SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 26, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, Sweeny, Manzanet-Daniels, JJ.

6391 In re Jerry Delakas, Index 100739/11
Petitioner-Appellant,

-against-

Jonathan Mintz, etc.,
Respondent-Respondent.

Santamarina & Associates, New York (Gil Santamarina of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alyse Fiori of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered April 4, 2011, which denied the petition and dismissed a CPLR article 78 proceeding to annul and vacate respondent's determination, dated January 6, 2011, denying petitioner's application to renew a license to operate an existing newsstand, affirmed, without costs.

Respondent's determination that petitioner does not qualify for a license pursuant to 6 RCNY § 2-64(a)(12) has a rational basis (*see Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 [2010]). As the dissent

points out, 6 RCNY § 2-64(a)(12) mandates three requirements that must be met before a license to operate a newsstand may be assigned upon the death or disability of the named license holder. Even a cursory review of the first subsection shows that petitioner does not qualify. It reads: "(A) the applicant is a dependent spouse, dependent domestic partner, dependent child or one-time employee of the former licensee, or bears another pre-existing, established relationship to such former licensee that included financial dependence on such licensee." Petitioner had been paying a monthly rent to successive owners of the operating license since 1987. He never sought the license in his own name until the last named licensee passed away and he could no longer continue the improper relationship. Thus, it was the license, and not any of the three previous holders, on which petitioner was dependent.[1]

Finally, although not necessary for this determination, it was certainly a rational conclusion that petitioner had to be aware of the illicit, under the table arrangement he facilitated by his payments to three separate owners beginning as far back as 1987; each owner submitted sworn statements that he/she was the operator of the newsstand while petitioner openly operated it.

[1]As petitioner does not meet the first requirement of § 2-64(a)(12), it is not necessary to address the other two.

The dissent recognizes that our review of this matter is limited to whether there is any rational basis for respondent's determination. Regardless of whether we agree with it, on this record, it cannot be said that respondent's determination is irrational.

Petitioner is free to seek a license under his own name (6 RCNY § 2-64(1)(11)). He just may not jump ahead of those who are given priority as a matter of law.

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

All concur except Mazzarelli and Andrias, JJ. who dissent in an memorandum by Andrias, J. as follows:

ANDRIAS J. (dissenting)

Upon the death of the licensee, petitioner submitted an application pursuant to 6 RCNY § 2-64(a)(12) seeking to renew and transfer to his name the license for the newsstand at the corner of Lafayette Street and Astor Place, which petitioner had operated for more than 20 years and rebuilt in 1993 at a cost of approximately $55,000. By letter dated January 6, 2011, respondent denied the application on the ground that respondent "ha[d] not demonstrated that [respondent] should exercise discretion to issue a license to [petitioner] under section 2-64(a)(12) of the Rules of the City of New York, the applicable provision." The letter did not provide any further explanation.

Supreme Court found, and the majority agrees, that respondent's denial of the application had a rational basis since there is no evidence that the licensees employed petitioner or that he was financially dependent upon them. Under the record before us, I disagree and would grant the petition.

6 RCNY § 2-64(a)(12) provides:

> "Death or disability of licensee. At the discretion of the Commissioner or his or her designee, upon the death or permanent disability of the person who was licensed to operate a newsstand at a location, DCA [Department of Consumer Affairs] may accept an application for a license to operate such existing newsstand where:
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> "(A) the applicant is a dependent spouse, dependent domestic partner, dependent child or one-time employee

> of the former licensee, or bears another pre-existing, established relationship to such former licensee that included financial dependence on such licensee;
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> "(B) the applicant demonstrates to DCA that the operation of such newsstand will be his or her principal employment; and
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> "(C) the applicant is a person to whom the grant of such license would be in the interests of fairness . . ."

Petitioner satisfies these requirements.

First, petitioner has the "pre-existing, established relationship" to the former licensees contemplated by § 2-64(a)(12)(A). The record establishes that the license for the newsstand was issued to Stella Schwartz, and transferred to her sister, Katherine Ashley, and that they allowed petitioner to operate the stand since 1987 in exchange for a fee of $75 per week. When Katherine died in 2006, a provision in her last will and testament stated her "wish" that petitioner, who had diligently conducted the day to day operations of the newsstand for many years, and with whom she had "developed a warm, trusting and loving relationship," continue to operate it and succeed her as "franchisee." While the license was instead transferred in 2008 to Katherine's husband, Sheldon, petitioner continued to operate the newsstand on the same terms that he had with Katherine.

Supreme Court found that this established relationship was

not enough because petitioner did not demonstrate that he had a financially dependent relationship with the licensee, as required by § 2-64(a)(12)(A). Supreme Court reasoned that petitioner was financially dependent on the license, not on the licensee. This amounts to a distinction without a difference under the practical realities of this case. Petitioner operated the newsstand pursuant to an agreement with the Ashleys, who held the license. The newsstand provided petitioner with his livelihood, and he was dependent on the Ashleys to continue their arrangement with him, which, as evidenced by Katherine's will, grew into more than a pure business relationship.

Second, petitioner complied with § 2-64(a)(12)(B) by submitting an affidavit stating that "[u]pon receipt of the license, the operation of said newsstand would be my principal employment in accordance with Section 20-229 of the Administrative Code of New York. If I am licensed to operate the Newsstand by the Department, operation of the Newsstand shall be my principal employment as long as I am so-licensed."

Third, petitioner "is a person to whom the grant of such license would be in the interests of fairness," as required by § 2-64(a)(12)(C). Petitioner has operated the newsstand continuously since 1987 and it is the source of his livelihood. Based on his understanding with Katherine that he would continue

to operate the newsstand indefinitely, in or about 1993, he rebuilt it at a cost of approximately $55,000. When Katherine died, in recognition of petitioner's diligent efforts at the newsstand and their "warm, trusting and loving relationship," she expressed her wish that petitioner continue the franchise.

Respondent argues that the denial of the application was rational because petitioner participated in an unlawful under-the-table arrangement under which he rented the newsstand from the licensees, who submitted fraudulent renewal applications to DCA over a period of years. However, petitioner did not sign those applications and respondent has not shown that petitioner was aware that he was violating any laws or rules when he paid the licensees $75 per week to operate the newsstand. Indeed, the record shows that petitioner openly operated the newsstand and was recognized in the neighborhood as its operator, as reflected in published articles and his blog.

In light of the foregoing, although petitioner did not have a prescriptive right to the renewal of the license in his name under 6 RCNY § 2-64(a)(12), the denial of his application was an

unjustifiable exercise of discretion that shocks the judicial conscience given that it will deprive petitioner of the business that he has painstakingly built up over a period of more than 20 years.

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

ENTERED: APRIL 26, 2012

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4526 Dorothy Vaughan, Index 307262/08
Plaintiff-Respondent,

-against-

Leighton Leon, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Steven N. Feinman of counsel), for appellants.

Edelman, Krasin & Jaye, PLLC, Carle Place (Jarad Lewis Siegel of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered August 6, 2010, which denied defendants' motion for summary judgment dismissing the complaint, modified, on the law, to dismiss the 90/180-day category of plaintiff's Insurance Law § 5102(d) claim, and otherwise affirmed, without costs.

In this action for personal injuries plaintiff alleges that she sustained a serious injury as a result of a car accident that occurred on June 30, 2007 at the intersection of East 223rd Street and White Plains Road, in the Bronx. Defendant Leon, a taxi driver, testified at his deposition that he was traveling northbound on White Plains road at approximately 20 miles per hour when he reached the intersection of East 223rd. At that point, a truck was to defendant driver's left on East 223rd and was obscuring his view of that street. Plaintiff testified at

her deposition that she was stopped at the stop sign on East 223rd before proceeding to inch her way into the intersection. She was traveling at a speed of approximately 5 to 10 miles per hour when her car collided with defendant's car. The following day plaintiff went to the emergency room at Jacobi Hospital complaining of back and right shoulder pain. She was examined and released that day. Approximately a week later, on July 9, 2007, plaintiff was examined by Dr. Gautam Khakhar and continued to see him for five months following the accident, during which time she underwent physical therapy for her back, neck, and right shoulder.

Plaintiff commenced this action alleging that she sustained a serious injury under Insurance Law § 5102(d). Defendants subsequently moved for summary judgment dismissing the complaint on the grounds that plaintiff was negligent as a matter of law because she failed to yield the right of way at the intersection; and on the grounds that plaintiff failed to establish that she sustained a serious injury. The motion court denied defendants' motion in its entirety.

Notwithstanding that plaintiff's approach into the intersection was regulated by a stop sign and defendant driver's approach was not regulated by a traffic control device, issues of fact about plaintiff stopping at the stop sign and which vehicle

entered the intersection first preclude a finding as a matter of law that plaintiff's conduct was the sole proximate cause of the accident (*see Rivera v Berrios Trans Serv. Inc.*, 64 AD3d 416 [2009]). Further, plaintiff's testimony that she was traveling between 5 and 10 miles per hour and that the impact of the two vehicles was "very heavy" presents issues of fact whether defendant driver was negligent (*Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 299 [2008]).

Although defendants established prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), plaintiff raised sufficient issues of fact to warrant denial of summary judgment. On review of plaintiff's MRI films, defendants' radiologist noted that there were disc bulges that were "chronic and degenerative in origin" and that there was "no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous tear or epidural hematoma." These findings establish prima facie that any injury to plaintiff's lumbar spine was not causally related to the accident (*see Depena v Sylla*, 63 AD3d 504 [2009], *lv denied* 13 NY3d 706 [2009]). The burden then shifted to plaintiff to raise a triable issue of fact.

In opposition to defendants' motion, plaintiff submitted the affirmation of her treating physician, Dr. Khakhar, who first saw

her nine days after the accident. He concluded that plaintiff's injuries were caused by the accident. Dr. Khakhar based this conclusion on the MRI report of the lumbrosacral spine and right shoulder taken on July 16, 2007,[1] electrodiagnostic testing, the patient's medical records, and objective clinical examinations of plaintiff, which revealed a painful and limited range of motion when compared to normal ranges, that began a week after the accident and continued for a period of approximately five months thereafter. This submission, which was based on objective findings by the doctor, as well as plaintiff's subjective complaints, was sufficient to substantiate a claim of serious injury (*Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011]).

Although the dissent makes much of plaintiff's failure to annex the MRI reports, Dr. Khakhar affirmed that he reviewed them, and then made his own clinical findings based on the history provided by plaintiff and his education, training and experience (*Baez v Boyd*, 90 AD3d 524 [2011] [plaintiff raised an issue of fact by submitting the affirmed report of his treating

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[1]Dr. Khakhar did not specify who wrote the MRI reports, although the date of the MRI was the same as the date reflected in the report of defendant's expert, Dr. Berkowitz. Contrary to the dissent's argument, this does not invalidate Dr. Khakhar's affirmation. Even if the doctor relied on the same films as defendant's expert, they could reach different conclusions on causation.

orthopedist, who had reviewed the MRI films]). Moreover, although Dr. Khakhar did not explain what was in the MRI report or whether the MRI report he reviewed was affirmed, Dr. Khakhar's report itself was affirmed and is sufficient to raise an issue of fact. The dissent cites no cases in support of its argument that plaintiff's doctor must describe the specific contents of the MRI report for plaintiff to defeat a summary judgment motion.

Furthermore, although Dr. Khakhar did not expressly reject defendants' expert's conclusion that the injuries were degenerative in origin, by attributing the injuries to a different, yet equally plausible cause, plaintiff raised a triable issue of fact (*see Yuen*, 80 AD3d at 482; *Linton v Nawaz*, 62 AD3d 434, 439-440 [2009], *affd on other grounds* 14 NY3d 821 [2010]). Although "[a] factfinder could of course reject this opinion" (*Perl v Meher*, 18 NY3d 208, 219 [2011]), we cannot say on this record, as a matter of law, that plaintiff's injuries had no causal connection to the accident.

The dissent unpersuasively argues that the Court of Appeals' brief references to *Pommells v Perez* (4 NY3d 566 [2005]) in the *Perl* opinion mandate a ruling in defendant's favor unless plaintiff's submissions specifically explain why the conclusion of degeneration by defendants' doctors is incorrect; this is not what *Perl* holds. Rather, the Court in *Perl* concluded that the

plaintiff's contrary evidence presented on a summary judgment motion, even if "hardly powerful," merely must be sufficient to raise an issue of fact (*Perl*, 18 NY3d at 219). In fact, the *Perl* opinion focuses on whether the numerical measurements of range of motion were contemporaneous, which is not the central issue in this case. As the dissent notes, the record here does not contain as much detail in the treating physician's affirmation as was contained in the *Perl* affirmation, but such detail is not required. Plaintiff, at her deposition, explained that she had not previously been injured before this accident, and Dr. Khakhar noted she was acutely symptomatic when he saw her about a week after the accident. Here, this information, combined with Dr. Khakhar's affirmation and conclusion as to causation, contained sufficient detail. The dissent's suggestion that there is a specific catechism that plaintiff's doctor must recite ignores the central purpose of a summary judgment motion, which is to determine whether there are factual issues to be resolved at trial.

Nor is *Carrasco v Mendez* (4 NY3d 566 [2005], *supra*), one of the three appeals decided in *Pommells*, similar to plaintiff's case, as the dissent contends.[2] Carrasco's original doctor

[2] We need not analyze the specific facts of all the cases cited in the dissent's footnote 8, because, under *Perl*, which is

concluded in his final report that Carrasco's pain was related to a prior degenerative condition, thereby agreeing with the defendant's analysis (*id.* at 579-580). Dr. Khakhar, however, found just the opposite with regard to plaintiff, and concluded that her injuries were casually connected to the accident. The dissent incorrectly argues that *Carrasco* turns on the lack of detail in the doctor's conclusions. However, the *Carrasco* Court found that the plaintiff "did not refute defendant's evidence of a preexisting degenerative condition" because plaintiff's second doctor's report "was entirely consistent with those formations identified by the MRI" and with the conclusion of the defendant's expert (*Id*. at 580).

The court should have dismissed plaintiff's 90/180-day claim. Plaintiff's deposition testimony that she was confined to her home for only one month after the accident and her treating physiatrist's statement that she was "partially incapacitated" are insufficient to raise the inference that plaintiff was prevented from performing her usual and customary activities for at least 90 of the 180 days following the accident (Insurance Law

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the most recent controlling authority, plaintiff's submissions are sufficient. Moreover, as the dissent concedes, other precedents of this Court support the conclusion reached here (*see e.g. Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011], *supra*).

§ 5102[d]; *see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 523 [2010]; *Valentin v Pomilla*, 59 AD3d 184, 186-187 [2009]).

All concur except Andrias, J.P. and Friedman, J. who dissent in part in a memorandum by Friedman, J. as follows:

FRIEDMAN, J. (dissenting in part)

Plaintiff claims to have suffered injuries to her lumbar spine as a result of the subject motor vehicle accident. In support of their motion for summary judgment, defendants submitted competent medical expert evidence, in the form of an affirmed MRI report, explaining in detail why the reporting radiologist concluded that plaintiff's lumbar spine exhibited changes due to preexisting degeneration rather than traumatic injury. In opposition, not only did plaintiff fail to submit any report by a radiologist, the physiatrist whose affirmation she submitted completely ignored the likelihood raised by the defense radiologist that plaintiff's lumbar deficits were the result of degeneration. Moreover, the two other medical reports plaintiff submitted –- putting aside that neither one was sworn or affirmed –- both explicitly acknowledged (presumably based on a radiological report absent from the record) that the lumbar spine MRI evidenced "degenerative changes," and drew no connection between plaintiff's condition and the accident.

Because plaintiff submitted no evidence specifically addressing and rebutting the view of the defense radiologist that plaintiff's deficits were the result of a degenerative condition that preexisted the accident, under precedent of the Court of Appeals and of this Court, defendants are entitled to summary

judgment dismissing the complaint insofar as it seeks recovery for a "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" comprising a "serious injury" under the No-Fault Law (Insurance Law § 5102[d]). As more fully discussed below, the Court of Appeals' recent decision in *Perl v Meher* (18 NY3d 208 [2011]) does not support the majority's result because, unlike here, the plaintiff's experts in *Perl* specifically addressed the defense theory that the MRI demonstrated degenerative etiology. Since I agree with the majority that the claim under the 90/180-day provision of § 5102(d) should have been dismissed, I would reverse and grant in its entirety defendants' motion for summary judgment dismissing the complaint. To the extent the majority does otherwise, I respectfully dissent.

In my view, the medical evidence concerning the etiology of plaintiff's lumbar spine condition suffices, by itself, to require the dismissal of her claim under the "permanent consequential limitation" and "significant limitation" prongs of the No-Fault Law's definition of "serious injury." Accordingly, I will restrict my discussion of the medical evidence to the material bearing on the origin of the spinal condition.[1]

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[1]In addition, while plaintiff alleges that she felt pain in her right shoulder after the accident, the only permanent injury

Plaintiff was involved in a two-car collision on June 30, 2007, when she was 54 years old.[2] She did not have any physical complaints immediately after the accident. The next day, she went to an emergency room because she "felt a little pain" in her back and right shoulder. The hospital told plaintiff that it was "just a sprain," gave her Motrin and sent her home, without taking any X rays. On July 9, 2007, she first visited Gautam K. Khakhar, M.D., a physiatrist, who found her to be "partially incapacitated," started her on a course of physical therapy, referred her to an orthopedist for an electrodiagnostic test, and ordered an MRI of, inter alia, the lumbosacral spine. Dr. Khakhar subsequently referred plaintiff to a pain management specialist. Plaintiff treated with Dr. Khakhar until December 17, 2007, when he determined that she had reached "maximum medical improvement from conservative management." More than a year and a half later, on August 31, 2009 (after this action had been commenced), plaintiff again visited Dr. Khakhar, who

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she claimed in opposing the summary judgment motion was to her lumbar spine. She made no claim, and offered no evidence, that the alleged shoulder injury was permanent. Accordingly, there is no need to discuss the medical evidence relating to the alleged shoulder injury.

[2]According to the report of a physical examination of plaintiff conducted on September 7, 2007 (about two months after the accident), plaintiff was then five feet, one inch tall and weighed 160 pounds.

examined her, referred her to physical therapy and advised her to consult a spinal surgeon. Plaintiff was examined by Dr. Khakhar once again on October 26, 2009 (after defendants moved for summary judgment).

In support of their motion for summary judgment, defendants submitted, among other things, an affirmed MRI report, dated January 6, 2009, by Jessica F. Berkowitz, M.D., a radiologist, based on the MRI of plaintiff's lumbar spine that was made on July 16, 2007 (16 days after the accident). In relevant part, Dr. Berkowitz reported:

> "**IMPRESSION:** Diffuse disc bulge, L5-S1. Disc bulges are chronic and degenerative in origin. There is no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous tear or epidural hematoma.
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> "**CAUSAL RELATIONSHIP:** Evaluation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

In opposing the summary judgment motion, plaintiff did not submit a report by any radiologist who had examined the MRI of her lumbar spine. She did submit an affirmation by Dr. Khakhar, plaintiff's treating physiatrist, but Dr. Khakhar did not claim to have reviewed the MRI or even to be qualified to undertake such a review. While Dr. Khakhar stated in his affirmation that "MRI reports of the lumbosacral spine and right shoulder taken on

July 16, 2007 are annexed hereto as Exhibit 'A,'" in the record before us, no such reports are annexed to his affirmation. Neither does Dr. Khakhar's affirmation offer any substantive description of the contents of the MRI reports or explain how those reports support his conclusion that plaintiff's symptoms were "a result of the [subject] motor vehicle accident."

The report on the MRI of the lumbosacral spine referred to by Dr. Khakhar is presumably the same one mentioned in plaintiff's counsel's opposition affirmation. Specifically, counsel's affirmation makes reference to "Dr. Mark Frelich's impression of an 'MR Scan of the Lumbosacral spine,'" states that Dr. Frelich's report is annexed as "Plaintiff's Exhibit 'D,'" and quotes a sentence said to be from that report.[3] However, there is no MRI report by a Dr. Mark Frelich, or by any physician having a similar name, to be found anywhere in the record.[4]

Plaintiff submitted two reports by physicians other than Dr. Khakhar, but neither of these reports was sworn or affirmed,

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[3]The sentence purportedly quoted from Dr. Frelich's report ("Bulging disc L5-S1 with extension into right and left L5-S1 Neural Foramina without compromise of the dorsal root ganglia") says nothing about the possible cause of the finding.

[4]The record does include an "Exhibit D" to plaintiff's counsel's affirmation, but this document is a report by Dr. Khakhar based on the physical examination of plaintiff he conducted on October 26, 2009.

neither was prepared by a radiologist, and neither offered any opinion on the cause of plaintiff's symptoms. Moreover, far from contradicting the view of the defense radiologist that plaintiff's lumbar spine exhibited a preexisting degenerative condition, both of these reports refer to an MRI report outside the record (possibly that of Dr. Frelich) that actually *confirms* the degenerative etiology of plaintiff's symptoms. Thus, the report of Dov J. Berkowitz, M.D., an orthopedist, dated August 2, 2007, states: "At this point, MRI is positive for a disc protrusion *with some degenerative changes*" (emphasis added). Similarly, the report of Brian Haftel, M.D., a pain management specialist, dated September 7, 2007, states that a report on the MRI of plaintiff's lumbar spine noted "degenerative changes noted at L4-5 articulating facet joints leading to hypertrophy of the ligamentum flavum," "[d]essicative changes . . . at the L5/S1 level consistent with degenerative change," and "degenerative changes of the articulating facets" of L5/S1. Aside from these references to MRI evidence of degenerative changes, neither the orthopedist, Dr. Berkowitz, nor the pain management specialist, Dr. Haftel, offered any opinion as to the cause of plaintiff's lower-back symptoms. Notably, the reports of both Dr. Berkowitz and Dr. Haftel are addressed to Dr. Khakhar, indicating that Dr. Khakhar referred plaintiff to the two other physicians.

In the end, the only evidence plaintiff submitted concerning the origin of her symptoms and impairments were Dr. Khakhar's bare assertions in his affirmation to the effect that those symptoms "were caused by the motor vehicle accident of June 30, 2007."[5] Dr. Khakhar gave no account of the basis on which he reached this conclusion. Although he claimed to have reached his conclusions based upon, inter alia, an MRI report on the lumbosacral spine (which, to reiterate, was not annexed to his report), he did not explain how anything in that unsubmitted MRI report supported his attribution of the impairments to an accident. Equally important, he made no mention at all of the defense radiologist's view that the condition revealed by the MRI of the lumbar spine was a preexisting degenerative condition. Dr. Khakhar simply ignored the possibility that plaintiff's symptoms had a degenerative etiology, notwithstanding that the reports of two physicians to whom he referred her both make reference to evidence that she suffers from a degenerative condition.

The problem with plaintiff's opposition to the summary judgment motion in this case is that, while Dr. Khakhar claimed

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[5]In addition to Dr. Khakhar's affirmation, plaintiff submitted two affirmed examination reports by the same physician, but neither of these examination reports said anything about etiology.

to rely on an MRI report by an unidentified physician, plaintiff not only failed to make that MRI report part of the record, Dr. Khakhar completely failed both to describe the contents of that report (other than to say it concerned the lumbosacral spine) and to explain how that unseen and undescribed report supported his conclusion that plaintiff's symptoms "result[ed]" from the subject accident.[6] Further, while, under *Perl* (as more fully discussed below), it would have been sufficient for Dr. Khakhar to address Dr. Jessica Berkowitz's finding of a degenerative condition by explaining that the condition was "asymptomatic" until exacerbated by the accident, *Dr. Khakhar's affirmation contains no such statement.*[7] Again, as I will explain below, even under *Perl*, where (as here) the defense has made a prima

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[6]Plaintiff's failure to submit the MRI report with Dr. Khakhar's affirmation, and Dr. Khakhar's failure to discuss the contents of that MRI report in any substantive way, are presumably related to the fact that the MRI report discussed in the reports of plaintiff's orthopedist and pain management specialist actually corroborates the view that plaintiff had a preexisting degenerative condition.

[7]The majority seems to take the position that the combination of plaintiff's statement that "she had not previously been injured before this accident" with Dr. Khakhar's observation of symptoms after the accident is equivalent to an affirmed statement by a physician that any preexisting condition had been asymptomatic before the accident. However, even if it is true that plaintiff was not "injured" before the subject accident, that does not necessarily mean that she did not have *symptoms* until the accident occurred. Thus, I do not follow the majority's logic.

facie case that the symptoms result from preexisting degeneration, a plaintiff cannot simply rely on a treating physician's unsupported assertion that the symptoms were somehow causally connected to the accident. This is all that plaintiff presented here.

In sum, in response to defendants' expert radiological evidence attributing plaintiff's impairments to a preexisting degenerative condition, plaintiff submitted nothing but the boilerplate, unexplained and unsupported assertion of her treating physiatrist that the impairments resulted from the subject accident. Dr. Khakhar, plaintiff's physiatrist, utterly failed to address the view of the defense radiologist that plaintiff was simply experiencing the effects of the degenerative changes that had accumulated over the 54 years of her life preceding the accident. Indeed, Dr. Khakhar ignored the well-supported opinion of the defense radiologist even though the reports of the orthopedist and pain specialist to whom Dr. Khakhar referred plaintiff made reference to an MRI report (not submitted by plaintiff) that evidently supports the same view. Under controlling case law, the foregoing does not suffice to raise a triable issue in the face of defendants' prima facie showing, through the affirmed MRI report of the defense radiologist, that plaintiff's lumbar spinal condition results

from preexisting degenerative disease.

In an action to recover for serious injury under Insurance Law § 5102(d), where the defendant moves for summary judgment based on detailed and competent medical evidence attributing the alleged injury to a preexisting degenerative condition rather than the accident, the burden shifts to the plaintiff to come forward with competent medical evidence specifically refuting the claimed lack of causal connection to the accident (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). A plaintiff cannot carry this burden simply by offering a conclusory expert opinion that the injuries "were causally related to the accident" without directly addressing the defendant's theory that the injuries resulted from degenerative changes (*see Pommells*, 4 NY3d at 580).

The Court of Appeals' discussion of *Carrasco v Mendez,* one of the three appeals decided in the *Pommells* opinion (cited with approval in *Perl v Meher*, 18 NY3d at 218) illustrates how the rule described above operates in a scenario similar to the one before us. In *Carrasco*, the defendant submitted in support of his summary judgment motion the report of a medical expert who, based on MRIs and other evidence, "concluded that the pain in areas identified as herniated . . . was caused by preexisting and degenerative conditions" (4 NY3d at 579). The defendant also submitted a report by the plaintiff's "original doctor . . .

not[ing] . . . that plaintiff's pain was related to a prior condition" (*id.*). In response, the plaintiff offered the report of his treating physician, who "opin[ed] that plaintiff suffered serious and permanent injuries which were causally related to the accident" (*id.* at 579-580). The Court of Appeals held that this did not suffice to defeat the summary judgment motion because

> "plaintiff did not refute defendant's evidence of a preexisting degenerative condition. To the contrary, the [physician's] report supplied by plaintiff explained that the pain and loss of range of motion in the cervical spine was entirely consistent with those formations identified by the MRI and set forth by [the physicians relied on by the defendant] as related to a degenerative condition. In this case, with persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation. In the absence of any such evidence, we conclude . . . that defendant was entitled to summary dismissal of the complaint" (*id.* at 580).

This Court has summarized the governing principles as follows:

> "To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is 'serious' within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident. Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation, insufficient to support a finding that

such a causal link exists" (*Valentin v Pomilla*, 59 AD3d 184, 186 [2009], quoting *Diaz v Anasco*, 38 AD3d 295, 295-296 [2007] [internal quotation marks omitted]).

Numerous other decisions issued by this Court in recent years hold to the same effect.[8]

In my view, the foregoing authority –- including the

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[8]*See e.g. Arroyo v Morris*, 85 AD3d 679 (2011); *Soho v Konate*, 85 AD3d 522 (2011); *Feliz v Fragosa*, 85 AD3d 417 (2011); *Shu Chi Lam v Wang Dong*, 84 AD3d 515 (2011); *Johnson v Singh*, 82 AD3d 565 (2011); *Lemos v Giacomo Mgt., Inc.*, 82 AD3d 602 (2011); *Porter v Bajana*, 82 AD3d 488 (2011); *Riviello v Kambasi*, 82 AD3d 543 (2011); *Quinones v Ksieniewicz*, 80 AD3d 506 (2011); *Rodriguez v Freight Masters, Inc.*, 80 AD3d 452 (2011); *Thomas v Booker*, 76 AD3d 456 (2010); *Turner v Benycol Transp. Corp.*, 78 AD3d 506 (2010); *Nieves v Castillo*, 74 AD3d 535 (2010); *Perez v Giouroukos*, 75 AD3d 488 (2010); *DeJesus v Cruz*, 73 AD3d 539 (2010); *Weinberg v Okapi Taxi, Inc.*, 73 AD3d 439 (2010); *Barner v Shahid*, 73 AD3d 593 (2010); *Cabrera v Gilpin*, 72 AD3d 552 (2010); *Kerr v Klinger*, 71 AD3d 593 (2010); *Amamedi v Archibala*, 70 AD3d 449 (2010), *lv denied* 15 NY3d 713 [2010]; *D'Ariano v Meldish*, 68 AD3d 640 (2009); *Lopez v Abdul-Wahab*, 67 AD3d 598 (2009); *Cruz v Lugo*, 67 AD3d 495 (2009); *Moses v Gelco Corp.*, 63 AD3d 548 (2009); *Depena v Sylla*, 63 AD3d 504 (2009), *lv denied* 13 NY3d 706 (2009); *Jean v Kabaya*, 63 AD3d 509 (2009); *Marsh v City of New York*, 61 AD3d 552 (2009); *Nickolson v Albishara*, 61 AD3d 542 (2009); *Delfino v Luzon*, 60 AD3d 196 (2009); *Colon v Tavares*, 60 AD3d 419 (2009); *Russell v Mitchell*, 59 AD3d 355 (2009); *Sky v Tabbs*, 57 AD3d 235 (2008); *Ronda v Friendly Baptist Church*, 52 AD3d 440 (2008); *Rodriguez v Abdallah*, 51 AD3d 590 (2008); *Becerril v Sol Cab Corp.*, 50 AD3d 261 (2008); *Santana v Khan*, 48 AD3d 318 (2008); *Yagi v Corbin*, 44 AD3d 440 (2007); *Johnson v Marriott Mgt. Servs. Corp.*, 44 AD3d 450 (2007), *lv denied* 10 NY3d 716 (2008); *Brewster v FTM Servo Corp.*, 44 AD3d 351 (2007); *Davis v Giria*, 40 AD3d 272 (2007); *Otero v 971 Only U, Inc.*, 36 AD3d 430 (2007); *Henry v Rivera*, 34 AD3d 352 (2006); *Style v Joseph*, 32 AD3d 212 (2006); *Agard v Bryant*, 24 AD3d 182 (2005); *Simms v APA Truck Leasing Corp.*, 14 AD3d 322 (2005); *Blackwell v Fraser*, 13 AD3d 157 (2004); *Wallingford v Perez*, 11 AD3d 390 (2004).

decision of the Court of Appeals in *Pommells*, as substantially reaffirmed in *Perl* -- requires that defendants be granted summary judgment dismissing the complaint on the ground that plaintiff has failed to address the medical evidence attributing his alleged injuries to degenerative disease. I see no principled basis for departing from a rule so well established and so well founded in reason and fairness. To the extent certain decisions of this Court have departed from this rule (*see e.g. Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011] [cited by the majority]; *Jacobs v Rolon*, 76 AD3d 905 [2010]; *Linton v Nawaz*, 62 AD3d 434 [2009], *affd on other grounds* 14 NY3d 821 [2010] [cited by the majority]; *June v Akhtar*, 62 AD3d 427 [2009]; *Glynn v Hopkins*, 55 AD3d 498 [2008]), I do not believe that we should follow these decisions, as they are contrary to the weight of this Court's own authority and, more importantly, contrary to the holding of the Court of Appeals in *Pommells*.

In this case, the only admissible radiology report in the record attributed the observed condition of plaintiff's lumbar spine to degenerative changes. Moreover, two other physician's reports submitted by plaintiff herself, although not admissible because not sworn or affirmed, referred to another radiological report based on the same MRI noting degenerative changes in the

lumbar spine.[9] The only expert who attributed plaintiff's impairments to the accident was Dr. Khakhar, who simply asserted that such a causal relationship existed, without explaining his reasoning and, most importantly, without addressing the defense radiologist's view (supported by the reports of his own orthopedic and pain management consultants) that plaintiff was experiencing the effects of degenerative changes. Indeed, Dr. Khakhar did not even claim to have ascertained that plaintiff's symptoms began only after the accident.

The instant case is readily distinguishable from *Perl v Meher* (*supra*), in which the plaintiff's radiologist and treating physician both specifically rebutted the defense radiologist's view that the MRI established that the symptoms were the result of degeneration. The plaintiff's radiologist in *Perl*, "while [acknowledging] that some findings from the MRI are 'consistent with degenerative disease,' [opined that] a single MRI cannot rule out the possibility that 'the patient's soft tissue findings are . . . a result of a specific trauma.' That question, [the plaintiff's] radiologist said, can best be judged 'by the patient's treating physician in conjunction with exam, history

[9]The reports of plaintiff's orthopedist and pain management specialist are both dated in 2007 and therefore could not be referring to the report of the defense radiologist, which is dated January 6, 2009.

and any previous tests'" (18 NY3d at 219). Further, the treating physician in *Perl* opined that the plaintiff's symptoms were "based upon a traumatic event *and not degeneration*" (emphasis added) because he was "asymptomatic before the motor vehicle accident." No such statements specifically denying degenerative etiology appear in Dr. Khakhar's affirmation or in any other document submitted by plaintiff in this case. Again, Dr. Khakhar did not even claim that plaintiff's symptoms did not begin until after the accident.

In asserting that *Perl* is not distinguishable, the majority ignores the fact that the result in *Perl* was based on the affirmed statement by the treating physician that, because the plaintiff "'had not suffered any similar symptoms before the accident or had any prior injury/medical conditions that would result in these findings,' the findings were causally related to the accident" (18 NY3d at 219). Again, the record in this case contains no such statement. The majority reads *Perl*'s characterization of the plaintiff's evidence in that case as "hardly powerful" (*id.*) to abolish any requirement that a plaintiff, in opposing summary judgment in a no-fault case, specifically address a defendant's a prima facie showing that the symptoms are attributable to a preexisting degenerative condition. I see no warrant for this reading of *Perl*.

Nor does the majority's attempt to distinguish *Carrasco v Mendez* hold water. There is no indication in the Court of Appeals' decision that the view of the *Carrasco* "plaintiff's original doctor . . . that [his] pain was related to a prior condition" (4 NY3d at 579) was essential to the Court's holding that the defendant in that case was entitled to summary judgment.[10] In *Carrasco*, as here, the plaintiff presented a treating physician's unsupported and unexplained conclusion that the symptoms were "'a result of the motor vehicle accident'" (*id.*). This was held to be insufficient in *Carrasco*, and nothing in *Perl* indicates that the Court of Appeals has abandoned this holding.[11]

The majority asserts that I "cite[] no cases in support of

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[10]In fact, this case does present a parallel to the view of the "plaintiff's original doctor" in *Carrasco* in that, here, as previously discussed, the reports of plaintiff's orthopedist and pain management specialist both refer to an MRI report that noted the presence of degenerative changes in the lumbosacral spine.

[11]The majority also tries to distinguish *Carrasco* based on the Court's statement that the report of plaintiff's second physician (Dr. Lambrakis) "'was entirely consistent with those formations identified by the MRI' and with the conclusion of the defendant's expert" (citing 4 NY3d at 580). However, exactly the same could be said here about Dr. Khakhar's report. Just as with Dr. Lambrakis's report in *Carrasco* (which opined that the plaintiff's symptoms in that case were "'a result of the motor vehicle accident'" [4 NY3d at 579]), the only inconsistency between Dr. Khakhar's report and the MRI report of Dr. Berkowitz was Dr. Khakhar's unexplained, boilerplate conclusion that plaintiff's symptoms were caused by the accident.

[my] argument that plaintiff's doctor must describe the specific contents of the MRI report for plaintiff to defeat a summary judgment motion." As I believe should be clear from the foregoing discussion of the case law, the Court of Appeals has always held to the position –- appropriately followed by the weight of authority in this Court –- that, in the face of expert evidence attributing a plaintiff's alleged symptoms to a preexisting degenerative condition, the plaintiff must come forward with an expert opinion articulating some reason for attributing the symptoms to the accident. I accept that the reason given need not be a conflicting MRI report, but plaintiff's expert cannot rely on a MRI report to rebut the one submitted by defendants without at least explaining how the contents of plaintiff's MRI report support his conclusion. Here, Dr. Khakhar says he looked at an MRI report, but utterly fails to explain how that report supports his conclusion. Nor does he offer any other explanation –- even a statement that the symptoms did not appear until after the accident –- for rejecting the view of the defense radiologist that the symptoms resulted from the degenerative condition revealed by the MRI. In the end, as in *Carrasco*, plaintiff here has offered nothing on causation but her treating physician's naked assertion.

The majority distorts my position by asserting that I am

"suggest[ing] that there is a specific catechism that plaintiff's doctor must recite." On the contrary, it is my view that the plaintiff's medical expert must provide some substantive explanation –- even a weak one –- for his or her rejection of the defense expert's view that the symptoms are degenerative in nature. It is the majority that is allowing plaintiff to defeat a well-supported summary judgment motion with nothing more than a boilerplate, uninformative "catechism" over a physician's signature.

For the foregoing reasons, the majority, insofar as it sustains the complaint, erroneously departs from the course charted by the Court of Appeals. I therefore dissent from that aspect of the majority's decision.

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

ENTERED: APRIL 26, 2012

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6019 Sheila Chestnut, as Executrix of the Estate of Doris Fulton, Deceased,
Plaintiff-Appellant,

-against-

Marion Bobb-McKoy, M.D., et al.,
Defendants-Respondents.

Index 302997/08

Kramer & Pollack, LLP, Mineola (Larry J. Kramer of counsel), for appellant.

Edward J. Guardaro, Jr., White Plains, for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered March 17, 2011, which, in this action alleging medical malpractice, granted defendants' motion to dismiss as time-barred all claims arising out of treatment rendered prior to October 11, 2005, unanimously modified, on the law, to the extent of only dismissing claims for treatment rendered before May 17, 2005, and otherwise affirmed, without costs.

On April 11, 2008, plaintiff commenced this action based on the failure to timely diagnose and treat lung cancer, leading to the unimpeded growth of the cancer and the patient's death. Plaintiff charges defendants with malpractice committed on May 30, 2002 through August 8, 2006. At issue is the viability of any claim for malpractice committed prior to October 11, 2005,

which is, on its face, outside the 2½ year statute of limitations (*see* CPLR 214-a). Supreme Court rejected plaintiff's continuous treatment argument for the period in question, and dismissed any such malpractice claim as time-barred.

CPLR 214–a sets forth, in pertinent part, that "[a]n action for medical . . . malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." "Generally, a medical malpractice action accrues on the date of the alleged wrongful act" *(see Plummer v New York City Health & Hosps. Corp.*, 98 NY2d 263, 269 [2002], *citing Nykorchuck v Henriques*, 78 NY2d 255, 258–259 [1991]. However, where there is a continuous course of treatment for the conditions giving rise to the malpractice action, the running of the applicable statutory period is tolled during the period of continuous treatment *(see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]; *Langsam v Terraciano*, 22 AD3d 414 [2005]).

The continuous treatment doctrine tolls the 2 1/2-year limitations period for medical malpractice actions when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original

condition or complaint (CPLR 214-a; *Nykorchuck,* 78 NY2d 255*; McDermott v Torre*, 56 NY2d 399, 407 [1982]). "The premise underlying the doctrine is that a plaintiff should not have to interrupt ongoing treatment to bring a lawsuit, because the doctor not only is in a position to identify and correct the malpractice, but also is best placed to do so" (*Cooper v Kaplan*, 78 NY2d 1103, 1104 [1991]; *see also Ganess v City of New York*, 85 NY2d 733 [1995]). In the absence of continuing efforts by a doctor to treat a particular condition or complaint, however, those policy reasons do not justify the patient's delay in bringing suit *(Cooper,* at 1104*; Allende v New York City Health Hosps. Corp.*, 90 NY2d 333 [1997]).

With respect to failure to diagnose cases, courts have held that a "failure to make the correct diagnosis as to the underlying condition while continuing to treat the symptoms does not mean, for purposes of continuity, that there has been no treatment" (*Hein v Cornwall Hosp.*, 302 AD2d 170, 174 [2003]; *Dellert v Kramer*, 280 AD2d 438 [2001]). Thus, a physician or hospital cannot escape liability under the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, where it treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition (*Hill v Manhattan W. Med.*

Group-H.I.P., 242 AD2d 255 [1997]; *see e.g. Shifrina v City Of New York*, 5 AD3d 660 [2004]).

Accordingly, in this case, the applicability of the continuous treatment doctrine to the defendants' dealings with plaintiff's decedent prior to October 11, 2005, turns on whether or not defendants were consistently treating and/or monitoring the decedent for specific symptoms related to lung cancer. Our review of the record establishes that prior to May 2005, there was no continuous treatment for symptoms that are ultimately traced to lung cancer. Plaintiff's own medical expert opines that during this time period -- May 2002 through May 2005 -- the only symptom related to lung cancer that the doctors discovered was high alkaline phosphate levels, which consistently showed up in the decedent's blood work analysis. Nonetheless, other than noting that the levels were elevated, there is nothing in the record to show that defendants ever discussed these results with the decedent, much less agreed to monitor the abnormal readings at her future examinations. Thus, given that the patient was not aware of the need for further treatment of this condition, the decedent was not faced with the dilemma that the continuous treatment doctrine is designed to prevent, i.e. interrupting the treatment or monitoring a condition in order to protect her rights *(Young,* 91 NY2d at 296; *Allende,* 90 NY2d at 337-338).

The same cannot be said with respect to the activities that began on May 17, 2005. There is sufficient evidence on the record to raise an issue of fact as to whether the statute of limitations was tolled by the continuous treatment doctrine for the period from May 17, 2005 through August 9, 2006 (*Hill*, at 255). Plaintiff's medical expert opines that four symptoms associated with lung cancer were manifested during this time period, namely bilateral knee pain, leg swelling, finger clubbing and high alkaline phosphate levels in the blood. From May 17, 2005 through August 9, 2006, a 13-month period, plaintiff's decedent visited the doctors at least four times for these conditions allegedly suggestive of lung cancer. At the inception, on May 17, 2005, the decedent was examined for her leg swelling, knee pain and toe fungus. The doctor recommended, inter alia, that the patient elevate her feet to alleviate the leg swelling, and wear open toed shoes for the toe fungus. However, seven weeks later, July 6, 2005, the patient returned to the doctor with the recurring knee pain and swelling. This time, the doctor prescribed Tylenol and ordered an X-ray of her knees. The X-ray came out normal, but plaintiff's pain remained. The doctor continued to look for the source of the knee pain and leg swelling and ordered blood work (August 9, 2005), which revealed the high levels of alkaline phosphates. The next visit was eight

months later, April 11, 2006, when the patient complained again about her knee pain. On this occasion, the doctor diagnosed the possible source of the pain as arthritis. The doctor prescribed Naproxyn and scheduled a further examination, which took place three months later, on July 14, 2006. On that day, the doctor addressed the recurring knee pain and swelling, as well as clubbing. At this time, the doctor prescribed Advair, and ordered blood work and an X-ray of the lungs. Phone calls were made and a letter was sent to the decedent instructing her to follow-up with defendants. The X-ray revealed a "large mass," which on August 9, 2006 was diagnosed as lung cancer.

In our view, this record, read in a light most favorable to plaintiff, presents a triable question of fact as to whether the decedent's visits to defendants from May 17, 2005 through August 9, 2006 were part of a continuous treatment for symptoms that are ultimately traced to lung cancer. During this relatively short period of 13 months, the doctor examined the decedent a total of four times, often at very short intervals (*see Shifrina,* 5 AD3d at 661-662). Significantly, during these visits, the doctors appeared to be actively engaged, albeit unsuccessfully, in attempting to find the source of the knee pain and swelling, as suggested by the many diagnostic tests performed, including the x-ray and blood tests. Moreover, on at least one occasion (July

6, 2005), the doctor was sufficiently concerned about plaintiff's persistent knee pain and leg swelling that the doctor scheduled a follow-up examination. Based on the frequency and intensity of the course of treatment of plaintiff's knee condition, it cannot be said, as matter of law, that the decedent did not receive continuous treatment of such a condition, which, according to plaintiffs's expert, was a symptom, among others, ultimately traceable to the cancerous condition whose alleged misdiagnosis has given rise to this action (*see Harris v Dizon*, 60 AD3d 495 [2009]; *Hein*, 302 AD2d at 174 [2003]; *Williams v Health Ins. Plan of Greater* N.Y., 220 AD2d 343 [1995]).

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

ENTERED: APRIL 26, 2012

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6166 Ken Johnson, et al., Index 111162/08
Plaintiffs-Respondents,

–against–

Societe Generale S.A.,
Defendant-Appellant.

Shearman & Sterling LLP, New York (Kirsten Nelson Cunha and Daniel Lewis of counsel), for appellant.

Ferber Chan Essner & Coller, LLP, New York (Robert M. Kaplan of counsel), for respondents.

Amended judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 15, 2011, deleting the words "with prejudice" from a prior judgment, pursuant to an order, same court and Justice, entered May 9, 2011, which granted plaintiffs' motion to correct the prior judgment pursuant to CPLR 5019(a), reversed, on the law, without costs, the amended judgment vacated and plaintiffs' motion denied. The Clerk is directed to reinstate the prior judgment.

Plaintiffs were entitled to payment of notes and warrants, purchased from Societe Generale Acceptance N.V. (Acceptance), if the value of certain underlying investment funds at maturity was higher than the funds value at inception. Defendant Societe Generale S.A. (SGSA) provided a guarantee for the punctual payment of any amounts due plaintiffs from Acceptance.

In August 2008, plaintiffs filed a complaint against SGSA and others alleging that the investments had been mismanaged and that SGSA, as guarantor, was obligated to pay plaintiffs the amount that would have been due in the absence of the mismanagement. After SGSA moved to dismiss the complaint with prejudice, plaintiff filed an amended complaint, which asserted essentially the same theory of liability as the original complaint, but named only SGSA as defendant.

In November, 2008, SGSA moved to dismiss the amended complaint, with prejudice. On January 12, 2010, JHO Ira Gammerman granted SGSA's motion "to the extent that the complaint is dismissed for failure to state a cause of action." The court found that the "clear language" of the guarantee obligated SGSA to make payments only where Acceptance was obliged to make payments, but failed to do so, and that there had been no determination that the funds were not profitable due to Acceptance's mismanagement. The court rejected defendant's statute of limitations argument and did not reach its forum non conveniens argument.

On March 4, 2010, the Clerk signed and entered a judgment, drafted by defense counsel, which dismissed the amended complaint "with prejudice and without costs or disbursements." Plaintiff appealed from the judgment and on January 27, 2011, this Court

unanimously affirmed, stating:

> “Plaintiff investors' factual allegations failed to support a claim that they were entitled to legal recourse against defendant guarantor based on its guaranty of the nonparty debtor's alleged payment obligations owed to plaintiffs. The amended complaint essentially acknowledges that there is no definitive sum owed plaintiffs by the debtor, and that a trial on plaintiffs' claims against the debtor would be necessary to determine such sum, if any. Plaintiffs' ‘belie[f]’ that the debtor might owe them $1,000,000 in payments on their investments is entirely speculative and unsupported. Accordingly, no obligation can be said to have accrued against the guarantor here” (80 AD3d 530, 530 [internal citations omitted]).

On February 22, 2011, plaintiffs moved to correct the judgment, pursuant to CPLR 5019(a), by striking the phrase “with prejudice,” or, in the alternative, to modify and/or vacate the judgment, pursuant to CPLR 2221 and 5015, to conform to the trial court's January 12, 2010 order granting the motion to dismiss. Prior to the motion, plaintiffs did not challenge the judgment insofar as it provided for dismissal with prejudice - either in the trial court or on their appeal from the order that dismissed the amended complaint.

The motion court, which succeeded JHO Gammerman, granted the motion to resettle. Observing that “there is nothing in Judge Gammerman's decision that says or that indicates that the plaintiffs' claims were to be dismissed with prejudice,” the court found that inclusion of the phrase “with prejudice” was “an

administerial act" by the clerk, which the court did not review before entry. We now reverse.

Under CPLR 5019(a), a trial court has the discretion to correct a judgment which contains a mistake, defect, or irregularity not affecting a substantial right of a party (*see Kiker v Nassau County*, 85 NY2d 879, 881 [1995]). Where the alleged error is substantive, other than one that is clearly inconsistent with the intentions of the court and the parties as demonstrated by the record, relief should be obtained either through an appeal from the judgment, or, if grounds for vacatur exist, through a motion to vacate pursuant to CPLR 5015(a) (*see Salamone v Wincaf Props.*, 9 AD3d 127, 133-134 [2004], *lv dismissed* 4 NY3d 794 [2005], *abrogated on other grounds by Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687 [2006]).

Here, "[t]he court was without authority to resettle the judgment by deleting the words 'with prejudice' since that revision changed the judgment 'in a matter of substance'" *(Roth v South Nassau Communities Hosp.*, 239 AD2d 331, 332 [1997]; *see also Dependable Printed Circuit Corp. v Mnemotron Corp.*, 22 AD2d 911, 911 [1964] ["In our opinion, the resettlement herein (striking the phrase 'with prejudice' and substituting the phrase 'without prejudice') changed the judgment in a matter of substance, and the Special Term had no revisory power over the

judgment to effect such a change"]). Further, plaintiffs waived their claim that the phrase "with prejudice" should have been deleted from the judgment by not raising the substantive issue in the prior appeal (*see Harbas v Gilmore*, 214 AD2d 440 [1995], *lv dismissed* 87 NY2d 861 [1995] [rejecting the argument that the court should have amended the order so as to delete the phrase "with prejudice," after that order had been affirmed on appeal, on the ground that such a change would involve a matter of substance beyond the court's inherent power of control over its judgments]).

Kiker v Nassau County (85 NY2d 879 [1995], *supra*), is inapposite. In *Kiker*, the Court of Appeals held that a clerk's mistake in computing interest on a judgment could be remedied pursuant to CPLR 5019, even though direct appeal of the judgment was complete. However, the Court found that no substantive right of the parties was affected by the rate of interest because:

> "[t]he correct rate of interest was not contested by the parties; it was dictated by statute. Moreover, the trial court never decided what rate should be applied. Rather, the County Clerk erroneously applied the wrong rate due to a ministerial error. Indeed, plaintiff cannot show that his rights are affected when the right he is now claiming, a right to a 9% interest on his judgment, has never existed" (*id*. at 881).

Unlike the correct interest rate, the determination of whether to dismiss the complaint with or without prejudice is not

mandated by statute, and it cannot be said that the insertion of the words “with prejudice” in the original judgment was clearly inconsistent with the intention of the court as demonstrated by the record. The court addressed the substance of plaintiff’s claims and found that “plaintiffs cannot demonstrate that Acceptance was obligated to make a payment to them upon maturity of the funds. Therefore, plaintiffs also cannot demonstrate that [SGSA], as guarantor, is obligated to make a payment to plaintiffs.” Based on this finding, in its decretal paragraphs, the court stated:

> “Accordingly, it is ORDERED that defendant's motion to dismiss the amended complaint is granted and the amended complaint is dismissed, and it is further
>
> “ORDERED that the Clerk is directed to enter judgment accordingly.”

Defendant’s motion was to dismiss the amended complaint with prejudice and the corresponding judgment dismissing the amended complaint with prejudice cannot be deemed the result of a clerical error. In this regard, we note that the court was under the mistaken impression that a “with prejudice” dismissal had not been requested by defendant.

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

CATTERSON, J. (dissenting)

In my view, a trial court has discretion to amend a judgment to cure mistakes, defects and irregularities that do not affect substantial rights of parties (see CPLR 5019(a)), or to make it reflect what the court's original order intended (see Matter of Owens v. Stuart, 292 A.D.2d 677, 678, 739 N.Y.S.2d 473, 474-475 (3d Dept. 2002). While the defendant moved to dismiss with prejudice, the court's order dismissing the complaint did not state that the dismissal was with prejudice. Rather, the phrase was included for the first time in a judgment signed and entered by the County Clerk, which was prepared by the defendant's attorneys, and which was not submitted to the court for review prior to entry.

The determination of whether a judgment is with or without prejudice can affect the substantial rights of the parties when it reflects the discretionary determination of a judge. However, where, as here, the evidence supports the conclusion that a provision of the judgment is the product of an error by the clerk, that error is subject to correction pursuant to CPLR 5019.

See Kiker v. Nassau County, 85 N.Y.2d 879, 626 N.Y.S.2d 55, 649 N.E.2d 1199 (1995). Indeed, there is no evidence whatsoever that the determination of "with prejudice" was considered or resolved by the court on the defendant's motion.

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

ENTERED: APRIL 26, 2012

CLERK

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

7208 Lamont Banner, etc., et al., Plaintiffs-Respondents, Index 108180/08

-against-

New York City Housing Authority, Defendant-Appellant.

Cullen and Dykman LLP, Brooklyn (Joseph Miller of counsel), for appellant.

Raskin & Kremins, L.L.P., New York (Andrew Metzar of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 26, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

The infant plaintiff was injured when, while sitting on his bicycle in the courtyard at the rear of a building owned by defendant, he was hit in the eye by a bottle that was allegedly thrown from the roof of the building. Plaintiffs allege in their notice of claim and bill of particulars that NYCHA was negligent in failing to secure the roof and in allowing persons to use it in a dangerous and defective manner.

A landlord is not an insurer of tenant safety (*Nallan v*

Helmsley-Spear, Inc., 50 NY2d 507, 519 [1980]; *Raghu v 24 Realty Co.*, 7 AD3d 455 [2004]). However, "a landowner has a duty to exercise reasonable care in maintaining his own property in a reasonably safe condition under the circumstances" (*see Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]; *Kush v City of Buffalo*, 59 NY2d 26, 29-30 [1983]). This duty includes an obligation "to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person" (*Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 878 [2001]; *Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]). "However, this duty only arises when there is an ability and opportunity to control such conduct, and an awareness of the need to do so" (*Jean v Wright*, 82 AD3d 1163, 1164 [2011], *lv denied* 17 NY3d 704 [2011]; *see also D'Amico v Christie*, 71 NY2d 76, 85 [1987]).

Defendant satisfied its initial burden on its motion for summary judgment. The affidavits from its supervisor of caretakers and a professional engineer established that defendant was required to keep the door to the roof unlocked for fire safety purposes (*see* Multiple Dwelling Law 104). The deposition testimony of infant plaintiff established that neither he nor his friends actually saw a person on the roof throw a bottle, and that the alleged perpetrator was unknown, making it possible that

the perpetrator was a resident of the building who would have had access to the roof despite any amount of security that the defendant could have provided to keep intruders out (*see Whiteside v New York City Hous. Auth.*, 248 AD2d 461, 462 [1998], *lv denied* 92 NY2d 808 [1998]).

In opposition to defendants' prima facie demonstration of entitlement to judgment as a matter of law, plaintiffs failed to raise a triable issue of fact that the defendants had the ability and opportunity to control the conduct at issue through the exercise of reasonable measures, and that the failure to have done so was a proximate cause of the injuries alleged (*see Whiteside*, 248 AD2d at 462; *Catlyn v Hotel & 33 Co.*, 230 AD2d 655 [1996]).

Accordingly, defendant is entitled to summary judgment dismissing the complaint.

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

ENTERED: APRIL 26, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Manzanet-Daniels, Román,JJ.

7351 Alicia Guastaferro, Index 600721/10
Plaintiff-Appellant,

-against-

The Walt Disney Company, et al.,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about March 30, 2011,

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 April 4, 2012,

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

ENTERED: APRIL 26, 2012

CLERK

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

7485 The People of the State of New York, Ind. 972/08
Respondent,

-against-

Alfonso Rizzuto,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about March 25, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: APRIL 26, 2012

CLERK

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

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

7486 Jan Krejbich, Index 108588/09
Plaintiff-Respondent,

-against-

Schimenti Construction Company, Inc., et al.,
Defendants-Appellants.

_____

Herzfeld & Rubin, P.C., New York (Joseph E. Donat of counsel), for appellants.

O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 12, 2011, which granted plaintiff's motion for summary judgment on the issue of liability on his cause of action under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law. Plaintiff testified that while he was installing wooden siding to a shed, the A-frame ladder he was standing upon tipped over, causing him to fall to the ground and sustain injury. Plaintiff's version of events was corroborated by his coworker. Accordingly, a violation of section 240(1) was established (*see Harrison v V.R.H. Constr. Corp.*, 72 AD3d 547 [2010]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [2003], *lv dismissed* 100 NY2d 556 [2003]).

In opposition, defendants failed to raise a triable issue of fact. The defendants failed to put forth any evidence of record that establishes that plaintiff was the sole proximate cause of his injuries. Moreover, conflicting accounts as to the positioning of the ladder *after* the accident and the color of the ladder that plaintiff was using do not create an issue of fact as to proximate cause (*see e.g. Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [2005]).

We have considered defendants' remaining contentions, including that the height from which plaintiff fell was de minimis, and find them unavailing.

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

ENTERED: APRIL 26, 2012

CLERK

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

7487 Sun Graphics Corp., et al., Plaintiffs-Appellants, Index 108339/10

-against-

Levy, Davis & Maher, LLP, et al., Defendants-Respondents.

Joseph R. Sahid, New York, for appellants.

Kaufman Borgeest & Ryan LLP, New York (Jonathan B. Bruno of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 5, 2011, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs failed to establish that the three-year statute of limitations on their cause of action alleging legal malpractice was tolled pursuant to the continuous representation doctrine (CPLR 214[6]; *see CLP Leasing Co., LP v Nessen*, 12 AD3d 226 [2004]). They alleged generally that defendants continued to represent them during the three years preceding the commencement of the action, but failed to allege that that representation pertained to the specific matters at issue (*see Apple Bank for Sav. v PricewaterhouseCoopers LLP*, 70 AD3d 438 [2010]; *Serino v Lipper*, 47 AD3d 70, 76 [2007], *lv dismissed* 10 NY3d 930 [2008]).

The causes of action for breach of contract, breach of

fiduciary duty, and negligent misrepresentation are redundant of the legal malpractice claim, since they arise from the same allegations and seek identical relief (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [2002]; *see also Weksler v Kane Kessler, P.C.*, 63 AD3d 529, 531 [2009]).

The cause of action alleging a violation of Judiciary Law § 487 fails to state a cause of action, since plaintiffs do not allege that defendants engaged in any deceptive conduct during a pending proceeding in which plaintiffs were parties (*see Stanski v Ezersky*, 228 AD2d 311, 313 [1996], *lv denied* 89 NY2d 805 [1996]).

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

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

ENTERED: APRIL 26, 2012

CLERK

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

7488 Yuriy Wowk, Index 108213/08
Plaintiff-Appellant, 59115/08

-against-

Broadway 280 Park Fee, LLC,
Defendant,

Istithmar Building 280 Park, LLC,
Defendant-Respondent.

[And a Third-Party Action]

_____

Serhiy Hoshovsky, New York, for appellant.

Russo & Toner, LLP, New York (Alan Russo of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered April 12, 2011, which, to the extent appealed from, granted defendant Istithmar Building 280 Park, LLC.'s motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to deny the motion as to the Labor Law §§ 240(1) and 200 and common-law negligence claims, and to deem the complaint amended to assert a claim under Labor Law § 202, and otherwise affirmed, without costs.

Plaintiff, a professional window washer, was injured while carrying water up to the scaffold upon which he worked, when he fell down the fixed exterior staircase that provided the sole

means of access to the scaffold.

Exterior window washing is a protected activity under Labor Law § 240(1) (*see Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). Moreover, plaintiff's act of carrying water for washing the windows was an integral part of cleaning the windows (*see Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 201-202 [2002]).

Defendant accurately points out that plaintiff stated for the first time on appeal that his first cause of action, which was undenominated, was brought under Labor Law § 202. Plaintiff identified the specific provision of the Industrial Code (12 NYCRR) that defendant allegedly violated, a prerequisite for a Labor Law § 202 claim, for the first time in opposition to defendant's motion. However, in view of the rule that leave to amend "shall be freely given" (CPLR 3025[b]) and that defendant has shown no prejudice attributable to plaintiff's omissions, we find that plaintiff should be permitted to proceed with his Labor Law § 202 claim. His activity manifestly is covered by the statute. We also find that the reference in 12 NYCRR 23-1.7(d) to "passageways" can encompass a permanent staircase, when that staircase is the sole access to the work site (*see Ryan v Morse Diesel*, 98 AD2d 615, 616 [1983]).

In opposition to defendant's motion as to the Labor Law §

200 and common-law negligence claims, plaintiff raised an issue of fact whether defendant had constructive notice of a dangerous condition on the work site, based on a recurring condition (*see e.g. Martinez v White Cottage Enters.*, 2 AD3d 506 [2003]; *Padula v Big V Supermarkets*, 173 AD2d 1094, 1096 [1991]; *Sutton v Bruno's Vil. Inc.*, 2005 NY Misc LEXIS 3439, *19-21 [2005]). He testified that the treads on the staircase were wet when he was ascending and descending them, that the wetness was caused by condensate from the nearby air conditioning units and their water tanks, and that there was moisture on the same part of the stairscase every morning in August and September until 10 or 11 A.M., when it burned off.

Labor Law § 241(6) does not apply to routine exterior window washing (*see Agli v Turner Constr. Co.*, 246 AD2d 16, 24 [1998]).

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

ENTERED: APRIL 26, 2012

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

7489 Petra Mortgage Capital Corp., LLC, et al., Plaintiffs-Appellants, Index 651861/10

-against-

Amalgamated Bank, etc., Defendant-Respondent.

_____

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellants.

Arnold & Porter, LLP, New York (Charles G. Berry of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 28, 2012, which denied plaintiffs' motion to compel the production of all communications between defendant and its attorneys in a prior legal action, unanimously affirmed, with costs.

Defendant's commencement of an action as plaintiffs' agent pursuant to an "Intercreditor and Servicing Agreement" did not create an attorney-client relationship between defendant's attorney and plaintiffs (*see Bank of N.Y. v River Terrace Assoc.*, LLC, 23 AD3d 308, 311 [2005]; *see also In re Colocotronis Tanker Sec. Litig.*, 449 F Supp 828 [SD NY 1978]). Nor were defendant and plaintiffs fiduciaries merely because they participated in

the same loans (*see 330 Acquisition Co. v Regency Sav. Bank*, 306 AD2d 154 [2003]).

Plaintiffs failed to demonstrate the applicability of the crime-fraud exception to the attorney-client privilege (*see Horizon Asset Mgt., Inc. v Duffy*, 82 AD3d 442 [2011]; *Galvin v Hoblock*, 2003 WL 22208370, *4-5, 2003 US Dist LEXIS 16704, *12-15 [SD NY 2003]).

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

ENTERED: APRIL 26, 2012

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

7490 The People of the State of New York, Respondent, Ind. 2537/95

-against-

Michael Nieves, Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about March 2, 2010, which denied, on the ground of ineligibility, defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded for further proceedings.

As the People concede, defendant is eligible to be considered for resentencing because he is deemed to still be serving a sentence for a class B drug felony. Defendant was convicted in 1996 of class B drug felonies and sentenced to concurrent terms of 5½ to 11 years. After being released on parole, he was convicted of another felony in 2003 and received a consecutive term of 3½ to 7 years. Consecutive terms are treated

as a single, aggregate term (*see* Penal Law § 70.30[1][b]; *People v Buss*, 11 NY3d 553, 557 [2008]). Therefore, defendant is deemed to be serving a sentence of 9 to 18 years, for a conviction that qualifies for possible resentencing.

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

ENTERED: APRIL 26, 2012

CLERK

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

7491-
7491A In re Marianne C. Gourary,
Petitioner-Appellant,

-against-

John P. Gourary,
Objectant-Respondent.

File 512/07

Kramer Levin Naftalis & Frankel LLP, New York (Michael J. Dell of counsel), for appellant.

Reddy, Levy & Ziffer, P.C., New York (John J. Reddy, Jr. of counsel), for respondent.

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered November 1, 2011, which, after a hearing, sustained the objection of objectant, John Gourary, that the collection of rare books, prints, and related materials (the collection) of decedent Paul Gourary, was part of the residuary estate, rather than items specifically bequested to petitioner (hearing order); and order, same court and Surrogate, entered November 18, 2011, granting, in part, petitioner's motion for leave to reargue a prior order, same court and Surrogate, entered on or about November 1, 2010, and upon reargument: (a) adhered to its prior order which imposed a surcharge on petitioner for penalties and interest assessed against the estate for the late filing of an estate tax return and the concomitant late payment of the estate tax that was due; (b) imposed a surcharge on

petitioner for not treating, as an asset of the estate, 50% of the tax refund received in connection with the filing of 2006 joint federal and state tax returns on behalf of herself and decedent; and (c) imposed a six percent interest rate on the above and other surcharges assessed against petitioner, unanimously affirmed, without costs.

The court properly found that article Second of decedent's will, which left to petitioner, in addition to two-thirds of his residuary estate, "[a]ll household furniture and furnishings, books, pictures, jewelry and other articles of personal or household use including automobiles," did not unambiguously include decedent's multi-million dollar collection of rare books, prints, manuscripts, pamphlets, scrolls, broadsides, engravings, and etchings, rather than including such collection in the residuary estate. The court concluded that it was not the intent of decedent to include this collection in the terms of "books" and "pictures," included with other items of household and personal use. We find no reason to disturb that determination (*see generally Matter of Kosek*, 31 NY2d 475, 483-484 [1973]; *Matter of Thompson*, 218 AD 130 [1926], *affd* 245 NY 565 [1927]).

The court correctly surcharged petitioner for improperly keeping the entire tax refund emanating from the couple's joint tax return. The fact that decedent's separate account, from

which the underlying joint tax payment was made, may have been "treated" by petitioner and decedent as a joint account, would, at most, entitle petitioner to half of the refund. Contrary to petitioner's contention, section 675 of the Banking Law only applies when the account is denominated as a joint account (*see* Banking Law § 675; *Viola v Viola*, 71 AD3d 1129, 1130 [2010]). Furthermore, petitioner included this separate account as an estate asset in the judicial accounting she filed, and in the estate tax return. Accordingly, the court rightly rejected petitioner's argument that she was entitled to the entire refund, and held that she was entitled to only half of the refund, with the remainder going to the estate. Thus, the court properly imposed a 50% surcharge.

The court correctly held that the duty of an estate fiduciary to file timely returns and pay any tax due is not excused by asserting that the late filing was caused by the fiduciary's reliance on a professional hired to do the work (*see United States v Executor of the Estate of Boyle*, 469 US 241, 250 [1985]). "Congress has charged the executor with an unambiguous, precisely defined duty to file the return [timely] . . . That the [professional], as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute" (*id.*). Accordingly, petitioner was

properly surcharged for the penalties associated with the untimely filing and payment of the estate taxes.

The court did not improvidently exercise its discretion by imposing a six percent interest rate on the surcharges. In an equitable action, "[w]hether interest is awarded, and at what rate, is a matter within the discretion of the trial court" (*Matter of Janes*, 90 NY2d 41, 55 [1997]; CPLR 5001[a]). In reducing the rate from nine percent to six percent, the court providently exercised its discretion by explicitly acknowledging that (as petitioner urges), "generally interest is awarded to compensate beneficiaries for any losses they may have suffered, and it should not be imposed to punish an accounting fiduciary for past misconduct or negligence." Contrary to petitioner's assertion, the statutory nine percent rate would have been "presumptively fair and reasonable," irrespective of the lower interest rate in the current market (*see Rodriguez v New York*

City Hous. Auth., 91 NY2d 76, 81 [1997]; *see also Baines v City of New York*, 269 AD2d 309, 310 [2000], *lv denied* 95 NY2d 757 [2000]).

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

ENTERED: APRIL 26, 2012

CLERK

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

7492 Migdalia Camacho, Index 300638/09
Plaintiff-Respondent,

-against-

Angel Espinoza, et al.,
Defendants-Appellants,

David D. Rador, et al.,
Defendants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Erdal Turnacioglu of counsel), for appellants.

Dinkes & Schwitzer, P.C., New York (Jacob Galperin of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 20, 2011, which, insofar as appealed from, in this action for personal injuries sustained in a motor vehicle accident, denied the motion of defendants Angel Espinoza and Mitzy Transportation, Inc. for summary judgment dismissing the complaint in its entirety as against them, unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff's cervical, lumbar, left shoulder, and left wrist injuries were not serious injuries caused by the accident. Defendants submitted affirmed reports of a radiologist and an orthopedist, showing that plaintiff sustained no range of motion limitations, and

objective MRI evidence evincing no evidence of traumatic or causally related injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [2011]). Defendant also established that plaintiff's cervical injuries were not serious injuries caused by the accident by submitting evidence that she suffered from degenerative conditions that preexisted the accident (*id.*).

In opposition, plaintiff raised triable issues of fact. Although plaintiff's physicians did not expressly address the conclusion of defendants' expert that the cervical injuries were degenerative in origin, the physician attributed plaintiff's injuries to a different, yet equally plausible cause, namely, the accident (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011]).

Moreover, plaintiff raised an issue of fact regarding whether the injuries to her left shoulder and cervical spine were serious injuries. Plaintiff submitted an affirmed report from her treating orthopedic surgeon demonstrating that she continued to exhibit range of motion deficits in her left shoulder even after having surgery (*see Paulino v Rodriguez*, 91 AD3d 559 [2012]). She also submitted an affidavit from her chiropractor, quantifying range of motion limitations in her cervical spine. Since plaintiff established that some injuries meet the "no-fault" threshold, "it is unnecessary to address whether [her]

proof with respect to other injuries [s]he allegedly sustained would have been sufficient to withstand defendants' motion for summary judgment" (*see Linton v Nawaz*, 14 NY3d 821, 822 [2010]). However, plaintiff failed to rebut defendants' showing on causation with regard to the lumbar spine.

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

ENTERED: APRIL 26, 2012

CLERK

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

7493 In re Savannah D.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sean M. Nelson of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 8, 2011, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second degree and menacing in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated her a juvenile delinquent and placed her on probation. That disposition, which was recommended by the Department of Probation, was the least restrictive dispositional alternative consistent with appellant's needs and

the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The underlying conduct was serious, in that it involved violent and disruptive behavior at school, culminating in appellant's attack on a teacher. In addition, appellant's school record was poor and she was in need of continuing counseling services

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

ENTERED: APRIL 26, 2012

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

7494 In re Pei-Fong K.,
Petitioner-Respondent,

-against-

Myles M.,
Respondent-Appellant.

Tennille M. Tatum-Evans, New York, for appellant.

Weil, Gotshal & Manges, LLP, New York (Jessica Liou of counsel), for respondent.

Order, Family Court, New York County (Elizabeth Barnett, Attorney Referee), entered on or about December 13, 2010, which to the extent appealed from as limited by the briefs, after a fact-finding hearing, granted petitioner mother a five-year order of protection in favor of the parties' child, subject to court-ordered visitation, unanimously affirmed, without costs.

The appellant father challenges the order of protection only insofar as it applies to the child, in that he contends that his admittedly violent conduct was not directed towards her. However, Family Court Act § 827(a)(vii) permits a finding of aggravated circumstances where a repeated pattern of physical injury and like incidents "constitute an immediate and ongoing danger to petitioner, or any member of petitioner's family."

The court properly determined that a fair preponderance of

the evidence supported a finding that the father engaged in a series of violent and threatening actions directed at the mother, some in the presence of the child, warranting the order of protection. Moreover, the order permits court-ordered visitation, thus enabling the father to maintain a relationship with the child.

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

ENTERED: APRIL 26, 2012

CLERK

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

7496 Fedie R. Redd, Index 402474/10
Petitioner-Appellant,

-against-

Edward A. Battisti, et al.,
Respondents-Respondents.

Fedie R. Redd, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Marion R. Buchbinder of counsel), for respondents.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered February 8, 2011, denying a petition seeking to vacate a post-hearing arbitration award finding that petitioner was guilty of all of the specified charges and that respondent Division of Parole (DOP) had just cause for terminating her from her position as a parole officer, granting DOP's cross motion to confirm the award, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

Petitioner failed to establish that the arbitration award violated public policy, was irrational, or was in violation of any of the grounds enumerated in CPLR 7511(b)(1) (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). The record amply supports the arbitrator's finding that petitioner had violated

the DOP's Code of Conduct by making false accusations of stalking, which resulted in her arrest. There is no basis for disturbing the arbitrator's rejection of petitioner's account of events (*see Matter of Cherry v New York State Ins. Fund*, 83 AD3d 446, 447 [2011]). Indeed, an investigating detective testified that at the time of the alleged incident, the purported stalker was not even in petitioner's vicinity, as demonstrated by store receipts, bank ATM records, and security surveillance video. In light of petitioner's responsibilities as a parole officer, which depend in large part upon her veracity, her misconduct warranted the penalty of termination.

Petitioner's allegations of racial and gender bias are speculative and without any evidentiary basis in the record. We have considered petitioner's remaining arguments and find them unavailing.

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

ENTERED: APRIL 26, 2012

CLERK

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

7498 In re Jill R.,
Petitioner-Respondent,

-against-

Eugene C.,
Respondent-Appellant.

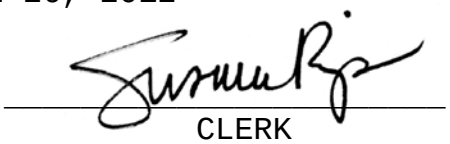
Leslie S. Lowenstein, Woodmere, for appellant.

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about August 16, 2011, which denied respondent father's motion to vacate an order of protection and an order suspending visitation, upon the father's default, and to restore the proceeding to the trial calendar, unanimously affirmed, without costs.

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

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

ENTERED: APRIL 26, 2012



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

7499 Muriel Norton, et al., Index 117134/08
Plaintiffs-Appellants,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent.

_____

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

James M. Begley, New York (Karla Denalli of counsel), for respoondent.

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Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered January 21, 2011, after a jury trial, upon a verdict in favor of defendant, unanimously affirmed, without costs.

The trial court did not err in declining to charge defendant's former employee as an interested witness in the absence of any evidence that his testimony was biased or that he was personally interested in the outcome of the matter (*cf. Lowenstein v The Normandy Group, LLC*, 51 AD3d 517 [2008] [former employee of defendant and participant in accident who had motive to shield himself from blame properly charged as interested witness]). Any error attributable to the failure to charge the jury that defendant had statutory responsibility for the maintenance of the subject sidewalk is harmless in light of

defendant's admitted responsibility for maintaining the sidewalk.

The court did not improvidently exercise its discretion in declining, on the eve of trial, to so order a subpoena that could have been issued by counsel and sought items that could have been obtained during discovery (*see* CPLR 2302; *Pena v New York City Tr. Auth.*, 48 AD3d 309, 309-310 [2008]).

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

ENTERED: APRIL 26, 2012

CLERK

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

7500 The People of the State of New York, Respondent, Ind. 1190/09

-against-

Enrique Castillo, also known as Enrique C. Fernandez, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered July 12, 2010, as amended August 6, 2010, convicting defendant, after a jury trial, of offering a false instrument for filing in the first degree (three counts) and attempted petit larceny, and sentencing him to an aggregate term of three to nine years, unanimously affirmed.

The court properly admitted evidence of an uncharged crime. Defendant was charged with filing documents that falsely represented himself as the owner of a building. The court properly received evidence of a similar, uncharged scheme involving a Brooklyn property. The perpetrator of the Brooklyn scheme also filed fraudulent documents, using the same variation on defendant's name, the same address, and the same falsified

notary stamp that were used with respect to the property involved in the charged crime. The uncharged scheme was highly relevant to trial issues concerning knowledge, fraudulent intent and motive (*see e.g. People v Potter*, 30 AD3d 313, 314 [2006], *lv denied* 7 NY3d 816 [2006]). Furthermore, the charged and uncharged crimes shared a distinctive pattern and were thus admissible as evidence of identity (*see People v Beam*, 57 NY2d 241, 253 [1982]). There was ample evidence to support the inference that defendant was the perpetrator of the Brooklyn scheme (*see People v Robinson*, 68 NY2d 541, 544-545 [1986]). Defendant's challenge to the court's limiting instruction is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

The court properly exercised its discretion in permitting testimony by a judge who had been the attorney for the deceased owner of the property that was the subject of the charged crimes. Defendant argues that this testimony was cumulative to other evidence and served no purpose except to impress the jury by having a judge testify for the prosecution. However, the judge's testimony was clearly relevant, and it could not have caused any prejudice. The word "judge" was mentioned only once, when the witness stated his present employment. Furthermore, the court

offered to instruct the jury that a judge's testimony should be treated like that of any witness, but defendant declined that offer.

The court properly admitted statements made at arraignment by defendant's former counsel. These were vicarious admissions by defendant, made through his agent (*see People v Brown*, 98 NY2d 226, 232-233 [2002]). Accordingly, these statements were properly introduced into evidence by way of the testimony of a court reporter. Defendant's argument that the circumstances required the People to call the former counsel as a witness is unpersuasive.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 26, 2012

CLERK

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

7501 Haim Yuzary, etc., Index 307411/09
Plaintiff-Appellant,

-against-

WCP Wireless Lease Subsidiary LLC, et al.,
Defendants,

Fannie Mae, et al.,
Defendants-Respondents.

Law Office of Lee M. Albin, Garden City (David Pfeffen of counsel), for appellant.

Cuddy & Feder LLP, White Plains (Joshua E. Kimerling of counsel), for Fannie Mae, respondent.

Solomon E. Antar, Brooklyn, for 1058 Southern Blvd. Realty Corp. and Miriam Shasho, respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 28, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment and granted that portion of defendant Fannie Mae's cross motion for summary judgment seeking to restrict plaintiff's mortgage to a one-quarter interest in the mortgaged property and to declare Fannie Mae's mortgage superior, unanimously modified, on the law, to so declare, and otherwise affirmed, with costs.

Plaintiff failed to establish his entitlement to summary judgment since the maturity date of the mortgage and note at

issue was February 15, 1992 and his submissions raised questions of fact as to whether this action for foreclosure was timely commenced (CPLR 213(4); *see CDR Créance S.A. v Euro-America Lodging Corp.*, 43 AD3d 45, 51 [2007]).

The motion court properly declined to dismiss the affirmative defenses alleging that plaintiff's action is based on forged documents. The submissions in this regard raise an issue of fact as to whether the signature on a letter purporting to extend the mortgage term was, in fact, forged (*see Seaboard Sur. Co. v Earthline Corp.*, 262 AD2d 253 [1999]; *cf. Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]).

The motion court also properly found that Fannie Mae's mortgage has priority over plaintiff's mortgage. Plaintiff's mortgage had, from all appearances, reached its maturity date 14 years before Fannie Mae acquired its mortgage. Thus, any foreclosure action would have been time-barred as of February 14, 1998 (CPLR 213[4]). Moreover, even assuming that the letter purporting to extend the mortgage term was genuine, it was never recorded, and therefore is not effective against Fannie Mae, which is a bona fide encumbrancer with no notice of the purported extension (Real Property Law § 291; *Bergenfeld v Midas Collections*, 38 AD2d 939, 939-940 [1972]; *Weideman v Pech*, 102 AD 163, 165-166 [1905]).

The motion court properly found that, at best, plaintiff is limited to a one-quarter interest in the mortgaged property (*see Citifinancial Co. (DE) v McKinney*, 27 AD3d 224, 226-227 [2006]), subordinate to the Fannie Mae mortgage.

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

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

ENTERED: APRIL 26, 2012

CLERK

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

7504N Daniel F. Hayes, Index 115688/10
Plaintiff-Appellant,

-against-

Biedermann, Reif, Hoenig & Ruff, P.C., et al.,
Defendants-Respondents.

Kaiser Saurborn & Mair, P.C., New York (Daniel J. Kaiser of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, New York (Joan M. Gilbride of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 2, 2011, which, in this action alleging age discrimination, granted defendants' motion to compel arbitration and stayed the proceedings, unanimously reversed, on the law, without costs, and the motion denied.

The record shows that the parties entered into an employment agreement that contained a broad arbitration clause. The agreement also provided that it could not be extended except by a writing signed by both parties. At the time of plaintiff's termination, the employment agreement had expired by its own terms, and no written agreement signed by both parties had extended it. Although plaintiff continued to work for defendant law firm after the expiration of the agreement, evincing an

agreement to extend some of the provisions of the contract, that was insufficient to extend the arbitration provision without a clearly expressed intention to do so. Accordingly, since no agreement to arbitrate existed at the time of plaintiff's termination, the court improperly stayed the proceedings and directed arbitration (*see Matter of Waldron [Goddess]*, 61 NY2d 181, 185 [1984]; *Donnkenny Apparel v Lee*, 291 AD2d 224 [2002]).

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

ENTERED: APRIL 26, 2012

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román JJ.

6195 Carlos Garcia, Index 105831/07
Plaintiff-Respondent,

-against-

225 East 57th Street Owners, Inc.,
Defendant-Appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 10, 2011, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Sheila Abdus-Salaam
Nelson S. Román, JJ.

6195
Index 105831/07

Carlos Garcia,
Plaintiff-Respondent,

-against-

225 East 57th Street Owners, Inc.,
Defendant-Appellant.

Defendant appeals from an order of the Supreme Court, New York County (Joan M. Kenney, J.), entered March 10, 2011, which, insofar as appealed from, as limited by the briefs, denied its motion for summary judgment dismissing the Labor Law § 241(6) cause of action to the extent it is based on violations of Industrial Code (12 NYCRR) § 23-3.3(b)(3) and (c).

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant.

Ephrem J. Wertenteil, New York, and Hecht, Kleeger, Pintel & Damashek, New York, for respondent.

CATTERSON, J.

In this personal injury action in which the plaintiff alleges a violation of Labor Law § 241(6), the critical inquiry is not whether the plaintiff was engaged in the demolition or "dismantling" of a structure. Rather, we must decide if the breaking of a mirrored panel that injured plaintiff is the type of hazard contemplated by the Industrial Code provisions that plaintiff alleges were violated.

The following facts are undisputed: The plaintiff Carlos Garcia was employed by nonparty JMPB Enterprises, LLC as a laborer. The defendant owns a 22-story cooperative apartment building in Manhattan and contracted with JMPB to remove wall coverings including mirrored wall panels. JMPB was then to plaster, prime, and paint the walls.

The two-by-eight-foot panels were affixed to the surface of the walls with adhesive. The plaintiff removed the panels by wedging a spatula between the panel and the drywall. The plaintiff then tapped the spatula with a hammer to pry the panel loose. Several of the panels had broken while being removed. On January 16, 2007, the plaintiff was injured when a piece of panel he was removing broke and cut his hand.

The plaintiff commenced this action on April 23, 2007, alleging common-law negligence and violations of the Labor Law.

After discovery, the defendant moved for summary judgment seeking dismissal of the complaint. In a decision and order dated March 10, 2011, the motion court granted summary judgment dismissing the Labor Law §§ 200 and 240(1) and common-law negligence claims and the Labor Law § 241(6) claim based on 12 NYCRR 23-1.7(e)(1) and (2) and an alleged OSHA violation, and denied that part of the motion seeking dismissal of plaintiff's § 241(6) claim insofar as it was based on 12 NYCRR 23-3.3(b)(3) and 23-3.3(c) on the ground that the plaintiff raised a triable issue of fact as to whether the work being performed on the premises was demolition. For the reasons set forth below, we reverse, and dismiss the remainder of the § 241(6) claim.

In relevant part, Labor Law §241(6) states:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein [...] The commissioner may make rules to carry into effect the provisions of this subdivision."

The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR, part 23, which defines demolition work as:

> "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." 12 NYCRR 23-1.4(b)(16).

We have held that, in order to constitute demolition, the work must "involve changes to the structural integrity" of a building or structure. Cardenas v. One State St., LLC, 68 A.D.3d 436, 439, 890 N.Y.S.2d 41, 43 (2009) (internal quotation marks omitted).

On appeal, the plaintiff relies on Pino v. Robert Martin Co., (22 A.D.3d 549, 802 N.Y.S.2d 501 (2d Dept. 2005)) to argue that he was injured while "dismantling a structure" and therefore he was engaged in demolition work in the context of Labor Law § 241(6). In Pino, the Second Department found that a shelving unit was a structure under § 241(6), because it was a "production or piece of work artificially built up or composed of parts joined together in some definite manner." 22 A.D.3d at 552, 801 N.Y.S.2d at 503 (internal quotation marks omitted). However in that case, the Second Department appeared merely to adopt a definition used in the analysis of two cases alleging violations of Labor Law 240(1). See Joblon v. Solow, 91 N.Y.2d 457, 464, 672 N.Y.S.2d 286, 290, 695 N.E.2d 237, 241 (1998), quoting Lewis-Moors v. Contel of N.Y., 78 N.Y.2d 942, 943, 573 N.Y.S.2d 636, 636, 578 N.E.2d 434, 434 (1991). These decisions, in turn, relied upon the hoary authority of Caddy v. Interborough R. T. Co., 195 N.Y. 415, 420, 88 N.E. 747, 749 (1909).

In Caddy, the 1897 statute at issue required employers to

furnish scaffolding to workers engaged in the "erection, repairing, altering or painting of a house, building or structure." The purpose of the statute, as in the current Labor Law § 240(1), was to protect workers from elevation-related hazards. The Court found that in addition to buildings and houses, the statute encompassed other "structures" for which scaffolding would be required. "Structure" was broadly construed in 1909 in order to effectuate the purpose of the statute of 1897. In the case of § 240(1) claims, we still broadly construe the statute to protect workers from falling from a height or being struck by a falling object.

However, Labor Law § 241(6) is different in scope from § 240(1). Section 241 was enacted to protect workers from industrial accidents specifically in connection with construction, demolition or excavation work. Nagel v. D & R Realty Corp., 99 N.Y.2d 98, 102, 752 N.Y.S.2d 581, 584, 782 N.E.2d 558, 561 (2002). Section § 241(6) places a non-delegable duty upon owners and contractors "to provide reasonable and adequate protection and safety" for workers. The scope of that duty in § 241(6) is circumscribed by the specific safety rules set forth in the Industrial Code. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502, 618 N.E.2d 82, 86, 601 N.Y.S.2d 49, 53 (1993).

By its terms, therefore, § 241(6) "require[s] reference to outside sources to determine the standard by which a defendant's conduct must be measured." 81 N.Y.2d at 503, 601 N.Y.S.2d at 54 (internal quotation marks omitted) (the provision "contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority"). In other words, unlike § 240(1), to establish liability under this provision, a plaintiff "must specifically plead and prove the violation of an applicable Industrial Code regulation." Buckley v. Columbia Grammar & Preparatory, 44 A.D.3d 263, 271, 841 N.Y.S.2d 249, 256 (1st Dept. 2007), lv. denied 10 N.Y.3d 710, 859 N.Y.S.2d 395, 889 N.E.2d 82 (2008).

Here, in support of his claims, the plaintiff relies on § 23–3.3(b)(3): "Demolition by hand" of "walls and partitions," which requires that:

> "[w]alls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration."

The plaintiff also relies on section § 23-3.3(c) which requires that:

> "continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

The court below observed that "one could conclude" that the broken mirror was "a hazard arising from 'loosened material' as [the] defendant failed to guard the glass mirror from falling into large broken pieces." However, the court interpreted "loosened material" too broadly. The cited provisions have been construed as specific safety rules designed to protect a worker from the hazards created when a structure is *weakened* by the "*progress of the demolition*." Smith v. New York City Hous. Auth., 71 A.D.3d 985, 987, 897 N.Y.S.2d 232, 234 (2d Dept. 2010)(emphasis added); Campoverde v. Bruckner Plaza Assoc. L.P., 50 A.D.3d 836, 837, 855 N.Y.S.2d 268, 269 (2d Dept. 2008)(citation omitted). Thus, "loosened material" must be material loosened by the "progress" of demolition. This loosening material might evade notice until it "fall[s]" or "collapse[s]" and injures a worker. This does not encompass material which is being loosened deliberately.

Hence, in Medina v. City of New York (87 A.D.3d 907, 929 N.Y.S.2d 582 (1st Dept. 2011)), we found a § 241(6) violation based on 12 NYRCC 23-3.3(c) where the plaintiff was injured when

a section of subway rail, which he was cutting, sprang free and fell on him, injuring his leg. We found that the stressed rail was the kind of hazard contemplated by section 23-3.3(c) since "repeated saw cuts loosened the rail, rendering it unstable." 87 A.D.3d at 909, 929 N.Y.S.2d at 584. In that case, we found that continued inspections would have detected the hazard of the stressed rail.

In Ortega v. Everest Realty LLC (84 A.D.3d 542, 923 N.Y.S.2d 74 (1st Dept. 2011)), the plaintiff was injured when the wall of an aluminum shed fell on him as he was sawing through it. We found that, if the plaintiff could demonstrate at trial that the wall fell as a result of structural instability caused by the vibrations from the plaintiff's saw cutting, he could go forward with his § 241(6) claim based on violations of Industrial Code sections 23–3.3(b)(3) and (c). Ortega, 84 A.D.3d at 545, 923 N.Y.S.2d at 78. In that case, there was no dispute that the defendants had failed to make any inspections, and we determined that the required inspections and shoring might have protected the plaintiff from the hazard of a wall weakened by the progress of demolition.

The Second Department's determination in Smith v. New York City Hous. Auth. (71 A.D.3d 985, 897 N.Y.S.2d 232) is particularly instructive. In Smith, the Court found that 12

NYCRR 23–3.3(b)(3) and (c) did not apply to the plaintiff's claim. The plaintiff was using a jackhammer to demolish a four-foot wall. He was chipping away at the mortar surrounding a cinder block in order *to dislodge it* when it fell along with one or two other blocks that were attached and injured him. The Court found that the hazard of the falling bricks arose from the performance of the demolition work, and not from structural instability caused by the progress of demolition. See also Ofri v. Waldbaum, Inc., 285 A.D.2d 536, 728 N.Y.S.2d 74 (2d Dept. 2001).

It is clear, therefore, that the code provisions cited by the plaintiff are inapplicable to his claim, and therefore even if we accepted that the plaintiff was engaged in the demolition or dismantling of a structure, his claim cannot survive the defendant's summary judgment motion: The mirrored panel did not break because it was weakened by the progress of demolition or dismantling, and therefore neither shoring or bracing or continued inspections could have prevented it from breaking and injuring plaintiff.

In this case, the plaintiff was deliberately loosening the mirror in order to remove it from the wall, and it broke as he was removing it. The hazard therefore arose from the actual performance of his work, and not from structural instability

caused by the progress of other demolition work. To guard, shore, or brace the mirror would have precluded the plaintiff from performing the task of removing the mirror. Thus, the provisions of the Industrial Code relied upon by the plaintiff could not have protected him, and so cannot support his claim.

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered March 10, 2011, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the Labor Law § 241(6) cause of action to the extent it is based on violations of Industrial Code (12 NYCRR) § 23-3.3(b)(3) and (c), should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

All concur.

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

ENTERED: APRIL 26, 2012

CLERK