SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 17, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Catterson, Moskowitz, Renwick, Richter, JJ.

3784 Peter L. Venetis, Index 650343/08
Plaintiff-Respondent,

-against-

David Stone, et al.,
Defendants-Appellants.

_____

Faust Oppenheim LLP, New York (Petra von Ziegesar of counsel), for appellants.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jeffrey T. Golenbock of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 10, 2010, which denied so much of defendants' dismissal motion as was directed to the first, third, fourth and fifth causes of action, unanimously affirmed, with costs.

The court dismissed the cause of action for declaratory judgment, but left standing the causes for breach of contract, unjust enrichment, quantum meruit and promissory estoppel. Accepting the allegations of the complaint as true and giving plaintiff the benefit of every possible favorable inference (*see e.g. AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]), one cannot conclude that he was engaged solely in effecting transactions in securities (*see* 15

USC § 78c[a][4][A]) or buying and selling securities (§ 78c[a][5][A]; *see also* §§ 78c[a][10], 78o[a][1]).

The agreement alleged by plaintiff is sufficiently definite to be enforced (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475 [1989], *cert denied* 498 US 816 [1990]). In fact, because he alleges far more than simply negotiating business opportunities, his claims are not barred by General Obligations Law § 5-701(a)(10) (*see Super v Abdelazim*, 108 AD2d 1040, 1041-1042 [1985]). Because the statute of frauds does not bar the breach of contract claims, plaintiff's promissory estoppel claim also survives, despite plaintiff's failure to plead unconscionable injury (*see Foster v Kovner*, 44 AD3d 23, 29-30 [2007]).

Since plaintiff does not seek an assignment of LLC interests, defendants' argument that such an assignment must be in writing is irrelevant.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3945-
3945A Judith Halevi, et al.,
Plaintiffs,

-against-

Bartley Fisher,
Defendant.
- - - - -
Bartley Fisher,
Counterclaim-Plaintiff-Appellant,

-against-

Judith Halevi, et al.,
Counterclaim-Defendants,

Wagner Davis P.C., et al.,
Additional-Counterclaim-
Defendants-Respondents,

J-Bar Associates, LLC, et al.,
Additional-Counterclaim-Defendants.
- - - - -
Judith Halevi,
Plaintiff,

-against-

Bartley Fisher,
Defendant.
- - - - -
Bartley Fisher,
Counterclaim-Plaintiff-Appellant,

-against-

Judith Halevi,
Counterclaim-Defendant,

Wagner Davis P.C., et al.,
Additional-Counterclaim-
Defendants-Respondents,

J-Bar Associates, LLC, et al.,
Additional-Counterclaim-Defendants.

Index 604456/06
105349/07

Meyers Tersigni Feldman & Gray LLP, New York (Anthony L. Tersigni of counsel), for appellant.

The McDonough Law Firm, L.L.P., New Rochelle (Edward G. Warren of counsel), for respondents.

Orders, Supreme Court, New York County (Jane S. Solomon, J.), entered June 12, 2009, which granted the motion of additional counterclaim-defendants Wagner Davis P.C. and Steven R. Wagner (collectively law firm) for summary judgment dismissing the counterclaims asserted against them for aiding a breach of fiduciary duty and for tortious interference with prospective economic relations, unanimously affirmed, with costs.

The record shows that the law firm established its entitlement to judgment as a matter of law and that in opposition, defendant/counterclaim plaintiff Bartley Fisher failed to raise a triable issue of fact. The law firm submitted evidence showing that J-Bar Associates, LLC listed only plaintiff Judith Halevi as owner, that the law firm had never agreed to represent Fisher personally but only to represent C-Square Associates and Halevi in connection with the negotiations with Starwood Capital Group, LLC, and that Fisher had consented to such representation and the possibility of a conflict of interest by signing a letter agreement in 2005.

Furthermore, the law firm demonstrated that Fisher suffered no damages by its representation. The parties stood to gain from

a higher settlement, and at his deposition, Fisher acknowledged that the Starwood settlement amount was acceptable to him. Accordingly, any prejudice to Fisher's position in the dispute over his interest in J-Bar with Halevi was avoided by the escrow of settlement funds, and the litigation between Halevi and Fisher was thereafter settled.

The court also properly found that, even if Halevi did breach her fiduciary duty to Fisher, the firm did not knowingly participate in the breach (*see Kaufman v Cohen*, 307 AD2d 113, 125-126 [2003]). Nor were Fisher's claims of tortious interference against the law firm meritorious, as counsel was "immunized from liability under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith" (*Beatie v DeLong*, 164 AD2d 104, 109 ([1990]). Thus, Fisher's argument here that the motion court failed to address the issues of compensatory damages and disgorgement of legal fees is unavailing, as the court found both that Fisher had not raised a triable issue as to how he was damaged by the law firm's

representation, and that Fisher could not recover from the law firm for breach of fiduciary duty or tortious interference.

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

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

ENTERED: FEBRUARY 17, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4157 Inocencia Cruz, Index 6018/05
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 8, 2009, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's motion to strike the note of issue to allow further discovery, unanimously modified, on the law, defendant's motion denied, and plaintiff's motion granted to the extent of permitting post-note of issue discovery concerning two notice witnesses, and otherwise affirmed, without costs.

Plaintiff alleges that she was injured when she slipped and fell on a wet floor in the restroom of a public park. Defendant failed to satisfy its initial burden of showing prima facie that it lacked actual or constructive notice of the alleged hazard, since the testimony of defendant's park supervisor regarding general daily maintenance procedures failed to identify the last time the bathroom had been checked or cleaned before the accident

occurred (*see Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323 [2008]). Moreover, the park supervisor had no personal knowledge of the condition of the restroom at the time of the accident or during the hours immediately preceding it (*see Lebron v Napa Realty Corp.*, 65 AD3d 436 [2009]).

As plaintiff's failure to disclose witness affidavits prepared before the commencement of the action was the result of law office failure, and plaintiff referred to both witnesses in her General Municipal Law § 50-h examination, the witnesses' testimony need not be precluded, so long as defendant is afforded an opportunity to depose the witnesses before trial (*see Spitzer v 2166 Bronx Park E. Corps.*, 284 AD2d 177 [2001]; *Alabadla v New York City Tr. Auth.*, 276 AD2d 278 [2000]; *O'Callaghan v Walsh*, 211 AD2d 531 [1995]; 22 NYCRR 202.21[d]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4270 The People of the State of New York, Ind. 4461/07
Respondent,

-against-

Victoria Mojica,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Dewey & LeBoeuf LLP, New York (Mayur R. Patel of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

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Judgment, Supreme Court, New York County (John Cataldo, J.), rendered January 8, 2009, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth degree, four counts each of unlawfully dealing with a child in the first degree and endangering the welfare of a child, and two counts of criminally using drug paraphernalia in the second degree, and sentencing her to an aggregate term of 5 years' probation with 250 hours of community service, unanimously affirmed.

The verdict was based on legally sufficient evidence. Moreover, we find that there was overwhelming evidence that defendant was a possessor of the drugs and paraphernalia found in her apartment during the execution of a search warrant in her presence. Most of the contraband was in the refrigerator and other locations in the kitchen likely to be used by defendant in

daily life. The evidence warrants the conclusion that defendant exercised dominion and control, at least jointly with her codefendant, over the contraband (*see* Penal Law § 10.00[8]; *People v Torres*, 68 NY2d 677 [1986]; *People v Tirado*, 38 NY2d 955 [1976]). The jury could have readily rejected any suggestion that the codefendant somehow sneaked the contraband into the apartment without defendant's knowledge.

The court properly exercised its discretion in permitting the People to ask defendant about uncharged sales made in the apartment. In these sales to an informant, a woman generally matching defendant's description retrieved drugs from the refrigerator. Initially, we note that these questions elicited nothing but denials from defendant. In any event, regardless of their admissibility as part of the People's direct case or as impeachment material, they were at least admissible to refute defendant's testimony that she had no knowledge of any drugs in her apartment. These inquiries were relevant to her knowledge of drug activity in her apartment (*see People v Alvino*, 71 NY2d 233, 242-243 [1987]), and their probative value outweighed any prejudicial effect. Defendant, citing *People v Robinson* (68 NY2d 541, 544-545 [1986]), argues that the People were required to prove by clear and convincing evidence that she was the person who made the uncharged sales. However, the rule in *Robinson* was limited to situations in which the prosecution seeks to prove

identity by way of a distinctive modus operandi. Here, the description of the female member of the drug-selling team, coupled with the location and surrounding circumstances, made it at least highly likely that defendant was this person.

The court properly denied defendant's motion to suppress an incriminating statement she made to her sister, which was overheard by the police. The statement was plainly spontaneous, and was not induced by any actions of the police (*see People v Harris*, 57 NY2d 335, 342 [1982], *cert denied* 460 US 1047 [1983]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, JJ.

4271 Edward Heim, et al., Index 113467/07
Plaintiffs-Respondents,

-against-

The Trustees of Columbia University
in the City of New York,
Defendant-Appellant,

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

_____

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel), for appellant.

Larkin, Axelrod, Ingrassia and Tetenbaum, LLP, Newburgh (Michael Kolb of counsel), for Heim respondents.

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

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 11, 2010, which denied defendant Columbia's motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion for leave to amend the complaint to assert a cause of action against Columbia under General Municipal Law (GML) § 205-e(3), unanimously reversed, on the law, without costs, the motion granted, the cross motion denied, and the complaint dismissed as against Columbia. The Clerk is directed to enter judgment in favor of Columbia accordingly.

An out-of-possession landlord with a right of reentry may be held liable where it has constructive notice of a "significant

structural or design defect in violation of a specific statutory safety provision" *(Quinones v 27 Third City King Rest.,* 198 AD2d 23, 24 [1993]). Columbia's contention that it did not have a right to reenter the premises to inspect or make repairs is belied by the plain language of the governing lease. Nonetheless, we find that the missing drain cover did not constitute a structural defect (*see Avila v Rahman NY*, 275 AD2d 271, 272 [2000]; *Morrone v Chelnik Parking Corp.*, 268 AD2d 268, 270 [2000]). Moreover, the Building Code provisions upon which plaintiff relies, relating to the load-bearing capacity of the basement floor, do not avail him, because they were designed to prevent a different harm from that allegedly suffered by plaintiff (*see Avila*, 275 AD2d at 272). Accordingly, Columbia cannot be held liable for plaintiff's injury under a theory of constructive notice (*see Torres v West St. Realty Co.*, 21 AD3d 718, 721 [2005], *lv denied* 7 NY3d 703 [2006]), and plaintiffs' common-law negligence and Labor Law § 200 claims fail.

Other than their contention that the missing drain cover constituted a violation of the Building Code, plaintiffs point to

no other statutory provisions which could serve as a predicate for their GML § 205-e claim. As such, that claim also fails (*see Williams v City of New York*, 2 NY3d 352, 365 [2004]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4272 In re Cisely G.,

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

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Randall S. Carmel, Syosset, for appellant.

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

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at fact-finding hearing; Nancy M. Bannon, J. at disposition), entered on or about February 22, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of attempted gang assault in the second degree and assault in the third degree, unanimously modified, on the law, to the extent of vacating the finding as to attempted gang assault in the second degree, dismissing that count of the petition and remanding for a new dispositional hearing, and otherwise affirmed, without costs.

The count of the petition charging appellant with committing acts constituting second-degree gang assault alleges that "with intent to cause physical injury to another person and when aided by two or more other persons actually present [she] caused/attempted to cause physical injury to such person or to a

third person." However, these are not the elements of gang assault in the second degree, where the required result is *serious* physical injury. Therefore, this count was defective.

Moreover, attempted gang assault in the second degree is a legal impossibility for trial purposes (*Matter of Stephanie R.*, 196 Misc 2d 659 [Family Ct, Queens County 2003]), as "there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended" (*People v Campbell*, 72 NY2d 602, 605 [1988]). Since second-degree gang assault involves the intended result of physical injury and the unintended result of serious physical injury, it is similar to first-degree manslaughter, which cannot be attempted because "there can be no attempt to commit a crime where one of the elements is a specific intent but another, an unintended result" (*People v McDavis*, 97 AD2d 302, 304 [1983], *lv denied* 61 NY2d 910 [1984]). The only exceptions to this rule involve special situations such as a guilty plea in a criminal case (*see People v Foster*, 19 NY2d 150, 153 [1967]).

The prior cases in which we affirmed findings of attempted second-degree gang assault (*Matter of Alizia McK.*, 25 AD3d 429 [2006]; *Matter of Esmeralda C.*, 309 AD2d 507 [2003]) do not stand for any proposition contrary to this determination. The parties to those appeals did not litigate any issues relevant to the validity of such a charge, and we had no occasion to reach such

issues (*see e.g. People v Louree*, 8 NY3d 541, 546 n [2007]).

However, the evidence established assault in the third degree. We find no reason to disturb the court's credibility determination as to the victim's identification of appellant as one of her attackers.

Since we are dismissing the most serious charge, we find it appropriate to remand for a new dispositional hearing.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., DeGrasse, Freedman, Román, JJ.

4275 Gloria Aguilar, et al., Index 103132/06
Plaintiffs-Respondents,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

_____

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellants.

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York (Ben B. Rubinowitz of counsel), for respondents.

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Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered August 6, 2009, upon a jury verdict awarding plaintiff Gloria Aguilar an aggregate amount of $8 million for past physical and mental pain and suffering over 3.7 years, an aggregate amount of $8 million for future physical and mental pain and suffering over 32.6 years, $9.5 million for future medical expenses, and awarding plaintiff Aristedes Aguilar $1 million for past loss of services and $1 million for future loss of services over 27.4 years, unanimously modified, on the law, to reduce the award for future medical expenses to $6,969,793.19, and, on the facts, to vacate the awards for past and future physical and mental pain and suffering and past loss of services and order a new trial solely as to such damages, unless plaintiffs, within 30 days of service of a copy of this order with notice of entry, stipulate to reduce the awards for past

physical and mental pain and suffering to $5 million, for future physical and mental pain and suffering to $5 million, and for past loss of services to $500,000 and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

Plaintiff, a 45-year-old married mother of three, was hit by a bus, dragged along the street and remained under the bus for some time while rescuers attempted to free her. As a result of the accident, her left leg was amputated above the knee and her right leg was rendered, essentially, useless. Plaintiff underwent 10 surgeries, had numerous setbacks and suffers from post-traumatic stress disorder and severe depression. She depends on others for the most basic of care, and because of complications from her prosthesis and residual pain from the accident, she has been unable to engage in relations with her husband. Given the extensive proof of plaintiff's psychological trauma, the trial court proposed a jury verdict sheet which included itemized damages for, inter alia, past and future mental and past and future physical, pain and suffering.

Because defendants failed to object to the errors in the verdict sheet, the charge became the law applicable to the

determination of the case (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 559 [2009]), and this Court will only review if the error was "fundamental" (*Clark v Interlaken Owners*, 2 AD3d 338, 340 [2003]). The error here was not fundamental because it did not "confuse [or] create[] doubt as to the principle of law to be applied" (*Aragon v A & L Refrig. Corp.*, 209 AD2d 268, 269 [1994] [internal quotation marks and citations omitted]), or improperly shift fault (*see Polipo v Sanders*, 227 AD2d 256, 258 [1996], *lv denied* 88 NY2d 812 [1996]), such that the jury was "prevented from fairly considering the issues at trial" (*Curanovic v New York Cent. Mut. Fire Ins. Co.*, 22 AD3d 975 [2005] [internal quotation marks and citations omitted]). Accordingly, the issue is beyond the scope of review (*see Klein-Bullock v North Shore Univ. Hosp. at Forest Hills*, 63 AD3d 536 [2009]).

Under the circumstances presented, the award for past loss of services and the aggregate awards for past physical and mental pain and suffering and for future physical and mental pain and suffering deviate materially from what is reasonable compensation to the extent indicated (*see e.g. Bissell v Town of Amherst*, 56 AD3d 1144, 1148 [2008], *lv dismissed in part and denied in*

part 12 NY3d 878 [2009]; *Miraglia v H & L Holding Corp.*, 36 AD3d 456 [2007], *lv denied* 10 NY3d 703 [2008]; *Bondi v Bambrick*, 308 AD2d 330 [2003]). The award for future medical expenses is also reduced to the maximum amount supported by the evidence (*see Miraglia* at 457).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4276 Rowena Cheng, et al., Index 600929/08
Plaintiffs-Appellants,

-against-

Danjonro, Inc., et al.,
Defendants-Respondents.

_____

Massoud & Pashkoff, LLP, New York (Ahmed A. Massoud of counsel), for appellants.

Iannuzzi and Iannuzzi, New York (John Nicholas Iannuzzi of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 2, 2010, which granted the individual defendants' motion to dismiss the complaint as against them and denied plaintiffs' motion for partial summary judgment dismissing the counterclaim and as against the corporate defendants on the first and second causes of action, unanimously affirmed, without costs.

Dismissal of the complaint as against the individual defendants was proper, since plaintiffs failed to allege, "with the requisite particularized statements detailing fraud or other corporate misconduct, facts that would warrant piercing the corporate veil" (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [2005] [internal quotation marks and citation omitted]). The record demonstrates that the corporate defendant Designer Doors Direct, Inc. was formed for legal purposes and was engaged

in legitimate business. Similarly, the allegations of the complaint do not support any inference that the individual defendants violated the Debtor and Creditor Law (*see Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 [2000]).

Furthermore, in light of the allegations of wrongdoing by both plaintiffs and the corporate defendants in this discontinued business venture, the court properly determined that issues of fact precluded summary judgment on the first and second causes of action and counterclaim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4277 The People of the State of New York, Ind. 1073/08
Respondent,

-against-

Jerry Smith,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.) rendered on or about February 11, 2009,

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: FEBRUARY 17, 2011

CLERK

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

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4278 Drianna Rodriguez, etc., Index 18720/06
Plaintiff-Appellant,

-against-

Our Lady of Mercy Healthcare Systems, Inc., et al.,
Defendants-Respondents.

_____

Tomkiel & Tomkiel, P.C., Scarsdale (Matthew Tomkiel of counsel), for appellant.

_____

Appeal from order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered September 16, 2009, which denied plaintiff's motion for a default judgment against defendant St. Agnes Hospital, unanimously dismissed, without costs, as taken from a nonappealable order.

The order appealed was entered ex parte as it relates to St. Agnes, the only party against which the default judgment was sought, and an ex parte order is not appealable (CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]; *Lichtman v Mount Judah Cemetery*, 269 AD2d 319 [2000], *lv dismissed in part*

and denied in part 95 NY2d 860 [2000]). It is further noted that plaintiff has failed to serve St. Agnes with notice of this appeal.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4280 In re Akeem B.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Byron Robert Goldstein of counsel), attorney for the child.

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

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at fact-finding hearing; Nancy M. Bannon, J. at disposition), entered on or about March 1, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the third degree and menacing in the third degree, and placed him on probation for a period of nine months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a term of probation. The underlying offense was not a simple schoolboy fight; instead, appellant insisted on fighting after the complainant twice refused to do so. In addition,

appellant had disciplinary and academic problems at school and his mother admitted she was unable to supervise him adequately. In light of these factors, as well as the very short duration of any supervision that an ACD might have provided, the court adopted the least restrictive dispositional alternative consistent with appellant's needs and those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4282 London Rain Ortiz, an Infant by His Mother and Natural Guardian, Kristal Fowler, et al., Plaintiffs-Respondents, Index 13063/06

-against-

Gun Hill Management, Inc., Defendant-Respondent,

Sumkin Family Limited Partnership XII, et al., Defendants,

Langsam Property Services Corp., Defendant-Appellant.

_____

Mound Cotton Wollan & Greengrass, New York (Kenneth R. Lange of counsel), and McMahon Martine & Gallagher, Brooklyn (Patrick W. Brophy of counsel), for appellant.

Levy, Phillips & Konigsberg, LLP, New York (Philip Monier III of counsel), for Ortiz respondents.

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Deirdre E. Tracey of counsel), for Gun Hill Management Inc., respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered August 11, 2009, which denied defendant Langsam Property Services Corp.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The record presents issues of fact as to the scope and extent of defendant managing agent's (Langsam) control over the property, which if "complete and exclusive" could render Langsam liable for nonfeasance in abating the lead-based paint condition that allegedly injured the infant plaintiff (*see German v Bronx*

United in Leveraging Dollars, 258 AD2d 251, 252 [1999]). Langsam's contract could readily be construed as giving it "complete and unfettered authority to undertake all repairs costing less than" $2,000, as well as the repair of any condition it deemed an emergency (*see Tushaj v Elm Mgt. Assoc.*, 293 AD2d 44, 48 [2002]; *see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139-140 [2002]).

Issues of fact also exist as to Langsam's alleged affirmative acts of negligence, for which it may be liable to plaintiffs if it was in complete and exclusive control of the property (*see Caldwell v Gumley-Haft L.L.C.*, 55 AD3d 408 [2008]; *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 11 [2006]). The first is whether Langsam failed to timely or adequately remedy the condition despite plaintiff's numerous complaints over the course of several years. The second is whether Langsam was negligent in failing to move the infant plaintiff into another apartment until October 2004, the Department of Health and Mental

Hygiene having found 10 lead-based paint violations in August 2004 (*see Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 11 [2006]; *German v Bronx United in Leveraging Dollars*, 258 AD2d at 252).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4283 The People of the State of New York, Ind. 1815/08
Respondent,

-against-

Luis Ortiz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Patricia Curran of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered February 17, 2009, as amended March 18, 2009, and as further amended April 12, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 2 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence warrants the conclusion that an officer had a suitable opportunity to observe defendant sell drugs to an apprehended buyer.

The court properly precluded defendant from introducing evidence that the alleged buyer, who died before defendant's trial, told defendant's investigator that he bought the drugs at

issue from someone other than defendant. The court correctly rejected defendant's argument that the deceased buyer's statements qualified as declarations against penal interest. In the first place, at the time the buyer made the hearsay declarations, he had already pleaded guilty to a misdemeanor and been sentenced, and he did not take an appeal. The buyer would have had no reason to believe that the declarations would ever be used against him in any proceeding. Furthermore, the identity of the seller was not an incriminating part of the declarations (*see People v Geoghegan*, 51 NY2d 45, 49 [1980]). Finally, defendant did not provide any meaningful independent proof that the statements were reliable, and the People had evidence to the contrary (*see People v Ennis*, 11 NY3d 403, 412-413 [2008], *cert denied* __US__, 129 S Ct 2383 [2009]).

Since defendant only argued that these declarations should have been admitted under a state law hearsay exception, and never claimed he was constitutionally entitled to introduce them (*see People v Lane*, 7 NY3d 888, 889 [2006]), his constitutional claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, since this evidence was neither reliable nor critical to establish defendant's defense (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]).

Defendant has not established any basis for summary reversal as the result of the loss of certain trial exhibits (see *People v Yavru-Sakuk*, 98 NY2d 56, 59 [2002]). The loss of these exhibits has not impeded our weight of the evidence review.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, JJ.

4284 Antonio A. Simoes, Index 6506/04
Plaintiff-Appellant-Respondent,

-against-

City of New York,
Defendant-Respondent-Appellant.

_____

Law Offices of H.Q. Nguyen, New York (Herbert Rodriguez, Jr. of counsel), for appellant-respondent.

White, Quinlan & Staley, L.L.P., Garden City (Joanne Emily Bell of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered July 20, 2009, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the cause of action pursuant to Labor Law § 240(1), denied plaintiff's cross motion for summary judgment on the § 240(1) claim, and denied defendant's motion for summary judgment dismissing the cause of action pursuant to Labor Law § 241(6), unanimously affirmed, without costs.

On the night of the subject accident, plaintiff was working as a flagman charged with directing traffic so as to allow manlifts to be driven into position under the bridge that was being renovated. During the course of this work, one of the manlifts malfunctioned and the workers decided to drive it to a

nearby vacant lot. When the manlift was unable to make it over the curb next to the lot, plaintiff climbed up the boom and into the aerial basket in an attempt to use the controls in the basket to negotiate the manlift over the curb. Moments later, a foreman drove another vehicle toward the manlift in an attempt to push it into the lot. When that vehicle made contact with the manlift, the manlift fell over with plaintiff still within the aerial basket.

Under the circumstances presented, dismissal of the Labor Law § 240(1) cause of action was proper. Plaintiff was not protected by the statute since his duties as a flagman did not entail elevation-related risks *(see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Modeste v Mega Constr. Inc.*, 40 AD3d 255 [2007]; *Jamison v County of Onondaga*, 17 AD3d 1142, 1143 [2005]).

The court properly declined to dismiss the section 241(6) cause of action. Plaintiff was sufficiently in the construction area for the purposes of section 241(6) (*see Lucas v KD Dev. Constr. Corp.* 300 AD2d 634 [2002]), and contrary to defendant's contention, there are triable issues as to whether the Industrial

Code provisions relied upon by plaintiff, namely, 12 NYCRR 23-9.6(c)(3) and 12 NYCRR 23-9.6(e)(8), are applicable.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4285 Michael Cikoja, Index 16577/05
Plaintiff-Appellant,

-against-

Alan R. Elstein,
Defendant-Respondent.

_____

Cascione Purcigliotti & Galluzzi, New York (Thomas G. Cascione of counsel), for appellant.

Koors & Jednak, Bronx (Paul W. Koors of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered October 5, 2009, dismissing the complaint, and bringing up for review an order, same court and Justice, entered July 21, 2009, which denied plaintiff's motion to set aside the jury verdict, unanimously affirmed, without costs.

The verdict was based on a fair interpretation of the evidence; issues of credibility are for the jury, whose resolution thereof is entitled to deference (*see Crespo v Chan*, 54 AD3d 621 [2008]). There was ample evidence from which the jury could fairly infer that plaintiff was not credible and did not sustain a serious injury to his right shoulder as a result of the 2003 automobile accident.

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

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4286 The People of the State of New York Ind. 3234/01
Respondent,

-against-

Denny Diaz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 2, 2008, as amended September 9, 2008, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a second felony offender, to a term of 3 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, made on the ground of alleged denial of defendant's constitutional right to a speedy trial (*see People v Taranovich*, 37 NY2d 442, 445 [1975]). The delay was entirely attributable to defendant, who unlawfully failed to appear and was returned on a bench warrant approximately six and one-half years later. Defendant could have terminated the delay at any time by

complying with the law and surrendering himself (*see e.g. People v Atkins*, 4 AD3d 252. 253 [2004], *lv denied* 2 NY3d 795 [2004]; *see also People v Ortiz*, 60 AD3d 563 [2009], *lv denied* 12 NY3d 919 [2009]). In any event, to the extent the actions of the authorities in searching for an absconding defendant may be relevant, we find that the police made reasonably diligent efforts. Furthermore, the remaining *Taranovich* factors weigh in favor of the People.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4287 11 Essex Street Corp., Index 600176/04
Plaintiff, 110019/04
101984/05
-against- 590172/06
590479/06
Tower Insurance Company of New York, 590879/06
Defendant. 590972/06
- - - - - 590456/09
11 Essex Street Corp.,
Plaintiff-Respondent-Respondent,

-against-

7 Essex Street, L.L.C., etc.,
Defendant-Respondent,

DeSimone Consulting Engineers, et al.,
Defendants-Appellants,

Berzak Gold, P.C.,
Defendant-Respondent-Appellant,

Big Apple Wrecking and Construction Corp.,
Defendant.

[And Other Actions]

_____

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for respondent-appellant.

Zetlin & De Chiara LLP, New York (Michael J. Vardaro of counsel), for DeSimone Consulting Engineers, PLLC, appellant.

Harrington, Ocko & Monk, LLP, White Plains (Michael W. Freudenberg of counsel), for Jeffrey M. Brown Associates, Inc., appellant.

Weg & Myers, P.C., New York (Dennis T. D'Antonio of counsel), for respondent-respondent.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Emily Jane Goodman,

J.), entered September 15, 2009, which, insofar as appealed from, granted plaintiff's motion to amend the complaint to add a cause of action for gross negligence and a demand for punitive damages against defendants Jeffrey M. Brown Associates, Inc., DeSimone Consulting Engineers, and Berzak Gold, P.C., and denied DeSimone's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

The record shows that Jeffrey M. Brown Associates knew that the building at 7 Essex Street would not tolerate the likely settlement of its foundations and that plaintiff's building had to be underpinned, and yet the record does not permit the conclusion as a matter of law that Brown fulfilled its responsibility to monitor the excavation every day. DeSimone was responsible for performing controlled inspections of the underpinning of plaintiff's building and knew that the building might be damaged during the excavation, and yet the record does not permit the conclusion that DeSimone took all necessary precautions to prevent damage to the building. Berzak Gold's principal knew that plaintiff's building had only a rubble slab footing and yet did not speak to plaintiff or ask to see any construction plans. The record presents issues of fact whether defendants' conduct "evinced a conscious disregard of the rights of others or [was] so reckless as to amount to such disregard"

(*Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC*, 71 AD3d 537, 538 [2010] [internal quotation marks and citation omitted]). Thus, the court properly permitted plaintiff to amend the complaint to add a cause of action for gross negligence against defendants, since the amendment caused no prejudice to them (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22 [2003]). As the faulty underpinning of a multi-story building implicates public safety, if gross negligence is proved, punitive damages may properly be awarded (*see Fonda v 157 E. 74th Co.*, 158 AD2d 297 [1990]).

The court correctly denied DeSimone's motion for summary judgment on the grounds that it had denied a prior summary judgment motion by DeSimone and no new factual assertions and evidence were submitted or other sufficient cause shown for DeSimone's making the second motion (*see Jones v 636 Holding Corp.*, 73 AD3d 409 [2010]; *Forte v Weiner*, 214 AD2d 397 [1995], *lv dismissed* 86 NY2d 885 [1995]).

We have considered defendants' remaining contentions and find them without merit.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4288 Olufunmibi Awoshiley, Index 401711/08
Plaintiff-Appellant,

-against-

Beth Israel Medical Center, et al.,
Defendants-Respondents.

_____

Olufunmibi Awoshiley, appellant pro se.

Edwards Angell Palmer & Dodge LLP, New York (Rory J. McEvoy of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 5, 2009, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiff's retaliatory discharge claim fails to state a cause of action because it does not allege any conduct by defendants that violates the Executive Law (*see* Executive Law § 296[1][e]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]). His defamation claim is pleaded with insufficient particularity (*see Manas v VMS Assoc., LLC*, 53 AD3d 451, 454-455 [2008]). The remaining cause of action, civil

conspiracy, is not an independent cause of action in New York (*American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 416 [1998]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4290 The People of the State of New York, SCI 862/08
Respondent,

-against-

Mauhamet C.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Maxwell Wiley, J.), rendered on or about June 2, 2008,

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

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

ENTERED: FEBRUARY 17, 2011

CLERK

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

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4291N John Barnwell, Index 112825/07
Plaintiff-Respondent,

-against-

Emigrant Savings Bank, et al.,
Defendants-Appellants.

_____

Proskauer Rose LLP, New York (Bettina B. Plevan of counsel), for appellants.

Schwartz & Perry LLP, New York (Matthew T. Schatz of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered July 12, 2010, which granted plaintiff's motion to compel the deposition of defendants' Chairman and Chief Executive Officer, and denied defendants' cross motion for a protective order, unanimously reversed, on the facts and in the exercise of discretion, without costs, the motion denied and the cross motion granted.

In this age discrimination action, after plaintiff requested to depose Howard Milstein, defendants' Chairman and Chief Executive Officer, defendants complied with CPLR 3106(d) by notifying plaintiff that they would initially produce Lou Schlosser as a deponent, would produce Janet Martin second, and would then consider producing Milstein. Schlosser, who was plaintiff's supervisor and participated in discussions concerning whether to terminate plaintiff, would likely provide material

testimony based on his personal knowledge of the facts surrounding the action. In contrast, Milstein appears to have had little contact with plaintiff, and plaintiff fails to show that Milstein's testimony would be unique (*see Weiner v Jewish Home & Hosp. for Aged*, 243 AD2d 403 [1997]). Regardless, defendants appear to have made a good-faith representation that they will produce Milstein if plaintiff determines, after deposing Schlosser and Martin, that Milstein's testimony would be material and unique (*see E & M Adv. West/Camelot Media, Inc. v Vertical Lend, Inc.*, 45 AD3d 502 [2007]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4292 In re Tony Simmons, Ind. 6052/08
[M-43] Petitioner,

-against-

Hon. Cassandra M. Mullen, et al.,
Respondents.

Law Office of Gregory J. Watford, New York (Gregory J. Watford of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Roberta L. Martin of counsel), for Hon. Cassandra Mullen, Hon. Carol Berkman and Eric T. Schneiderman, respondents.

Cyrus R. Vance, Jr., District Attorney, New York (Aaron Ginandes of counsel), for Cyrus R. Vance, Jr., respondent.

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

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

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4295 In re Aliyah Julia N.,

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

Cecelia Lee N.,
Respondent-Appellant,

Harlem Dowling-Westside Center,
Petitioner-Respondent.

_____

Julian A. Hertz, Larchmont, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose LLP, New York (Theodore K. Cheng of counsel), attorneys for the child.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 13, 2009, which, upon a finding of permanent neglect against respondent mother, terminated respondent's parental rights to the subject child and transferred the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for purposes of adoption, unanimously affirmed as to the fact-finding determination, and the appeal therefrom otherwise dismissed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that the agency made diligent efforts to encourage and strengthen the parental relationship, including working with respondent to formulate a service plan, maintaining frequent contact with her, scheduling visits with the child, and referring respondent for, inter alia, parenting skills classes and domestic violence counseling, and that, despite these efforts, respondent failed to complete the necessary programs and maintain meaningful contact with the child and plan for the child's future (Social Services Law § 384-b[7][a], [f]; § 384-b[3][g][i]; *Matter of Aisha C.*, 58 AD3d 471 [2009], *lv denied* 12 NY3d 706 [2009]). "[T]he agency is not charged with a guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]).

Respondent did not appear at the dispositional hearing and did not move to vacate her default. No appeal lies from an order entered on default (*see Matter of Joei R.*, 302 AD2d 334 [2003]; *lv dismissed in part, denied in part* 100 NY2d 575 [2003]). Were we to reach the merits, we would find that the child's best interests will be served by the termination of respondent's

parental rights and the child's adoption by the foster mother who has provided her with excellent care, and not by a suspended judgment (*see Matter of Isabella Star G.*, 66 AD3d 536 [2009]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4297-
4298 Ratha Mak,
Plaintiff-Respondent,

-against-

Silverstein Properties, Inc.,
Defendant-Respondent

120 Broadway Holdings, LLC,
Defendant-Appellant,

Platinum Maintenance Services Corp., et al.,
Defendants.

- - - - -

Ratha Mak,
Plaintiff-Respondent,

-against-

Silverstein Properties, Inc.,
Defendant-Appellant,

120 Broadway Holdings, LLC,
Defendant-Respondent,

Platinum Maintenance Services Corp., et al.,
Defendants.

[And Other Actions]

Index 15129/06
85550/06
86267/07

_____

Cartafalsa, Slattery, Turpin & Lenoff, New York (David R. Beyda and B. Jennifer Jaffee of counsel), for 120 Broadway Holdings, LLC, appellant/respondent.

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for Silverstein Properties Inc., respondent/appellant.

John V. Decolator, Garden City, for Ratha Mak, respondent.

_____

Orders, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 14, 2009, and June 14, 2010, which,

insofar as appealed from as limited by the briefs, denied Silverstein Properties Inc.'s and 120 Broadway Holdings, LLC's motions for summary judgment on their cross claims for contractual and common-law indemnification; and granted plaintiff's motion for reargument of the October 14, 2009 order and upon reargument, denied Silverstein's motion for summary judgment on plaintiff's Labor Law section 200 and common-law negligence claims, unanimously modified, on the law, to dismiss the cross claims for contractual indemnification, and otherwise affirmed, without costs.

The court properly denied Silverstein's motion for summary judgment on plaintiff's Labor Law section 200 and common-law negligence claims. Issues of fact remain as to whether Silverstein created the allegedly dangerous condition existing thereon or had notice thereof (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]; *Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264 [2008]; *DeSilva v City of New York*, 15 AD3d 252, 254 [2005]).

While 120 Broadway's intent to indemnify Silverstein for Silverstein's negligence can be discerned from the indemnification provision in the management agreement, that provision is void under General Obligations Law § 5-322.1 (*see Haynes v Estate of Goldman*, 62 AD3d 519 [2009]). Accordingly, Silverstein's cross claim for contractual indemnification is

dismissed.

120 Broadway's claim for contractual indemnification also fails as a matter of law and is dismissed, as the plain language of the indemnification provision shows that Silverstein agreed to indemnify 120 Broadway only for liability arising out of those acts or omissions of Silverstein "in violation of the agreement," outside the scope of Manager's authority, or otherwise constituting gross negligence, but did not agree to indemnify 120 Broadway for Silverstein's acts of negligence.

The court properly denied summary judgment on 120 Broadway's cross claim for common-law indemnification because Silverstein's negligence has not yet been established (*see Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 AD3d 635 [2010]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4299 The People of the State of New York, Ind. 6085/04
Respondent,

-against-

Rubin Scott,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered October 14, 2008, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

Although we find that defendant's waiver of the right to appeal was invalid, we perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4300 Admiral Insurance Company, Index 108052/08
Plaintiff-Respondent-Appellant,

-against-

Joy Contractors, Inc., et al.,
Defendants,

Lincoln General Insurance Company, et al.,
Defendants-Respondents,

Reliance Construction Ltd., etc., et al.,
Defendants-Appellants-Respondents.

_____

Gallo Vitucci & Klar, New York (Chad E. Sjoquist of counsel), for Reliance Construction Ltd., appellant-respondent.

Gordon & Silber, P.C., New York (Jon D. Lichtenstein of counsel), for New York Crane & Equipment Company, appellant-respondent.

Coughlin Duffy LLP, New York (Justin N. Kinney of counsel), for respondent-appellant.

Schoenfeld Moreland, P.C., New York (Jeff R. Thomas of counsel), for Lincoln General Insurance Company, respondent.

O'Melveny & Myers LLP, New York (Thomas G. Carruthers of counsel), for James Kennelly, East 51st Street Development Company, LLC, East 51st Associates, LLC, Magnum Real Estate Group, LLC, 968 Kingsman LLC, 309 Eagle LLC, East 51st Street New Co., LLC, Kennelly Development Company, LLC, and Kennelly-McInnis Development Company, LLC, respondents.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered June 25, 2009, which, insofar as appealed from as limited by the briefs, granted plaintiff Admiral Insurance Company's and defendant Lincoln General Insurance Company's motions for summary judgment to the extent of declaring that they have no obligation

to defend or indemnify defendant New York Crane & Equipment Company under the subject insurance policies, denied motions to dismiss the first, fourth, twelfth and thirteenth causes of action, and granted motions to dismiss the fifth cause of action and the sixth, seventh, ninth and tenth causes of action as against defendants other than Joy Contractors, Inc., unanimously modified, on the law, to declare that the residential construction activities exclusion in the Admiral policy is not applicable, and otherwise affirmed, without costs.

On March 15, 2008, a tower crane operated by Joy collapsed during the construction of a high-rise condominium at 303 East 51st Street in Manhattan. The accident resulted in the deaths of seven people, including six of Joy's employees, and other injuries and damage. Joy is a named insured under commercial general liability (CGL) and excess liability policies issued by Lincoln and Admiral, respectively.

In its first cause of action, Admiral seeks a declaration that it has no obligation to provide coverage for claims arising from the accident, based on the residential construction activities exclusion. However, the record establishes that the exclusion does not apply in this case (*see Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]). The evidence overwhelmingly indicates that, at the time of the accident, the

building was intended to be a mixed-use structure, not a purely residential one. This evidence includes references to "storefronts" in various documents, correspondence in which the New York City Department of Buildings confirms that the building to be constructed is a "mixed use" structure, and the affidavits by two people associated with the project. Admiral's engineering expert conclusorily dismissed the evidence indicating a "mixed use" intent. However, he lacked personal knowledge of the project, and his speculative conclusions are insufficient to overcome the evidence of mixed-use intent.

Admiral's second cause of action and Lincoln's cross claim seek a declaration that New York Crane is not entitled to coverage under the subject policies because it does not qualify as an additional insured. The additional insured endorsement under which New York Crane seeks coverage provides that "all insureds shown in a written contract, or agreement that includes primary and non-contributory wording where required" are additional insureds, "but only with respect to liability . . . caused . . . by [Joy's] acts or omissions; or . . . [t]he acts or omissions of those acting on [Joy's] behalf; *in the performance of [Joy's] ongoing operations for the additional insured(s)*" (emphasis added). "[A]ffording the unambiguous provisions of the

policy their plain and ordinary meaning" (*Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 442 [2007]), we reject New York Crane's contention that Joy's contractual obligation to follow industry standards in its operation of the crane leased to it by New York Crane transformed Joy into a party working "for" or "on behalf" of New York Crane. Plainly, the parties had a lessor/lessee relationship, which could have been insured by an appropriate endorsement, such as one for leased equipment (*see e.g. Westchester Fire Ins. Co. v Continental Cas. Co.*, 2006 WL 786866, 2006 Minn App Unpub LEXIS 274 [Minn App 2006]).

As the additional insureds' coverage depends on whether the underlying claims arose out of Joy's acts or omissions, disposition of the fourth cause of action must await the trials of the underlying actions. Similarly, in the absence of discovery, it cannot be determined whether the professional services exclusion (the thirteenth cause of action) is applicable here.

In its fifth cause of action, Admiral seeks a declaration that the "LLC" defendants do not qualify as insureds, based on the CGL policy provision entitled "Section II - Who Is An Insured." However, the LLC defendants, who are the owners and developers of the construction project, seek coverage not as

named insureds, but as additional insureds, and that coverage is provided by the above-cited additional insured endorsement.

Insurance Law § 3420(d) (subd [d][2], as amended by L 2008, ch 388, § 5) does not afford a defense to Admiral's 12th and 13th causes of action relying on the employer's liability and professional services exclusions, respectively, because the Admiral policy was not "delivered or issued for delivery in this state." An insurance policy "is issued for delivery in New York if it covers both insureds and risks located in this state" (*see Preserver Ins. Co. v Ryba*, 10 NY3d 635, 642 [2008] [internal quotation marks and citation omitted]). The Admiral policy was issued to Joy, a New Jersey corporation with a New Jersey place of business, and delivered in New Jersey.

The sixth, seventh, ninth and tenth causes of action seeking to avoid coverage by, inter alia, declaring the policy void ab initio, are based on Joy's alleged misrepresentations in its application for excess coverage. However, the other defendants are not alleged to have made any misrepresentations to Admiral, and under New York law, they may not be penalized because of a material misrepresentation made by Joy (*Lufthansa Cargo, AG v New York Mar. & Gen. Ins. Co.*, 40 AD3d 444 [2007]; *see also BMW Fin. Servs. v Hassan*, 273 AD2d 428, 429 [2000], *lv denied* 95 NY2d 767 [2000]).

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4301 In re Veronica Wright-Roberts,
Petitioner-Appellant,

-against-

Livingston Roberts,
Respondent-Respondent.

_____

Orrick, Herrington & Sutcliffe LLP, New York (René A. Kathawala of counsel), for appellant.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about June 28, 2010, which denied petitioner's motion to compel respondent and/or his counsel to comply with a demand pursuant to CPLR 3118 for a verified statement setting forth respondent's post office address and residence, unanimously reversed, on the law, without costs, and the motion granted.

Respondent father has failed to pay child support, with the result that he is in substantial arrears. He has failed to make any payments of those arrears or appear at any scheduled court proceedings since October 2009, and a warrant for his arrest was issued in January 2010. Despite numerous attempts by the New York County Sheriff's Office to execute the warrant at four addresses either provided by respondent in these proceedings or identified by the Sheriff's Office, the warrant remains outstanding. To ascertain respondent's residence, petitioner served a CPLR 3118 demand on respondent's attorney for his client's address. When that demand was not complied with, petitioner moved for an order

compelling respondent and/or his counsel to provide a verified statement setting forth respondent's post office address and residence.

Pursuant to CPLR 3118, respondent, as a party in this action, is required to provide petitioner with a verified statement setting forth his post office address and residence. Moreover, respondent's counsel, who is currently representing respondent in the pending litigation, can also be compelled to disclose his client's address, if it is known by him, without implicating the attorney-client privilege, since "disclosure is necessary for the proper administration of justice" (*see Matter of Jacqueline F.*, 47 NY2d 215, 221 [1979]). It may be unlikely that respondent will comply with an order directing him to disclose his address, given his history of willfully failing to comply with court orders. However, that does not justify denying petitioner the relief to which she is entitled in the first instance. Respondent should not be permitted to hide from his obligations with impunity.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4302 The People of the State of New York, Ind. 4921/08
Respondent,

-against-

John O'Keefe,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), entered April 28, 2009, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The court should have granted defendant's motion to suppress evidence recovered from his backpack. However, the error in admitting the tool and other physical evidence recovered from the backpack was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Without the physical evidence, there was still overwhelming proof of every element of burglary, including the element of entry with intent to commit a crime.

Defendant's challenge to the People's summation is unpreserved and we decline to review it in the interest of

justice. As an alternative holding, we also reject it on the merits (*see People v Overlee*, 236 AD2d 133, 144 [1997], *lv denied* 91 NY2d 976 [1998]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4303 Ivan Coneo, Index 16463/00
Plaintiff-Respondent,

-against-

Washington Heights Hellenic Orthodox Church, Inc.,
Defendant-Appellant,

St. Spyridon Greek Orthodox Church,
Defendant.

_____

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset (Anton Piotroski of counsel), for appellant.

Burns & Harris, New York (Alison R. Keenan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about June 8, 2010, which, inter alia, granted defendant Washington Heights Hellenic Orthodox Church, Inc.'s (WHHOC) motions for a directed verdict and/or judgment notwithstanding the verdict to the extent of setting aside the jury verdict insofar as it included a finding that denied WHHOC's Workers' Compensation defense, i.e, that plaintiff's employer was not the alter ego of WHHOC, and directed a new trial on that issue, unanimously modified, on the law, judgment directed in favor of defendant as to the Workers' Compensation defense, the complaint dismissed, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The trial evidence established that the school, where plaintiff worked at the time of his injury, was the alter ego of WHHOC. Specifically, WHHOC, through its governing board (i.e., the Parish Council), exercised domination and control over the school, completely controlling its day-to-day functions including its decision making and finances. WHHOC owned the properties on which the school and St. Spyridon Church were situated. Moreover, the school and Spyridon Church were not separate legal entities, but rather, in effect, were unincorporated divisions of WHHOC that functioned in accordance with WHHOC's directives (*see e.g. Aguirre v Roman Catholic Church of St. Helena*, 277 AD2d 126 [2000]; *Pappas v Greek Archdiocese of N. & S. Am.*, 178 AD2d 104 [1991]). Given such proof of an alter ego relationship, the plaintiff can be deemed an employee of WHHOC, which would afford WHHOC a complete defense to the plaintiff's negligence action under Workers' Compensation Law § 11, thereby warranting dismissal of his claims

(*see e.g. Aguirre*, 277 AD2d 126; *Smith v Roman Catholic Diocese of Syracuse*, 252 AD2d 805 [1998]; *Pappas*, 178 AD2d 104).

We have considered appellant's remaining arguments and find them moot and/or unavailing.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4306 In re Deborah Muhammad, Index 401936/09
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Deborah Muhammad, appellant pro se.

Sonya M. Kaloyanides, New York (Andrew M. Lupin of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia Kern, J.), entered June 11, 2010, which denied the petition seeking to annul respondent's determination, dated July 13, 2009, finding petitioner ineligible for public housing for five years, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioner is ineligible for public housing for five years was not arbitrary and capricious and did not lack a rational basis (*see generally Slesinger v Department of Hous. Preserv. & Dev. of City of N.Y.*, 39 AD3d 246 [2007]). In making its determination, respondent relied on admissions made by petitioner as well as its admissions policy, which provides, in relevant part, that tenants subject to eviction from a Housing Authority apartment pursuant to a licensee action are ineligible for admission for five years from the date of the person's move-

out or eviction (*see Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [2004] ["an agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference"]). Here, petitioner was subject to eviction from the public housing residence pursuant to a licensee action because her sister vacated the subject apartment in 2001, and petitioner and her children were never added to the lease for the apartment.

Contrary to petitioner's argument that her eligibility application should be granted because a judge of the Civil Court instructed her to file an application for public housing under her own name, respondent cannot be compelled to approve petitioner's application, since she had no clear right to the relief requested (*see e.g. Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]).

Similarly, to the extent that petitioner claims that employees of respondent misinformed her about respondent's policies and she relied upon such statements, an agency "cannot be estopped from invoking [its] regulations" *(Taylor v New York State Div. of Hous. & Community Renewal,* 73 AD3d 634, 634 [2010]).

Petitioner's reliance on the fact that she occasionally paid rent while she resided in her sister's apartment without respondent's authorization, is misplaced. These payments did not

make her an authorized tenant of public housing (*see Matter of Barnhill v New York City Hous. Auth.*, 280 AD2d 339 [2001]).

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

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4307 The People of the State of New York, Respondent, SCI 2574/08 Ind. 2462/09

-against-

Carlos Rangel, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

Judgments, Supreme Court, Bronx County (John P. Collins, J.), rendered July 10, 2009, convicting defendant, upon his pleas of guilty, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of 2 years with 2 years' postrelease supervision, unanimously affirmed.

Although we find that defendant's waiver of the right to appeal was invalid, we perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4308 In re Dorothy Morman, Index 103530/09
Petitioner,

-against-

New York City Department of Housing
Preservation and Development,
Respondent.

_____

Vincent J. Licata, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Determination of respondent New York City Department of Housing Preservation and Development, dated December 9, 2008, which terminated petitioner's enhanced Section 8 rent subsidy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered November 5, 2009), dismissed, without costs.

Respondent's determination was supported by substantial evidence. The record demonstrates that petitioner violated the agency's policies requiring truthful and complete reporting of household composition and income information on the application and recertification forms (*see Matter of Hussain v Donovan*, 73 AD3d 573 [2010]; *Matter of Gerena v Donovan*, 51 AD3d 502 [2008]). In reaching its determination, respondent did not deviate from the regulatory framework governing income verification (*cf.*

Matter of Frick v Bahou, 56 NY2d 777, 778 [1982]).

The penalty imposed was not so disproportionate to the offense as to be shocking to one's sense of fairness (*see Hussain* at 573).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4309 The People of the State of New York, Respondent, Ind. 6214/08

-against-

Akeem Jordan, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew Mark Thomas of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered October 16, 2009, as amended October 27, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him to an aggregate term of 6 years, unanimously affirmed.

The court properly admitted, with suitable limiting instructions, uncharged crimes evidence that was highly probative without being unduly prejudicial. In this observation sale case, identity was a critical issue, particularly because there was a significant gap between the transaction and the arrest.

The court permitted the observing and arresting officers to give sanitized testimony about unspecified "interactions" between

themselves and defendant, including one in which defendant fled. The observing officer also testified about similarly unspecified interactions between defendant and two other persons before the charged sale, along with an actual sale to an additional customer at virtually the same moment as the charged sale. Even assuming that the jury might have assumed that all of these incidents involved criminality, they were nevertheless admissible (*see e.g. People v Carter*, 77 NY2d 95, 107 [1990], *cert denied* 499 US 967 [1991]; *People v Julius*, 300 AD2d 167, 168 [2002], *lv denied* 99 NY2d 655 [2003]; *People v Matthews*, 276 AD2d 385 [2000], *lv denied* 96 NY2d 736 [2001]). This evidence tended to show that the observing officer made a reliable identification, both because he knew defendant from a prior encounter, and because he had ample opportunity to observe him on the night of the charged sale. The evidence also showed that the arresting officer, who lost sight of defendant for a short period, arrested the right man because he knew defendant from previous encounters. The evidence of prior flight explained why the arresting officer did not stop defendant at the scene of the sale, but waited until he could trap defendant at another location.

Defendant's constitutional claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4310-
4310A Index 400575/09

In re Eugene Taylor,
Petitioner,

Lawrence P. Fraiberg,
An Allegedly Incapacitated Person,

Paul D. Siegfried, etc.,
Respondent.

- - - - -

Timothy Coyle,
Nonparty Appellant.

_____

Timothy Coyle, appellant pro se.

Gottesman, Wolgel, Malamy, Flynn & Weinberg, P.C., New York (Lawrence L. Flynn of counsel), for respondent.

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Order, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered on or about August 9, 2010, which, insofar as appealable, upon renewal, adhered to the original determination of the motion by the allegedly incapacitated person's (AIP) guardian for a determination of appellant's claim for payment for personal services allegedly rendered to the AIP from January 1, 2009 through June 3, 2009, and order, same court and Justice, entered on or about May 14, 2010, which ordered that the guardian deny appellant's claim, unanimously affirmed, without costs. Appeal from the portion of the August 9, 2010 order that denied appellant's motion for reargument unanimously dismissed, without

costs, as taken from a nonappealable order.

On the prior motion, the court determined that appellant's claim was not properly substantiated, since appellant was unable to produce a written contract, and his claim that he was hired by his brother, or by the AIP himself, pursuant to an oral agreement, to work 40 hours per week at an annual salary of $100,000 was not supported by tax records or contemporaneous time records documenting the hours he worked and the services he provided, but was based only on his own initial claim letter, a letter from his brother, and his affidavit. On renewal, appellant submitted another letter from his brother, which purported to set forth in detail appellant's job responsibilities pursuant to the alleged oral contract, and a detailed statement of hours and services rendered for each date of employment. Assuming that these submissions constituted "new facts," and assuming further that appellant's justification for failing to present them on the prior motion – that he left the documents in his condo in Florida – was "reasonable," the new facts do not change the prior determination (CPLR 2221[e][2], [3]). Appellant's submissions on renewal were plainly created after the

fact, and therefore added nothing to substantiate his claim.

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

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

ENTERED: FEBRUARY 17, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4312N-
4312NA Index 105224/05

Gerard A. Connolly,
Plaintiff-Respondent,

-against-

Napoli, Kaiser & Bern, LLP, et al.,
Defendants-Appellants,

Gerald Kaiser,
Defendant.

_____

Hitchcock & Cummings LLP, New York (Christopher B. Hitchcock of counsel), for appellants.

Deutsch Atkins, P.C., New York (Andrew M. Moskowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 24, 2009, which, insofar as appealed from, granted plaintiff's motion to add Napoli, Kaiser, Bern & Associates, LLP (NKBA) as a party to the action, unanimously affirmed, with costs. Order, same court and Justice, entered August 4, 2009, which, insofar as appealed from, granted plaintiff's motion to quash a deposition subpoena except to the extent it seeks employment records, unanimously affirmed, with costs.

The record demonstrates that NKBA and Napoli, Kaiser & Bern, LLP (NKB) not only bear virtually identical names, but also share an address, and that, while apparently plaintiff began working for NKB in 2000 pursuant to an oral contract, in 2001, he entered into a written employment agreement with NKBA. It is thus clear

that NKBA is united in interest with the original defendants and by reason thereof can be charged with notice of the commencement of the action. Given that plaintiff's claims are based on the alleged breach of the agreement with NKBA, NKBA knew or should have known that, but for a mistake as to the identity of the proper parties, plaintiff would have brought the action against it as well (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]; *Euroway Contr. Corp. v Mastermind Estate Dev. Corp.*, 59 AD3d 157 [2009]).

In light of the fact that the employment records the court ordered produced will almost certainly provide the information that defendants seek, the subpoena ad testificandum served on the nonparty witness was properly quashed (*see Kooper v Kooper*, 74 AD3d 6, 16-17 [2010]).

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

ENTERED: FEBRUARY 17, 2011

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3023 XL Specialty Insurance Co., et al., Index 650529/08
Plaintiffs-Appellants,

-against-

Loral Space & Communication, Inc.,
Defendant-Respondent.

_____

Boundas, Skarzynski, Walsh & Black, LLC, New York (James Sandnes of counsel), for appellants.

Kirkland & Ellis LLP, New York (Eric F. Leon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about February 16, 2010, modified, on the law, to grant plaintiffs' motion to the extent of declaring that plaintiffs are not obligated to indemnify defendant for the part of the fee award that directed defendant to pay fees to Abrams & Laster LLP as counsel for the class action plaintiffs, and to deny defendant's cross motion to the same extent, and otherwise affirmed, without costs.

Opinion by Moskowitz, J. All concur except Catterson and Acosta, JJ. who dissent in part and concur in part in an Opinion by Catterson, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Karla Moskowitz
Rolando T. Acosta, JJ.

3023
Index 650529/08

_____x

XL Specialty Insurance Co., et al.,
Plaintiffs-Appellants,

-against-

Loral Space & Communication, Inc.,
Defendant-Respondent.
_____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about February 16, 2010, which denied plaintiffs' motion for summary judgment on their cause of action seeking a declaration that they are not obligated to reimburse defendant for attorney's fee awards in an underlying Delaware class action and derivative law suit, and granted defendant's cross motion for summary judgment declaring that plaintiffs are so obligated.

Boundas, Skarzynski, Walsh & Black, LLC, New York (James Sandnes, James A. Skarzynski, Rachel Simon and Chelsea J. Walsh of counsel), for appellants.

Kirkland & Ellis LLP, New York (Eric F. Leon, Jay P. Lefkowitz and Maura M. Klugman of counsel), and Trachtenberg Rodes & Friedberg LLP, New York (Leonard A. Rodes of counsel), for respondent.

MOSKOWITZ, J.

The question this Court needs to resolve is whether plaintiffs-insurers' policy covers fees defendant-insured must pay to counsel for the plaintiffs in two lawsuits. Our analysis centers primarily around whether these fees constitute (1) a "loss" and (2) a "securities claim" under the policy. According to our interpretation, the motion court was correct to declare that there is coverage for the fees of plaintiffs' counsel in the derivative lawsuit. However, the motion court was incorrect to the extent it declared that plaintiffs-insurers must cover fees to counsel in the class action, because that case did not involve a "securities claim."

Plaintiffs-appellants XL Speciality Insurance Company, Arch Insurance Company and U.S. Specialty Insurance Company (the insurers) issued a "Management Liability and Company Reimbursement" policy to defendant-respondent Loral Space and Communication, Inc. (Loral) on a claims-made basis. The parties agree that section I(C) of the policy is the applicable provision. Under this section, the insurers agreed to pay, "on behalf of the **Company Loss** resulting solely from any **Securities Claim** first made against the **Company** during the **Policy Period** . . . for a **Company Wrongful Act**." The policy defines "Loss" as:

"damages, judgments, settlements or other amounts

(including punitive or exemplary damages where insurable by law) and **Defense Expenses** in excess of the Retention that the **Insured** is legally obligated to pay."

"**Company Wrongful Act**" means:

"any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by the Company in connection with a Securities Claim"

Loral paid an additional premium to amend the policy's definition of "Securities Claim" to include shareholder derivative claims in endorsement no. 11:

'Securities Claim' means a Claim, other than an administrative or regulatory proceeding against or investigation of a Company, made against any insured:

"(1) for a violation of any federal, state, local regulation, statute or rule regulating securities, including but not limited to the purchase or sale of, or offer to purchase or sell, securities which is:

"(a) brought by any person or entity based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the purchase or sale of, or offer to purchase or sell, securities of the Company; or

"(b) brought by a security holder of a Company with respect to such security holder's interest in securities of such Company; or

"(2) brought derivatively on behalf of the Company by a security holder of such Company."

Thus, the policy covers either a derivative claim by a shareholder or a claim made against the Company "for a violation of any federal, state, local regulation, statute or rule

regulating securities."

During the policy period, Loral entered into a transaction with a controlling shareholder, MHR Fund Management LLC (MHR), by which MHR agreed to provide Loral with $300 million. In exchange, Loral agreed to issue preferred stock to MHR that was convertible into common stock.

Other shareholders caught wind of Loral's transaction with MHR and ultimately shareholders filed two lawsuits in the Delaware Chancery Court. The first was a shareholder derivative action, by BlackRock Corporate High Yield Fund, Inc, that sought rescission of the transaction (the "BlackRock derivative suit"). The second was a class action by another shareholder, Highland Crusader Offshore Partners, L.P. (The "Highland class action") seeking damages. Both suits alleged that Loral's board of directors breached its fiduciary duties in approving the transaction because the MHR Financing was not entirely fair to Loral. In large part this was because: (1) the Special Committee of directors established to negotiate the MHR financing was not independent from MHR; (2) the process leading to the execution of the MHR financing was otherwise unfair to Loral; and (3) the total value of the preferred stock that Loral issued to MHR was worth far more than the $300 million that Loral received in the MHR financing.

Loral stood by its directors and defended against both lawsuits.

The Delaware Chancery Court consolidated the two actions and tried them together. After trial, the Delaware Chancery Court, looking at the "entire fairness"[1] of the transaction held that the transaction was unfair to Loral because, inter alia, the dividend rate was too high and the conversion rate was too low (*see In re Loral Space and Communications Inc., Consol. Litig.*, 2008 WL 4293781, 2008 Del Ch LEXIS 136 [Del Ch 2008]). To remedy this unfairness, the Delaware Chancery Court reformed the terms of the MHR financing. Most significantly, the Delaware Chancery Court restructured the MHR financing to provide that, in return for its $300 million investment in Loral, MHR would receive non-voting common stock instead of convertible preferred stock. At no point did the Delaware Chancery Court order MHR, Loral or anyone else to pay any money damages to Loral or the underlying plaintiff

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[1] Under Delaware law, a controlling or dominating shareholder standing on both sides of a transaction bears the burden of proving its entire fairness:

> "The concept of fairness has two basic aspects: fair dealing and fair price . . . However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness" (*Weinberger v. UOP, Inc.*, 457 A2d 701, 711 [Del 1983]).

shareholders. The Delaware Chancery Court found it unnecessary to "undertake at this time a director-by-director liability assessment" (2008 WL 4293781, *33, 2008 Del Ch LEXIS 136, *120) because MHR and Loral could work out a remedy without awarding Loral any monetary damages. Thus, the Delaware Chancery Court did not make any findings one way or the other concerning the fault of Loral's officers and directors.

Thereafter, counsel for BlackRock and counsel for Highland applied for awards of attorneys' fees. Loral stipulated to an award of almost $8.8 million for BlackRock's counsel in the derivative action. Using the lodestar method, the Chancery Court awarded Highland's counsel about $10.7 million for fees and expenses, finding that, although there had not been a creation of a common fund, the litigation had produced a substantial benefit to the company, thus warranting an award of fees under the "corporate benefit doctrine."[2] On appeal, the Delaware Supreme

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[2] The "corporate benefit doctrine" allows the Delaware court to award attorneys' fees to plaintiffs' counsel in successful derivative or class action suits where there has been a benefit to the corporation. If shareholder litigation results in a money judgment benefitting the corporation or an ascertainable class, plaintiff's counsel is ordinarily entitled to an allowance of fees paid from the "common fund" that counsel's efforts helped to create (*see Tandycrafts, Inc. v Initio Partners*, 562 A2d 1162, 1166-1167 [Del 1989]). When there is no common fund, but the corporation nevertheless receives a benefit, shareholder's counsel can still seek fees from the corporation, but will receive payment on a quantum meruit basis

Court affirmed that award (*Loral Space & Communications, Inc. v Highland Crusader Offshore Partners, L.P.*, 977 A2d 867, 870 [Del 2009]).

Thereafter, Loral sought coverage for these fees from its insurers. Plaintiffs-insurers commenced this action seeking a declaration that they are not obligated to provide coverage to Loral for the attorney fees. The insurers argue primarily that Loral has not suffered a covered loss because the Delaware Chancery Court found no liability against Loral and only ordered a remedy against MHR (i.e., a restructuring of the transaction to dilute MHR's stocks to remove their voting rights). As the resulting restructure actually provided a benefit, albeit non monetary, to Loral, the insurers argue that Loral has not suffered a loss. The fees, the insurers extrapolate, simply reduce the benefit that Loral received.

Giving the unambiguous provisions of the policy "their plain and ordinary meaning" (*Nautilus Ins. Co. v Matthew David Events, Ltd.*, 69 AD3d 457, 459 [2010] [internal quotation marks and citations omitted]), the fee awards constitute a "Loss" resulting solely from a "Securities Claim" for a "Company Wrongful Act."

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out of the corporation's own assets (*Tandycrafts* at 1167; *see also In re First Interstate Bancorp Consol. Shareholder Litig.*, 756 A2d 353, 361 [Del Ch 1999], *affd* 755 A2d 388 [Del 2000]).

The policy's definition of "Loss" is broad. It covers "other amounts" the insured becomes "legally obligated" to pay. Although the Delaware Chancery Court did not create a common fund, the shareholders' counsel can still seek fees from the corporation under the "corporate benefit doctrine." Thus, Loral is legally obligated to pay the amount of the fee award out of its own pocket. This situation fits squarely within the definition of "Loss" as an "other amount" Loral is "legally obligated to pay" (*see Safeway Stores, Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 F3d 1282, 1287 [9th Cir 1995] [plaintiff's attorney fees that were part of settlement were "actual out-of-pocket loss" under insurance policy because "[t]he lawyers got the money, not the shareholders" even though shareholders received a dividend that was not a loss under the policy]). What the insurers are in essence suggesting is that the attorneys' fees should be offset against the value of the non monetary benefit Loral and its shareholders received as a result of the restructured transaction. But nothing in the policy suggests offsetting a Loss by the amount of any non monetary benefits received.

I do not agree with the dissent's reading that "legally obligated to pay" refers to "the Retention." Nor would I equate "other amounts" entirely with "damages." The policy definition

of "loss" lists both "damages" and "other amounts ... the insured is legally obligated to pay." If both items mean "damages," there would be no need to list "other amounts." Nevertheless, the attorneys' fees Loral had to pay constitute damages *(see UnitedHealth Group Inc. v Hiscox Dedicated Corporate Member Ltd.,* 2010 WL 550991 at *10-11, 2010 US Dist LEXIS 10983, *29, 31 [D Minn Feb. 9, 2010] [portion of settlement constituting plaintiff's attorney fee award "falls squarely within the Policy's definition of [d]amages" where policy defined "[d]amages" as "any monetary amount. . .which an insured is legally obligated to pay"]).

The argument that Loral received a benefit is illusory. As a result of the shareholder derivative suit, the Delaware Court simply reformed the transaction to make it fair to Loral and its shareholders. Loral did not make a profit. There was nothing extra added as a result of the underlying action. At best, the reformation of the transaction leveled the playing field and repaired the wrong that Loral would have suffered otherwise. The Delaware Court recognized this circumstance when it stated that the remedy would rectify the harm to Loral:

> "[T]he remedy rectifies the harm to Loral and its public stockholders from an unfair, non-market tested transaction that saddled the corporation with an unwieldy capital structure and a future in which MHR held unilateral veto power over virtually any major decision the Loral

Del Ch LEXIS 136, *119-120).

Finally, the "corporate benefit doctrine" was only the vehicle by which plaintiff's counsel could receive compensation for the success in the derivative suit (*see In re First Interstate Bancorp Consol. Shareholders Litig.*, 756 A2d at 360). While Loral may have received a benefit in that it no longer had to suffer harm, it does not follow that Loral actually made a tangible profit.

Reliance Group Holdings v National Union Fire Ins. Co. of Pittsburgh, Pa. (188 AD2d 47, *lv dismissed in part, denied in part*, 82 NY2d 704 [1993]) does not help the insurers. In that case, the insured had acquired profits wrongfully. The decision merely stands for the well-established principle that there is no insurance where an insured is forced to disgorge funds that it acquired wrongfully (*id.* at 55; *see also Vigilant Ins. Co. v Credit Suisse First Boston Corp.*, 10 AD3d 528, 529 [2004]). Moreover, *Reliance* is distinguishable on its facts. After paying to settle various lawsuits, Reliance gained access to the remainder of the money it had acquired. Here, there is no remainder. As a practical matter, at the end of the underlying suit, Loral had the same $300 million that MHR invested in exchange for stock that Loral had before the start of the case. The only difference is now the stock that Loral issued is

actually worth the $300 million.

In an ordinary derivative suit there is often a monetary settlement. The attorneys' fees traditionally come out of those settlement funds. In cases where the corporate defendant has insurance, the policy often helps fund the settlement. Loral paid an extra premium to obtain coverage for derivative lawsuits. Had the Delaware Court instead rendered a monetary judgment against Loral in favor of minority shareholders, the insurers would be unlikely to contest coverage. But, that did not happen. Instead, in the face of this unusual transaction,[3] the Delaware Chancery Court crafted a creative, equitable remedy that retained the transaction's general parameters, but rendered it fair to all concerned and avoided even more litigation over whether certain individual director defendants should be liable. As part of this equitable judgment, the Delaware Court also rendered a money judgment against Loral for the derivative plaintiff's attorneys' fees. That Loral must now pay this amount places the fees squarely in the "other amounts" portion of the definition of "Loss."

Moreover, this policy covers derivative lawsuits. After

[3] The Delaware Chancery Court described the Loral-MHR transaction as "a large, non-market tested transaction, which is without many, if any, precedents (2008 WL 4293781, *31, 2008 Del Ch LEXIS, *115)."

all, the policy covers a Securities Claim "brought derivatively on behalf of the Company by a security holder of such Company." As we noted, Loral apparently paid an additional premium to add derivative suits to the definition of "Securities Claim." The award of attorneys fees is typical in a derivative suit where plaintiff has prevailed. To declare that Loral has no coverage for derivative plaintiff's attorneys' fees would deprive Loral of the coverage for derivative lawsuits that it paid for and expected to receive. Had the insurers meant to exclude derivative plaintiff's attorneys' fees, they could have limited the definition of "Loss," limited the definition of "Securities Claim" or drafted an exclusion.

Finally, the insures argue that Loral cannot recover costs of, in effect, prosecuting a derivative action, and that Loral can only recover for these fees if the Delaware Court *found* that Loral committed a "Company Wrongful Act." However, the policy does not contain these limitations. Rather, the policy covers all losses "resulting solely from any Securities Claim [the definition of which includes a derivative lawsuit] first made against the Company during the Policy Period . . . for a Company Wrongful Act." The definition for "Company Wrongful Act" includes an "*alleged* act." Thus, the policy covers all losses resulting from a derivative action *alleging* a Company Wrongful

Act. The policy says nothing that requires a court to find that the Company had committed a Company Wrongful Act before coverage is available. The insurers' interpretation therefore not only contradicts the plain language of the policy, but also imposes a precondition to coverage found nowhere in the policy.

The dissent correctly points out that the stipulation in which Loral agreed to the fee award to BlackRock's counsel states that Loral was paying the fee "[i]n consideration of the results achieved by the derivative plaintiffs." However, this language does not change the reality that the fee award is an amount that Loral has become legally obligated to pay. Loral stood by its directors and officers. It never took over this lawsuit. Because it remained a nominal defendant, Loral now is legally obligated to pay the fee award. The policy covering Loral provided coverage for losses resulting solely from a securities claim. Loral paid an extra premium to expand securities claim to include derivative lawsuits. A loss from a derivative suit is precisely what happened here. Accordingly, the plain terms of the policy dictate that the insurers' must cover the fee award in the BlackRock action.

However, the claims in the Highland class action do not fall within coverage because they do not involve a "Securities Claim." These claims are not derivative claims and did not otherwise

allege a violation "of any federal, state, local regulation, statute or rule regulating securities." Rather, they allege only breach of fiduciary duty by the company's directors. Loral's argument that both Delaware actions were based on the "entire fairness rule," that governs securities transactions, is without merit. The entire fairness rule is not a rule regulating securities. It is a standard to review corporate transactions where, as here, the plaintiff has rebutted the presumption of fairness arising from the business judgment rule (*see Emerald Partners v Berlin,* 787 A2d 85, 91 [Del 2001]; *Weinberger v UOP, Inc.*, 457 A2d at 710 [Del 1983]). The clear language of the policy does not encompass losses arising from an action brought against the company and its directors claiming only common-law breach of fiduciary duty (*see generally P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d 195 [2009]).

Accordingly the order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about February 16, 2010, that denied plaintiffs' motion for summary judgment on their cause of action seeking a declaration that they are not obligated to reimburse defendant for attorney's fee awards in an underlying Delaware class action and derivative lawsuit, and granted defendant's cross motion for summary judgment declaring that plaintiffs are so obligated, should be modified, on the law, to

grant plaintiffs' motion to the extent of declaring that plaintiffs are not obligated to indemnify defendant for the part of the fee award that directed defendant to pay fees to Abrams & Laster LLP as counsel for the class action plaintiffs, and to deny defendant's motion to the same extent, and otherwise affirmed, without costs.

All concur except Catterson and Acosta, JJ. who dissent in part and concur in part in an Opinion by Catterson, J. as follows:

CATTERSON, J. (dissenting in part, concurring in part)

Because, in my opinion, defendant Loral Space did not sustain a "loss," I must respectfully dissent from that part of the majority opinion finding that plaintiff insurers are obligated to indemnify defendant for attorneys' fees in the underlying derivative action.

The following facts are not disputed: during the policy period, Loral entered into a transaction with a controlling shareholder, MHR Fund Management LLC (MHR), which resulted in the filing of two lawsuits in the Delaware Chancery Court. The lawsuit at issue in this dissent is the derivative action commenced by a group of shareholders led by BlackRock Corporate High Yield Fund, Inc. The group (hereinafter referred to as either the "derivative plaintiffs" or "plaintiff shareholders") sought rescission of the transaction which it alleged "operates as an unfair transfer of wealth to a controlling shareholder." This action and a class action by another shareholder, Highland Crusader Offshore Partners, L.P., seeking monetary damages were consolidated by the Delaware Chancery Court, and tried together.

After trial, the Chancery Court, applying the "entire fairness standard" of review, held that the transaction was unfair to Loral. It found essentially that MHR had underpaid for what it received. The court devised an equitable remedy that

reformed the transaction by greatly reducing the nature and number of Loral securities that MHR had ostensibly purchased for $300 million. The court entered a final judgment "in favor of Loral and against MHR." In re Loral Space & Communications Inc. Consol. Litig., 2008 WL 4293781, *39, 2008 Del. Ch. LEXIS, *151 (Del. Ch. Sept. 19, 2008).

Thereafter, counsel for BlackRock and counsel for Highland applied for awards of attorneys' fees. Loral stipulated to an award of approximately $8.7 million for BlackRock's counsel in the derivative action. The language of the stipulation made it clear that Loral was paying the fee "[i]n consideration of the results achieved by the derivative plaintiffs in this action."

Loral could not reach a similar agreement with Highland, but using the lodestar method to calculate the fees the Chancery Court awarded Highland's counsel about $10.7 million for fees and expenses. The court found that the litigation had produced a substantial benefit to the company, thus warranting an award of fees under the corporate benefit doctrine; that award was affirmed on appeal. Loral Space & Communications, Inc. v. Highland Crusader Offshore Partners, L.P., 977 A.2d 867, 870 (Del 2009).

Loral satisfied the final order in the Delaware action by paying the full amount of the attorneys' fees awards. Loral then

sought to have the plaintiff insurers in the instant action reimburse the funds pursuant to their insurance policy. The plaintiff insurers notified Loral that the fee awards were not covered by the policy. Plaintiff insurers then filed this declaratory judgment action seeking a declaration that the fee award is not a covered loss under the policy. Cross motions for summary judgment followed.

Subsequently, the court granted Loral's motion for partial summary judgment, finding that the fees paid to the attorneys in the underlying litigation are covered by the subject insurance policy. For the reasons set forth below, I part company with the majority in its affirmance of that part of the decision that declares the fee award in the derivative action is covered under the subject policy.

Under the Management Liability and Company Reimbursement Policy issued by the plaintiff insurers to defendant Loral, the relevant provision states that plaintiff insurers will pay "on behalf of the Company[,] **Loss** resulting solely from any **Securities Claim** first made against the **Company** during the **Policy Period . . .** for a **Company Wrongful Act.**"

The Policy defines "[l]oss" as "damages, judgments, settlements or other amounts (including punitive or exemplary damages, where insurable by law) and Defense Expenses in excess

of the Retention that the Insured is legally obligated to pay." It defines "Securities Claim" as either a derivative claim brought by a shareholder, or a claim made against the Company "for a violation of any federal, state, local regulation, statute or rule regulating securities." It defines "Company Wrongful Act" as "any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by the Company in connection with a Securities claim."

The majority characterizes the attorneys' fees award as a loss, finding that it falls within the category of "other amounts [...] that the Insured is legally obligated to pay." In my opinion, the policy definition of loss is not as broad as the majority perceives it to be. As a threshold matter, the subject matter of the adjectival clause "legally obligated to pay" is "the Retention," that is, the self-insured deductible portion of the defense expenses that Loral agreed to pay, and not "other amounts." Indeed, it is undisputed that the plaintiff insurers funded the defense costs and paid out approximately $9 million in excess of the $5 million that Loral paid as the retention portion of those expenses.

Second, "[l]oss" as defined in the provision is clearly meant to arise from payments in the form of *damages* whether awarded by judgment in cases of a proven wrongful act by the

company, or negotiated in a settlement in the case of a wrongful act that has not been proved, but has been alleged. "[O]ther amounts" is characterized as including punitive or exemplary damages. In other words other types of *damages* that are insurable by law. In my opinion, plaintiff insurers correctly assert that the motion court erred because it ignored the linking phrases of the provision which require a covered loss to be "[damages] **resulting solely** from a [s]ecurities [c]laim first made against the company during the Policy Period ... **for** a Company Wrongful Act." In this case, it is undisputed that the Delaware court did not award monetary damages against any party; it found no wrongdoing by Loral, but ordered the remedy against a third party (MHR), and the resulting restructure provided a benefit to Loral.

In that regard, I believe the motion court's error lies in further ignoring the well-established principle that a covered loss must be an actual loss, and not an expense or the cost of doing business. See Safeway Stores, Inc. v. National Union Fire Ins. of Pittsburgh, Pa., 64 F.3d 1282, 1286 n.8 (1995)("[t]he plain meaning of the term 'loss' requires that [a company] suffer a financial detriment").[1] As the plaintiff insurers assert, the

[1]In my opinion, the majority's reliance on Safeway for holding that the attorneys' fees awards in this case are a

court cannot ignore the plain and ordinary meaning of the word "[l]oss." See Reliance Group Holdings v. National Union Fire Ins. Co. of Pittsburgh, Pa., 188 A.D.2d 47, 54-56, 594 N.Y.S.2d 20, 24-25 (1st Dept. 1993), lv. dismissed in part, denied in part, 82 N.Y.2d 704, 601 N.Y.S.2d 578, 619 N.E.2d 656 (1993)(no loss because Reliance ended up with gain of $74 million even though it had to pay $21 million to settle claims against it). The majority takes the position that this Court's decision in Reliance stands *merely* for the proposition that disgorgement of wrongfully acquired funds is not an insurable loss. However, I agree with plaintiff insurers that, while Reliance indeed reiterates that proposition, it is enunciated as part of the broader principle that there must be an *actual* loss. In other words, the purported loss must be viewed in the context of an entire transaction. In Reliance, this Court makes the tautological link concluding, "Reliance sustained no 'loss' as defined in the policy, but rather realized a profit of approximately $74 million." 188 A.D.2d at 55, 594 N.Y.S.2d at 25.

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covered "out-of-pocket loss" is misplaced as it is entirely distinguishable on the facts: Safeway was not a derivative suit, but a series of class-action suits in which the company defended and indemnified its directors for breach of fiduciary duty. The attorney fees were a covered loss under its directors' and officers' liability policy. In any event, they were a negotiated part of the settlement. Safeway, at 1287.

Similarly, in this case Loral did not sustain a loss but rather benefitted from the judgment. The Delaware Chancery Court concluded that "MHR Financing was unfair and that a final judgment should be entered in favor of Loral and against MHR." 2008 WL 4293781, *39, 2008 Del. Ch. LEXIS, *151. The Delaware Chancery Court reformed the terms of the MHR financing. In return for its original $300 million investment, MHR was to receive non-voting common stock instead of convertible preferred stock. In other words, the reformation eliminated the massive dilution of convertible stock and conversion rights, and all other terms of the transaction were voided. As the Chancery Court observed, "conversion rights, payment in kind, dividends and close voting all have financial value to a publicly traded corporation." It concluded that the reformation was "clearly a hugely substantial benefit [to Loral]."

The fact that the benefit is not *precisely* quantifiable because there was no monetary judgment awarded is irrelevant. It is well established that attorney fee awards in shareholder derivative suits are awarded either from a "common fund" where shareholder litigation results in a money judgment, or the fees are awarded pursuant to the "corporate benefit doctrine." See Fletcher v. A.J. Indus. Inc., 266 Cal.App.2d 313 (Cal. 1968). Hence, the corporate benefit doctrine evidences the fact that

some successful derivative litigation does not result in monetary gain but in intangible benefits to the corporation. See In re First Interstate Bancorp. Consol. Shareholders Litig., 756 A2d 353, 357 (Del. Ch. Ct. 1999), aff'd 755 A.2d 388 (Del. 2000) (corporate benefit doctrine comes into play when tangible monetary benefit is not conferred but some other valuable benefit is).

The majority footnotes its acknowledgment of this, yet fails to draw the logical conclusion. Instead, while conceding that Loral may have received a benefit "because it no longer had to suffer harm," the majority nevertheless observes that "it does not follow that Loral actually made a tangible profit" and therefore Loral's "benefit is illusory." Loral's minority shareholders may beg to differ.

Indeed, Loral, in stipulating to the award of more than $8.7 million in attorney fees, agreed that it was "[i]n consideration of the results achieved by the derivative plaintiffs in this action." Moreover, while I do not address the issue of the attorneys' fees award in the class action suit because the majority finds that the award is not a loss as defined by the policy, the finding of the Chancery Court that it should be awarded pursuant to the corporate benefit doctrine is instructive. Further, the Delaware Supreme Court affirmed the

award and the finding of the trial court that the attorneys had "conferred a benefit in excess of $100 million, plus a substantial therapeutic benefit." 977 A.2d at 870.

Finally, it should be noted that the rationale that supports the exception to the American rule in awarding attorneys' fees in derivative litigation, also explains why payment of such fees cannot be characterized as a loss according to any plain and ordinary meaning of the word. The rationale for such exception is that the expense of litigating what ultimately results in a benefit to the corporation should not rest entirely on the shoulders of a few plaintiff shareholders, but should be spread among all shareholders of the company for whose benefit the shareholder brought suit. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392, 90 S.Ct. 616, 625, 24 L.Ed.2d 593, 606 (1970); see also Richman v. DeVal Aerodynamics Inc., 40 Del. Ch. 548, 550, 185 A.2d 884, 885 (Del. Ch. 1962). In the latter seminal case, the court found that attorneys' fees are to be awarded where benefits accrue to that class of shareholders of which derivative plaintiff is a member "such as to require, *in equity, payment by the class as a whole*." 40 Del. Ch. at 552, 185 A.2d at 886) (emphasis added).

For this reason, the attorneys' fees award is essentially viewed as the equitable entitlement of the successful derivative

plaintiff to recover the expense of his/her attorneys' fees from all the shareholders of the corporation on whose behalf the suit was brought. Mills, 396 U.S. at 392, 90 S.Ct. at 625, 24 L.Ed.2d at 606. In that case, the United States Supreme Court recognized that "allow[ing] others to obtain full benefit from the plaintiff's [shareholder's] efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." Mills, 396 U.S. at 392, 90 S.Ct. at 625, 24 L.Ed.2d at 606. Clearly, if *not* spreading the cost of attorneys' fees sounds in unjust enrichment, the obvious corollary is that shifting the cost to shareholders as a group cannot be characterized as a loss. See generally Reliance Group Holdings, 188 A.D.2d at 54-56, 594 N.Y.S.2d at 24-25.

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

ENTERED: FEBRUARY 17, 2011

CLERK