SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 19, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Buckley, Sweeny, Moskowitz, JJ.

3015 Alan M. Goldston, as Assignee of Goldston & Schwab, LLP,
Plaintiff-Appellant,

-against-

Bandwidth Technology Corp., et al.,
Defendants-Respondents.

Index 112098/04

Penn Proefriedt Schwarzfeld & Schwartz, New York (Neal Schwarzfeld of counsel), for appellant.

Warner & Scheuerman, New York (Jonathon D. Warner of counsel), for respondents.

Judgment, Supreme Court, New York County (Rolando T. Acosta, J.), entered on or about March 19, 2007, after a nonjury trial, in an action by an attorney against former clients for specific performance of a retainer agreement, insofar as appealed from, holding the subject retainer agreement to be void and unenforceable, unanimously reversed, on the law, without costs, and judgment awarded in favor of plaintiff for 2% of defendant Bandwidth Technology Corp.'s authorized and outstanding shares, and the matter remanded for further proceedings, including the entry of an amended judgment.

Under well-established rules applicable to the principal-agent relationship, defendant Bandwidth Holdings Corp. and its

wholly owned subsidiary, Bandwidth Technology Corp. (BTC), are bound by the retainer agreement signed by their president, Jonathan Star. Star had at least apparent authority to enter into the agreement with Goldston & Schwab (G&S), plaintiff's predecessor in interest. The corporations actually received services from the law firm under the agreement, and BTC further ratified the agreement by adopting a resolution terminating plaintiff, then the remaining member of G&S, from his position as corporate counsel. Defendants have set forth no grounds upon which they may be relieved from performance under the retainer agreement, and they are required to compensate plaintiff according to its terms.

The essential facts are uncontroverted. G&S entered into a September 1998 agreement to provide legal services to defendants BTC and Bandwidth Holdings Corp. The retainer agreement was duly executed by Jonathan Star, as president of defendant corporations. The agreement sets the law firm's compensation for its services to defendants at four shares of BTC stock, representing a 2% interest in the corporation. The agreement is for a fixed term of one year and retroactive to June 1, 1998, encompassing legal services rendered to the corporations prior to its execution, together with future services to be rendered throughout the balance of the contract term. In November 1998, Alan Schwab, plaintiff's law partner, left the firm and, by

resolution adopted at a February 1999 shareholders' meeting, plaintiff was formally discharged by BTC from "any and all duties and authority granted to him as corporate attorney." Defendants failed to compensate plaintiff pursuant to the terms of the retainer agreement, and this action ensued.

After a nonjury trial, Supreme Court dismissed plaintiff's claim for compensation under the retainer agreement on the ground that defendants' president lacked the authority to engage the services of G&S without approval of the corporations' board of directors. The court concluded that the retainer agreement was void because Star did not have the authority to enter into a binding agreement on behalf of the corporations, adopting defendants' reasoning that the transfer of BTC stock to G&S as compensation for its services required board approval (citing Business Corporation Law § 504 and § 505), which was not obtained.

Whether defendants are legally obligated to compensate plaintiff under the terms of the agreement is an issue that can be resolved as a matter of law. The agreement signed by Star, as agent for both corporations, is binding on defendants whether or not Star had actual authority to engage in the transaction or sought any necessary corporate approval. "'The president or other general officer of a corporation has power, prima facie, to do any act which the directors could authorize or ratify . . .

The true test of his authority to bind the corporation is . . . whether, at the time, he is engaged in the discharge of the general duties of his office, and in the business of the corporation'" (*Odell v 704 Broadway Condominium*, 284 AD2d 52, 56-57 [2001], quoting *Hastings v Brooklyn Life Ins. Co.*, 138 NY 473, 479 [1893]; *see Allied Sheet Metal Works v Kerby Saunders, Inc.*, 206 AD2d 166, 168 [1994] [vice president has "at least apparent authority to bind the corporation"]).

The retention of corporate counsel by Star is clearly an act subsumed within "the powers which, of necessity, inhere in the position of chief executive" (*Odell*, 284 AD2d at 56) and one that was undertaken "in the discharge of the general duties of his office, and in the business of the corporation" (*id.* at 57 [internal quotation marks and citation omitted]; *see Park Riv. Owners Corp. v Bangser Klein Rocca & Blum*, 269 AD2d 313 [2000] [president had presumptive authority to institute action and retain counsel]). Significantly, defendants do not contend that the retainer agreement is so extraordinary or provides for such unusual compensation as to require board approval (*see Ullman-Briggs, Inc. v Salton, Inc.*, 754 F Supp 1003, 1006 [SD NY 1991]; *Goldenberg v Bartell Broadcasting Corp.*, 47 Misc 2d 105, 109 [1965]). They argue only that the retainer agreement amounted to an "informally approved agreement" and that corporate practice "was to have all informally approved agreements signed by two

principals."

Defendants' attempt to minimize the significance of a contract signed by their corporate president notwithstanding, an agreement entered into within the exercise of a corporate officer's apparent authority is binding on the corporation without regard to the officer's lack of actual authority (*Odell*, 284 AD2d at 57). Even in the instance where a chief executive's actual authority to enter into a particular agreement without the approval of the board of directors is in doubt, no obligation is imposed on the other party to the transaction "to show that [the president] did, in fact, consult the board" (*id.* at 56; *see Hallock v State of New York*, 64 NY2d 224, 231 [1984] [a principal is bound by a transaction entered into by its agent where the principal's conduct creates the appearance that the agent has such authority]). Even where an officer acts to the detriment of corporate interests, the law imposes no duty on a third party who deals with the corporation to inquire into its employee's actual authority. "The risk of loss from an unauthorized act of a dishonest employee falls on the corporation which appointed him to act on its behalf and not on the party who relies on his apparent authority" (*Geotel, Inc. v Wallace*, 162 AD2d 166, 168 [1990], *lv dismissed, lv denied* 76 NY2d 917 [1990]). Finally, it is well settled that the president of a corporation has presumptive authority to engage the services of counsel, even if

those services exceed the terms of the general retainer agreement under which counsel was engaged (*Twyeffort v Unexcelled Mfg. Co.*, 263 NY 6, 9-10 [1933]).

Because the retention of counsel falls within the scope of the executive's apparent authority, his actual authority is immaterial, and internal procedures for review or ratification of corporate transactions are irrelevant (*cf. Leslie, Semple & Garrison v Gavit & Co.*, 81 AD2d 950, 951 [1981] [sale of corporation's physical assets]). Moreover, on the record before us, it is clear that defendants accepted the benefits of legal work performed by G&S and are therefore bound by the agreement, whether they authorized it or not (*see Matter of Cologne Life Reins. Co. v Zurich Reins. [N. Am.]*, 286 AD2d 118, 126 [2001], citing Restatement [Second] of Agency § 94; *Eden Temporary Servs. v House of Excellence*, 270 AD2d 66, 67 [2000]). Thus, Supreme Court's finding that "it was company practice to have two principals sign all approved corporate contracts" is of no moment.

Business Corporation Law § 504 and § 505 do not stand as an impediment to defendants' performance of their agreement with plaintiff. The former statute provides that "the judgment of the board or shareholders, as the case may be, as to the value of the consideration received for shares shall be conclusive" (Business Corporation Law § 504[a]) and that shares may be issued for

consideration for not less than the "value thereof, as is fixed from time to time by the board" (Business Corporation Law § 504[c]). These provisions concern the valuation of stocks at time of issue (*see Vohra v Prasad Realty Corp.*, 174 AD2d 735, 735 [1991]), and do not preclude an agreement to award issued and outstanding shares in lieu of a cash payment (*id.* at 736; *see Torres v Speiser*, 268 AD2d 253 [2000], *cf. Palmerton v Envirogas, Inc.*, 80 AD2d 996 [1981] [purported agreement to purchase stock in newly-formed corporation]). Furthermore, testimony established that BTC was in turmoil at the time of the retainer because its right to use bandwidth technology, the corporation's only valuable asset, was being questioned by its inventor, John Leroy Silvers. Star testified that, at the time, the outlook for the company was bleak since Silvers, who was supposed to develop the technology for the corporation, was not cooperating. Star could not assess the value of the stock, except to say that "it wasn't worth a lot." Thus, Star's offer of the stock in compensation for legal services, and plaintiff's acceptance of it, were not based on any valuation of the corporation's shares, but rather were made with the understanding that such valuation was uncertain. Therefore, the transaction did not implicate Business Corporation Law § 504. Finally, Business Corporation Law § 505 governs only the issuance of "rights or options," neither of which are involved in the subject transaction.

Defendants assert that plaintiff performed little or no work for them following the signing of the retainer agreement, noting that at his deposition plaintiff "was unable to recall any work he performed for Bandwidth after November 1998." They conclude that plaintiff must look to Webface, Inc., defendant's predecessor, for reimbursement, and they seek to avoid any obligation under the retainer agreement on the ground that plaintiff did not render substantial performance.

Defendants' contention that G&S performed no work under the September 1998 retainer agreement for which compensation may be due disregards its plain language:

> "Goldston & Schwab LLP (the "Firm") is pleased to have been engaged by Bandwidth Technology Corp. ("BTC"), formerly known as Webface, Inc., and by BTC's parent company Bandwidth Holdings Corp. (collectively, "Company") to act as counsel for those entities. Pursuant to your request, and on the basis of the understanding set forth herein, we have been acting in that capacity since June 1, 1998, and we are pleased to continue to work for your organization."

Defendants do not deny that, during the summer of 1998, G&S incorporated BTC and Bandwidth Holdings Corp., absorbing Webface into the corporate structure in what plaintiff described as a "reverse triangular merger." This plan was duly adopted by Webface and BTC on July 20, 1998. Defendants do not contend that this work represents less than substantial performance under the retainer agreement, only that plaintiff rendered no substantial

services to them following its execution in September 1998. Since the parties' agreement expressly provides that the stated 2% interest in the corporation represents the firm's compensation "for the initial period June 1, 1998 through May 31, 1999," and it is clear that G&S performed substantial work for the corporation prior to the signing of the September 1998 agreement, the contention that plaintiff did not substantially perform under the retainer agreement is without merit.

Defendants further maintain that the dissolution of G&S by operation of law upon the departure of Alan Schwab, Esq. at the end of November 1998 constitutes a breach of the retainer agreement. Defendants intimate that they objected to the substitution of plaintiff for the law firm of Goldston & Schwab, asserting that they did not "waive the right to object to the substitution of Goldston for G&S following its dissolution."

This contention is belied by the record. The minutes of a shareholders' meeting dated February 19, 1999 include a resolution that "Alan Goldston be relieved of any and all duties and authority granted to him as corporate attorney and that he no longer be engaged as corporate attorney for Bandwidth Technology Corp." Apart from indications that plaintiff personally performed much of the legal work on behalf of G&S, this corporate resolution clearly establishes that plaintiff was officially recognized as "corporate attorney" and was regarded as

defendants' general counsel, as the successor to G&S. In addition, the record is devoid of evidence that defendants were represented by any other attorney from the effective date of the retainer agreement to the date on which plaintiff was relieved as corporate counsel.

Further, there is no merit to defendants' contention that the departure of Schwab from G&S, resulting in its dissolution as a matter of law, constituted a breach of the retainer agreement. As this Court has noted, a change in the organization of a business does not, without more, give rise to a claim by a party contracting with that business even if the reorganization adversely affects the party's interests (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 107 [2002]; *Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 214 [1991]).

The question of whether the retainer agreement constitutes a general retainer (*see Atkins & O'Brien v ISS Intl. Serv. Sys.*, 252 AD2d 446, 448 [1998]) or a nonrefundable special retainer compensable only in quantum meruit (*see Matter of Cooperman*, 83 NY2d 465, 475 [1994]) is answered by the terms of the agreement under which G&S was originally retained, which clearly provides for the engagement of "corporate counsel." In any event, contrary to defendants' insinuation, it is not dispositive that the subject retainer agreement contemplates the performance of such specialized work as litigation and filings with the

Securities and Exchange Commission by other attorneys. It has long been recognized that the exclusion of certain legal work from the representation provided by counsel does not render a corporate retainer agreement anything other than a general retainer (*see Twyeffort*, 263 NY at 8).

It is apparent that defendants are simply disinclined to honor the terms of their contractual arrangement with plaintiff. This is curious in view of a March 1999 remuneration agreement with their investment advisor providing that the advisor is to receive 5% of the corporations' shares in exchange for its services. Defendants do not contend that either arrangement represents excessive compensation for the services received. In any event, parties to a contract may make a bargain as they see fit "even if the consideration exchanged is grossly unequal or of dubious value" (*Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 475 [1993]), the operative factor being whether the promised consideration "is acceptable to the promisee" (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]).

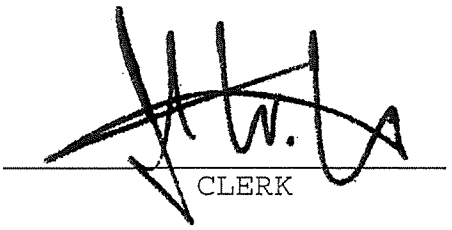
"Absent a claim of fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny" (*Spaulding v Benenati*, 57 NY2d 418, 423 [1982]). However, even if this question were to be addressed, the value of plaintiff's services represented by the value of BTC stock at the time services were rendered was reasonable, as indicated by the value

placed on the corporate shares in a March 17, 1999 purchase agreement for a single share of stock for the price of $10,000. When plaintiff was discharged as corporate counsel in February 1999, BTC was still a company in the early stages of development, and the four shares promised to him had a recognized value of just $40,000. This sum is entirely consonant with the trial court's finding that the value of plaintiff's services in quantum meruit was $50,000.

In conclusion, defendants have presented no basis for relieving them of their obligation to compensate G&S in accordance with the terms of the retainer agreement, and no such basis is discernible on the record. Nor does any question of fact remain unresolved by the evidence amassed at trial.

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

ENTERED: JUNE 19, 2008



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Tom, J.P., Andrias, Nardelli, Sweeny, JJ.

3161 Howard Brown, Index 8804/05
Plaintiff-Respondent,

-against-

Ranjit Singh, et al.,
Defendants-Appellants.

Marjorie E. Bornes, New York, for appellants.

Monaco & Monaco, LLP, Brooklyn (Frank A. Delle Donne of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered September 21, 2007, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff offered no explanation for the absence of any evidence that he underwent any medical treatment or physical therapy in the five years since he was examined, X-rayed and released by the hospital emergency room immediately after the automobile accident in which he claims to have sustained "serious injury." In addition, the report of a physician who examined plaintiff more than five years after the accident was too remote in time to show any contemporaneous range of motion limitations in his cervical and lumbar spine resulting from the accident, and

therefore fails to raise an issue of fact as to whether his injuries were permanent or significant (*see Thompson v Ramnarine*, 40 AD3d 360 [2007]).

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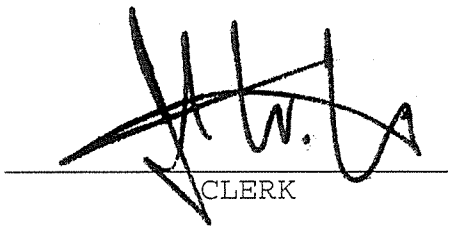
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 19, 2008



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Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3183 Felicia Hernandez, Index 121762/03
Plaintiff-Respondent,

-against-

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

Steve Efron, New York, for appellants.

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

Judgment, Supreme Court, New York County (Robert D. Lippmann, J., and a jury), entered December 28, 2006, awarding plaintiff, inter alia, pre-structured damages in the principal amounts of $3 million for past pain and suffering, $4.6 million for future pain and suffering over 24 years, future surgery expenses of $90,000 over 5 years, future psychotherapy expenses of $126,000 over 8 years, and other medical expenses of $4,661,529 over 24 years, and bringing up for review an order, same court and Justice, entered June 22, 2006, which granted plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, plaintiff's motion for summary judgment on the issue of liability denied and the matter remanded for a trial on that issue, and, in the event plaintiff prevails on the issue of liability, damages as found by the jury (1) vacated, on the law, as to the awards of $30,000 for future ankle surgery within 5 years, and $126,000 for

future psychotherapy over 8 years, (2) reduced, on the law, as to the award for a home health aide from $3,042,949 over 24 years to $633,947.70 over 5 years, and as to the award for handicapped-adapted housing over 24 years from $850,000 to $490,400, and (3) vacated, on the facts, as to the awards for past and future pain and suffering, and a new trial directed on those issues, unless plaintiff stipulates, within 30 days of service of a copy of this order, to reduce the past and future pain and suffering awards to $2.5 million and $3 million, respectively.

Supreme Court erred in granting plaintiff's motion for summary judgment on the issue of liability. Triable issues of fact exist as to whether defendant driver failed to exercise due care to avoid the accident (*see* Vehicle and Traffic Law § 1146; *Marquis v Eisenstein*, 5 AD3d 741, 742 [2004]), and whether plaintiff was comparatively negligent in failing to keep a proper look-out for traffic (*see Thoma v Ronai*, 82 NY2d 736 [1993]; *Cator v Filipe*, 47 AD3d 664 [2008]; *cf. Hoey v City of New York*, 28 AD3d 717 [2006]).

Plaintiff suffered severe injuries to her legs, which were pinned under defendant New York City Transit Authority's bus; her right arm, shoulder, and ankle were also injured. She was in the hospital for almost three months, underwent five operations, and will need at least one future operation; she needs a four-prong cane in order to walk; and still experiences pain. Without

minimizing the severity of plaintiff's injuries, the $3 million awarded by the jury for past pain and suffering deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]). The highest supportable amount, taking into account that plaintiff did not suffer an amputation but did suffer injuries to both legs, an ankle, and a shoulder, is $2.5 million (*cf. Sladick v Hudson Gen. Corp.*, 226 AD2d 263 [1996]; *Hoenig v Shyed*, 284 AD2d 225 [2001]).

Similarly, the future pain and suffering award of $4.6 million over 24 years likewise deviates materially from what would be reasonable compensation, with case law from this Court demonstrating that $3 million over 24 years would constitute reasonable compensation for comparable injuries (*see Bondi v Bambrick*, 308 AD2d 330, 330-331 [2003] [total pain and suffering award of $9.75 million did not deviate from what is reasonable compensation for active 35-year old woman]; *Kovit v Estate of Hallums*, 307 AD2d 336, 336-338 [2003], *revd on other grounds* 4 NY3d 499 [2005] [$10 million future pain and suffering award reduced to $1.75 million]; *Sladick*, 226 AD2d at 263-264 [$5 million future pain and suffering award over 42 years did not deviate from what would be reasonable compensation]).

The award of $3,042,949 for a home health aide for the next 24 years was speculative and unproven with reasonable certainty (*see Pouso v City of New York*, 22 AD3d 395, 397 [2005]). The

jury anticipated that plaintiff would have her right knee replaced within 5 years, as shown by its award for future surgery expenses, and indeed plaintiff's own doctor said that if the surgery went well, plaintiff would be able to perform independent daily activities. Therefore, plaintiff did not prove that she would need a home health aide for the next 24 years (*id.*). Accordingly, we reduce the home health aide award to $633,947.70 (that amount is to 5 years what $3,042,949 is to 24 years). The award for handicapped-adapted rental housing is excessive to the extent indicated (*see Eccleston v New York City Health & Hosps. Corp.*, 266 AD2d 426, 428 [1999]), given the uncontradicted evidence that a more cost-effective solution would be the purchase of a handicapped-adapted cooperative apartment, in addition to payments for 24 years of common charges and any necessary renovations.

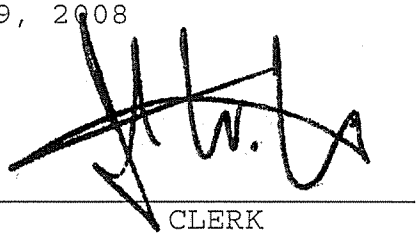
The witness who testified as to plaintiff's need for future ankle surgery did not say that plaintiff would need that operation within the next five years. Therefore, the jury's award of $30,000 for an ankle operation within five years is speculative and should be set aside (*Pouso at* 397).

At the time of trial, plaintiff was not undergoing psychotherapy, even though that had been recommended to her. Nor did plaintiff's expert psychological witness establish her need for future psychotherapy with reasonable certainty. Accordingly,

the award for future psychotherapy expenses is speculative and should be set aside (*see Guerrero v Djuko Realty*, 300 AD2d 542, 543 [2002], *lv denied* 100 NY2d 501 [2003]).

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

ENTERED: JUNE 19, 2008



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Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3812N Veras Investment Partners, LLC, et al., Plaintiffs-Appellants, Index 600340/07

-against-

Akin Gump Strauss Hauer & Feld LLP, Defendant-Respondent.

Flemming Zulack Williamson Zauderer LLP, New York (Linda M. Marino of counsel), for appellants.

Patterson Belknap Webb & Tyler LLP, New York (Philip R. Forlenza of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 26, 2008, which denied plaintiffs' motion to vacate the order, same court (John A. K. Bradley, JHO), dated November 5, 2007, granting defendant's motion for a declaration that plaintiffs waived the attorney-client privilege by placing certain subjects "at issue," and to compel the disclosure of otherwise privileged communications and attorney work product, unanimously modified, on the law and the facts, disclosure of otherwise privileged materials relating to defendant's 2002 advice to plaintiffs and the October 2003 proffer to the regulators limited to the time period ending January 31, 2005, disclosure of otherwise privileged materials relating to the legality of plaintiffs' trading practices limited to the time during which plaintiffs engaged in such practices, disclosure of nonparty counsels' work product consisting of their analyses and

evaluations of plaintiffs' jeopardy denied insofar as they relate to plaintiffs' rationale for entering into the settlement agreement with the regulators, disclosure of otherwise privileged materials relating to defendant's alleged conflicts of interests and plaintiffs' execution of the June 28, 2004 waiver letter limited to the time period ending with defendant's resignation as counsel in May 2005, and otherwise affirmed, without costs.

In this legal malpractice and fraud action, defendant moved for an order compelling disclosure of communications plaintiffs may have had with their nonparty counsel as well as the work product of such counsel. The judicial hearing officer supervising discovery granted the motion on the ground that plaintiffs waived the attorney-client privilege. Thereafter, the Commercial Division denied plaintiffs' CPLR 3104(d) motion to vacate the JHO's order. The instant appeal, from the Commercial Division's order, concerns the scope of plaintiffs' waiver.

Plaintiffs are hedge funds, related entities and their principals, James McBride, Kevin Larson and Brian Virginia. According to the complaint, McBride and Larson formed a hedge fund in late 2001 while being advised and represented by defendant and Eliot D. Raffkind, one of its partners. Virginia joined McBride and Larson in the enterprise approximately three months after they decided to form the hedge fund. Plaintiffs claim to have received defendant's advice regarding two trading

strategies known as mutual fund market timing and late trading. Mutual fund market timing generally involves the short-term "in and out" purchase and sale of mutual fund shares in a manner designed to take advantage of inefficiencies in the way mutual funds make daily determinations of the net asset value (NAV) of their shares. The NAV of mutual funds is determined at each day's close of the stock market, 4:00 p. m. Eastern Standard Time. Prices of mutual funds, particularly international funds, may become stale due to information delay. Market timers exploit the information delay by buying shares when their prices are artificially low or selling shares when their prices are artificially high. Late trading involves the placing of orders for mutual fund shares after the close of the stock market on a given day, and purchasing and selling the shares at that day's NAV rather than the next day's NAV. Late trading "with information" involves the use of market information that becomes available after the 4:00 p. m. close. Plaintiffs claim to have been erroneously advised by Raffkind and other Akin Gump attorneys that their market timing and late trading practices posed no legal risks. However, beginning in September 2003, these very practices became the subject of investigations launched by the New York State Attorney General, the Securities and Exchange Commission, the Commodity Futures Trading Commission and the Texas Security Board (collectively, the regulators). In

addition, several lawsuits were brought against plaintiffs by mutual fund investors who claimed to have been damaged by the market timing and/or late trading practices.

In September 2003, defendant undertook the representation of plaintiffs and Raffkind in connection with the regulatory investigations. On or about October 9, 2003, McBride, Larson and Raffkind proffered before the regulators. In Larson's proffer, he claimed to have been advised by Raffkind in 2002 that late trading with information was permissible. Defendant submits that Raffkind did not recall giving such advice in 2002 but would not rule it out. The parties differ on the issue of whether, at the time of the proffers, McBride told defendant that he had received similar advice from Raffkind. Plaintiffs assert that the said representation was tainted by conflicts of interests because Raffkind's ongoing advice and approval of their trading practices were directly implicated in the investigations. It is plaintiffs' position that defendant could have asserted an advice-of-counsel defense on their behalf but declined to do so due to its conflicts of interests. Nevertheless, plaintiffs acknowledged and waived potential conflicts of interests stemming from Raffkind's role by letter dated June 28, 2004.

Plaintiffs' principals retained individual counsel shortly after October 2003, and plaintiffs collectively retained the firm of Katten Munchin Zavis and Rosenman LLP (KMZ) to assist

defendant in the regulatory investigations. Plaintiffs allege that defendant resisted KMZ's participation in their defense by limiting its role and access to relevant information. In November 2004, plaintiffs retained an "unconflicted" law firm, Richards Spears Kibbe & Orbe LLP, now known as Richards Kibbe & Orbe LLP (RK&O), on the premise that defendant was acting to protect its own interests rather than plaintiffs'. Defendant continued to act as plaintiffs' counsel until its withdrawal on May 2, 2005. Taking the lead in plaintiffs' defense, RK&O provided the regulators with a January 31, 2005 letter that detailed certain advice purportedly given to plaintiffs by Raffkind. In March 2005, McBride, Larson and Raffkind were called to testify before the regulators. Thereafter, plaintiffs reached a settlement with the regulators that required a substantial disgorgement as well as other sanctions.

The complaint sets forth claims that defendant (1) negligently and improperly advised plaintiffs while they were engaged in market timing and late trading, (2) improperly undertook to represent plaintiffs during the regulatory investigations in light of a conflict of interests stemming from the said advice and (3) intentionally and improperly thwarted plaintiffs' advice-of-counsel defense in order to shield itself from liability. The JHO determined that plaintiffs had waived the attorney-client privilege and work-product immunity with

respect to communications among plaintiffs and their other counsel relating to (1) plaintiffs' rationale for entering into the settlement agreement with the regulators, (2) defendant's 2002 late trading advice and preparation of McBride and Larson for their proffers, (3) the legality of plaintiffs' trading practices and (4) defendant's disclosure of potential conflicts and plaintiffs' understanding and waiver of such conflicts.

The determinations of a trial court overseeing discovery are generally not disturbed absent an improvident exercise of discretion (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [2007]). This Court is nonetheless vested with a corresponding power to substitute its own discretion for that of the trial court, even absent an abuse of the latter's discretion (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]). Communications between an attorney and a client in the course of professional employment for the purpose of obtaining legal advice are privileged and not discoverable unless the privilege is deemed to have been waived by the client (*Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834, 835 [1983]). The privilege is waived where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of the party's claim or defense, and application of the privilege would deprive the opposing party of

vital information (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63-64 [2007]). Plaintiffs acknowledge their waiver of the attorney-client privilege with respect to any advice they received concerning the legality of their market timing and late trading practices through September 2003, the period when they were engaged in those practices. Plaintiffs have also agreed to produce contemporaneous documents regarding their individual counsels' advice on the signing of the June 28, 2004 waiver of defendant's potential conflicts of interests. In all other respects, however, plaintiffs contend that the JHO's order is too broad because it sets forth no temporal limits and can be literally read to require the disclosure of even nonparty counsels' work product which was never shared with plaintiffs.

In rendering his decision, the JHO determined that any relevant advice plaintiffs received from their nonparty counsel bears on the issue of plaintiffs' reasonable reliance on defendant's advice regarding the legality of their trading practices. Based solely on the relevance of such advice, the JHO concluded that plaintiffs had waived the privilege with respect to any attorney-client communications that bear on plaintiffs' state of mind regarding the legality of their trading practices. The JHO similarly reasoned that plaintiffs waived the privilege as to communications with nonparty counsel regarding defendant's disclosure of its potential conflicts and plaintiffs'

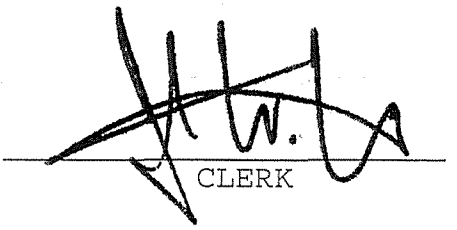
understanding and waiver of such conflicts.

"[T]hat a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit" (*Deutsche Bank*, 43 AD3d at 64). Instead, "at issue" waiver occurs when a party has asserted a claim or defense that he or she intends to prove by use of the privileged material (*id.*). Accordingly, it was error for the JHO to find waiver on the basis of relevance alone. By itself, relevance also provides no basis for the JHO's conclusion that plaintiffs' claims stemming from defendant's 2002 late trading advice and its preparation of McBride and Larson for their proffers raise "factual assertions which can only be resolved by an examination of the advice given by the other attorneys." The JHO's order also directs the disclosure of nonparty counsels' "analyses and evaluations of plaintiffs' jeopardy" with respect to plaintiffs' rationale for entering into the settlement agreement with the regulators. Such materials would constitute attorneys' work product, immune from disclosure under CPLR 3101(c), because they involve strategy and legal theory (*see Rodriguez v City of New York*, 29 AD2d 962 [1968], *appeal dismissed* 26 NY2d 833 [1970]). The assertion of a cause of

action with a claim for damages arising out of the settlement agreement does not constitute a waiver of the work product immunity (*see Deutsche Bank*, 43 AD3d at 66).

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

ENTERED: JUNE 19, 2008



Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3964 The People of the State of New York, Ind. 58/05
Respondent,

-against-

Cosmes Morel,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Philip A. Wellner of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

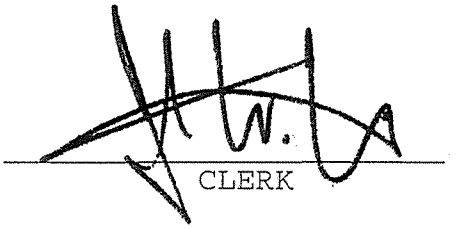
Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Brenda Soloff, J. at plea and sentence; A. Kirke Bartley, J. at resentence), rendered October 26, 2005, as amended October 25, 2007, convicting defendant, on his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him, as a second felony offender, to a term of 6½ years, unanimously affirmed.

The record establishes that defendant executed a valid waiver of his right to appeal, after consultation with counsel (*see People v Moissett*, 76 NY2d 909 [1990]). As an alternative

holding, we also find that the court properly denied defendant's suppression motion.

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3965 James M. Johnson, Index 102338/07
Petitioner-Appellant,

-against-

Scholastic Inc., et al.,
Respondents-Respondents.

Bonnie P. Josephs, New York, for appellant.

Proskauer Rose LLP, New York (Neil H. Abramson of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered June 1, 2007, dismissing this proceeding to challenge a final determination of the City Human Rights Commission of no probable cause for petitioner's discrimination complaint, unanimously affirmed, without costs.

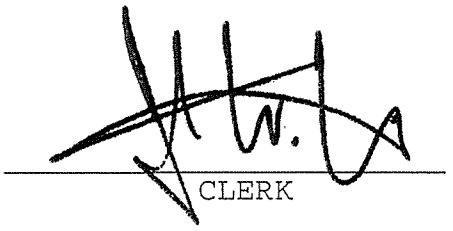
A petition for review of an agency determination cannot go forward without joining that agency in the proceeding (*see Matter of Solid Waste Servs., Inc. v New York City Dept. of Envtl. Protection*, 29 AD3d 318, 319 [2006], *lv denied* 7 NY3d 710 [2006]; *see also Matter of Okoumou v Community Agency for Senior Citizens, Inc.*, 17 Misc 3d 827, 832, 833 [2007]). Here, neither the City Commission nor its chairperson was joined as a party, necessitating dismissal.

Even if the petition had not been denied for failure to name the City Commission as a respondent, we would find that the

determination was supported by substantial evidence (*see Matter of New Venture Gear, Inc. v New York State Div. of Human Rights*, 41 AD3d 1265 [2007]), the City Commission's investigation was sufficient (*see Stern v New York City Commn. on Human Rights*, 38 AD3d 302 [2007]), and the purported "new evidence" provided no basis for disturbing the Commission's determination.

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3966 Rebecca Reyes, Index 24482/01
Plaintiff-Respondent, 83300/02

-against-

CSX Transportation, Inc., et al.,
Defendants.

- - - - -

[A Third Party Action]

- - - - -

CSX Transportation, Inc.,
Second Third-Party Plaintiff-Appellant,

-against-

New York City Economic
Development Corporation, et al.,
Second Third-Party Defendants.

Hodgson Russ LLP, New York (Lawrence R. Bailey, Jr. of counsel), for appellant.

Brand Brand Nomberg & Rosenbaum, LLP, New York (Thomas S. Pardo of counsel), for respondent.

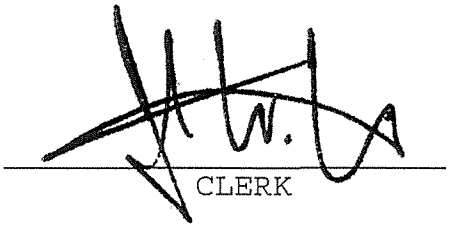
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about December 17, 2007, which granted plaintiff's motion to sever the second third-party action, unanimously reversed, on the facts, without costs, and the motion to sever denied.

Severance of the second third-party action, which plaintiff sought because of the delay likely to result from still-outstanding disclosure in the second third-party action, should have been denied in view of second third-party plaintiff's

representation that it would not be seeking any further disclosure in the second third-party action. Plaintiff therefore "is no longer faced with any delays" in moving her case to trial (*see Sichel v Community Synagogue*, 256 AD2d 276, 276-277 [1998] [where issue in a third-party action is respective liability of defendant and third-party defendant for plaintiff's injury, a severance of third-party action should not be ordered unless necessary to prevent prejudice or substantial delay to one of the parties]).

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3967-
3967A In re Elizabeth Amanda T., etc., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Helene Lisa H., etc.,
Respondent-Appellant,

Graham-Windham Services to Families
and Children,
Petitioner-Respondent,

John J. Marafino, Mount Vernon, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Tamra A. Steckler, The Legal Aid Society, New York (Mitchell Katz of counsel), Law Guardian.

Orders of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about April 5, 2006, which, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence established that petitioner agency met its obligation to endeavor diligently to strengthen the parental relationship by, inter alia, arranging visitation and providing referrals for parenting classes and psychiatric evaluation, and that respondent failed to meaningfully avail

herself of these services so as to gain insight into her own behavior, address the issues that led to the children's removal from the home, and prepare to assume custodial parenting responsibilities (*see Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Kimberly C.*, 37 AD3d 192 [2007], *lv denied* 8 NY3d 813 [2007]; *Matter of Lenny R.*, 22 AD3d 240 [2005], *lv denied* 6 NY3d 708 [2006]).

A preponderance of the evidence established that since 2003 the children have been in a stable and caring pre-adoptive home where they have bonded with their foster mother and the other children, and that termination of respondent's parental rights is in their best interests (*see Matter of Racquel Olivia M.*, 37 AD3d 279 [2007], *lv denied* 8 NY3d 812 [2007]; *Matter of Amani T.*, 33 AD3d 542 [2006]).

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

ENTERED: JUNE 19, 2008

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 19, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
Milton L. Williams
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 8131/97
Respondent,

-against- 3968-
3969-
Danny Green, 3970
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (Arlene Silverman, J.), rendered on or about December 12, 2006,

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

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

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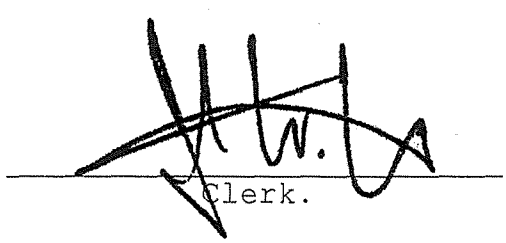


Clerk.

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

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3971 2246 Holding Corp., Index 570292/06
Petitioner-Respondent,

-against-

Maria Jimenez Nolasco,
Respondent-Appellant.

Kenneth Rosenfeld, Northern Manhattan Improvement Corp.-Legal Services, New York (Ramon Gutierrez of counsel), for appellant.

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered June 1, 2007, which reversed an order of Civil Court, New York County (Louis Villella, J.), entered October 10, 2006, that had granted respondent's motion to stay execution of a warrant of eviction, unanimously reversed, on the law and the facts, without costs, and the Civil Court order reinstated to the extent of staying execution of the warrant for 60 days from service of a copy of this order, to permit payment of all outstanding arrears.

Respondent was a 30-year tenant in a building owned by petitioner, who commenced this summary holdover proceeding for possession of the apartment on the basis of chronic nonpayment of rent. In March 2006, the parties entered into a stipulation, so ordered by the court, settling the proceeding. The stipulation required respondent, inter alia, to pay the arrears and $1,000 in

legal fees by the following month, with "time . . . of the essence for payment." The agreement also noted that respondent had provided petitioner with an approval letter from the Human Resources Administration (HRA) authorizing payment of the arrears, and permitted a 10-day delay in payment, if necessary, for HRA to issue a check.

In May 2006, respondent proffered her portion of the arrears, which petitioner refused. In June, she obtained an order staying execution of a warrant of eviction through the 23rd of the month, after HRA failed to issue a check for the arrears. The court also awarded petitioner additional legal fees. In July respondent obtained another stay of execution until the end of August, on the same ground. HRA finally issued the check at the end of August, but petitioner refused to accept it on the ground that it was untimely.

In October 2006, respondent obtained yet another stay through the end of November for the payment of the legal fees assessed by the court. Civil Court held that this 30-year resident's defaults were largely the result of HRA's delay in issuing benefits, which she had sought early in the proceedings, and respondent was able to produce her portion of the arrears prior to the August due date mandated by the court's July order. On petitioner's appeal, Appellate Term reversed on the ground

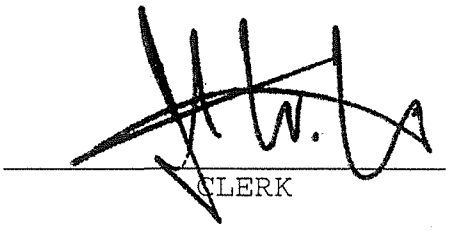
that respondent had repeatedly failed to comply with the "time is of the essence" payment terms of the settlement agreement.

It is a well-settled principle of equity that courts do not look favorably upon the forfeiture of leases (*Sharp v Norwood*, 223 AD2d 6, 11 [1996], *affd* 89 NY2d 1068 [1997]). The policies underlying the rent stabilization laws are generally better served by holding out to a tenant the opportunity usually afforded in a nonpayment proceeding to cure the breach of his rent obligations (*Park Summit Realty Corp. v Frank*, 107 Misc 2d 318, 323 [App Term 1980], *affd* 84 AD2d 700 [1981], *affd* 56 NY2d 1025 [1982]).

Respondent's multiple defaults were largely the result of a delay in payment by HRA. Petitioner was aware, at the time of the settlement, that a portion of the amount due was to be paid by HRA. An indigent tenant who resides in an apartment for many years should not be evicted where she has made diligent efforts to comply with the terms of the settlement agreement, only to be stymied by events beyond her control. Under these circumstances, the decision of the Housing Court judge was appropriate.

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3972 The People of the State of New York, by Andrew M. Cuomo, Attorney General of the State of New York, Plaintiff-Respondent, Index 401726/06

-against-

Liberty Mutual Insurance Company, et al., Defendants-Appellants.

Kornstein Veisz Wexler & Pollard, LLP, New York (Kevin J. Fee of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (Richard P. Dearing of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 28, 2007, which denied defendants' motion to dismiss the complaint, unanimously modified, on the law, the motion granted to the extent of dismissing the fifth cause of action and all claims within the first, third and fourth causes of action based upon contingent commission agreements, and otherwise affirmed, without costs.

"Contingent commission agreements between brokers and insurers are not illegal, and, in the absence of a special relationship between the parties, defendant[s] had no duty to

disclose the existence of the contingent commission agreement" (*Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [2007], citation omitted; *see also* New York State Ins. Dept. Gen. Counsel Opinion Ltr., "Disclosure of Broker Commission, Aug. 30, 2005, http://www.ins.state.ny.us/ogco2005/rg050818.htm ["neither the Insurance Law nor the regulations promulgated thereunder require an insurance broker to disclose to its clients the commission it earns on the policies it places"]). Here, since no special relationship was alleged, claims of common-law fraud, including a breach of fiduciary duty to disclose, as well as unjust enrichment based on defendants' use of contingent commissions or such nondisclosure (as included in the first, third, fourth and fifth causes of action), must fail.

The Attorney General stated valid claims against defendants for their participation in a bid-rigging scheme in violation of the Donnelly Act (General Business Law § 340[2]). The State has inherent authority to act in a parens patriae capacity when it suffers an injury to a quasi-sovereign interest (*Alfred L. Snapp & Son, Inc. v Puerto Rico*, 458 US 592, 601 [1982]) "apart from the interests of particular private parties" (*id.* at 607). Here, the Attorney General sued to redress injury to its "quasi-sovereign interest in securing an honest marketplace for all consumers" (*State of New York v General Motors Corp.*, 547 F Supp 703, 707 [SD NY 1982]), free of bid-rigging. Contrary to

defendants' contention, this Court's decision in *People v Grasso* (42 AD3d 126 [2007]) does not support a holding that the Attorney General is not empowered to assert the Donnelly Act claims under the facts herein.

Nor are the bid-rigging claims time-barred, since the amended complaint alleges defendants' participation in the bid-rigging scheme within three years of the filing of the action (General Business Law § 342-a). Furthermore, "the Donnelly Act . . . should generally be construed in light of Federal [antitrust] precedent" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 335 [1988]), and because bid-rigging is an activity that is inherently one of fraudulent concealment, the statute of limitations should be tolled (*see State of New York v Hendrickson Bros., Inc.*, 840 F2d 1065, 1083 [2d Cir 1988], *cert denied* 488 US 848 [1988]). Since the bid-rigging scheme was not discovered until October 2004, the claims filed in May 2006 are timely.

Nor did the Donnelly Act bid-rigging claims involve conduct that is regulated by Insurance Law § 2316, which law was not in force and effect between August 3, 2001 and June 25, 2003 (*see* Insurance Law § 2342), when a substantial portion of the bid-rigging activities occurred.

However, the court did err in failing to dismiss in its entirety the fifth cause of action, which alleges breach of fiduciary duty, since, absent a special relationship that does

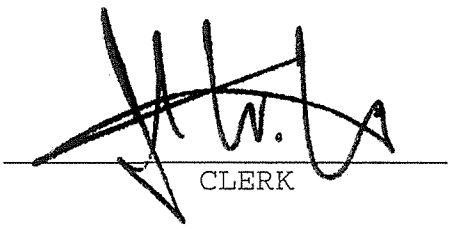
not exist here, an insurance agent or broker owes no common-law duty to its customer other than to obtain the policy requested within a reasonable period of time, or to inform the customer that it could not do so (*see Murphy v Kuhn*, 90 NY2d 266, 270 [1997]).

Therefore, except as stated herein, valid claims are stated by the Attorney General with respect to bid-rigging to sustain the first, second, third and fourth causes of action in the amended complaint.

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

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

ENTERED: JUNE 19, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 19, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
Milton L. Williams
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 1654/05
Respondent,

-against- 3973

Albert McLaurin,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about March 14, 2006,

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

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

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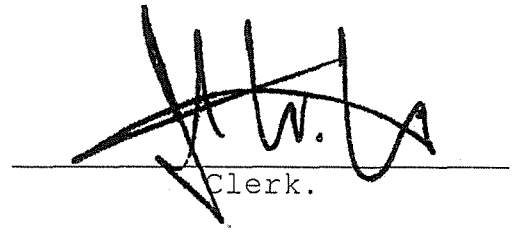


Clerk.

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

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3975 The People of the State of New York, Respondent, Ind. 4361/06

-against-

Renata Hill, Defendant-Appellant.

- - - - -

3976 The People of the State of New York, Respondent,

-against-

Terrain Dandridge, Defendant-Appellant.

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

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for Terrain Dandridge, appellant.

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 14, 2007, convicting defendant Renata Hill, after a jury trial, of gang assault in the second degree and assault in the third degree, and sentencing her to an aggregate term of 8 years, unanimously modified, on the law and as a matter of discretion in the interest of justice, to the extent of vacating the gang assault conviction and remanding for a new trial on that count, and otherwise affirmed.

Judgment, same court and Justice, rendered June 14, 2007,

convicting defendant Terrain Dandridge, after a jury trial, of gang assault in the second degree, and sentencing her to a term of 3½ years, unanimously reversed, on the law and the facts, and the indictment dismissed.

A person is guilty of gang assault in the second degree when, with intent to cause "physical injury to another person and when aided by two or more other persons actually present, [s]he causes serious physical injury to such person" (Penal Law § 120.06). Under no view of the evidence could the jury have found that either of these defendants performed an act that directly caused serious physical injury, since the only serious injury suffered by the complainant was the stab wound inflicted by another codefendant. In order to find these defendants guilty of gang assault, the jury would have had to find that each defendant, acting with the mental culpability required for the commission of the crime, solicited, requested, commanded, importuned or intentionally aided the knife-wielding codefendant to engage in the conduct constituting the offense (Penal Law § 20.00).

Viewing the evidence in the light most favorable to the prosecution, we conclude there was insufficient evidence that defendant Dandridge's limited involvement in the altercation was intended to aid, or actually aided, any other member of the group to cause physical injury. Even if we were to find that the

evidence was legally sufficient, we would nevertheless find that Dandridge's conviction was against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]).

As for defendant Hill, however, the verdict was based on legally sufficient evidence and was not against the weight of the evidence. The evidence supported the inference that she intended to cause physical injury and actively participated in punching and kicking the victim, thereby intentionally aiding the other members of the group in inflicting physical injury, with the ultimate result being serious physical injury (*see People v Villanueva*, 35 AD3d 229 [2006], *lv denied* 8 NY3d 885 [2007]).

Nevertheless, Hill's gang assault conviction must be reversed because the jury charges on accessorial liability and justification were confusing and erroneous. There was contradictory evidence concerning the altercation and the multiple defendants' varying roles. Although the incident was captured on surveillance videotapes, the tapes were of poor quality and they could be viewed as supporting the contentions of both the prosecution and defense. In light of the sharply disputed trial issues, it was critical that the charge to the jury clearly set forth the requirements for imposition of accessorial liability and the elements of the defense of justification.

The court did not give the standard jury instruction, which

tracks Penal Law § 20.00. Instead, the court indicated that, in addition to finding that each defendant possessed "the mental state that the law includes as being required to be proven," the prosecution must prove "that a person did an act intending in some fashion to carry out the common purpose." The court then provided an analogy to an orchestra, stating that every member of the orchestra, whether the conductor or the person who makes a "ting" on a triangle, was acting "in concert." The court concluded: "You're in it. You're in it. I'm not going to refer to the pregnancy thing, but you're either pregnant or you're not. You are either involved or you're not."

In considering a challenge to a jury instruction, the "crucial question is whether the charge, in its entirety, conveys an appropriate legal standard and does not engender any possible confusion" (*People v Wise*, 204 AD2d 133, 135 [1994], *lv denied* 83 NY2d 973 [1994]). Although a trial judge is not obligated to use the standard jury instructions, this Court has stated "each time a judge declines to employ the carefully thought-out measured tone of the standard jury charge in favor of improvised language, an additional risk of reversal and a new trial is created" (*People v Fong*, 16 AD3d 179, 180 [2005], *lv denied* 4 NY3d 886 [2005]; *see also People v Aponte*, 2 NY3d 304, 307 [2004]). While a hypothetical given in connection with a proper charge on in-concert liability may be helpful (*see People v Brooks*, 217 AD2d

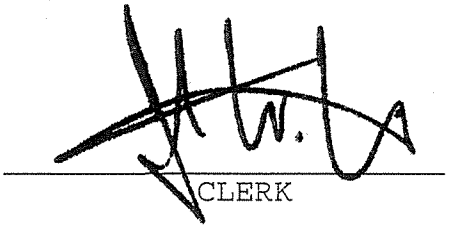
492 [1995], *lv denied* 86 NY2d 840 [1995]), the charge as given in this case could have engendered confusion by leading the jury to believe that any person who was involved in any way in the fight was guilty of gang assault, whether or not that person engaged in conduct intended to aid the primary actor who caused serious physical injury. A comparison with an orchestra may be appropriate to explain that it is no defense that a person's role in a crime was small, so long as the person's conduct satisfied the requirements of Penal Law § 20.00, but it is essential that the court connect such a comparison with the elements of that statute.

Reversal of Hill's gang assault conviction is required for the additional reason that the jury charge on the defense of justification failed to separately instruct the jury on the use of ordinary physical force and the use of deadly physical force. By failing to distinguish them, the charge created the possibility that the jurors could have understood the duty to retreat to apply to the use of both types of force. While, unlike Hill's challenge to the court's accessorial liability charge, this objection was not preserved, reversal in the

interest of justice is warranted (*see People v Soriano*, 36 AD3d 527, 529 [2007]). These errors, neither of which was harmless, require reversal of Hill's gang assault conviction.

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3977 Edward J. Brown, Sr., Index 115994/05
Plaintiff-Appellant,

-against-

445 East 85th Street, LLC, et al.,
Defendants-Respondents.

The Nolan Law Firm, New York (William Paul Nolan of counsel), for appellant.

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

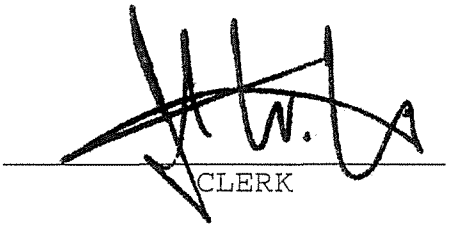
Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 29, 2007, which, to the extent appealable, denied plaintiff's motion for renewal of a prior order that had granted defendants' motion to dismiss the complaint against the limited liability company for lack of jurisdiction, unanimously affirmed, without costs.

The transcript submitted on the motion to renew failed to present any material facts not considered by the court on the original motion addressed to the question of service (*see Foley v Roche*, 68 AD2d 558, 568 [1979]). In any event, the newly submitted material would not have warranted a departure from the

court's initial ruling dismissing the complaint for lack of personal jurisdiction (*see* CPLR 311-a; *National Heritage Life Ins. Co. v T.J. Props. Co.*, 286 AD2d 715 [2001]).

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3978 Long Island Lighting Company, Index 604715/97
Plaintiff,

KeySpan Corporation,
Plaintiff-Appellant,

-against-

Century Indemnity Company, et al.,
Defendants-Respondents,

Allianz Underwriters Insurance
Company, et al.,
Defendants.

Dickstein Shapiro LLP, New York (Edward Tessler of counsel), for appellant.

White & Williams LLP, New York (Robert F. Walsh of counsel), for respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered October 4, 2007, which denied plaintiff KeySpan's motion to vacate a prior judgment dismissing its claim relating to the Syosset Landfill Superfund site, and for leave to amend its complaint to separately restate the claims for each of the damage sites at issue, unanimously affirmed, with costs.

We reject KeySpan's argument that the IAS court had the authority, pursuant to CPLR 5015(a)(5) or inherently, to vacate the final order of dismissal and judgment previously entered in connection with the Syosset Landfill claim. In order to vacate an order of dismissal under CPLR 5015(a)(5), that prior disposition must have been reversed, modified or vacated. Here,

the IAS court's final order and judgment of dismissal was based on its December 2003 prior order granting the motions of defendants Century and General Reinsurance for summary judgment on the Syosset Landfill claims based on late notice, which was affirmed on appeal; thus, KeySpan cannot point to a prior order that has been reversed, modified or vacated.

In addition, a "court's inherent power to exercise control over its judgment is not plenary, and should be resorted to only to relieve a party 'from judgments taken through [fraud,] "mistake, inadvertence, surprise or excusable neglect"'" (*Matter of McKenna v County of Nassau*, 61 NY2d 739, 742 [1984]). KeySpan's mistaken belief that the November 2006 order and the January 2007 judgment expressly severing the Syosset Landfill claims from the remainder of the claims would be a proper final judgment that would be accepted for review by the Court of Appeals cannot be the basis for vacating a final judgment and order (*see e.g. Matter of Parkchester Apts. Co. v Lefkowitz*, 41 NY2d 987, 991 [1977]).

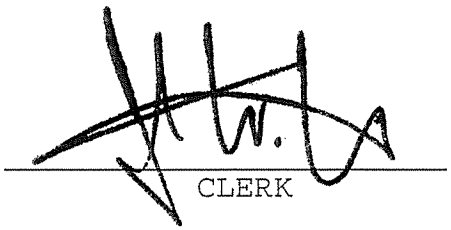
We further reject KeySpan's contention that the IAS court abused its discretion when it denied leave to amend the complaint, as the lengthy procedural history of this case indicates that the parties would be prejudiced by further delay

in the proceedings, and because the motion lacked merit (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82 [2007]).

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

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, DeGrasse, JJ.

3979 The People of the State of New York, Ind. 838/06
Respondent,

-against-

Maico Lopez-Jimenez,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J. at plea; Efrain Alvarado, J. at sentence), rendered on or about January 2, 2007, unanimously affirmed.

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

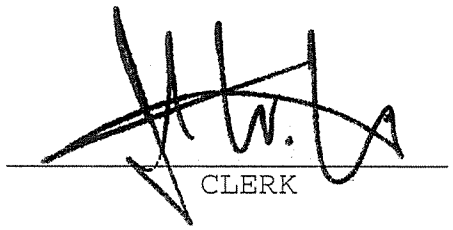
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3980 Madison Apparel Group Ltd., Index 601405/07
Plaintiff-Appellant,

-against-

Hachette Filipacchi Presse, S.A., et al.,
Defendants-Respondents.

Dorsey & Whitney LLP, New York (Bruce R. Ewing of counsel), for appellant.

Kilpatrick Stockton LLP, New York (Georges Nahitchevansky of counsel), for respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered January 2, 2008, which, to the extent appealed from, granted defendants' motion to dismiss the complaint to the extent of concluding that the complaint did not state a claim for fraudulent concealment, deeming the cause of action for fraudulent concealment a cause of action for fraudulent misrepresentation and dismissing the cause of action for breach of the implied covenant of good faith and fair dealing, unanimously modified, on the law, to reinstate the cause of action for fraudulent concealment, and otherwise affirmed, without costs.

The complaint alleges that defendants had peculiar and superior knowledge of their ongoing negotiations with a third-party licensee, that plaintiff was unable to discern such negotiations through the use of reasonable intelligence or due

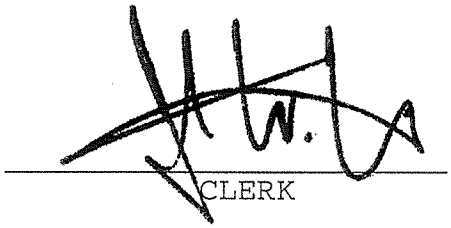
diligence, and that defendants were aware that plaintiff sought to terminate the parties' agreement at least in part due to its lack of knowledge about the negotiations. These allegations, which for purposes of this motion to dismiss pursuant to CPLR 3211(a)(7) we accept as true and view in a light most favorable to plaintiff, invoke the "special facts" doctrine, pursuant to which defendants had a duty to disclose the negotiations (*see Black v Chittenden*, 69 NY2d 665, 668-669 [1986]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 327-328 [1996]; *Travelers Indem. Co. of Illinois v CDL Hotels USA, Inc*, 322 F Supp 2d 482, 499 [SD NY 2004]). The complaint sufficiently alleges the remaining four elements of a claim for fraudulent concealment (*see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [2003]).

Applying the implied covenant of good faith and fair dealing in the manner urged by plaintiff would effectively create an independent contractual right that was not bargained for by the

parties (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [2006], *lv dismissed* 7 NY3d 886 [2006]).

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3981 Henry Jenrette, et al., Index 22103/05
Plaintiffs,

-against-

Green Acres Mall, et al.,
Defendants.

- - - - -

Green Acres Mall, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Fifth Avenue Ice Cream, Inc.,
doing business as Haagen Dazs, et al.,
Third-Party Defendants-Respondents.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Patrick Lawless of counsel), for appellants.

Camacho Mauro Mulholland, LLP, New York (Eric L. Cooper of counsel), for respondents.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about December 3, 2007, which granted plaintiffs' motion and third-party defendants' cross motion to sever the third-party claims from the main action, and denied third-party plaintiffs' cross motion for summary judgment on the claim for indemnification, unanimously reversed, on the law, without costs, summary judgment granted on the indemnification claim conditioned on a finding of liability against defendants/third-party plaintiffs, and the motion and cross motion to sever the third-party action denied.

Given that the parties are sophisticated commercial entities

and that third-party defendants were obligated under the lease to procure insurance, the lease indemnification provision does not violate General Obligations Law § 5-321 (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]). There should have been a conditional grant of summary judgment on the indemnification claim (*see Rubin v Port Auth. of N.Y. & N.J.*, 49 AD3d 422 [2008]). In light of our decision, severance is unwarranted (*see Rothstein v Milleridge Inn*, 251 AD2d 154 [1998]), as there is no issue of further discovery.

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

ENTERED: JUNE 19, 2008

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3982N Andrew Z. Tong, Index 100509/07
Plaintiff-Appellant,

-against-

S.A.C. Capital Management, LLC, et al.,
Defendants-Respondents.

Filippatos PLLC, New York (Parisis G. Filippatos of counsel), for appellant.

Willkie Farr & Gallagher LLP, New York (Robert J. Kheel of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 18, 2007, which, to the extent appealed from as limited by the briefs, granted defendants' motion to compel arbitration and, upon effectively granting plaintiff's motion for renewal and reargument, adhered to its original decision to seal the record, unanimously modified, on the law, to vacate the sealing order, and otherwise affirmed, without costs.

Since all plaintiff's claims arise out of events that occurred in the course of his employment by defendant SAC Capital Management, LLC and supervision by SAC manager defendant Ping Jiang, they all are subject to arbitration pursuant to the broad and unambiguous arbitration provision contained in his employment agreement, which covers "any dispute or controversy arising out of or relating to this agreement, the interpretation thereof, and/or the employment relationship." Even if the arbitration

provision were, as plaintiff contends, ambiguous in scope, since its construction is governed by the Federal Arbitration Act, any such ambiguities would be properly resolved in favor of arbitration (*Matter of PricewaterhouseCoopers v Rutlen*, 284 AD2d 200 [2001]).

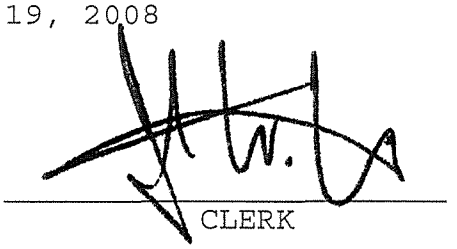
There is insufficient evidence of record to substantiate plaintiff's claim that he was induced by fraud or duress to enter into the arbitration agreement, and it has not been shown that the entire employment agreement was permeated by either fraud or duress so as to invalidate the arbitration provision (*see Matter of Weinrott [Carp]*, 32 NY2d 190, 197 [1973]; *Matter of O'Neill v Krebs Communications Corp*, 16 AD3d 144 [2005], *lv denied* 5 NY3d 708 [2005]). Nor is there precedent to support plaintiff's claim that the question of arbitrability should have been submitted to a jury.

The factors relied upon by the court in sealing the record

do not outweigh the public's right of access thereto (*see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322 [2006]; *Liapakis v Sullivan*, 290 AD2d 393 [2002]; *Matter of Hofmann*, 284 AD2d 92 [2001]; *Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1 [2000]; *Morelli v Dinkes*, 250 AD2d 530 [1998]).

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

ENTERED: JUNE 19, 2008



CLERK

Mazzarelli, J.P., Andrias, Williams, Renwick, JJ.

3983N In re City of New York, etc., Index 401660/01

- - - - -

Eastside Corporation,
Claimant-Appellant-Respondent,

-against-

The City of New York,
Condemnor-Respondent-Appellant.

Certilman Balin Adler & Hyman, LLP, East Meadow (M. Allan Hyman of counsel), for appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York (Holly R. Gerstenfeld of counsel), for respondent-appellant.

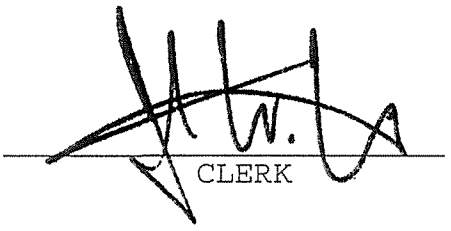
Order and judgment (one paper), Supreme Court, New York County (Leland G. DeGrasse, J.), entered October 3, 2007, awarding claimant $541,919.17 as an additional allowance for costs pursuant to Eminent Domain Procedure Law § 701, and bringing up for review an order, same court and Justice, entered July 18, 2007, which, insofar as appealed from as limited by the briefs, granted claimant's motion for attorney fees to the extent of awarding $485,955 as a percentage of the principal condemnation award and for appraisal fees in the sum of $44,469.21, unanimously affirmed, without costs.

Given that the condemnation award was "substantially in excess of the amount of the condemnor's proof," reimbursement of claimant's attorney fees incurred in establishing the inadequacy

of the condemnor's offer was necessary for claimant "to achieve just and adequate compensation," and the award of $485,955 in attorney fees was reasonable (EDPL 701; *see generally Hakes v State of New York*, 81 NY2d 392, 396-397 [1993]; *Matter of New York State Urban Dev. Corp.*, 183 Misc 2d 900, 903-904 [2000]). The award of appraisal fees was proper for the same reasons. The court was not bound by claimant's retainer agreement with counsel, which provided for attorney fees to be calculated as a percentage of the interest portion of the award, as well as the principal; it was required only to assess reasonable attorney fees (*see* EDPL 701).

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

ENTERED: JUNE 19, 2008



JUN 19 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
John T. Buckley
Luis A. Gonzalez
James M. Catterson, JJ.

2662
2662A
Index 28266/02

x

Tyrone Guzman, by his parent and natural guardian, Shalette Jones, et al.,
Plaintiffs-Appellants,

-against-

4030 Bronx Blvd. Associates L.L.C.,
Defendant-Respondent.

x

Plaintiffs appeal from a judgment of the Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about May 20, 2007, dismissing the complaint and bringing up for review an order of the same court and Justice, entered April 2, 2007, which granted defendant's motion in limine to preclude plaintiffs' expert from testifying, directed a verdict in defendant's favor dismissing the complaint, and denied plaintiffs' motion for a continuance.

Segal & Lax, LLP, New York (Patrick Daniel Gatti of counsel), for appellants.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), and Law Offices of Alan I. Lamer, Elmsford, for respondent.

TOM, J.P.

This appeal concerns the trial court's role as "gatekeeper" in determining the qualifications of an expert, a neuropsychologist, to render a medical opinion and the adequacy of the foundation upon which that opinion is based. While plaintiffs' expert is qualified to render an opinion on the extent of plaintiff Tyrone Guzman's neurological deficits and may testify that those deficits are consistent with a history of head trauma, plaintiffs have failed to identify any evidentiary basis for the opinion sought to be elicited from the expert as to which of several accidents is the proximate cause of such deficits. Thus, his testimony as to this isolated point was properly precluded. However, we conclude that the trial court erred in dismissing this action without affording plaintiffs the opportunity to retain another expert witness to establish the nature of Tyrone Guzman's physical injury and its cause, and we remand this matter for further proceedings.

Tyrone Guzman, the infant plaintiff (plaintiff), has a history of head trauma. In the year 2000, he was struck in and above the left eye by a baseball when he was tagged while sliding headlong into first base. He apparently was not treated for this injury. On June 16, 2001, a portion of a bathroom ceiling fell, striking plaintiff in the head and neck. An ambulance report states that he was found, semi-conscious, on the floor by his

mother and complained that his "neck & back hurt." He was taken to Our Lady of Mercy Medical Center's emergency room, where bruising was noted around the neck and back. A head CT scan was negative. On May 15, 2002, plaintiff was struck in the head by a basketball. He was seen at the emergency room of North General Hospital, where he was diagnosed with contusions of the face, scalp and neck. On September 8, 2004, plaintiff was a back-seat passenger, secured by a lap belt, in an automobile that rolled over at least three times, according to witnesses. He was transported by ambulance to Lehigh Valley Hospital, where a CT scan of the head and x-rays of the chest, lumbar spine and left knee were negative. The ambulance report and hospital record differ on whether plaintiff experienced a brief period of unresponsiveness. On October 13, 2004, plaintiff was again seen at Lehigh Valley Hospital in connection with an unspecified motor vehicle accident. He complained of headache and dizziness over the preceding three days, shaking of the legs upon awakening that morning and decreased appetite. His condition was diagnosed as acute viral illness and post-concussion syndrome.

This action seeks damages arising out of injuries allegedly sustained by plaintiff in the apartment owned and maintained by defendant when the bathroom ceiling partially collapsed. Insofar as relevant to this appeal, the complaint, as supplemented by plaintiffs' verified bill of particulars, claims that plaintiff

experiences post-traumatic headaches as a result of a head injury with loss of consciousness. Plaintiffs' supplemental verified bill of particulars additionally claims that he suffers from various impairments "consistent with a history of head trauma."

Following the exchange of expert witness information, defendant was informed that plaintiffs would offer testimony from Elkhonon Goldberg, Ph.D., an expert in neuropsychology, "as to the effects of the accident of June 16, 2001 upon Tyrese [*sic*] Guzman's intellectual and cognitive ability, particularly as to the diminution of Mr. Guzman's cognitive and intellectual abilities." The notice indicates that the witness will compare pre-accident and post-accident abilities and educational achievement and "will testify that Mr. Guzman's post-accident cognitive functioning is significantly diminished from its pre-accident state." The notice does not identify the basis for comparison of pre-accident and post-accident abilities. Plaintiffs did not identify any other expert witness who would be produced.

Following jury selection, defendant interposed the instant motion in limine to preclude the proposed testimony of plaintiffs' neuropsychologist. Dr. Goldberg concluded, in two reports he submitted, that plaintiff sustained a traumatic brain injury (TBI) as a result of the ceiling collapse. Defendant argued, inter alia, that: (1) Dr. Goldberg's opinion that

plaintiff's injuries were the result of the June 16, 2001 incident was insufficient to establish causation because it was not based on any objective medical evidence in the record; (2) Dr. Goldberg's examinations of plaintiff were flawed because he did not review plaintiff's counseling records and/or school records prior to the issuance of his reports, which indicated that the problems Dr. Goldberg claimed plaintiff suffered as a result of the accident already existed; (3) Dr. Goldberg's two reports failed to take into consideration that plaintiff had a prior accident where he was hit in the left eye with a baseball, and a subsequent accident where he was hit in the head with a basketball, and failed to mention that the CT scan that was conducted on plaintiff on the day of the injury came back negative; and (4) Dr. Goldberg failed to consider that plaintiff was in a car accident, a CT scan came back negative, and only two weeks later he returned to the hospital because he had the shakes, headaches and dizziness, and a new CT scan again came back negative. Thus, defendant concluded, the witness should be precluded from giving testimony relating "his psychological test findings to a medical diagnosis of brain injury."

In opposition, plaintiffs argued that while Dr. Goldberg is not a medical doctor, "[t]here is no magic to the MD degree aside from automatically qualifying by study alone." They noted that a psychologist has been found qualified to testify concerning the

limitations resulting from TBI (citing *Hernandez v City of New York*, 156 AD2d 641 [1989]) and that the diagnosis of mental disorders and the treatment of associated mental, emotional and behavioral symptoms have been held to be "within the scope of practice of the professions of psychology" (quoting *People v R.R.*, 12 Misc 3d 161, 202 [2005]; *see also Matter of Nicole V.*, 71 NY2d 112, 121 [1987] [social worker's testimony that child suffered from sexually abused child syndrome properly received to corroborate child's out-of-court statements]).

Following oral argument, Supreme Court granted defendant's motion in limine, ruling that while a neuropsychologist is permitted to give testimony concerning a TBI, the absence of evidence by the qualified expert to make the "critical connection" between the psychologist's testimony and the TBI renders the testimony "useless." Plaintiff then moved for a continuance, since Dr. Goldberg was the only medical expert scheduled to testify on behalf of plaintiffs, and defendant cross-moved for a directed verdict dismissing the complaint. The court denied plaintiff's motion and granted defendant's motion for a directed verdict.

On appeal, the parties offer arguments based on divergent evidentiary criteria. Plaintiffs purport to offer authority for the proposition that a neuropsychologist is a competent witness to give evidence concerning the effects--and even the cause--of

neurological impairments. Defendant, on the other hand, argues that plaintiffs were unable to establish a foundation for the evidence they sought to elicit from their expert witness.

Before accepting expert testimony, a trial court is required to conduct a two-step analysis. First, it must confirm that the methodology used by the expert to arrive at a conclusion is generally regarded as reliable by the scientific community (*see Frye v United States*, 293 F 1013 [1923]; *People v Middleton*, 54 NY2d 42, 49 [1981]). Second, the court must establish the "admissibility of the specific evidence--i.e., the trial foundation" (*People v Wesley*, 83 NY2d 417, 428 [1994]). The latter inquiry is made "at the trial and is the same as that applied to all evidence, not just to scientific evidence" (*id.* at 429). Thus, admissibility is a distinct evaluation, involving "matters going to trial foundation or the weight of the evidence, both matters not properly addressed in the pretrial *Frye* proceeding" (*id.* at 426).

In view of the parties' disparate appellate arguments, it is appropriate to first consider what exactly the trial court decided. It is significant that the motion was interposed following jury selection, indicating that it was not defendant's intention to bring on a *Frye* hearing (*see id.*). In its moving papers, defendant contended that Dr. Goldberg

> "is claiming/diagnosing that the plaintiff has suffered a closed head Traumatic Brain

> Injury (TBI) . . . No where [*sic*] in his expert disclosure, reports or his background does Dr. Goldberg exhibit the basis to do so and as such should be precluded from relating his psychological test findings to a medical diagnosis of brain injury"

(citing *Romano v Stanley*, 90 NY2d 444 [1997] [forensic pathologist unqualified to render opinion as to the "visible intoxication" elements of the Dram Shop Act; affidavit devoid of foundational scientific basis]). Thus, it is clear that the court's disposition of the motion was founded upon the lack of evidentiary basis for the expert witness's proposed testimony.

At oral argument, the court perceived at the outset that it was being asked to render a decision "as to causation." Plaintiffs clearly did not agree, stating that "what we're doing now is a *Frye* hearing," to which the court responded, "This is not a *Frye* hearing." The court made it quite plain that the sufficiency of Dr. Goldberg's qualifications and the cognitive function testing he performed were not at issue, stating, "I have no problem with Dr. Goldberg testifying and I know what he's going to testify to." The court then summed up plaintiffs' argument, stating:

> "You're saying Dr. Goldberg can say there's a deficiency and that I believe that deficiency was caused by the incident of June '01 as opposed to any other incident or some other reason that people have cognitive deficits."

The court granted defendant's motion, ruling that plaintiffs' expert witness is "only qualified to testify as to

the effects of a brain injury." The court noted, "There are other events that could possibly be the cause of a brain injury but at this point we don't even have evidence that there was a brain injury." Defendant then moved for a directed verdict, which the court granted, stating that, as a result of its ruling, plaintiffs "would not be able to make [out] a prima facie case."

Contrary to plaintiffs' assertions, the trial court did not preclude Dr. Goldberg's testimony as to the issue of causation because he lacks a medical degree. Indeed, the record is quite clear that the court based its ruling on the absence of any objective medical foundation to support Dr. Goldberg's testimony, and not on his lack of qualification.

Plaintiffs obfuscate the issue on appeal by continuing to promote the qualifications of their expert in support of their position that he is qualified to offer an opinion that the accident of June 16, 2001 was the proximate cause of the infant plaintiff's neurological deficits. They restate the argument advanced at trial--that the lack of a medical degree does not preclude their witness from giving expert testimony on a medical question within his area of proficiency. They quote *Steinbuch v Stern* (2 AD3d 709, 710 [2003]), which they contend is "exactly on point," for the proposition that "'[t]he court was required to assess his qualification as an expert based upon his professional background, training, study, and experience.'"

This Court has recognized that a medical opinion can be received from a witness who, though lacking a medical degree, is properly qualified by training and experience (*Karasik v Bird*, 98 AD2d 359, 362-363 [1984]). However, from the record at oral argument, it is apparent that the court found no reason to conduct a *Frye* hearing to determine the reliability of the proffered evidence and the methodology on which it depends or to inquire into the professional qualifications of the witness to offer expert testimony. Nevertheless, plaintiffs persist in arguing the merits of an issue the trial court categorically stated it was not deciding--their expert's qualification to give testimony with respect to a head injury.[1] As the court observed, defendant had "moved to preclude Dr. Goldberg from testifying as to causation only." In order to decide the motion, the court was required to go beyond the threshold question, embraced by plaintiffs, of whether the witness was qualified to testify and consider the evidentiary issue of whether, "in opining as to causation and prognosis, [the witness] exhibited a degree of confidence in his conclusions sufficient to satisfy accepted

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[1] A neuropsychologist has been found qualified to give testimony concerning the extent of the impairment resulting from a brain injury (*Chelli v Banle Assoc., LLC,* 22 AD3d 781, 783 [2005], *lv denied* 7 NY3d 703 [2006]; *see also Matter of Nichols v Colonial Beacon Oil Co.*, 284 App Div 581, 585 [1954] [Workmen's Compensation Board accepted testimony from a neuropsychologist concerning contribution of postoperative medications, including whiskey, to death resulting from delirium tremens following hernia surgery]).

standards of reliability" (*Matott v Ward*, 48 NY2d 455, 459 [1979]).

As to the threshold inquiry, the determination of whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court, the provident exercise of which will not be disturbed absent a serious mistake or an error of law (*Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398-399 [1941]). Plaintiffs do not claim that Supreme Court erred in accepting, without discussion, Dr. Goldberg's qualification as an expert witness, and we discern no basis to examine the issue sua sponte.

For purposes of this appeal, this Court therefore assumes, without deciding, that based on tests administered to the infant plaintiff, Dr. Goldberg is qualified to render an opinion that the type and extent of cognitive impairment indicated by his interpretation of the test results are consistent with cognitive impairment associated with injury normally resulting in TBI. The issue to be resolved is whether the evidence relied upon by the expert is sufficient to provide a foundation for his opinion that plaintiff's neurological impairments were proximately caused by the injuries sustained as a result of the particular negligence attributed to defendant, rather than by another incident in which plaintiff experienced head trauma or even by psychosocial and

other factors entirely unrelated to injury.[2]

With respect to the admissibility of the expert's testimony, it is apparent that plaintiffs have identified no procedures actually employed by their neuropsychologist that would enable him to offer a reliable causation opinion based on accepted methodology (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). "It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness" (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]), with limited exceptions not applicable here (*People v Sugden*, 35 NY2d 453, 460-461 [1974]). In the absence of record support, an expert's opinion is without probative force (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]). Even assuming, as plaintiffs contend, that Dr. Goldberg is qualified to definitively state that plaintiff's neurological deficits are the result of trauma so as to rule out genetic, perinatal and psychosocial causes, plaintiffs have failed to identify any evidence and accepted methodology that would permit their expert to state, within "accepted standards of reliability" (*Matott*, 48 NY2d at 459), that those deficits are the result of one traumatic incident as opposed to another, or even to rule out nontraumatic causes or the cumulative effect of the series of head traumas

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[2] The record indicates that plaintiff "has a history, dating from at least 1998, of academic and cognitive deficits."

sustained by plaintiff.

Dr. Goldberg failed to offer or identify any objective medical evidence to support his conclusion that plaintiff's alleged brain injury and resulting cognitive problems were caused by the incident in question. The expert witness first examined plaintiff and administered neuropsychological tests on June 17, 2004, three years after the injury alleged to have been sustained as a result of the collapse of the bathroom ceiling. The report dated June 21, 2004 does not identify any earlier testing used as a basis for the expert's conclusion that "the accident suffered in 2001 is the direct and proximal cause of the cognitive deficit documented in this evaluation." Particularly, the report does not refer to any assessment of plaintiff's cognitive function made before the June 2001 incident that might serve as a basis for comparison so as to support the attribution of the noted deficits to events subsequent to the assessment, even if not to the June 2001 incident itself. A later evaluation made by plaintiffs' expert in October 2006 merely notes, "A clinically significant cognitive deficit is still present." It does not even mention the September 2004 car accident, let alone attempt to assess its effect on plaintiff's cognitive function. Moreover, when faced with objective medical evidence indicating the absence of brain injury, such as negative CT scans, plaintiffs' expert dismissed it without sufficient explanation.

In fact, all CT scans taken in connection with injuries sustained by plaintiff resulted in negative findings. Nor did Dr. Goldberg adequately address evidence showing that plaintiff's cognitive difficulties predated the subject accident.

The deficient evidentiary foundation offered in support of the proposed testimony of plaintiffs' expert witness should be contrasted to another matter likewise involving successive injury to the plaintiff, in which it was observed that:

> "the doctor had played an intimate role in the medical history of the case. He was the treating physician. His was the advantage of a prompt postaccident examination. In the course of his repeated treatment, he had the opportunity to note the refinements and subtleties of his patient's progress. He had personally observed the nature and extent of each of the exacerbating incidents in determining their effect on his diagnosis and treatment; he bore the responsibility for determining their relationship to the pre-existing symptoms. He had also undertaken a current medical survey on the eve of trial himself. In sum, if any one was in a position to hold an informed opinion, it was Dr. Millard" (*Matott*, 48 NY2d at 462).

The expert witness in the instant matter lacks the close connection with plaintiff's treatment that might permit a reliable assessment of the extent to which a particular traumatic event or nontraumatic factors contributed to the noted cognitive impairment. Thus, Supreme Court properly decided that plaintiffs' expert failed to establish a sufficient evidentiary foundation with respect to causation.

As the Court of Appeals stated in *Bernstein v City of New York* (69 NY2d 1020, 1021-1022 [1987]):

> "A jury verdict must be based on more than mere speculation or guesswork. Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury. If there are several possible causes of injury, for one or more of which defendant is not responsible, plaintiff cannot recover without proving the injury was sustained wholly or in part by a cause for which the defendant was responsible" (internal citations and quotation marks omitted).

In the absence of any other witness competent to establish the requisite nexus between the incident of June 2001 and the injury alleged to have resulted, there is no nonspeculative basis on which a jury could decide that defendant is responsible for Tyrone Guzman's neurological impairments (*see Taub v Art Students' League of N.Y.*, 39 AD3d 259 [2007]). Thus, Dr. Goldberg's reports regarding plaintiff, which conclude that plaintiff's cognitive disabilities were the results of his injury on June 16, 2001, are not based on any objective medical testimony and were properly precluded by the court.

Plaintiffs, however, contend that the court abused its discretion in denying their motion for a continuance pursuant to CPLR 4402 to enable them to retain a medical expert to testify

concerning causation. The decision whether to grant a continuance is a matter within the sound discretion of the trial court (*Matter of Sakow*, 21 AD3d 849 [2005], *lv denied* 7 NY3d 706 [2006]; *Telford v Laro Maintenance Corp.*, 288 AD2d 302, 303 [2001]) and should not be disturbed absent a clear abuse of that discretion (*Sakow*, 21 AD3d at 849; *Balogh v H.R.B. Caterers*, 88 AD2d 136, 143 [1982]). However, "[i]t is an abuse of discretion to deny a continuance where the application complies with every requirement of the law and is not made merely for delay, where the evidence is material and where the need for a continuance does not result from the failure to exercise due diligence" (*Balogh*, 88 AD2d at 141).

Here, plaintiffs' request for a continuance was not the result of their failure to exercise due diligence. To the contrary, they were without an expert witness upon the commencement of the trial because the trial court entertained defendant's motion in limine made after jury selection. As plaintiffs' counsel argued in support of his application, had defendant's motion been made prior to jury selection, plaintiffs would have had the opportunity to obtain another expert witness. Further, any resulting delay or waste of judicial resources would not have been the fault of plaintiffs, because, but for defendant's motion in limine, they were prepared for trial.

Accordingly, the judgment of the Supreme Court, Bronx County

(Betty Owen Stinson, J.), entered on or about May 20, 2007, dismissing the complaint and bringing up for review an order of the same court and Justice, entered April 2, 2007, which granted defendant's motion in limine to preclude plaintiffs' expert from testifying, directed a verdict in defendant's favor dismissing the complaint, and denied plaintiffs' motion for a continuance, should be reversed, on the law, the facts and in the exercise of discretion, without costs, the judgment vacated, the motion for a continuance to obtain a medical expert granted, and the matter remanded for further proceedings. Appeal from the aforesaid order should be dismissed, without costs, as superseded by the appeal from the judgment.

All concur except Saxe, J. who dissents in part in an Opinion as follows:

SAXE, J. (dissenting in part)

It is astonishing that our rules of evidence have been employed to dismiss the lawsuit of a child who *indisputably* was hit in the head and rendered temporarily unconscious or semiconscious by a large chunk of falling ceiling, who has since that time suffered a variety of symptoms -- sharp, throbbing headaches as well as back and neck pain -- and has displayed memory impairments and an inability to focus and pay attention. According to a qualified neuropsychologist, testing has shown various forms of "clinically significant cognitive deficits" that are indicative of, or consistent with, closed-head brain injury. Yet, because this clinician did not indicate *in his report* how he arrived at the conclusion that the injury he found had been caused by defendant's negligence, the trial court granted defendant's in limine motion to preclude him from testifying and dismissed plaintiffs' action. The majority does not challenge the evidentiary ruling, disagreeing instead only with the dismissal and concluding that plaintiffs should have been given more time to obtain another expert's opinion. However, I take issue with the preclusion of the expert's testimony. Under these circumstances, the question of whether the expert may properly offer his opinion both as to the presence of brain injury and as to the causation of that injury should have been left to trial.

Furthermore, the timing of the motion and decision are

shocking; at the end of the court day following the completion of jury selection and pretrial proceedings on March 26, 2007, plaintiffs' counsel was presented with this thoroughly prepared motion in limine including 15 exhibits and a legal analysis that had to be responded to immediately. He was required to counter the legal analysis, without even time to collect and submit any relevant exhibits, such as any deposition testimony, perhaps by the child or his mother, setting forth their firsthand experience or observations of the nature and extent of the changes in Tyrone since the accident. The record on appeal is appallingly one-sided, essentially consisting of the pleadings, defendant's submissions on its motion, and the in-court colloquy, with plaintiffs' opposition limited to a two-page "Brief in Opposition."

Defendant's motion in limine to preclude the testimony of plaintiffs' expert should not have been granted in any respect. While I agree with my colleagues that the judgment in defendant's favor should be vacated and the matter remanded, I would reverse the ruling in its entirety so as to permit the testimony of plaintiffs' expert without limitation.

Facts

On June 16, 2001, plaintiff Tyrone Guzman, then age 11, was struck in the head and neck by a falling chunk of the bathroom ceiling. He was found by his mother supine on the floor in a

semi-conscious state with ceiling plaster debris all around him. He indicated that his back and neck hurt. A cervical spine x-ray and CT scan were taken, and their results were reported to be negative. Plaintiff was discharged from the hospital approximately three hours after he arrived, at which time he was ambulatory and alert; he was given follow-up instructions for head injury.

Apparently -- although, because of the state of the record, this can only be asserted based upon multiple hearsay gleaned from reports submitted by defendant as exhibits -- Tyrone was given little to no follow-up care in the months that followed. Notably, however, he was from that time on excused from gym classes, indicating that all was not well with him physically. A number of the reports mention that throughout the months that followed Tyrone suffered from frequent sharp and throbbing headaches, sometimes with blurred vision, for which he was treated with Tylenol unless the pain was so severe as to cause him to cry, at which point he would be given Motrin. He also reported experiencing dizziness, even from merely bending over to tie his shoes, along with other ongoing problems such as the neck and back pain.

In early 2002, Tyrone was sent for follow-up care to Neuro Care Associates, where he apparently received physical therapy, including a program of muscular relaxation, focused deep

breathing and "muscle awareness techniques." However, it appears -- again, through hearsay -- that his treatment was discontinued due to "transportation difficulties." Testing in March 2002 revealed a normal EEG and normal brainstem auditory evoked response, although a needle electromyography of the cervical spine and related upper limbs suggested the presence of soft tissue injury.

In September 2002, upon his attorney's referral, Tyrone was examined by Dr. Joseph Waltz, a neurologist. In the "Impression" section of his report, dated October 8, 2002, Dr. Waltz stated that plaintiff suffered from post-traumatic headaches, cervical radiculopathy, and lumbosacral radiculopathy.

In October 2002, plaintiffs commenced this negligence action against defendant, the owner of the premises in which the accident occurred. On June 17, 2004, plaintiffs' counsel had Tyrone examined by Elkhonon Goldberg, Ph.D., a board-certified neuropsychologist whose main area of expertise is disorders due to traumatic brain injury. Dr. Goldberg reviewed information provided by Tyrone and his mother, and conducted an extensive battery of neuropsychological tests. It is worth mentioning that Dr. Goldberg reported that during the battery of tests, Tyrone began to experience headaches and vomited, and he also became quite somnolent at one point.

From the results of his testing Dr. Goldberg concluded:

> "The documented neuropsychological pattern is consistent with the history of head trauma and indicates a clinically significant cerebral dysfunction with a particular impact of the left hemisphere. [¶] It is my professional opinion that the accident suffered in 2001 is the direct and proximal cause of the cognitive deficit documented in this evaluation. Given the amount of time elapsed since the accident, a long-term, permanent cognitive deficit is likely to persist and it will continue to interfere with Tyrone's education ... since it affects language, the primary medium of any educational process; as well as attention, the primary prerequisite of any successful educational process."

A repeat neuropsychological evaluation was performed by Dr. Goldberg on October 24, 2006, and in his follow-up report Dr. Goldberg reviewed the battery of tests performed on Tyrone and the nature of the cognitive deficits he found. He reaffirmed his prior conclusion that Tyrone displayed cerebral dysfunction consistent with the head trauma.

Plaintiffs' supplemental bill of particulars indicates that Tyrone's injuries included impairments in memory, attention, concentration, and communication skills, although the sparse record contains no submission from Tyrone's mother, teachers, or others with a long-term relationship with him, as to their observations regarding this claim of deterioration of his mental capabilities since the accident.

Plaintiffs' CPLR 3101(d) response designating Dr. Goldberg as their expert, to testify as to Tyrone's cognitive deficits, the consequences of those deficits, and the causation of those deficits, was served on January 16, 2007. In an addendum dated

January 25, 2007 and served on January 29, 2007, Dr. Goldberg challenged the assessment of defendant's expert neurologist, Dr. David Kaufman, who had concluded that Tyrone displayed no objective signs of cognitive impairment. Dr. Goldberg questioned the validity of Dr. Kaufman's assessment by asserting that "a neurological evaluation contains only a very brief and cursory assessment of cognition and is neither intended nor capable of providing a comprehensive assessment of cognitive function or dysfunction." He also responded to the contention that Tyrone had the same cognitive deficits prior to the accident, as evinced by earlier school assessments, with the explanation that Tyrone's pre-accident difficulties in school related to "behavioral dyscontrol and emotional dysregulation," while his cognitive language and memory functions at that time were within normal range. In contrast, his present difficulties, post-accident, implicated problems with verbal memory, language and attention. He added that although measurements of Tyrone's IQ before and after the accident were similar, the WISC IQ tests that were used

> "are notoriously weak in measuring attention and are particularly inadequate for measuring memory. Therefore, they are not sensitive to the kind of deficit that characterizes [Tyrone's] cognitive impairment and would not have been able to document any changes in his attention and particularly in his memory."

Defendant then obtained an additional opinion of another neurologist, Dr. William Head, on February 7, 2007. Dr. Head

reviewed all the available records, along with Dr. Goldberg's reports, and came to conclusions similar to those of Dr. Kaufman, albeit in much greater detail.

When the case was set for trial on March 26, 2007, following jury selection, the court considered various oral applications, such as a request for a missing witness charge and a request for a ruling that defendant's two experts would provide cumulative testimony. Then, defendant made what it characterized as an in limine motion, for which it had prepared formal written papers, to preclude the testimony of plaintiff's expert, Dr. Goldberg.

That same day, the trial court reviewed the papers submitted by defendant's counsel, heard argument, and indicated its agreement with defendant's position; then, explaining that it viewed the motion as dispositive, it put the matter over to the next morning to give plaintiff's attorney time to counter the arguments "on the limited issue of whether or not Doctor Goldberg, a [Ph.D.] psychologist[,] is qualified to testify as to the causation of the deficits that he found in the plaintiff Tyrone Guzman."

The next day, plaintiff's counsel emphasized in his argument that a neuropsychologist is qualified to offer an opinion regarding brain injury, while the trial court countered that such an expert may testify only as to the effects of a brain injury, but not as to the existence of a brain injury, where there is no

medical evidence establishing such brain injury. It concluded that Dr. Goldberg was precluded from testifying as to the cause of the deficits he found, in the absence of objective medical evidence of brain injury. It then dismissed the action in its entirety on the ground that without the expert's testimony as to causation, plaintiff could not make out a prima facie case.

Analysis

In holding that the trial court's ruling should be modified, the majority explains that the court's decision was proper to the extent that Dr. Goldberg's testimony lacked a sufficient evidentiary foundation. That is, it holds that there is nothing in the record permitting Dr. Goldberg to causally connect the results of his testing with the incident of June 2001. It asserts that plaintiffs have failed to identify any procedures employed by Dr. Goldberg that would enable him to offer a reliable causation opinion based on accepted methodology, or to identify any evidence permitting him to state, within "accepted standards of reliability," that Tyrone's cognitive deficits are the result of the June 2001 incident, as opposed to some other incident(s) or some nontraumatic causes.

As the majority recognizes, Dr. Goldberg is certainly qualified to render an opinion that the type and extent of cognitive impairment indicated by his interpretation of the test results are consistent with traumatic brain injury. It

nevertheless concludes that Dr. Goldberg lacked a basis to support his conclusion that it was *this particular* incident that caused the injury resulting in the observed impairments. Indeed, it assumes an absence of any other witness competent to establish the nexus between the 2001 incident and the injury.

I fail to understand why dismissal at this juncture was considered appropriate on this reasoning. First of all, the court did not consider the possibility of seeking testimony by Dr. Goldberg before deciding this purported "in limine" motion, so of course it had no evidence as to the science he employed. Therefore, it is not surprising that the record fails to establish that which the majority demands, namely, an explanation of the "procedures actually employed by [Dr. Goldberg] that would enable him to offer a reliable causation opinion based on accepted methodology."

Second, it was not proper to preclude Dr. Goldberg's expected testimony based upon the lack of an "objective medical foundation" for the claim of traumatic brain injury. That Tyrone's claimed traumatic brain injury was not established through a positive CT scan does not establish as a matter of law the non-existence of any such injury. There is no reason Dr. Goldberg should not be permitted to testify that the presence of brain injury may be deduced from the results of the tests he performed. Defendant in its motion papers presented to the trial

court relied upon *Toure v Avis Rent A Car Sys.* (98 NY2d 345, 350 [2002]), in which the Court of Appeals focused on the need of "objective medical proof" for a plaintiff "*to meet the 'serious injury' threshold under the No-Fault Law*" (emphasis added). That case focused entirely and solely on the No-Fault Law. It does not preclude a plaintiff in a personal injury action from establishing the existence of traumatic brain injury through results of neuropsychological testing combined with observations of people who know the plaintiff as to alterations in him since the accident.

Of course, an expert may not testify to a conclusion which assumes material facts that are not supported by the evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]). But, notably, in *Cassano* it was at the close of the plaintiff's case that the trial court determined that the expert had assumed facts that were not established by the evidence. Dr. Goldberg should not be faulted for failing to explain his reliance on certain facts when he was never given the opportunity to testify as to the facts on which he based his conclusion. Third, as to proving that the claimed injury was caused by the ceiling collapse, that connection may be made by others linking perceived alterations in Tyrone's cognitive function to the date of the accident. Yet plaintiffs did not even have the opportunity to present evidence from people who knew Tyrone well and may have observed pronounced

alterations in his skills and abilities following the 2001 accident, which evidence could also have supported the conclusion that the observed cognitive deficits were causally related to the accident.

The suggestions that Tyrone had cognitive problems even before the 2001 incident, and that his cognitive problems could have been caused by accidents other than the 2001 incident, are valid and viable grounds for challenging the opinion of Dr. Goldberg. But, these challenges go to the weight of his proposed testimony, not its admissibility. By the same token, the defense should not be permitted to establish an absence of evidence of a causative link between the accident and Tyrone's post-accident cognitive deficits simply by claiming that testimony by Tyrone's mother must necessarily be fatally flawed.

It should go without saying that the preclusion of Dr. Goldberg's opinion may not be appropriately attributed to the fact that Tyrone was so unlucky as to be subjected to several, rather than merely one, incident potentially causing him injury. True, plaintiff must establish that the injury was caused, in whole or in part, "by a cause for which the defendant was responsible" (*Bernstein v City of New York*, 69 NY2d 1020, 1022 [1987] [citation and internal quotation marks omitted]). But, both the facts and the posture of the present case are widely different from those in *Bernstein*. It is one thing to dismiss a

complaint upon review of a trial record and a conclusion that there is *no* evidence supporting the factual conclusion the jury had to reach to justify the verdict. It is another to dismiss a case *before trial* by concluding, based upon an expert's report, that the expert cannot make a causal connection between the accident and the injury, and to further conclude that there can be no other means of establishing that causal connection.

As to the one event intervening between the incident in question and Dr. Goldberg's first evaluation of Tyrone, i.e., Tyrone's being hit in the head with a basketball in May 2002, there is nothing to indicate that from that point on there was an increase or alteration in the symptoms of injury that Tyrone began to display in June 2001 and that continued unabated through and after the incident in May 2002. As to the car accident in 2005, any injuries it caused do not negate the damage caused by the 2001 incident, which in any event were assessed before the car accident.

In Matott v Ward (48 NY2d 455 [1979]), the Court upheld a ruling allowing the plaintiff's osteopathic physician, whom the plaintiff saw intermittently over the years following his accident, to offer his opinion that the plaintiff's subsequent complaints of new orthopedic injuries to parts of his body affected by the original accident were causally related to the original accident. The question focused on by the Court was not

whether this expert could properly make that determination; it was simply whether he asserted the requisite level of "reasonable certainty." It would have been appropriate here to leave for trial any challenge to Dr. Goldberg's conclusion that all Tyrone's injuries were caused by the single event in 2001; however, it was not appropriate to prevent Tyrone's case from being presented.

Even if Dr. Goldberg's reports failed to sufficiently establish the basis upon which he concluded that the accident in question had caused the asserted cognitive deficits, there are more appropriate alternatives than dismissal of the complaint prior to trial. The court had the option of assessing at the close of plaintiffs' case whether causation evidence had been presented to connect the injury observed by Dr. Goldberg with the incident and its repercussions as observed by Tyrone's family and friends; it also had the option of instructing the jury as to the limited use it could make of Dr. Goldberg's opinion evidence. Dismissal was, at the very least, premature, as was the conclusion that Dr. Goldberg's proposed testimony was insufficiently connected to the incident.

I cannot help but observe that if Tyrone had been born into a different family, more steps might have been taken immediately to assess and clearly document any changes in Tyrone's abilities following the accident, with a multitude of experts' evaluations

and ongoing reviews of his progress or lack of it. It is a disgrace if a lack of follow-up that may be attributable to a lack of funds or education prevents Tyrone from establishing that he suffered from debilitating injury either wholly or partially resulting from being hit in the head due to defendant's negligence.

Finally, because of the one-sided procedure by which this application was made and granted, and because it seems likely that plaintiff can present a sufficient evidentiary basis to claim that Tyrone has suffered cognitive impairment as a result of the 2001 accident, I would reverse the trial court's ruling and deny defendant's in limine motion, and remand this matter for immediate trial.

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

ENTERED: JUNE 19, 2008

CLERK