SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 24, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Williams, McGuire, JJ.

3053 In re Kadiatou B.,

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

Fatamatou N.-B., et al.,
Respondents-Respondents,

Administration for Children's Services,
Petitioner-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ann E. Scherzer of counsel), for appellant.

Patricia W. Jellen, Eastchester, for Fatamatou N.-B., respondent.

Lisa H. Blitman, New York, for Mamadou B., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), Law Guardian.

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about June 27, 2006, which, after a fact-finding hearing, dismissed a derivative neglect petition against respondent parents, unanimously affirmed, without costs.

The record evidence supports Family Court's dismissal of the derivative neglect petition at issue. The court's prior finding of child abuse, which is the basis of that petition, was based upon vague, nonspecific evidence as to the earlier death of

respondents' three-month-old baby (who was also named Kadiatou) in 1999, and the parents have since demonstrated a positive change in circumstances. It should be noted that the court was particularly familiar with the evidence in this case inasmuch as it had also presided over the predicate 2002 abuse case and the 2005 Family Court Act § 1028 hearing.

As this Court has stated, proof of the abuse or neglect of one child "may, in appropriate circumstances, be sufficient to sustain a finding of abuse or neglect" of a second child (*Matter of Cruz*, 121 AD2d 901, 902 [1986]). We further stressed, however, that the

> "determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct which formed the basis for a finding of abuse or neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists (*id.* at 902-903)."

Other relevant factors include whether the conduct upon which the prior finding was based "supports the conclusion that the parents have a faulty understanding of the duties of parenthood" (*Matter of Christina Maria C.*, 89 AD2d 855 [1982]), and whether sufficient positive change in the parents' behavior has occurred (*see Matter of Kimberly H.*, 242 AD2d 35, 39 [1998]).

Initially, the prior conduct that resulted in the 2002 finding of abuse - the 1999 death of three-month-old Kadiatou and the severe injury to her twin sister, Aisstou - some seven years

earlier, is, under the circumstances, sufficiently remote in time from the petition at issue. Although there is no hard and fast rule governing time proximity, the underlying abuse finding was inconclusive as to the parents' role. In fact, the record sheds no light on "the nature of the conduct." Rather, the conduct relating to Kadiatou's death supporting the prior abuse finding was never defined, and neither of the respondents was ever found to have committed an intentional, reckless or even negligent act against the children; nor was either of the respondents found to have been responsible for their injuries. Indeed, neither parent was ever charged with any criminal conduct. Rather, the finding was reached solely on the basis of the legal construct res ipsa loquitur. Hence, the record contains no specific evidence as to whether the prior abuse finding supports the conclusion that respondents had a faulty understanding of their parental duties. This case is thus distinguishable from *Matter of Justice T.* (305 AD2d 1076 [2003], *lv denied* 100 NY2d 512 [2003]), where a longer time interval was found not to be remote because such faulty understanding was evidenced by the parent's conviction for egregious intentional conduct that occurred while she was receiving rehabilitative services due to prior allegations of abuse. It is also distinguishable from *Matter of Umer K.* (257 AD2d 195 [1999]), where there was criminal responsibility imposed on the parents for the abuse, and strong expert testimony

supporting the continued inability of the parents to care for the child.

With respect to the injuries causing Kadiatou's death in 1999, the only evidence offered by ACS was the records of the Medical Examiner that were received at the fact-finding hearing. The cause of death was stated as "homicide" and, specifically, "blunt impact to [the] head." The records indicate that Kadiatou was born prematurely, at 24 weeks gestation, and died on November 18, 1999, at the reported age of 3½ months. She had suffered multiple fractures and other injuries to her skull and head. At least three and possibly four skull fractures (the records are ambiguous in this regard) were observed, as well as subscapular, subdural and subarachnoid hemorrhages.

Although ACS urges on appeal that the injuries were inflicted on more than one occasion, there is no such finding in the record. Moreover, ACS did not offer any testimony from a representative of the Office of the Medical Examiner either to explain the homicide finding or to opine on the injuries. Rather, to support this legal conclusion, ACS relies on references in the records to the effect that the fractures were "healing" and certain of the hemorrhages were "fresh, recent and organizing."[1]

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[1]ACS also relies on a treatise on forensic pathology, which states that "considerable force" is necessary to cause a fracture to an infant's skull (Spitz and Fisher, Medicolegal Investigation

Unquestionably, the death of respondents' infant child is extremely disturbing. But like Family Court, we cannot blink at ACS' failure to present any testimony bearing on the issue of whether Kadiatou's skull fractures occurred at separate times, or whether her fatal injuries were the result of intentional conduct by a caregiver, let alone one of the respondents in particular. Indeed, there is no basis in the record to identify which of the respondents Kadiatou was with, or even whether she was with one of them, when she suffered the fatal injuries.

In addition, no evidence was presented that dismissing the petition would be harmful to the welfare of the subject child, now three years old. There is a plethora of evidence to the contrary regarding the parents' positive behavior. In its comprehensive and well-reasoned written opinion, Family Court agreed with the caseworker that respondents "complied with each and every element of the service plan" jointly devised by ACS and New York Foundling, a child and family services agency, to wit:

> "They engaged in and completed parenting skills courses, they engaged in a course of treatment of individual psychotherapy and they visited regularly with [the surviving twin] Aisstou, reportedly not missing a single visit. Indeed, not only did the Respondents complete that which was asked of them, they continued with services of their own accord thereafter, thereby building upon the foundation which those services offered by ACS had set."

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of Death, 707 [3rd ed. 1993]). The term "considerable" force, however, is unilluminating and, of course, "considerable force" can be inflicted accidentally and without committing homicide.

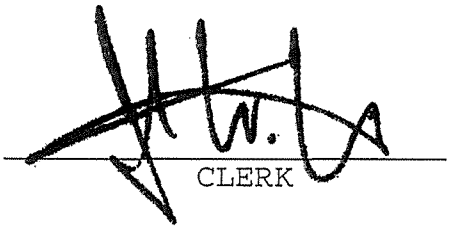
Furthermore, since 2002, respondent mother has undergone individual counseling at Harlem Hospital, and learned sufficient English to allow her to undergo individual psychotherapy, which she successfully completed. She enrolled and participated in the Nah We Yone Program, which provides family services, counseling and a women's wellness support network to immigrant and displaced Africans. Nah We Yone also provided a social worker who successfully taught the mother how to play games, read and relate to Aisstou, who was 5 years old at the time. By way of contrast, when the deceased child and Aisstou were born, the mother was only 15 years old, shy and withdrawn, had only recently arrived in the United States, spoke no English, and her support network consisted of her husband and one friend. The father has also received parenting skills training and individual counseling, and more recently was participating in family counseling. The parents have been active in Nah We Yone as a couple, both clinically and socially.

Observations, by the caseworker and social workers, of the parents' interactions with Aisstou and the subject child have been positive. Indeed, as Family Court also noted, the caseworker "pointedly stated that she saw no parenting issues with the parents." Moreover, in October 2005, during the pendency of this matter in Family Court, ACS discharged Aisstou from foster care to the custody of her parents without prior

consultation with the Family Court. As Family Court observed, that determination by ACS "clearly manifest[s] the Agency's belief that the parents have overcome whatever problems existed in the past, are capable of caring for a child and are not exhibiting any fundamental defect in judgment."

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

ENTERED: JUNE 24, 2008



Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3984 The People of the State of New York, Respondent,

SCI 40635C/05

-against-

William Ford,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael R. Sonberg, J. at plea; Denis J. Boyle, J. at sentence), rendered October 20, 2006, convicting defendant of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The court properly exercised its discretion in declining to run defendant's sentence nunc pro tunc to the date of his arrest in another county. Defendant did not preserve his claim that he was entitled to that remedy as a matter of law on the ground that, by failing to have him produced in a timely fashion, the People violated his right under CPL 380.30(1) to be sentenced without unreasonable delay (*see People v Marshall*, 228 AD2d 15 [1997], *lv denied* 89 NY2d 1013 [1997]), and we decline to review it in the interest of justice. As an alternative holding, we conclude that the eight-month delay in sentencing due to

defendant's incarceration on another case was not unreasonable (*see People v Turner*, 222 AD2d 206, 207 [1996], *lv denied* 88 NY2d 855 [1996]).

Defendant's valid waiver of his right to appeal precludes review of his excessive sentence claim. In any event, we perceive no basis for reducing the sentence.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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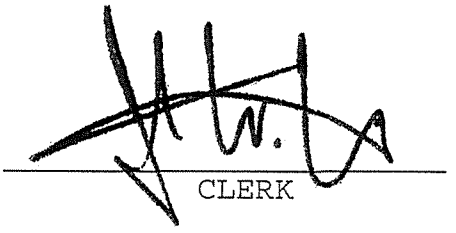

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Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3985 In re Lee A. Goldberg, Index 650164/07
Petitioner-Respondent,

-against-

Thelen Reid Brown Raysman & Steiner LLP, et al.,
Respondents-Appellants.

Thelen Reid Brown Raysman & Steiner LLP, New York (John C. Ohman of counsel), for appellants.

Jeffrey A. Jannuzzo, New York, for respondent.

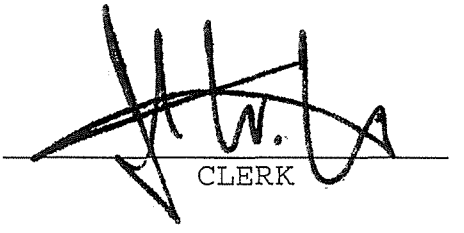
Order and judgment (one paper), Supreme Court, New York County (Bernard J. Fried, J.), entered October 17, 2007, which granted the petition to confirm an arbitration award and awarded petitioner the principal amount of $453,468.62, plus interest, costs and disbursements, unanimously affirmed, with costs.

The arbitration award was properly confirmed as it did not violate a strong public policy, was not irrational, and did not exceed the arbitrator's authority (*see Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]; CPLR 7511[b]). Indeed, the arbitrator offered a well-reasoned justification for his interpretation of the parties' agreement, and there exists no basis for vacatur thereof (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). As for the award of counsel fees to petitioner, it was respondents that first sought such fees in their counterclaim,

and mutual demands for counsel fees in an arbitration proceeding constitute, in effect, an agreement to submit the issue to arbitration, with the resultant award being valid and enforceable (*see Matter of Warner Bros. Records (PPX Enters.)*, 7 AD3d 330 [2004]; *compare Matter of Matza v Oshman, Helfenstein & Matza*, 33 AD3d 493, 494-495 [2006]). While respondents may have attempted to withdraw the request for attorneys' fees in connection with their counterclaim, there was no such attempt in connection with their defense of the arbitration proceeding.

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

ENTERED: JUNE 24, 2008



Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3986 Morais Remekie, et al.,
Plaintiffs,

Index 27681/01
83404/03
83711/04

-against-

The 740 Corporation,
Defendant.
- - - - - - - - - -
The 740 Corporation,
Third-Party Plaintiff-Respondent,

-against-

Lico Contracting, Inc.,
Third-Party Defendant,

Otis Elevator Company,
Third-Party Defendant-Appellant.
- - - - - - - - - - -
The 740 Corporation,
Second Third-Party Plaintiff-Respondent,

-against-

Thomas J. Tisch, et al.,
Second Third-Party Defendants-Appellants.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Otis Elevator Company, appellant.

Eustace & Marquez, White Plains (Rose M. Cotter of counsel), for Tisch appellants.

DeCicco, Gibbons & McNamara, P.C., New York (Ankur H. Doshi of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered February 13, 2007, which denied the motions of third-party defendant Otis Elevator Company (Otis) and second third-party defendants (Tisch) for summary judgment dismissing the

third-party complaint and the second third-party complaint, respectively, and all cross claims as against them, unanimously modified, on the law, Otis's motion granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendant building owner, The 740 Corporation (740 Corp.), did not submit competent proof to controvert Otis's expert evidence that the freight elevator in question was not defective at the time plaintiff worker was injured (*see generally Nazario v St. Barnabas Hosp.*, 34 AD3d 345 [2006]). Nor did it offer proof to show that Otis had actual or constructive notice of any alleged defective condition (*see Parris v Port Auth. of N.Y. & N.J.*, 47 AD3d 460 [2008]; *Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]). The elevator service agreement between 740 Corp. and Otis did not include the freight elevator in question, and testimony that Otis may have inspected the freight elevator pursuant to 740 Corp.'s verbal request was too vague and non-specific as to the time frame of the alleged request to raise an issue of fact as to liability on such grounds. In the absence of a contract for routine or systematic maintenance, an independent repair contractor has no duty to inspect or warn of any purported defects (*see Daniels v Kromo Lenox Assoc.*, 16 AD3d 111 [2005]).

Tisch's motion was properly denied. The plain language of the indemnification provision in the alteration agreement between

740 Corp. and Tisch, as owners of a duplex under renovation, provided that Tisch would be liable for "all" injury to persons or property "in the [b]uilding," arising out of the renovation work. Plaintiff was injured in the building while removing refuse from the renovation, which work was within the scope of the agreement between Tisch and the contractor, plaintiff's employer. Tisch's interpretation of the indemnification provision as restricting indemnification to liabilities that arise after the renovation work has been completed fails when the whole provision is read in context; furthermore, it is an attempt to create an ambiguity where none exists (*see U.S.B.M. Realty Co., Inc. v Studio MacBeth, Inc.*, 46 AD3d 317 [2007]).

We reject 740 Corp.'s request that we search the record and find that it is entitled to summary judgment on its contractual indemnification claim. 740 Corp. has not demonstrated, as a matter of law, that it is free of any negligence that might have contributed to plaintiff's injury. The conflict in testimony between plaintiff and his coworker as to the cause of the

accident, as well as the inspection and condition of the elevator, creates issues of fact which cannot be resolved on this motion.

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

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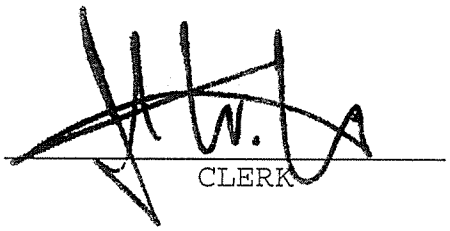


Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3987-
3988-
3989 In re Samuel L., and Others,

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

Christopher S.,
Respondent,

Jennifer F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Julian A. Hertz, Larchmont, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

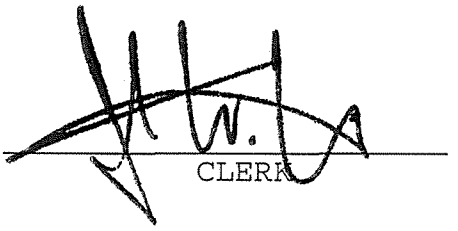
Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about April 23, 2007, placing the subject children in the custody of the Commissioner of Social Services upon a fact-finding determination that respondent-appellant abused one of the children and derivatively neglected the other children, unanimously affirmed, without costs.

A prima facie showing of abuse was made out with medical testimony that the five-month-old child was brought to the hospital with injuries, including a bulging fontanel, bilateral subdural hematoma, skull fracture, and retinal hemorrhages, that

were of such a nature as not to be accidental or sustained less than a few days, and more likely a few weeks, before the child was seen (Family Ct Act § 1012[e][i]; 1046[a][ii]). Respondent, who presented no medical evidence of her own, offered explanations for these injuries that were inconsistent with this medical testimony and otherwise not plausible, and thus failed to rebut the presumption of culpability (*see Matter of Sara B.*, 41 AD3d 170 [2007]). No basis exists to disturb Family Court's findings of credibility (*see id.*).

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

ENTERED: JUNE 24, 2008



Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3990 The People of the State of New York, Ind. 5356/03
Respondent,

-against-

Alex Gomez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lawrence H. Cunningham of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Phylis Skloot Bamberger, J.), rendered December 10, 2004, convicting defendant, after a jury trial, of attempted murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 22 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record concerning counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). We reject defendant's argument that there could be no reasonable strategic justification for the fact that his trial counsel made a summation argument concerning lack of corroborating evidence as to a certain aspect of the People's case, which led the court to rule that he had opened the door to precluded evidence of

uncharged crimes. The record suggests that counsel took a reasonable calculated risk that the court would not perceive his summation argument, which was beneficial to his client, as sufficient to permit the People to introduce the precluded evidence, particularly at that late stage of the trial. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not established that his counsel's actions were unreasonable, or that, even if unreasonable, they caused defendant any prejudice or deprived him of a fair trial. Defendant's claim that the court improperly precluded him from introducing certain evidence is contradicted by the record, which reveals that he succeeded in eliciting that evidence. We have considered and rejected defendant's remaining arguments in this regard.

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

ENTERED: JUNE 24, 2008

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Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3991 Herbert Altman, et al., Index 604220/06
Plaintiffs-Appellants,

-against-

New York Board of Trade, Inc.,
Defendant-Respondent,

The Board of Governors of the
New York Board of Trade,
Defendant.

Bernfeld, DeMatteo & Bernfeld, LLP, New York (David B. Bernfeld of counsel), for appellants.

Milbank, Tweed, Hadley & McCloy LLP, New York (Michael L. Hirschfeld of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 6, 2007, which, insofar as appealed from as limited by the briefs, granted defendant New York Board of Trade, Inc.'s motion to dismiss the first through fifth and eighth through thirteenth causes of action, and denied plaintiffs' application for leave to amend the complaint, unanimously affirmed, with costs.

Plaintiffs, holders of Trading Permits on the Board of Trade of the City of New York (NYBOT), brought this action to block a proposed merger between the NYBOT, organized under the New York Not-For-Profit Corporation Law, and the InterContinental Exchange, Inc., a Delaware for-profit corporation. Plaintiffs allege that defendants' actions in connection with the proposed

merger would deprive them of their rights as members of the NYBOT to vote on the proposed merger and share in the proceeds of the merger, and ultimately strip them of their right to trade on the NYBOT in the "open outcry" format. The merger closed in January 2007.

Plaintiffs' causes of action for breach of contract (eighth through eleventh) were properly dismissed pursuant to CPLR 3211(a)(1). The only written document governing plaintiffs' rights and obligations as Permit Holders is the NYBOT By-Laws, which expressly state in section 101(b) that "Permit Holders . . . shall not constitute 'members' within the meaning of the N[-]PCL . . . and will not have any voting rights in the Exchange or any rights to receive any distributions of cash, securities or other property, whether on dissolution, liquidation, merger, consolidation or otherwise." Likewise, plaintiffs cannot expand the scope of their rights on the basis of a course of conduct. Any such course of conduct plaintiffs allege contradicts the plain language of the NYBOT By-Laws, which make clear that Permit Holders do not have the right to vote on a proposed merger or share in merger proceeds (*see Julien J. Studley, Inc. v New York News*, 70 NY2d 628, 629-30 [1987]).

Plaintiffs' claims asserted under the N-PCL (first through fifth and twelfth) are also not viable since the N-PCL expressly delegates to the NYBOT the right to designate who is a "member"

in its certificate of incorporation or by-laws (*see* N-PCL 102[a][9]; 601). The NYBOT's By-Laws clearly provide that only Equity Members are to be deemed "members" for purposes of the N-PCL, and that Permit Holders "shall not have any of the rights or privileges of 'members' under the N[-]PCL." Because plaintiffs are not "members" within the meaning of the N-PCL, the merger did not proceed in violation of their rights under this statute (*see Harris v Lyke*, 217 AD2d 982 [1995], *lv denied* 87 NY2d 801 [1995]; *see also Kemp's Bus Serv. v Livingston-Wyoming Ch. Of NYSARC*, 267 AD2d 1085, 1086 [1999]; *Pellegrini v Rockland Community Action Council*, 190 AD2d 881, 882-883 [1993]). For the same reason, the NYBOT's Board of Governors owe no fiduciary duty to plaintiffs under the N-PCL.

Plaintiffs' fraud cause of action (thirteenth) is duplicative of their breach of contract claims (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 305 [2003]).

Furthermore, the motion court appropriately rejected plaintiffs' request to amend the complaint inasmuch as it is apparent that any proposed amendment would be futile in light of the evidence (*see Norte & Co. v New York & Harlem R.R. Co.*, 222 AD2d 357, 358 [1995], *lv denied* 88 NY2d 811 [1996]).

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

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

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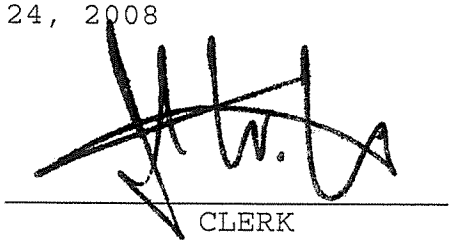

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Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3993-
3993A Goldman & Greenbaum, P.C., Index 102460/06
Plaintiff-Respondent,

-against-

Parisis G. Filippatos,
Defendant-Appellant.

Parisis G. Filippatos, New York, appellant pro se.

Martin Wm. Goldman, New York, for respondent.

Orders, Supreme Court, New York County (Debra A. James, J.), entered April 25, 2007, which denied defendant's motion to dismiss the complaint and granted plaintiff's motion for partial summary judgment, referring the matter of damages and costs to a Special Referee to hear and report, unanimously affirmed, with costs.

The Fee Dispute Resolution Program has no applicability where the amount in dispute exceeds $50,000 (*see* 22 NYCRR 137.1[b][2]); both parties agree that the amount in dispute substantially exceeds that amount. Plaintiff contends that since it rescinded the tentative credit of $50,000, the amount owed by defendant client is approximately $140,000. Defendant admits he paid only $114,000 of the approximately $250,000 billed in attorney's fees. The amount in dispute clearly exceeds the $50,000 cap.

Plaintiff law firm did not consent to arbitration (22 NYCRR § 137.2). Accordingly, it is unnecessary to consider whether defendant waived his right to arbitration.

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

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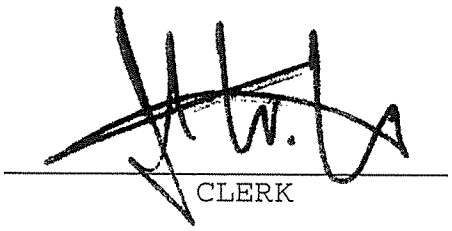

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Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3994-
3994A Daniel Sidelev, Index 103348/07
Plaintiff-Respondent,

-against-

Roman Tsal-Tsalko, et al.,
Defendants-Appellants.

Law Offices of Bukh & Associates, Brooklyn (Nicholas M. Wooldridge of counsel), for appellants.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 31, 2007, which denied defendants' motion to vacate an earlier dismissal order, reinstate their answer and restore the action to the trial calendar, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded to Supreme Court for further proceedings. Appeal from the earlier order, entered October 29, 2007, which sua sponte struck defendants' answer for purported discovery violations and directed entry of judgment in favor of plaintiff, unanimously dismissed, without costs.

The court improvidently exercised its discretion under CPLR 3126 in denying defendants' motion to vacate the striking of their answer, since they did not have "prior notice . . . that such a sanction might be imminent" (*Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1999]). Furthermore, the record indicates that the court never issued a written order at the

conclusion of the preliminary conference, or had its discovery directions recorded by a court reporter (22 NYCRR § 202.12[d]). Under the circumstances, the court should have afforded defendants "a second chance to furnish the information [they] had allegedly not turned over" (*Hanson v City of New York*, 227 AD2d 217 [1996]).

The record also indicates that defendants substantially complied with the court's discovery directions, and thus any delay in disclosing the requested information was not willful, contumacious or in bad faith (*Postel*, 262 AD2d at 42). Since defendants did provide the missing information and documents, along with a reasonable excuse for the delay, the court should have granted their motion, especially since plaintiff failed to substantiate any claim of prejudice (*Marks v Vigo*, 303 AD2d 306, 307 [2003]).

A preliminary conference order "is not appealable as of right because it is not an order which determined a motion made upon notice" (*Postel*, 262 AD2d 40 at 41). However, since defendants did subsequently move, on notice, to vacate that

order, the appeal from the later order denying that motion is reviewable (*see Santoli v 475 Ninth Ave. Assoc., LLC*, 38 AD3d 411, 414 [2007]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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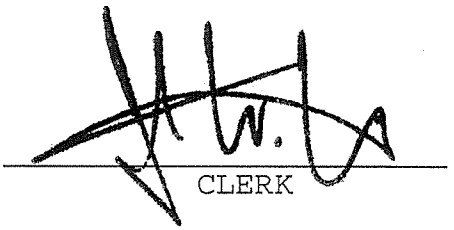

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Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3995 The People of the State of New York, Ind. 5298/03
Respondent,

-against-

Jonathan Rodriguez,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (William A. Loeb of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles J. Tejada, J. at hearing; Carol Berkman, J. at trials and sentence), rendered June 2, 2005, convicting defendant, after two jury trials, of manslaughter in the first degree and assault in the second degree, and sentencing him to concurrent terms of 25 years and 7 years, respectively, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. The lineup photographs demonstrate the lineup was not suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Defendant did not stand out as significantly younger than the other lineup participants. The disparity between the actual ages of a defendant and other lineup participants has little relevance unless such disparity is

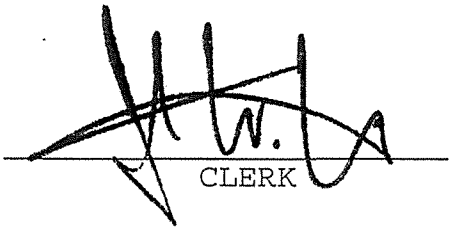
reflected in their physical appearances (*see People v Grant*, 43 AD3d 800, 801 [2007], *lv denied* 9 NY3d 990 [2007]; *People v Amuso*, 39 AD2d 425 [2007], *lv denied* 9 NY3d 862 [2007]).

Defendant failed to preserve his claim that the court at his second trial erred in instructing the jury that it should not consider self-defense or justification, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court reasonably anticipated that although defendant did not raise a justification defense, there was some evidence in the case that might lead the jury to speculate about such a defense. Accordingly, the court properly exercised its discretion in directing the jury not to consider that issue (*cf. People v Medor*, 39 AD3d 362 [2007], *lv denied* 9 NY3d 867 [2007]), and this instruction could not have undermined defendant's misidentification defense or caused him any prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 24, 2008



Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3996 The People of the State of New York, Ind. 6731/06
Respondent,

-against-

Gerald Baker,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (William A. Loeb of counsel), for appellant.

Judgment, Supreme Court, New York County (James A. Yates J.), rendered on or about March 22, 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.

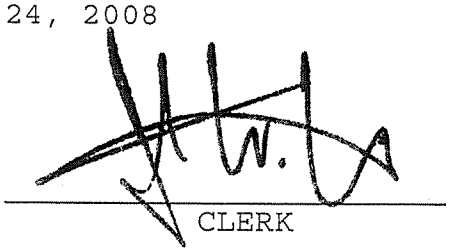
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 24, 2008



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Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3997 The People of the State of New York, Ind. 3638/06
Respondent,

-against-

Lloyd Jackson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

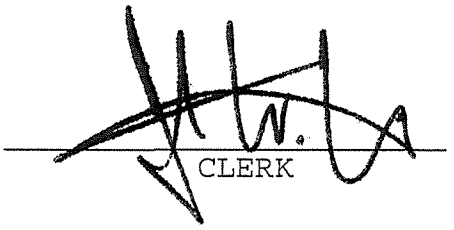
Judgment, Supreme Court, New York County (Gregory Carro, J. at suppression hearing; Micki A. Scherer, J. at plea and sentence), rendered November 8, 2006, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. During a lawful stop of the car that defendant was driving, the officer saw defendant making fast movements towards his pants pocket. As the officer got closer, he saw defendant, who was acting in a nervous and jittery manner, remove his hand from his right front pants pocket. Defendant produced a registration that did not match his driver's license. As the officer talked with defendant, he observed a bulge, about three or four inches wide, protruding from the same pocket where defendant's hand had been.

When the officer asked if defendant had "anything on [him]," defendant, notwithstanding the obvious pocket bulge, answered "no." While these observations would have justified a protective frisk (*see People v Mims*, 32 AD3d 800 [2006]), notwithstanding possibly innocent explanations for defendant's conduct (*see People v Allen*, 42 AD3d 331 [2007], *affd* 9 NY3d 1013 [2008]), the officer instead made the limited intrusion of ordering defendant out of the car, touching the outside of the bulge, and asking defendant what was in his pocket. When defendant replied that he had drugs, this provided probable cause for his arrest.

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

ENTERED: JUNE 24, 2008



Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

3998 Freddy Rivas, Index 6609/07
Plaintiff-Respondent, 85866/07

-against-

Raymond Schwartzberg & Associates, PLLC,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

Desena & Kafer, P.C., et al.,
Third-Party Defendants-Respondents.

Robin Grumet, New York, for appellant.

Loscalzo & Loscalzo, P.C., New York (Michael S. Kafer of counsel), for Freddy Rivas, respondent.

McManus, Collura & Richter, P.C., New York (Scott C. Tuttle of counsel), for Desena & Kafer, P.C., Michael S. Kafer and Ralph Desena, Jr., respondents.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about December 27, 2007, which denied defendant's motions to dismiss the complaint and to disqualify plaintiff's attorneys, and granted third-party defendants' motion to dismiss the third-party complaint, unanimously modified, on the law, to dismiss plaintiff's breach of contract cause of action, and otherwise affirmed, without costs.

Plaintiff in this legal malpractice action sufficiently alleged the loss of his personal injury claim based on the expiration of the limitations period as a result of defendant's having commenced the action against the wrong entity, even though

there has not been an adverse disposition of the action (*see Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45 [1993]). However, plaintiff's breach of contract claim, arising from the same facts and alleging similar damages, should have been dismissed as duplicative (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [2003]).

The third-party action for contribution or indemnification was not viable since third-party defendants did not share in defendant's responsibility for plaintiff's alleged loss, not having represented him as defendant's successor until after expiration of the limitations period on the personal injury claim (*see Wilson v Quaranta*, 18 AD3d 324, 326 [2005]). We reject defendant's contention that third-party defendants, first authorized by the bankruptcy court to represent plaintiff's estate after the limitations period had run, were responsible for seeking an order of retention nunc pro tunc assuming arguendo that they could have done so (*see In re Piecuil*, 145 BR 777, 783 [WD NY 1992]; *cf. In re Bennett Funding Group, Inc.*, 213 BR 234, 243 [ND NY 1997]). Defendant's actions and communications with both the trustee and the attorney for the named defendant in the personal injury action showed that he was acting as plaintiff's attorney (*see Wei Cheng Chang v Pi*, 288 AD2d 378, 380 [2001], *lv denied* 99 NY2d 501 [2002]; *see also Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [2008]), yet he never sought an order

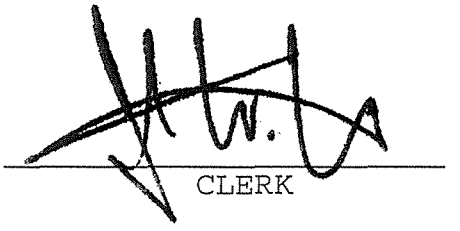
of retention despite being repeatedly advised of the requirement and the need to act expeditiously in light of the imminent running of the statute of limitations.

Disqualification of plaintiff's attorneys based on a claimed conflict of interest was moot in light of the dismissal of the third-party action. Nor was relief warranted under the advocate-witness rule in light of defendant's failure to demonstrate that the attorney testimony was necessary (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446 [1987]).

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

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

ENTERED: JUNE 24, 2008



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Lippman, P.J., Gonzalez, Buckley, Catterson, JJ.

4000 In re Philips Lin, Index 105564/07
Petitioner-Respondent,

-against-

Raymond H. Wong, et al.,
Respondents-Appellants.

Wong, Wong & Associates, PC, New York (Nicholas G. Yokos of counsel), for appellants.

Philips Lin, respondent pro se.

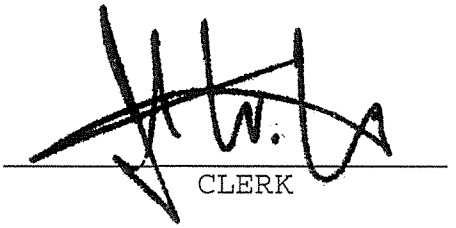
Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 27, 2007, which granted petitioner former client's application to confirm an attorney fee arbitration award issued pursuant to 22 NYCRR part 137, and denied respondents attorneys' cross motion to dismiss the proceeding as against the individual respondent, a member of respondent law firm, and to consolidate the proceeding with another proceeding brought by the law firm against the former client denominated "Petition for Trial De Novo Review of [the same] Arbitration Award," unanimously affirmed, with costs.

Respondents fail to show that vacatur of the award is warranted under the well-known standard insulating arbitral awards from disturbance on grounds of legal or factual error (*Djeddah v Starr*, 306 AD2d 59 [2003], *lv denied* 100 NY2d 516 [2003]). Certainly there is nothing about the submission to indicate that the dispute was not finally and definitely decided,

as against the individual respondent as well as respondent law firm, or that the amount of the award is "totally irrational" (*see Graniteville Co. v First Natl. Trading Co.*, 179 AD2d 467, 469 [1992], *lv denied* 79 NY2d 759 [1992]). Consolidation was properly denied as the Petition for Trial De Novo Review of Arbitration Award had been dismissed.

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

ENTERED: JUNE 24, 2008



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Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

4001 The People of the State of New York, Respondent, Ind. 4367/03 4367A/03

-against-

Mark Johnson, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

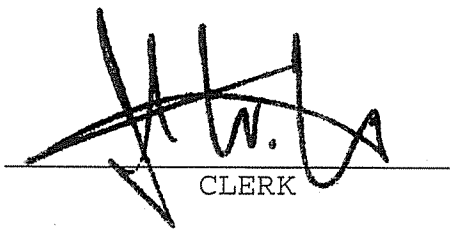
Order, Supreme Court, New York County (Arlene R. Silverman, J.), entered on or about May 22, 2007, which denied defendant's CPL 440.20 motion to set aside his sentence, unanimously affirmed.

Defendant has not established that his sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20[1]). Most of defendant's present claims are identical to claims that this Court has already rejected on his direct appeal (2008 NY Slip Op 04394 [May 13, 2008]). We find those claims to be barred by the doctrine of res judicata (*see People v Walker*, 265 AD2d 254 [1999], *lv denied* 94 NY2d 908 [2000]), and without merit in any event. To the extent that

defendant raises additional challenges to his sentence, we likewise find them without merit.

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

ENTERED: JUNE 24, 2008



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Lippman, P.J., Tom, Gonzalez, Buckley, Catterson, JJ.

4002N In re James C. Witham, Index 603378/07
Petitioner-Respondent,

-against-

vFinance Investments, Inc.,
Respondent-Appellant,

National Financial Services, LLC,
Respondent.

Lax & Neville, LLP, New York (Jason Levine of counsel), for appellant.

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for James C. Witham, respondent.

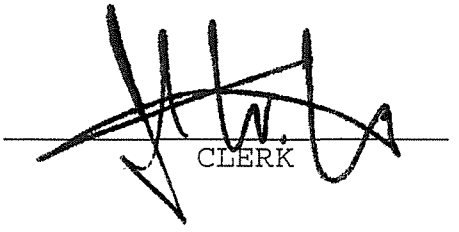
Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered November 28, 2007, which granted petitioner's motion for a preliminary injunction in aid of arbitration and directed him to post an undertaking in the amount of $37,500, and bringing up for review, pursuant to CPLR 5517(b), an order, same court and Justice, entered December 18, 2007, which, upon petitioner's stipulation that the subject stock would not be removed from his account, adhered to the prior order insofar as the undertaking amount was fixed at $37,500, unanimously affirmed, without costs.

The preliminary injunction was not an improvident exercise of discretion. Because petitioner claims the right to retain ownership of shares in the company of which he is CEO and Chair of the Board, and because those shares would be sold without an injunction, "the award to which the applicant may be entitled may

be rendered ineffectual without such provisional relief" (CPLR 7502[c]). Moreover, applying the traditional three-pronged analysis, petitioner showed a likelihood of success on the merits by showing that his claims have prima facie merit (*see e.g. Trimboli v Irwin*, 18 AD3d 866 [2005]), including a claim of fraud based on alleged misrepresentation of facts beyond mere intention not to perform on a contract (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1999]). We also find that the motion court soundly exercised its discretion in concluding that petitioner faced irreparable harm and that the balance of the equities was in his favor. The undertaking, as effectively amended by petitioner's stipulation and the second order, was rationally related to the potential damages recoverable if the preliminary injunction is later determined to have been unwarranted (*Kazdin v Putter*, 177 AD2d 456 [1991]).

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

ENTERED: JUNE 24, 2008



Tom, J.P., Saxe, Gonzalez, Nardelli, JJ.

3442 Bernadette Speach, et al., Index 401087/03
Plaintiffs-Appellants,

-against-

Consolidated Edison Company of New York, Inc.,
Defendant,

The City of New York,
Defendant-Respondent.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

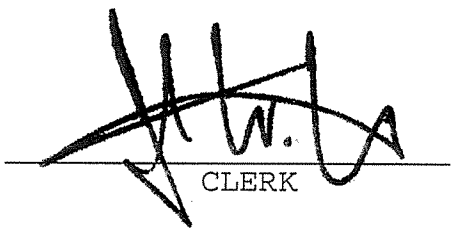
Order, Supreme Court, New York County (Paul G. Feinman, J.), entered January 29, 2007, which granted defendant City of New York's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Dismissal of the complaint as against the City was proper in this action where plaintiff was injured when she allegedly tripped and fell in a five-inch deep sinkhole located on a City street. The record establishes that the City lacked prior written notice of the defective condition as required under Administrative Code of the City of New York § 7-201(c)(2) (Pothole Law), and plaintiff failed to raise a triable issue of fact as to whether the City created the defective condition within the meaning of the exception to the prior written notice requirement, "which requires that the affirmative negligence of

the City immediately result in the existence of a dangerous condition" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Bielecki v City of New York*, 14 AD3d 301 [2005]). Even assuming that the City failed to address the underlying cause of the sinkhole in its prior repair efforts, the condition that caused plaintiff's fall developed over time (*see Bielecki*, 14 AD3d at 302).

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

ENTERED: JUNE 24, 2008



CLERK

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

3617N Richard Jackson, et al., Index 115879/01
Plaintiffs-Appellants,

-against-

Westminster House Owners Inc., et al.,
Defendants-Respondents.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for appellants.

Irwin, Lewin, Cohn & Lewin, P.C., New York (Edward Cohn of counsel), for respondents.

Order, Supreme Court, New York County (Kibbie F. Payne, J.), entered May 17, 2007, which, insofar as appealed from, denied plaintiffs' motion to renew that portion of an order and judgment (one paper), same court and Justice, entered May 18, 2005, awarding attorneys' fees to defendant residential cooperative, unanimously affirmed, without costs.

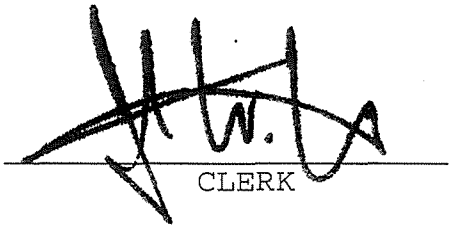
Plaintiffs sued defendants cooperative and managing agent under various contract and tort theories. The coop, pursuant to paragraph 28 of the proprietary lease, asserted a counterclaim for attorneys' fees incurred in defending that action. The court, in the order and judgment that plaintiffs seek to vacate, which was affirmed by this Court (24 AD3d 249 [2005], *lv denied* 7 NY3d 704 [2006]), dismissed the complaint, granted the counterclaim, and referred the matter to a Special Referee to determine the amount of reasonable attorneys' fees. Plaintiffs

correctly argue that in *Dupuis v 424 E. 77th Owners Corp.* (32 AD3d 720 [2006]), which was decided subsequent to the subject order and judgment, we held that paragraph 28 of the proprietary lease therein, identical to paragraph 28 herein, did not entitle the defendant coop to recover attorneys' fees, since there was no claim that the plaintiff tenant/shareholder, who sued the coop for breach of the warranty of habitability, was in default of her lease obligations. Contrary to plaintiffs' characterization, however, *Dupuis* was neither new law nor a clarification of prior law, and thus cannot serve as a basis for renewal (CPLR 2221[e][2]). Our prior ruling in *Mogulescu v 255 W. 98th St. Owners Corp.* (135 AD2d 32, 40-41 [1988], *lv dismissed in part and denied in part* 73 NY2d 868 [1989]), cited by *Dupuis*, articulated the same proposition with respect to an identical paragraph 28, as had the Second Department in *St. George Tower & Grill Owners Corp. v Honig* (232 AD2d 475 [1996]), also cited by *Dupuis*. Nor do plaintiffs offer an explanation for their failure to timely assert these precedents that might excuse such failure and

warrant vacatur of the judgment in the interests of justice (CPLR 5015[a][1]; *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

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

ENTERED: JUNE 24, 2008



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Saxe, J.P., Gonzalez, Nardelli, McGuire, JJ.

3653-
3654-
3654A Artalyan, Inc., et al., Index 605038/01
Plaintiffs-Appellants-Respondents,

Royal Insurance Company of America, etc., et al.,
Plaintiffs,

-against-

Kitridge Realty Co., Inc., et al.,
Defendants-Respondents,

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

Meier Franzino & Scher, LLP, New York (Davida S. Scher and Tinamarie Franzoni of counsel), for appellants-respondents.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondents-appellants.

Kral Clerkin Redmond Ryan Perry & Girvan, LLP, Smithtown (James V. Derenze of counsel), for Kitridge Realty Co., Inc.; Estate of Irving Goldman; BLDG Management Co., Inc.; Wembly Management Co., Inc.; IG Second Generation Partners, L.P.; IG Second Generation Partners & I BLDG Co., Inc. and IG Second Generation Partners, L.P. & I BLDG Co., respondents.

Gartner & Bloom, P.C., New York (Susan P. Mahon of counsel), for Extreme Building Services Corp., respondent.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for MRC II Contracting, Inc., respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered April 20, 2007, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Kitridge Realty Co., Inc., Irving Goldman, Wembly Management Co., Inc., IG

Second Generation Partners, L.P., IG Second Generation Partners & I BLDG Co., Inc., and IG Second Generation Partners & I Bldg Co. (the Kitridge defendants) for summary judgment dismissing that portion of the complaint of plaintiffs Artalyan, Inc., Duran Jewelry, Inc., Oscar Platinum & Co., Roy Rover New York, Inc., Rover & Lorber, LLC, Roy Rover individually, and Ultramax, Inc. (plaintiffs) setting forth claims for conversion; granted the motion of defendant Extreme Building Services for summary judgment dismissing the complaint as against it; and granted the motion of the City of New York and New York City Police Department (the City defendants) for summary judgment dismissing the claims against them for conversion, unanimously affirmed, without costs. Order, same court and Justice, entered April 24, 2007, which granted defendant MRC II Contracting's motion for summary judgment dismissing the complaint against it, unanimously affirmed, without costs. Order, same court and Justice, entered June 26, 2007, which denied the City defendants' motion for summary judgment with respect to plaintiffs' negligence claim premised on alleged failure to safeguard plaintiffs' personal property, unanimously reversed, on the law, without costs, to dismiss the negligence claim as against the City defendants.

The motion court properly dismissed plaintiffs' claims for conversion. The record is devoid of evidence that either the Kitridge defendants or MRC II had control and dominion over

plaintiffs' property; thus, they cannot be liable for conversion (*see Zion Tsabbar, D.D.S., P.C. v Hirsch*, 266 AD2d 91, 92 [1999]; *cf. Glass v Wiener*, 104 AD2d 967, 968-969 [1984]). Similarly, defendant Extreme was not liable for conversion, as the record demonstrates that it also did not exercise dominion and control over plaintiffs' property, but merely did as it was directed to do by excavating the building debris and turning over any recovered property to the New York City Police Department for safekeeping. Finally, the City defendants cannot be liable for conversion, as the record is devoid of evidence that any City employee claimed possession of plaintiffs' property, wrongfully denied plaintiffs access to it, or wrongfully disposed of it.

Further, defendants are not subject to vicarious liability for any conversion that was allegedly carried out by their employees. With respect to Extreme and MRC II, the acts complained of were not within the scope of employment for either one of those defendants' employees, as such acts, if any, would have been committed for personal motives unrelated to the furtherance of the employers' business (*see Naegele v Archdiocese of N.Y.*, 39 AD3d 270, 271 [2007], *lv denied* 9 NY3d 803 [2007]; *Adams v New York City Tr. Auth.*, 211 AD2d 285, 294 [1995], *affd* 88 NY2d 116 [1996]; *Campos v City of New York*, 32 AD3d 287, 291-92 [2006], *lv denied* 8 NY3d 816 [2007], *lv dismissed* 9 NY3d 953 [2007]). Similarly, there is no basis for vicarious liability

against the Kitridge defendants, as they did not control the actions of Extreme's or MRC II's employees at the demolition site, nor is there any evidence in the record that any of their employees deliberately took property from the site (*see Marino v Vega*, 12 AD3d 329, 330 [2004]).

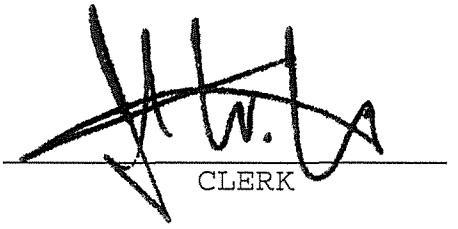
The motion court also erred in denying the City defendants' motion to dismiss the complaint insofar as asserted against them for negligence. A public employee's discretionary acts may not result in the municipality's liability even when the conduct is negligent (*Pelaez v Seide*, 2 NY3d 186, 198 [2004]; *Lauer v City of New York*, 95 NY2d 95, 99 [2000]). Rather, to impose liability, duty must be born of a special relationship between the plaintiff and the governmental entity, and when such relationship is shown, the government is under a duty to exercise reasonable care toward the plaintiff (*Pelaez*, 2 NY3d at 198-99; *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). Here, plaintiffs allege that there was a special relationship between them and the City defendants because of the City defendants' voluntary assumption of a duty that generated justifiable reliance. However, plaintiffs failed to sustain their heavy burden of showing any special relationship between itself and the City (*Pelaez*, 2 NY3d at 202). To the contrary, none of the evidence in the record showed that plaintiffs justifiably relied on any statements by City representatives, and in any event, the

alleged statements of City representatives were too vague to induce plaintiffs' reasonable reliance (*see Luisa R. v City of New York*, 253 AD2d 196, 203 [1999]; *Taebi v Suffolk County Police Dept.*, 31 AD3d 531 [2006]).

In light of the foregoing, we need not consider the parties' remaining contentions.

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

ENTERED: JUNE 24, 2008



Friedman, J.P., Williams, Catterson, Acosta, JJ.

3759 Wilbur McNeill, et al.,
Plaintiffs-Respondents,

-against-

LaSalle Partners,
Defendant,

G.C.T. Venture, Inc., et al.,
Defendants-Appellants,

ETS Contracting, Inc.,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

- - - - -

LaSalle Partners Incorporated,
Second Third-Party Plaintiff,

G.C.T. Venture, Inc., et al.,
Second Third-Party Plaintiffs-Appellants,

-against-

Miller Druck Co. Inc., et al.,
Second Third-Party Defendants-Respondents.

- - - - -

LaSalle Partners Incorporated,
Third Third-Party Plaintiff,

G.C.T. Venture, Inc., et al.,
Third Third-Party Plaintiffs-Appellants,

-against-

ETS Contracting, Inc.,
Third Third-Party Defendant-Respondent.

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2602/01
83585/02
83593/03

Newman Fitch Altheim Myers, P.C., New York (Michael H. Zhu of counsel), for appellants.

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

Marks, O'Neill, O'Brien & Courtney, P.C., Elmsford (John J. Hopwood of counsel), for ETS Contracting, Inc., respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Miller Druck Co. Inc., Miller Druck Specialty Contracting, Inc. and D. Magnan & Co., Inc., respondents.

Judgment, Supreme Court, New York County (Wilma Guzman, J.), entered March 1, 2007, awarding plaintiff Wilbur McNeill, on a jury verdict, damages against defendants-appellants G.C.T. Venture, Inc. (GCT) and Lehrer McGovern & Bovis, Inc. and Bovis Lend Lease LMB, Inc. (formerly known as Lehrer McGovern & Bovis, Inc.) (collectively, Bovis), and dismissing defendants-appellants' third third-party complaint against third third-party defendant ETS Contracting, Inc. (ETS), the appeal from which brings up for review an order, same court (Kenneth L. Thompson, Jr., J.), entered October 13, 2005, granting second third-party defendants Miller Druck Co. Inc. and Miller Druck Specialty Contracting, Inc. (collectively, Miller Druck) and D. Magnan & Co., Inc. (Magnan) summary judgment dismissing defendants-appellants' second third-party complaint, unanimously reversed, on the law, without costs, the second and third third-party complaints reinstated, and the matter remanded for a new trial on all issues.

Plaintiff, an asbestos abatement inspector, alleges that he injured his knee when he slipped and fell on a liquid substance on the floor while he was walking to an abatement area to perform an inspection in the course of the renovation of Grand Central Terminal. The project was owned by defendant-appellant GCT, and defendant-appellant Bovis was the construction manager. After trial, the jury returned a verdict finding Bovis and GCT (collectively, appellants) liable for plaintiff's injuries under Labor Law § 241(6). For the reasons discussed below, we reverse the judgment, reinstate appellants' second third-party complaint against Miller Druck and Magnan and appellants' third third-party complaint against ETS (both of which were dismissed before the case went to the jury), and remand for a new trial on all issues.

Initially, we reject appellants' argument that plaintiff was not within the class of persons entitled to assert claims based on violations of Labor Law § 241(6). Plaintiff's inspection of asbestos abatement work during the construction phase of the Grand Central Terminal renovation project was essential and integral to the progress of the construction, since the abatement work could not continue unless he gave his approval. Plaintiff was thus within the class of persons that Labor Law § 241(6) was intended to protect (*see Aubrecht v Acme Elec. Corp.*, 262 AD2d 994 [1999]).

At trial, the main thrust of appellants' defense on the

issue of liability was to question the credibility of plaintiff's uncorroborated account of his accident. Appellants also questioned the credibility of plaintiff's testimony about the severity of his injury and its causation. Nonetheless, the court refused to permit appellants to impeach plaintiff's credibility by questioning him, on cross-examination, as to the reason he lost the job he held at the time of the accident. Although plaintiff testified at his deposition that he was laid off for economic reasons, the record reflects that appellants obtained documentation indicating that plaintiff was terminated for having defrauded his employer through the submission of fraudulent reimbursement slips. Such dishonest conduct (assuming plaintiff engaged in it) plainly falls within the category of prior immoral, vicious or criminal acts having a direct bearing on the witness's credibility, inasmuch as "it demonstrates an untruthful bent or significantly reveals a willingness or disposition . . . voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society" (*People v Walker*, 83 NY2d 455, 461 [1994] [citations, internal quotations marks and brackets omitted]). Moreover, appellants sought to question plaintiff about this matter in good faith, and with a reasonable basis in fact (*see People v Kass*, 25 NY2d 123, 125-126 [1969]). While the reason for plaintiff's termination, as a collateral matter (since plaintiff did not seek lost-

earnings damages), was not a proper subject for extrinsic proof (*see Badr v Hogan*, 75 NY2d 629, 634-635 [1990]), under the circumstances of this case, the trial court abused its discretion as a matter of law in preventing appellants from questioning plaintiff about it during cross-examination. Since the issue of plaintiff's credibility went to the heart of appellants' defense as to both liability and damages, the error was not harmless, and a new trial is required.

The trial court also erred in precluding appellants from questioning plaintiff on cross-examination about his deposition testimony that the liquid on which he slipped might have been "encapsulate" (a milky liquid used in the abatement of asbestos) and in dismissing the third-party complaint against ETS, the project's asbestos abatement subcontractor, on that basis. At his deposition, plaintiff testified that he thought the liquid on which he slipped "could be some kind of encapsulate, but I wasn't sure." At trial, however, plaintiff testified that he had no idea what kind of liquid had caused his accident. Under these circumstances, appellants were entitled to question plaintiff about the deposition testimony in question, both for purposes of impeachment and to use the prior inconsistent testimony as evidence-in-chief that the liquid was encapsulate. In the latter regard, plaintiff's deposition testimony, which was given under oath by a declarant available for cross-examination at trial, has

sufficient indicia of reliability to be considered as evidence-in-chief (*see Letendre v Hartford Acc. & Indem. Co.*, 21 NY2d 518 [1968]; *Campbell v City of Elmira*, 198 AD2d 736, 738 [1993], *affd* 84 NY2d 505 [1994]; *cf. Nucci v Proper*, 95 NY2d 597, 602 [2001] [witness's prior inconsistent "unsworn oral statements" were not admissible as evidence-in-chief], *affg* 270 AD2d 816, 817 [2000] [distinguishing *Campbell* on the ground that the prior inconsistent statement therein "was sworn testimony and was admissible as evidence-in-chief"]). Given that plaintiff is subject to cross-examination at trial, the admissibility of his prior deposition testimony is not affected by the circumstance that ETS did not receive notice of the deposition by reason of its own failure (although served with process) to appear in the action as of that time.

The appeal from the judgment brings up for review a pretrial order rendering summary judgment dismissing appellants' third-party complaint against Miller Druck (the project's marble, stone and tile contractor) and Magnan (to which Miller Druck subcontracted the terrazzo floor work). This grant of summary judgment was erroneous. It appears from the record that the work of Miller Druck and Magnan produced a liquid "slurry" that could end up on the floor. As plaintiff's deposition did not conclusively establish that he slipped on encapsulate, rather than the slurry by-product of Miller Druck's and Magnan's work,

an issue of fact exists as to which contractor was responsible for the liquid on which plaintiff slipped. Contrary to the arguments of Miller Druck and Magnan, the record contains evidence tending to show that these contractors were working in reasonable proximity to the site of plaintiff's accident. Accordingly, the pretrial motion and cross motion by Miller Druck and Magnan for summary judgment dismissing appellants' third-party complaint against them should have been denied.

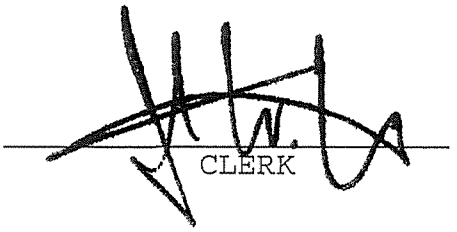
Finally, the trial court erred in precluding appellants' expert witness, Dr. Lubliner, from testifying that the subject incident, which occurred in September 1997, was not a proximate cause of a lateral meniscus injury that first came to light in January 2004. Although Dr. Lubliner's CPLR 3101(d)(1) disclosure statement, served three years before trial, did not state that he would opine as to the proximate causation of this particular injury, the reason for this omission was that plaintiff never gave any notice prior to trial that his expert, Dr. Goldstein, would connect the lateral meniscus injury (discovered in 2004) to the subject incident (which occurred in 1997). Appellants first learned that the lateral meniscus injury would be attributed to the subject incident when Dr. Goldstein testified at trial. Under these circumstances, plaintiff could not claim to have been misled or prejudiced by appellants' expert disclosure, and fairness demanded that appellants be permitted to present expert

testimony to counter plaintiff's surprise contention that the subject incident caused the late-appearing lateral meniscus injury. We note that appellants' supplemental expert disclosure, served a month before trial, advised plaintiff that Dr. Lubliner's testimony would be based on his review of the medical records and of other testimony offered at trial. Accordingly, at the trial to be held on remand, in the event plaintiff presents evidence attributing the lateral meniscus injury to the subject incident, appellants should be permitted to present testimony on that issue by Dr. Lubliner or any other expert they may subsequently identify.

In view of the foregoing, we need not reach the parties' remaining arguments.

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

ENTERED: JUNE 24, 2008



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

3801 Lexington Insurance Company, as subrogee of 1633 Broadway LLC, etc., Plaintiff-Respondent, Index 108164/06

-against-

Power Cooling Inc., Defendant-Respondent,

Concepts ETI, Inc., et al., Defendants-Appellants.

Rutherford & Christie, LLP, New York (Jeremy P. Spiegel of counsel), for appellants.

Gwertzman Lefkowitz Burman Smith & Marcus, New York (David S. Smith of counsel), for Lexington Insurance Company, respondent.

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for Power Cooling Inc., respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 5, 2007, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint as against them with leave to renew after further discovery, unanimously modified, on the law, appellants' motion granted to the extent of dismissing the second, fourth and fifth causes of action as against them, and otherwise affirmed, without costs.

Dismissal of the second and fourth causes of action, alleging breach of implied and express warranty, is appropriate since the claims are barred by the applicable four-year statute of limitations (*see* Uniform Commercial Code § 2-725[1]). The

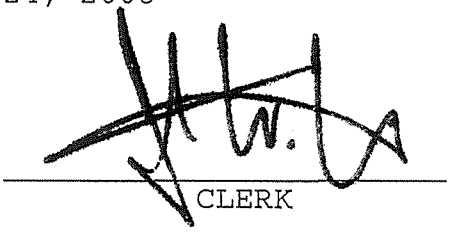
fifth cause of action for breach of contract, predicated upon appellants' corporate predecessor having sold the allegedly defective impeller in November 1999, which defendant Power Cooling installed as a component to subrogor building owner's air conditioning system in 2000, is also barred by the four-year limitations period (*id.*).

Summary judgment, however, on plaintiff's first (negligence) and third (strict products liability) causes of action was properly denied. Depositions and expert discovery have yet to be conducted, and the record presents triable issues.

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

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

ENTERED: JUNE 24, 2008



CLERK

Tom, J.P., Gonzalez, Buckley, Catterson, JJ.

3999 Nicoll & Davis LLP, Index 602324/06
Plaintiff-Respondent,

-against-

Isaac Ainetchi, et al.,
Defendants-Appellants.

Ross & Asmar LLC, New York (Steven B. Ross of counsel), for appellants.

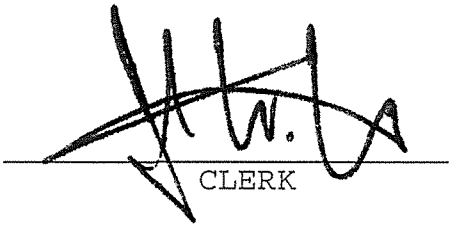
Nicoll Davis & Spinella LLP, New York (Jack T. Spinella of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 26, 2007, which, to the extent appealed from, denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff law firm's failure to comply with the rules on retainer agreements (22 NYCRR 1215.1) does not preclude it from suing to recover legal fees for services provided (*see Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54 [2007]).

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

ENTERED: JUNE 24, 2008



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Peter Tom
Milton L. Williams
Rolando T. Acosta, JJ.

3220
Ind. 2854/04

The People of the State of New York,
Respondent,

-against-

Jovannie Florestal,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered August 7, 2006, convicting her, after a jury trial, of murder in the second degree, and imposing sentence.

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

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

LIPPMAN, P.J.

The primary issue raised by this appeal is whether defendant was properly convicted of depraved indifference murder where the jury was instructed to consider the element of depraved indifference based on the objective circumstances surrounding defendant's conduct instead of based on her mental state. Since the jury charge did not provide an accurate definition of depraved indifference, we reverse and remand for a new trial.

Defendant Jovannie Florestal was convicted after a jury trial of one count of second-degree murder (Penal Law § 125.25 [4])[1] in connection with the death of her three-month-old child, Colesvintong Florestal, Jr. Codefendant father, Colesvintong Florestal, pleaded guilty to one count of second-degree murder prior to trial and was sentenced to 20 years to life in prison. His conviction was affirmed (*People v Florestal*, 47 AD3d 457 [2008], *lv denied* 10 NY3d 810 [2008]). The People proceeded against defendant both on the theory that she and codefendant acted in concert and on the theory that she failed to provide her

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[1]Penal Law § 125.25(4) provides that "[a] person is guilty of murder in the second degree when . . . [u]nder circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person."

infant son with adequate food and medical care.

The child was born February 21, 2004, weighing nine pounds, two ounces. He died three months later, on May 20, 2004, at approximately the same weight. The medical examiner testified that the cause of death was a combination of "malnutrition, dehydration and multiple injuries of different ages, Battered Child Syndrome." The infant sustained a number of serious physical injuries, some of which were external and plainly visible. The autopsy revealed many broken bones at various stages of healing, including a fractured skull caused by blunt impact. The medical examiner also testified that there was evidence of bleeding on the brain that indicated that the child had been shaken violently on more than one occasion. The medical examiner noted that the infant was emaciated and had suffered from inadequate nutrition for an extended period of time.

The theory of the defense was that defendant was not indifferent to her child's suffering but, as a result of her experiences, was incapable of rendering assistance. Defendant sought to introduce psychiatric testimony from an expert witness, Dr. Joseph Scroppo, a forensic psychologist, about "battering and its effects in order to rebut the statutory element of 'depraved indifference to human life.'" Supreme Court precluded Dr. Scroppo from offering expert opinion as to defendant's mental

state pertaining to depraved indifference, which it viewed as an issue for the jury to decide. However, the court did find such evidence admissible as to defendant's mental state on the mens rea element of recklessness.

At trial, Dr. Scroppo testified, based largely on information imparted to him by defendant, that defendant had a traumatic upbringing, including having been sexually abused by her brothers when she was a child. Dr. Scroppo also testified that defendant told him that co-defendant had been physically abusive to her. He opined that, as a result, defendant would likely minimize what was happening in the home as a coping strategy, and fail to perceive the need for outside assistance. Dr. Scroppo also indicated that he was not sure to what extent defendant actually appreciated the magnitude of the harm to her child.

When delivering the jury charge on depraved indifference, the court instructed the jury that it must determine whether an objective assessment of the circumstances showed that defendant's conduct demonstrated a complete disregard for the value of human life. In response to a request from the jury, the court repeated the instruction that the jury must consider defendant's conduct based on the objective circumstances. The jury ultimately returned a verdict finding defendant guilty of depraved

indifference murder.

As a preliminary matter, we find that defendant adequately preserved the argument that depraved indifference is "a culpable mental state" (*People v Feingold*, 7 NY3d 288, 294 [2006]). Defendant moved for a trial order of dismissal, asserting that there was insufficient evidence to show that she was aware of and recklessly disregarded a risk of imminent death. Further, as to the scope of proposed expert psychiatric testimony, defendant argued that the Court of Appeals had rejected the objective circumstances standard, holding in *People v Suarez* (6 NY3d 202 [2005]) that a state of mind of depraved indifference is an element of the crime of depraved indifference murder. Supreme Court expressly rejected defendant's position.

Although defendant did not make a specific request to charge or object to the jury charge as given, the issue was adequately preserved, since the trial court "specifically confronted and resolved [it]" (*Feingold*, 7 NY3d at 290; *see* CPL 470.05[2]). "The law does not require litigants to make repeated pointless protests after the court has made its position clear" (*People v Mezon*, 80 NY2d 155, 161 [1992]).

Defendant asserts that the trial court erroneously instructed the jury to consider the objective circumstances surrounding defendant's conduct instead of whether defendant had

the required mental state of depraved indifference. Defendant further contends that her expert should have been permitted to render an opinion as to whether she had, or was capable of forming, the mental state of depraved indifference. Defendant's arguments have merit under the current formulation of the law. Inasmuch, however, as the law was, at least arguably, unclear at the time of the trial, an issue is raised as to the applicability of the subsequently articulated law.

In this respect, it may be useful to briefly describe the recent evolution of the law on the issue of depraved indifference. For many years, the rule, as stated in *People v Register* (60 NY2d 270, 277 [1983], *cert denied* 466 US 953 [1984]) and followed in *People v Sanchez* (98 NY2d 373, 379-380 [2002]), was that depraved indifference was not a mens rea. Instead, it was intended "to objectively define the circumstances which must exist to elevate a homicide from manslaughter to murder" (*Register* at 278). Shortly after *Sanchez* was decided, the Court reversed a series of convictions of depraved indifference murder where each defendant's conduct in killing a single victim was consistent only with intentional murder (*see People v Payne*, 3 NY3d 266 [2004]; *People v Gonzalez*, 1 NY3d 464 [2004]; *People v Hafeez*, 100 NY2d 253 [2003]). This line of cases began to

"point[] the law in a different direction" (*Feingold*, 7 NY3d at 292).

Subsequently, *People v Suarez* (6 NY3d at 214), explained that the statutory element of "depraved indifference to human life" (Penal Law § 125.25[2]) is a component of the crime, consisting of both depravity and indifference. The Court acknowledged that its holding constituted a departure from *Register* since depraved indifference was no longer being defined exclusively by reference to the magnitude of the risk presented by defendant's conduct (*see Suarez* at 215). However, the Court did not take the step of expressly overruling *Register* and stating that depraved indifference was in fact "a culpable mental state" until *People v Feingold* (7 NY3d at 294). To place defendant's case in the context of this progression of the law, her trial took place in May 2006 - after the Court had decided *Suarez*, but prior to its decision in *Feingold*. Defendant was sentenced approximately one month after *Feingold* was decided.

"Under traditional common-law principles, cases on direct appeal are generally decided in accordance with the law as it exists at the time the appellate decision is made" (*People v Vasquez*, 88 NY2d 561, 573 [1996]). There is no reason to depart from this principle here. We have already implicitly determined that the current formulation of depraved indifference murder

should be applied when reviewing cases on direct appeal (*see People v Dickerson*, 42 AD3d 228, 234-235 [2007], *lv denied* 9 NY3d 960 [2007]). Other departments of the Appellate Division have likewise concluded that current law is applicable (*see e.g. People v George*, 43 AD3d 560, 561-562 [3d Dept 2007], *lv granted* 9 NY3d 961, 966 [2007]; *People v Collins*, 45 AD3d 1472, 1473 [4th Dept 2007]).

By contrast, the Court of Appeals was squarely presented with the issue of retroactivity in *Policano v Herbert* (7 NY3d 588 [2006]) and held that retroactive application was not appropriate in the context of a habeas corpus proceeding, where the underlying conviction had long been final. That procedural posture presents different considerations than the present case, where defendant is challenging her conviction on direct appeal. Defendant's case does not present the problem of a potentially overwhelming amount of litigation brought by those seeking post-conviction collateral relief. It is interesting to note that Policano's conviction became final in June of 2001 - a year before *Sanchez* was decided. Here, although *Register* and *Sanchez* were not expressly overruled until *Feingold* (*see Policano*, 7 NY3d at 603), the law had been sufficiently modified at the time of defendant's trial for defendant to have actually raised the issue of whether depraved indifference is a culpable mental state and

for the trial court to have ruled on that issue. Thus, it is certainly appropriate to apply current law on depraved indifference to defendant's case.

Applying the existing law, it is clear that the trial court improperly instructed the jury that depraved indifference must be determined by an objective view of the circumstances, rather than according to defendant's state of mind. We cannot conclude "that the jury, hearing the whole charge, would gather from its language the correct rules which should be applied in arriving at [a] decision" (*People v Umali*, 10 NY3d 417, 427 [2008] [internal quotation marks and citations omitted]). As the evolution of the case law has made apparent, an appropriate charge would instruct the jury to evaluate the element of depraved indifference as a mental state in order to determine whether defendant's conduct reflected a complete disregard for the value of human life and whether defendant acted because he or she was indifferent to whether or not grievous harm would result (*see Suarez*, 6 NY3d at 214; CJI2d[NY] Penal Law § 125.25[4]). Since the jury convicted defendant based on an erroneous definition of the charged crime, defendant is entitled to a new trial.

The same error infected the trial court's refusal to allow defendant's expert witness to render an opinion whether defendant's state of mind was that of "depraved indifference" to

the plight of her child. The record demonstrates that the trial court failed to exercise its discretion as to the admissibility of that aspect of the expert testimony because it found that depraved indifference was "an objective, factual jury question," rather than a question of defendant's state of mind. The court could have found that the effects of defendant's history of abuse on her ability either to comprehend the danger to her child or to provide the child with appropriate medical assistance were outside the understanding of the average juror. Since depraved indifference is "a culpable mental state," the proposed expert testimony is akin to testimony concerning a defendant's ability to form the requisite intent and would be admissible (*see People v Cronin*, 60 NY2d 430, 433-434 [1983]).

Finally, Supreme Court properly denied defendant's motion to preclude her statement to caseworkers from the Administration for Children's Services based on the People's failure to provide CPL 710.30 notice. ACS's independent investigation pertaining to both the deceased infant and defendant's older child was not subject to the type of pervasive governmental involvement that would transform it into State action (*see People v Ray*, 65 NY2d 282, 286 [1985]).

The verdict was based on legally sufficient evidence and was

not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). In light of our remand for a new trial, we do not address defendant's remaining contentions. We leave them to the sound discretion of the court, should they arise on retrial (*see People v Evans*, 94 NY2d 499, 504-505 [2000]).

Accordingly, the judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered August 7, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing her to a term of 25 years to life, should be reversed, on the law, and the matter remanded for a new trial.

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

ENTERED: JUNE 24, 2008