robert I. Gruber, New York, for appellant.

Eisenberg & Kirsch, Liberty (Michael D. Wolff of counsel), for respondent.

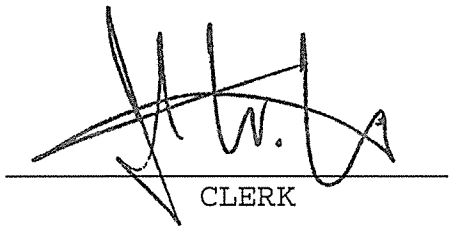
Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 1, 2008, which, in an action for personal injuries sustained in a rear-end collision, granted defendant's decedent's motion to vacate an order, entered after inquest, finding that plaintiff sustained a serious injury and directing entry of a judgment awarding plaintiff damages of $195,000, and vacated the finding of serious injury and the award of damages made after the inquest but not the finding of fault necessarily made in the order that directed the inquest, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 4, 2008, which granted the same relief upon condition that defendant's decedent serve and file a written withdrawal of the disclaimer of coverage by his insurance carrier, unanimously dismissed, without costs, as superseded by the appeal from the

August 1, 2008 order.

The motion court correctly found that while defendant's decedent offered no evidence on the issue of fault, he did show a meritorious defense on the issue of serious injury, and properly vacated his default upon a showing that his many illnesses and disabilities rendered his failure to appear excusable (CPLR 5015[a][1]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: NOVEMBER 19, 2009



CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1498 In re Taliya G., and Another,

Children Under the Age
of Eighteen Years, etc.,
- - - - -
Jeannie M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

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

Karen Freedman, Lawyers for Children, Inc., New York (Hal Silverman of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about October 30, 2008, which, upon a fact-finding determination that respondent mother neglected the subject children, placed the children in the custody of petitioner Commissioner of Social Services of New York County until the completion of a permanency hearing scheduled for January 15, 2009, unanimously affirmed, without costs.

There is no basis for rejecting the court's finding, based on its credibility determinations (*see Matter of Nakym S.*, 60 AD3d 578 [2009]), that respondent knew or should have known of her live-in boyfriend's drug business but nevertheless allowed

him to reside in the apartment with her seven-year-old son, who had access to the drugs stored in the dresser in his bedroom (*see Matter of Roy R.*, 6 AD3d 213 [2004]; *Matter of Michael R.*, 309 AD2d 590 [2003]). In *Matter of Hiram V.* (162 AD2d 453 [1990]), on which respondent relies, it was found that there was no imminent risk of harm because the mother was estranged from the father and credibly denied knowledge of the presence of narcotics.

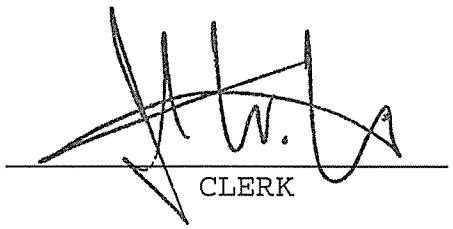
There was no need for a delegation of authority for the laboratory report analyzing the drugs, because the report was not a hospital or private agency record "relating to a child" (*see* Family Court Act § 1046[a][iv]). There were reasonable assurances of the identity and unchanged condition of the drugs (*see People v Valdez*, 41 AD3d 316 [2007], *lv denied* 9 NY3d 883 [2007]; *People v Epps*, 8 AD3d 85 [2004], *lv denied* 3 NY3d 673 [2004]).

The finding of derivative neglect with respect to the younger child, an infant, is supported by the evidence of neglect with respect to the older child, which demonstrates "such an impaired level of parental judgment as to create a substantial risk of harm for any child in [respondent's] care" *Matter of Joshua R.*, 47 AD3d 465, 466 [2008, *lv denied* 11 NY3d 703 [2008]). In addition, evidence showed that the seven-year-old had access

to the drugs and could have given them to the infant; petitioner was not required to demonstrate that the children were left together unsupervised.

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

ENTERED: NOVEMBER 19, 2009



Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1499 Michael Meyer, et al., Index 109952/04
Plaintiffs-Appellants,

-against-

Alex Lyon & Son Sales Managers
& Auctioneers, Inc., et al.,
Defendants-Respondents,

Hitachi Maxco, Ltd., et al.,
Defendants.

[And a Third-Party Action]

RAS Associates, PLLC, White Plains (Luis F. Ras of counsel),for appellants.

Jones Garneau, LLP, Scarsdale (Clifford I. Bass of counsel), for Alex Lyon & Son Sales Managers & Auctioneers, Inc., respondent.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for NES Equipment Services Corporation, respondent.

Colucci & Gallaher, P.C., Buffalo (Anthony J. Colucci, III of counsel), for JLG Industries, Inc. and JLG Equipment Services, Inc., respondents.

Harris Beach PLLC, New York (Robert A. Schaefer, Jr. of counsel), for United Rentals (North America) Inc. and United Rentals, Inc., respondents.

Silverman Sclar Shin & Byrne PLLC, New York (Vincent Chirico of counsel), for Rental Service Corporation, respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 5, 2008, which, to the extent appealed from, granted defendants-respondents' motions for summary judgment

dismissing the complaint, and denied plaintiffs' cross motion for summary judgment against the JLG defendants and Alex Lyon & Son as academic, unanimously affirmed, without costs.

Plaintiff Michael Meyer was injured when a telescopic boom on a man lift manufactured by JLG Industries collapsed while he was operating it and he fell 25 feet. Plaintiff purchased the man lift on behalf of his company, CR Systems, Inc., at an auction held by Alex Lyon & Son. He had attended auctions held by Alex Lyon & Son before and knew that auctioned items were purchased on an "as is" and "where is" basis. Plaintiff had the man lift transported to NES Equipment Services Corp. for inspection and repair, aware that it could not be used on a job site until it was certified to be safe. However, he wanted to use the man lift before NES completed its inspection and repair, so he drafted and provided NES with an agreement in which he agreed to hold NES harmless for "any and all claims arising out of the use of" the man lift. The agreement was to remain in effect until NES installed a certain "operating basket" and completed the "required safety inspection." Plaintiff then had the man lift transported to a work site, where he used it for two days; he would not allow CR Systems employees to use the man lift before it had been certified as safe. The accident occurred the next day while plaintiff was using the man lift at his home.

The strict products liability cause of action against the JLG defendants and Alex Lyon & Son based on the failure to warn could not be sustained because, even assuming that these defendants had a duty to warn, the evidence shows that plaintiff, in the exercise of reasonable care, could have discovered the defect and perceived its danger and could have averted his injury by not using the man lift until it was certified as safe (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106-107 [1983]).

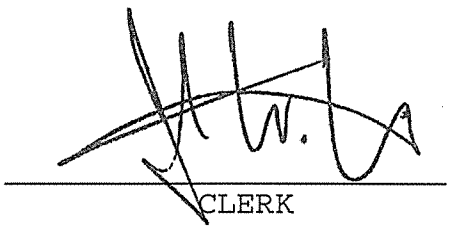
The breach of implied warranty cause of action against the JLG defendants and Alex Lyon & Son was correctly dismissed because the sale was made on an "as is" basis and this disclaimer was conspicuously stated on the auction registration form signed by plaintiff (*see Sky Acres Aviation Servs. v Styles Aviation*, 210 AD2d 393 [1994]). The breach of express warranty cause of action was correctly dismissed because plaintiff's actions belie any reliance on a "Safe Ready to Rent" tag found on the man lift (*see Scaringe v Holstein*, 103 AD2d 880, 881 [1984]; *Friedman v Medtronic, Inc.*, 42 AD2d 185, 190 [1973]).

As to the negligence cause of action, the proximate cause of plaintiff's accident was his own disregard of NES's representation that the man lift was not safe and had not been certified (*see Kenney v City of New York*, 30 AD3d 261 [2006]).

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

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

ENTERED: NOVEMBER 19, 2009



CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1500 The People of the State of New York, Ind. 61949C/04
Respondent,

-against-

Juan Medina,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Andrew C. Fine of counsel), and Cahill Gordon & Reindel LLP, New York (Noah H. Bishoff of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered May 4, 2007, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 8 years, and otherwise affirmed.

Defendant did not preserve his present challenge to the portion of the court's jury instruction on robbery that defined the term larceny. Regardless of what defense counsel may have been alluding to in his comments at the end of the charge (*see People v Borrello*, 52 NY2d 952 [1981]), these comments were insufficient to convey a request that the court not only give a definition of larceny that included an intent to "deprive another

of property or to appropriate the same to himself or a third person," as set forth in Penal Law § 155.05(1), but *also* read to the jury the definitions of "deprive" and "appropriate" set forth in subdivisions three and four of Penal Law § 155.05. We decline to review this claim in the interest of justice. As an alternative holding, we find no basis for reversal, because, in the factual context presented, the absence of these definitions did not cause any prejudice.

The court properly exercised its discretion when it denied defendant's mistrial motions made after notes from the deliberating jury indicated it was deadlocked, and instead delivered several *Allen* charges (*see Matter of Plummer v Rothwax*, 63 NY2d 243, 250 [1984]). The progress of deliberations that continued after each *Allen* charge indicated that there had not been an unyielding breakdown in deliberations, and that the charges did not coerce a verdict (*see People v Campos*, 239 AD2d 185 [1997], *lv denied* 90 NY2d 902 [1997]; *People v Bonilla*, 225 AD2d 330 [1996], *lv denied* 88 NY2d 933 [1996]). The court also properly exercised its discretion by not asking the jury about the likelihood of a verdict or conducting a separate colloquy with a possible holdout juror. Defendant's challenges to the content of the court's *Allen* charges and related comments to the jury are unpreserved and we decline to review them in the

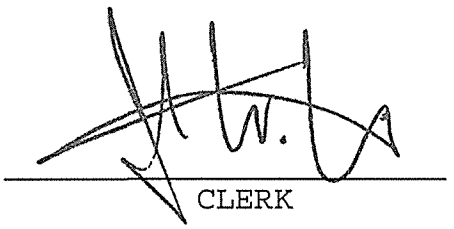
interest of justice. As an alternative holding, we also reject them on the merits.

The court also properly exercised its discretion when it declined to conduct an inquiry of the jurors to ascertain if they had read media accounts of the trial. The court was appropriately concerned that doing so might draw the jury's attention to the existence of particular reports and thereby create prejudice where none might already exist (*see People v Shulman*, 6 NY3d 1, 32 [2005], *cert denied* 547 US 1043 [2006]). While the record indicates that a juror was aware that there had been a media report relating to the trial, there was no indication that any juror had violated the court's instructions to avoid reading or listening to such reports (*see People v Erving*, 55 AD3d 419 [2008], *lv denied* 11 NY3d 897 [2008]).

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 19, 2009



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Tom, J.P., Friedman, Moskowitz, Abdus-Saalam, JJ.

1501-
1501A Cynthia Griffin, Index 123212/02
Plaintiff-Appellant,

-against-

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

Burns & Harris, New York (Christopher J. Donadio of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

Judgment, Supreme Court, New York County (Helen E. Freedman, J., and a jury), entered March 31, 2008, in favor of defendants and against plaintiff in an action against the City and a police detective arising out plaintiff's arrest, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 4, 2008, which denied plaintiff's motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Based on defendant detective's testimony that he arrested plaintiff because she swallowed what he and his partner believed were drugs, the trial court properly submitted to the jury the issue of whether the strip searches of plaintiff were supported by reasonable suspicion that plaintiff was concealing contraband

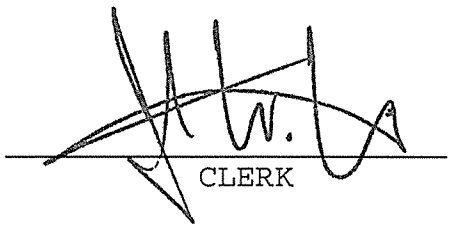
(*see Weber v Dell*, 804 F2d 796, 802 [2d Cir 1986], *cert denied sub nom. County of Monroe v Weber*, 483 US 1020 [1987]). The court's initial expression of uncertainty in charging the burden of proof on reasonable suspicion was harmless, as the court, in the end, correctly and clearly charged that defendants bore the burden. Any error in not charging the jury on plaintiff's claim for assault and battery based on the detective's touching of plaintiff during an illegal arrest (*see Johnson v Suffolk County Police Dept.*, 245 AD2d 340 [1997]; *Rubio v County of Suffolk*, 2007 US Dist LEXIS 75343, *13, 2007 WL 2993830, *4 [SD NY 2007]) was rendered harmless by the jury's express finding that probable cause existed for the arrest. The court properly denied plaintiff's request to charge the jury on defendant City's alleged negligent retention and supervision of the detective, and properly precluded evidence relating to this claim, as the City had already stipulated that it was responsible for the detective's actions (*see Karoon v New York City Tr. Auth.*, 241 AD2 323, 324 [1997]). Nor was such evidence admissible in connection with plaintiff's claim for negligent hiring and training under 42 USC § 1983 where plaintiff's evidence did not relate to any City policy or practice but to the detective's alleged prior bad acts purportedly showing a propensity for violence (*cf. Johnson v Kings County Dist. Attorney's Off.*, 308

AD2d 278, 293-294 [2003]). The court properly permitted the defense, during plaintiff's summation, to read a question and answer from the detective's deposition that were read by plaintiff's attorney during the trial, in order to correct the latter's misleading reading of only part of the questions and answers in his summation (*cf. People v De Los Angeles*, 270 AD2d 196, 199 [2000], *lv denied* 95 NY2d 891 [2000]). The court properly denied plaintiff's motion for a missing documents charge regarding the detective's Daily Activity Report from the night of plaintiff's arrest, where plaintiff failed to demonstrate that the document still existed and was under defendants' control (*see Manne v Museum of Modern Art*, 39 AD3d 368 [2007]); we would add that the detective gave a reasonable explanation as to why he was unable to locate this document (*see Acevedo v New York City Health & Hosps. Corp.*, 251 AD2d 21, 22 [1998], *lv denied* 92 NY2d 808). Certain comments by the court, most of which are

misinterpreted by plaintiff, did not deprive plaintiff of a fair trial, and, to the extent the jury may have misinterpreted them, the court gave proper curative instructions.

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

ENTERED: NOVEMBER 19, 2009



Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1502 The People of the State of New York, SCI 6837/06
Respondent,

-against-

Samuel Moales,
Defendant-Appellant.

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

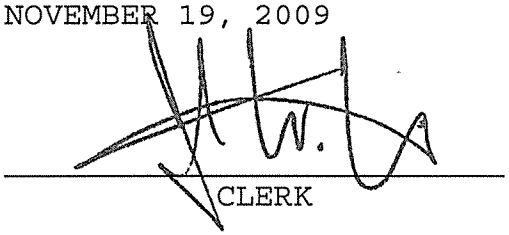
Robert M. Morgenthau, District Attorney, New York (Matthew C. Williams of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Ambrecht, J.), rendered on or about October 29, 2007,

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

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

ENTERED: NOVEMBER 19, 2009



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

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1503 The People of the State of New York, Ind. 6025/06
Respondent,

-against-

Jean Sanon,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about January 23, 2008, unanimously affirmed.

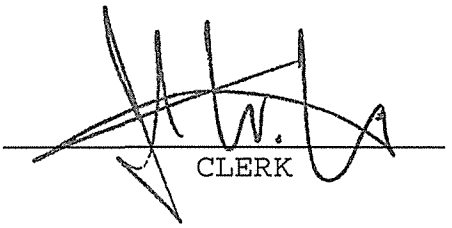
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 19, 2009



Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1504 In re Washington Mutual, FA, Index 118849/01
Petitioner-Respondent,

-against-

Metropolitan Transportation Authority,
Respondent-Appellant.

Helene Fromm, New York, for appellant.

Michael J. Greco, Rye Brook, for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered January 15, 2008, which, insofar as appealed from, granted petitioner's application to annul respondent MTA's determination denying petitioner's claim for relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 USC § 4601 *et seq.*) to the extent of directing respondent to schedule a proceeding de novo to determine petitioner's claim, "preferably before an independent determiner, not employed on a regular basis by respondent or any of its affiliates or subsidiaries," unanimously reversed, on the law, without costs, the determination reinstated, and the matter remanded to Supreme Court for further proceedings.

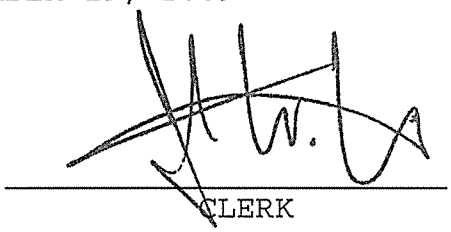
There is no dispute that under the Relocation Act -- which makes federal funds available for reimbursement of relocation costs incurred as a direct result of the condemnation of private

property for federally financed programs or projects (42 USC § 4621[b]) -- claims are to be determined by the agency responsible for the taking, here respondent MTA. Petitioner's argument that MTA's initial determination rejecting its claim was decided by an MTA representative who was not impartial was not raised in the administrative proceeding and therefore is not preserved for judicial review (*see Matter of Asaro v Kerik*, 299 AD2d 196, 197 [2002]). Were we to reach the issue, we would not find bias simply because the person designated by MTA to decide the claim in the first instance was the staff attorney who had previously represented MTA in the condemnation proceeding (*see Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 197 [1981], *cert denied* 454 US 1125 [1981]; *DeBonis v Corbisiero*, 178 AD2d 183, *lv denied* 80 NY2d 753 [1992]). We would also note that pursuant to 49 CFR 24.10(h), the decision of the allegedly biased representative was reviewed by an MTA official who was not directly involved in the taking and whose impartiality is not challenged. We would also hold that even if the assignment of the allegedly biased person were to be deemed inappropriate, it would not give rise to a due process claim as the Relocation Act has no statutory or regulatory requirement for an adjudicatory or

evidentiary hearing (*see Supreme Oil Co. v Metropolitan Transp. Auth.*, 157 F3d 148, 152-153 [2d Cir 1998], *cert denied* 528 US 868 [1999]).

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

ENTERED: NOVEMBER 19, 2009



CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1505 The People of the State of New York, Ind. 1951/03
Respondent,

-against-

Andre Stewart,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

Order, Supreme Court, New York County (Bruce Allen J.), entered on or about April 3, 2009, which denied defendant's CPL article 440 motion, unanimously affirmed.

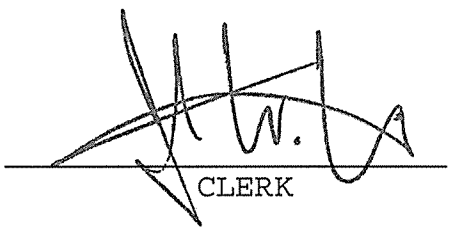
When defendant pleaded guilty in 2003, the court did not inform him of the specific term of postrelease supervision he would be receiving, although it did inform him it would impose the maximum permissible term. At sentencing the court imposed 5 years post-release supervision. The omission of the warning required under *People v Catu* (4 NY3d 242 [2005]) "is clear from the face of the record and therefore not properly raised in a CPL article 440 motion" (*People v Louree*, 8 NY3d 541, 546 [2007]). There is no merit to defendant's argument that this aspect of the *Louree* decision is dictum.

Defendant also argues that this rule should not apply to him

because his failure to take a direct appeal was not "unjustifiable" within the meaning of CPL 440.10(2)(c), in that his time to take an appeal expired before *Catu* was decided, so that an appeal would allegedly have been futile. Under that reasoning, since a CPL article 440 motion has no time limit, a defendant whose conviction was already final could use such a motion to take advantage of any relevant new development in the law, regardless of whether the new rule applied retroactively on collateral review (*cf. Policano v Herbert*, 7 NY3d 588, 603-604 [2006]). Moreover, it would not have been "futile" to raise the issue of lack of advice concerning postrelease supervision on appeal; defendant had the same opportunity as the defendant in *Catu* to do so.

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

ENTERED: NOVEMBER 19, 2009



Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1507 Rod Arellano, Index 101692/06
Plaintiff-Respondent,

-against-

HSBC Bank USA, et al.,
Defendants-Appellants,

Alexandra Fuzaylova,
Defendant.

Tracy S. Woodrow, Buffalo, for appellants.

Rod Arellano, respondent pro se.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 12, 2009, which, in an action for, inter alia, wrongful termination, denied defendants-appellants' motion for leave to amend their answer so as to add the affirmative defense of statute of limitations, and, upon amendment, for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing the complaint as against them.

The motion court should have granted defendants leave to amend the answer (see CPLR 3025[b]). Although the motion was made approximately three years after defendants answered the complaint, plaintiff did not and could not reasonably claim to

have been prejudiced or surprised by the request to amend the answer (*see Solomon Holding Corp. v Golia*, 55 AD3d 507 [2008]; *Seda v New York City Hous. Auth.*, 181 AD2d 469 [1992], *lv denied* 80 NY2d 759 [1992]).

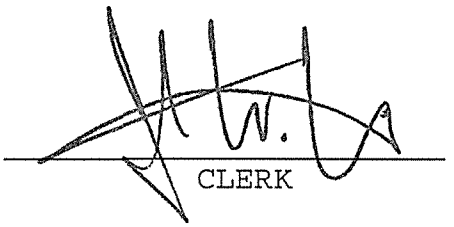
We further find that defendants were entitled to summary judgment. The allegations raised in support of plaintiff's cause of action for employment discrimination are identical to those raised in his communications to the Equal Employment Opportunity Commission, and thus any action thereon was required to have been brought within 90 days of his receipt of the letter giving him the right to sue (*see Meadows v Robert Flemings, Inc.*, 290 AD2d 386 [2002], *lv dismissed* 100 NY2d 555 [2003]). Similarly time-barred are plaintiff's claims of infliction of extreme emotional distress, libel and slander (*see* CPLR 215).

Furthermore, there is no support in the record for plaintiff's claims of wrongful termination (*see Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 316 [2001]; *Shah v Wilco Sys.*, 27 AD3d 169, 174 [2005], *lv dismissed in part, denied in part* 7 NY3d 859 [2006]); retaliation (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Dunn v Astoria Fed. Sav. &*

Loan Assn., 51 AD3d 474 [2008], *lv denied* 11 NY3d 705 [2008]); and wrongful accusation (*see Duane Thomas LLC v Wallin*, 8 AD3d 193, 194 [2004]).

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

ENTERED: NOVEMBER 19, 2009



Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1508 In re Kadija Tempie M., etc.,

A Child Under the Age of
Eighteen Years, etc.,

Terry M.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

John R. Eyerman, New York, for respondent.

Andrew J. Baer, New York, Law Guardian.

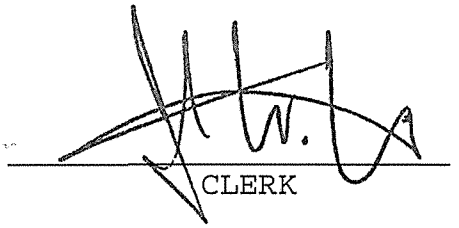
Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about March 28, 2008, which, insofar as appealed from, after a dispositional hearing on remand from this Court (43 AD3d 343 [2007]), terminated respondent father's parental rights to the subject child and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that the termination of respondent's parental rights was in the best interests of the child was supported by the evidence, including testimony at the hearing showing that the child, who at the time of the hearing was several months shy of

her 14th birthday, wished to be adopted by her current foster family and that they also wish to adopt her. The child has also been able to visit with her siblings and maintain a meaningful relationship with them while living with the foster family (*see Matter of Jaiheem M.S.*, 62 AD3d 569, 570 [2009]; *Matter of Victoria Marie P.*, 57 AD3d 282, 283 [2008], *lv denied* 12 NY3d 706 [2009]), and respondent has failed to take the necessary steps to complete any of the service plan goals laid out for him by the agency.

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

ENTERED: NOVEMBER 19, 2009



Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1509 In re Theodore Smith, Index 117051/07
Petitioner-Respondent,

-against-

The New York City Department of Education,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for appellant.

William A. Gerard, Palisades, for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 13, 2008, which granted the petition to vacate a December 4, 2007 arbitration award finding petitioner guilty of numerous disciplinary charges and suspending him for one year without pay, and remanded the matter for a new arbitration hearing, unanimously reversed, on the law, without costs, the award reinstated, and the petition dismissed. The Clerk is directed to enter judgment accordingly.

The fact that a replacement arbitrator, who was not present during the receipt of evidence, made the arbitration award based on a review of the record, did not deny petitioner due process of law. Due process of law and the concept of a fair hearing "do not require that the actual taking of evidence be before the same

[arbitrator] who makes the final determination" (*Matter of Gupta v New York State Dept. of Social Servs.*, 208 AD2d 629, 629 [1994]; *see also Kern v Excelsior 57th Corp.*, 270 AD2d 25 [2000], *lv denied* 94 NY2d 763 [2000]).

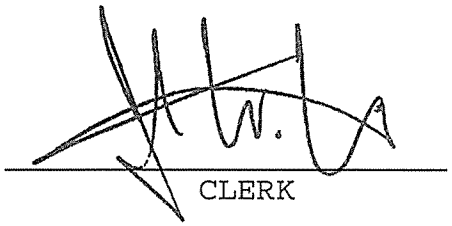
Here, the replacement arbitrator drew his credibility assessments from compelling documentary evidence. Specifically, he relied on contemporaneous writings and diligently reviewed the testimony in the record (*see e.g. Cioffi v Lenox Hill Hosp.*, 287 AD2d 335 [2001], *lv denied* 97 NY2d 612 [2002]), noting inconsistencies and admissions, a sound basis upon which to reach credibility determinations. Further, the replacement arbitrator granted petitioner an opportunity to present new evidence, including his own testimony, documentary evidence, and additional witnesses, of which he chose not to avail himself. Moreover, the sole reason that the replacement arbitrator was substituted in this matter was because petitioner issued threats to the first arbitrator, which led to his recusal. Petitioner should not be permitted to benefit from such behavior by obtaining a hearing de novo before a second arbitrator.

Finally, the record evidence does not support vacatur of the

award on any of the alternative grounds urged by petitioner in Supreme Court.

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

ENTERED: NOVEMBER 19, 2009



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Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1510 Vincenzo Ferriolo, Index 105667/04
Plaintiff-Appellant,

-against-

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

Decolator, Cohen & DiPrisco, LLP, Garden City (Joseph L. Decolator of counsel), for appellant.

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

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 11, 2008, which, upon reargument, granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on his cause of action pursuant to General Municipal Law § 205-e, unanimously modified, on the law, to deny defendants' motion to the extent it sought to dismiss plaintiff's common-law negligence cause of action, and otherwise affirmed, without costs.

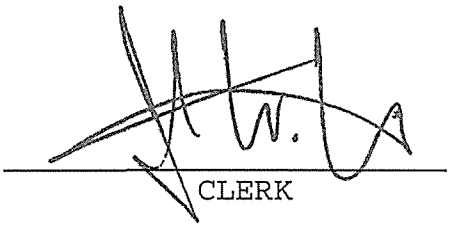
Plaintiff's common-law negligence claim is not barred by the "firefighter's rule," because, while plaintiff was present in the precinct locker room when defendant Gian discharged his gun, he was not engaged in any specific duty that increased the risk that he would be shot (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 439-440 [1995]). He was donning his uniform before

beginning his tour of duty and conversing with another officer when the gun went off while Gian was moving it from one locker to another.

The motion court correctly dismissed plaintiff's General Municipal Law § 205-e cause of action predicated upon alleged violations of the Penal Law and the Labor Law. No criminal charges were brought against Gian, and plaintiff failed to come forward with compelling evidence that Gian's conduct was criminally negligent or criminally reckless so as to overcome the presumption that the Penal Law had not been violated (*see Williams v City of New York*, 2 NY3d 352, 366-367 [2004]). Nor was plaintiff's injury the type of workplace injury contemplated by Labor Law § 27-a (*see id.* at 367-378).

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

ENTERED: NOVEMBER 19, 2009



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Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1511 The People of the State of New York, Respondent, Ind. 9473/94 2036/84

-against-

Arthur Blake, also known as Robert Johnson, also known as Ronald Boyd, also known as Steven Banks, Defendant-Appellant.

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

Purported appeal from order, Supreme Court, New York County (Rena K. Uviller, J.), entered on or about March 12, 2008, which denied defendant's CPL 440.20 motion to set aside a resentence, unanimously dismissed on the ground of failure to obtain leave to appeal pursuant to CPL 460.15.

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

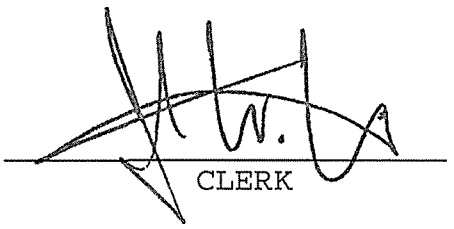
Pursuant to Criminal Procedure Law 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting

such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within 30 days after service of a copy of this order, with notice of entry.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 19, 2009



Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1514 Melissa Lopez, Index 309189/08
Plaintiff-Respondent,

-against-

Jesus Garcia, et al.,
Defendants-Appellants.

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for appellants.

Noreen M. Giusti, Kew Gardens, for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 2, 2009, which, in an action for personal injuries sustained when plaintiff and defendants' vehicle came into contact, granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied and the case remanded for further proceedings.

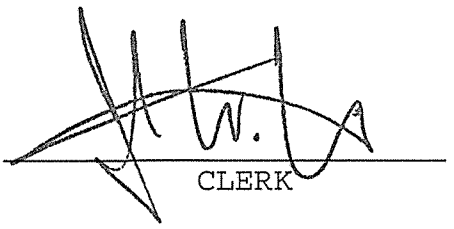
Assuming, arguendo, that plaintiff satisfied her initial burden on the motion with evidence that defendants' vehicle hit her as she was crossing the street in the crosswalk, with a green light and walk sign in her favor, she would not be entitled to summary judgment. Issues of fact as to plaintiff's comparative negligence are raised by (1) plaintiff's statement in her affidavit that she did not see defendants' vehicle before she was

struck (*see Thoma v Ronai*, 82 NY2d 736 [1993]); (2) the police accident report, which plaintiff submitted in support of her motion because it states that defendant driver told the police officer that plaintiff "was in his blind spot," but which also states that the driver was "executing a legal left turn" and that a witness said that plaintiff "never looked when walking into the roadway" (*see id.*; *Cator v Filipe*, 47 AD3d 664 [2008], citing, inter alia, *Schmidt v Flickenger Co.*, 88 AD2d 1068 [1982] [having right of way in a crosswalk does not absolve a pedestrian "from looking, while so crossing, for vehicles approaching which deny her that right"); and (3) defendant driver's affidavit in opposition stating, not inconsistently with the police report, that as he was straightening out his vehicle after making a left turn with a green light, plaintiff, whom he had noticed before the accident running "with other people approximately her age," ran into "the front passenger bumper of my vehicle, on the right side," "in a place where I could not see her." We note that plaintiff made her motion for summary judgment two months after joinder of issue, before a preliminary conference had been

conducted and before defendants had a fair opportunity to depose plaintiff or the witness mentioned in the police report (CPLR 3212[f]; *see Bradley v Ibex Constr LLC*, 22 AD3d 380 [2005]).

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

ENTERED: NOVEMBER 19, 2009



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Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1515N Arbor Realty Funding LLC, Index 602186/08
Plaintiff-Appellant,

-against-

East 51st Street Development Company, LLC, et al.,
Defendants,

TMJ Plumbing and Heating Corp., et al.,
Defendants-Respondents.

Herrick, Feinstein LLP, New York (Raymond N. Hannigan of counsel), for appellant.

Steven G. Rubin & Associates, P.C., Jericho (Steven G. Rubin of counsel), for T.M.J. Plumbing and Heating Corp. and R&J Construction Corp., respondents.

Welby, Brady & Greenblatt, LLP, White Plains (Michael I. Silverstein of counsel), for ThyssenKrupp Safeway, Inc., respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 4, 2009, which, upon plaintiff's motion, clarified that an order, same court and Justice, entered February 2, 2009, which referred the issue whether certain notes and mortgages could be satisfied without the sale of the property located at 303 East 51st Street in Manhattan, contemplated an examination of the value of property other than the subject real property, unanimously affirmed, without costs.

Initially, we find that plaintiff's motion for clarification

of the February 2, 2009 order was essentially a motion to reargue that was granted (CPLR 2221[d][2]).

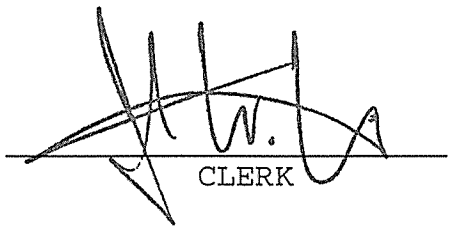
Contrary to plaintiff's contention, the court did not require it to pursue the borrower for a money judgment on a guaranty in the middle of a foreclosure action. The court directed the special referee to hear and report whether plaintiff's notes and mortgages could be satisfied without the sale of the property located at 303 East 51st Street because it required that information to decide the motion for summary judgment on the second counterclaim of defendants T.M.J. Plumbing and Heating Corp. and R&J Construction Corp., two of the construction entities that filed mechanic's liens against 303, 305 and 307 East 51st Street (the East 51st Street property). T.M.J. and R&J alleged that plaintiff should not be permitted to sell the East 51st Street property until it had "exhausted all of its remedies as to the Second Avenue Property and from the Guarantor." The reference was authorized by CPLR 4001, 4212 and 4311. In addition, the referee's report will provide the court with information relevant to the entry of any deficiency judgment against defendant guarantors pursuant to RPAPL 1371(1). Thus, the court's order did not impermissibly require the plaintiff to

satisfy the debt from the guarantor's personal assets before plaintiff exhausted the mortgaged properties.

Plaintiff's remaining arguments are unavailing.

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

ENTERED: NOVEMBER 19, 2009



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

1516 The People of the State of New York, Ind. 730/07
Respondent,

-against-

Michael Johnson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Joseph Dawson, J.), rendered March 26, 2008, convicting defendant, after a jury trial, of assault in the first degree, criminal possession of a weapon in the fourth degree, aggravated harassment in the second degree, attempted assault in the third degree and menacing in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 12½ years, unanimously affirmed.

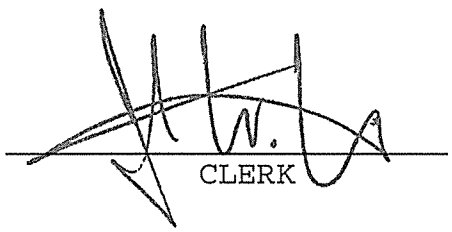
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find the evidence to be overwhelming. There is no basis for disturbing the jury's determinations concerning credibility. Notwithstanding the victim's drug and alcohol abuse, she provided credible testimony that it was defendant, her former boyfriend, who caused her injuries. The evidence, including the fact that

the injuries consisted of a severed jugular vein and a separate stab wound to the arm, completely refuted any hypothesis that she accidentally stabbed herself. We do not find anything particularly significant about the fact that she may have used the word accident to mean incident.

The court properly exercised its discretion in denying defendant's mistrial motions, made when, at several junctures in her testimony, the victim volunteered uncharged crimes evidence that was not responsive to questions. The drastic remedy of a mistrial was not warranted, because the curative actions that were either provided by the court, or offered by the court but rejected by defendant, were sufficient to prevent defendant from being prejudiced (*see People v Santiago*, 52 NY2d 865 [1981]; *People v Young*, 48 NY2d 995 [1980]).

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

ENTERED: NOVEMBER 19, 2009



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

1518 In re Harry Nespoli, etc., et al., Index 103762/07
Petitioners-Appellants,

-against-

John J. Doherty, etc., et al.,
Respondents-Respondents.

Stroock & Stroock & Lavan LLP, New York (Ernst H. Rosenberger of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Marcy J. Kahn, J.), entered July 17, 2008, which denied the application of petitioner sanitationmen's union to annul the determination of respondent Commissioner of the Department of Citywide Administrative Services (DCAS) to increase the probationary period for newly appointed sanitation workers from 12 months to 18 months, and dismissed the proceeding, unanimously affirmed, without costs.

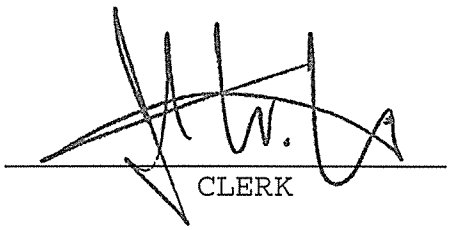
The affidavit of respondent Commissioner of the Department of Sanitation of the City of New York (the Commissioner; DSNY) in opposition to the petition avers, inter alia, that the number of accidents, disciplinary complaints and arrests involving new sanitation workers is too high. Furthermore, based on his long experience with DSNY, a longer probationary period would enable

DSNY to weed out higher risk employees and increase training and experience. This would reduce these numbers and promote safety and discipline. No basis exists for concluding that the Commissioner's belief that the numbers are unacceptably high, or his belief that extending the probationary period will reduce the numbers, is irrational, or that such beliefs are a pretext for some arbitrary or bad-faith motive (CPLR 7803[3]; *see Matter of Hughes v Doherty*, 5 NY3d 100, 105 [2005]; *Matter of Caruso v Ward*, 155 AD2d 242, 243 [1989]). While it appears that administrative action was taken following discussion between DSNY and DCAS without any study or written recommendation, as in *Caruso* (*id.*), the City's personnel rules give DCAS's commissioner discretion to provide for a probationary period other than one year without engaging in any particular process of review (55 RCNY, Appendix A, § 5.2.1). The Commissioner's reference to the two-year probationary period for police and corrections officers

is not irrelevant but provides a benchmark for comparison, tending to show that 18 months is not excessive.

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

ENTERED: NOVEMBER 19, 2009



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

1525 Richard Pu, Index 602986/06
Plaintiff-Appellant,

-against-

George Mitsopoulos, et al.,
Defendants-Respondents.

Catalano Gallardo & Petropoulos, LLP, Jericho (Matthew Flanagan of counsel), and Furman Kornfeld & Brennan, New York (A. Michael Furman of counsel), for appellant.

Richard Pu, appellant pro se.

Alatsas & Taub, P.C., Brooklyn (Asher E. Taub of counsel), for Mitsopoulos, Titan Pharmaceuticals and Nutrition, Inc., and Theoni's Pharmacy, Inc., respondents.

L'Abbate, Balkan, Colavita & Contini, L.L.P, Garden City (Noah Nunberg of counsel), for Theodore Alatsas, Asher Taub and Alatsas & Taub, P.C., respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about July 8, 2008, which, to the extent appealed from as limited by the briefs, denied plaintiff's motions to dismiss the counterclaim for legal malpractice, to file a second amended complaint, to disqualify defendants' counsel, and for an order of attachment and receivership, and granted so much of defendants' cross motion as sought to dismiss the cause of action for fraud against the attorney defendants, unanimously affirmed, with costs.

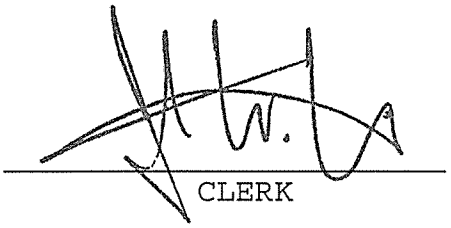
Although plaintiff, the prior attorney for some of the

defendants herein, commenced this action to recover legal fees purportedly owed him by certain of these defendants, he also sued the parties' current counsel, plus the wife of defendant George Mitsopoulos and a pharmacy owned by her. The court appropriately dismissed all claims asserted against the lawyer defendants, the wife and her business, who were never plaintiff's clients and are not obligated to him for any legal fees. Attorneys such as these, whose only involvement with the underlying transaction was the performance of their professional services and who did not personally profit therefrom, are not generally liable for the acts of their clients (*see Weisman, Celler, Spett & Modlin v Chadborne & Parke*, 271 AD2d 329, 330 [2000], *lv denied* 95 NY2d 760 [2000]). Moreover, not only does plaintiff, who is not a secured creditor of any of the defendants, have no basis for challenging the underlying conveyances herein -- most of which took place before he had even asserted a claim for more than a minimal amount of unpaid legal fees, but there is no indication that such conveyances were at all fraudulent. Under these circumstances, plaintiff has no right to an order of attachment (*see* CPLR 6201) or the appointment of a receiver (CPLR 6401[a]).

We have considered plaintiff's arguments on the remaining issues raised on this appeal, and find them unavailing.

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

ENTERED: NOVEMBER 19, 2009



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

1526 In re Kimberly M.,

A Child Under the Age of
Eighteen Years, etc.,

Nancy L.,
Respondent-Appellant,

Administration of Children's Services,
Petitioner-Respondent.

Louise Belulovich, New York, for appellant.

Appeal from order, Family Court, New York County (Susan M. Doherty, Referee), entered on or about May 8, 2008, which, inter alia, directed a trial discharge of the subject child by petitioner agency to the non-respondent father, unanimously dismissed, without costs, as moot.

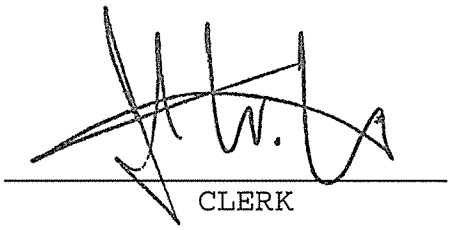
The appeal is moot because the May 8, 2008 order was superseded by an order of custody and visitation, same court and Referee, entered on or about June 30, 2009, on the stipulation of respondent mother, petitioner agency, the law guardian, and the non-respondent father, awarding custody to the father (*see e.g. Matter of Breeyanna S.*, 52 AD3d 342 [2008], *lv denied* 11 NY3d 711 [2008]).

Were we to consider the merits, we would find that the referee's determination that the trial discharge to the father

was in the child's best interest was amply supported by the evidence that while the mother had relapsed in her addiction, the father had remained clean, that while the mother was ineligible for housing assistance, the father was eligible, and that while the mother was unemployed, the father had been gainfully employed for a year (*see Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]).

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

ENTERED: NOVEMBER 19, 2009



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

1528 The People of the State of New York, Ind. 3820/07
Respondent,

-against-

Ronald Hudson,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about January 25, 2008, unanimously affirmed.

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

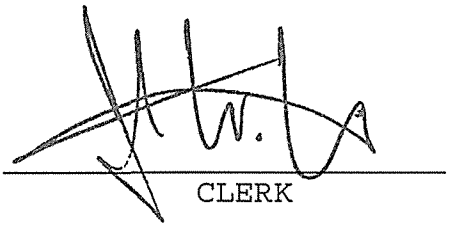
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: NOVEMBER 19, 2009



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

1529 The People of the State of New York, Ind. 1939/06
Respondent,

-against-

Morris Grady,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki Scherer, J. at severance motion; William A. Wetzel, J. at jury trial and sentence), rendered April 24, 2007, as amended May 29, 2007, convicting defendant of attempted murder in the second degree (two counts), assault in the first and second degrees, robbery in the first degree (two counts), attempted robbery in the first degree (two counts) and robbery in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 45 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's severance motion. In the first place, the court correctly determined that the motion was untimely, and we reject defendant's arguments to the contrary. The court also correctly determined that defendant did not establish good cause for a

severance under CPL 200.20(3). Defendant was charged in a single indictment with crimes arising out of robberies of a laundromat and a garage, each involving an attempt to kill a victim. As in *People v Ford* (11 NY3d 875, 879 [2008]), "there was no material variance in the quantity of proof for the separate incidents. Moreover, the evidence as to the two crimes was presented separately and was readily capable of being segregated in the minds of the jury." Although defendant argues that the proof of his identity as to the garage robbery was much weaker than as to the laundromat robbery, we find that the proof was very strong in both cases. In particular, there was ample evidence connecting defendant to a car stolen in the garage robbery, and the circumstances warranted the conclusion that he stole the car rather than merely possessing it. Furthermore, defendant did not substantiate his assertion that he had important testimony to give concerning the garage robbery and a strong need to refrain from testifying as to the laundromat robbery (*see People v Lane*, 56 NY2d 1, 8-9 [1982]).

Likewise, we reject defendant's argument that the verdict convicting him of the crimes involved in the garage robbery was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Although the victims were unable to identify defendant, and had identified another man in a lineup,

there was a surveillance tape of the crime, and the jury was able to compare defendant's appearance with that of the person depicted on the tape. This evidence, taken together with the evidence discussed above relating to the stolen car, clearly established defendant's guilt (*see People v Solomon*, 6 AD3d 335 [2004], *lv denied* 3 NY3d 648 [2004]).

The court properly exercised its discretion in denying defendant's mistrial motion, made in connection with the court's suppression of evidence that had already been placed before the jury. After a detective testified that the registration for the car taken in the garage robbery was in defendant's wallet, and the wallet was received in evidence, defendant raised a Fourth Amendment issue, asserting that it was based on information not available to him prior to trial. After ruling that defendant was entitled to suppression, the court properly rejected the drastic remedy of a mistrial (*see People v Santiago*, 52 NY2d 865 [1981]), and instead struck the evidence, with a thorough curative instruction that was satisfactory to defendant and which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]). In any event, any error was harmless because the stricken evidence was duplicative of other evidence. The police found the car's insurance and leasing documents under a chair cushion in defendant's apartment, and defendant's argument that

this evidence was significantly less probative than the stricken evidence is without merit.

Defendant's challenges to the prosecutor's summation 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 People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

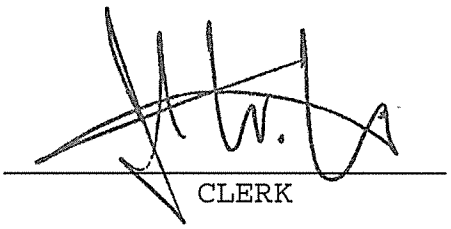
We perceive no basis for reducing the sentence.

M-4357 - People v Morris Grady

Motion seeking to strike portions of defendant's brief and reply brief granted.

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

ENTERED: NOVEMBER 19, 2009



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

1530 The People of the State of New York, Ind. 899/03
Respondent,

-against-

Richard Thompson,
Defendant-Appellant.

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

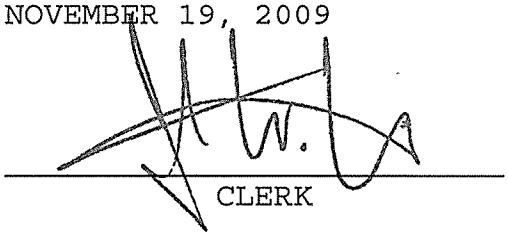
Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about November 9, 2006,

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

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

ENTERED: NOVEMBER 19, 2009



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

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

1531 In re Nahajah Lituarrah Lavern K.,

Tiffany Renee W.,
Respondent-Appellant,

Leake & Watts Services, Inc.,
Petitioner-Respondent.

Robin G. Steinberg, The Bronx Defenders, Bronx (Florian Miedel of counsel), for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 25, 2008, which, to the extent appealed from, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

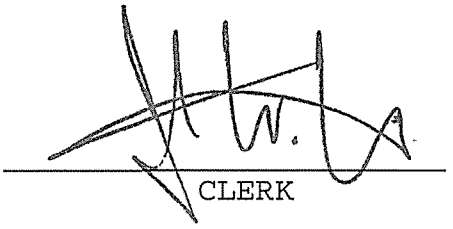
The finding of permanent neglect was supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record establishes that the agency made diligent efforts to encourage and strengthen the parental relationship by providing assistance so that respondent could attend family therapy, obtain suitable housing, meet her financial needs, and by scheduling

regular visits with the child. Despite these diligent efforts, respondent failed to attend therapy, secure a suitable home environment, or obtain employment before the petition was filed. She was also inconsistent in her visitation (*see Matter of Kevin J.*, 55 AD3d 468 [2008], *lv denied* 11 NY3d 715 [2009]; *Matter of William P.*, 23 AD3d 237 [2005]).

A preponderance of the evidence demonstrated that the termination of respondent's parental rights was in the best interests of the child, who has been living with her foster family for virtually her entire life (*see Matter of Emanuel N.F..*, 22 AD3d 288 [2005]).

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

ENTERED: NOVEMBER 19, 2009



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

1533-
1533A The People of the State of New York,
Respondent,

Ind. 1490/08
1272/07

-against-

Gail Dixon,
Defendant-Appellant.

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

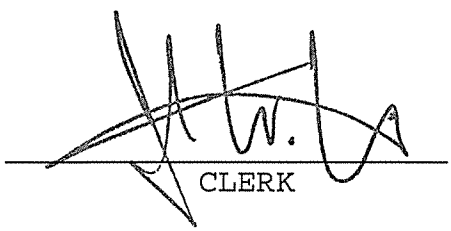
Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgments, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 31, 2008, convicting defendant, upon her pleas of guilty, of grand larceny in the second and third degrees, and sentencing her, as a second felony offender, to an aggregate term of 4 to 8 years, unanimously affirmed.

The surcharges and fees were properly imposed (*see People v Guerrero*, 12 NY3d 45 [2009]). We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 19, 2009



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

1536 Andrzej Malmon, et al., Index 106213/05
590229/06
590656/06
Plaintiffs,

-against-

East 84th Apartment Corp., et al.,
Defendants.

- - - - -

Concord Restoration, Inc.,
Third-Party Plaintiff-Respondent,

Liberty International a/s/o
Concord Restoration, Inc.,
Third-Party Plaintiff,

-against-

Marble Unique, LLC, et al.,
Third-Party Defendants-Appellants

Hi-Tech Restoration LLC, et al.,
Third-Party Defendants.

[And a Second Third-Party Action]

Lawrence, Worden, Rainis & Bard, P.C., Melville (Roger B. Lawrence of counsel), for appellants.

Devereaux Baumgarten, New York (Michael J. Devereaux of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered October 22, 2008, which, to the extent appealed from, denied third-party defendants Marble Unique, LLC and Hartford Insurance Company of the Midwest's motions for summary judgment dismissing the declaratory judgment action of third-party

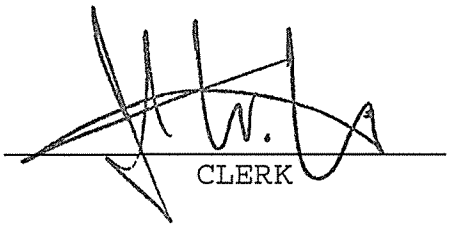
plaintiffs Concord Restoration Inc. and Liberty International a/s/o Concord Restoration Inc. for indemnification and a declaration of their duty to defend and which, inter alia, granted Concord Restoration Inc. and Liberty International a/s/o Concord Restoration Inc.'s cross motions for summary judgment to the extent of declaring that Hartford had a duty to defend them in the underlying action, unanimously modified, on the law, to declare as well that the aforementioned third-party defendants had no obligation to indemnify, and otherwise affirmed, without costs.

We find that Concord had notice of the Workers' Compensation Board hearing and that its worker's compensation carrier appeared and presented testimony therein. As such, Concord was bound by the WCB determination that Hi Tech, and not Marble, was the underlying plaintiff's employer at the time of the accident (*see Liss v Trans Auto Sys.*, 68 NY2d 15, 21 [1986]). Even without regard to the WCB determination, summary judgment on this issue should have been granted to Marble. The evidence that Hi Tech was on the work site at the time of the accident and that Marble was not on site, had ceased work months before and did not resume work until months after the accident established movant's entitlement to judgment. Concord presented no evidence to the contrary that would require a trial. However, because the claim

against Marble, ultimately unavailing, on its face fell within the ambit of its insurance, Hartford had the duty to defend. As such, summary judgment was properly granted to Concord on that part of its claim (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708 [2007]; *Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663 [1981]).

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

ENTERED: NOVEMBER 19, 2009



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

1537 In re Antonio Jenkins, Index 106290/08
Petitioner-Appellant,

-against-

State of New York Public
Employment Relations Board,
Respondent-Respondent,

United Federation of Teachers, etc., et al.,
Respondents.

Antonio Jenkins, appellant pro se.

David P. Quinn, Albany, for State respondent.

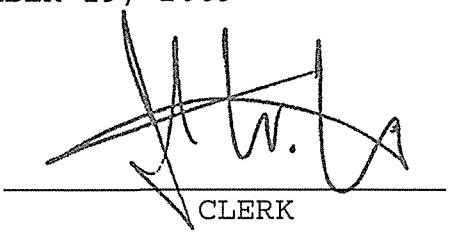
Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered January 23, 2009, dismissing this proceeding to annul an administrative order of respondent Public Employment Relations Board, unanimously affirmed, without costs.

The agency determination was neither irrational nor arbitrary and capricious (*Swakeen v New York City Health & Hosps. Corp.*, 39 AD3d 287 [2007], *lv denied* 9 NY3d 809 [2007]). Ample evidence in the record supports the conclusion that the administrative law judge's credibility determinations should not be disturbed (*see Matter of D'Augusta v Bratton*, 259 AD2d 287 [1999]). Furthermore, the evidence established that respondent United Federation of Teachers did not breach its duty of fair representation (*see Mellon v Benker*, 186 AD2d 1020 [1992]).

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

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

ENTERED: NOVEMBER 19, 2009



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

1538 In re Mathilde Diaz, Index 110497/09
Petitioner,

-against-

New York State Department of Motor Vehicles,
Respondent.

Mathilde Diaz, petitioner pro se.

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

Determination after hearing by respondent's appeals board, dated April 17, 2009, which affirmed petitioner's conviction for speeding, unanimously confirmed, the petition denied, and this proceeding brought pursuant to article 78 (transferred to this Court by order of Supreme Court, New York County [Joan A. Madden, J.], entered on or about August 20, 2009), dismissed, without costs.

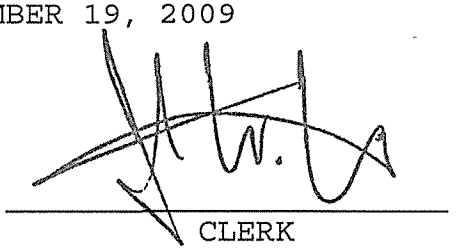
Petitioner was charged with driving above the speed limit on Union Turnpike, in violation of Vehicle and Traffic Law § 1180(d), for which she was fined $200 and her driver's license was revoked. The police officer testified that at the time he issued the ticket, the driver named in the summons provided him with a valid New York driver's license containing a photo. Petitioner stated at the hearing that she did "not recall ever

meeting this officer," that she had permitted others to use her car, and had lost her driver's license at this time. She now contends, for the first time, that she was with her dying grandmother at the time the ticket was issued.

An administrative determination is regarded as supported by substantial evidence when the proof is so substantial that an inference of the existence of a fact can reasonably be drawn therefrom (*see Matter of Stork Rest. v Boland*, 282 NY 256, 273 [1940]). The duty of weighing the evidence and resolving conflicting testimony rests solely on the administrative agency conducting the hearing (*id.* at 267). The agency's determination was supported by substantial evidence in the testimony of the police officer.

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

ENTERED: NOVEMBER 19, 2009



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

1539 William J. Fay III, etc., Index 18874/06
Plaintiff-Appellant,

-against-

Enrique Vargas,
Defendant-Respondent.

Zeccola & Selinger, LLC, Goshen (John S. Selinger of counsel), for appellant.

Burke, Lipton & Gordon, White Plains (Brian D. Acard of counsel), for respondent.

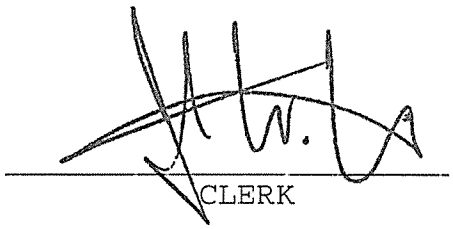
Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered June 23, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The police accident report was inadmissible because it was made by an officer who did not witness the accident and it contains the hearsay, and presumably self-serving, statements of plaintiff's decedent as to the ultimate issue of fact (*Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 396 [2003], *lv dismissed in part, denied in part* 100 NY2d 636 [2003]; *Kajoshaj v Greenspan*, 88 AD2d 538, 539 [1982]). The officer's affidavit

vouching for the truth of his report does not render admissible the hearsay statements contained in the report.

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

ENTERED: NOVEMBER 19, 2009



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

1540N Paul Winn, Index 600462/07
Plaintiff-Appellant,

-against-

Michelle Tvedt, etc., et al.,
Defendants,

12 East 87th Street Owners Corp.,
Defendant-Respondent.

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for appellant.

Braverman & Associates, P.C., New York (Jon Kolbrener of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 28, 2008, which lifted a stay of any action by defendant 12 East 87th Street Owners Corp. to terminate plaintiff's tenancy of apartment units 8C and Penthouse at 12 East 87th Street, unanimously affirmed, without costs.

The order is not appealable as of right because it did not decide a motion made on notice (CPLR 5701[a][2]). However, in the interest of judicial economy, we nostra sponte deem the notice of appeal a motion for leave to appeal and grant said leave (*see* CPLR 5701[c]; *Milton v 305/72 Owners Corp.*, 19 AD3d 133 [2005], *lv denied* 7 NY3d 778 [2006]).

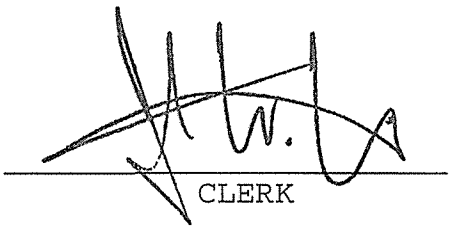
The court properly lifted the stay, since the record

establishes that plaintiff failed to comply with the conditions imposed by the court in granting the stay and that he was afforded an opportunity to remedy his noncompliance.

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

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

ENTERED: NOVEMBER 19, 2009



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