SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 5, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Sweeny, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7129 In re Josephine Thomas, Index 100711/11
Petitioner-Appellant,

-against-

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

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Paul T. Rephen of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered August 31, 2011, which denied the petition seeking a judgment directing respondents to provide legal representation and reimbursement for legal fees and expenses incurred in defense of a civil action arising out petitioner-paraprofessional's discipline of a student, and dismissed the proceeding brought pursuant to CPLR article 78, affirmed, without costs.

The court correctly determined that Education Law § 2560,

which incorporates by reference General Municipal Law § 50-k, and Education Law § 3028, do not conflict and should be read together and "applied harmoniously and consistently" (*Alweis v Evans*, 69 NY2d 199, 204 [1987]). "It is the duty of the courts to so construe two statutes that they will be in harmony, if that can be done without violating the established canons of statutory interpretation" (McKinney's Cons Laws of NY, Book 1, Statutes § 398).

It is a fundamental rule of statutory construction that a court, "in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]). The plain meaning of the statutory language is "'the clearest indicator of legislative intent'" (*Matter of Smith v Donovan*, 61 AD3d 505, 508 [2009], quoting *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998], *lv denied* 13 NY3d 712 [2009]).

Both Education Law §§ 3028 and 2560 provide for the legal representation and indemnification of Board of Education employees. However, they each set forth different circumstances under which such representation and indemnification are to be provided.

Education Law § 3028 provides entitlement to representation and indemnification for any civil or criminal suit filed against a board of education "arising out of disciplinary action" that the employee has taken against a student "while in the discharge of his [or her] duties within the scope of his [or her] employment."

Education Law § 2560(1), as amended in 1979, provides for representation and indemnification for board of education employees in a city having a population of one million or more "pursuant to the provisions of, and subject to the conditions, procedures and limitations contained in section fifty-k of the general municipal law."

General Municipal Law § 50-k(2) and (3) provide a uniform standard for legal representation and indemnification of employees of the City of New York. Such representation and indemnification shall be provided for acts or omissions that the Corporation Counsel determines "occurred while the employee was acting within the scope of his [or her] public employment and in the discharge of his [or her] duties and was not in violation of any rule or regulation of his [or her] agency at the time the alleged act or omission occurred."

When read together, it is clear that, pursuant to Education

Law § 3028, a board of education must provide legal representation and pay attorney's fees and expenses incurred in the defense of an employee in any action arising out of a disciplinary action taken against a student by an employee while acting in the scope of his or her employment and in the discharge of his or her duties, *unless*, pursuant to Education Law § 2560(1), the employee is a member of a board of education in a city having a population of one million or more, and, pursuant to General Municipal Law § 50-k, he or she violated any rule or regulation of the agency (*see Sagal-Cotler v Bd. of Educ. of City School Dist. of City of N.Y.*, __ AD3d __ (2012), decided simultaneously herewith; *Matter of Zampieron v Board of Educ. of the City School Dist. of the City of N.Y.*, 30 Misc 3d 1210[A], 2010 NY Slip Op 52338[U], *8 [2010]).

Here, because petitioner was employed as a paraprofessional by the New York City Department of Education (DOE), Education Law § 2560(1) applies. Therefore, in order to obtain legal representation pursuant to the statute, petitioner must meet three requirements: (1) she must be acting within the scope of her employment; (2) in the discharge of her duties; and (3) not be in violation any rule or regulation of the DOE at the time of the incident. As Supreme Court correctly found, petitioner was

acting within the scope of her employment since the incident occurred in a classroom. However, the act of hitting a child on the head during a lesson violated DOE Chancellor's Regulation A-420 as well as a statewide rule prohibiting corporal punishment (*see* 8 NYCRR 19.5[a][2]), and therefore was not undertaken in the discharge or furtherance of her duties as a school employee, whether as an act of discipline or, as the dissent contends, to get the child's attention (*cf. Blood v Board of Educ. of City of N.Y.*, 121 AD2d 128 [1986]). Although petitioner denied at the time, and continues to deny ever striking the child, the record shows that the allegations against her were substantiated and that she was transferred to another building as a result of the incident.

In an attempt to fit this case within the parameters of our decision in *Blood v Board of Educ. of City of N.Y.* (121 AD2d 128 [1986] *supra*), the dissent creates a scenario wherein petitioner "[a]t worst, . . . became annoyed at [the child's] inattentiveness and used her hand to direct him." According to the dissent, the incident was nothing more than a "natural and foreseeable incident of her work" and was "at most, an impulsive act designed to get the attention of an unfocused student and consistent with the teaching task she was assigned to perform,"

thus bringing her actions within the scope of her duties. Such a scenario, however, is not supported by the record and ignores the fact that petitioner's actions violated two regulations prohibiting corporal punishment.

As noted, petitioner maintains that she never struck the child. The only reference to the child's inattentiveness, aside from petitioner's brief, is a statement from a witness, another kindergarten student, contained in a counselor's report that the child "was not listening and Ms. Thomas hit him in the forehead with the back of her hand and [the child] said that it hurt." Petitioner, in her response to the reassignment, stated that the child "was very frustrated with the work." There is no indication that the student was not paying attention or that his behavior was a cause for discipline. This is a far different set of facts from *Blood*, where a teacher, who had become angry at a student, grabbed and carelessly swung the child's book bag and accidently struck another student in the eye. Notably, in *Blood*, the teacher's conduct in striking the other student was clearly accidental, and no disciplinary action was taken as a result of the incident (121 AD2d at 131, 133.) Here, the striking was intentional and petitioner was disciplined.

While it is true, as the dissent points out, that some nisi

prius courts have found that Education Law § 3028 is the applicable statute despite the population requirements of Education Law § 2560(1), those cases are easily distinguishable from the present case. For example, *Morel v City of New York* (2010 NY Slip Op 32079[u] [Sup Ct, NY County 2010]), involved a teacher, Ramon Morel, who allegedly punched and shoved a 14-year-old female student while ushering her and her friends out of a gym after a basketball game. After a DOE investigation, the allegations were substantiated. A lawsuit was commenced by the student against Morel and he requested representation. The Corporation Counsel denied the request on the sole ground that Morel's action were not within the ambit of General Municipal Law § 50-k(2). The IAS court found that Education Law § 3028 was controlling (2010 NY Slip Op 32079[u], *4-5). The basis of the court's determination was that "the DOE, in over a year since the incident, had not brought disciplinary charges against Morel," and "there is no evidence that Corporation Counsel had a factual basis to determine that Morel was acting outside the scope of his employment when he pushed [the student] out of the gym." (*id*. at *7.)

In *Matter of Inglis v Dundee Cent. School Dist. Bd. of Educ.* (180 Misc 2d 156 [Sup Ct, Yates County 1999]), the teacher, after

directing a student to stop playing a piano in the classroom, slapped the student. When criminal charges of harassment were filed against the teacher, she requested representation, which the school district denied on the basis that she was not acting within the scope of her employment when she slapped the student. The teacher brought an article 78 proceeding to have the district reimburse her for her legal expenses in defending the harassment charge, which ultimately was adjourned in contemplation of dismissal (180 Misc 2d at 157). In granting the petition, the court found that the teacher was acting within the scope of her employment and that even accepting the district's position that slapping a student was a violation of the statewide prohibition against corporal punishment, "[s]uch an act is one that the School District could reasonably anticipate" (*id.* at 158-159). Significantly, there is no mention as to whether the teacher was disciplined by the respondent school district.

Other courts have held that Education Law § 2560(1) is the controlling statute governing a petitioner's right to legal representation and indemnification by respondents (*see e.g. Matter of Martin v Board of Educ. of the City of New York*, __ Misc 3d __, 2011 NY Slip Op 3093[U] [Sup Ct, NY County 2011]; *Matter of Zampieron v Board of Educ. of the City School Dist. of*

the City of N.Y., 30 Misc 3d 1210[A], 2010 NY Slip Op 52338[u] [Sup Ct, NY County 2010]). Indeed, § 2560 and General Municipal Law § 50-k reflect the Legislature's intent that there be one uniform provision dealing with the representation and indemnification of New York City employees, and that legal representation and indemnification be denied in those cases where the individual had violated an agency rule or regulation (*see* Governor's Bill Jacket, L1979, ch. 673).

Based upon the foregoing, it cannot be said that the decision of the Corporation Counsel in denying representation to petitioner was erroneous. In an article 78 proceeding, the proper standard of judicial review is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *Matter of DeFoe Corp. v New York City Dept. of Transp.*, 87 NY2d 754 [1996]). Arbitrary and capricious action is taken "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

The Corporation Counsel is empowered by General Municipal Law § 50-k(2) to make factual determinations in the first

instance as to whether a petitioner violated any agency rule or regulation, which "determination may be set aside only if it lacks a factual basis and in that sense, is arbitrary and capricious" (*Matter of Williams v City of New York*, 64 NY2d 800, 802 [1985]). Although petitioner denies she struck the child, the allegations against her were "substantiated" at the conclusion of an investigation. Significantly, petitioner failed to challenge the disciplinary findings against her.

Accordingly, respondents' determination denying petitioner legal representation and indemnification in a civil action arising out of this incident had a rational basis and was not arbitrary and capricious, an abuse of discretion, or contrary to law (*see Perez v City of New York*, 43 AD3d 712, 713 [2007], *lv denied* 10 NY3d 711 [2008]).

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

FREEDMAN, J. (dissenting)

I respectfully dissent and would reverse Supreme Court's judgment and order denying the petition, grant the petition, and direct respondents to provide petitioner with legal representation and indemnification in connection with her defense in a civil action.

The following is undisputed: petitioner, a paraprofessional employed by the City Department of Education for 23 years, had been assigned to Public School 94 in the Bronx since 2001. On May 14, 2009, a kindergarten student at the school told a counselor that, a few days before, petitioner had been teaching mathematics concepts to a group composed of the student and a few others. The student reported that "when he was doing the wrong thing," petitioner "hit" him on the head with the back of her hand. Thereafter, the child's mother filed a formal complaint that petitioner had used corporal punishment. Petitioner denied the charge and continues to deny it, but an investigation by the Department of Education found that the charge was "substantiated" by a witness who confirmed the student's account. In a letter dated May 21, 2009, the principal of the school informed petitioner that she was being reassigned to another part of the school and that a copy of the letter would

be placed in her personnel file. No other sanctions were imposed.

In April 2010, the student and his mother brought a civil action in Supreme Court, Bronx County against petitioner and respondents New York City and the City Department of Education alleging pain and suffering and mental anguish and seeking both compensatory and punitive damages.[1]

In May 2010, petitioner requested that respondents provide her with legal representation in connection with the lawsuit, but in a October 2010 letter the City's Law Department denied the request "[p]ursuant to Section 50-k of the General Municipal Law."

In January 2011, petitioner commenced this article 78 proceeding in which she seeks an order directing respondents to defend and indemnify her pursuant to Education Law § 3028. In August 2011, Supreme Court denied the petition and dismissed the proceeding on the ground that the Corporation Counsel had a rational basis to find that petitioner had struck the student in violation of regulations prohibiting corporal punishment (8 NYCRR

[1]Plaintiffs claim that petitioner's act caused much more injury than one would normally expect from a single tap or light blow to a child's head.

19.5[a][2]; NYCDOE Chancellor's Regulation A-420). The court found that, under Education Law § 2560 and General Municipal Law § 50-k, petitioner was not entitled to a defense or indemnification because the claims in the civil lawsuit arose from her unlawful act of corporal punishment while employed by the New York City Board of Education.

Education Law § 3028 provides that, "[n]otwithstanding any inconsistent provision of any general, special or local law," each New York state school district shall provide legal counsel for, and pay counsel's fees and expenses incurred in, defending an employee of the district's schools in a civil action "arising out of disciplinary action taken against any pupil of the district" while the employee is discharging his duties "within the scope of his employment."

Education Law § 2560(1) provides that, "[n]otwithstanding any inconsistent provision of law, general, special or local," an employee of a school board "in a city having a population of one million or more" is "entitled to legal representation and indemnification pursuant to the provisions of, and subject to the conditions, procedures and limitations contained in [General Municipal Law § 50-k]." General Municipal Law § 50-k(2), which section 2560(1) incorporates by reference, requires the City of

New York to defend its employees in civil actions arising from "any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency." As indicated, the denial in this case was based on petitioner's purported violation of the regulation against the use of corporal punishment.

The trial court acknowledged that, "[u]pon initial examination," sections 3028 and 2560 are "inconsistent," but held that, since section 2560 only affects employees of the New York City Board of Education, the statute controls because it is more narrowly applicable than section 3028.

The majority does not find sections 3028 and 2560 to be in conflict and instead attempts to harmonize them by construing section 2560 as an exception to the general rule set forth in section 3028. As the majority reads the statutes, a board of education must defend and indemnify an employee in an action that arose from disciplinary action that the employee took against a student in the scope of the employee's employment (pursuant to section 3028), *unless* the employee worked for the New York City Board of Education and violated a regulation of that agency

(pursuant to section 2560).

I disagree with the reasoning of both the trial court and the majority. As a threshold matter, I find that the majority's attempt to harmonize the statutes fails because their plain language renders them irreconcilable. Section 2560 cannot be read as an exception to section 3028 because both statutes apply "[n]otwithstanding any inconsistent provision of law" and accordingly they are mutually exclusive.

Since the statutes conflict, it must be determined which of them applies pursuant to the principle that "in a conflict between a statute of general applicability and one of special applicability, the special statute controls" (*Matter of Board of Mgrs. of Park Place Condominium v Town of Ramapo*, 247 AD2d 537, 537 [1998]; *see Delaware County Elec. Coop. v Power Auth. of State of N.Y.*, 96 AD2d 154, 163-164 [1983], *affd* 62 NY2d 877 [1984]). Contrary to the trial court's finding, Education Law § 3028 is more specific because substantively it applies only to claims arising from disciplinary action taken against students, whereas Education Law § 2560 and General Municipal Law § 50-k, as incorporated therein, apply generally to all claims against New York City Board of Education employees that arise from acts within the scope of their employment. I note that a

number of nisi prius courts that have considered the two Education Law provisions in similar circumstances have also concluded that section 3028 controls (*see Matter of Sagal-Cotler v Board of Educ.*, 2010 NY Slip Op 32657[u] [Sup Ct, NY County 2010]; *Matter of Morel v City of New York*, 2010 NY Slip Op 32079[u] [Sup Ct, NY County 2010]; *Matter of Inglis v Dundee Cent. School Dist. Bd. of Educ.*, 180 Misc 2d 156 [1999]).

Here, as the majority agrees, petitioner was acting within the scope of her employment. The majority's assertion that petitioner's action did not occur while she was acting in the discharge of her duties belies common sense. When the purported event occurred, petitioner was teaching the student mathematical concepts. At worst, she became annoyed at his inattentiveness and used her hand to direct him. Thus, what occurred was a natural and foreseeable incident of her work (*see Blood v Board of Educ. of City of N.Y.*, 121 AD2d 128, 130 [1986]). In *Blood*, when a teacher who was angered by a student snatched his book bag from him, the bag struck another student and injured her (121 AD2d at 130-131). Holding that the teacher was entitled to a defense in the ensuing civil lawsuit, this Court found that her actions fell within the scope of her employment because "it is not so unusual an occurrence that a teacher loses her temper with

her class," and further recognized that "displays of anger . . . cannot be regarded as other than natural and sometimes necessary incidents of a teacher's work" (*id.* at 131).

In this case, as in *Blood*, petitioner's action was, at most, an impulsive act designed to get the attention of an unfocused student and consistent with the teaching task she was assigned to perform; thus it was in furtherance of the discharge of her duties. The majority claims that this characterization was based on the kindergartner's report. However, the report may well have been the major source of the "substantiation" that the principal found.

Accordingly, I would reverse.

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

ENTERED: JUNE 5, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7133 In re Deborah Sagal-Cotler, Index 104406/10
Petitioner-Respondent,

-against-

Board of Education of City School
District of The City of New York, et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Paul T. Rephen of counsel), for appellants.

Richard E. Casagrande, New York (Ariana A. Gambella of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Carol E. Huff, J.), entered October 7, 2010, which, among other things, granted the petition seeking a judgment declaring that respondents' denial of legal representation and indemnification of expenses petitioner incurred in defense of a civil action was arbitrary and capricious and contrary to law, and directed respondents to provide petitioner with legal representation and reimburse her for all reasonable legal fees incurred in defense of the action, reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Contrary to Supreme Court's determination and the dissent's

position, Education Law § 2560, which incorporates by reference General Municipal Law § 50-k, and Education Law § 3028 are not irreconcilable, but rather can and should be read together and "applied harmoniously and consistently" (*Alweis v Evans*, 69 NY2d 199, 204 [1987]). "It is the duty of the courts to so construe two statutes that they will be in harmony, if that can be done without violating the established canons of statutory interpretation" (McKinney's Cons Laws of NY, Book 1, Statutes § 398).

It is a fundamental rule of statutory construction that a court, "in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. Of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]). The plain meaning of the statutory language is "'the clearest indicator of legislative intent'" (*Matter of Smith v Donovan*, 61 AD3d 505, 508 [2009], quoting *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998], *lv denied* 13 NY3d 712 [2009]).

Both Education Law §§ 3028 and 2560 provide for the legal representation and indemnification of board of education employees. However, they each set forth different circumstances under which such representation and indemnification are to be

provided.

Education Law § 3028 provides entitlement to representation and indemnification for any civil or criminal suit filed against a board of education employee "arising out of disciplinary action" that the employee has taken against a student "while in the discharge of his [or her] duties within the scope of his [or her] employment."

Education Law § 2560(1), as amended in 1979, provides for representation and indemnification for board of education employees in a city having a population of one million or more "pursuant to the provisions of, and subject to the conditions, procedures and limitations contained in section fifty-k of the general municipal law."

General Municipal Law § 50-k(2) and (3) provide a uniform standard for legal representation and indemnification of employees of the City of New York. Such representation and indemnification shall be provided for acts or omissions that the Corporation Counsel determines "occurred while the employee was acting within the scope of his [or her] public employment and in the discharge of his [or her] duties and was not in violation of any rule or regulation of his [or her] agency at the time the alleged act or omission occurred."

When read together, it is clear that, pursuant to Education Law § 3028, a board of education must provide legal representation and pay attorney's fees and expenses incurred in the defense of an employee in any action arising out of a disciplinary action taken against a student by an employee while acting in the scope of his or her employment and in the discharge of his or her duties, *unless*, pursuant to Education Law § 2560(1), the employee is a member of a board of education in a city having a population of one million or more, and, pursuant to General Municipal Law § 50-k, he or she violated any rule or regulation of the agency (*see Thomas v New York City Dept. of Educ.*, __ AD3d __ [2012], decided simultaneously herewith; *Matter of Zampieron v Board of Educ. of the City School Dist. of the City of N.Y.*, 30 Misc 3d 1210[A], 2010 NY Slip Op 52338[U], *8 [2010]).

Here, because petitioner was a paraprofessional employed by respondent Board of Education of the City of New York (now known as New York City Department of Education [DOE]), Education Law § 2560(1) applies. Therefore, in order to obtain legal representation and indemnification pursuant to the statute, petitioner must meet three requirements: (1) she must be acting in the scope of her employment, (2) in the discharge of her

duties, and (3) not be in violation of any rule or regulation of the DOE. Here, petitioner's admitted act of hitting a student in the face when he refused to accompany her to the school cafeteria violated a DOE regulation (Chancellor's Regulation A-420) as well as a statewide rule prohibiting corporal punishment (*see* 8 NYCRR 19.5[a][1]), and therefore was not undertaken in the discharge of her duties, whether as an act of discipline or otherwise (*cf*. *Blood v Board of Educ. of City of N.Y.*, 121 AD2d 128 [1986]). Indeed, petitioner admitted in a letter that she "lost it" and hit the student, for which she received a 10-day suspension without pay.

The dissent's reliance on our decision in *Blood v Board of Educ. of City of N.Y.* (121 AD2d 128 [1986], *supra*) to support its contention that petitioner was acting within the discharge of her duties is misplaced. The facts here present a far different situation from *Blood,* where a teacher, who had become angry at a student, grabbed and carelessly swung the child's book bag and accidently struck another student in the eye. Notably, in *Blood,* the teacher's conduct in striking the other student was clearly accidental, and no disciplinary action was taken as a result of the incident (121 AD2d at 131, 133.) Here, the striking was intentional and petitioner was disciplined.

Since these statutes are not irreconcilable and can easily be read in harmony in order to effectuate the Legislature's intent, we need not address the issue as to which statute is the more specific one and, hence, controlling.

Based upon the foregoing, it cannot be said that the decision of the Corporation Counsel in denying representation to petitioner was erroneous. In an article 78 proceeding, the proper standard of judicial review is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *Matter of DeFoe Corp. v New York City Dept. of Transp.*, 87 NY2d 754, 760 [1996]). Arbitrary and capricious action is that taken "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

The Corporation Counsel is empowered by General Municipal Law § 50-k(2) to make factual determinations in the first instance as to whether a petitioner violated any agency rule or regulation, which "determination may be set aside only if it lacks a factual basis and in that sense, is arbitrary and

capricious" (*Matter of Williams v City of New York*, 64 NY2d 800, 802 [1985]). Significantly, petitioner here admitted that she struck the student in question and was disciplined for her actions on the basis that she violated the two aforesaid regulations addressing corporal punishment.

Accordingly, the petition should not have been granted, as respondents' determination had a rational basis in the record and was not arbitrary and capricious or contrary to law (*see Perez v City of New York*, 43 AD3d 712, 713 [2007], *lv denied* 10 NY3d 711 [2008]).

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

FREEDMAN, J. (dissenting)

For the reasons set forth below, I respectfully dissent and would affirm Supreme Court's judgment and order, which granted the petition and directed respondents to provide petitioner with legal representation in connection with her defense in a civil lawsuit, and also directed them to reimburse petitioner for the fees and expenses for the private attorneys she retained after respondents denied her a defense.

This proceeding arises from an incident on December 22, 2008 at a Brooklyn public school serving special needs students. Petitioner Sagal-Cotler, a paraprofessional at the school, was escorting a class of students to the school cafeteria on the first floor. The party entered a crowded elevator in which, according to petitioner, "everyone was talking loudly." One of petitioner's students then began singing aloud. When the elevator reached the first floor, petitioner asked the singer to exit from the elevator and accompany her to the cafeteria, but the student ignored her. Petitioner twice more asked the student to come with her, but he again failed to pay her any attention. Petitioner then "yelled his name and slapped him across the face."

Thereafter, an allegation of corporal punishment was lodged

against petitioner. In January 2009, when the school's principal, petitioner, and her union representative met to discuss the matter, petitioner admitted that she had "lost it" on the elevator and slapped the student, and also submitted a written statement that she was "truly sorry" and that "it will never happen again." As a result, the principal suspended petitioner without pay for 10 days, reassigned her, and directed her to attend "therapeutic crisis intervention" classes and an anger management workshop.

In July 2009, the student that petitioner had slapped and his mother brought a civil action in Supreme Court, Kings County against petitioner and respondents New York City and the City Board of Education. Seeking both compensatory and punitive damages, the plaintiffs allege that the incident caused the student "great pain, shock and mental anguish."[2]

In October 2009, petitioner filed a request that respondents provide her legal representation in connection with the lawsuit, but in a December 2009 letter the City's Law Department denied the request "[p]ursuant to Section 50-k of the General Municipal

[2] The disparity between the injury typically caused by a single slap to a face and the harm that the plaintiffs allege is striking.

Law." Thereafter, petitioner retained private legal counsel to defend her in the civil action.

In April 2010, petitioner commenced this article 78 proceeding in which she seeks an order directing respondents to provide her with legal representation and reimburse her for the private attorney's fees and expenses. Supreme Court granted the petition on the ground that, in denying petitioner's request, respondents had arbitrarily and capriciously misapplied the relevant provisions of the Education Law and General Municipal Law.

Supreme Court found that petitioner is entitled to relief pursuant to Education Law § 3028, which provides that, "[n]otwithstanding any inconsistent provision of any general, special or local law," each New York state school district shall provide legal counsel for, and pay counsel's fees and expenses incurred in, defending an employee of the district's schools in a civil action "arising out of disciplinary action taken against any pupil of the district" while the employee is discharging his duties "within the scope of his employment."

Respondents contend that Education Law § 3028 is inapplicable here and argue that another statute, Education Law § 2560(1), controls. Section 2560(1) provides that

"[n]otwithstanding any inconsistent provision of law, general, special or local," an employee of a school board "in a city having a population of one million or more" is "entitled to legal representation and indemnification pursuant to the provisions of, and subject to the conditions, procedures and limitations contained in [General Municipal Law § 50-k]. . ." General Municipal Law § 50-k(2), which Education Law § 2560(1) incorporates by reference, requires the City of New York to defend its employees in civil actions arising from "any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency . . ."

According to respondents, Education Law § 2560(1) permits corporation counsel to refuse to defend petitioner because she allegedly violated regulations that prohibit using corporal punishment to discipline New York City public school students (8 NYCRR 19.5[a][2]; NYCDOE Chancellor's Regulation A-420).

Supreme Court properly found that sections 3028 and 2560 of the Education Law are in conflict, and that section 3028 controls pursuant to the principle that "in a conflict between a statute of general applicability and one of special applicability, the

special statute controls" (*Matter of Board of Mgrs. of Park Place Condominium v Town of Ramapo*, 247 AD2d 537, 537 [1998]; *see Delaware County Elec. Coop. Inc. v Power Auth. of State of N.Y.*, 96 AD2d 154, 163-164 [1983], *affd* 62 NY2d 877 [1984]). Education Law § 3028 is more specific because substantively it applies only to claims arising from disciplinary action taken against students, whereas Education Law § 2560 and General Municipal Law § 50-k, as incorporated therein, apply generally to all claims against New York City Board of Education employees that arise from acts within the scope of their employment. I note that other nisi prius courts that have considered the two Education Law provisions in similar circumstances have also found them in conflict and concluded that section 3028 controls (*see Matter of Morel v City of New York*, 2010 NY Slip Op 32079[u] [Sup Ct, NY County 2010]; *Matter of Inglis v Dundee Cent. School Dist. Bd. of Educ.*, 180 Misc 2d 156 [1999]).

The majority does not find sections 3028 and 2560 to be in conflict and instead attempts to harmonize them by construing section 2560 as an exception to the general rule set forth in section 3028. As the majority reads the statutes, a Board of Education must defend an employee in an action that arose from disciplinary action that the employee took against a student in

the scope of the employee's employment (pursuant to section 3028), *unless* the employee worked for the New York City Board of Education and violated a regulation of that agency (pursuant to section 2560).

I find that the majority's attempt to harmonize the statutes fails because their plain language renders them irreconcilable. Section 2560 cannot be read as an exception to section 3028 because both statutes apply "[n]otwithstanding any inconsistent provision of law" and accordingly they are mutually exclusive.

Under the facts set forth here, including petitioner's acknowledgment that she slapped the unruly and recalcitrant student in an effort to get him to the cafeteria where he was supposed to be, petitioner's contact with the student obviously constituted disciplinary action taken within the scope of her employment. The majority's assertion that petitioner was not acting in the discharge of her duties belies common sense (*see Blood v Board of Educ. of City of N.Y.*, 121 AD2d 128 [1986]). In *Blood*, when a teacher who was angered by a student snatched his book bag from him, the bag struck another student and injured her (121 AD2d at 130-131). Holding that the teacher was entitled to a defense in the ensuing civil lawsuit, this Court found that her actions occurred in the discharge of her duties because "it is

not so unusual an occurrence that a teacher loses her temper with her class," and further recognized that "displays of anger . . . cannot be regarded as other than natural and sometimes necessary incidents of a teacher's work" (*id.* at 131).

As in *Blood,* petitioner's loss of temper and impulsive action, when faced with a persistently disobedient student in an otherwise stressful situation, clearly occurred in the scope of her work as she was discharging her duty to get the students to the cafeteria. Respondents distinguish *Blood* on the ground that the teacher in that case did not intend to hit the particular student that was injured, but rather intended to discipline another student. However, that distinction does not negate that the incident here arose from a momentary display of anger arising from petitioner's discharge of her duty.

Accordingly, I would affirm.

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

ENTERED: JUNE 5, 2012

CLERK

Andrias, J.P., Saxe, Catterson, Renwick, Román, JJ.

7502 Carolyn Le Bel, as Executrix of the Estate of Marya Lenn Yee,
Plaintiff-Respondent,

-against-

Mary A. Donovan, et al.,
Defendants-Appellants. Index 652200/10

Amos Alter, New York, for appellants.

Gallet Dreyer & Berkey, LLP, New York (David S. Douglas of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 24, 2011, which, to the extent appealed from, denied defendants' motion to dismiss plaintiff's causes of action for breach of contract and breach of fiduciary duty, and to strike paragraph 20 of the complaint, unanimously affirmed, without costs.

Plaintiff's decedent, Marya Lenn Yee, and defendant Mary A. Donovan were partners in defendant law firm known as Donovan & Yee, LLP (the firm). On the evening of November 30, 2008, Yee was a passenger in a small plane which crashed in California, severely injuring her. She was taken to a hospital, where she died early the following morning. Yee's estate subsequently commenced this action for, inter alia, breach of the partnership

agreement and breach of fiduciary duty, and sought an accounting, partnership distributions, dissolution of the firm, and other relief.

Defendants' motion to dismiss plaintiff's claims for breach of contract and breach of fiduciary duty as premature, in light of plaintiff's claim for an accounting, was properly denied. While it is well settled that absent an accounting an action at law may not be maintained by one partner against another, such proscription only applies if the claim for damages cannot be determined without an examination of the partnership's books (*Simons v Doyle*, 262 AD2d 236, 237 [1999], *lv dismissed* 94 NY2d 899 [2000]; *1056 Sherman Ave. Assoc. v Guyco Constr. Corp.* 261 AD2d 519, 520 [1999]; *Kriegsman v Kraus, Ostreicher & Co.*, 126 AD2d 489, 490 [1987]). Hence, the absence of an accounting will not bar an action brought by a partner against another if the "alleged wrong involves a partnership transaction which can be determined without an examination of the partnership books" (*Simons* at 237; *1056 Sherman Ave. Assoc*, at 520; *Kriegsman* at 490). Moreover, the foregoing proscription does not apply to actions where equitable relief is sought, since logically, unlike an action at law, where monetary damages "alone afford a full and complete remedy" (*Cadwalader Wickersham & Taft v Spinale*, 177

AD2d 315, 316 [1991]), equitable relief can usually be determined absent an accounting. Accordingly, the proscription does not bar an action where the claims asserted are both equitable and at law if the primary claim is unrelated to money damages and the accounting sought "is merely a method to determine the amount of the monetary damages [as to other claims]" (*Abrams v Rogers*, 195 AD2d 349, 350 [1993]).

Here, the motion court correctly denied defendants' motion to dismiss the complaint, rejecting defendants' assertion that this action was barred by plaintiff's failure to bring a predicate action for an accounting since the primary claims for breach of contract and breach of fiduciary duty involve a partnership action which can be determined absent an examination of the partnership books (*Simons* at 237; *1056 Sherman Ave. Assoc*, at 520; *Kriegman* at 490). Moreover, since plaintiff's primary claims at law can be resolved absent an accounting and she also asserts equitable claims, the accounting claim is merely incidental; a method by which to calculate the amount of monetary damages as to the remaining claims (*Abrams* at 350 [Plaintiff's motion to strike defendant's jury demand denied insofar as equitable affirmative defenses were incidental to defenses at law]).

While “equitable defenses and equitable counterclaims shall be tried by the court” (CPLR § 4101), here, where plaintiff alleges both equitable and claims at law, the trial court can decide the equitable claims while submitting the claims at law to the jury (*Abrams* at 349-350; *Azoulay v Cassin*, 103 AD2d 836, 836 [1984]) [“The joinder of legal and equitable claims by a plaintiff does not deprive a defendant of his right to a jury trial of those legal claims triable by a jury as a matter of constitutional and/or statutory right”]). Alternatively, the trial court can submit all claims, equitable and at law, for resolution to a jury (*John W. Cowper Co. v Buffalo Hotel Dev. Venture*, 99 AD2d 19, 23 [1984][“(T)he Trial Justice can direct the method by which the issues are tried and may minimize the danger of conflicting verdicts by permitting the jury to hear testimony on both the legal issues and the Lien Law claims [which are equitable claims], treating the jury's determination on the latter as advisory”]).

Under New York law, partners owe each other a fiduciary duty (*see Appell v LAG Corp.*, 41 AD3d 277, 278 [2007]). Defendants also owed a fiduciary duty to Yee’s estate, as Yee’s successor in interest (*see Josephberg v Cavallero*, 262 App Div 1, 4 [1941]). Plaintiff has sufficiently pled a claim for breach of fiduciary

duty; paragraphs 18 and 19 of the complaint allege that defendant Donovan continues to operate the partnership in violation of the Partnership Agreement and failed to distribute Yee's interest to Yee's estate in accordance with the Partnership Agreement (*see Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [2011]). Contrary to defendants' contention, plaintiff has alleged more than a mere accounting, and if defendants did not understand the separate causes of action, the appropriate remedy was to file a motion for a more definite statement under CPLR 3024(a).

The motion court's denial of defendants' request to strike paragraph 20 of the complaint as prejudicial was not appealable as of right (*see* CPLR 5701[b][3]), and this court denied defendants' motion for leave to appeal from that part of the order.

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

ENTERED: JUNE 5, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7523N John J. Maurer, Index 306249/10
Plaintiff-Appellant,

-against-

Suzanne Maurer,
Defendant-Respondent.
- - - - -
John A. Schiller,
Nonparty Respondent.

_____

Bonnie P. Josephs, New York, for appellant.

Winter & Grossman, PLLC, Garden City (Robert S. Grossman of counsel), for Suzanne M., respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 31, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for consolidation or joint trial of two actions with this divorce action, unanimously affirmed, without costs.

We affirm, for the reasons stated by the IAS court. The motion court properly exercised its discretion in denying consolidation of the actions since one action was ready for trial and the others were not (*see Dias v Berman*, 188 AD2d 331 [1992]). We also note that because the constructive trust action concerns use and enjoyment of real property in Suffolk County, venue for that action must lie in Suffolk County (*see* CPLR 507; *GAM Prop.*

Corp. v Sorrento Lactalis, Inc., 41 AD3d 645, 646 [2007]; *see also Handler v 1050 Tenants Corp.*, 295 AD2d 238, 240 [2002]). Accordingly, the IAS court properly denied the motion for consolidation or joint trial in New York County.

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

ENTERED: JUNE 5, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7565 The People of the State of New York, Ind. 4192/08
Respondent,

-against-

Julio Moronta,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne Gantt of counsel), and Dewey and LeBoeuf, LLP, New York (Michael McLaughlin of counsel), for appellant.

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered March 24, 2010, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

In 2006, the relationship between defendant and 35-year-old Eduvigis Eustate ended when she left him. Over the next two years, defendant repeatedly violated orders of protection she held against him. On August 16, 2008, defendant learned that Eustate was socializing with two men outside an establishment located on Amsterdam Avenue and 148th Street, several blocks from defendant's whereabouts. Although defendant and Eustate had been separated for two years, he became angry and jealous.

Disregarding an order of protection, defendant armed himself with a knife and walked to where Eustate and her friends were sitting. When two of Eustate's friends momentarily stepped away from the group, defendant snuck up behind her and stabbed her in the back so hard that he forced the knife's six-inch blade eight inches into her body. Eustate tried to get up and flee, but defendant backed her against a phone booth and stabbed her twice more, thrusting the knife four to six inches into her abdomen each time.

Police officers who were patrolling nearby noticed the commotion and confronted defendant, who was still holding the knife. The officers arrested him and recovered the weapon. On his way to the precinct, defendant told the officers, "She deserved it." Eustate died in the hospital shortly thereafter from multiple stab wounds that had pierced several major organs, including her liver, lungs, and heart.

Defendant was charged with numerous crimes, including murder in the second degree. At the ensuing trial, defendant requested a jury charge for manslaughter in the first degree based upon his contentions that he did not intend to murder the victim and that the affirmative defense of extreme emotional disturbance applied. Supreme Court granted the request for a manslaughter charge based

upon a purported lack of the requisite intent, but denied the request to charge extreme emotional disturbance. The jury found him guilty of murder in the second degree.

On appeal, defendant contends that Supreme Court erred in refusing to instruct the jury as to the affirmative defense of extreme emotional disturbance. According to defendant, he "had become upset over his belief that [Eustate] and her boyfriend were keeping his daughter from calling him," which made him "ill" and "crazy." That, combined with the "sexual taunts" that Eustate had allegedly directed at him immediately before the stabbing, established that defendant had acted under the influence of extreme emotional distress which, from defendant's perspective, resulted from a reasonable explanation or excuse. Thus, defendant argues that the court's failure to charge the jury on extreme emotional disturbance entitles him to a new trial. We cannot agree.

Extreme emotional disturbance, which is a mental infirmity not rising to the level of insanity, is comprised of both objective and subjective elements (*see People v Roche*, 98 NY2d 70, 75–76 [2002]; *see also People v Smith*, 1 NY3d 610, 612 [2004]; *People v White*, 79 NY2d 900, 903 [1992]). The affirmative defense does not negate the element of intent to

cause death (*see* Penal Law § 125.20[2]), but instead reflects that "[t]he Legislature has recognized that some intentional homicides may result from 'an understandable human response deserving of mercy'" (*People v Harris*, 95 NY2d 316, 318 [2000], quoting *People v Casassa*, 49 NY2d 668, 680–681, *cert denied* 449 US 842 [1980]).

Defendant has the burden of establishing the defense by a preponderance of the evidence (*see Roche*, 98 NY2d at 75). In considering whether the defense should be charged, the trial court views the evidence "in the light most favorable to the defendant" (*Harris,* 95 NY2d at 320). However, "[i]n the absence of the requisite proof, an extreme emotional disturbance charge should not be given because it would invite the jury to engage in impermissible speculation concerning [the] defendant's state of mind at the time of the homicide" (*Roche*, at 76; *see People v Walker,* 64 NY2d 741, 743 [1984]).

Here, the court properly denied defendant's request for an extreme emotional disturbance charge, for even viewing the proof in the light most favorable to him (*People v Harris, supra* at 320), the jury could not have found either element established by a preponderance of the evidence. First, there was simply no credible evidence that defendant was acting out of "extreme

mental trauma" or "extremely unusual and overwhelming stress" when he killed Eustate (*People v Irizarry*, 199 AD2d 180, 181 [1993], *lv denied* 83 NY2d *872 [1994]; see also Patterson,* 39 NY2d 288, 304 [1976], *aff'd* 432 US 197 [1977]). For instance, the fact that defendant went out of his way to confront Eustate in knowing violation of an order of protection and while carrying a knife highlights "the planned and deliberate character of the attack" -- qualities inconsistent with an extreme emotional disturbance (*see People v Acevedo*, 56 AD3d 341, 341 [2008], lv denied 12 NY3d 813 [2009]).

Secondly, defendant's "very calm" demeanor and cold statement in the police car, "She deserved it," show his recognition that he had accomplished a predetermined objective in killing Eustate and defeats the notion that he "'didn't really realize' what was happening." To be sure, defendant testified that he "lost [his] mind" or "kind of lost [his] head out of jealousy and things." However, even accepting defendant's self-serving assertion that he stabbed Eustate out of "jealousy and things" after the "[t]rigger event" of having been called a "big stupid fag," the "high degree of self-control" he exhibited in stabbing Eustate to death is at odds with his statements suggesting that he lost control and "inconsistent with the

extreme emotional disturbance defense" (People v *Bonilla*, 57 AD3d 400, 401 [2008], *lv denied* 12 NY3d 814 [2009]).

We find the sentence not excessive under the circumstances of this case.

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

ENTERED: JUNE 5, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Renwick, Freedman, JJ.

7576-
7576A-
7576B Index 310418/93

Karen Kosovsky,
Plaintiff-Respondent,

-against-

Kenneth Zahl,
Defendant-Appellant.

_____

Verner Simon, P.C., New York (Paul W. Verner of counsel), for appellant.

Dobrish Zeif Gross, LLP, New York (Robert Z. Dobrish of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered October 4, 2011, in plaintiff's favor, and bringing up for review an order, same court and Justice, entered on or about September 15, 2011, which confirmed the Special Referee's report, dated October 20, 2010, regarding defendant's retroactive child support arrears, and modified the Special Referee's report, dated January 25, 2011, to correct a miscalculation of the amount of counsel fees awarded to plaintiff, unanimously affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order and judgment (one paper), same court and Justice, entered December 21, 2010, which granted plaintiff's

motion to confirm the report of the Special Referee, dated July 14, 2010, adjudged defendant in civil contempt, and ordered him to pay $10,000 to plaintiff, pursuant to 22 NYCRR 130-1.1, unanimously affirmed, with costs.

The Special Referee's findings regarding counsel fees (as corrected) and retroactive child support arrears are amply supported by the record (*see Sichel v Polak*, 36 AD3d 416 [2007]). Domestic Relations Law § 237(b) authorizes the court to award counsel fees in enforcement actions. In addition, the parties' so-ordered 2000 stipulation provided that plaintiff would be entitled to an award of counsel fees for fees incurred in connection with effecting payment of add-on expenses. Defendant's argument that no definitive order was issued that judicially determined that plaintiff was entitled to counsel fees is without merit.

We also find that the record clearly supports a finding of civil contempt based upon defendant's failure to comply with court-ordered child support payments, which, as the Special Referee found, was undertaken primarily to harass plaintiff. The court's direction that defendant reimburse plaintiff for costs

occasioned by his frivolous conduct was an appropriate exercise of discretion (*see Matter of Beiny*, 164 AD2d 233 [1990]).

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

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

ENTERED: JUNE 5, 2012

CLERK

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

7831 The People of the State of New York, Ind. 5495/04
Respondent,

-against-

Jamal Williams,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Arroyo of counsel), for respondent.

Order, Supreme Court, New York County (Renee White, J.), entered on or about June 24, 2009, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law article 6-C), unanimously affirmed.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sex offender adjudication (*see* Correction Law § 168-n[3]). Defendant was properly assessed 30 points under risk factor 1 because the complainant's grand jury testimony provided clear and convincing evidence that the gun defendant displayed prior to raping her constituted a dangerous instrument (*see People v Pettigrew*, 14 NY3d 406,

408-409 [2010]; *People v Kost*, 82 AD3d 729 [2011]).

Twenty points were properly assessed under risk factor 7, where the complainant testified that she had met defendant for the first time on the night he raped her (*see People v Tejada*, 51 AD3d 472 [2008]). The court properly assessed 10 points under risk factor 8, because although the prosecutor acknowledged that defendant had provided the police with different birth dates on different occasions, the court was entitled to rely on the statements defendant had made to authorities in 2003 regarding his birth date.

Defendant failed to preserve his contention that the court erred by relying upon his CPL 730 exam to assess 15 points under the risk factor relating to drug and alcohol use (*see People v Windham*, 10 NY3d 801 [2008]), and we decline to review it in the interest of justice. As an alternate holding, we find that the court may consider a report of a CPL 730 examination prepared in connection with the underlying conviction (*see People v Buford*, 56 AD3d 381 [2008]).

The court properly assessed 15 points under risk factor 12, because given his contradictory statements and his failure to participate in programs while incarcerated, there was no genuine acceptance of responsibility as required by the risk assessment

guidelines (*see People v Mitchell*, 300 AD2d 377 [2002], *lv denied* 99 NY2d 510 [2003]; *People v Chilson*, 286 AD2d 828 [2001], *lv denied* 97 NY2d 655 [2001]).

Moreover, the court did not improperly double-count nor did it err when it did not set forth its reasons for designating defendant a sexually violent offender. Defendant pleaded guilty to attempted first degree rape (Penal Law §§ 110.00/130.35[1]), an enumerated sexually violent offense, and thus, the designation was required by statute (*see* Correction Law § 168-a[3][a], 7[b]; *People v Bunger*, 78 AD3d 1433 [2010], *lv denied* 16 NY3d 710 [2011]; *People v Lockwood*, 308 AD2d 640 [2003]).

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

ENTERED: JUNE 5, 2012

CLERK

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

7832 In re Mecca Clinkscales, Index 100275/11
Petitioner,

-against-

Raymond W. Kelly, etc., et al.,
Respondents.

Kousoulas & Associates, P.C., New York (Antonia Kousoulas of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondents.

Determination of respondent Police Commissioner, dated September 10, 2010, dismissing petitioner from the Police Department, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Judith J. Gische, J.], entered May 24, 2011), dismissed, without costs.

Respondent's determination is supported by substantial evidence that petitioner stole a $500 money order from a fellow police officer and deposited it into her personal bank account (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). There is no basis for disturbing the Assistant Deputy Commissioner for Trials' (ADC) credibility

determinations (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

The ADC properly denied petitioner's request for an adjournment of the hearing pending the disposition of the complaining officers' related disciplinary charges. Petitioner's counsel agreed to the scheduled hearing date, knowing that the minutes, but not the decision, in the related matter were available. Moreover, the decision in the related matter was not probative of any issue in this proceeding. Petitioner was not deprived of due process, as she had a copy of the complaining officers' testimony in the related hearing (*see People v Comfort*, 60 AD3d 1298, 1299 [2009], *lv denied* 12 NY3d 924 [2009]).

The penalty imposed does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

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

ENTERED: JUNE 5, 2012

CLERK

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

7833 Revman International Inc., Index 650379/11
Plaintiff-Appellant,

-against-

The CIT Group/Commercial Services, Inc.,
Defendant-Respondent.

_____

Phillips Nizer LLP, New York (Donald L. Kreindler of counsel), for appellant.

Hahn & Hessen LLP, New York (John P. Amato of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 6, 2012, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

The duty to indemnify plaintiff for its attorneys' fees cannot be implied from the agreement, the purpose of which was to provide plaintiff with liquidity (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]; *Ayala v Lockheed Martin Corp.*, 22 AD3d 394 [2005]). Contrary to plaintiff's contention, the parties' stipulation did not constitute an admission by defendant of any obligation to pay for the defense costs incurred by plaintiff in the adversary proceeding. In the absence of any

duty, it is unnecessary to decide whether defendant was absolved of that duty because of plaintiff's alleged breach of the factoring agreement.

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

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

ENTERED: JUNE 5, 2012

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, JJ.

7834 Gramercy Park Residence Corp., etc., Index 603071/02
Plaintiff-Appellant,

-against-

Elaine Ellman, etc.,
Defendant-Respondent.

Randall T. Sims, New York, for appellant.

Shaw & Binder, P.C., New York (Daniel S. LoPresti and Stuart F. Shaw of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Rosalyn H. Richter, J.), entered November 4, 2005, which, to the extent appealed from, granted defendant's cross motion for summary judgment on the first counterclaim and awarded defendant attorneys' fees in connection with that counterclaim, and denied plaintiff's summary judgment motion to dismiss that counterclaim, unanimously modified, on the law, to deny defendant's cross motion and vacate the fee award, remand for further proceedings, and otherwise affirmed, without costs.

The appeal from the November 2005 judgment is not untimely due to the failure to serve notice of entry. To the contrary, such failure means that the 30-day time limit to notice the appeal never began to run, and thus, the appeal is timely (*see*

Matter of Reynolds v Dustman, 1 NY3d 559 [2003]).

With regard to the merits, there are issues of fact as to who actually erected the subject sunshade. While the proprietary lease clearly states that such costs are to be borne by the lessee if the structure was erected by the lessee or her predecessor in interest, the documentary evidence submitted by the parties fails to establish who erected the original structure. As such, the award of attorneys' fees to defendant on this issue must be vacated and a hearing held to resolve the issue of who built the original structure. Only at that time may further proceedings be held to set the amount of attorneys' fees to which the prevailing party is entitled.

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

ENTERED: JUNE 5, 2012

CLERK

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

7835 In re Frances M.,
Petitioner-Appellant,

-against-

Jorge M.,
Respondent-Respondent.

Louise Belulovich, New York, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

Lisa H. Blitman, New York, attorney for the child.

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about October 12, 2010, which, after a fact-finding hearing, awarded sole physical and legal custody of the subject child to respondent father with visitation to petitioner mother according to an attached order of visitation, unanimously modified, on the facts, to provide that petitioner have visitation on Mother's Day from 10:00 a.m. until 7:00 p.m., the child's birthday from 10:00 a.m. until 3:00 p.m., and, in even years, the Thanksgiving holiday, beginning the Wednesday before Thanksgiving at 5:30 p.m. until the Friday after Thanksgiving at 12:00 p.m., and otherwise affirmed, without costs.

The Referee's determination that the child's best interests would be served by awarding custody to respondent, has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Indeed, the evidence shows that respondent has provided a healthy, stable environment for the child and has provided for the child's needs since the child was paroled to him in 2000, after a finding of neglect against petitioner. By contrast, the evidence shows that petitioner suffers from emotional, physical, and financial issues that prevent her from putting the child's needs before her own. Based on the parties' acrimonious relationship, joint decision making is not in the child's best interests (*see Reisler v Phillips*, 298 AD2d 228, 229-230 [2002]).

We modify the visitation schedule to the extent indicated (*see generally Matter of Blanchard v Blanchard*, 304 AD2d 1048,

1050 [2003]).

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

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

ENTERED: JUNE 5, 2012

CLERK

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

7838 NYCTL 2005-A Trust, et al., Index 381551/08
Plaintiffs,

-against-

Rosenberger Boat Livery, Inc., et al.,
Defendants-Appellants,

Mortgage IRA, LLC, et al.,
Defendants.
- - - - -
Joan Iacono, Esq.,
Receiver-Appellant,

-against-

Ronald Magro,
Third-Party Bidder-Respondent.

Clair & Gjertsen, Scarsdale (Ira S. Clair of counsel), for appellants.

Kathleen R. Bradshaw, Bronx, for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 27, 2011, which denied the motion of defendants Rosenberger Boat Livery, Inc. and John E. Burke and nonparty Joan Iacono, as Rosenberger's temporary receiver, to vacate (1) an order, same court (Howard R. Silver, J.), entered November 13, 2008, appointing a referee, (2) a judgment of foreclosure, same court (Silver, J.), entered June 17, 2010, and (3) an auction sale that took place on October 25, 2010, unanimously affirmed,

with costs.

Rosenberger's temporary receiver was not a necessary party because title to the property remained with the corporation (*see Bate v Brenack Stevedoring Co., Inc.*, 197 App Div 194, 195 [1921]). We note that Rosenberger and Burke (who owns half of Rosenberger's shares) appeared early on in this litigation.

The documents challenged by defendants are labeled affidavits and begin, "[name of witness], *being duly sworn*, deposes and says . . ." (emphasis added). Therefore, the referee and the foreclosure court could accept these documents as affidavits (*see Sparaco v Sparaco*, 309 AD2d 1029, 1030 [2003], *lv denied* 2 NY3d 702 [2004]), even though the notary stated that the witness "acknowledged . . . that he executed the same." In any event, defendants do not point to any inaccuracies in the documents.

Even assuming, arguendo, the Bronx Press Review did not qualify as a "newspaper" pursuant to General Construction Law § 60(a) because it did not have a paid circulation, notice of the sale was also published in the New York Law Journal, and defendants do not contend that the Law Journal fails to qualify as a newspaper. Real Property Actions and Proceedings Law § 231(2)(a) requires publication in only one newspaper when the

real property to be sold is located in a county within the city of New York. Thus, publication was proper.

The irregularities in the referee's terms of sale were properly disregarded by the court inasmuch as they did not affect a substantial right of any party (*see* CPLR 2001).

Rosenberger could have redeemed its property "at any point before the property [wa]s actually sold at a foreclosure sale" (*NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 13 NY3d 573, 579 [2009], *cert denied* __ US __, 130 S Ct 3466 [2010]). However, after the sale, the right to redeem was extinguished, even though no deed had yet been delivered to the purchaser (*see e.g. Chase Manhattan Mtge. Corp. v Harper*, 54 AD3d 987, 988 [2008]).

Defendants have not met their burden of demonstrating a disparity in price *and* "one of the categories integral to the invocation of equity such as fraud, mistake or exploitive

overreaching" (*Guardian Loan Co. v Early*, 47 NY2d 515, 521 [1979]), to warrant setting aside the sale of the property.

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

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

ENTERED: JUNE 5, 2012

CLERK

Corrected Order - June 28, 2012

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

7839 In re Paul W.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (**Nancy M. Bannon at suppression hearing, speedy trial motion and fact-finding determination;** Monica Drinane, J. **at disposition**), entered on or about April 20, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the second degree (two counts), possession of pistol or revolver ammunition, and unlawful possession of a weapon by a person under sixteen (two counts), and placed him with the Office of Children and Family Services for a period of 18 months, unanimously reversed, on the law, and the petition dismissed, without costs.

Appellant's suppression motion was properly denied. The evidence showed that the officers, who were on patrol in a high

crime area in the early morning hours, received a transmission of two black males with a gun. Upon arriving at the location provided, the officers saw appellant running at full speed and holding his waistband. The officers broadcast a detailed description of appellant and when two other officers, who had heard the transmissions, responded to the location, they saw appellant and another black man crossing the street. Appellant, who sufficiently matched the description, appeared nervous when he noticed the officers, and a bulge was observed in the jacket of appellant's companion. Under these circumstances, there was a reasonable suspicion justifying the stop and frisk of appellant, which recovered a gun, as the officers had a legitimate concern for their safety (*People v Batista*, 88 NY2d 650, 653-654 [1996]; *People v Rivera*, 14 NY2d 441, 446 [1964], *cert denied* 379 US 978 [1965]).

The petition, however, is dismissed because appellant's right to a speedy disposition pursuant to Family Court Act § 340.1 was violated (*see e.g. Matter of Frank C.*, 70 NY2d 408 [1987]). "Successive motions to adjourn a fact-finding hearing shall not be granted in the absence of a showing . . . of special circumstances; such circumstances shall not include calendar congestion" (Family Court Act 340.1[6]). Furthermore, the suppression hearing was not conducted on an expedited basis, as required because appellant was detained (*see* Family Court Act §

332.2[4]).

Furthermore, the preclusion motion filed by appellant's counsel pertained only to the third officer's testimony at the fact-finding hearing, and thus, did not provide grounds for delaying the suppression hearing (*see* Family Court Act § 330.2[8]).

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

ENTERED: JUNE 5, 2012

CLERK

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

7840-
7840A Index 108853/09

Avv. Lodovico Isolabella,
Plaintiff-Respondent,

-against-

Tamir Sapir, et al.,
Defendants-Appellants.

Arrufat Gracia, PLLC, New York (Christie M. Delbrey of counsel), for appellants.

Peter B. Ackerman, White Plains, for respondent.

Orders, Supreme Court, New York County (Emily Jane Goodman, J.), entered November 14, 2011, which denied defendants' motions for leave to file an untimely motion for summary judgment dismissing the complaint and for summary judgment dismissing the complaint on the ground that they did not consent to being added as party defendants and plaintiff did not obtain leave of the court to add them, unanimously affirmed, without costs.

Defendants failed to demonstrate the requisite good cause for making a late motion for summary judgment (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]). They claim the affirmative defenses of improper joinder (CPLR 1003) and plaintiff's failure to obtain leave to add them as new party defendants (CPLR 3025), but they waived these defenses by

substantially participating in the amended action for two years before (belatedly and untimely) serving an answer that included the defenses. In any event, in a stipulation executed by all parties appearing in the action, defendants, through their in-house counsel, "consented" to service of the amended complaint upon them. They have not shown that their in-house counsel lacked the authority to consent to the amended complaint and their joinder on their behalf.

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

ENTERED: JUNE 5, 2012

CLERK

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

7841 Edward Winters, Index 109387/07
Plaintiff Appellant,

-against-

Main LLC, et al.,
Defendants-Respondents,

The Ritz-Carlton Hotel
Company of New York, Inc.,
Defendant.
- - - - -
LC Main, LLC, etc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Roger & Sons Concrete, Inc.,
Third-Party Defendant-Respondent.

Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), for appellant.

O'Connor Redd, LLP, White Plains (Peter Urreta of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered May 20, 2011, which, to the extent appealed from, granted defendants LC Main, LLC and George A. Fuller Company Inc.'s motion for summary judgment dismissing the complaint as against them, granted third-party defendant Roger & Sons Concrete, Inc.'s motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for partial summary judgment on his

Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff testified that he lost his footing on a scaffold platform, causing a pipe he had been handed to slip downward in his hands, and that when he reached forward to grab the pipe, he felt a sharp pain in his back. He testified further that he did not know why he lost his footing; the scaffold did not shake or move, and there was no debris on the platform.

This evidence demonstrates as a matter of law that plaintiff's injuries were caused not by a failure to provide adequate protection against an elevation-related risk but by an accident arising from a routine workplace risk (*see* Labor Law § 240[1]). Nor were plaintiff's injuries caused by a failure to comply with any of the Industrial Code (12 NYCRR) provisions he cited in support of his Labor Law § 241(6) claim, since the scaffold on which he was standing never moved, he never fell, and no hoisting equipment was in use. As to plaintiff's Labor Law § 200 and common-law negligence claims, his testimony demonstrates that his injuries were not caused by any unsafe condition of the

work site, and his and other witnesses' testimony that hand assembly was the standard method of scaffold construction demonstrates that his injuries were not caused by the way in which he performed his work.

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

ENTERED: JUNE 5, 2012

CLERK

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

7842 225 5th, LLC, Index 112126/08
Plaintiff-Respondent,

-against-

Jhanna Volynets,
Defendant-Appellant.

_____

McCusker Anselmi Rosen & Carvelli, P.C., New York (Michael R. Futterman of counsel), for appellant.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (George Tzimopoulos of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered August 9, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its first cause of action, alleging breach of contract, and for a declaration, upon its second cause of action, that the purchase agreement was validly canceled, and so declared, unanimously affirmed, without costs.

Defendant's failure to appear at the scheduled closing, at which plaintiff appeared, ready, willing and able to close, constitutes a default under the purchase agreement (*see El-Ad 250 W. LLC v 30 Hubert St. LLC*, 67 AD3d 520 [2009]). Defendant's failure to cure her default or to provide a lawful excuse for it

entitles plaintiff to retain the 10% down payment as liquidated damages, pursuant to paragraphs 9 and 16 of the purchase agreement (*see Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 378 [1986]; *Rivera v Konkol*, 48 AD3d 347 [2008]).

The issue of which party should bear liability for the carrying costs is rendered moot by defendant's unexcused default, which entitles plaintiff to the down payment as liquidated damages without reference to its actual damages (*see Uzan v UN Ltd. Partnership*, 10 AD3d 230, 237 [2004]).

Defendant failed to raise an issue of fact whether the conditions existing in the unit on the day before closing were other than "minor details" and therefore gave her the right, under paragraph 18(i) of the purchase agreement, to decline to accept title.

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

ENTERED: JUNE 5, 2012

CLERK

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

7843 Brother Jimmy's BBQ, Inc., et al., Index 105077/09
Plaintiffs-Respondents,

-against-

American International
Group, Inc., et al.,
Defendants,

Illinois National Insurance Company,
Defendant-Appellant,

Lauren Sclafani,
Defendant-Respondent.

_____

Sedgwick LLP, New York (Jessika Moon of counsel), for appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Brother Jimmy's BBQ, Inc., Brother Jimmy's NYC Restaurant Holdings, LLC, Brother Jimmy's Franchising, LLC, Josh Leibowitz, Michael Daquino and Kevin Bulla, respondents.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for Lauren Sclafani, respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered May 17, 2011, which granted plaintiffs' cross motion for summary judgment to declare that defendant insurer Illinois National Insurance Company (defendant), in its capacity as plaintiffs' excess carrier, was required to defend and indemnify plaintiffs in the underlying personal injury action once the primary insurance was exhausted, and denied defendant's motion

for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The motion court correctly determined that defendant-appellant Illinois National Insurance Company's disclaimer of coverage was untimely. Regardless of the timeliness of plaintiffs' notice of claim, the ground alleged as support for disclaimer was clear from the face of the notice of claim and other documents submitted to Illinois National, making the 38-day delay before issuance of the notice of disclaimer unreasonable as a matter of law under Insurance Law § 3420(d) (*see Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 [2006]; *e.g. George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 92 AD3d 104 [2012]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 5, 2012

CLERK

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

7844 In re Will Reese, Jr., Index 401809/10
Petitioner-Appellant,

-against-

John B. Rhea, etc., et al.,
Respondents-Respondents.

Jennifer Levy, Legal Services NYC-Bronx, Bronx (Amy Leipziger of counsel), for appellant.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondents.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered May 11, 2011, which, to the extent appealed from, denied the petition seeking to annul the determination of respondents, dated March 3, 2010, insofar as it terminates petitioner's tenancy, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner does not challenge respondents' determination that he violated its occupancy rules by refusing to transfer to an appropriately sized apartment, that he permitted his daughters to reside in the apartment without complying with its occupancy rules, and that he violated a stipulation that was part of the settlement of two prior charges against him. Rather, his sole

contention is that the penalty imposed by respondents constitutes an abuse of discretion.

Judicial review of a penalty imposed by an administrative agency is limited to the question of whether the punishment constitutes an abuse of discretion. The sanction must be upheld unless it shocks the judicial conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232-234 [1974]).

The penalty imposed here does not shock the conscience because petitioner agreed to accept a smaller apartment to settle prior charges and then reneged on his promise. The stipulation also included terms of probation, which petitioner violated. Moreover, it was unreasonable for him to believe that he could retain a three-bedroom apartment and that his wife, from whom he is separated, could retain a four-bedroom apartment so that his

daughters could reside in whichever apartment they chose, in light of respondents' obligation to attempt to accommodate larger families (*see Matter of March v Rhea*, 82 AD3d 487, 488 [2011]; *Matter of Kotoff v Franco*, 223 AD2d 373 [1996]).

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

ENTERED: JUNE 5, 2012

CLERK

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

7845 The City of New York, Index 401916/03
Plaintiff-Appellant,

-against-

General Star Indemnity Company,
Defendant-Respondent.

_____

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellant.

Marshall, Conway & Bradley, P.C., New York (Christopher T. Bradley of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 9, 2011, which denied the City's motion for leave to renew its motion for summary judgment declaring that defendant General Star Indemnity Company had a duty to indemnify the City and reimburse its defense costs in the now settled underlying personal injury action, unanimously affirmed, without costs.

This declaratory judgment action stems from an underlying action in which the plaintiff therein, an employee of MVN Associates, Inc. (MVN), was allegedly injured during the course of his employment. MVN purchased liability insurance coverage under a "master policy" that General Star issued to the "Marine Contractors Alliance." The master policy identified only the

named insured, while MVN, as an insured under the policy, and the City, as an additional insured, were identified only on certificates of insurance which contained numbers and effective dates that did not match the master policy.

The City asserts that it is now clear from discovery that General Star received notice of the claim on June 27, 2002. Even if notice of claim was received on that date, questions of fact exist as to whether the information received, which failed to identify the named insured or the number of the master policy, provided a sufficient basis for disclaimer, or if sufficient documentation was not provided until July 8, 2002, as claimed by General Star (*see Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 409 [2010]). Accordingly, issues of fact also exist as to the timeliness of General Star's investigation, which was not commenced until July 9, 2002, and subsequent disclaimer, issued on August 7, 2002 (*id.*). Although General Star claims

that it had to gather information from multiple sources to identify the policy and program applicable to the underlying claim, issues exist as to whether it conducted a "diligent" investigation (*see id.*).

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

ENTERED: JUNE 5, 2012

CLERK

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

7846 The People of the State of New York, Ind. 2425/10
Respondent,

-against-

Michael Caines,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about November 9, 2010, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JUNE 5, 2012

CLERK

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

7848 Linda D., Index 310316/09
Plaintiff-Respondent,

-against-

Theo C.,
Defendant-Appellant.

Berkman Bottger Newman & Rodd, LLP, New York (Walter F. Bottger of counsel), for appellant.

Cohen Goldstein Silpe, LLP, New York (Jeffrey R. Cohen of counsel), for respondent.

Judgment of divorce, Supreme Court, New York County (Barbara Jaffe, J.), entered November 22, 2011, after a nonjury trial, to the extent appealed from as limited by the briefs, denying defendant any portion of the marital apartment's appreciation, distributing the marital estate, directing that defendant pay child support of $1,200 per month, and awarding plaintiff counsel and expert fees, unanimously modified, on the law and the facts, to the extent of vacating the award of counsel and expert fees, and otherwise affirmed, without costs.

Defendant failed to show that the marital apartment, which plaintiff purchased before the marriage, appreciated as a result of his contributions (*see Karas-Abraham v Abraham*, 69 AD3d 428, 430 [2010]). Although defendant performed, and marital funds

helped pay for, some renovations to the apartment, the court-appointed appraiser made no findings that the renovations had any effect on the value of the apartment. In any event, the trial court adequately compensated defendant for his contributions by giving him a credit for one-quarter of the renovation costs (*see Bernholc v Bornstein*, 72 AD3d 625, 628 [2010]).

The trial court providently exercised its discretion in distributing the marital estate (*see Fields v Fields*, 65 AD3d 297, 303 [2009], *affd* 15 NY3d 158 [2010]). The court considered the factors listed in Domestic Relations Law § 236(B)(5)(d) and set forth the rationale for its decision (*id*.).

The trial court improvidently exercised its discretion in awarding plaintiff $100,000 for attorneys' fees and $12,850 for expert fees. The parties' financial situations were not so disparate as to render this award appropriate (*see generally*

O'Shea v O'Shea, 93 NY2d 187, 190 [1999]).

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

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

ENTERED: JUNE 5, 2012

CLERK

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

7849N In re Richard A. Otto, File 3358/99
Deceased.
- - - - -
Regan Otto Schroeder, et al.,
Movants-Respondents,

-against-

Maria Otto,
Respondent-Appellant.

_____

Blank Rome LLP, New York (Laurie J. McPherson of counsel), for appellant.

Willkie Farr and Gallagher LLP, New York (David Gise of counsel), for Regan Otto Schroeder, respondent.

Scarola Malone & Zubatov LLP, New York (Rachel Balaban of counsel), for Jed Isaacs, respondent.

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Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about August 30, 2011, which granted co-executors Regan Otto Schroeder and Jed Isaacs's motion for a protective order to prevent objectant Maria Otto from obtaining any discovery related to RB Holdings Corp., except to the extent of records necessary to substantiate certain professional fees, and granted Otto's motion to compel to the same extent, unanimously affirmed, with costs.

Otto is bound by the settlement agreement she signed that resolved the issue of the payments she now attempts to contest

(*see Butterfield v Cowing*, 112 NY 486, 492 [1889]). Moreover, none of the documents about which she now raises issues are new to her, and all the issues could have been raised by one of her many previous counsel (*see Matter of Souza*, 80 AD3d 446 [2011]).

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

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

ENTERED: JUNE 5, 2012

CLERK

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

7850N Financial Structures Limited, et al., Index 601159/08
Plaintiffs-Appellants,

-against-

UBS AG, et al.,
Defendants-Respondents.

_____

SNR Denton US LLP, New York (Richard M. Zuckerman of counsel), for appellants.

Paul Hastings LLP, New York (James B. Worthington of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 17, 2012, which granted defendants' motion to quash a subpoena served by plaintiffs on a nonparty seeking transcripts of deposition testimony of certain witnesses and related documents in a separate action brought against defendants, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting the motion, as plaintiffs failed to demonstrate that the information sought could not be obtained in the course of their

own depositions of witnesses common to both actions (*see Menkes v Beth Abraham Servs.*, 89 AD3d 647, 647-648 [2011]; *Connolly v Napoli, Kaiser & Bern, LLP*, 81 AD3d 530, 531 [2011]).

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

ENTERED: JUNE 5, 2012

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5115 Ruth L. Burtman, Index 116740/07
Plaintiff-Respondent,

-against-

Robin R. Brown, M.D., et al.,
Defendants,

Elizabeth J. Beautyman, M.D.,
Defendant-Appellant.

_____

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains (Edward J. Guardaro, Jr. of counsel), for appellant.

Marie R. Hodukavich, Peekskill, for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered November 22, 2010, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

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

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
James M. Catterson
Karla Moskowitz
Sallie Manzanet-Daniels, JJ.

5115
Index 116740/07

_____x

Ruth L. Burtman,
Plaintiff-Respondent,

-against-

Robin R. Brown, M.D., et al.,
Defendants,

Elizabeth J. Beautyman, M.D.,
Defendant-Appellant.

_____x

Defendant Elizabeth J. Beautyman, M.D., appeals from the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered November 22, 2010, which, insofar as appealed from, denied her motion for summary judgment dismissing the complaint as against her.

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains (Edward J. Guardaro, Jr. and Patricia D'Alvia of counsel), for appellant.

Marie R. Hodukavich, Peekskill, for respondent.

CATTERSON, J.

In this medical malpractice action, we are asked to determine whether the plaintiff's primary care physician had any duty to supervise or override a course of treatment initiated by another physician actively treating the plaintiff. In this case, we find that the motion court erred in finding that the defendant, Elizabeth Beautyman, M.D., as primary care physician, had an independent duty to assess the plaintiff's condition and order diagnostic testing such as a biopsy. On the contrary, as set forth more fully below, case law supports the defendant's position that her status as the plaintiff's primary care physician is not dispositive as to whether a duty exists in this case. Moreover, where no duty is found to exist, the opinion of plaintiff's expert that the defendant deviated from the standard of accepted medical practice is irrelevant.

The following facts are undisputed: On August 4, 2005, the plaintiff, Dr. Ruth Burtman, a 43-year-old licensed psychologist, saw the defendant Dr. Beautyman, an internist and primary care physician for the first time. At the time of the plaintiff's first visit, she was three months pregnant and already under the care of defendant West Care Associates (hereinafter referred to as "West Care"), a rotating group obstetrical practice, which included the defendant doctors Robin Brown and Hope Langer. The

plaintiff had been a patient at West Care since 1997. In 1999, she was treated by Dr. Brown and West Care for an underarm mass. At the time, Dr. Brown had ordered a tissue sample and subsequently the mass was found to be a benign lipoma.

Prior to the plaintiff's first visit with the defendant, she had two prenatal visits at West Care. Dr. Brown examined her on both visits, on June 30, 2005 and July 28, 2005.

On August 4, 2005, at the plaintiff's first visit with the defendant, she requested a full checkup, and the defendant performed a physical examination. The plaintiff subsequently had another prenatal checkup with Dr. Brown at West Care on August 25, 2005.

On September 20, 2005, six weeks after her first visit with the defendant, and almost a month after her prior prenatal visit with Dr. Brown, Dr. Langer examined the plaintiff and noted the presence of a mass in the upper left quadrant of her abdomen. Dr. Brown requested a sonogram which was performed on October 12, 2005.

On October 13, 2005, a radiology report was faxed to the defendant who noted that the report referred to a mass consistent with a benign fibrolipoma. She did not discuss the report with the plaintiff, or any of the plaintiff's other doctors.

It is further undisputed that the West Care doctors as part

of their care of the plaintiff decided to adopt a "wait and watch" approach. They did not attempt to remove the mass while the plaintiff was pregnant because there was "no concern" as to the mass.

The plaintiff had a second office visit with the defendant in January 2006 after she fell and sprained her ankle. She asked the defendant for a referral to a physical therapist. Subsequently, the plaintiff gave birth to a baby boy on February 12, 2006. She testified that by the time she gave birth, the mass had increased in size.

In June 2006, she returned to a different primary care physician whom she had previously seen in February 2005. This visit concerned a tick bite on her abdomen. It was not until the end of October 2006 when the plaintiff saw Dr. Robert Grant, a plastic surgeon, who made a diagnosis of subcutaneous masses. On December 8, 2006, Dr. Grant performed the excision of the two masses. The pathology report of December 19, 2006, showed that the 10cm left quadrant mass was an "atypical lipoma," suggesting a malignancy. On January 6 2007, a surgical oncologist at Memorial Sloan Kettering, performed a "wide radical excision of th[e] area."

The plaintiff commenced the instant medical malpractice action on or about January 13, 2008, against, inter alia,

defendant Dr. Beautyman, the obstetricans at West Care, and West Side Radiology. With respect to Dr. Beautyman (hereinafter referred to as "the defendant"), the plaintiff alleged departures from good and accepted standards of practice. The plaintiff claims the defendant failed to properly examine, test, diagnose and treat her for a left upper-quadrant abdominal soft tissue mass; specifically, that the defendant failed to order a biopsy which would have revealed that her condition was a malignant liposarcoma. The plaintiff claims that as a result she was deprived of the option of less radical and invasive surgery.

Upon completion of discovery, virtually all the defendants moved for summary judgment. The court granted the summary judgment motion of the individual doctors in the obstetrical practice because the plaintiff failed to oppose their summary judgment motion. The court denied Dr. Beautyman's summary judgment motion.

In a decision entered November 22, 2010, the court found that questions of fact existed as to whether the defendant had carried out a thorough abdominal examination on August 4, 2005. The court based its finding on the plaintiff's expert's statement that "at or about this time . . . the plaintiff herself could feel these masses." The court also found an issue of fact as to whether the defendant should have conducted an abdominal

examination at plaintiff's second office visit in January 2006 – three months after the sonogram report was faxed to her. The court held that "at the very least, [defendant] had an obligation to discuss that report with [plaintiff] . . . and to discuss with her a differential diagnosis with a suggestion for a follow-up biopsy." The court based its holding primarily on the defendant's status as the primary care physician. It relied on the opinion of the plaintiff's expert which stated that an abdominal mass was a "medical issue, rather than a gynecological" problem, and thus entirely within the scope of the defendant's duty as the primary medical physician.

This was error. The court's holding that an issue of fact exists as to the thoroughness of the defendant's examination of August 4, 2005 is based on an assumption that the abdominal mass was present and discernible at the time of the first visit in August 2005. This is an assumption of facts not in the evidence of record: At deposition, the plaintiff simply could not recall when and to whom she complained about the abdominal mass first – or even whether she showed it to the defendant. She testified that she showed the mass to "my doctor" identifying the doctor as Dr. Brown. She was asked: "Was Dr. Brown the first [to see the abdominal mass]?" The plaintiff answered: "I'm not sure." As to the defendant, the plaintiff was asked: "Did you show [Dr.

Beautyman the] lipoma?" Upon replying, yes, she was asked, "When?" The plaintiff replied, "I don't know."

It is disingenuous of the plaintiff to assert, on appeal, that "[s]ince the January 11, 2006 examination was focused on the ankle, plaintiff must have showed the mass to Dr. Beautyman on August 4, 2005." Indeed, this is nothing more than impermissible speculation which is clearly controverted by the deposition testimony of the defendant and the West Care group of doctors, as well as by the evidence of record which shows that the first reference to any abdominal mass appeared in the plaintiff's medical charts on September 20, 2005.

Dr. Brown testified there was no evidence of an abdominal mass during the plaintiff's visits on June 30, July 28 or even August 25. The defendant similarly testified that there was no evidence of any discernible masses at the visit on August 4th; and that the plaintiff did not come to her with a complaint, but solely for a general physical examination. There is no notation of any mass in the plaintiff's medical chart from that visit, nor any notation that the plaintiff complained about it. Neither are there any notations of an abdominal mass in the plaintiff's medical charts at West Care at this time. This establishes that the plaintiff neither complained nor presented with any discernible abdominal mass on her documented visits at West Care

on June 30, or July 28, 2005 (approximately a week before her visit with the defendant), or even on August 25 (three weeks after the visit with the defendant) during an examination at West Care. Moreover, there is no expert affidavit in the record stating that an abdominal mass of the size noted on October 12 during the sonogram would have been discernible or palpable two months earlier at the plaintiff's first office visit with the defendant.

The motion court also erred in finding an issue of fact as to the thoroughness of the defendant's examination of the plaintiff at the second office visit in January 2006. The court observed that the defendant as the primary care physician had a duty to examine plaintiff's abdomen at that visit, or "at the very least" to discuss the sonogram report and suggest a follow-up biopsy. The court, thus, imposed on the defendant the duty of overseeing a course of treatment commenced by another treating physician who specifically referred the plaintiff to a different specialist to follow up on her condition. Moreover the court did so without reference to any legal authority and erroneously relied instead on the opinion of the plaintiff's expert.

We have repeatedly held that in order to reach any discussion about deviation from accepted medical practice, it is necessary first to establish the existence of a duty. See, e.g.

Cregan v. Sachs, 65 A.D.3d 101, 879 N.Y.S.2d 440 (1st Dept. 2009). Whether a defendant doctor owes a plaintiff a duty of care is a question for the court. McNulty v. City of New York, 100 N.Y.2d 227, 232, 762 N.Y.S.2d 12, 16, 792 N.E.2d 162, 166 (2003). It is generally not an appropriate subject for expert opinion. Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 833 N.Y.S.2d 89 (1st Dept. 2007).

In this case, the defendant asserts that the dispositive factor in ascertaining duty is not the defendant's primary care physician status, but the extent to which the defendant advised, and the plaintiff relied on advice about the abdominal mass. Well-established precedent supports this view. See Maggio v. Werner, 213 A.D.2d 883, 884, 623 N.Y.S.2d 424, 425 (3d Dept. 1995), citing Markley v. Albany Med. Ctr. Hosp., 163 A.D.2d 639, 640, 558 N.Y.S.2d 688, 689 (3d Dept. 1990); see also Wasserman v. Staten Is. Radiological Assoc., 2 A.D.3d 713, 714, 770 N.Y.S.2d 108, 109-110 (2d Dept. 2003); Chulla v. DiStefano, 242 A.D.2d 657, 662 N.Y.S.2d 570 (2d Dept. 1997), lv. dismissed 91 N.Y.2d 921, 669 N.Y.S.2d 263, 692 N.E.2d 132 (1998).

The foregoing decisions stand for the proposition that, "[a]lthough physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient."

Markley, 163 A.D.2d at 640, 558 N.Y.S.2d at 689. In other words, the question is whether the physician owes a duty under the circumstances of a particular scenario. See Cregan, 65 A.D.3d at 110, 879 N.Y.S.2d at 446, citing Huffman v. Linkow Inst. For Advanced Implantalogy, Reconstructive & Aesthetic Maxillo-Facial Surgery, 35 A.D.3d 214, 826 N.Y.S.2d 229 (1st Dept. 2006).

Hence, in Huffman, we concluded that plaintiff's primary dentist owed no duty to plaintiff with respect to reconstructive surgery performed by an oral surgeon because the dentist "neither participated in nor was responsible for the surgical aspects of plaintiff's treatment." 35 A.D.3d at 215, 826 N.Y.S.2d at 230. Similarly in Wasserman, the Court found that defendant internists could not be charged with the duty to diagnose a nerve disorder in the plaintiff's ankle since "they were not involved in th[at] aspect of [plaintiff's] care." Wasserman, 2 A.D.3d at 714, 770 N.Y.S.2d at 109.

It is interesting to note that the plaintiff cites to Maggio in support of her argument that the defendant had an all-encompassing duty to investigate the abdominal mass, discuss it with the plaintiff and make referrals for follow-up evaluation and treatment. In fact, Maggio underscores the principle that a physician's duty is circumscribed by the medical functions undertaken by that physician. 213 A.D.2d 884, 623 N.Y.S.2d at

425. In that case, an obstetrician referred a patient under his care during pregnancy to a surgeon for evaluation of a breast lump. The surgeon wrote to the defendant that he did not see a need for direct intervention until after the pregnancy unless there was an obvious change. The patient continued to complain of pain to the defendant obstetrician who continued to advise her that she should not be concerned because "these things are common in pregnancies." Maggio at 884, 623 N.Y.S.2d at 425. Subsequently, the patient was diagnosed with a carcinoma in her right breast.

The Court observed that defendant had "assumed a legal duty to provide appropriate care to plaintiff when he accepted her as a patient." Maggio, 213 A.D.2d at 884, 623 N.Y.S.2d at 425. However, the Court added: "The question here is whether that duty extended to the mass found in plaintiff's breast." Id. In that case, the Court denied defendant summary judgment because it found an issue of fact as to "whether defendant undertook to advise plaintiff about her condition . . . which advice was accepted and relied upon by plaintiff." Id.

In this case, no triable issue of fact exists as to whether the defendant played any role in advising the plaintiff on the diagnosis or treatment of her abdominal mass. On the contrary, it is indisputable, as evidenced by the radiology report in the

record, that Dr. Brown of West Care ordered the sonogram, and that she was faxed the results. The report also includes notations by Dr. Brown that she discussed the results with the plaintiff. At deposition, Dr. Brown testified that she formed a differential diagnosis and set the course of treatment.

Dr. Brown ordered the sonogram because that is what "we routinely do." Indeed, it is Dr. Brown who had sent the plaintiff for tissue sample upon finding a soft tissue mass on her left underarm in 1999. Moreover, while all the physicians who were deposed, including the defendant, agreed that only a biopsy could determine conclusively whether the mass was indeed benign, Dr. Brown further testified that because the radiology report did not raise concerns, it was decided not to do anything further until after the birth of the plaintiff's child. The plaintiff agreed with that characterization of a "wait and watch" course of treatment. Dr. Brown further testified that she had advised the plaintiff to see a breast surgeon.

Finally Dr. Brown acknowledged that the abdominal mass was monitored during the plaintiff's prenatal visits at West Care. She testified that if there was no notation about the mass in the plaintiff's charts it meant there was no significant change in size and no complaints by the plaintiff. Dr. Brown testified that a biopsy would have been recommended if there had been a

significant change in size or if the plaintiff had complained about pain.

Nor did the plaintiff raise the subject of the abdominal mass with the defendant on the date of her second office visit on January 11, 2006. It was a problem-specific visit following the plaintiff's fall at a construction site. This is further evidenced by the plaintiff's testimony that she was disgruntled that she had to come into the office when all she had wanted was a referral for physical therapy over the telephone.

Consequently, notwithstanding the fact that Dr. Brown faxed a copy of the radiology results to the defendant, it is indisputable that the defendant was not involved in the setting or monitoring of the course of treatment prescribed for the plaintiff's abdominal mass. Neither Dr. Brown nor any other physician at West Care spoke to the defendant about the report. Moreover, when Dr. Brown faxed the report to the defendant, it appears from the record to have been faxed with Dr. Brown's notation in the bottom left corner that she had called the plaintiff on October 12.

Finally, the plaintiff's reliance on Daugharty v. Marshall (60 A.D.3d 1219, 875 N.Y.S.2d 621 (3d Dept. 2009)) is misplaced. In that case, a triable issue of fact was raised when a family practitioner failed to refer the decedent to a specialist even

though the decedent was also receiving care from a cardiologist. However, unlike the primary care physician in this case who saw the plaintiff only twice, in Daugharty, the family practitioner had been treating decedent for 13 years and for a number of various ailments including hypertension, coronary artery disease, compulsive obstructive pulmonary disease, arthritis, gallstones and prostate complaints. The Court concluded that because the decedent made ongoing complaints to the family practitioner about abdominal pain, it was the practitioner's duty to make the referral to a gastroenterologist.

The plaintiff, therefore, produces no legal authority for the view that a primary care physician has an independent duty to assess the course of treatment set and monitored by another physician. We decline to adopt such a view in these circumstances.

Accordingly, the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered November 22, 2010, which, insofar as appealed from, denied defendant-appellant's motion for summary judgment dismissing the complaint as against her, should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

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

TOM, J.P. (dissenting)

The alleged malpractice at issue on this appeal is the failure to refer plaintiff for a biopsy to determine if two abdominal masses discovered during an ultrasound examination were malignant. The summary judgment motion of those defendants providing obstetrical care was granted in the absence of opposition and the complaint dismissed as against them, leaving only the question of whether Supreme Court erred in denying the companion motion of appellant Elizabeth J. Beautyman.[1] It is asserted that Beautyman owed no duty to her patient because, while fully aware of the masses, she took no action to treat them.

As plaintiff's primary care physician, Beautyman cannot abdicate responsibility for her patient's health care. Beautyman concedes that in October 2005 she received, reviewed and incorporated into plaintiff's medical record a copy of the report of Dr. Sherman Lipshitz, a radiologist, who interpreted the ultrasound examination. However, Beautyman failed to follow up by referring plaintiff for appropriate diagnosis and treatment, thereby contributing to injuries resulting from the delay in

[1] The motion of the plastic surgeon who removed the masses was also denied, but no appeal has been taken.

excising a liposarcoma.

The American Academy of Family Physicians defines “primary care physician” as “a generalist physician who provides definitive care to the undifferentiated patient at the point of first contact and takes continuing responsibility for providing the patient's care.” The definition continues, inter alia: “The style of primary care practice is such that the personal primary care physician serves as the entry point for substantially all of the patient's medical and health care needs - not limited by problem origin, organ system, or diagnosis.”

Whether or not the abdominal masses were apparent at the time Beautyman first examined plaintiff in August 2005, Beautyman certainly knew of their existence by the time plaintiff again consulted her in January 2006. The radiologist’s report describes two discrete palpable masses, one in the left anterior upper abdominal wall, and the other in the left axilla. Beautyman, as plaintiff’s primary care physician, assumed the responsibility to see that her patient's medical needs were met. Indeed, the affidavit of plaintiff’s expert internist states that Beautyman’s failure to re-examine her patient and make a referral for a biopsy deviated from accepted medical practice.

The failure to alert plaintiff to the need to rule out the possibility of a malignancy is particularly egregious under the

circumstances because Beautyman's inaction implied that no further treatment was necessary. This Court has noted that even in the absence of a physician-patient relationship, the failure to disclose a potentially injurious medical condition may constitute ordinary negligence where the person examined is likely to construe silence to mean that he or she is in good health (*see McKinney v Bellevue Hosp.*, 183 AD2d 563, 565 [1992] [differential diagnosis of pyoinflammatory disease or lung neoplasm following pre-employment chest Xray]). As we stated, "The tendency of the average person, in similar circumstances, to interpret . . . silence as an indication of good health is so apparent and the consequence of such reliance so potentially serious that we conclude that the law imposes a duty to disclose" (*id.* at 566). Because the burden of disclosure is slight, the seriousness of the harm to be avoided warrants departure from the general rule that absent a relationship giving rise to such obligation, no duty to disclose is imposed by law (*see Stambovsky v Ackley*, 169 AD2d 254 [1991]).

As a bare minimum, the existence of a physician-patient relationship imposes a duty to alert the patient to a potential threat to her health, otherwise unknown to her (*see Caracci v State of New York*, 203 AD2d 842, 845 [1994] [cause of action for ordinary negligence sustained where health center failed to

apprise student of a radiologist's report indicating an abnormal mass]). Particularly where, as here, a physician has undertaken to provide primary medical care, there is a duty to advise the patient of those conditions known to the physician that pose a threat to the patient's health so that the patient may make an informed decision whether to seek further treatment (*see McKinney*, 183 AD2d at 565-566). Furthermore, as the physician primarily responsible for the patient's care, Beautyman was subject to the additional duty to take such appropriate medical action as might be necessary to diagnose and treat the condition, either personally or by way of referral to a qualified practitioner (*see Daugharty v Marshall*, 60 AD3d 1219 [2009] [primary care physician liable for failure to (1) diagnose gastrointestinal conditions and (2) refer the patient to a gastroenterologist]).

The cases relied upon by Beautyman in support of dismissal of the complaint are distinguishable in that the patients were known to be undergoing treatment for the injurious condition (*Wasserman v Staten Is. Radiological Assoc.*, 2 AD3d 713 [2003] [radiological group not involved in plaintiff's orthopedic treatment not liable for failure to diagnose nerve condition in her ankle]; *Chulla v DiStefano*, 242 AD2d 657 [1997], *lv dismissed* 91 NY2d 921 [1998] [clinic that implanted birth-control device

not liable for failure to diagnose breast cancer in a patient being treated by another medical group]; *Lipton v Kaye*, 214 AD2d 319 [1995] [as a matter of policy, non-treating consultant pathologist under no duty to follow up with treating obstetrician]; *Markley v Albany Med. Ctr. Hosp.*, 163 AD2d 639 [1990] [pediatricians, to whom infant undergoing chemotherapy was referred for general care, not liable for overdose of drug administered during the course of infant's chemotherapy]; *cf. Maggio v Werne*r, 213 AD2d 883 [1995] [question of fact as to whether patient continued to rely on advice given by her obstetrician after she was referred to a surgeon for treatment of breast tumor]). While the general duty of care owed by physicians to their patients "may be limited to those medical functions undertaken by the physician and relied on by the patient" (*Markley*, 163 AD2d at 640), actually providing primary care induces the patient to rely on the physician to take action where medically appropriate. Where, as here, a primary care physician neither takes suitable action nor even discusses the condition, the patient will naturally be induced to refrain from seeking treatment, to her obvious detriment (*see McKinney*, 183 AD2d at 566; *Caracci*, 203 AD2d at 844). As this Court noted in *Lipton*, liability is predicated on the effect of a misrepresentation or failure to disclose, which induces "'the

person to whom it was made to forego action that might otherwise have been taken for the protection of the plaintiff'" (214 AD2d at 321, quoting *Eiseman v State of New York*, 70 NY2d 175, 187 [1995]).

The majority, seeking to distinguish the Third Department's ruling in *Daugharty*, takes the position that the defendant doctor's duty to refer his patient to a qualified specialist arose only after the passage of many years and over the course of extensive treatment (which did not include the gastric condition at issue). Several points bear emphasis. First, as a simple question of law, the issue is whether the primary care physician's relationship to the patient gives rise to a duty or not. Either the primary care physician owes a duty to refer the patient to the appropriate specialist or no such duty is imposed by law. From the opposite perspective, either a patient is justified in relying on a primary care physician to provide treatment, advice and, where necessary, referral for treatment of general health-related conditions or, as Beautyman argues, the patient is limited to relying on advice and treatment for only those conditions he or she personally brings to the attention of the practitioner.

Second, the negligence involved in this case is the failure to disclose, or even recognize, the potential threat represented

by two “palpable” abdominal masses. While it might be acceptable for a specialist rendering limited and particularized treatment to neglect ruling out a hazardous medical condition outside his area of specialization,[2] no such latitude extends to a physician who assumes responsibility for the general health of the patient. As noted, the expectation that the primary care physician will assume such responsibility arises at the outset from the nature of the physician-patient relationship, not from any long-standing association between doctor and patient.

Third, the majority concludes that Beautyman had no duty to assess the course of treatment provided by other physicians; however, no such treatment was in fact provided. Plaintiff stated that the obstetrical group had decided on a “wait and watch” approach, with the result that they provided no treatment at all. In reality, Beautyman does not allege that she relied on diagnostic actions taken by other physicians but on their very inaction. Had Beautyman taken the minimal step of discussing the radiologist’s report with her patient, it would have been readily apparent that absolutely nothing was being done to determine whether the abdominal masses were malignant. Notably, Beautyman

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[2] Since no appeal has been taken from the dismissal of the complaint as against the physicians who provided obstetrical care and expressed “no concern” about the masses, this issue is not before us.

provides no basis for relying on doctors who were providing obstetrical care to render appropriate and necessary services to her patient that would normally be provided by an oncologist or pathologist.

Finally, the duty breached is, in the first instance, that of disclosure – specifically that the two masses (of which both patient and doctor were aware) could not simply be assumed to be benign – and, more broadly, the failure to refer the patient for a biopsy to obtain a definitive diagnosis. As Beautyman conceded in her deposition testimony, physical examination of a mass only offers "clues" as to its malignancy and that "[t]he only way to know for sure would be either a biopsy or an excision and biopsy." Her omission to make a referral for this procedure was particularly harmful under the circumstances because the patient, faced with a number of doctors who expressed no concern about her condition, relied to her detriment on there being nothing about which she needed to be concerned (*see Bradley v St. Charles Hosp.*, 140 AD2d 403, 404 [1988] [hospital can be held liable for failure to diagnose malignant condition where employee was induced to rely upon the results of an annual physical examination]; *cf. Lee v City of New York*, 162 AD2d 34, 38-39 [1990], *lv denied* 78 NY2d 863 [1991]). Significantly, there is no indication in the record why immediate referral for a needle

biopsy would have been contraindicated by the course of plaintiff's pregnancy, or for any other reason. Thus, the failure to refer plaintiff to a qualified specialist "in and of itself, represented a deviation from the applicable standard of care" (*Daugharty*, 60 AD3d at 1221).

In sum, this is a case where no treating physician exercised due care to determine, by appropriate medical testing, whether a patient's medical health was threatened by a malignancy. The gravamen of Beautyman's defense is that she was entitled to rely on the judgment of other treating physicians who saw no need for concern. It should be evident, however, that one doctor's negligence may not be excused by the inadequate treatment provided by another (*see Datiz v Shoob*, 71 NY2d 867 [1988]; *Ruddy v Nolan*, 37 AD3d 694, 695 [2007]). Thus, it is immaterial that other doctors, who received the same radiologist's report as Beautyman, likewise neglected to take the obvious next step of ordering a needle biopsy. Since there is record evidence that such omission constitutes a departure from the applicable standard of care, there remains a material question of fact precluding summary judgment in favor of Beautyman.

Further, plaintiff's initial visit with Beautyman was on August 4, 2005, for a full physical checkup. At that visit Beautyman had plaintiff disrobe to conduct the examination.

Beautyman's chart for plaintiff's examination on that day showed no masses present. However, plaintiff had a left underarm benign mass that had been observed by other doctors, and documented as early as 1999, raising questions about the examination. Moreover, plaintiff testified that, in the same month she first saw Beautyman, she noticed the abdominal mass to be the size of an egg.

Accordingly, the order should be affirmed.

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

ENTERED: JUNE 5, 2012

CLERK