SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 6, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11340 Robert Jenkins, Index 300280/11
Plaintiff-Respondent,

-against-

The Related Companies, L.P., et al.,
Defendants-Respondents,

W5 Group, LLC, doing business as
Waldorf Demolition,
Defendant-Appellant.

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Ken Maguire Associates, PLLC, Garden City (Mary Ellen O'Brien of counsel), for appellant.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for Robert Jenkins, respondent.

London Fischer, LLP, New York (Michael J. Carro of counsel), for The Related Companies, L.P., 42nd and 10th Associates, L.L.C. and Tishman Construction Corporation of NY, respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered June 7, 2013, which, insofar as appealed from as limited by the briefs, denied the motion of defendant W5 Group, LLC d/b/a Waldorf Demolition (Waldorf) for summary judgment dismissing the complaint as against it, and granted the cross motion of defendants The Related Companies, L.P., 42nd and

10th Associates, LLC, and Tishman Construction Corporation (collectively Construction Defendants) for summary judgment on their contractual indemnification claim against Waldorf, unanimously affirmed, without costs.

On December 28, 2010, plaintiff, a glazier for a nonparty subcontractor, slipped and fell on ice while walking on an outdoor setback of a building under construction. The Construction Defendants included the owner of the premises, and the general contractor and construction manager on the project. Defendant Waldorf was the general cleanup contractor pursuant to a contract, and had agreed to provide additional "blizzard storm snow removal" services in response to a blizzard that occurred between December 26, 2010 and December 28, 2010.

Waldorf's motion for summary judgment was properly denied as the record presents a triable issue of fact as to whether Waldorf owed plaintiff a duty of care by having "launched a force or instrument of harm" in failing to exercise reasonable care in the performance of its snow and ice removal duties (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141 [2002] [internal quotation marks omitted]). The evidence, including photographs and videos taken at the scene of the accident showing the icy condition and deposition testimony that there was no sand or salt in the area where plaintiff fell, raises questions as to whether

Waldorf had adequately salted the pathway, and therefore, whether it created or exacerbated the hazardous ice condition (*see Ramirez v BRI Realty*, 2 AD3d 369 [1st Dept 2003]; *Figueroa v Lazarus Burman Assoc.*, 269 AD2d 215 [1st Dept 2000]).

The motion court properly granted the Construction Defendants' cross motion for summary judgment on their contractual indemnification claim against Waldorf. The parties' contract contains a broad indemnification provision and does not require a showing of negligence on Waldorf's part. Moreover, given the lack of evidence of active negligence on the part of the Construction Defendants, they are entitled to full, not conditional, indemnification (*see Fiorentino v Atlas Park LLC*, 95 AD3d 424 [1st Dept 2102]; *cf. Cuomo v 53rd and 2nd Associates, LLC*, 111 AD3d 548 [1st Dept 2013]).

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

ENTERED: FEBRUARY 6, 2014

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10734-
10735 In re The Exoneration Initiative,
Petitioner-Respondent,

-against-

The New York City Police Department,
Respondent-Appellant.

Index 102688/12

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

Exoneration Initiative, New York (Rebecca E. Freedman of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Peter H. Moulton, J.), entered March 28, 2013, granting the CPLR article 78 petition to annul respondent NYPD's determination, which redacted or withheld seven pages of documents from a file pertaining to a homicide investigation, and to compel respondent to disclose unredacted copies of all seven pages, as requested by petitioner pursuant to the Freedom of Information Law (FOIL), and awarding petitioner reasonable attorney's fees, modified, on the law, to grant the petition to the extent of directing respondent to disclose the two pages that were entirely withheld, with the name, address, telephone number, and any other information identifying the unnamed informant redacted therefrom, to disclose a copy of the DD5 pertaining to

that informant with the redactions made by respondent except for the police tax registration number, and denying petitioner's request for attorney's fees, and otherwise affirmed, without costs. Judgment, same court and Justice, entered June 24, 2013, awarding petitioner $49,276.94 in attorney's fees, reversed, on the law, without costs, and the judgment vacated.

In this action for the disclosure of documents relating to a criminal investigation of Richard Rosario, who was convicted of murder in the second degree, we find that petitioner exhausted its administrative remedies by submitting an appeal from respondent's initial denial of its FOIL (Public Officers Law § 84, *et seq*.) request, and, commencing the instant proceeding when it received only a partial determination after the statutorily mandated 10-day response period had lapsed (*see Matter of New York Times Co. v New York City Police Dept.*, 103 AD3d 405, 408 [1st Dept 2013], *lv dismissed* 21 NY3d 930 [2013]; *Council of Regulated Adult Liq. Licensees v City of N.Y. Police Dept.*, 300 AD2d 17, 18 [1st Dept 2002]; *see also* Public Officers Law § 89[4][a-b]). Petitioner's FOIL request sought disclosure of documents relating to the murder investigation, including a DD5, and statements from persons interviewed by the police, including someone who did not testify at trial and is identified in the DD5 only as "Passerby," and Jose Diaz, a food cart vendor who was

operating his hot-dog truck within a short distance of where the murder took place.

We agree with the dissent's observation that the public safety exemption of Public Officers Law § 87(2)(f) does not warrant a blanket exception for DD5s[1] that reveal the identity of individuals (*see Gould v New York City Police Dept.*, 89 NY2d 267, 277 [1996]*; Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]). However, the dissent's rationale for release of this information, i.e., that "they may provide further information that would benefit Rosario's case" is at odds with both the public safety and privacy exemptions of Public Officers Law § 87.

The *Gould* Court recognized that unlimited disclosure of identifying information on the DD5s is not warranted. It stated that "[d]isclosure of such documents could potentially endanger the safety of witnesses, invade personal rights, and expose confidential information of nonroutine police procedures. The statutory exemptions contained in the Public Officers Law,

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[1]DD5s are "reports produced by police officers to record the information they have gathered in conjunction with an investigation made pursuant to a complaint," which are commonly requested in FOIL applications pertaining to prior criminal investigations (*see Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]).

however, strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files" (*Gould*, 89 NY2d at 278, citing Public Officers Law § 87[2][b], [e], [f]).

We disagree with the dissent's conclusion that there is no basis to find that "disclosing the passerby's name and address and telephone number as of 1996, and Jose Diaz's address and telephone number, could endanger them or violate their privacy." While it is true that, as we observed in *Johnson*, "the disclosure of information that tends to exonerate a criminal defendant would not be likely to represent any apparent danger to the witness from whom it was derived" (*Matter of Johnson*, 257 AD2d at 349), we went on to state that, in the context of a homicide investigation, "we do not find that there must be a specific showing by respondents that petitioner, who is presently incarcerated, has threatened or intimidated any of the witnesses in his criminal case . . . in order to warrant redaction of certain identifying information" (*Johnson*, 257 AD2d at 343, citing *Gould,* 89 NY2d at 277). Indeed, as we noted in *Matter of Bellamy v New York City Police Dept.* (87 AD3d 874 [1st Dept 2011], *affd* 20 NY3d 1028 [2013]), "The agency in question need only demonstrate 'a possibility of endanger[ment]' in order to invoke this exemption" (*id.* at 875 quoting *Matter of Connolly v*

New York Guard, 175 AD2d 372, 373 [3d Dept 1991]; *see Matter of Rodriguez v Johnson*, 66 AD3d 536 [1st Dept 2009]). In fact, "[e]ven in the absence of such a threat, certain information found in DD-5s could, by its inherent nature, give rise to the implication that its release, in unredacted form, could endanger the life and safety of witnesses or have a chilling effect on future witness cooperation" (*Johnson,* 257 AD2d at 349).

Here, disclosure of the information concerning Diaz is not mandated by the observation that his testimony was potentially exculpatory. While his failure to identify Rosario in a line-up is arguably exculpatory, his testimony at trial which largely corroborated the accounts provided by the People's other two witnesses raises the "possibility of endangerment," satisfying respondent's burden with respect to the information pertaining to Diaz (*see Matter of Bellamy*, 87 AD3d at 857).

Further, the disclosure of the information regarding Passerby would also create a possibility that Passerby's life or safety could be endangered. While it is true that Passerby's statement might seem at odds with the account provided by the People's witnesses, this account is not dispositive.

Moreover, we find that the disclosure of the addresses and phone numbers of Diaz and Passerby, as well as Passerby's name, would constitute an unwarranted invasion of privacy. Since there

is no argument that the records at issue fall within any of the six non-exhaustive categories of exemption set forth in Public Officers Law § 87(2)(b), we must, as noted by the dissent, "balance the privacy interests at stake against the public interest in disclosure of information" (*Matter of Regenhard v City of New York*, 102 AD3d 612, 613 [1st Dept 2013]). In addition to the above analysis of the public safety exemption, account must be taken of the chilling effect the release of such personal information to the general public would have on future witnesses to intentional murder from cooperating with the police, for fear that once they provide their contact information, the general public would have easy and permanent access to their whereabouts as well as the information they provided during the investigation. We have held such redactions to be proper (*see Matter of Rodriguez,* 66 AD3d 536).

Accordingly, we find that respondent properly redacted identifying information regarding Diaz and Passerby before disclosing some of the requested documents.

Information regarding other persons who did not provide statements to law enforcement was properly withheld since, under these circumstances, disclosure would result in an unwarranted

invasion of personal privacy (*see* Public Officers Law § 87[2][b]; *Matter of Bellamy*, 87 AD3d *at 875; Matter of De Oliveira v Wagner*, 274 AD2d 904, 905 [3d Dept 2000]). However, respondent fails to establish that the disclosure of the tax registration number of the detective who recorded an unnamed informant's statement would constitute an unwarranted invasion of public privacy; thus, respondent must disclose a new copy of the DD5 pertaining to this informant with this number unredacted.

Respondent fails to establish that the pages pertaining to the unnamed informant fall under the confidentiality exemption (Public Officers Law § 87[2][e][iii]), in the absence of any evidence that this person received an express or implied promise of confidentiality (*see Matter of Johnson*, 257 at 348). Furthermore, since respondent fails to establish that any exemption justifies the complete withholding of two of the three pages pertaining to this informant, respondent is ordered to disclose those pages with redactions only to conceal the informant's name, address, phone number, and any other information identifying this person.

Since petitioner has not substantially prevailed, it is not entitled to attorney's fees pursuant to Public Officers Law § 89(4)(c).

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

FREEDMAN, J. (dissenting)

I respectfully dissent to the extent that I would affirm both Supreme Court's order and judgment directing respondent to disclose unredacted records that petitioner seeks under the Freedom of Information Law (Public Officers Law § 84 *et seq.*) (FOIL), and the court's judgment awarding petitioner attorney's fees under Public Officers Law § 89(4)(c).

Petitioner, a nonprofit organization that investigates and, where it deems appropriate, litigates on behalf of indigent prisoners claiming their actual innocence, seeks access to New York City Police Department (NYPD) records relating to the criminal investigation of Richard Rosario, who has been incarcerated since his conviction for second degree murder in 1996. Rosario maintains that he was in Florida when the murder occurred and that his trial counsel was constitutionally ineffective for failing to adequately investigate his alibi defense.

In November 2011, petitioner filed a FOIL request with the NYPD requesting disclosure of, among other things, "DD5" complaint follow-up reports and other records pertaining to statements by a passerby at the crime scene who did not testify at Rosario's criminal trial and by Jose Diaz, a trial witness for the People who was in the vicinity of the murder but who did not

identify defendant. Petitioner contends that the passerby's and Diaz's statements corroborate other evidence that the murder was premeditated and committed by someone who knew the victim, contradicting the People's theory at Rosario's criminal trial that the victim was a stranger who Rosario killed after a chance encounter.

In December 2011, the NYPD denied the entire FOIL request; thereafter petitioner filed an administrative appeal. In a February 2012 letter, a NYPD Records Access Appeals Officer informed petitioner that the NYPD had been directed "to conduct a further search for the requested records" and that its determination would be deferred until the search was completed.

In May 2012, petitioner filed this article 78 proceeding to compel respondents to disclose the requested documents. Petitioner also seeks attorney's fees and costs. The NYPD cross-moved to dismiss, contending that petitioner failed to exhaust its administrative remedies because the NYPD was still searching for the requested records. In July 2012, Supreme Court denied the cross motion, finding that the NYPD failed to comply with the ten-day time limit for an agency to respond to an appeal from a FOIL request denial (Public Officers law § 89[4][a]), and that the failure constituted a denial of the administrative appeal under Public Officers Law § 89(4)(b).

In August 2012, NYPD answered the petition, asserting that the records it refused to furnish, or furnished with redactions, fall under the FOIL exemptions for public safety (Public Officers Law § 87[2][f]), personal privacy (Public Officers Law § 87[2][b]), and confidentiality (Public Officers Law § 87[2][e][iii]). After NYPD furnished some of the requested records and a conference was held before the court, the number of pages in dispute was narrowed to seven. Three of the pages make up a DD5 containing the passerby's statement and the other four pertain to Jose Diaz. In response to the FOIL request, the NYPD withheld two of the seven pages from the passerby's DD5 and redacted the other five pages to remove the passerby's name, address, and telephone number and Diaz's address and telephone number. The NYPD also redacted other individuals' names and some fragmentary information about them from the five pages.

In March 2013, after reviewing the seven unredacted pages *in camera*, the motion court granted the petition and ordered the NYPD to disclose the pages in full, finding that the NYPD failed to establish that the disclosure would endanger either the passerby or Diaz or invade anyone's privacy. It further found that the exemption to protect confidential sources is inapplicable. In addition, the court rejected the NYPD's claim that a police officer's tax registration number should be

redacted from the passerby's DD5 under the personal privacy exemption.

In June 2013, the Court awarded petitioner approximately $49,000 in attorney's fees. Thereafter, the NYPD appealed from both the order and judgment granting the petition and the judgment awarding attorney's fees. The appeal also brings up for review the July 2012 order denying the NYPD's cross motion to dismiss the petition.

As a preliminary matter, I agree with the majority that the cross motion was properly denied because the NYPD's failure to respond fully to the FOIL request within 10 days constituted a denial which exhausted petitioner's administrative remedies. I also agree that the passerby's DD5 pages do not fall under FOIL's confidentiality exemption because the NYPD made no showing that it made an express or implicit promise of confidentiality to the passerby.

However, I see no basis to find that disclosing the passerby's name, address, and telephone number as of 1996, and Jose Diaz's address and telephone number, could endanger them or violate their privacy. FOIL imposes a broad duty on government agencies to disclose their records. Statutory exemptions to disclosure are "narrowly construed," and an agency's justification for non-disclosure must be "particularized and

specific" (*New York Civ. Liberties Union v City of Schenectady*, 2 NY3d 657, 661 [2004]). While FOIL provides that an agency may withhold records if it demonstrates the possibility that disclosure "could endanger the life or safety of any person" (Public Officers Law § 87[2][f]; *Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 [1st Dept 2011], *affd* 20 NY3d 1028 [2013]), "this does not mean . . . that a blanket exemption is warranted on public safety grounds for all DD5s that reveal . . . the identity of individuals" (*Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]). In *Johnson*, this Court noted that "the disclosure of information that tends to exonerate a criminal defendant would not be likely to represent any apparent danger to the witness from whom it was derived" (*id.*).

Here, petitioner seeks identifying information about the passerby and Diaz because their accounts of the murder are at odds with the People's theory of the case and they may provide further information that would benefit Rosario's case. After reviewing the three pages pertaining to the passerby, the motion court agreed with petitioner that the passerby "may have information that helps Rosario as he attempts to prove his innocence." The majority acknowledges that the passerby's statement to the police did not corroborate "the account provided

by the People's witnesses," and I am puzzled by the majority's reasoning that, merely because "this account is not dispositive," disclosing information about the passerby who contradicted that account would endanger him.

As for Diaz, heretofore disclosed records indicate that he made certain statements to the NYPD, which the People did not elicit at trial and which suggest that the murder was premeditated and the perpetrator knew the victim. Diaz stated that the perpetrator and an accomplice brandished guns during the altercation, and that the shooter followed the victim and his friend as the accomplice ran to the getaway car and moved it to enable the shooter to flee from the scene. Petitioner also is motivated to contact Diaz because, although he testified that he thought he could recognize the men involved in the incident, he was unable to identify Rosario as the perpetrator both during a police lineup three weeks after the shooting and in court. The majority's determination that disclosing Diaz's address and telephone number as of 1996 could endanger him merely because he testified at Rosario's trial is conclusory, given that some of his statements to the police, as well as his failure to identify Rosario, are exculpatory.

I also do not concur with the majority's holding that the privacy exemption justifies redacting identifying information and

other data for Diaz, the passerby, and other persons named in the seven pages. To invoke the exemption, an agency must demonstrate that the records sought constitute an "unwarranted invasion of personal privacy" (*New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). To determine whether disclosure of personal information is warranted, a court "must balance the privacy interests at stake against the public interest in disclosure of the information" (*Matter of Regenhard v City of New York*, 102 AD3d 612, 613 [1st Dept 2013]).

Here, any intrusion into individuals' privacy is outweighed by the possibility that Rosario is actually innocent and that evidence of actual innocence may be revealed. It is noted that after Rosario's direct appeal from his conviction failed, he sought habeas relief which was denied by a divided panel of the Second Circuit of the United States Court of Appeals (*Rosario v Ercole*, 601 F3d 118, 126 [2d Cir 2010], *cert denied* __ US __, 131 SCt 2901 [2011]). In a partial dissent, Circuit Judge Straub wrote that "there exists too much alibi evidence that was not presented to the jury, and too little evidence of guilt, to now have *any* confidence in the jury's verdict . . . . [T]he majority essentially concedes a *Strickland* violation and that Rosario would be entitled to relief if this case arose on direct review, but denies the writ out of deference to the state court"

(*Rosario*, 601 F3d at 129, 137 [Straub, J., dissenting]).

Since I believe that none of the FOIL exemptions justify withholding or redacting the seven pages and would affirm Supreme Court's grant of the petition, I would also affirm the award of attorney's fees to petitioner because it prevailed in the litigation and Supreme Court providently exercised its discretion in finding that the NYPD's delay in responding to the administrative appeal warranted the award (*see* Public Officers Law § 89[4][c][ii]).

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

ENTERED: FEBRUARY 6, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10901 Michael Kalish, Index 102657/09
Plaintiff-Appellant,

-against-

HEI Hospitality, LLC, etc., et al.,
Defendants-Respondents,

Starwood Hotels and Resorts Worldwide, Inc.,
Defendant.

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Gallo Vitucci Klar LLP, New York (Yolanda L. Ayala of counsel), for appellant.

Hoey, King, Epstein, Prezioso & Marquez, New York (Andrew G. Sfouggatakis of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 2, 2012, which granted defendants-respondents' motion for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

In this personal injury action, plaintiff alleged that he sustained injuries when he slipped and fell in his hotel bathroom. At his deposition, plaintiff testified that the bathroom floor appeared to be made of polished tile that was "very smooth." On the morning of the accident, plaintiff removed his personal slippers upon entering the bathroom and placed a bath mat made of terry material on the floor in front of the tub.

This mat lacked rubber backing or other material that he had seen at other hotels. After taking a shower, he dried off in the tub, exited the bathroom without incident, and started to get dressed. Several minutes later, plaintiff re-entered the bathroom. He took one step onto the bath mat which slid forward, causing him to twist his left knee, fall backward and hit the floor.

Tyrus Joubert, the hotel's executive director of housekeeping, testified at his deposition that the bathroom floor is composed of granite. The cleaning procedure is to spray the floor with disinfectant and wipe it with rags. The floors were never waxed or buffed and no other chemicals or agents were used. The bath mats are 100% cotton and do not have any kind of non-skid surface. Before the date of the accident, Joubert had not received any complaints about the bath mats, or about the bathroom floor being slippery, and he was unaware of any incidents similar to plaintiff's accident.

Plaintiff's complaint alleged that the failure to provide non-skid backing on the bath mat was a dangerous condition which caused his injuries. Plaintiff further alleged that defendants created the dangerous condition and/or that they had prior actual or constructive notice. At the conclusion of discovery, defendants moved for summary judgment dismissing the complaint.

The motion court determined that defendants met their burden

of proof by providing evidence that the bathroom floor was cleaned normally, but not waxed or buffed, and that the bath mat was not defective, but was a standard 100% cotton mat, widely used at the hotel with no prior complaints. It further found that plaintiff did not raise any triable issues of fact because he "failed to identify a common law, statutory, or relevant industry standard imposing a duty on hotel owners to supply a no-skid surface in the bathroom area." The court dismissed the complaint.

In order to subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury (*see, Mercer v City of New York*, 88 NY2d 955, 966 [1996]; *Kelly v Berberich*, 36 AD3d 475, 476 [1st Dept 2007]). A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prime facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence (*see Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]). Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice

thereof (*see Kesselman v Lever House Rest.*, 29 AD3d 302, 303-304 [1st Dept 2006]).

In cases involving inherently smooth, and thus potentially slippery tiled or stone floors, absent competent evidence of a defect in the surface or some deviation from an applicable industry standard, no liability is imposed (*Murphy v Connor*, 84 NY2d 969, 971-972 (1984); *Lunan v Mormile*, 290 AD2d 249 [1st Dept 2002]; *Portnova v Trump Taj Mahal Assoc.*, 270 AD2d 757, 758 [3d Dept 2000], *app denied,* 95 NY2d 756 [2000]). The same standard applies to allegedly defective bath mats (*Portnova,* 270 AD2d at 758).

The motion court properly found that defendants made a prima facie showing that the accident was not attributable to a defect in the floor or the bath mat, and that they were therefore entitled to summary judgment. In opposition, plaintiff failed to raise a triable issue of fact.

Plaintiff submitted an undated affidavit of his expert, Russell J. Kendzior, who examined an examplar provided during discovery since the actual bath mat in question had not been preserved. Kendzior stated that the exemplar was not a bath mat at all, but was merely a cotton towel without any non-skid backing that was therefore defective as a means of "preventing it from sliding on the highly polished slippery marble tile floor

upon which it was placed." He cited Section 5.4.5 of the American Society of Testing and Materials F-1637-09 Standard which requires that "mats, runners and area rugs shall be provided with safe transition from adjacent surfaces and shall be fixed in place or provided with slip resistant backing." He further opined that "the subject mat would fall in the low traction category and therefore would increase the likelihood of sliding on a smooth surfaced floor like that at the Defendants [*sic*] hotel."

Significantly, Kendzior never examined the actual floor involved in this incident. He viewed only a photograph, from which it would be impossible to conclude how slippery the floor was, if at all. Moreover, he did not test the mat exemplar against the floor, or against any floor, before opining that it would have been in the "low traction category." He made no reference to any methodology used to arrive at this determination. Finally, the standards cited by Kendzior in his affidavit specifically identify bath tubs and showers as beyond the scope of the practices contained therein. Simply put, his conclusions about the cause of the accident are purely speculative (*see Silva v 81st St. & Ave. A Corp.*, 169 AD2d 402, 404 [1st Dept 1991], *lv denied* 77 NY2d 810 [1991]).

This case is indistinguishable from *Azzaro v Super 8 Motels,*

Inc. (62 AD3d 525 [1st Dept 2009]), where we affirmed the dismissal of the plaintiff's complaint. The *Azzaro* plaintiff slipped on a cotton floor mat and sustained injuries when stepping out of the shower at her hotel room. She made the same claims as plaintiff in this case, i.e., that the cotton mat and floor were unreasonably dangerous, particularly because of the lack of rubber backing on the cotton floor mat. *Azzaro's* expert cited the same industry standard as the expert here, which we found to be "inapplicable to the bathroom" (*id.* at 526), as its language specifically identified bath tubs and showers as beyond the scope of the practices contained therein.

Here, since defendants made a prima facie showing that the accident was not attributable to a defect in the floor or the bath mat, and plaintiff's expert's conclusory affidavit and other submissions failed to raise a triable issue of fact, the complaint was properly dismissed.

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

ENTERED: FEBRUARY 6, 2014

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

11385 The People of the State of New York, Dkt. 18508C/10
Respondent,

-against-

Jean Azor,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered September 12, 2011, convicting defendant, after a nonjury trial, of two counts of attempted assault in the third degree, and sentencing him to concurrent terms of 45 days, affirmed.

According to their testimony at the *Wade* hearing, on February 3, 2010, two Rikers Island correction officers directed an inmate who was giving them a hard time to go into one of the "pens." At that point, defendant, who was in the "search pen," called out, "That's my Muslim brother," and forcefully pushed open the pen's gate, striking one of the officers with it. A physical altercation ensued, during which defendant repeatedly punched both officers.

One of the officers sounded his alarm and the probe team

arrived almost immediately. Defendant was subdued, handcuffed and detained at the scene. No other inmates were involved in the altercation, which lasted approximately one minute. According to the trial testimony, once defendant was subdued he was taken into a bus to have his picture taken for the record.

On February 9, 2010 and March 11, 2010 respectively, the two officers that defendant punched identified him in separate photographic arrays. One of the officers testified that he had seen defendant on at least two occasions prior to the February 3rd incident, when logging defendant in and out for a court appearance. The other stated that he must have seen defendant before the incident, but that he "never had an interaction like that with him where he would stand out in my head." On March 23, 2010, defendant was formally charged by a criminal complaint.

Under these circumstances, the court properly denied defendant's motion to suppress the identification testimony because of the alleged suggestiveness of the photo array identification procedure. Since the officers were the victims of the assault and participated in subduing defendant at the scene during the face-to-face altercation, which did not involve any other inmates, the identifications were confirmatory in nature and there is no substantial likelihood of a misidentification or of an in-court identification influenced by the photographic

array procedure. Although the concurrence is correct that defendant was not formally charged until approximately seven weeks after the incident, there was no intervening break between the offense and defendant's apprehension and detention, and as the court implicitly found, the identifications were supported by an independent source. Indeed, as the court observed, it was arguably not even necessary to conduct an identification procedure since the victims of the alleged crimes took defendant into custody during the course of the underlying assault. This fact pattern differs fundamentally from one in which an individual commits a crime and a defendant, who is later arrested, is subsequently identified as that individual in a police-arranged procedure.

Defendant's claim that the evidence was legally insufficient is unpreserved (*see People v Gray*, 86 NY2d 10 [1995]) and we decline to review it in the interest of justice. As an alternative holding, we find that when the evidence is viewed in the light most favorable to the prosecution, a rational trier of fact could have found that defendant's guilt was proved beyond a reasonable doubt (*see People v Bleakley*, 69 NY2d 490 [1987]). Nor is the verdict against the weight of the evidence. To the extent defendant identifies discrepancies in the testimony of prosecution witnesses, they are relatively minor and the court

was entitled to credit the officers' testimony over that of the defense witness (*id.* at 495).

Defendant's argument that the court violated his rights under the Confrontation Clause when it prohibited cross-examination of the correction officers about prior excessive force investigations conducted against them is unpreserved (*see People v Brown*, 254 AD2d 75 [1st Dept 1998], *lv denied* 92 NY2d 980 [1998]) and we decline to review it in the interest of justice. As an alternative holding, we find that defendant's contentions are without merit. The court properly allowed the defense to engage in good faith cross-examination of the officers regarding any specific allegation of excessive force, while prohibiting questioning regarding the fact that investigations were conducted that did not result in determinations of wrongdoing, or regarding civil settlements that established no specific link to misconduct by the officers.

All concur except Richter, J. who concurs in a separate memorandum as follows:

RICHTER, J. (concurring)

I write separately because I would affirm the court's finding that the identification procedures were not suggestive. I agree with the majority's recitation of the facts surrounding defendant's alleged assault on the officers, and therefore need not repeat those facts here. However, the record does not establish what happened after defendant was handcuffed. Nor does it establish that an identification was made by either officer at that time. Officer Anthony testified that he immediately left the area after defendant was subdued, and Officer Peluso gave no testimony about what occurred following the alleged assault.[2] Furthermore, defendant was not arrested until seven weeks later, and the arresting officer was not called as a witness at the suppression hearing. Nor did any members of the probe team who entered after the assault testify at the hearing. Thus, there was a significant period of time between the incident, the identification procedures and the arrest, and we must address the alleged suggestiveness of the photo arrays that were shown to the officers (*see e.g. People v Garner*, 71 AD3d 491 [1st Dept 2010], *lv denied* 14 NY3d 888 [2010]).

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[2] The majority impermissibly relies on trial testimony that defendant was taken onto a bus to have his picture taken after the incident. No such evidence was presented at the suppression hearing. Nor was there evidence at the hearing that any picture was shown to either of the victim officers on the day of the assault.

Although the motion court did not use the word "suggestiveness" in its decision, it is apparent that the court made a finding that the procedures used did not taint the in-court identifications. Neither the composition of the photo arrays nor the conduct of the officers overseeing the procedures created "a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Although the background of defendant's photograph is slightly lighter than some of the other individuals in the array, Officer Anthony testified that the original array he viewed was "lighter" and Officer Peluso recalled his original array as being "clear." Nothing was said by the officer who administered the photo array that would have led the viewing officers to pick out defendant. Thus, the motion to suppress was properly denied.

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

ENTERED: FEBRUARY 6, 2014

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

11504-
11505 The People of the State of New York,
Respondent,

-against-

Mesias Pina,
Defendant-Appellant.

Ind. 470/06

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Appeals from judgment, Supreme Court, Bronx County (Catherine M. Bartlett, J.), rendered June 4, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of one year, and order, same court (Doris M. Gonzalez, J.), entered May 1, 2012, which denied defendant's CPL 440.10 motion to vacate the judgment, held in abeyance, and the matter remitted to Supreme Court for an evidentiary hearing to determine if defendant was denied effective assistance of counsel.

The motion court erred in deciding defendant's CPL 440.10 motion without conducting a hearing because there are factual questions as to counsel's mental acuity during the time immediately proceeding defendant's plea and at the time of the

plea. The record demonstrates that, prior to his plea in June 2008, defendant raised issues regarding counsel's competence. This Court later suspended counsel from the practice of law due to mental illness, noting that he "exhibited symptoms of mild cognitive impairment in February 2008 which have since resulted in a diagnosis of Alzheimer's disease" (*Matter of Kalina*, 78 AD3d 92, 93 [1st Dept 2010]). Although the suspension of an attorney due to mental illness "does not itself establish that every representation of a criminal defendant by that attorney during the time period giving rise to the suspension was necessarily ineffective," (*People v Lopez*, 298 AD2d 114, 117 [1st Dept 2002], *lv denied* 99 NY2d 616 [2003]) the concerns raised by defendant present questions of fact regarding counsel's ability, thereby necessitating a hearing.

Further, having reviewed counsel's medical records, furnished previously by counsel to the Departmental Disciplinary Committee, we note they may contain information relevant to

defendant's claims. Thus, the medical records shall be made available for the purpose of determining former counsel's competence at the time he represented defendant. The parties shall contact the Appellate Division to obtain the records.

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11665 The People of the State of New York, Respondent, Ind. 3237/07

-against-

Nadine Panton, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J. at hearing; Ann M. Donnelly, J. at jury trial and sentencing), rendered December 21, 2010, convicting defendant of murder in the second degree and robbery in the second degree, and sentencing her to an aggregate term of 25 years to life, unanimously modified, on the law, to the extent of vacating the DNA databank fee, and reducing the amounts of the mandatory surcharge and crime victim assistance fees from $250 and $20 to $200 and $10, respectively, and otherwise affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

The record supports the court's determination that defendant's statements were voluntary and not the product of

coercion. Defendant did not preserve her argument that the statements she made after receiving *Miranda* warnings should have been suppressed as the product of custodial interrogation before the warnings were administered (*see e.g. People v Medina*, 93 AD3d 459 [1st Dept 2012], *lv denied* 19 NY3d 999 [2012]), and we decline to reach the issue in the interest of justice. As an alternative holding, we find that suppression was not warranted. Even assuming that the detective's display to defendant of a crime scene photograph of the murder victim, shortly before giving the warnings, constituted the functional equivalent of interrogation, defendant made no incriminating statements until after the warnings were administered, and her post-*Miranda* statements were attenuated from the display of the photo (*see People v White*, 10 NY3d 286 [2008]).

Defendant's arrest did not violate *Payton v New York* (445 US 573 [1980]), as the record demonstrates that the detectives entered defendant's apartment with her consent. Since the detectives did not mention a probation warrant until after defendant had already let them into her apartment, and since the warrant was not the basis for defendant's arrest, the fact that the warrant proved to be invalid does not affect any Fourth Amendment issue in this case.

Defendant's ineffective assistance of counsel claim, based

on counsel's failure to preserve the *Miranda* issue, is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing defendant's sentence.

As the People concede, since defendant committed the crime before the effective dates of legislation increasing the mandatory surcharge and crime victim assistance fees, and imposing a DNA databank fee, defendant's sentence must be modified accordingly.

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11667 Luis Berrios, Index 302618/08
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant,

Consolidated Edison Company of
New York, Inc., et al.,
Defendants,

Tri-Messine Construction Co.,
Defendant-Respondent.

[And a Third-Party Action]

_____

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for appellant.

Lefkowicz & Gottfried, LLP, New York (Eric J. Gottfried of counsel), for Luis Berrios, respondent.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for Tri-Messine Construction Co., respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 22, 2011, which denied defendant City of New York's motion for summary judgment dismissing the complaint and cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Eight days before plaintiff's accident, a City highway inspector employed by the Department of Transportation prepared a

Highway Inspection and Quality Assurance Report identifying a two-inch-deep defect in the street at the location of the accident, and issued a Corrective Action Request for repairs. These documents constitute a "written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition," i.e., one of the three alternative prerequisites to bringing an action against the City for personal injuries caused by a defect in the public street (*see* Administrative Code of City of NY § 7-201[c][2]; *Bruni v City of New York*, 2 NY3d 319 [2004]). However, the same provision of the Administrative Code also provides the City with a 15-day grace period within which to repair or otherwise render safe the defective condition (§ 7-201[c][2]). Since the "written acknowledgement" was received by the City only eight days before the accident, this action may not be maintained against the City.

Plaintiff has identified no circumstances warranting an exception to the notice requirement of the Administrative Code or

the 15-day grace period (*see Walker v City of New York*, 34 AD3d 226 [1st Dept 2006]; *Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166 [1st Dept 2003]; *compare Kelly v City of New York*, 172 AD2d 350 [1st Dept 1991]).

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11668 The People of the State of New York, Ind. 6218/10
Respondent,

-against-

Vicki Turini,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about November 3, 2011, 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: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11672-
11673 In re Estefania S., and Another,

Children Under Eighteen Years
of Age, etc.,

Orlando S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Michael J. Balch, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about December 7, 2012, insofar as it found that respondent sexually abused the subject child Estefania S. and derivatively abused the subject child Allinson S., unanimously affirmed, without costs. Appeal from that portion of the order which released the subject children to their mother, and placed respondent under the supervision of the Administration for Children's Services for a period of one year, and imposed certain conditions for one year, unanimously dismissed, without costs, as moot. Appeal from order of protection, same court and Judge, entered on or about December 7,

2012, which directed respondent to stay away from and not communicate with the children for a period of one year, unanimously dismissed, without costs, as moot.

The Family Court's determination that respondent sexually abused Estefania is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *see Matter of Sade B. [Scott M.]*, 103 AD3d 519, 520 [1st Dept 2013]). The court properly found that Estefania's detailed out-of-court statements were sufficiently corroborated by the testimony of her psychotherapist that she suffers from post-traumatic stress disorder and other symptoms consistent with sexual abuse, including nightmares and suicidal ideation, her sister's out-of-court statements to the caseworker, and the caseworker's testimony (*see In re Anahys V. [John V.]*, 68 AD3d 485 [1st Dept 2009], *lv denied* 14 NY3d 705 [2010]). There is no reason to disturb the court's evaluation of the evidence, including its credibility determinations, which are supported by the record (*Matter of Sade B. [Scott M.]*, 103 AD3d at 520).

The court properly drew the strongest negative inference from respondent's failure to testify (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]).

The finding of derivative abuse is supported by the finding that respondent sexually abused the older daughter since his

actions "showed a fundamental defect in understanding his parental obligations" (*id.*). Moreover, Allinson's out-of-court statements that respondent had requested massages from her, in light of Estefania's statements that he had initiated some incidents of sexual abuse by asking for back massages, at roughly the same age, provide further support for the finding of derivative abuse.

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

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11674 The People of the State of New York, Respondent, Ind. 8544/00 165/01

-against-

Adolphus Cooper, Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 18, 2012, resentencing defendant, as a second violent felony offender, to concurrent terms of 22 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11675 Maria Teresa Bacani, etc., et al., Index 118041/05
Plaintiffs-Appellants,

-against-

Lisa Rosenberg, M.D.,
Defendant-Respondent,

Deepak Nanda, M.D., et al.,
Defendants.

_____

Bubb, Grogan & Cocca, LLP, New York (Christopher L. Deininger of counsel), for appellants.

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Gerard S. Rath of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 10, 2012, which, upon renewal, granted the motion of defendant Lisa Rosenberg, M.D. for summary judgment dismissing the complaint as against her, unanimously affirmed, without costs.

Plaintiff mother delivered a stillborn fetus 10 days after fetal demise was diagnosed in the 35th week of gestation. Defendant Rosenberg was plaintiff mother's obstetrician, and had referred the mother to Dr. Deepak Nanda, a perinatologist. In *Bacani v Rosenberg* (74 AD3d 500 [1st Dept 2010], *lv denied* 15 NY3d 708 [2010]), this Court dismissed the action as against Dr. Nanda, finding that plaintiffs had not raised a triable issue of

fact as to whether Nanda departed from accepted medical practice, and whether such departure was a competent producing cause of the fetus's death (*id.* at 502-503); Rosenberg did not appeal from Supreme Court's denial of her motion for summary judgment.

Upon renewal, the motion court properly dismissed the action as against Rosenberg. As this Court previously found, the opinions of plaintiffs' expert, Dr. Harrigan, failed to raise a triable issue, and plaintiffs' submission of an attorney-drafted CPLR 3101(d) expert disclosure averring that an expert pathologist would testify concerning causation is not evidentiary proof in admissible form sufficient to defeat the subject motion for summary judgment (*see e.g. Velasco v Green-Wood Cemetery*, 48 AD3d 271, 272 [1st Dept 2008]). Furthermore, plaintiffs' argument that the claims against Nanda and Rosenberg differ is unavailing because, if Dr. Nanda was not negligent in failing to order additional testing, Dr. Rosenberg could not be negligent in

failing to ask Dr. Nanda to order such testing.

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

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11677 320 West 13th Street, LLC, Index 603730/07
Plaintiff-Respondent,

-against-

Wolf Shevack, Inc., et al.,
Defendants,

Amalgamated Technologies, Inc., et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about May 21, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 22, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11678 In re Frank Lepore, Petitioner, Index 115782/10

-against-

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

Law Office of James R. Cullen, Kew Gardens (James R. Cullen of counsel), for petitioner.

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

Determination of respondent New York City Police Department, dated August 5, 2010, which revoked petitioner's Carry Business handgun license, 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 [Manuel J. Mendez, J.], entered May 16, 2011), dismissed, without costs.

Respondent's determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Petitioner conceded at the administrative hearing that he failed to immediately notify the License Division of his arrest (*see* 38 RCNY 5-30[a], [c][1] and [d]; *Matter of Broadus v City of N.Y. Police Dept. [License Div.]*, 62 AD3d 527, 528 [1st Dept 2009]), and that during the altercation with the restaurant parking attendant, he publicly

displayed his handgun after unholstering it (*see* 38 RCNY 5-22[a][11], [b][5], and 5-30[b][7]). Petitioner also failed to notify the License Division when an order of protection was issued against him (*see* 38 RCNY 5-30[c][5]; *Matter of Logan v Kelly*, 89 AD3d 602 [1st Dept 2011]), and of his change of address within 10 calendar days after the change became effective (38 RCNY 5-22[c][2]; 5-29[a][1][I]; *see Matter of Papaioannou v Kelly*, 14 AD3d 459, 460 [1st Dept 2005]). There exists no basis to disturb the credibility determinations of the Hearing Officer (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11679 The People of the State of New York, Respondent, Ind. 3427/06

-against-

Robert Symonds, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J. at dismissal motion; Peter Benitez, J. at jury trial and sentencing), rendered November 17, 2009, convicting defendant of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's assertion that the DNA evidence against him could have been the product of crime scene contamination is speculative. Moreover, there was additional circumstantial evidence connecting defendant to the crime.

After a thorough hearing, the motion court properly declined to dismiss the indictment on the ground of prearrest delay (*see People v Taranovich*, 37 NY2d 442, 445 [1975]). Although the

delay was lengthy, it was satisfactorily explained and was a permissible exercise of prosecutorial discretion (*see People v Decker*, 13 NY3d 12 [2009]). We find defendant's claim that he was prejudiced by the delay unpersuasive.

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11680-
11681 Index 101115/11

Eileen Robert,
Plaintiff-Appellant,

-against-

Stephanie R. Cooper, P.C., etc.,
et al.,
Defendants-Respondents.

Codispoti & Associates, P.C., New York (Bruno F. Codispoti of counsel), for appellant.

Law Offices of Theodore P. Kaplan, New York (Theodore P. Kaplan of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered April 18, 2012, as amended by order entered June 21, 2012, which, to the extent appealed from, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

At issue is the second of two actions between the parties stemming from a former attorney-client relationship. In the first action, plaintiff's attorney sued her for breach of contract and account stated, seeking attorneys' fees. In the second action, plaintiff asserts claims of fraud and a violation of Judiciary Law § 487, based on allegations that the underlying retainer agreement was fraudulent and forged, that fraudulent invoices were presented to the court and jury in the first

action, that she was at times double-billed for legal services by defendants, and that her attorney committed perjury in the first action. Thus, plaintiff's claims arose from the same transaction as that underlying the first action. As the motion court noted, plaintiff's claims regarding the retainer agreement and invoices address the "core" of the litigation in the first action for attorney's fees and thus should have been raised in that action. They are thus barred by res judicata principles (*see Matter of Josey v Goord*, 9 NY3d 386, 389-390 [2007]; *Marinelli Assoc. v Helmley-Noyes Co.*, 265 AD2d 1, 5-6 [1st Dept 2000]; *see also Smith v Russell Sage Coll.*, 54 NY2d 185, 192 [1981]).

Moreover, with the sole exception of the alleged forgery of one of the retainer agreements, which plaintiff had a full and fair opportunity to litigate but due to her own oversight did not litigate, the issue of fraud was litigated and was necessarily decided by the jury in reaching its damages calculation. Plaintiff is thus collaterally estopped to re-litigate those claims (*Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]).

While the trial in the first action was limited to damages, contrary to plaintiff's contentions, the jury's calculation was not merely "mathematical" in light of the evidence that she was permitted to present. In calculating the total damages, the jury

necessarily had to consider and reject plaintiff's arguments that certain invoices were manufactured or altered and had to make a determination as to the credibility of her former attorney, defendant Stephanie Cooper, in connection with any perjury allegation.

While plaintiff claims that the court's in limine ruling at trial, which on its face prohibited her from impugning Cooper's character at trial or challenging her own liability to pay for the legal services rendered, the complaint in the second action belies her claim, since it contains no other allegations than those she fully litigated in the trial of the first action. Furthermore, the transcript makes clear that she was able to present extensive evidence of these claims in her defense.

Moreover, it is apparent that plaintiff's complaint stems entirely from fraud allegedly committed in connection with the first action, and thus amounts to an impermissible collateral attack on the first judgment (*Matter of New York Diet Drug Litig.*, 47 AD3d 586 [1st Dept 2008]; *Rivero v Ordman*, 277 App Div 231 [1st Dept 1950]).

Contrary to plaintiff's assertions, the motion court cited and applied the correct standard of review, and properly rejected as incredible plaintiff's claims that she did not scrutinize the retainer agreement and discover the forgery and any related

fraudulent conduct during the trial in the first action. As the court noted, that retainer agreement was the entire basis of the first action. Furthermore, plaintiff's claim that she did not scrutinize the agreement sooner due to her wholesale trust of Cooper, a former long-time friend, seems to us similarly incredible, given that plaintiff's purported long-time friend had by that time withdrawn as counsel from her case, had, by plaintiff's allegations, betrayed confidences in the underlying litigation, had sued plaintiff, and had affirmatively sought to prevent plaintiff from attacking her character.

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11682 The People of the State of New York, Ind. 2565/02
Respondent,

-against-

Joseph Johnson,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 29, 2012, resentencing defendant to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: FEBRUARY 6, 2014

CLERK

Sweeny, J.P., Andrias, Richter, Clark, JJ.

11683N-
11684N-
11685N-
11686N

Index 500155/10

In re Marc A. Landis, Temporary Guardian of the Property for the Appointment of Guardian for Lea C. Debora, also known as Claire Hillel, etc.

- - - - -

Marc A. Landis,
Petitioner-Respondent,

David Debora,
Cross-Petitioner-Appellant,

Lea C. Debora,
Respondent-Respondent, AIP,

Barbara H. Urbach Lissner, as Co-Guardian of the Person and the Property of Lea Debora,
Respondent.

_____

Anderson Kill & Olick, P.C., New York (Jerry S. Goldman of counsel), for appellant.

Phillips Nizer, LLP, New York (Elizabeth A. Adinolfi of counsel), for Marc A. Landis, respondent.

Keane & Beane, P.C., White Plains (Christopher J. Aventuro of counsel), for Lea C. Debora, respondent.

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

_____

Appeal from order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered March 12, 2012, insofar as it granted an application by petitioner-temporary guardian of the "person in

need of a guardian" (PING) for interim legal fees, and awarded said counsel (Phillips Nizer, LLP) fees and disbursements, unanimously dismissed, without costs, for lack of standing. Order and judgment (one paper), same court and Justice, entered July 20, 2012, which, inter alia, appointed cross-petitioner as one of two co-guardians of the person and property of the PING, his mother, respondent Lea Debora, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 18, 2012, which denied cross-petitioner's motion to reargue the July 20, 2012 order and judgment, unanimously dismissed, without costs, as taken from a nonappealable order. Order, same court and Justice, entered February 20, 2013, which denied cross-petitioner's motion for authorization to retain specified attorneys as counsel to represent him in his capacity as co-guardian of the person and property of his mother, unanimously affirmed, without costs.

Dismissal of the cross-petitioner's appeal from the order entered March 12, 2012 is warranted for lack of standing. The cross-petitioner was not appointed as a co-guardian of his mother's property until July 20, 2012, subsequent to entry of the fee award order now challenged. Moreover, cross-petitioner had no direct interest in whether or not petitioner's court-authorized counsel was paid, or whether such fees would be paid

from his mother's substantial estate. Cross-petitioner was not "aggrieved" (CPLR 5511), as he did not stand to be directly affected by the interim fee award. "That 'the adjudication "may remotely or contingently affect interests which the party represents does not give it a right to appeal"'" (*State of New York v Phillip Morris Inc.*, 61 AD3d 575, 578 [1st Dept 2009], *appeal dismissed* 15 NY3d 898 [2010]).

Cross-petitioner's argument, inter alia, that "errors" in the judgment warranted its vacatur is unavailing, inasmuch as certain provisions that cross-petitioner sought to be included in the judgment would entitle him to, inter alia, immediate receipt of assets belonging to his mother, despite her express wishes otherwise. We find the record amply supports the discretion of the trial court to utilize petitioner's proposed order and judgment, as modified by the court, to define the terms of the co-guardianship appointments.

The trial court also properly exercised its discretion in denying cross-petitioner's motion for authorization to retain specified counsel to represent him in his co-guardian capacity given, inter alia, said counsel's history of representing cross-petitioner in litigation that was adverse to his mother's interests, their tendency to engage in burdensome litigation, and their receipt of fees paid by cross-petitioner, without court

approval, from assets that his mother legally controlled.

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

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

ENTERED: FEBRUARY 6, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10913-
10914 Nancy Perez, et al.,
Plaintiffs-Appellants,

-against-

Jane M. Fitzgerald, D.C., et al.,
Defendants-Respondents.

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Sullivan Papain Block McGrath & Cannavo, P.C., New York (Susan M. Jaffe of counsel), for appellants.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 12, 2012, and bringing up for review an order, same court and Justice, entered August 22, 2012, reversed, on the law, without costs, and the cross motion denied, and the verdict reinstated. The appeal from the aforementioned order, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Sweeny, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Sallie Manzanet-Daniels, JJ.

10913-10914
Index 305261/09

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Nancy Perez, et al.,
Plaintiffs-Appellants,

-against-

Jane M. Fitzgerald, D.C., et al.,
Defendants-Respondents.

_____x

Plaintiffs appeal from the judgment of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 12, 2012, dismissing the complaint, and bringing up for review an order, same court and Justice, entered August 22, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' cross motion to set aside the verdict on the ground that plaintiffs' claims were time-barred.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Susan M. Jaffe and Stephen C. Glasser of counsel), for appellants.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for respondents.

SWEENY, J.

This issue before us is whether the 2½ year time limitation in which to commence medical, dental or podiatric malpractice actions set forth in CPLR 214-a applies to chiropractic malpractice actions. For the reasons stated herein, we hold that it does not.

In May 2005, plaintiff was involved in a car accident. She presented to defendant Jane Fitzgerald, D.C., complaining of pain in her neck radiating down to the arms. Dr. Fitzgerald ordered an MRI on May 24, 2005. Dr. Fitzgerald testified that she read and relied on the radiologist's report, but did not personally review plaintiff's MRI films. The radiologist's report, which Dr. Fitzgerald received on May 25, 2005, stated that plaintiff had a number of herniated or bulging discs in her neck. There was no indication in that report that the MRI showed a tumor in plaintiff's spine. The failure to diagnose this condition is the gravamen of this action.

In July 2006, over four visits, Dr. Fitzgerald again treated plaintiff for complaints of neck pain and bilateral hand numbness. During these visits, Dr. Fitzgerald adjusted plaintiff's neck; however, she did not order another MRI.

From February 2005 through April 2007, plaintiff was also seeing various physicians with complaints of hyperthyroidism,

high blood pressure and cholesterol, as well as yearly well-care visits with her primary physician. Plaintiff did not tell any of these physicians about her back and neck pain, and hand tingling and numbness. She testified that she considered Dr. Fitzgerald, her chiropractor, for treatment of those issues.

In mid-late 2007, plaintiff saw a new chiropractor, a Dr. Senzamici, with the same complaints of back and neck pain and hand tingling and numbness. Since her condition was not improving, Dr. Senzamici recommended plaintiff see an orthopedist. Plaintiff asked her primary care physician for a referral and also requested that she order an MRI to bring with her to the new doctor.

This second MRI was taken in 2008, and plaintiff brought it to Dr. Olsewski, an orthopedic surgeon. Dr. Olsewski advised plaintiff that she had a tumor in her spine and recommended that she see a neurosurgeon immediately. She subsequently underwent surgery by Dr. Tabaddor.

Thereafter, an action was commenced against Dr. Fitzgerald alleging chiropractic malpractice. The verified complaint, filed in the Bronx County Clerk's office on June 29, 2009 alleges that defendant treated plaintiff continuously during the period commencing February 7, 2005 through April 20, 2007. The verified complaint further alleges that defendant departed from good and

accepted standards of chiropractic practice by, inter alia, failing to exercise the degree of care, professional knowledge and training generally used by chiropractors in the communityin the treatment of plaintiff; failing to properly follow up in the treatment of plaintiff; failing to order the appropriate diagnostic studies (i.e., a second MRI); failing to render a proper and timely diagnosis of plaintiff's condition (i.e., the tumor on plaintiff's spine); improperly performing chiropractic manipulation procedures; and improperly providing chiropractic care and treatment of plaintiff. The action was brought beyond the CPLR 241-a limitation period of 2½ years, but within the three-year limitation of CPLR 214(6).

At the close of plaintiff's case, and again after trial, defendant moved to dismiss the complaint as time-barred, arguing the limitation period of CPLR 214-a was applicable to this action. The court reserved decision for posttrial briefing. The jury found that defendant departed from accepted chiropractic practices by failing to refer plaintiff for a second MRI in July 2006.

Thereafter, defendant renewed her motion to dismiss, arguing that the shortened 2½ year statute of limitations of CPLR 214-a has been applied to other healthcare providers, such as nurses and physical therapists and should also be applied to

chiropractors. The trial court granted defendant's motion and dismissed the complaint.

CPLR 214-a provides that "[a]n action for medical, dental or podiatric malpractice" must be commenced within 2½ years of the alleged negligent act or omission. All other professional malpractice actions are governed by the three-year statute of limitations found in CPLR 214(6). CPLR 214-a was originally enacted in 1975 as part of a comprehensive plan amending the Public Health Law, Insurance Law, Worker's Compensation Law, Judiciary Law, Education Law, CPLR and Business Corporation Law. This was done in response to concerns about the high cost and potential unavailability of medical malpractice insurance in New York State (Memorandum of State Executive Department, 1975 McKinney's Session Laws of NY, at 1601-1602). Its enactment reduced the time for bringing a medical malpractice action from three years to 2½ years. The term "medical malpractice" was not defined in the new statute.

In 1985, the Court of Appeals in *Bleiler v Bodnar* (65 NY2d 65 [1985]) addressed the issues of whether, and under what circumstances, hospitals and nurses fall within the purview of "medical malpractice" and can thus obtain the benefit of the truncated statute of limitations. The Court established the now well-settled rule that a negligent act or omission by a health

care professional may receive the benefit of the shortened limitations period if such professional was engaged in conduct "that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician" (*id.* at 72).

After *Bleiler* was decided, the Legislature twice amended CPLR 214-a to extend the protection of the shorter limitations period to actions for "dental malpractice" (1985) and "podiatric malpractice" (1986). There have been no further amendments.

The issue as to what categories of health-related activities constitutes "medical treatment" or bears a "substantial relationship to the rendition of medical treatment by a licensed physician" under the standard established in *Bleiler* was addressed by the Court of Appeals in *Karasek v LaJoie* (92 NY2d 171 [1998]), in which the Court rejected the expansive definition of the "practice of medicine" contained in Education Law § 6521[1] as a basis for deciding whether the treatment in question was medical, stating that to do so would "lead to widely overinclusive results" (*id.* at 175). In holding that "absent legislative clarification," licensed psychologists do not provide

[1]Education Law § 6521 defines the practice of medicine as "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition."

"medical services" within the meaning of *Bleiler*, the Court adopted a restrictive approach to the application of the shortened statute. Relying in part on the legislative history of CPLR 214-a, the Court concluded that the legislature's intent in enacting the statute was to provide "the named professionals with an added litigation advantage in order to combat unreasonable increases in malpractice rates" (*id.* at 177-178). The Court made clear, however, that its conclusion was based in large part on the nature of the mental health services provided in that case, and specifically stated that its conclusion did not impair the holding in *Bleiler* that, "in the area of somatic health care professionals other than licensed physician may be liable for 'medical malpractice' within the meaning of CPLR 214-a" (*id.* At 177).

Further demonstrating the restrictive approach to the application of CPLR 214-a, the Second Department has held that the practice of optometry does not constitute the practice of medicine (*Boothe v Weiss*, 107 AD2d 730, 730 [2d Dept 1985]; *see also Robinson v Meca*, 214 AD2d 246, 248-249 [2d Dept 1995]).

Prior to *Bleiler,* the few cases that addressed the issue of whether chiropractic malpractice falls within the ambit of

medical malpractice found that it did not (*see Faden v Robbins* 88 AD2d 631 [2d Dept 1982] [holding that an action predicated on chiropractic malpractice is not a "medical malpractice action" for purposes of convening a medical malpractice panel]; *Vidra v Shoman*, 59 AD2d 714, 715 [2d Dept 1977] ["chiropractic treatment is a service distinct from medicine, and that chiropractors do not practice medicine"]; *Rivera v City of New York*, 150 Misc2d 566 [Sup Ct, NY County 1991] [chiropractic expert's name need not be disclosed, since "[a]n action predicated on chiropractic malpractice is not a medical malpractice action").

Post *Bleiler*, the one case addressing chiropractic services found that, on the facts of that case, the issue "as to whether defendant's services constituted medical treatment" was a question of fact for the jury (*Foote v Picinich*, 118 AD2d 156, 157 [3d Dept 1986]). *Foote* was premised on the *Bleiler* court's statement that health care providers other than physicians may be liable for medical malpractice. Other courts have found that claims against hospitals and medical corporations based on allegations that physical therapists, technicians, nurses, etc. committed "medical malpractice" fall within the ambit of CPLR 214-a where the treatment rendered by the health care providers was performed at the direction of a physician or pursuant to a hospital protocol which was part and parcel of patient care. In

addition, the alleged injury was found to have occurred during the course of medical treatment or bore a substantial relationship to such treatment pursuant to a referral or prescription from a physician and thus fell within the ambit of CPLR 214-a (*see e.g. Spiegel v Goldfarb*, 66 AD3d 873, 874 [2d Dept 2009], *lv denied* 15 NY3d 975 [2010] [lab services performed at direction of physician held to be "crucial element" of plaintiff's diagnosis and treatment and thus were an "integral part of the process of rendering medical treatment"]; *Ryan v Korn*, 57 AD3d 507, 508 [2d Dept 2008] [burns received by application of heating pad during physical therapy held to be substantially related to her medical treatment; *Meiselman,* 50 AD2d 979 [physical therapist placed plaintiff in a traction device causing permanent injury]; *Pattavina,* 26 AD3d 167 [physical therapist exerted such force to plaintiff's back it herniated a disc]; *Levinson,* 17 AD3d 242 [use of electrical stimulation machine by physical therapist "an integral part of the rendering of professional medical treatment"]; *Wahler* 275 AD2d 906 [physical therapy held to be part of professional medical treatment]; *Pacio v Franklin Hosp.*, 63 AD3d 1130, 1133 [2d Dept 2009] [CPLR 214-a applied where plaintiff alleged that "licensed practical nurses, nursing assistants, patient care assistants, home health aides, and nutritionists" employed by

defendant hospital failed to follow a protocol to prevent pressure ulcers, i.e., a protocol that bore a substantial relationship to the rendition of medical treatment]; *Morales v Carcione*, 48 AD3d 648 [2d Dept 2008] [CPLR 214-a applied where technician employed by physician providing medical treatment for neuropathy); *Meiselman v Fogel*, 50 AD3d 979 [2d Dept 2008], *lv dismissed* 11 NY3d 783 [2008] [214-a applied where claims against physical therapists, including use of machines, and various techniques were held to be an integral part of rendering medical treatment]; *Pattavina v DiLorenzo*, 26 AD3d 167 [1st Dept 2006] [same]; *Levinson v Health S. Manhattan*, 17 AD3d 247 [1st Dept 2005] [same]; *Wahler v Lockport Physical Therapy*, 275 AD2d 906 [4th Dept 2000], *lv denied* 96 NY2d 701 [2001] [same]).

Here, plaintiff was not referred to Dr. Fitzgerald by a licensed physician and Dr. Fitzgerald's chiropractic treatment was not an integral part of the process of rendering medical treatment to a patient or substantially related to any medical treatment provided by a physician. Indeed, plaintiff did not even inform her physicians, including her primary care physician, that she was receiving chiropractic treatment for her neck and back. Further, the record establishes that the treatment provided by Fitzgerald, consisting of adjusting or applying force to different parts of the spine, massages, heat compression, and

manipulation of plaintiff's neck, constituted chiropractic treatment (*see* Education Law § 6551). The fact that defendant provided treatment to the human body to address a physical condition or pain, which may be within the broad statutory definition of practicing medicine (Education Law § 6521), does not, by itself, render the treatment "medical" within the meaning of CPLR 214-a, since the use of such a broad definition would result in the inclusion of many "alternative and nontraditional approaches to 'diagnosing [and] treating . . . human disease'" which are clearly nonmedical in nature (*Karasek v LaJoie*, 92 NY2d at 175; *compare Foote* 118 AD2d 156).

The common thread in the cases finding that CPLR 214-a applies is that the services were provided at the direction or request of a physician who was providing medical treatment to the particular patient, thus meeting the *Bleiler* standard and bringing them within the parameters of CPLR 214-a. Here, there is no doubt that Dr. Fitzgerald's treatment was separate and apart from any other treatment provided by a licensed physician and was not performed at a physician's request. Accordingly, as with the psychologist in *Karasek*, and the optometrist in *Boothe*, defendant is not entitled to invoke the benefit of the shortened limitations period applicable to medical, dental and podiatric malpractice, and is subject to the three-year statute of

limitations of CPLR 214(6). Plaintiff's chiropractic malpractice complaint was therefore timely commenced.

In light of the foregoing, we need not address plaintiff's remaining arguments.

Accordingly, the judgment of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 12, 2012, dismissing the complaint, and bringing up for review an order, same court and Justice, entered August 22, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' cross motion to set aside the verdict on the ground that plaintiffs' claims were time-barred, should be reversed, on the law, without costs, the cross motion denied, and the verdict reinstated. The appeal from the aforementioned order, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: FEBRUARY 6, 2014

CLERK

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

11230 Hilary Kolodin, also known as Hilary Kole,
Plaintiff-Respondent,

-against-

John R. Valenti, etc., et al.,
Defendants-Appellants,

Howard Weiss,
Defendant.

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Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP, New York (Andrea Bierstein of counsel), for appellants.

Lewis and Garbuz, P.C., New York (Lawrence I. Garbuz of counsel), for respondent.

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Amended order, Supreme Court, New York County (Ellen M. Coin, J.), entered April 16, 2013, affirmed, with costs.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Richard T. Andrias
Karla Moskowitz
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

11230
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Hilary Kolodin, also known as
Hilary Kole,
Plaintiff-Respondent,

-against-

John R. Valenti, etc., et al.,
Defendants-Appellants.

Howard Weiss,
Defendant.

_____x

Defendants appeal from the amended order of the Supreme Court, New York County (Ellen M. Coin, J.), entered April 16, 2013, which, inter alia, granted plaintiff's motion for partial summary judgment declaring the recording and management contracts between plaintiff and defendant Jayarvee terminated, and so declared.

Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP, New York (Andrea Bierstein, Paul J. Hanly, Jr. and Jayne Conroy of counsel), for appellants.

Lewis and Garbuz, P.C., New York (Lawrence I. Garbuz, Adina Lewis and Michael Andrews of counsel), for respondent.

ACOSTA, J.P.

This case, apparently one of first impression, aptly illustrates the well-known axiom that cautions against mixing business with pleasure. The question presented is whether a so-ordered stipulation, agreed upon by plaintiff and defendant Valenti in Family Court and which precludes all contact between them except by counsel, renders impossible the performance of two prior contracts between plaintiff and Jayarvee, Inc., Valenti's artist management company. We hold that it does.

Plaintiff is a well-known professional jazz singer. Valenti is the sole shareholder and president of Jayarvee, a corporation that manages musical artists, produces musical recordings, and owns and operates the well-known jazz club Birdland. Plaintiff and Valenti met in 2003 while plaintiff was performing at Birdland, and the two quickly kindled a romantic relationship. By early 2004, plaintiff had moved into Valenti's Manhattan apartment. They became engaged that year, and for some years held themselves out as husband and wife, although they never married. They also developed a professional relationship, many details of which are still at issue in Supreme Court.

By 2011, the couple's personal relationship had deteriorated. Plaintiff alleges that in or about March 2011, Valenti obtained her private electronic materials – in part by

physically overpowering her – and subsequently made repeated threats to release those materials to the public. He allegedly stated that he would ruin plaintiff's professional career and personal life by posting the data on the internet.

Despite the ongoing personal drama between plaintiff and Valenti, their professional relationship continued. Plaintiff and Jayarvee – with Valenti signing as the company's president – entered into a recording contract and a management contract in April 2011 and June 2011, respectively. Plaintiff moved out of their shared residence in May 2011.

Nonetheless, in October 2011, plaintiff commenced a Family Court proceeding in which she sought an order of protection against Valenti. The court granted a temporary order of protection that, inter alia, prevented Valenti from contacting plaintiff, either directly or through third parties. The order was extended on consent several times through June 2012.

Plaintiff commenced the instant action on November 21, 2011 – while the Family Court proceeding was pending – against Valenti, Jayarvee, and plaintiff's accountant, Howard Weiss (who is not a party to this appeal). Among other things, plaintiff sought rescission of the contracts and a declaration that Jayarvee was in breach. In April 2012, defendants answered, Valenti counterclaimed for the return of an engagement ring he

had given to plaintiff, and Jayarvee counterclaimed for breach of the contracts. Defendants then moved for a default judgment against plaintiff for failure to timely respond to the counterclaims; the motion was ultimately denied. In their verified answer, Valenti and Jayarvee – and Valenti, in his affidavit in support of defendants' motion for default – argued that the temporary order of protection had made performance of the contracts impossible.

Plaintiff and Valenti resolved the Family Court matter on June 13, 2012, by entering into a stipulation, so-ordered by the court. Under the terms of the stipulation, plaintiff withdrew her petition without prejudice, and both parties agreed to have no further contact with each other. The stipulation specified that "[n]o contact shall include no third party contact, excepting counsel." Following that provision, there is language, visibly crossed out, that would have allowed for contact by "other individuals at Jayarvee or [Valenti's] place of business."

Thereafter, plaintiff moved for partial summary judgment on her claims for rescission of the contracts. Supreme Court granted the motion and declared both contracts terminated on the ground of impossibility. We now affirm.

"[I]mpossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of

performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). The excuse of impossibility is generally "limited to the destruction of the means of performance by an act of God, *vis major*, or by law" (*407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]).

In this case, performance of the contracts at issue has been rendered objectively impossible by law, since the stipulation destroyed the means of performance by precluding all contact between plaintiff and Valenti except by counsel. Defendants argue that the stipulation precludes only direct contact between plaintiff and Valenti. However, while it may be inartfully drafted, there can be no question that the stipulation precludes contact via third parties as well.

Because of Valenti's central role in the operation of Jayarvee, performance of the contracts would necessarily require his input and, consequently, a violation of the stipulation. The recording and management contracts are for personal services, so they require substantial and ongoing communication between plaintiff and Jayarvee. In his sworn affidavit, Valenti identifies himself as the "sole shareholder and President" of

Jayarvee. Moreover, Jayarvee is a relatively small organization, with approximately 40 employees, and Valenti concedes that he "oversee[s] [the employees] in their day-to-day activities for the corporation." Of course, employees of Valenti's company are third parties who fall within the ambit of the stipulation's "no contact" provision. For Jayarvee to perform the contracts – or, for that matter, for plaintiff to perform – the company's employees would need to serve as conduits for communications to plaintiff that originated with Valenti. That result would clearly violate the stipulation's prohibition of third-party contact.

It is true that Jayarvee is not a party to the stipulation, and Valenti is not a party to the contracts. Practically speaking, however, Jayarvee's employees answer to Valenti, and the company's decisions are ultimately made by Valenti. It would be impossible for Jayarvee, without Valenti's input, to engage in communication with plaintiff. It is of no moment that Jayarvee *could* hypothetically perform the contracts absent Valenti's involvement; to do so would require a sort of firewall, the very establishment of which would necessitate (direct or indirect) communication between Valenti and plaintiff. Valenti's own admissions as to his role managing Jayarvee compel the conclusion that the contracts could not be performed without his involvement

and, thus, without violating the stipulation.

Moreover, there was an attempt in Family Court to exempt Jayarvee's employees from the "no contact" provision. As originally drafted, the stipulation included language that would have permitted communication by "other individuals at Jayarvee or [Valenti's] place of business" in addition to communication by counsel. However, the court struck that language, and plaintiff and Valenti agreed to the stipulation without it. Valenti evidently understood that the stipulation precluded contact between plaintiff and employees of Jayarvee and that, without an exception permitting such contact, the contracts could not be performed.

Indeed, defendants have previously acknowledged that the doctrine of impossibility applies to the contracts here. Valenti admitted in his sworn affidavit that the temporary order of protection – an order that was essentially identical to the stipulation in its preclusion of third-party contact – made performance by Jayarvee impossible. Jayarvee and Valenti admitted the same in their verified answer. Defendants are correct that judicial estoppel is inapplicable here, since Valenti did not secure a judgment in his favor based on his prior statements (*see All Terrain Props. v Hoy*, 265 AD2d 87, 93 [1st Dept 2000]). However, while Valenti is free to argue that

performance is possible, he cannot create an issue of fact by contradicting his prior sworn statement (*see Garber v Stevens*, 94 AD3d 426, 427 [1st Dept 2012]).

Furthermore, contrary to defendants' contention, plaintiff's role in bringing about the stipulation does not render the impossibility doctrine inapplicable. That plaintiff unilaterally obtained the temporary order of protection is irrelevant, because Valenti consented to the stipulation, which essentially operates in its place. Plaintiff did not unilaterally control the means by which the impossibility was created (*see Cushman & Wakefield v Dollar Land Corp. [US]*, 36 NY2d 490, 496 [1975] [dissenting shareholders who obtained injunction precluding sale of corporation, and later gained control over corporation, could not rely on injunction to declare sale of corporation impossible because they had power to dissolve injunction]). Further, this Court is unaware of any case that has considered a situation where, as here, the party who initially sought the order that caused the impossibility was compelled to do so by the alleged domestic abuse of her partner.

Nor, as defendants contend, was it foreseeable at the time of contracting that plaintiff and Valenti would enter into an agreement to bar contact between each other (*cf. Kel Kim*, 70 NY2d at 902). Valenti argues that the breakdown of his

relationship with plaintiff constituted the grounds of impossibility on which plaintiff relies, and that the breakdown was foreseeable. Rather, the *stipulation* is what makes performance of the contracts impossible. Absent the stipulation (and the temporary order of protection that preceded it), Jayarvee and plaintiff could have lawfully performed the contracts despite plaintiff and Valenti's strained relationship, but when the Family Court so-ordered the stipulation to which Valenti and plaintiff assented, performance of the contracts between Jayarvee and plaintiff became legally and objectively impossible. Even if plaintiff could have foreseen that her relationship with Valenti would continue to deteriorate, it was not foreseeable that she and Valenti would enter into the stipulation.

Consequently, the stipulation is not something that the parties could have contracted around (*cf. Kel Kim*, 70 NY2d at 902). Nor, assuming arguendo that plaintiff's allegations are true, is domestic abuse something that, as a public policy matter, parties should be expected to contract around. In *Kel Kim*, the Court of Appeals held that performance of a lease agreement was not excused by impossibility where the lessee failed to obtain the contractually required amount of liability insurance, because Kel Kim's "inability to procure and maintain

requisite coverage could have been foreseen and guarded against when it specifically undertook that obligation in the lease" (*id.*). Here, by contrast, in undertaking to perform recording and management contracts, the eventuality that the parties would subsequently stipulate to forbid contact with one another could not have been foreseen or guarded against.

Accordingly, the amended order of the Supreme Court, New York County (Ellen M. Coin, J.), entered April 16, 2013, which, inter alia, granted plaintiff's motion for partial summary judgment declaring the recording and management contracts between plaintiff and defendant Jayarvee terminated, and so declared, should be affirmed, with costs.

All concur.

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

ENTERED: FEBRUARY 4, 2014

CLERK