SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 21, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3264 The People of the State of New York, Respondent,

-against-

Quinn Jenkins,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered March 23, 2009, resentencing defendant to a term of 6 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison sentence at that time (People v Lingle, __ NY3d __, 2011 NY Slip Op 03308 [2011]). Defendant's remaining challenges to his resentencing are without merit (*id.*).

Defendant also argues that he should be permitted to

withdraw his guilty plea on the ground that the plea court inadequately advised him of the PRS portion of his sentence (*see People v Catu*, 4 NY3d 242 [2005]). That claim is not properly before this Court on this appeal from the judgment of resentence (*see People v Jordan*, 16 NY3d 845 [2011]).

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

ENTERED: JUNE 21, 2011

CLERK

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

4768 Marques Fernandez, an Infant, by his Mother and Natural Guardian Ruth De Los Santos, Plaintiff-Respondent, Index 111669/07

-against-

Joel Moskowitz, M.D., et al., Defendants-Appellants.

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Kaufman Borgeest & Ryan LLP, New York (Jacqueline Mandell of counsel), for Joel Moskowitz, M.D., appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for New York University Medical Center, appellant.

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered June 15, 2010, which, in an action alleging medical malpractice relating to the prenatal care and delivery of infant plaintiff, denied defendants' motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Infant-plaintiff, Marques Fernandez (infant), and his mother, plaintiff Ruth De Los Santos (mother), allege that defendants Dr. Moskowitz and New York University Medical Center (NYUMC) deviated from the standard of care during prenatal care,

and labor and delivery, and that defendants failed to obtain informed consent for the emergency caesarean section. As a result of this alleged malpractice, plaintiffs claim infant suffered a hypoxic-ischemic brain injury which has resulted in developmental delays and neurological impairments.

Mother first saw Dr. Moskowitz on January 2, 2004 for prenatal care. Ultrasounds were performed on February 25, 2004 and April 21, 2004, and both showed that the fetus was growing at a normal rate. The third and final ultrasound was performed on June 30, 2004. It revealed that the fetus's growth rate had changed from the previous two ultrasounds, and that the ratio of head circumference to abdominal circumference was outside the normal range.

At approximately 11:00 A.M. on July 4, 2004, while in her 39th week of pregnancy, mother's water broke and she was subsequently admitted to NYUMC. Mother experienced a normal labor with no signs of fetal distress and no complications until 10:40 P.M. when she suffered a prolapsed umbilical cord. Dr. Moskowitz, who had not examined mother prior to 10:40 P.M., ordered an emergency caesarean section and mother arrived in the operating room at 10:54 P.M. At approximately 11:09 P.M., the baby was delivered. Upon delivery, infant cried spontaneously, had normal Apgar scores, and had normal cord blood gases. He was

taken to the newborn nursery where he ate well, had good color and muscle tone and did not experience any seizures or other neonatal complications. Mother and infant were discharged from the hospital four days after birth.

Infant proceeded to develop normally during the first year of his life and his pediatric records indicate he was a healthy baby. In November 2005, an MRI of infant's brain, which was done because of an eye condition, yielded normal results. In July 2006, during his two-year-old visit to his pediatrician, the doctor observed some speech delays and behaviors that suggested a developmental disorder on the autism spectrum. The pediatrician referred infant for a comprehensive evaluation by New York City Early Intervention, which diagnosed him with Pervasive Developmental Disorder (PDD). This disorder is within the mild to moderately autistic range. In May 2007, infant underwent another MRI of his brain, and it too yielded normal results. Plaintiffs commenced this medical malpractice action in August 2007, alleging that negligent prenatal care and negligent delivery resulted in a brain injury and developmental delays.

The motion court should have granted defendants' summary judgment motions because plaintiffs did not adequately address defendants' prima facie showing that there was no hypoxic-ischemic brain injury, which occurs when the brain is deprived of

oxygen (*see Rodriguez v Waldman*, 66 AD3d 581 [2009]). Plaintiffs were required to establish that Dr. Moskowitz and NYUMC departed from the standard of care in treating plaintiffs and that those departures were the proximate cause of infant's injuries (*see Dallas-Stephenson v Waisman*, 39 AD3d 303, 306-07 [2007]). Hindsight reasoning is not sufficient to defeat a summary judgment motion (*Brown v Bauman*, 42 AD3d 390, 392 [2007]).

Defendants' experts contended that infant's developmental and cognitive delays, separate and apart from PDD, were the result of his eye condition, which is a genetic visual impairment that has a shown association with autism. Additionally, defendants' experts cited infant's normal Apgar scores and cord blood gases as further evidence that he did not suffer a brain injury at birth. Moreover, they noted the two normal MRIs of infant's brain.

Plaintiffs' experts opined that the developmental delays were due to a brain injury, and contended the brain injury occurred as a result of intrauterine growth restriction (IUGR) and a prolapsed umbilical cord. Plaintiffs' obstetrical expert, Dr. Halbridge, alleged that the June 30, 2004 ultrasound evidenced the presence of IUGR, and as a result, infant did not receive enough oxygen to his brain. Dr. Halbridge further alleged that the type of brain injury this infant suffered is

commonly subtle at birth and over the first few months of life.

However, Dr. Halbridge failed to refute the MRIs relied on by defendants' experts, both of which yielded normal results, and were administered well past the first few months of infant's life. Indeed, infant developed normally for an extended period of time and did not exhibit signs of delay until he was two years old, facts which remain unexplained by plaintiffs' experts. Both Dr. Halbridge and plaintiffs' expert pediatrician and neurologist, Dr. Trifiletti, in a conclusory fashion, state that infant's developmental delays are not related to his genetic visual impairment, and that the only reasonable etiology is a brain injury that occurred as a result of IUGR and a prolapsed umbilical cord. However, the experts fail, via medically supported assertions, to establish the basis for this conclusion. The mere contention that defendants deviated from the standard of care by failing to diagnose IUGR and not lifting infant's head off of the umbilical cord prior to the emergency caesarean section, does not establish that the alleged deviations were the proximate cause of infant's developmental delays, which appeared two years after the delivery.

The motion court also should have granted summary judgment to defendants on plaintiffs' informed consent claim because plaintiffs were unable to rebut defendants' prima facie showing

of lack of proximate cause. Although mother alleges that she was not properly informed after the June 30, 2004 ultrasound that vaginal delivery involved excessive risk, she fails to establish that the decision not to perform a caesarean section on June 30th led to the developmental problems that infant is now experiencing.

We have reviewed plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: JUNE 21, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4009 Gary Rosenbach, et al., Plaintiffs, Index 602463/05 590742/08

-against-

The Diversified Group, Inc., et al., Defendants.

- - - - -

The Diversified Group, Inc., et al., Third-Party Plaintiffs-Respondents-Appellants,

-against-

Marcum & Kliegman LLP, et al., Third-Party Defendants,

Kostelanetz & Fink LLP, et al., Third-Party Defendants-Appellants-Respondents.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Thomas W. Hyland of counsel), for Kostelanetz & Fink, LLP, appellant-respondent.

Ropers, Majeski, Kohn & Bentley, New York (Amber W. Locklear of counsel), for Weiss & Company, appellant-respondent.

McKenna Long & Aldridge LLP, New York (Charles E. Dorkey III of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 16, 2009, which, to the extent appealed from as limited by the briefs, denied the motions by third-party defendants Kostelanetz & Fink LLP (K&F) and Weiss & Company (Weiss), respectively, to dismiss third-party plaintiffs' claims

for contribution as against them, unanimously affirmed, with costs.

In a prior arbitration proceeding, defendants/third-party plaintiffs (collectively, DGI) were found to have defrauded plaintiffs by selling them a tax shelter investment that was subsequently disallowed by the IRS. DGI, alleging that plaintiffs' losses resulted in part from the negligent tax advice they received from their attorneys and accountants, asserts third-party claims for contribution against, inter alia, K&F, plaintiffs' tax lawyers, and Weiss, the accounting firm that prepared plaintiffs' relevant tax returns. For the reasons set forth below, we affirm Supreme Court's denial of the respective motions by K&F and Weiss to dismiss DGI's contribution claims against them.

The doctrine of collateral estoppel does not bar DGI's claims for contribution because the issue of K&F's and Weiss's liability was not necessarily decided in the prior arbitration proceeding (*see Matter of Hofmann*, 287 AD2d 119, 123 [2001]). Contrary to K&F's and Weiss's further contention, that DGI has been found liable for fraud, while K&F and Weiss are alleged only to have been negligent, does not bar DGI's contribution claims (*see Corva v United Servs. Auto. Assn.*, 108 AD2d 631 [1985]; *Taft v Shaffer Trucking*, 52 AD2d 255, 259-260 [1976], *appeal dismissed*

42 NY2d 974 [1977]). Nor does the doctrine of unclean hands bar a claim for contribution, since the entire purpose of CPLR article 14 is to codify the changes in tort law as to equitable contribution among tortfeasors announced by the Court of Appeals in *Dole v Dow Chem. Co.* (30 NY2d 143 [1972]; *see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 125 AD2d 27, 29 [1987], *affd* 71 NY2d 21 [1987]).

We reject K&F's argument that *Kirschner v KPMG LLP* (15 NY3d 446 [2010]) requires dismissal of DGI's contribution claims. The doctrine of in pari delicto bars a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party whose equal or lesser fault contributed to the loss (*see id.* at 464 [in pari delicto "mandates that the courts will not intercede to resolve a dispute between two wrongdoers"]; *Chemical Bank v Stahl*, 237 AD2d 231, 232 [1997] [in pari delicto "requires immoral or unconscionable conduct that makes the wrongdoing of the party against which it is asserted at least equal to that of the party asserting it"]). In *Kirschner*, the Court of Appeals held, among other things, that in pari delicto survived the establishment of the comparative fault regime under CPLR 1411 because "there is no reason to suppose that the *statute* did away with common-law defenses based on intentional conduct, such as in pari delicto" (*id.* at 474).

Critically, the claims that the *Kirschner* Court found to be precluded by in pari delicto sought recovery for the wrongdoer's *own* injuries.[1] In this case, by contrast, we are concerned with contribution claims under CPLR article 14 that seek reimbursement for the wrongdoer's payment of more than its alleged equitable share of the damages suffered by third parties. Ever since *Dole* was decided nearly 40 years ago, this state has permitted contribution claims "among joint or concurrent tort-feasors regardless of the degree or nature of the concurring fault" (*Kelly v Long Is. Light. Co.*, 31 NY2d 25, 29 [1972]; *see also Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d at 27 [CPLR 1401 "applies not only to joint tort-feasors, but also to concurrent, successive, independent, alternative, and even intentional tort-feasors"]). Indeed, the Court of Appeals has expressly recognized that

[1]Specifically, *Kirschner* held that in pari delicto barred claims asserted in the names of two corporations (in one case, by shareholders suing derivatively; in the other case, by a bankruptcy litigation trustee) against the corporations' outside advisors for failing to prevent fraudulent schemes perpetrated by corporate officers acting on behalf of the corporations. In each case, the misconduct of the corporate officers was found to be imputable to the corporation as a matter of law. Notably, the two hypothetical examples of the operation of in pari delicto posited in *Kirschner* both concerned a wrongdoer seeking recovery for his own injuries (*see* 15 NY3d at 464 ["A criminal who is injured committing a crime cannot sue the police officer or security guard who failed to stop him; the arsonist who is singed cannot sue the fire department"]).

contribution applies among tortfeasors "in pari delicto" (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 689-690 [1990]; *see also County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 46 [1984], *affd* 66 NY2d 642 [1985] ["Contribution involves an apportionment of responsibility where wrongdoers are *in pari delicto*"]). Nothing in *Kirschner* indicates any change in New York's adherence to this long-standing principle.

The third-party complaint states a cause of action against K&F by alleging that the law firm failed to disclose material legal information to its client in advising whether or not to apply for a tax amnesty. This allegedly material omission takes the claim out of the realm of "error of judgment" (*see Rosner v Paley*, 65 NY2d 736, 738 [1985]). Similarly, the third-party complaint states a cause of action against Weiss by alleging that the accounting firm, as tax preparer, lacked a reasonable basis for believing the tax shelter at issue would be accepted by the IRS.

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

ENTERED: JUNE 21, 2011

CLERK

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

4311 In re Regina Wise, etc., Index 400523/09
Petitioner,

-against-

Ricardo Elias Morales, etc.,
Respondent.

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Joan L. Beranbaum, New York (Richard S. Cempa of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Marissa D. Shemi of counsel), for respondent.

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Determination of respondent, dated January 7, 2009, which terminated petitioner's tenancy based upon findings that she misrepresented that she was unemployed and failed to report employment income on her affidavits of income, unanimously modified, on the law, to vacate the penalty of termination and remand the matter to respondent for the imposition of a lesser penalty, 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 23, 2009) otherwise disposed of by confirming the remainder of the determination, without costs.

Termination of petitioner's tenancy, under the circumstances was "so disproportionate to the offense," underpayment of rent, "in the light of all the circumstances, as to be shocking to

one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks and citation omitted]).

We have stated that "[t]he forfeiture of public housing accommodations is a drastic penalty because, for many of its residents, it constitutes a tenancy of last resort" (*Matter of Holiday v Franco*, 268 AD2d 138, 142 [2000]). The article 78 court found that termination of petitioner's tenancy was not an excessive penalty because petitioner had concealed income. However, evicting a tenant and her family on account of concealment of income may nonetheless, under the circumstances presented, constitute an unjustifiable penalty. In *Matter of Davis v New York City Dept. of Hous. Preserv. & Dev.* (58 AD3d 418, 419 [2009]), this Court found that the eviction of a tenant who had concealed income was "shockingly disproportionate to the offense," stating:

> "[HPD's] finding that petitioner intentionally failed to disclose her son's SSI benefits is supported by substantial evidence and has a rational basis in the record. The penalty of termination of the rent subsidy is shockingly disproportionate to the offense, however, since it will likely

> lead to homelessness for petitioner, a 25-year tenant, and the three minor children who live with her, one of whom is disabled" (*id.* [citations omitted]).

This is not an isolated holding. In *Matter of Gray v Donovan* (58 AD3d 488 [2009]), we found termination of the petitioner's housing subsidy to be "shockingly disproportionate to the offense," of failure to report income earned by two adult children, where the petitioner had lived in the building for more than 30 years and had no record of any prior offenses, and the record indicated that termination of the subsidy would likely lead to homelessness for her and her 13-year old son.

In *Matter of Williams v Donovan* (60 AD3d 594 [2009]), we vacated the penalty of termination of a housing subsidy and remitted for imposition of a lesser penalty for the tenant's failure to report income earned by an adult son, where the petitioner had resided in the apartment for 28 years and had an unblemished tenancy.

In *Matter of Vasquez v New York City Hous. Auth.* (57 AD3d 360 [2008]), we vacated the penalty of termination where the tenant, who was chronically delinquent in rent payments and had been charged with unauthorized use of an ATM card, made restitution of the amounts due to the complainant, had no prior criminal record, and cared for a family member with disabilities.

Petitioner did not intentionally violate her obligations as a tenant. Petitioner's formal education ended in the sixth grade. She was a poor student who had failed reading. At the age of 14, she gave birth to her first child, who subsequently succumbed to crib death. She did not return to school, nor did she work. At the age of 15, she gave birth to her second child.

Petitioner was functionally illiterate and required aid in completing her annual recertification documentation. She relied upon a housing assistant to complete the form which she simply "signed and dated." Petitioner was unaware that she had an obligation to report her income, as it was never explained to her. She was never told to report her income as a lunch aide, even when, in 2002, she presented her pay stub to respondent's employee.

Petitioner has at all times been willing to repay all outstanding arrears. She fully cooperated with respondent, executing a confession of judgment and a separate stipulation as to monies owed the housing authority. Petitioner, a part-time lunch aide with the New York City Department of Education, was suspended while the criminal charges were pending against her, placing further financial strain upon the family.

Like the tenants in the cited cases, petitioner has admitted to under-reporting income and has made every effort to cure the

violation. Termination of her tenancy would have severe consequences not only for petitioner but for the three children she supports, all of whom face homelessness in the event of eviction. Since the penalty is "shockingly disproportionate to the offense," we hereby vacate the penalty and remand for imposition of a lesser penalty.

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

ENTERED: JUNE 21, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Abdus-Salaam, JJ.

4733 Aaryana Ortiz, an Infant by her Mother and Natural Guardian Maite Rodriguez, et al., Plaintiffs-Respondents, -against- New York City Housing Authority, Defendant-Appellant. Index 13870/06

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Herzfeld & Rubin P.C., New York (Linda M. Brown of counsel), for appellant.

David A. Kapelman, P.C., New York (David A. Kapelman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered May 18, 2010, which, in an action for personal injuries, denied defendant's motion for summary judgment dismissing the complaint, affirmed, without costs.

Defendant's motion for summary judgment was properly denied. Infant plaintiff sustained injuries when, while riding her scooter on a walkway, she was struck by an unsecured gate on which another child was swinging. The gate was part of a fence that bordered the walkway that led to and from the entrance of defendant's building.

The record presents triable issues of fact as to whether defendant, which owed a duty of care to keep its premises in a

reasonably safe condition (*see Basso v Miller*, 40 NY2d 233, 241 [1976]), was negligent in failing to ensure that the gate was secured and whether the accident was foreseeable. Indeed, the record shows that defendant was notified on several occasions that children who lived in the building often swung on the gate, which, when open, would partially block the walkway.

Cuevas v 73rd & Cent. Park W. Corp. (26 AD2d 239 [1966], *affd* 21 NY2d 745 [1968]), cited by defendant and the dissent, does not establish defendant's entitlement to summary judgment. In *Cuevas*, the infant plaintiff sustained injuries when another child raised and then dropped a public sidewalk cellar door on the plaintiff's hand. This Court held that the cellar doors must be maintained in a manner to prevent harm to those who use the streets, and that defendant was entitled to summary judgment because the cellar door was not a dangerous instrumentality, noting that "[i]t is simply that one is not obligated to protect users, including children, who may use harmless things to cause themselves harm" (*id.* at 242).

While there was no issue in *Cuevas* as to whether the cellar door constituted a dangerous condition, there is an issue of fact here based on the placement and use of the gate. Although defendant is correct that there is nothing inherently dangerous about a gate that has no lock, it is the particular circumstances

alleged here - - that the gate would swing into and partially obstruct the walkway, and was often used by children to swing upon into the walkway - - which raises an issue as to whether defendant permitted a dangerous condition to exist on its premises and had notice of that condition (*see generally Lehr v Mothers Work, Inc.*, 73 AD3d 564 [2010] [issue of fact as to whether defendant created a dangerous condition by manner in which clothing racks were placed and whether there was an ongoing hazard that was routinely ignored]; *see also Wolff v New York City Tr. Auth.*, 21 AD3d 956 [2005] [defendant denied summary judgment where plaintiff was allegedly injured when struck by an unsecured door while standing in subway station]; *Griffin v Sadauskas*, 14 AD3d 930 [2005] [landlord denied summary judgment where tenant fell down cellar stairs, the top steps of which were overlapped by an open door]; *Hanley v Affronti*, 278 AD2d 868 [2000] [homeowner denied summary judgment where guest fell down a flight of stairs after leaning against door that swung open toward stairway]).

Furthermore, there are triable issues as to whether the failure to secure the gate was a proximate cause of the accident. Contrary to defendant's contention, it cannot be said, as a matter of law, that the other child's action of swinging on the unsecured gate was an intervening, superseding cause of the

accident (*see Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]; *compare Lee v New York City Hous. Auth.*, 25 AD3d 214 [2005], *lv denied* 6 NY3d 708 [2006]).

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

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

DeGRASSE, J. (dissenting)

I respectfully dissent because I disagree with the majority's conclusion that there is an issue of fact as to whether defendant permitted a dangerous condition to exist on its premises. While riding her scooter on a walkway, the infant plaintiff was struck by an unsecured gate that was being used by another child as a swing. Plaintiff's theory of liability is that there was an "ongoing, recurrent hazardous condition of children swinging on the gate which existed for at least one year" prior to the accident. The majority correctly recognizes that an unlocked gate is not inherently dangerous. Nevertheless, the majority finds that the neighborhood children's frequent use of the gate as a swing raises an issue as to whether defendant permitted a dangerous condition to exist.

This case is on all fours with *Cuevas v 73rd & Cent. Park W. Corp.* (26 AD2d 239 [1966], *affd* 21 NY2d 745 [1968]) in which a child was injured when another child raised and dropped a cellar door on his hand. In affirming a dismissal of the complaint at the close of the plaintiff's case, the *Cuevas* Court held that "one is not obligated to protect users, including children, who may use harmless things to cause themselves harm" (*id.* at 242). Unlike the majority, I find no way to distinguish this case from *Cuevas* on the basis of the placement and use of the gate. This

record contains nothing, by way of an expert's affidavit, for example, to raise a triable factual issue as to whether the gate was negligently placed. As to the children's misuse of the gate, the overarching principle is that "foreseeability of misuse alone is insufficient to make out a cause of action" (*see Kurshals v Connetquot Cent. School Dist.*, 227 AD2d 593, 594 [1996]; *see also Barrett v Lusk*, 265 AD2d 654, 655 [1999]). I would reverse the order below and grant defendant's motion for summary judgment dismissing the complaint.

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

ENTERED: JUNE 21, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5037-
5037A &
M-1452
M-1495
M-1902

Metropolitan Life Insurance Company,
Plaintiff,

-against-

Ramon S. Velez Family Trust, et al.,
Defendants-Appellants,

Hunts Point Multi-Service Center, Inc.,
Defendant-Respondent.

Index 104396/09

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Appeals having been taken to this Court by the above-named appellants from orders of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about April 15, 2010,

And motions having been filed in connection with the aforesaid appeals,

And said appeals and motions having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulations of the parties hereto dated May 27, 2011,

It is unanimously ordered that the appeals and the motions filed in connection therewith be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulations.

ENTERED: JUNE 21, 2011

CLERK

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

5203-
5203A N.A. Lambrecht,
Plaintiff-Appellant,

Index 650182/09

-against-

Bank of America Corporation,
Defendant-Respondent.

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Cuneo Gilbert & LaDuca, LLP, Washington, DC (Matthew E. Miller of the District of Columbia Bar, the Commonwealth of Massachusetts Bar and the Louisiana Bar, admitted pro hac vice, of counsel), for appellant.

Wachtell, Lipton, Rosen & Katz, New York (Eric M. Roth of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 4, 2010, which denied plaintiff's motion for partial summary judgment and granted defendant's cross motion for summary judgment, deemed appeal from judgment, same court and Justice, entered February 7, 2011 (CPLR 5501[c]), and, so considered, said judgment unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 5, 2010, which granted in part defendant's motion to dismiss, unanimously dismissed, without costs, as untimely.

A shareholder will not be granted the right to inspect corporate books and records under section 220 of the Delaware General Corporation Law unless she establishes a "proper purpose," that is, unless her primary purpose for seeking the

relief is "reasonably related to [her] interest as a shareholder" (*see* 8 Del Code § 220[b], [d]; *Thomas & Betts Corp. v Leviton Mfg. Co.*, 681 A2d 1026, 1030 n 1 [Del 1996], quoting *BBC Acquisition Corp. v Durr-Fillauer Med., Inc.*, 623 A2d 85, 88 [Del Ch 1992]; *CM & M Group, Inc. v Carroll*, 453 A2d 788, 792 [Del 1982]). An asserted purpose of investigating in order to uncover possible misconduct is insufficient; the applicant "must present some credible basis from which the court can infer that waste or mismanagement may have occurred" (*Thomas & Betts Corp.*, 681 A2d at 1031; *Security First Corp. v U.S. Die Casting & Dev. Co.*, 687 A2d 563, 571 [Del 1997]). We reject plaintiff's contention that the "credible basis" requirement applies only when the claimed purpose is to uncover corporate mismanagement, and that investigating the corporation's reasons for refusal of a litigation demand constitutes a proper purpose under section 200. A shareholder's disagreement with company management over matters of business judgment is insufficient to satisfy her burden on an application to inspect corporate books and records (*Seinfeld v Verizon Communications, Inc.*, 909 A2d 117, 120 [Del 2006]).

The motion court correctly found that plaintiff failed to demonstrate the necessary "credible basis" for her demand to inspect defendant's books and records under section 220, since she failed to submit evidence from which it could be inferred

that defendant's board had acted wrongfully in refusing her demand to commence litigation (*see id.*).

The appeal from the January 5, 2010 order was untimely (*see* CPLR 5513[a]; 5515[1]), and that order was not brought up for review by the appeal from the judgment because it does not necessarily affect the final judgment (*see* CPLR 5501[a][1]; *see also Siegmund Strauss, Inc. v East 149th Realty Corp.*, 81 AD3d 260, 265-266 [2010]).

In view of the foregoing, we need not consider plaintiff's remaining contentions.

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5379 & M-2281 The People of the State of New York, Respondent,

-against-

Robert Nazario, Defendant-Appellant.

Ind. 366/02

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

Robert Nazario, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Richard Lee Price, J. at *Singer* hearing; Caesar Cirigliano, J. at nonjury trial and sentencing), rendered September 12, 2006, convicting defendant of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

The hearing court properly denied defendant's motion to dismiss the indictment on the ground of prearrest delay (*see People v Singer*, 44 NY2d 241 [1978]; *People v Taranovich*, 37 NY2d 442, 445 [1975]; *see also United States v Lovasco*, 431 US 783 [1977]). Although the almost 12-year delay was significant, it was not due to bad faith. Instead, it was the result of the prosecutor's efforts to acquire substantial corroborating evidence in order to prove defendant's guilt beyond a reasonable

doubt. The investigative delays were satisfactorily explained and were permissible exercises of prosecutorial discretion (*see People v Decker*, 13 NY3d 12 [2009]). Furthermore, there is no indication that defendant was prejudiced by the delay.

We have considered and rejected defendant's pro se challenge to the sufficiency of the trial evidence.

M-2281 - *People v Robert Nazario*

Motion to amend pro se supplemental brief denied.

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5380 Thomas A. Pollak, Index 650281/08
Plaintiff-Appellant,

-against-

Peter Moore, et al.,
Defendants-Respondents.

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Irwin Popkin, Melville, for appellant.

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for respondents.

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Appeal from judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered September 14, 2010, in favor of defendants, dismissing the complaint, unanimously dismissed, with costs.

Plaintiff's appeal from the judgment does not bring up for review an order of the motion court, entered November 20, 2009 (Richard B. Lowe, III, J.), which was marked "final disposition" and, in fact, disposed of all of plaintiff's claims, leaving nothing further in the action that would require non-ministerial judicial action (*see* CPLR 5015[a][1]; *Burke v Crosson*, 85 NY2d 10 [1995]). While the judgment explicitly referred to the November 20, 2009 order, and such order "affected" the judgment, the November 20, 2009 order did not meet the further criterion that the underlying order sought to be reviewed on appeal from the

judgment be "non-final" (*see* CPLR 5501[a][1]). Plaintiff abandoned his appeal from the November 20, 2009 order, and cannot revive that appeal by the expedient of effecting a ministerial entry of judgment upon the final order after expiration of the time to perfect the initial appeal.

Assuming we were able to reach plaintiff's appellate arguments on the merits, we would find them unavailing. Plaintiff's initial argument that Justice Lowe's November 20, 2009 order was void as it was dated approximately two weeks after Justice Lowe had transferred the action to another IAS part, and such transfer was based on his recusing himself from the action, is unsupported by the record. A review of the relevant transfer orders indicates that the transfer of the action to Justice Walter Tolub, who was handling a related foreclosure proceeding, was done for judicial economy purposes. Moreover, it is noted that prior to the transfer, defendants' motion to dismiss was fully submitted and orally argued before Justice Lowe, and Justice Lowe informed the parties that he would render a decision on the motion (*see generally Hudson View II Assoc. v Miller*, 282 AD2d 345 [2001], *lv dismissed* 96 NY2d 937 [2001]; *Zelman v Lipsig*, 178 AD2d 298 [1991]). Plaintiff offers no evidence to indicate bias or impropriety in the rendering of the November 20, 2009 order (*see generally Hudson View II Assoc.*, 282 AD2d 345).

We find plaintiff's related due process arguments unavailing.

We find that plaintiff's breach of contract claim, which was predicated upon a purported agreement by defendants to sell plaintiff a portion of a lot (with improvements thereon) pending formal division of the lot on the New York City tax map, to be barred by the statute of frauds. The documentary evidence established that the purported agreement was not signed by all the parties to be charged (*see* General Obligations Law § 5-703[2]; *Naldi v Grunberg*, 80 AD3d 1 [2010], *lv denied* __ NY3d __, 2011 NY Slip Op 71494 [2011]), the sale terms were modified by plaintiff, and the parties had an opportunity to execute plaintiff's marked-up contract of sale, but did not elect to execute such agreement. To the extent plaintiff relies on other writings to argue that they demonstrate the parties to be charged agreed to the sale of a portion of a lot to plaintiff (*see generally WWP Group USA v Interpublic Group of Cos.*, 228 AD2d 296 [1996]), we find that the writings do no more than reflect interest of the parties to be charged in effecting a sale of the portion of the property to plaintiff upon appropriate terms.

Plaintiff's alternative claims sounding in breach of fiduciary duty, fraud, fraud in the inducement and negligent misrepresentation were duplicative of his breach of contract

claims and, as such, properly dismissed (*see J.E. Morgan Knitting Mills v Reeves Bros.*, 243 AD2d 422 [1997]; *cf. Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]). Plaintiff's claim for unjust enrichment was unsupported by evidence that defendants, whose interest in the property at stake was foreclosed against, were enriched at plaintiff's expense (*see generally Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415 (1972), *cert denied* 414 US 829 [1973]; *Weiner v Lazard Freres & Co.*, 241 AD2d 114, 119-120 [1998]).

Insofar as plaintiff requested leave to serve a second amended complaint, denial of such relief was a proper exercise of discretion as plaintiff failed to annex a copy of a proposed second amended pleading to his motion papers, and he did not otherwise offer an affidavit of merit or any "new" facts as would overcome the legal defects in his prior two complaints (*see generally Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424 [2006]; *Gonik v Israel Discount Bank of N.Y.*, 80 AD3d 437, 438-439 [2011]).

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

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5381 Brunilda Sanchez, Index 407220/07
Plaintiff-Respondent,

-against-

City of New York,
Defendant,

New York City Transit Authority,
Defendant-Appellant.

_____

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellant.

Della Mura & Ciacci, LLP, Bronx (Walter F. Ciacci of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered April 30, 2010, which, in an action for personal injuries sustained when plaintiff's left foot and calf fell into a gap between the subway car she was exiting and the platform, denied defendant New York City Transit Authority's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant failed to meet its burden of demonstrating its entitlement to qualified immunity since it submitted only its own memorandum stating that the maximum permissible horizontal gap between a subway train and straight platform is six inches without citing any basis for this standard. Defendant presented

no evidence that "a public planning body considered and passed upon the same question of risk" that would go to a jury (*Jackson v New York City Tr. Auth.*, 30 AD3d 289, 290 [2006]).

Defendant also failed to establish its entitlement to judgment as a matter of law. Plaintiff's visual estimate of the gap as between seven and nine inches, as well as her testimony that her foot and calf fit through the gap, raise triable issues as to whether the gap was dangerous even under defendant's six-inch maximum standard (*see Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [2003]). Defendant's measurements of the gap were taken remotely in time from the accident, and even contemporaneous measurements taken by defendant would raise a question of fact by conflicting with plaintiff's estimate (*id.*).

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5382 In re Orietta Echeverria, Index 111085/09
Petitioner-Appellant,

-against-

The New York City Housing Authority,
Respondent-Respondent.

_____

Michael Stepper, New York, for appellant.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 17, 2010, which denied the CPLR article 78 petition and dismissed the proceeding to annul respondent's determination, dated June 3, 2009, denying petitioner's "remaining family member" grievance, unanimously affirmed, without costs.

Petitioner does not qualify as a remaining family member because she did not enter the apartment lawfully, and never received written permission for permanent occupancy from housing management (*see Matter of Valentin v New York City Hous. Auth.*, 72 AD3d 486, 487 [2010]; *Matter of Abreu v New York City Hous. Auth. E. Riv. Houses*, 52 AD3d 432 [2008]; *Jamison v New York City Hous. Auth.-Lincoln Houses*, 25 AD3d 501, 502 [2006]). Indeed, the record shows that the tenant of record's (petitioner's

mother) Permanent Permission Request to add petitioner as a permanent occupant had been denied on the ground that petitioner was too young to reside in a "senior building." The record affords no legal basis for relieving petitioner of the written notice requirement, as she failed to demonstrate that respondent knew or implicitly approved of her residency in the apartment (*see Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [2004]). Even if the Permanent Permission Request had been approved, petitioner could not have fulfilled the one-year occupancy rule, as her mother submitted the request only two months before her death (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [2007]).

Petitioner's argument that respondent should afford her mother, who suffered from rheumatoid arthritis, the "reasonable accommodation" of permitting an amendment to the mother's Affidavit of Income to reflect petitioner's occupancy is unavailing, as petitioner does not have standing to invoke the Americans with Disabilities Act (42 USC § 12132) on behalf of her mother (*see Matter of Rivera v New York City Hous. Auth.*, 60 AD3d 509, 510 [2009]). Further, although the evidence shows that the deceased was physically disabled and required petitioner's sister to prepare and sign documents on her behalf, no evidence indicates that she lacked the mental capacity to ensure that the

affidavit was properly completed. In any event, respondent's determination is supported by substantial evidence even without the affidavit.

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

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5383-
5383A Arthur A. Schneider, et al., Plaintiffs-Appellants, Index 116942/09

-against-

Brian A. Jarmain, Defendant-Respondent.

_____

Samuel A. Ehrenfeld, New York, for appellants.

Pryor Cashman LLP, New York (Jacob B. Radcliff of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered May 11, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered April 9, 2010, which granted defendant's motion to dismiss, unanimously affirmed, with costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs' claim of breach of the alleged 2005 oral agreement is precluded by the letter of intent, executed by the parties in 2006, which both contains a general merger clause and expressly denies the existence of any binding agreement between the parties (*see Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599-600 [1997]). Indeed, the letter of intent merely provides the framework for continuing negotiations aimed

at the execution of a binding agreement, and therefore is itself an unenforceable agreement to agree (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]).

The letter of intent also provides that it may be amended only by written agreement signed by the parties. This provision is fatal to plaintiffs' claim that defendant demonstrated the existence of the oral agreement by his subsequent actions in, among other things, representing himself to third parties as plaintiff Schneider's partner (*see Valentino v Davis*, 270 AD2d 635, 638 [2000]; *see also Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 179 [2007]).

Plaintiffs failed to articulate any argument as to their non-contract claims, and thus have abandoned their appeal from the dismissal of those claims (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [2009]).

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5384 In re Calvario Chase Norall W.,
etc.,

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

Denise W.,
Respondent-Appellant,

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

_____

Kenneth M. Tuccillo, Hastings-on-Hudson, for appellant.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 23, 2010, which, upon a finding of permanent neglect, terminated respondent's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the court's finding that, despite the agency's diligent efforts, respondent permanently neglected her son (Social Services Law § 384-b[7][a]; *Matter of Amanda R.*, 215 AD2d 220 [1995], *lv denied* 86 NY2d 705 [1995]). The agency exerted diligent efforts to encourage and strengthen the parent-child relationship by

assisting with filling out housing applications, offering counseling, and arranging regularly scheduled visitation with the child (*see id.*). The record establishes that respondent failed to maintain contact with the child through consistent and regular visitation, which alone constitutes permanent neglect (*Matter of Aisha C.*, 58 AD3d 471, 472 [2009], *lv denied* 12 NY3d 706 [2009]; *Matter of Jonathan M.*, 19 AD3d 197 [2005], *lv denied* 5 NY3d 798 [2005]; *Matter of Vincent Anthony C.*, 235 AD2d 283 [1997]).

A preponderance of the evidence supported the finding that termination of respondent's parental rights was in the child's best interests (*see Matter of Jayden C.* [*Michelle R.*], 82 AD3d 674 [2011]), so that he could be freed for adoption by his kinship foster mother, who has cared for his needs since soon after his birth (*see Matter of Paul Antoine Devontae R. [Paul R.]*, 78 AD3d 610 [2010], *lv denied* 16 NY3d 707 [2011]; *Matter of Aisha C.*, 58 AD3d at 472).

At the time of the hearing, the mother remained in the same circumstances she was in at the time of the child's removal nearly three years prior, with no realistic plan for his care (*see Matter of Daniella C.G.*, 25 AD3d 494 [2006], *lv denied* 6 NY3d 715 [2006]). Given the evidence that the mother had failed to make

any strides towards creating a relationship with her child, or making a plan for his care, a suspended judgment would be inappropriate (*see Matter of Lorenda M.*, 2 AD3d 370 [2003]).

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5385 The People of the State of New York, Respondent, Ind. 4167/09

-against-

Calvin Shands, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole A. Coviello of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Marcy L. Kahn, J. at plea and sentencing), rendered April 27, 2010, convicting defendant of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence. Defendant engaged in a pattern of suspicious conduct that warranted, at least, a common-law inquiry (*see e.g. People v Wilson*, 52 AD3d 239 [2008], *lv denied* 11 NY3d 743 [2008]). An officer was informed by store security personnel that two men were randomly collecting merchandise without looking at it, behavior that the officer recognized as suspicious. The police saw defendant acting in an unusually nervous manner while

he was unsuccessfully attempting to pay for a large amount of merchandise with a credit card. When the card was rejected, defendant declined the store clerk's offer to assist defendant by calling the bank. Defendant and his companion left the store without the merchandise, with the officers following behind. The fact that defendant did not actually take anything from the store did not detract from the officers' founded suspicion of criminality.

The police then conducted a common-law inquiry, not a seizure requiring reasonable suspicion. The record fails to support defendant's assertion that the police placed him against a wall, or engaged in any other coercive or intimidating conduct that would elevate the encounter to a seizure (*see e.g. People v Francois*, 61 AD3d 524 [2009], *affd* 14 NY3d 732 [2010]; *People v Grunwald*, 29 AD2d 33, 38-39 [2006], *lv denied* 6 NY3d 848 [2006]).

The officers properly asked defendant for identification. After defendant placed the contents of his pocket on a nearby wall, he either discarded or accidentally dropped a credit card. One of the officers caught the card and saw that it bore a name

that was not the name of defendant or his companion. That fact, when coupled with the suspicious behavior in the store, led to a strong inference that the card was stolen, providing the officer with probable cause for defendant's arrest.

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5386 & M-2236 Echostar Satellite L.L.C., Plaintiff-Appellant, Index 600282/08

-against-

ESPN Inc, et al., Defendants-Respondents.

Emery Celli Brinckerhoff & Abady, LLP, New York (Andrew G. Celli, Jr., of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (David L. Yohai of counsel), for respondents.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered January 6, 2011, in favor of defendants on their respective counterclaims, unanimously affirmed, with costs.

Reading each agreement as a whole and considering the relevant clauses in tandem (*see Lawyers' Fund for Client Protection of State of N.Y. v Bank Leumi Trust Co. of N.Y.*, 94 NY2d 398, 404 [2000]), we find that the agreements provide that the payment of licensing fees is due within 30 days after the defined reporting period ends and that interest on any late payments will begin to accrue on the 30th day. The provision referring to a 45-day period upon which plaintiff relies does not specify the payment due date; it affords plaintiff a 15-day grace period in which to make a late payment without being charged the interest that began accruing on the 30th day.

As the agreements are not ambiguous, we need not resort to the parties' conduct to shed light on their intent (*see AGCO Corp. v Northrop Grumman Space & Mission Sys. Corp.*, 61 AD3d 562 [2009]).

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

M-2236 - *Echostar Satellite L.L.C. v ESPN, Inc.*

Motion seeking to supplement appendix granted.

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5392 Julio Alicea, Index 20625/03
Plaintiff-Respondent-Appellant,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for the City of New York, appellant-respondent.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority, appellants-respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent-appellant.

_____

Amended judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered March 23, 2010, to the extent appealed from as limited by the briefs, upon a jury verdict, awarding plaintiff $158,960 for past pain and suffering and $782,800 for future pain and suffering over a period of 38 years, plus interest at the rate of 9% per year from the date of the verdict, unanimously modified, on the law and the facts, to vacate the award of interest and remand the matter to calculate interest at the rate of 3% per annum from the date of the verdict on the judgment awarded against defendant Manhattan and Bronx Surface Transit Operating Authority (MABSTOA), and to vacate the award

for past pain and suffering and direct a new trial only on the issue of such damages, unless defendants, within 30 days of service of a copy of this order with notice of entry, stipulate to increase the award for past pain and suffering to $400,000, and otherwise affirmed, without costs.

The 33-year-old plaintiff sustained a bimalleolar ankle fracture when he slipped and fell on a patch of snow-covered ice while exiting the rear doors of a MABSTOA bus. After the accident, plaintiff had three surgeries, including one open insertion to repair his broken bones, and a second to remove the surgical hardware. He also developed post-traumatic arthritis, and may require additional surgery in the future.

The jury's verdict awarding judgment against defendant the City of New York was supported by sufficient evidence and was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Indeed, based on the evidence presented at trial, including the Department of Sanitation (DOS) records and the testimony of a DOS supervisor, it was reasonable for the jury to conclude that the street condition at the subject bus stop constituted "an unusual or dangerous obstruction to travel," and that "sufficient time had elapsed to afford a presumption of the existence of the condition and an opportunity

[for the City] to effect its removal" (*Gonzalez v City of New York*, 148 AD2d 668, 670 [1989], *lv denied* 74 NY2d 608 [1989]).

We find that the award for future pain and suffering was not excessive. However, the award for past pain and suffering deviates materially from what would be reasonable compensation under the circumstances (CPLR 5501[c]*; see e.g. Hopkins v New York City Tr. Auth.*, 82 AD3d 446 [2011]; *Colon v New York Eye Surgery Assoc., P.C.*, 77 AD3d 597 [2010]; *Lowenstein v Normandy Group, LLC*, 51 AD3d 517 [2008]).

The judgment incorrectly applied interest at a rate of 9% to plaintiff's award against MABSTOA. The rate of interest should not exceed 3% (*see* Public Authorities Law § 1212(6); § 1203-a[6]; *Bello v New York City Tr. Auth.*, 50 AD3d 511, 512 [2008]; *Klos v New York City Transit Auth.*, 240 AD2d 635, 638 [1997]). Accordingly, the matter should be remanded as indicated.

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5393 Jose Martinez Jr., a Minor by his Mother and Natural Guardian, Evelyn Benjamin, et al., Plaintiffs-Appellants, Index 17651/06

-against-

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

_____

Gregory Danenberg, New York, for appellants.

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

_____

Order, Supreme Court, Bronx County (Larry Schachner, J.), entered December 21, 2009, which, in an action for personal injuries allegedly sustained when infant plaintiff was pushed down the stairs by a classmate during a fire drill, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted since the record establishes that infant plaintiff's injuries were proximately caused by the sudden and spontaneous act of another student (*see Mirand v City of New York*, 84 NY2d 44, 49 [1994]). The teacher here, consistent with school procedures, led her class down the stairs and out of the building during the fire drill (*see Esponda v City of New York*, 62 AD3d 458 [2009]). Although the teacher

was no longer in the stairwell when the incident occurred, infant plaintiff was not without any supervision, since another class and its teacher followed behind him down the stairs and there had been no prior incidents of students falling or being pushed down the stairs. The fact that the classmate may have had a disciplinary problem is insufficient to have placed the school authorities on notice that he could push infant plaintiff, with whom he had no history of violence, down the stairs (*see Siegell v Herricks Union Free Sch. Dist.*, 7 AD3d 607 [2004]).

Furthermore, plaintiffs' claim of a design defect with the door that infant plaintiff fell into after being pushed is not viable. The evidence shows that infant plaintiff's injuries were proximately caused by his classmate's sudden and spontaneous act, and there is no evidence from which to conclude that the doorway was defectively designed.

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

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

ENTERED: JUNE 21, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5394 The People of the State of New York, Ind. 1666/07
Respondent,

-against-

Arnaldo Rosa,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Mary Jo L. Blanchard of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.,), rendered June 30, 2008, as amended July 8, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously affirmed.

The only issue raised by defendant is his challenge to the requirement that he register under the Gun Offender Registration Act (Administrative Code of City of NY § 10-601 *et seq.*) and otherwise comply with that statute. That claim is not reviewable on this appeal. Gun offender registration is not "part of defendant's sentence or subsumed within the judgment of conviction" (*People v Smith*, 15 NY3d 669, 673 [2010]). Notwithstanding the fact that the sentencing court directed

defendant to register, and regardless of the merits of defendant's claim that he was not convicted of a crime that subjected him to these requirements, "the registration of a gun offender is an administrative matter between the City of New York, the NYPD, and the offender, not a component of a gun offender's sentence to be imposed by the sentencing court" (*id.*). Accordingly, we perceive no basis for distinguishing defendant's case from *Smith*. In any event, we note that defendant agreed to gun offender registration as a condition of his plea to the attempted crime.

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

ENTERED: JUNE 21, 2011

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3451 Jorge Angamarca, Index 115471/04
Plaintiff-Respondent-Appellant, 590327/05
590842/06

Blanca A. Guguancela Encolada,
Plaintiff,

-against-

New York City Partnership Housing
Development Fund, Inc., et al.,
Defendants,

Jefferson Townhouses, LLC,
Defendant-Appellant-Respondent.

[And Other Actions]

_____

Duane Morris, LLP, New York (Thomas R. Newman of counsel), for appellant-respondent.

Pollack Pollack Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered September 8, 2009, modified, on the law and the facts, to vacate the award for past and future pain and suffering, and the matter remanded for a new trial solely as to such damages, unless defendant Jefferson Townhouses, LLC, within 30 days of service of a copy of this order with notice of entry, stipulates to increase the awards for past pain and suffering and future pain and suffering to $1,500,000 and $3,500,000, respectively, and otherwise affirmed, without costs.

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

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
James M. Catterson
Dianne T. Renwick
Leland G. DeGrasse, JJ.

3451
Index 115471/04
590327/05
590842/06

_____x

Jorge Angamarca,
Plaintiff-Respondent-Appellant,

Blanca A. Guguancela Encolada,
Plaintiff,

-against-

New York City Partnership Housing
Development Fund, Inc., et al.,
Defendants,

Jefferson Townhouses, LLC,
Defendant-Appellant-Respondent.

[And Other Actions]

_____x

Cross-appeals from a judgment of the Supreme Court, New York County (Karen S. Smith, J.), entered September 8, 2009, to the extent appealed from as limited by the briefs, awarding plaintiff Angamarca damages for future lost earnings, future medical expenses and past and future pain and suffering.

Duane Morris LLP, New York (Thomas R. Newman of counsel), and Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains (Phillip A. Tumbarello and Joseph McGovern of counsel), for appellant-respondent.

Pollack Pollack Isaac & De Cicco, New York (Brian J. Isaac of counsel), Law Offices of Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel) and Davis, Saperstein & Salomon, PC, New York (Marc C. Saperstein of counsel), for respondent-appellant.

RENWICK, J.

This action arises out of a construction site accident. Plaintiff, an undocumented alien from Ecuador, emigrated to the United States in 2001. In 2002, plaintiff was hired as a construction worker by third-party defendant Roadrunner Construction Corp., despite its knowledge of his immigration status. Roadrunner never requested a social security number from plaintiff and paid him in cash or by check, and never withheld any payroll taxes from his wages.

On October 30, 2003, plaintiff was working on a construction project in which townhouses were being built by Jefferson Townhouses, LLC (Jefferson,) the owner of the property, which had hired Roadrunner to do carpentry work. Plaintiff was performing his work on the roof of a townhouse, framing a 30-foot wall outside of the unit, when he fell two stories to the second floor through an improperly covered opening in the roof. Plaintiff sustained severe injuries, including traumatic brain injury and multiple fractures of the vertebrae.

On November 2, 2004, plaintiff commenced this action against Jefferson, among others. This Court found that plaintiff was entitled to partial summary judgment on liability based upon the violation of Labor Law § 240(1) (*see Angamarca v New York City Partnership Hous. Dev. Fund. Co., Inc.*, 56 AD3d 264, 265 [2008]).

Meanwhile, the matter proceeded to trial on damages, at the conclusion of which, the jury found that plaintiff sustained total damages in the sum of $20 million: 1) $100,000 for past pain and suffering, including loss of enjoyment of life; 2) $1,531,172 for past medical expenses; 3) $74,013 for past loss of earnings; 4) $1,000,000 for future pain and suffering, including loss of enjoyment of life for 40 years; 5) $16,721,684 for future medical expenses for 40 years; 6) $573,131 for future loss of earnings for 23 years.

Jefferson appeals from the judgment seeking a new trial on the ground that the trial court improperly precluded it from cross-examining plaintiff and other witnesses about plaintiff's immigration status and his desire, expressed prior to the instant accident, of returning to Ecuador after he had earned enough money in the United States. Defendant argues that the jury should have been allowed to consider such evidence in determining its award of future lost earnings and medical costs. Defendant also argues that the damage award for future medical expenses was excessive. Plaintiff cross appeals, contesting the adequacy of the damage award for past and future pain and suffering.

Although a worker's immigration status may be a legitimate factor in litigating a lost wage claim (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 362 [2006]), under the facts of this case, the

trial court providently exercised its discretion in precluding defendant from inquiring about plaintiff's immigration status. In addressing mitigation concerns, the *Balbuena* Court explicitly held that where a plaintiff has suffered serious injuries which prevent him from working (such as Angamarca in this case) mitigation of damages is not implicated, and therefore, his immigration status is irrelevant (*id.* at 361).

Nor can we say, in the instant case, that the trial court erred in refusing to permit cross-examination of plaintiff about his immigration status and prior desire to return to Ecuador. Any argument, by defendant, that plaintiff was subject to deportation to Ecuador or had expressed an interest, prior to the accident, in some day returning to Ecuador, in an effort to suggest that plaintiff would incur lower medical expenses in Ecuador than in the United States, would also have been inappropriate. Contrary to the dissent's suggestion, defendant proffered no evidence that deportation was anything other than a speculative or conjectural possibility. The speculation that plaintiff might at some point be deported or voluntarily return to Ecuador was so remote that it rendered the issue of citizenship of scant probative value to the calculation of damages *(see Gonzalez v City of Franklin*, 137 Wis2d 109, 138-140, 403 NW2d 747, 759 [1987]; *Clemente v State of California*, 40

Cal3d 202, 221, 707 P2d 818 [1985]; *Peterson v Neme*, 222 Va 477, 482-483, 281 SE2d 869, 871-872 [1981]).

Moreover, defendant does not dispute that it was not prepared to show relevant evidence at trial that, had plaintiff returned to his native country, his future medical expenses would have been lower than those awarded by the jury. In fact, the trial court precluded purported expert testimony on this very same issue because of its belated disclosure -- less than a week before trial. Defendant does not contest that ruling in this appeal. Significantly, defendant was not prepared to present evidence from any source that would have guided the jury in determining whether plaintiff's future medical expenses would have been lower in Ecuador, and to what extent, than those awarded by the jury. Thus, under the unique facts of this case, the jury's determination of future medical expenses in Ecuador would have been mere speculation.

We turn to the issue of damages. The award of $100,000 for past pain and suffering and $1 million for future pain and suffering over 40 years deviates materially from for what would be reasonable compensation under the circumstances. The record shows that at the time of the accident, plaintiff was 34 years old and suffered traumatic brain injury and multiple fractures of the vertebrae, as well as rib fractures, leg fractures, and a

wrist fracture. Because plaintiff's spinal fractures placed him at risk for paralysis, he was kept on bed rest during his entire six-week hospital stay. During this period, medical personnel withheld pain medication so that they could perform a proper neurological assessment, which included deliberately and repeatedly inflicting pain to identify a change in plaintiff's level of consciousness. In addition, during that time, plaintiff underwent numerous medical procedures and surgeries, including a tracheotomy to ease his breathing. Plaintiff's head injuries required surgery to remove the contused part of his brain and a portion of his skull to reduce pressure. Specifically, the surgeon removed a bone flap from plaintiff's skull and cut away a portion of the right temporal lobe, as well as other portions of the brain. Surgeons then made a pocket in plaintiff's abdomen and inserted the bone flap in the pocket, to save the bone for later re-attachment. His multiple fractures of the vertebrae resulted in increased kyphosis (curvature) of plaintiff's spine, which required surgery to halt any further kyphosis. The surgery consisted of a spinal fusion of the vertebrae and the insertion of plates, nuts, screws, and rods into plaintiff's back. Plaintiff was left with orthopedic deficits after the accident and hospital treatment, including one leg shorter than the other, a rounded spine, a malunion in his wrist, and an indentation in

his face from the craniectomy. He also walks with a slow gait and has poor flexibility in his lower back. The brain injuries also resulted in cognitive impairments, primarily significant imbalance disturbance, very significant visual neglect on the left, and serious disturbances in the visual organizational realm. Due to his serious physical and cognitive impairments, plaintiff will always require some sort of supervision and assistance. In view of the devastating injuries and the deteriorating quality of life suffered by plaintiff, we find the sums of $1.5 million and $3.5 million, respectively, for past and future pain and suffering, to be a more appropriate award (*see Paek v City of New York*, 28 AD3d 207 [2006], *lv denied* 8 NY3d 805 [2007] [award of $3,000,000 for future pain and suffering over 40 years, where the plaintiff sustained a severe brain injury resulting in permanent cognitive impairments affecting memory, concentration, organizational ability, and emotional response (*see also Reed v City of New York*, 304 AD2d 1, 6-7 [2003], *lv denied* 100 NY2d 503 [2003] [award and past pain and suffering of $2.5 million and future pain and suffering of $2.5 million over 30 years where plaintiff suffered brain injuries that prevented her from holding a simple job for more than a few months, and also suffered seizures and memory loss]; *see also Sawtelle v Southside*, 305 AD2d 659 [2003] [an award of $1,250,000 for past

pain and suffering and $2,000,000 for future pain and suffering where plaintiff sustained a debilitating stroke following surgery]).

In view of testimony that plaintiff will would need around-the-clock care and rehabilitation services for the remainder of his life, the $16,721,684 award for future medical expenses over a projected 40-year period is not so disproportionate to what constitutes reasonable compensation as to warrant reduction. We have reviewed the remaining issues raised by defendant and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Karen S. Smith, J.), entered September 8, 2009, to the extent appealed from as limited by the briefs, awarding plaintiff Angamarca damages for future lost earnings and future medical expenses and past and future pain and suffering, should be modified, on the law and the facts, to vacate the award for past and future pain and suffering and the matter remanded for a new trial solely as to such damages, unless defendant Jefferson Townhouses, LLC, within 30 days of service of a copy of this order with notice of entry, stipulates to increase the award for

past pain and suffering from $100,000 to $1,500,000 and the award for future pain and suffering from $1,000,000 to $3,500,000, and otherwise affirmed, without costs.

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

TOM, J.P. (dissenting in part)

I respectfully take issue with the proposition expounded by the majority in this case that an alien worker's lack of permanent resident status is immaterial to his recovery of the cost of future medical treatment. The majority's conclusion that the immigration status of plaintiff is irrelevant to the award of damages for future medical expenses represents a wholly unwarranted extension of the Court of Appeals' ruling in *Balbuena v IDR Realty LLC* (6 NY3d 338 [2006]). It is a plaintiff's burden in a personal injury action to establish all elements of his or her claim, including damages, and the pertinent question for the jury is the amount required to fairly compensate him (*see Tate v Colabello*, 58 NY2d 84, 87-88 [1983]). By precluding evidence concerning where medical services are to be provided, the trial court improperly withheld material evidence from the jury, preventing a fair appraisal of the future cost of plaintiff's care.

Balbuena has no bearing on the issue raised by this appeal. In that case, the Court of Appeals was confronted with the narrow question of whether an undocumented alien who was prohibited from working in the United States under the Immigration Reform and Control Act (8 USC § 1324a *et seq.* [IRCA]) could recover *lost wages* in an action under the Labor Law (6 NY3d at 348, 355; *see*

Han Soo Lee v Riverhead Bay Motors, 57 AD3d 283, 284 [2008]). *Balbuena* does not address, let alone limit, consideration of a plaintiff's immigration status in regard to any item of damages. Nor has the Court of Appeals suggested that disputes must be resolved without regard to a litigant's immigration status; when material to the issue at bar, the Court has not hesitated to consider it, in one instance finding it dispositive of rights afforded by New York law (*see Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317-318 [2008] [B-2 visitor's visa was "logically incompatible" with a primary residence in New York for rent regulation purposes]).

As augmented by the majority, the judgment appealed from awards plaintiff a total of nearly $22 million in damages, including $16,721,684 for future medical expenses over 40 years of life expectancy, an amount that defendant-appellant Jefferson Townhouses, LLC contends is unfair and excessive. Just prior to trial, Supreme Court granted plaintiff's motion in limine to preclude any mention that he is not a permanent resident of this country, "read[ing] *Balbuena* to say that you're precluded from mentioning their immigration status." However, even confined to the narrow issue actually resolved in *Balbuena*, the trial court's ruling is contrary to prevailing appellate authority (*see Coque v Wildflower Estates Devs., Inc.*, 58 AD3d 44, 54 [2008] ["it is

appropriate for a jury to take the plaintiff's immigration status into consideration in determining the amount of damages for lost wages, if any, to which the plaintiff is entitled"]). Despite plaintiff's testimony at his examination before trial that he intended to work only for a few years in the United States, save some $20,000 and then return to his native Ecuador, where his family resides, plaintiff's experts presented evidence of the cost of his future medical care based exclusively on the cost of treatment in the United States. Thus, the trial court permitted the jury to assess damages on the untoward assumption that plaintiff would remain in this country indefinitely and be subject to our prevailing cost of medical care, the most expensive in the world.

The trial court broadly forbade defendants from informing the jury that plaintiff "is not a resident alien here," stating without elaboration that it would be "too prejudicial and too speculative." Ignored by this analysis is the prejudice to the defense in being unable to dispel the obvious misimpression that plaintiff is a permanent resident.

The purpose of compensatory damages, as the nomenclature suggests, is "to indemnify the injured person for the loss suffered" (Black's Law Dictionary 416 [8th ed 2004]) — that is, to reimburse the actual costs incurred as a result of his

injuries, not to bestow a windfall. As stated by the Second Department, "[T]he primary basis for an award of damages is compensation, i.e., to make the injured party whole to the extent that it is possible to measure his injury in terms of money" (*Sharapata v Town of Islip*, 82 AD2d 350, 366 [1981], *affd* 56 NY2d 332 [1982]).

The operative question before this Court is whether appellant should have been permitted to inform the jury of plaintiff's nationality and the limited duration of his intended stay. By adopting the trial court's reading of *Balbuena*, the majority sets an unfortunate precedent without support in either law or logic. For instance, if injury were to be sustained by a plaintiff who is visiting the United States on a temporary visa before returning to a nation where medical care is provided at no cost, would the majority seriously propose that the trial court be permitted to withhold those facts from the jury and allow the plaintiff to present evidence valuing damages for future medical expenses at the cost of care in this country? It should be readily apparent that the cost of care in the locality where it is to be provided cannot be summarily disregarded as "irrelevant" to the calculation of future medical expenses, as Supreme Court presupposed.

It is the plaintiff's burden to prove his entitlement to

damages, not the defendant's burden to disprove it. Neither the trial court nor the majority specify why it would be unduly prejudicial to disclose either plaintiff's status as a nonresident alien or his plans to return to his native country. If the purpose is to award compensation for medical expenses actually incurred, such disclosure promotes the ends of justice by obliging plaintiff to present evidence of the cost of future medical care in Ecuador based on the likelihood of repatriation.

The *Balbuena* Court's decision not to bar recovery of lost wages was heavily influenced by policy considerations. First, the Court noted that allowing an employer of persons prohibited from working in the United States under IRCA to limit liability for wages lost due to an injury covered by the Labor Law would undermine the purpose of legislation intended for the protection of workers (*Balbuena*, 6 NY3d at 359). Second, the Court indicated that limiting or precluding the potential liability of employers of undocumented workers for lost wages would make it financially attractive to hire them, thereby rewarding unscrupulous conduct and undermining the purpose of federal immigration laws (*id.*).

Unlike the situation in *Balbuena*, no public policy concerns justify barring evidence that would limit the amount of plaintiff's recovery to reasonable future medical expenses. This

is a matter in which plaintiff avoided disclosing his immigration status to his employer, and the employer avoided asking for documentation that would have revealed plaintiff's immigration status. Defendants have not sought to avoid responsibility for plaintiff's injuries, and plaintiff has identified no public policy to be served by permitting recovery of excessive damages.

In sum, it is not prejudicial to require that a plaintiff present the jury with an accurate portrayal of the likely cost of his future medical treatment, wherever it is to be rendered. To the contrary, it is unfair to prevent a defendant from putting a plaintiff to his proof by precluding the defense from presenting facts material to the accurate assessment of damages.

Accordingly, the judgment should be reversed to the extent appealed from by defendant Jefferson Townhouses, LLC, as limited by its briefs, and the matter remanded for a new trial on damages for future medical expenses.

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

ENTERED: JUNE 21, 2011

CLERK

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

3947 The People of the State of New York, Ind. 5810/07
Respondent,

-against-

Ledarrius Wright,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered April 16, 2009, affirmed.

Opinion by Catterson, J. All concur except Tom, J.P. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

3947
Ind. 5810/07

_____x

The People of the State of New York,
Respondent,

-against-

Ledarrius Wright,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered April 16, 2009, convicting him, after a jury trial, of murder in the first degree and criminal possession of a weapon in the second degree, and imposing sentence.

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

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

CATTERSON, J.

In his appeal from convictions for first-degree murder and second-degree criminal possession of a weapon, the defendant claims that the court erred in imposing consecutive sentences because he acted with singular intent during one criminal transaction. However, recent Court of Appeals decisions reiterate that the test for determining the legality of consecutive sentences is "not whether the criminal intent is one and the same [in each crime] but whether separate acts have been committed with the requisite criminal intent." *See* People v. McKnight, 16 N.Y.3d 43, 49, 917 N.Y.S.2d 594, 597, 942 N.E.2d 1019, 1022 (2010) (internal quotation marks and citations omitted), and People v. Frazier, 16 N.Y.3d 36, 41, 916 N.Y.S.2d 574, 577, 941 N.E.2d 1151, 1154 (2010). Because there is no overlap of statutory elements in the crimes committed by the defendant, the imposition of consecutive sentences was lawful.

Testimony at trial adduced the following: The murder of two young people in 2005 on West 133rd Street, Manhattan, occurred after a series of altercations between two groups of residents on the street. One group was comprised of the defendant, his brother Curtis Wright and their friend Tamara Brown. The other group, reportedly members of the Bloods street gang, included the two victims, Doneil Ambrister and Yvette Duncan, who were shot as

they walked along the street at approximately 1 A.M.

Trial testimony further established that, in the hours immediately prior to the shootings, the two groups were involved in an argument, and soon afterwards in a physical altercation in which Curtis Wright was struck in the forehead with a belt buckle. A witness testified that she saw a gun in the defendant's hand during that altercation.

A few hours later, the defendant approached Ambrister in the street as Ambrister walked back from a bodega with Duncan and several others. A witness for the People testified that the defendant then said something to the effect of "So, I can't live on this block no more." Ambrister, Duncan and another member of the group, Mack Bruce, indicated they did not want to talk to the defendant, and started to walk away. The defendant also appeared to be walking away.

However, according to four witnesses who testified, instead of walking away, the defendant drew a gun from his shorts. He then chased down Ambrister and shot him, fired at Duncan till she collapsed, and pointed the gun at Mack Bruce's head but the gun appeared to jam. Ambrister and Duncan died as a result of the shooting. Eyewitnesses identified the defendant as the shooter to police officers who arrived on the scene minutes later.

After a jury trial, the defendant was convicted of one count

of first-degree murder pursuant to Penal Law § 125.27 (1)(a)(viii) and second-degree criminal possession of a weapon pursuant to Penal Law § 265.03(1)(b). The court sentenced him to consecutive terms of 25 years to life for first-degree murder and 15 years on the weapon-possession conviction, for an aggregate term of 40 years to life.

On appeal, the defendant argues that the court erred in imposing consecutive sentences on the grounds that the People did not charge him with weapon possession unrelated to the murders, nor did they allege or prove that he possessed a gun with a separate intent to use it unlawfully against another. He asserts that the evidence demonstrates he acted with a singular intent during one criminal transaction.

In so arguing, the defendant, like the dissent, relies almost exclusively on People v. Hamilton (4 N.Y.3d 654, 797 N.Y.S.2d 408, 830 N.E.2d 306 (2005)), a case where the Court found concurrent sentences were mandated after defendant was convicted of assault, manslaughter and second-degree weapon possession. The Court held that, for defendant "to be sentenced consecutively on the weapon charge, it would have been necessary for the People to establish that he *possessed the pistol with a purpose unrelated to his intent to shoot* [the victims]." People v. Hamilton, 4 N.Y.3d at 658, 797 N.Y.S.2d at 409 (emphasis

added).

It appears, however, that the more recent Court of Appeals decisions departing from Hamilton are more in tune with the Court's pre-Hamilton authority, and explain why the Court has not cited Hamilton as a precedent. Indeed, while the defendant argues that there are "numerous cases" supporting the holding in Hamilton, the Court's sub silentio rejection of the case is evident in its subsequent decisions. People v. Taveras, 12 N.Y.3d 21, 878 N.Y.S.2d 642, 906 N.E.2d 370 (2009); People v. McKnight, 16 N.Y.3d 43, 917 N.Y.S.2d 594 (2010), supra and People v. Frazier, 16 N.Y.3d 36, 916 N.Y.S.2d 574 (2010), supra. Hence, for the reasons set forth below, the sentencing court was acting within its discretion in imposing consecutive sentences.

Penal Law § 70.25(2) mandates concurrent sentences "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other." For the purposes of determining overlap as to the second prong of the statute, "the commission of one offense is a material element of a second [...] if, by comparative examination, the statutory definition of the second crime provides that the *first crime is also a necessary component* in the legislative classification and definitional sense." People v. Day, 73 N.Y.2d 208, 211, 538

N.Y.S.2d 785, 787, 535 N.E.2d 1325, 1327 (1989) (emphasis added).

It is well established, then, that to arrive at a sentencing determination, the court must "examine the statutory definitions of the crimes for which [a] defendant has been convicted."[1] People v. Laureano, 87 N.Y.2d 640, 643, 642 N.Y.S.2d 150, 152 N.E.2d 1212, 1214 (1996). Because both prongs of Penal Law § 70.25(2) refer to an "act or omission," that is, to the actus reus that constitutes the offense, "the court must determine whether the actus reus element is, by definition, the same for both offenses . . . or if the actus reus for one offense is, by definition, a material element of the second offense." Id.

The actus reus of a crime is the "wrongful deed that comprises the *physical* components of a crime." People v. Rosas, 8 N.Y.3d 493, 496 n.2, 836 N.Y.S.2d 518, 521, 868 N.E.2d 199, 201 (2007) (emphasis added) (internal quotation marks and citations omitted). The test, therefore, is not whether the criminal intent is one and the same and inspiring the whole transaction but whether separate acts have been committed with the requisite criminal intent. People v. Day, 73 N.Y.2d at 211, 538 N.Y.S.2d at 787; see also People v. McKnight, 16 N.Y.3d at 49, 917

[1] The record does not reflect that the sentencing court conducted an examination of the statutory definitions. However, there is no requirement mandating that such examination be conducted on the record.

N.Y.S.2d at 598 (where an actus reus consists of repetitive, discrete acts, these acts do not "somehow merge" where the same criminal intent inspires the whole transaction).

Despite their citation in Hamilton, neither of the two Court of Appeals cases relied upon by the dissent stands for the proposition that the People must show defendant's separate and distinct intent. In People v. Parks, the Court imposed a sentence for criminal possession of a weapon running concurrently with sentences for felony murder and four counts of robbery. People v. Parks, 95 N.Y.2d 811, 814 n1, 712 N.Y.S.2d 429, 430, 734 N.E.2d 741, 742 (2000). Two of the robbery convictions were based on the defendant's possession of a loaded gun. 95 N.Y.2d at 813, 712 N.Y.S.2d at 430. Thus, it was the overlap of the statutory element of physical possession of the weapon that served as a basis for the imposition of concurrent sentences. Similarly, in People v. Sturkey, the sentences ran concurrently because the crimes of third-degree robbery and third-degree criminal possession of a weapon both arise from the defendant physically taking possession of the gun. People v. Sturkey, 77 N.Y.2d 979, 980-981, 571 N.Y.S.2d 898, 898, 575 N.E.2d 384, 384 (1991).

Here, the defendant was convicted of first-degree murder pursuant to Penal Law § 125.27 (1)(a)(viii), which in relevant

part, states:

> "A person is guilty of murder in the first degree when: (1) [w]ith intent to cause the death of another person, he causes the death of such person or of a third person; *and* (viii) as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person."

He was additionally convicted of second-degree weapon possession pursuant to Penal Law § 265.03(1)(b), which, in relevant part, states: "[a] person is guilty of criminal possession of a weapon in the second degree when: (1) with intent to use the same unlawfully against another [he] possesses a loaded firearm."

The People correctly assert that the actus reus of the first-degree murder statute in this case is the causing of death of two or more persons with no requirement that it be by shooting, stabbing or any other method employing a weapon, and that the actus reus of second-degree criminal weapon possession is possession of a loaded operable firearm with no requirement that, in fact, it be employed in any way, much less lethally. Hence, these are separate and distinct acts.

Further, since for sentencing purposes a court must focus on the statutory definition of an offense, there is no merit in the defendant's argument that the People, at trial, intertwined

defendant's intent to use his weapon unlawfully with the fatal shootings of the two victims. It is true that the People, in summation, stated that the defendant "possessed a gun and intended to use that gun unlawfully . . . [t]here's no doubt about his intent since he actually did use the gun unlawfully against two others."

However, that does not help the defendant for sentencing purposes. *See* People v. Day, 73 N.Y.2d at 211, 538 N.Y.S.2d at 787 ("[r]eference to the fact-specific circumstances and proof of a crime to determine whether, under the second statutory prong, one offense is a material element of a second is *not* the test for consecutive sentencing purposes") (emphasis added). Indeed, the defendant's argument that the intent component of the weapon-possession charge results in a statutory overlap because the People did not establish an intent separate from the intentional, fatal shootings is precisely the rationale that the Court of Appeals rejected in People v. Taveras, (12 N.Y.3d 21, 878 N.Y.S.2d 642), supra, and most recently in People v. Frazier, (16 N.Y.3d 36, 916 N.Y.S.2d 574), supra.

In Taveras, the Court rejected the argument that a criminal sexual act (sodomy) constituted a material element of first-degree falsifying of business records where defendant asserted that the statutory definition of the latter offense included

intent to conceal a crime, in this case the sodomy. People v. Taveras, 12 N.Y.3d at 26-27, 878 N.Y.S.2d at 645 (internal quotation marks and citations omitted) (the statutory definition of falsifying business records in the first degree which includes an intent to commit or conceal a crime does not render the first crime (sodomy) "a necessary component [of the second crime] in the legislative classification and definitional sense.")

Similarly, in Frazier, the defendant argued that sentences imposed for his burglary and larceny convictions should run concurrently because larceny was the crime that satisfied burglary's intent requirement. People v. Frazier, 16 N.Y.3d at 41, 916 N.Y.S.2d at 577. This Court agreed that defendant's larceny was the only crime that fulfilled the "'intent to commit a crime'" element of burglary, and that, therefore "the two acts - the entering of a dwelling for the sole purpose of stealing, and the actual taking of the property - cannot logically be considered separate and distinct acts." People v. Frazier, 58 A.D.3d 468, 469, 870 N.Y.S.2d 342, 343 (1st Dept. 2009). The Court of Appeals disagreed. In a particularly instructive ruling, it held, instead, that "[t]he crime of burglary was completed when defendant entered [each apartment] with the intent to commit a crime. The ensuing larceny was a separate crime, perpetrated through defendant's separate act of stealing

property." People v. Frazier, 16 N.Y.3d at 41, 916 N.Y.S.2d at 576-577 (larceny is not a *necessary* component of burglary).

The holding in Frazier would appear to foreclose the argument in this case that the shootings of the victims are the only crimes that satisfy the "intent-to-use-unlawfully" element of the weapon possession charge and hence they are not separate and distinct acts. The criminal weapon possession offense is a possessory act, the actus reus of which is complete once the defendant has "dominion and control of a weapon." *See* e.g. People v. McKnight, 16 N.Y.3d at 50, 917 N.Y.S.2d at 598 ("there are no more *acts* [a defendant] can take to advance that offense"). Criminal weapon possession is not a necessary component of first-degree murder.

We also decline to reduce the sentences in the interest of justice. We have considered defendant's arguments concerning the prosecutor's summation and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered April 16, 2009, convicting defendant, after a jury trial, of murder in the first degree and

criminal possession of a weapon in the second degree, and sentencing him to consecutive terms of 25 years to life and 15 years, respectively, should be affirmed.

All concur except Tom, J.P. who dissents in part in an Opinion.

TOM, J.P. (dissenting in part)

The shooting in this case arose from tensions developed from the confrontations between two rival groups of individuals who lived in the same neighborhood. Shortly after several fights had broken out between members of the two groups, one of which had occurred earlier that same evening involving defendant and his friends, defendant returned to the scene with a gun and shot two members of the rival group, Doneil Ambrister and Yvette Duncan, killing them. He was convicted of the murders and criminal possession of a weapon in the second degree. The sentence on the weapon count, imposed to run consecutively with the sentence on the murder charges, is unlawful.

This matter is governed by *People v Hamilton* (4 NY3d 654 [2005]), which is indistinguishable and dispositive of the sentencing issue. There, as here, the defendant shot two persons and was convicted of both the shootings and criminal possession of a weapon in the second degree, for which the trial court likewise imposed consecutive sentences. With respect to the requisite "intent to use [the gun] unlawfully against another" (Penal Law § 265.03([1]), the Court of Appeals noted, "[t]here is no doubt as to who the other person or persons were" (*id.* at 658). Here, defendant's intent to use the gun against the

victims was clear. A short time after the two groups had the physical altercation, earlier that evening when defendant's friend, Curtis, was struck in the forehead with a belt buckle, drawing blood, defendant returned with a gun and confronted the rival group. Before shooting the victims, defendant approached Ambrister and said something to the effect of, "[Y]ou said we couldn't come back to the block," or "So, I can't live on this block no more." As Ambrister attempted to run defendant shot him. As Ambrister fell to the ground defendant approached Duncan and another individual, Mack Bruce. Defendant shot Duncan and then, pointed the gun at Bruce's head and pulled the trigger, but the gun apparently jammed. As here, "[t]here is no allegation that the weapon count referred to a different pistol or a different event, and the prosecution does not contend otherwise" (*Hamilton* at 658). In the absence of proof of a distinct intent to use the gun unlawfully, the weapon count overlapped the charges arising out of the shooting of the two victims (Penal Law § 70.25[2]).

The Court of Appeals held that the trial court had violated Penal Law § 70.25(2), stating that to impose consecutive sentences on the defendant, it would have been necessary "to establish that he possessed the pistol with a purpose unrelated to his intent to shoot Roberts and Smith" (*id.*). The Court added

that the rule prohibiting consecutive sentences where "the weapon possession was not separate and distinct from the shootings" (*id.* at 659) has been consistently applied (*see People v Parks*, 95 NY2d 811 [2000]; *People v Sturkey*, 77 NY2d 979 [1991]; *People v Washington*, 9 AD3d 499 [2004], *lv denied* 3 NY3d 682 [2004]). While the majority's intricate reasoning suggests that it is possible to reach a contrary result, the principle of stare decisis compels adherence to established precedent, as expressed in *Hamilton*, a recent Court of Appeals' ruling on all fours.

Accordingly, the judgment should be modified to the extent of directing that the sentences run concurrently.

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

ENTERED: JUNE 21, 2011

CLERK