SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 28, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4503 The People of the State of New York, Respondent, Ind. 95063/05

-against-

Gregory Taylor,
Defendant-Appellant.

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Frances Y. Wang of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered April 21, 2006, convicting defendant, after a jury trial, of depraved indifference murder in the second degree, and sentencing him to a term of 25 years to life, affirmed.

On May 11, 2004, a firefighter conducting a routine building inspection discovered the body of 42-year-old Ana Almono Fowler on the roof of a building located at 401 East 187th Street in the Bronx. A black plastic bag covered Fowler's head and was knotted tightly around her neck. When Fowler's body was found, she was barefooted, her sweatshirt pulled up over one of her breasts and her jeans unzipped and pulled partially down. One of two beaded necklaces around Fowler's neck was broken and beads were missing.

After the plastic bag was peeled from Fowler's head, a wound above her right eyebrow and a bruise to her right cheek were noted.

The building at 401 East 187th Street is privately owned and used by the City of New York as a temporary housing facility. Defendant resided in the building in apartment 5E until May 6, 2004. The hallway of each floor of the building is monitored by two video cameras. Videos in evidence depict defendant approaching Fowler and entering his apartment with her on May 5 at 9:08 p.m., stepping back into the hallway and looking at the video camera on May 6 at 2:30 a.m., and carrying Fowler's body to the roof on the same day at 10:40 a.m. Shortly thereafter, defendant is seen leaving his apartment carrying a piece of white cloth and then re-entering the apartment. Five minutes later, defendant is seen leaving the building carrying his belongings in a black plastic bag. Beads matching those on Fowler's broken necklace were found scattered throughout defendant's apartment by Detective Zoltan Karpati on May 13. Bloodstains were also found on the bedroom wall and door. On May 18, Detective Karpati took defendant into custody and escorted him to the precinct. While in custody, defendant made a series of statements of which five were handwritten and one videotaped.

According to defendant's statements, Fowler accompanied him to his apartment after agreeing to have sex with him in exchange

for crack cocaine and money. Defendant stated that during the evening Fowler attacked him and he hit her in the head to protect himself. Thereafter Fowler became quiet and defendant fell asleep. Defendant stated that upon waking up the following morning, he heard Fowler's heartbeat, but he later denied hearing it. Defendant added that Fowler was bleeding and he placed the plastic bag on her head to stop the blood from spreading and because he couldn't stand to look at her. Thereafter, defendant dumped Fowler on the roof, gathered his possessions and vacated the building. A grand jury indicted defendant for depraved indifference murder and manslaughter in the first degree.

Dr. Zoya Shmuter of the Office of the Chief Medical Examiner of the City of New York performed an autopsy on Fowler's body. The autopsy revealed a one-half-inch laceration above Fowler's right eyebrow, purple discoloration of her face and abrasions on her cheek. Dr. Shmuter also found two abrasions on the right side of her neck. Upon opening the body's neck, Dr. Shmuter found hemorrhaging at the site of the abrasions. The hemorrhaging, Dr. Shmuter testified, was suggestive of a blunt force injury or compression. The autopsy report signed by Dr. Shmuter on May 27, 2004 listed the cause of death as blunt impact of the head and compression of the neck and chest.

Dr. James Gill, a deputy chief medical examiner, opined that the cause of Fowler's death was homicidal asphyxia. The term,

Dr. Gill explained, encompasses smothering, compression of the neck, and compression of the chest. Dr. Gill explained that the purple discoloration of Fowler's face was consistent with neck compression. The anatomical findings noted by Dr. Gill also included bruising of the large muscle on the right side of Fowler's neck, indicative of force applied to the area. Dr. Gill noted similar bruising on the right side of Fowler's chest. Dr. Gill opined that bleeding is a sign of life in a human body inasmuch as it is indicative of a heartbeat. He further opined that placing a plastic bag over a person's head could cause death by asphyxia.

At the close of trial, citing *People v Suarez* (6 NY3d 202 [2005]), defendant moved for an order of dismissal based upon the legal insufficiency of the evidence as follows:

> "What I suggest here, Your Honor, and the depraved indifference cases tend to fall into, at least in recent years, instances of child abuse, or abuse of spousal abuse, or abuse by one person against another, whether there's a familial relationship or not, that is protracted, that is prolonged that occurs not merely as the Court of Appeals noted in Suarez, in the course of a single incident, as opposed to substantial instances where there is a single incident that is isolated in its framework of time as opposed to continuing over a course of time . . . So, therefore under either theory that the People may be presenting here, we still are confined to a time period that has a minimum of five and a half hours, and a maximum of 13 and a half hours, clearly an isolated attack, as opposed to a course of conduct engaged in which would be considered to have been torturous, where the conscious objective would have been ... to torture, to brutalize, to prolong and ultimately fatally bring to the end another person's

life."[1]

Citing *People v Feingold* (7 NY3d 288 [2006]), defendant now challenges the legal sufficiency of the evidence as follows:

> "The evidence in this case rationally supported three possibly antagonistic, but equally plausible hypotheses. Either the victim was in fact dead in the morning when appellant found her turning purple on the floor, in which case appellant killed her during their crack addled struggle the night before - a manslaughter theory which was argued against by the People and which leaves open the question of self defense... Or, appellant mistakenly and recklessly or negligently believed that the unconscious victim was already dead. He tied a bag over her face to avoid looking at her and inadvertently suffocated her - a reckless manslaughter or negligent homicide. Or, finally, as the prosecutor argued in summation, the appellant found the victim on the floor in the morning, knew that she was unconscious but still breathing and tied a bag over her face with a conscious objective to kill her - an intentional murder. No reasonable view of the evidence, however, is consistent with depraved indifference murder."

To preserve a legal sufficiency challenge for appellate review, a defendant must move for a trial order of dismissal, and the argument must be "specifically directed" at the error being urged (*People v Hawkins*, 11 NY3d 484, 492 [2008]). As noted above, defendant's argument at trial was confined to calling into question the time frame with respect to the conduct constituting

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[1]Indeed, the majority in *Suarez* observed: "although we have reversed depraved indifference murder convictions in most cases involving isolated attacks, we have held that the crime is nevertheless established when a defendant - acting with a conscious objective not to kill but to harm - engages in . . . a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim" (*People v Suarez*, 6 NY3d at 212).

depraved indifference murder. We disagree with the dissent's view that in making this argument, defendant took the global position he now takes that the evidence did not establish the "brutal, prolonged and ultimately fatal course of conduct" required under *Suarez* (*see People v Suarez*, 6 NY3d at 212). In this regard, defendant's appellate challenge to the legal sufficiency of the evidence has not been preserved inasmuch as his trial motion to dismiss was based on a different argument (*see People v Wells*, 53 AD3d 181, 188-189 [2008], *lv denied* 11 NY3d 858 [2008]; *People v Crawford*, 38 AD3d 680, 681 [2007]). We further decline to reach the issue in the interest of justice.

Defendant also posits that the verdict is against the weight of evidence because the evidence shows that Fowler was already dead when defendant covered her head with the plastic bag tied around her neck. Our weight of the evidence review requires us to first determine whether an acquittal would not have been unreasonable (*People v Danielson*, 9 NY3d 342, 348 [2007]). If so, we must next weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions (*id.*). Then, based on the weight of the credible evidence, we must next decide whether the jury was justified in finding defendant guilty beyond a reasonable doubt (*id.*). In conducting the required analysis, based upon the

evidence adduced at trial we determine that an acquittal of the charge of depraved indifference murder would have been unreasonable. We would note, in any event, that a weighing of the evidence supports the conclusion that Fowler was fatally asphyxiated by defendant's placing of the plastic bag over her head and knotting the same around her neck. The conclusion would be supported by defendant's statement that he heard Fowler's heartbeat before placing the bag over her head. The conclusion would have further support in Dr. Gill's testimony that homicidal asphyxia, the cause of death that encompasses smothering, could have been brought about by use of the plastic bag. Dr. Gill's opinion is that Fowler's bleeding was an indication that she was alive when smothered by the plastic bag.

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

McGUIRE, J. (dissenting)

I respectfully dissent as I believe the conviction for depraved indifference murder is not supported by legally sufficient evidence.

In *People v Suarez* (6 NY3d 202 [2005]) the Court of Appeals made clear that when only one person is endangered by the defendant's conduct, a conviction for depraved indifference murder is authorized in only two categories of cases, both of which "reflect wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's inexcusable acts" (*id.* at 213). First, "when the defendant intends neither to seriously injure, nor to kill, but nevertheless abandons a helpless and vulnerable victim in circumstances where the victim is highly likely to die, the defendant's utter callousness to the victim's mortal plight - arising from a situation created by the defendant - properly establishes depraved indifference murder" (*id.* at 212). Second, "the crime is ... established when a defendant - acting with a conscious objective not to kill but to harm - engages in torture or a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim" (*id.*).

At the close of the People's case, defendant moved to dismiss the charge of depraved indifference murder on the ground

that it was not supported by legally sufficient evidence. Although defendant's argument was multi-faceted, he relied in particular on *People v Suarez* and argued that the evidence established "a time period that has a minimum of five and a half hours, and a maximum of 13 and a half hours, clearly an isolated attack, as opposed to a course of conduct engaged in which would be considered to have been torturous, where the conscious objective would have been ... to torture, to brutalize, to prolong and ultimately fatally bring to the end another person's life." In my view, a fair reading of this argument is that defendant objected that as a matter of law the evidence did not establish depraved indifference murder under the second of the two categories recognized in *Suarez*.

On this appeal, particularly at pages 17 to 18 of his brief, defendant asserts precisely this claim. Although he also advances other arguments that appear not to be preserved for review, his claim that the evidence did not establish depraved indifference murder under the second category recognized in *Suarez* is preserved for our review. The People do not and could not contend that defendant engaged in "torture," and thus the conviction can be sustained only if the evidence is legally sufficient to establish that defendant engaged in a "brutal, prolonged ... course of conduct against a particularly vulnerable victim." Regardless of whether the victim died as a result of

being smothered by defendant (through compression of the neck or chest) or as a result of defendant tying the plastic bag around her neck, the evidence did not establish the kind of "brutal" and "prolonged" course of conduct that, when a single person is endangered by the defendant's conduct, is necessary under the second category recognized in *Suarez*. To hold otherwise would be inconsistent with the pronouncement in *Suarez* that "[a] defendant may be convicted of depraved indifference murder when but a single person is endangered in only a few rare circumstances" (6 NY3d at 212).

The majority understands defendant's motion for a trial order of dismissal to have been "confined to calling into question the time frame with respect to the conduct constituting depraved indifference murder." Particularly given defense counsel's repeated reliance on *People v Suarez* and that *Suarez* sets forth so unequivocally the required proof in each of the two categories of cases, I submit that the majority reads counsel's argument too narrowly. The most that fairly can be said is that counsel stressed the "time frame" at various points. But counsel also repeatedly argued that the evidence had established only an "isolated attack" and, as quoted above, contrasted such an attack "to a course of conduct engaged in which would be considered to have been torturous, where the conscious objective would have been ... to torture, to brutalize, to prolong and ultimately

fatally bring to the end another person's life." Moreover, at the end of his argument, counsel argued as follows: "But the bottom line, Judge, is that the nature of what the Court of Appeals has focused on in depraved indifference ... make[s] it pretty clear that this type of charge is one that has a greater applicability in the *types of cases* that *Suarez* addresses as opposed to the type of case this is" (emphasis added).

In opposing the motion, moreover, the prosecutor made clear that he understood counsel's argument to be a broader one that called into question the sufficiency of the proof in light of the requirements of the two categories of cases identified in *Suarez,* not merely the "time frame" of defendant's conduct. Indeed, the prosecutor began his argument in opposition as follows: "I agree that one of the standards is whether the particular victim is particularly vulnerable, and in this case it's clear she was. And in this particular case, you can point to a period of prolonged suffering the victim would have gone through." Thus, the prosecutor understood defendant to be challenging the sufficiency of the proof on the issues of whether the victim was "particularly vulnerable," whether the defendant had engaged in a "prolonged" course of conduct and whether that conduct caused "suffering" (i.e., whether it was "brutal"). And the court then denied the motion "for the reasons argued persuasively by the prosecutor." Because the court thus ruled on each of these three

issues, defendant has preserved each of them for review (*People v Feingold*, 7 NY3d 288, 290 [2006] [although the People contended that defendant's challenge to the sufficiency of the evidence convicting him of depraved indifference reckless endangerment murder was "unpreserved because he did not plainly present it to the trial court," the challenge was preserved because the trial judge "specifically confronted and resolved th(e) issue"]).

Even under the majority's narrow view of defendant's motion to dismiss, the claim that the evidence was legally insufficient to establish a "prolonged" course of conduct is preserved for review. The victim may have been in defendant's apartment for a "prolonged" period. But the question is whether the conduct of defendant that caused her death, even assuming it was "brutal" within the meaning of the term as set forth in *Suarez* and the cases cited in *Suarez*, was committed over a "prolonged" period of time. The fatal acts could have been committed over a period of mere minutes, and in my view no reasonable juror could conclude from the evidence that those acts had been committed over a "prolonged" period.

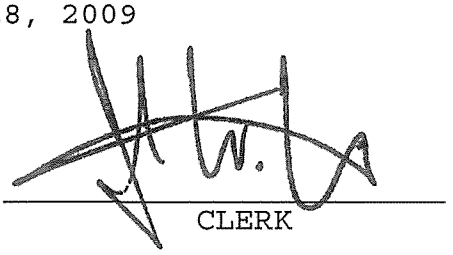
As I would hold that the evidence was legally insufficient to establish that the fatal acts were committed either in a "brutal" fashion or over a "prolonged" period, I need not consider whether it was legally sufficient to establish that the victim was "particularly vulnerable." I note, however, that the

People's position that the victim was "particularly vulnerable" depends on the sufficiency of the proof that the victim was alive but unconscious, and that defendant knew it, when he tied the plastic bag around her neck. The majority does not explain how the People proved beyond a reasonable doubt that she was alive or unconscious at that point, or that defendant knew she was alive.

Accordingly, I would reverse the conviction for depraved indifference murder, dismiss the first count of the indictment charging that crime and remand for a new trial on the second count of the indictment charging manslaughter in the first degree (*see Matter of Suarez v Byrne*, 10 NY3d 523 [2008]).

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

ENTERED: MAY 28, 2009



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Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

663 The People of the State of New York, Ind. 6348/03
Respondent,

-against-

Trevor Frederick,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered September 12, 2007, convicting defendant, after a nonjury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

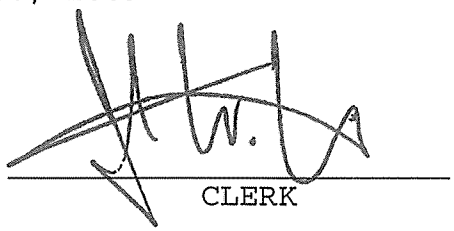
Where the court dismissed the indictment pursuant to CPL 200.80 as superseded by a new indictment, and subsequently dismissed the superseding indictment as procedurally defective, it properly reinstated the original indictment (*see People v Clarke*, 55 AD3d 1447, 1448 [2008], *lv denied* 11 NY3d 923 [2009]; *see also People v Rosa*, 265 AD2d 167 [1999], *lv denied* 94 NY2d 884 [2000]; *People v Lynch*, 162 AD2d 134 [1990], *lv denied* 76 NY2d 941 [1990]). The sole reason for dismissing the original indictment was that it had been superseded. However, the superseding indictment was a nullity that effectively left the original indictment in place.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant was properly convicted of felony murder based on evidence warranting a reasonable inference that, in the course of a burglary, defendant either pushed the deceased out of a fifth-story window after attacking him, or that the deceased fell while fleeing from defendant's attack by attempting to reach a fire escape. Under either scenario, the evidence established that defendant caused the victim's death (*see People v DaCosta*, 6 NY3d 181, 184 [2006]; *People v Matos*, 83 NY2d 5091 511 [1994]). We reject defendant's argument that a finding that defendant either pushed or drove the deceased out of the window would require speculation. On the contrary, we find that any third explanation for the fatal fall would be speculative. The evidence, including the surviving victim's credible account of defendant's conduct as well as compelling circumstantial evidence, pointed to the inescapable conclusion that the death could only have occurred in one or the other of the two ways posited by the People.

We perceive no basis for reducing the sentence, or directing that it be served concurrently with defendant's prior sentences.

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

ENTERED: MAY 28, 2009



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Gonzalez, P.J., Mazzarelli, Renwick, Abdus-Salaam, JJ.

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Lucia Ortiz,
Plaintiff-Respondent,

-against-

Citibank, et al.,
Defendants-Appellants,

The City of New York, et al.,
Defendants.

Purcell & Ingrao, P.C., Mineola (Terrance J. Ingrao of counsel), for Citibank and Blockbuster Video, appellants.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Abaco Management Corp., appellant.

Wade Clark Mulcahy, New York (Nicole Y. Brown of counsel), for JSMS Corporation, appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for respondent.

Orders, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered June 26, 2008, which, in an action for personal injuries sustained in a slip and fall on a patch of ice on a public sidewalk abutting a parking lot shared by defendants Citibank and Blockbuster, denied a motion by Citibank and Blockbuster, and motions by defendants Abaco Management Corp., a maintenance contractor hired by Blockbuster, and JSMS, a snow removal contractor hired by Abaco, respectively, for summary judgment dismissing the complaint and any cross claims as against them, unanimously reversed, on the law, without costs, and the

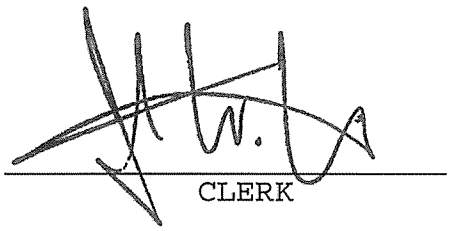
motions granted. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against defendants Citibank, Blockbuster Video, Abaco Management Corp. and JSMS Corporation.

At the time of this 2002 accident, i.e., prior to the adoption of Administrative Code of City of NY § 7-210, a property owner owed no duty to pedestrians to remove snow and ice that naturally accumulated on the sidewalk in front of its premises, but if it undertook to do so, it could be held liable if it negligently created or exacerbated a dangerous condition (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 519-521; *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 336-337 [2004]). As the record establishes that Citibank, Blockbuster and Abaco at no relevant time undertook to remove snow from the sidewalk, and did not control the manner in which JSMS removed snow from the sidewalk, their motions for summary judgment should have been granted (*see Keane v City of New York*, 208 AD2d 457 [1994]; *Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257-258 [2008]). With respect to JSMS, no issues of fact as to whether it created or exacerbated the dangerous condition that caused plaintiff's fall are raised by evidence that the last significant snowfall prior to the accident was two days earlier, and that it plowed a path in the sidewalk by pushing snow to the curb and

spread salt on the ground (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002]; *Nadel v Cucinella*, 299 AD2d 250 [2002]). We note that JSMS's contract with Abaco does not contain an indemnity clause.

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

ENTERED: MAY 28, 2009



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Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

668-
668A The People of the State of New York, Respondent,

Ind. 380/06
2434/06

-against-

Osei Boateng,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgments, Supreme Court, New York County (Maxwell Wiley, J.), rendered August 27, 2007, convicting defendant, upon his pleas of guilty, of grand larceny in the first degree (three counts), falsifying business records in the first degree (four counts) and conspiracy in the fifth degree, and sentencing him to an aggregate term of 4 to 12 years, and ordering him to pay restitution of $5,914,811 including interest, unanimously affirmed.

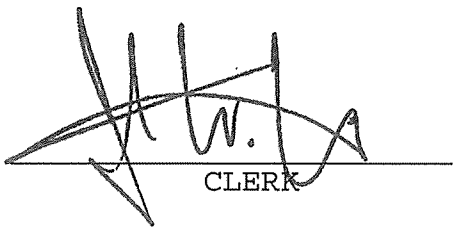
There is no reason to remand for a restitution hearing, because the record contains sufficient evidence to support the court's restitution finding, and defendant did not request such a hearing (*see* Penal Law § 60.27[2]). At the time of the plea, defendant admitted stealing "more than" three million dollars, and at sentencing, he never challenged, as either inaccurate or factually unsupported, the People's detailed proof underlying

their request for restitution in the amount of $5,633,153.33 (*see People v Kim*, 91 NY2d 407, 410-411 [1998]). None of defendant's arguments at sentencing can be construed as a request for a restitution hearing.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 28, 2009



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Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

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Nicoletti Gonson Spinner & Owen LLP
(formerly known as Nicoletti
Gonson & Spinner),
Plaintiff-Respondent,

-against-

York Claims Service, Inc.,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

Colonial Cooperative Insurance Company,
Third-Party Defendant-Respondent,

Stephen Muehlbauer,
Third-Party Defendant.

Riker, Danzig, Scherer, Hyland & Perretti LLP, Middletown, NJ (J. Noah Schambelan and Edwin F. Chociey, Jr., of the Bar of the State of New Jersey, admitted pro hac vice, of counsel), for appellant.

Nicoletti Gonson Spinner & Owens LLP, New York (Gary R. Greenman of counsel), respondent pro se.

Eric A. Inglis, Morristown, NJ, of the Bar of the State of New Jersey, admitted pro hac vice, of counsel, for Colonial Cooperative Insurance Company, respondent.

Appeals from judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered February 26, 2008, awarding plaintiff fees totaling the principal amount of $142,101.05, and from order, same court and Justice, entered July 31, 2008, to the extent it denied defendant's motion to renew, unanimously

dismissed as moot, with costs in favor of plaintiff and third-party defendants. Appeal from order, same court and Justice, entered October 18, 2007, which, inter alia, granted plaintiff's motion for summary judgment on its causes of action for breach of contract and account stated, granted third-party defendants' cross motions for summary judgment dismissing the third-party complaint and denied third-party plaintiff's cross motion for summary judgment in the third-party action, unanimously dismissed, without costs, as moot and as subsumed in the appeal from the judgment.

In light of third-party defendant Colonial's satisfaction of the judgment, defendant York lacks a significant ground for vindication on appeal with regard to its liability for fees owed to plaintiff or its right to indemnification from Colonial. Were we to address the merits, we would find that plaintiff submitted its bills and York failed to raise any timely protest (*see Tunick v Shaw*, 45 AD3d 145, 149 [2007], *lv dismissed* 10 NY3d 930 [2008]), that plaintiff's entitlement to its fees was not dependent on the dispute between York and Colonial, that York's defense was devoid of factual support, and that neither discovery nor the purportedly new evidence submitted on renewal would have

changed the prior determination (*see 212 Inv. Corp. v Kaplan*, 44 AD3d 332, 333 [2007]).

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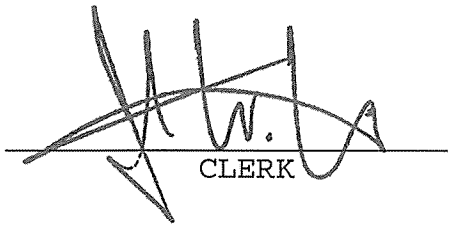

Gonzalez, P.J., Mazzarelli, Buckley, Abdus-Salaam, JJ.

670 The People of the State of New York, Ind. 1294/06
Respondent,

-against-

Ulyses Heredia,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cooley Godward Kronish LLP, New York (Ian R. Shapiro of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc Adam Sherman of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert E. Torres, J.), rendered May 15, 2007, convicting defendant, after a jury trial, of assault in the second degree and criminal impersonation in the first degree, and sentencing him to concurrent terms of 2½ years and 1 to 3 years, respectively, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request for a sanction resulting from the unavailability of the tape recording of the victim's 911 call inasmuch as defendant has not established that he was prejudiced by the absence of the tape (*see e.g. People v McDermott*, 279 AD2d 361 [2001], lv denied 96 NY2d 803 [2001]). Defendant's argument that the tape may have revealed discrepancies in the details of the occurrence which were presented by the victims at trial does not demonstrate prejudice in light of the strong and convincing evidence of an assault and criminal impersonation of an officer.

Further, the Sprint printout relating to the crime was available to defendant for impeachment use. Thus, the trial court was not required to impose a sanction (compare *People* v *Wallace*, 76 NY2d 953 [1990]).

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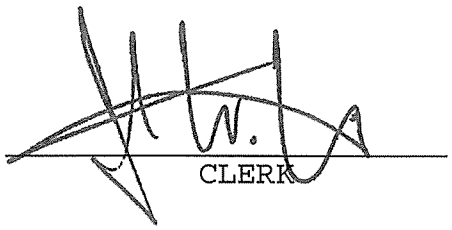


Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

671 In re Nikeerah S.,

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

Barbara S.,
Respondent-Appellant,

Hale House Center, Inc.,
Petitioner-Respondent.

Susan Jacobs, Center for Family Representation, Inc., New York (Karen F. McGee of counsel), for appellant.

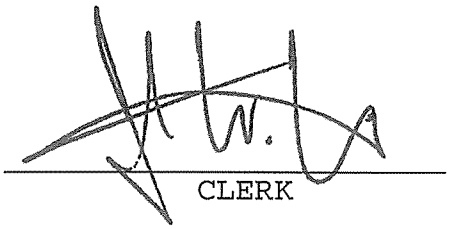
Appeal from order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 2, 2007, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights and transferred custody and guardianship of the subject child to petitioner for the purpose of adoption, held in abeyance, assigned counsel's application to withdraw granted, and Steven Feinman, Esq., 19 Court Plaza, Suite 201, White Plains, New York, 10601, Telephone No. (914) 949-8214, assigned as new counsel to prosecute this appeal.

Upon review of the record, we conclude that there are nonfrivolous issues to be raised on this appeal (*see Anders v California*, 386 US 738, 744 [1967]) and that therefore new counsel must be assigned (*see Matter of Jennifer R. v Michael C.*, 41 AD3d 270 [2007]). We note, without expressing an opinion as to the ultimate disposition of any of these issues, that they

include whether the inability of the court to assign counsel when the mother appeared to contest the permanent neglect petition deprived her of her statutory and constitutional right to counsel (*see Matter of Isaiah H.*, 2009 NY Slip Op 03251 [2009]; *Matter of James R.*, 238 AD2d 962 [1997]), whether subsequently assigned counsel provided ineffective assistance, and whether a suspended judgment should have been granted.

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

ENTERED: MAY 28, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

673 Rafael Hernandez, etc., et al., Index 114511/03
Plaintiffs-Respondents,

-against-

Michelle Vavra, et al.,
Defendants-Appellants,

Evelio Torres, et al.,
Defendants-Respondents.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for appellants.

Proner & Proner, New York (Tobi R. Salottolo of counsel), for Rafael Hernandez and Michael Hernandez, respondents.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Evelio Torres and Mungo One, Inc., respondents.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered April 9, 2008, awarding plaintiffs damages, based upon a jury verdict finding defendants-appellants 100% negligent in causing plaintiffs' decedent's personal injuries, unanimously affirmed, without costs.

The jury's verdict apportioning 100% of the fault to defendants bus company and operator was not against the weight of the evidence (*see Gonzalez v City of New York*, 45 AD3d 347, 348 [2007], *lv denied* 10 NY3d 701 [2008]; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). Giving deference to its credibility findings, the jury could rationally conclude from the trial evidence that the bus operated by defendant Vavra collided

with a cab operated by defendant Evelio Torres, causing the cab to spin around and strike plaintiff as he was crossing the street.

The impact caused plaintiff to sustain, inter alia, a traumatic brain injury termed a subarachnoid hemorrhage. The evidence further supported plaintiffs' contention that the subarachnoid hemorrhage resulted in plaintiff suffering a cerebral infarct about one week after the accident. The award of $1 million for past pain and suffering and $1.75 million for future pain and suffering over 15 years did not materially deviate from what would be reasonable compensation under the circumstances (*see* CPLR 5501[c]; *Paek v City of New York,* 28 AD3d 207, 208 [2006], *lv denied* 8 NY3d 805 [2007]; *Roness v Federal Express Corp.,* 284 AD2d 208 [2001]). The jury was also entitled to credit plaintiff's neurologist's testimony that plaintiff would require 12 hours of home health care services a day for the rest of his life. The testimony of plaintiff's health care provider supported the jury's award of $390,000 towards future home health care attendant expenses (*see Coore v Franklin Hosp. Med. Ctr.*, 35 AD3d 195, 197 [2006]).

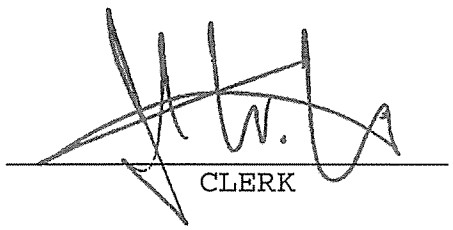
Any error in redacting the police report was harmless, as the essence of Torres' alleged "admission" concerning the cause of the accident was elicited and explained during his cross-

examination (*see Montes v New York City Tr. Auth.*, 46 AD3d 121, 127-128 [2007, Catterson J., concurring]).

In light of the inconsistency between the information contained on the face of defendants' CPLR 3101(d) notice pertaining to their expert neuropsychologist, and the substance of the expert's proposed testimony as clarified on voir dire, the trial court providently exercised its discretion in permitting the neuropsychologist to testify as to the results of his interview of plaintiff, while precluding him from testifying as to the results of neuropsychological tests he performed on plaintiff (*see Inwood Sec. Alarm, Inc. v 606 Rest., Inc.*, 35 AD3d 194 [2006]).

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

ENTERED: MAY 28, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

674 The People of the State of New York, Respondent, Ind. 1575/06

-against-

Robinson Manrique, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

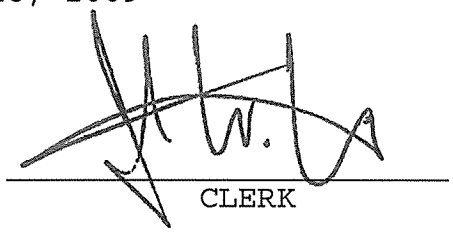
Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered January 3, 2008, convicting defendant, after a jury trial, of grand larceny in the fourth degree (two counts), criminal possession of stolen property in the fourth degree (two counts), petit larceny and criminal possession of stolen property in the fifth degree, and sentencing him to an aggregate term of 5 years' probation, unanimously affirmed.

We reject defendant's argument that his convictions relating to the theft and possession of two credit cards were against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that defendant stole a purse that the owner had briefly left unattended in a restaurant. That defendant went outside, took money from the purse, placed the purse under his clothing and began to walk back into the restaurant does not warrant an inference that defendant

intended to return the bag and its remaining contents, or that he did not intend to permanently deprive the owner of the two credit cards that remained in the bag. Defendant's act of secreting the bag under his garments when returning to the restaurant evinced an intent to keep the bag, and the jury could have reasonably concluded that defendant was looking for a more private location before removing more property from the bag. Furthermore, when defendant returned to the restaurant, he did not seek out the owner of the purse. Finally, when a police officer confronted defendant and tried to recover the purse, defendant again evinced an intent to keep it when he slapped away the officer's hand and shoved him. In any event, "even momentary possession of another's property by the accused is sufficient" (*People v Smith*, 140 AD2d 259, 261 [1988], *appeal denied* 72 NY2d 924 [1988] [citations omitted]).

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

ENTERED: MAY 28, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

677 Sigurd A. Sorenson, Index 600533/06
Plaintiff-Appellant,

-against-

257/117 Realty, LLC, et al.,
Defendants-Respondents.

Sigurd A. Sorenson, New York, appellant pro se.

Balber Pickard Maldonado & Van Der Tuin, PC., New York (Roger Juan Maldonado of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 7, 2008, which granted defendants' motion for summary judgment dismissing the complaint, cancelled the notice of pendency, and imposed sanctions against plaintiff and his attorney in the amount of $2,500 each, and costs and attorneys' fees in the amount of $16,386, unanimously affirmed, without costs.

In this action alleging fraudulent conveyance, plaintiff failed to establish "actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors" (Debtor and Creditor Law § 276; *see P.A. Bldg. Co. v Elwyn D. Lieberman, Inc.*, 227 AD2d 277 [1996]; *O'Brien-Kreitzberg & Assoc. v K.P., Inc.*, 218 AD2d 519 [1995]). Inasmuch as the conveyance of the subject building was specifically subject to plaintiff's rights in a related fraud action (*see Sorenson v Bridge Capital Corp.*, 52 AD3d 265 [2008], *appeal*

dismissed 12 NY3d 748 [2009]), there was no showing of fraud or intent to defraud because the parties to the conveyance had taken steps to ensure that any potential judgment would be satisfied (*see Grace Plaza of Great Neck v Heitzler*, 2 AD3d 780 [2003]).

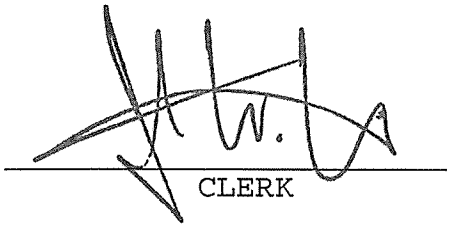
The claim under § 273 of the statute was also properly dismissed as the building was transferred for "other good and valuable consideration," which included the cost of completion of the building, and the conveyance did not render defendants insolvent.

The notice of pendency was properly cancelled once the court determined that plaintiff's claims were baseless (*see Gallagher Removal Serv. v Duchnowski*, 179 AD2d 622, 623 [1992]). The lack of merit to this action warranted the court's imposition of sanctions, costs and attorney's fees (22 NYCRR 130-1.1).

We have considered plaintiff's remaining arguments and find them without merit.

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

ENTERED: MAY 28, 2009



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Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

678 The People of the State of New York, Ind. 4397/06
Respondent,

-against-

William Ross,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Adam A. Nagorski of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered March 5, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second felony drug offender, to concurrent terms of 6 years, unanimously affirmed.

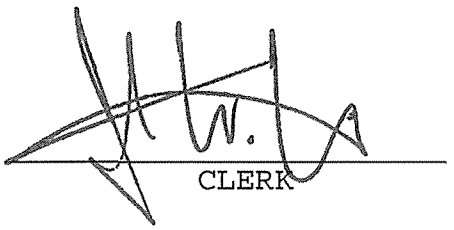
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. There was ample evidence supporting the inference that defendant possessed drugs with intent to sell, including the substantial amount of cash and drugs recovered from defendant and the recovery of identically packaged drugs from the apparent buyer who accompanied defendant into a building. Although, in performing weight of evidence review, we may consider the jury's

verdict on other counts (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), we find that defendant's acquittal of the sale charge does not warrant a different conclusion (*see People v Freeman*, 298 AD2d 311 [2002], *lv denied* 99 NY2d 582 [2003]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 28, 2009



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Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

679N Elena McMahan, Index 114668/07
Plaintiff-Respondent,

-against-

Bruce McMahan,
Defendant-Appellant,

Andrew D. Stone, et al.,
Defendants.

Isaacs & Evans, LLP, New York (Leigh R. Isaacs of counsel), for appellant.

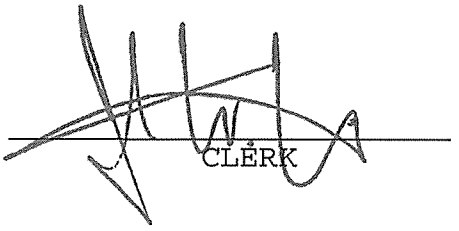
Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 14, 2008, which, sua sponte, discontinued the action without prejudice, unanimously modified, on the law and the facts, to discontinue the action with prejudice as against defendant-appellant, and otherwise affirmed, without costs.

As against appellant, the action should not have been discontinued without prejudice where plaintiff's notice of discontinuance was untimely under CPLR 3217(a) (*see Citidress II Corp. v Hinshaw & Culbertson LLP*, 59 AD3d 210, 211 [2009]), and was apparently served in order to avoid an adverse decision on a pending motion to dismiss the complaint with prejudice and to enable plaintiff to raise the claims she makes herein in another pending action (*see NBN Broadcasting v Sheridan Broadcasting Networks*, 240 AD2d 319 [1997]). The foregoing renders academic appellant's claim that the motion court should have granted its

motion to dismiss the complaint on default (*see 176-60 Union Turnpike v Howard Beach Fitness Ctr.*, 271 AD2d 327, 328 [2000]).

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

ENTERED: MAY 28, 2009



Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

680N Pamela Equities Corp., Index 114225/08
Plaintiff-Respondent,

-against-

270 Park Avenue Café Corp.,
Defendant-Appellant.

Vishnick McGovern Milizio, LLP, Lake Success (Andrew A. Kimler of counsel), for appellant.

Bauman Katz & Grill LLP, New York (John M. Giordano of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 21, 2008, which granted plaintiff landlord's motion for an order compelling defendant tenant to provide plaintiff with access to the kitchen and basement of the premises with certain limitations so as to allow plaintiff to perform necessary remedial work, unanimously modified, on the law, to the extent of striking that portion of the order indicating that it is a final disposition and remanding the matter to Supreme Court for the purpose of setting an undertaking to be posted by plaintiff, and otherwise affirmed, without costs.

The court exercised its discretion in a provident manner in granting the injunctive relief since plaintiff demonstrated a likelihood of success on the merits, irreparable injury based on further damage to the building if the necessary repairs are not made and that a balancing of the equities weighs in its favor

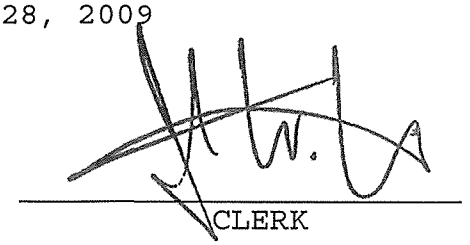
(*see generally Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *see also Huron Assoc. LLC v 210 E. 86th St. Corp.*, 18 AD3d 231 [2005]; *1500 Broadway Chili Co. v Zapco 1500 Inv.*, 259 AD2d 257 [1999]). However, because CPLR 6312(b) requires that plaintiff post an undertaking in an amount to be fixed by the court, the matter is remanded to the motion court to set an amount that reflects the damages that defendant may incur (*see Visual Equities v Sotheby's, Inc.*, 199 AD2d 59 [1993]).

Although the injunctive relief was appropriately granted, "[a] preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (*Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 122 [1991]). Thus, to the extent the motion court's order indicated that it was a final disposition, it was in error.

We have considered defendant's remaining arguments, including its request for a rent abatement, and find them unavailing.

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

ENTERED: MAY 28, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4394 Michael Bumbury, Index 8518/05
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant.

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

Ofodile & Associates, P.C., Brooklyn (Anthony C. Ofodile of counsel), for respondent.

Order, Supreme Court, Bronx County (Janice L. Bowman, J.), entered April 17, 2007, which denied defendant's motion to dismiss the complaint and granted plaintiff's cross motion to amend the complaint, modified, on the law, to dismiss that part of the complaint alleging a claim for malicious prosecution, and otherwise affirmed, without costs.

A cause of action for malicious prosecution accrues when the criminal proceeding terminates favorably to the plaintiff (*Boose v City of Rochester*, 71 AD2d 59, 65 [1979]). Thus, to the extent that plaintiff alleges malicious prosecution by the Bronx County District Attorney, that claim accrued on March 4, 2002, when the sodomy indictment was dismissed, and with regard to any claim of malicious prosecution, plaintiff's notice of claim served March 19, 2004 and this action commenced March 3, 2005 are untimely. In any event, we note that plaintiff cross-moved to amend his

complaint to remove any claims of malicious prosecution.

On the other hand, a cause of action for unlawful imprisonment accrues "when the confinement terminates" (*Boose v City of Rochester*, 71 AD2d at 65). Plaintiff's cause of action alleging unlawful imprisonment thus accrued upon plaintiff's physical release from custody (*Nunez v City of New York*, 307 AD2d 218, 219 [2003]; *Allee v City of New York*, 42 AD2d 899 [1973]), which took place on February 26, 2006, not December 18, 2001, when he was apparently transferred to federal custody to be deported. The City's argument that the federal custody has no bearing on its motion to dismiss lacks merit. The federal detention was rooted in plaintiff's wrongful sodomy conviction, after the City provided federal authorities with the record of plaintiff's conviction, but later failed to remove it from his criminal history, even though the conviction was vacated and the indictment ultimately dismissed.

Given the absence of prejudice to defendant, the court did not improvidently exercise its discretion by, in effect, granting plaintiff leave to amend the complaint to clarify his claims *(see Zornberg v North Shore Univ. Hosp.*, 29 AD3d 986 [2006]; *Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 298 AD2d 180 [2002]).

Upon review of the *Monell* claim (*Monell v Department of Social Servs. of City of N.Y.*, 436 US 658 [1978]) raised in the

original complaint, we find that plaintiff has given the City fair notice of a custom or policy that would establish municipal liability under 42 USC § 1983 by alleging gross negligence in failing properly to train, supervise and discipline its employees, resulting in injury. Such failure, it is alleged, amounted to "deliberate indifference" to the rights of individuals coming in contact with those employees (*Canton v Harris*, 489 US 378, 388 [1989]; *see also Pendleton v City of New York*, 44 AD3d 733 [2007]; *Johnson v Kings County Dist. Attorney*, 308 AD2d 278, 289-290 [2003]; *and see generally Ramos v City of New York*, 285 AD2d 284, 303-306 [2001]).

All concur except Nardelli and Buckley, JJ. who dissent in part in a memorandum by Buckley, J. as follows:

BUCKLEY, J. (dissenting in part)

I dissent only with respect to the cause of action for false imprisonment, which I would dismiss for failure to serve a timely notice of claim.

While plaintiff was incarcerated at Rikers Island in 1998 pending a parole violation hearing, an inmate, Joseph Davis, accused him of sexual assault. Following dismissal of the parole violation charge, plaintiff was released on bail, but was returned to custody on December 14, 1999, and shortly thereafter was convicted of sodomy in the first degree and sentenced to a prison term of 12 years.

During the course of a civil action by Davis against the City and individual correction officers, the City produced previously undisclosed Unusual Incident Reports generated by the New York City Department of Correction (DOC) memorializing statements of an inmate who claimed that Davis had divulged to him intentions to falsely accuse fellow inmates of sexual assault in order to obtain a transfer to a different cell. Plaintiff subsequently obtained copies of those reports, and in 2001 he moved to vacate the judgment of conviction based on the People's failure to disclose the exculpatory *Brady*[1] material consisting of the DOC Unusual Incident Reports. On November 5, 2001, Bronx Supreme Court vacated the conviction and ordered plaintiff to be

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[1]*Brady v Maryland*, 373 US 83 (1963).

released. The DOC released plaintiff on December 18, 2001 into the custody of the United States Immigration and Naturalization Service (INS), which had issued a detainer for his deportation, allegedly based on the mistaken belief that the judgment of conviction was still extant. On March 5, 2002, the indictment against plaintiff was dismissed on the People's recommendation, because the previously undisclosed evidence "contradicts Davis' testimony and supplies him with a possible motive to lie, [and] the People would be unable to prove this case beyond a reasonable doubt." However, the INS, later reorganized within the Department of Homeland Security (*see* 6 USC § 291; *Blake v Carbone*, 489 F3d 88, 92 [2d Cir 2007]), did not release him until early 2006, purportedly based on the continuing erroneous impression that the conviction, or at least the charges, were still valid.[2]

While still in federal immigration custody, plaintiff, by his attorney, served the City with a notice of claim on March 19, 2004, and filed a summons and complaint on March 3, 2005. Plaintiff asserted claims for false imprisonment, negligence, and violation of civil rights, grounded on the theory that the

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[2]Although plaintiff asserts that he was completely vindicated in the federal proceedings, the document in the record that he relies on for that proposition states that he was released on $20,000 bond, thus indicating that the removal proceedings remained unresolved. Nevertheless, for purposes of this appeal, plaintiff's rendition should be accepted as accurate (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993]).

recklessness or negligence of correction officers in failing to turn over exculpatory evidence to the District Attorney's Office, and the failure of the City to properly train and supervise correction officers, caused him to be unjustifiably imprisoned; he alleged that his confinement and damages were continuing because he was still in federal immigration detention.[3]

The City moved to dismiss the state law claims as time-barred and the civil rights claims as inadequately pleaded. Plaintiff cross-moved to amend the complaint to clarify his claims by separating them into distinct causes of action.

Whether denominated a cause of action for false imprisonment or false arrest, the distinction being mainly semantic (*see Brown v Roland*, 215 AD2d 1000 [1995], *lv dismissed* 87 NY2d 861 [1995]), the tort accrues when the confinement terminates (*see Nunez v City of New York*, 307 AD2d 218, 219 [2003]). A plaintiff must serve a notice of claim within 90 days after the claim arose (*see id.*; General Municipal Law § 50-e[1][a]), although the court may grant leave to file a late notice of claim within one year and 90

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[3]Plaintiff later withdrew his implicit claim of malicious prosecution against the District Attorney's Office. A separate action against the State for unjust conviction and imprisonment was dismissed for failure to state a cause of action under Court of Claims Act § 8-b, since the vacatur of his conviction was predicated on a deprivation of due process rights and not any of the grounds enumerated in the statute or on a likelihood of innocence (*see Bumbury v State of New York*, Ct Cl, Mar. 30, 2006, Scuccimarra, J., Claim No. 107877, Motion No. M-70858, UID No. 2006-030-523, *rearg denied* Nov. 13, 2006, Motion No. M-71758, UID No. 2006-030-581).

days of accrual (*see Nunez*, 307 AD2d at 219; General Municipal Law §§ 50-e[5]; 50-i[1]); the action must also be commenced within one year and 90 days (*see* General Municipal Law § 50-i[1]).

Plaintiff was released from municipal detention[4] on December 18, 2001, but did not serve a notice of claim until March 19, 2004 or a summons and complaint until March 3, 2005, both well outside the limitations periods. In order to render his claims timely, plaintiff argues that his municipal imprisonment and his federal detention should be deemed one continuous period of confinement, and thus that his claim accrued in February 2006, when he was released by the federal authorities. According to plaintiff, his confinement by federal immigration authorities should be attributed to the City because the City failed to remove his conviction from his criminal history.

Although ordinarily on a motion to dismiss the plaintiff's allegations are deemed to be true, we need not accept legal conclusions or factual allegations that are inherently incredible

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[4]In support of his argument that there should be no distinction between his City imprisonment and his federal detention, plaintiff makes much of the fact that following his conviction he was transferred from the City jail to a State correctional facility. However, that transfer was required by law (*see* Penal Law § 70.20[1][a]). Unlike the federal immigration authorities, the State Department of Correctional Services exercised no independent decision to take plaintiff into custody, and indeed was mandated to do so.

or flatly contradicted by documentary evidence or well-established law (*see Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1994]). The agency charged with maintaining criminal records is the New York State Division of Criminal Justice Services (DCJS) (*see People v White*, 56 NY2d 110, 112 n 1 [1982]; *Matter of Rodriguez v Johnson*, 4 AD3d 216 [2004]; *Matter of Ortiz v Supreme Ct. of New York County*, 199 AD2d 160 [1993]; Executive Law § 837[6]). Furthermore, "[u]pon the termination of a criminal action or proceeding against a person in favor of such person ... the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused" (CPL 160.50[1]; *see also Matter of Hynes v Karassik*, 47 NY2d 659 [1979]). Thus, the clerk of the court, a state employee (*see* Judiciary Law § 39[6]; *Weissman v Evans*, 56 NY2d 458, 462 [1982]), and the DCJS, a state agency, are the only ones with a duty to report and record a vacatur of conviction, and the City could not be faulted for any ministerial error in failing to correct plaintiff's criminal record. Therefore, plaintiff's federal detention cannot be deemed a continuation of his municipal confinement, a fact plaintiff himself implicitly acknowledged by commencing his action against the City while

still in federal detention. Accordingly, I would dismiss the state law claim for failure to abide by the limitations periods of the General Municipal Law.

The parties agree that plaintiff's allegations of violations of civil rights amount to a claim under 42 USC § 1983, although they differ on whether the cause of action was adequately pleaded. In contrast to a claim under state tort law, one under section 1983 does not require service of a notice of claim (*see Rapoli v Village of Red Hook*, 41 AD3d 456, 457 [2007]).

While a municipality cannot be held liable under section 1983 on the basis of respondeat superior, it can be held responsible for a deprivation of constitutional rights caused by its own official policy or custom (*see Monell v New York City Dept. of Social Servs.*, 436 US 658, 690-694 [1978]; *Ramos v City of New York*, 285 AD2d 284, 302 [2001]). A municipality's failure to train or supervise its employees can be considered tantamount to an official policy or custom where "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need" (*City of Canton, Ohio v Harris*, 489 US 378, 390 [1989]; *see Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 294 [2003]). To support a failure

to train or supervise claim, a plaintiff must demonstrate that: (1) the policymakers know to a moral certainty that their employees will encounter a given situation; (2) the situation either presents the employee with a difficult choice of the sort that training or supervision would make less difficult or there is a history of employees mishandling the situation; and (3) the wrong choice by the employee will frequently result in the deprivation of a person's constitutional rights (*see Johnson*, 308 AD2d at 293-294 [2003]; *Walker v City of New York*, 974 F2d 293 [2d Cir 1992], *cert denied* 507 US 961, 972 [1993]).

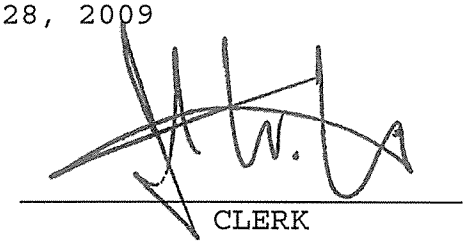
Plaintiff's section 1983 claim against the City is premised on a failure to adequately train, supervise, and/or implement proper policies for correction officers with respect to collecting and turning over exculpatory information. The City does not seriously contest that it knows to a moral certainty that its correction officers will encounter situations where an inmate witness contradicts another inmate's complaint of suffering an attack while in detention and the witness's statements are recorded in reports (*see Johnson*, 308 AD2d at 294). Nor does the City deny that a failure to disclose *Brady* material will frequently result in the deprivation of a person's constitutional rights (*see Ramos*, 285 AD2d at 304-306). Giving plaintiff the benefit of every reasonable inference (*see Kralic v Helmsley*, 294 AD2d 234, 235 [2002]), he alleges a history of

mishandling the situation, in that he asserts that the Department of Correction had in place procedures to disclose exculpatory reports to protect itself in civil litigation, but not for the benefit of the accused in criminal proceedings (*see Johnson*, 308 AD2d at 294-295). Therefore, I agree with the majority that plaintiff has sufficiently pleaded a *Monell* claim to survive a motion to dismiss.

Finally, I agree that Supreme Court did not improvidently exercise its discretion in granting leave to amend the complaint, since plaintiff sought only to separate the claims into distinct causes of action, not to raise any new claims, and therefore the City suffered no prejudice (*see Zornberg v North Shore Univ. Hosp.*, 29 AD3d 986 [2006]).

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

ENTERED: MAY 28, 2009



CLERK

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

109-
110 Ind. 876/04

The People of the State of New York,
Respondent,

-against-

Jermel Glover,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

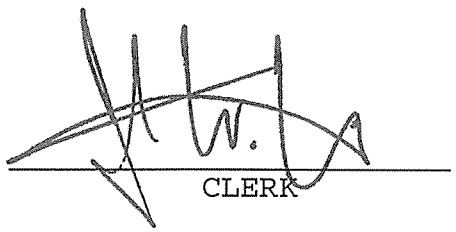
Judgment, Supreme Court, New York County (Micki A. Scherer, J.), entered on or about August 14, 2006, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

There was clear and convincing evidence for the court's determination that defendant has a psychological, physical or organic abnormality that decreases ability to control impulsive sexual behavior (*see People v Andrychuk*, 38 AD3d 1242 [2007], *lv denied* 8 NY3d 816 [2007]). Even assuming, without deciding, that the extent to which a sex offender's psychiatric disorder can be treated by medication is relevant to whether this override should be applied, defendant's argument in this regard is unavailing, in light of his long-standing pattern of failing to take prescribed

medications, despite his current assurances that he will be compliant.

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

ENTERED: MAY 28, 2009



CLERK

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

297-
297A Index 119221/03

M Entertainment, Inc., et al.,
Plaintiffs-Appellants,

-against-

Laurence Leydier, et al.,
Defendants-Respondents.

Bienstock & Michael, P.C., New York (Randall S.D. Jacobs of counsel), for appellants.

Satterlee, Stephens, Burke & Burke, LLP, New York (Christopher R. Belmonte of counsel), for Laurence Leydier, respondent.

Gogick, Byrne & O'Neill, LLP, New York (John M. Rondello, Jr., of counsel), for Wardrop Engineering Inc. and J.C. "Cam" Thompson, respondents.

Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered November 27, 2007, to the extent it dismissed the complaint as against defendants Wardrop and Thompson, unanimously affirmed, and appeal, to the extent it dismissed the complaint as against defendant Leydier, dismissed, without costs. Appeal from amended order, same court and Justice, entered on or about October 17, 2007, which, after a nonjury trial, directed entry of a judgment dismissing the complaint, unanimously dismissed as subsumed in appeal from judgment, and, with respect to plaintiff's claims against Leydier, dismissed for failure to obtain appellate jurisdiction, without costs.

An appeal as of right must be taken within 30 days after service by a party upon the appellant of a copy of the judgment or order appealed from, with notice of entry (CPLR 5513[a]). An appellant takes such an appeal by serving upon adverse parties a notice of appeal, and filing same with the clerk of the court in which the judgment or order has been entered (CPLR 5515[1]). Where applicable, CPLR 2103(b)(2) provides for service of papers upon an attorney by mailing to the address designated for that purpose. "Mailing," under the statute, requires the deposit of those papers "in a post office or official depository under the exclusive care and custody of the United States Postal Service *within the state* (CPLR 2103[f][1], [emphasis added]). It is undisputed that plaintiffs, who opted for service by mail, did not place the notice of appeal to be served upon Leydier in a post office or depository within this State. Accordingly, the notice of appeal is of no effect with respect to Leydier because service was not completed within the meaning of CPLR 2103 (*see Cipriani v Green,* 96 NY2d 821 [2001]; *National Org. for Women v Metropolitan Life Ins. Co.,* 70 NY2d 939 [1988]). We note that the Third Department has excused late service of a notice of appeal upon a showing of mistake or excusable neglect (*Peck v Ernst Bros.*, 81 AD2d 940 [1981]), but the Court of Appeals has categorically held that the power of an appellate court to review a judgment is subject to an appeal being timely taken" (*Hecht v*

City of New York, 60 NY2d 57, 61 [1983]). We thus find plaintiffs' improper service of their notice of appeal upon Leydier to be a fatal jurisdictional defect.

The evidence supports the trial court's finding that defendants Wardrop and Thompson did not fraudulently induce plaintiffs to enter into the memorandum of understanding or the licensing agreement that are the subjects of this lawsuit. These defendants were not parties to either agreement, nor did plaintiffs pay them anything in connection with the subject transaction. The record shows that these defendants' involvement consisted of the presence of Thompson and the CEO of Wardrop's affiliate at two meetings between plaintiffs and Leydier, Leydier's use of Wardrop's board room for one of those meetings, and Thompson's presentation of his business cards to plaintiffs, identifying himself as a principal of the Wardrop affiliate. Contrary to plaintiffs' contentions, Wardrop did nothing to give rise to the appearance and belief that Leydier or Thompson possessed authority to enter into a transaction with plaintiffs on its behalf, and to the extent that Leydier and/or Thompson made such representations, the words or conduct of a putative agent are insufficient to create apparent authority *(see Hallock v State of New York*, 64 NY2d 224, 231 [1984]).

We have considered plaintiffs' remaining contentions and find them without merit.

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

TOM, J.P. (dissenting in part)

The majority deprives plaintiffs of the opportunity to appeal as of right the dismissal of their claims against defendant Leydier without engaging in any analysis of the law and equities. Moreover, the cases relied upon in support of dismissal offer no guidance on the jurisdictional issue the majority resolves against plaintiffs.

It is Leydier's position that because a notice of appeal is deposited into a mailbox located outside, rather than within New York State, this Court is jurisdictionally barred from entertaining that party's appeal as of right against the recipient of the notice. The two cases he relies upon to support this result state, in the entirety and in virtually identical language:

> "Motion for leave to appeal dismissed as untimely. Service was not completed within the meaning of CPLR 2103(b)(2) by the mailing in Washington, D.C. The statute provides for mailing 'within the state'" (*National Org. for Women v Metropolitan Life Ins. Co.*, 70 NY2d 939 [1988]; *see also Cipriani v Green*, 96 NY2d 821 [2001] [Nevada mailing]).

Neither of these rulings suggests that the basis for the Court's disposition is jurisdictional. Both cases involve whether to grant permission to appeal, an application addressed to the Court's discretion (*see Matter of Newman v Gordon*, 31 NY2d 676 [1972]; *American Banana Co. v Venezolana Internacional de Aviacion S.A. [VIASA]*, 69 AD2d 762 [1979]), and reflect no more

than the Court of Appeals' disinclination to excuse a procedural irregularity in the exercise of a discretionary function (CPLR 2001; *see e.g. Matter of Ancona*, 17 AD3d 584 [2005] [pro hac vice]). The decisions do not state, as Leydier urges, that the movant's deviation from the manner of service prescribed by statute defeats the Court's appellate jurisdiction.

Generally, the failure to comply with a provision for service of papers can be disregarded in the absence of substantial prejudice to the right of a party (*see e.g. Matter of Brown v Casier*, 95 AD2d 574, 577 [1983] [failure to serve petition 20 days before return date]). Significantly, Leydier identifies no prejudice incurred by him as a result of the disputed irregularity in service and concedes that he timely received plaintiffs' notice of appeal, which was duly filed within the time prescribed by statute (CPLR 5515[1]). Thus, there is no question that the appeal was seasonably brought, thereby removing any question of a jurisdictional bar on the ground of untimeliness (CPLR 5513[a]; *see Hecht v City of New York*, 60 NY2d 57, 61 [1983]).

Leydier's sole objection to the service of the notice of appeal is that it was deposited in the wrong mailbox, i.e., one located in the State of New Jersey rather than New York. While, historically, the point of mailing has been a requirement for the completion of service of papers upon an attorney, it has not been

accorded the universal jurisdictional significance Leydier and the majority ascribe to it.

Rule 20 of the Rules of Civil Practice (the predecessor to CPLR 2103[b][2] and [f][1]) provided that service could be made on an attorney

> "through the post-office, by depositing the paper properly inclosed in a postpaid wrapper in a post-office or in any post-office box regularly maintained by the government of the United States in the city, village or town of the party or the attorney serving it, directed to the person to be served at the address within the state theretofore designated by him for that purpose."

The requirement for depositing papers "in the city, village or town of the party or the attorney serving it" has been liberalized to provide for deposit "in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (CPLR 2103[f][1]). Furthermore, mailing is no longer the only means of delivering papers to an attorney; CPLR 2103 now permits papers to be sent by the alternative means of "facsimile transmission," "overnight delivery service" and "electronic means" (CPLR 2103[b][5], [6], [7]).

Under the statute, an overnight delivery service is one "which regularly accepts items for overnight delivery to any address in the state" (CPLR 2103[b][6]). By contrast with service effected by utilizing the United States Postal Service to

make delivery, no restriction is imposed on the location from which service by overnight delivery originates, which can be made from anywhere on earth so long as the papers are deposited "into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery" (*id.*). Thus, such service can be effected from across the country or even around the world, as long as the delivery service customarily effects overnight delivery to any address within New York State and the papers are received by the chosen delivery service by the designated time. Likewise, there is no geographic constraint on the service of papers by facsimile transmission (CPLR 2103[b][5]).

The lack of any restriction under CPLR 2103(b)(6) on the location where "deposit . . . into the custody of the overnight delivery service" must be made strongly suggests that the location from which service is initiated is not intended to be a jurisdictional requirement. Case law bears this out. As stated in *Vita v Heller* (97 AD2d 464, 464 [1983]),

> "Service of papers by mail is deemed complete upon deposit of such papers in the mail and such manner of service creates a presumption of proper mailing to the addressee. The burden then falls upon the addressee to present evidence sufficient to overcome the presumption and establish nonreceipt." (Internal citations omitted.)

The rationale behind the presumption is that "the failure of the

mails is not to be ascribed to the parties" (*Seifert v Caverly*, 63 Hun 604, 606 [1892]). Service is "complete" (CPLR 2103[b][2]) even if the papers are not received in a timely fashion (*see Matter of Coppola v Motor Veh. Acc. Indem. Corp.*, 59 AD2d 1023, 1024 [1977]) or not received at all (*see Engel v Lichterman*, 62 NY2d 943 [1984]). Thus, what is forfeited by a party failing to effect service in accordance with the statute is the "presumption of proper mailing to the addressee" (*Vita*, 97 AD2d at 464; *see Ortega v Trefz*, 44 AD3d 916, 917 [2007] ["A properly executed affidavit of service raises a presumption that proper mailing occurred"]), requiring the party to establish actual receipt of the papers. Since Leydier concedes timely receipt of the notice of appeal, plaintiffs are relieved of this evidentiary burden.

Even if it were granted, for the sake of argument, that strict compliance with CPLR 2103(b)(2) is required, it would be appropriate to exercise this Court's discretion to excuse plaintiffs' failure to comply with the in-state restriction on mailing. As to matters not clearly jurisdictional, CPLR 2001 reflects the intent to avoid elevating form over substance by incorporating the essence of Civil Practice Act § 105 "to the end that slight mistakes or irregularities not affecting the merits or the substantial right of a party shall not become fatal in

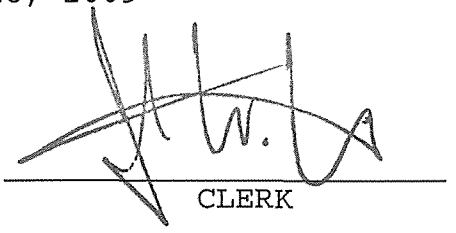
their consequences" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2001, at 626, quoting *People ex rel. Di Leo v Edwards*, 247 App Div 331, 334 [1936]).

In sum, there is no question that the appeal from so much of the order as granted dismissal of the complaint to Leydier was timely brought. Neither has any prejudice been demonstrated by Leydier, who concededly received the notice of appeal in timely fashion, thereby obviating any factual question concerning actual delivery. Under these circumstances, plaintiffs should not be deprived of the right to appeal from the dismissal of the complaint as against him.

Accordingly, I would affirm the order in all respects.

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

ENTERED: MAY 28, 2009



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Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

343-
344N In re Devin N., and Others,

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

Sandra N.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

In re Jamie A.D.N., and Others,

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

Sandra N.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Louise Feld of counsel), Law Guardian for Devin N., Murray N., Shownna N., Tranaia N., and Trevor N.

Karen Freedman, Lawyers For Children, New York (Hal Silverman of counsel), Law Guardian for Jamie N., Jasmine N., and Merkadel N.

Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about April 20, 2007, which, to the extent appealed from, found that respondent had neglected her five grandchildren, unanimously reversed, on the law, without costs,

and the petition dismissed as against her. Order, same court, Judge and entry date, which, to the extent appealed from, found that respondent had neglected her three great grandchildren, unanimously reversed, on the law, without costs, and the charges of neglect dismissed.

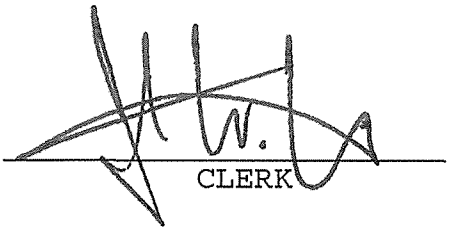
The evidence established that the crowded living conditions existing at respondent's apartment in August 2006 -- with clothing-filled garbage bags lining a living room wall and the kitchen in disarray -- was the result of a temporary situation where respondent had taken in her daughter and five children who had nowhere else to stay. While not ideal, these conditions were neither unsafe nor unsanitary (*see Matter of Erik M.*, 23 AD3d 1056 [2005]). The children had adequate sleeping accommodations and appeared to be clean. The condition of the premises did not constitute neglect (*see Matter of Allison B.*, 46 AD3d 313 [2007]), and did not place the children's physical, mental or emotional states in imminent danger of impairment (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]).

There was no evidence that the children were endangered by the mere presence of apparently intoxicated people in the apartment (*see Matter of Anna F.*, 56 AD3d 1197 [2008]; *Matter of Anastasia G.*, 52 AD3d 830 [2008]). With respect to Merkadel, one of the children alleged to have been neglected, the mere fact that he was in a locked room with a person who appeared to be

intoxicated and was smoking a cigarette does not establish that respondent's conduct placed the child's physical, mental or emotional state in imminent danger of impairment. Even assuming that an isolated instance of permitting someone to smoke a cigarette in the presence of an infant would be sufficient to establish such imminent danger, there was no evidence that respondent was aware that the individual in the room was smoking a cigarette. Moreover, the child protective specialist who saw Merkadel that evening testified that "he appeared to be healthy." Similarly, one of the police officers who entered the room testified that Merkadel was in "good condition." Thus, we conclude that the evidence was legally insufficient to establish the requisite "imminent danger."

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

ENTERED: MAY 28, 2009



Friedman, J.P., Sweeny, Catterson, Freedman, JJ.

369 The People of the State of New York, Ind. 3877/06
Respondent,

-against-

Junior Lightbody,
Defendant-Appellant.

Schwed & Zucker, Kew Gardens (David Zucker of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered June 19, 2008, convicting defendant, after a jury trial, of insurance fraud in the third degree, and sentencing him to a term of 5 years' probation, unanimously reversed, on the facts, and the indictment dismissed.

The verdict to the extent it found that Bronx County was a proper venue was against the weight of the evidence (*see People v Cullen*, 50 NY2d 168, 173 [1980]). On April 5, 2006, while in Queens County, defendant falsely reported to the police that his car had been stolen. In making this report, defendant claimed he had parked his car in Queens the previous night, and that was the last he saw of it. However, on April 3, two days before defendant made the report, the car was found in the Bronx, having been destroyed by fire. All other events relating to this case occurred in Queens, including defendant's making the report to

the police and his efforts to obtain reimbursement from his insurance company.

The People's theory of venue is that both the knowledge and fraudulent intent elements of insurance fraud (*see* Penal Law § 176.05[1]) occurred in Bronx County. A person may be convicted of an offense in an appropriate court of a county when "[c]onduct occurred within such county sufficient to establish...an element of such offense" (CPL 20.40[1][a]). Here, however, the evidence established that all the elements of the crime - namely, defendant's knowledge of the falsity of his report, his intent to commit insurance fraud, and the making of the false statements - occurred in Queens County, not the Bronx. While it is reasonable to infer that defendant brought or caused his car to be brought to the Bronx and burned, that conduct is not an element of insurance fraud; instead, it is part of the evidence establishing that defendant's claim was actually false.

With respect to geographical jurisdiction, the Court instructed the jury it had to find that both the intent the knowledge elements of insurance fraud - i.e., the intent and knowledge that pertained to the knowing filing of a false insurance claim - had to occur in the Bronx; but the evidence demonstrated that defendant's intent was formed and his knowledge was developed while he was in Queens. Defendant's actions in relation to the car were not *elements* of insurance fraud.

Therefore, as relevant to jurisdiction or venue, the elements of the crime occurred in Queens (*see People v Cullen*, 50 NY2d at 175; *People v Leonard*, 106 AD2d 470 [1984], *lv denied* 64 NY2d 1020 [1985]).

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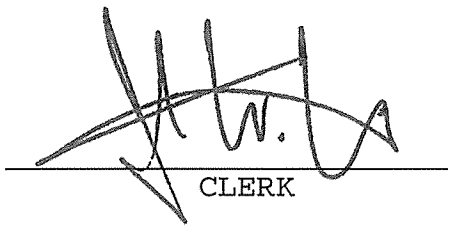

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Eugene Nardelli, J.P.
John T. Buckley
Karla Moskowitz
Dianne T. Renwick, JJ.

4949
Index 117401/05

Liam Cregan, etc., et al.,
Plaintiffs-Appellants,

-against-

Michael E. Sachs, M.D., et al.,
Defendants,

Madhavarao Subbaro, M.D.,
Defendant-Respondent.

Plaintiffs appeal from the order of the Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 21, 2008, which granted the motion of defendant Dr. Madhavarao Subbaro for summary judgment dismissing the complaint as against him.

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

Costello, Shea & Gaffney, LLP, New York (Sylvia E. Lee and Frederick N. Gaffney of counsel), for respondent.

NARDELLI, J.P.

The threshold issue is the extent of an anesthesiologist's postoperative duties to his patient after a procedure which took place in a doctor's office, but required the patient to remain in the office overnight.

Plaintiff's decedent, Kay Cregan, died on March 17, 2005, at the age of 42, from complications resulting from plastic surgery performed by defendant Michael E. Sachs in his office in New York. Defendant Dr. Madhavarao Subbaro provided anesthesiologic services for the surgery.

The decedent, who lived in Ireland, had contacted Dr. Sachs after hearing publicity about him, and they met in Ireland to discuss the procedures she was interested in having. They agreed that Dr. Sachs would perform five procedures: facial cervical reconstruction (face lift), bilateral upper/lower eyelid blepharaoplasty; nasal septal reconstruction; upper lower lip augmentation, and chin augmentation. Ms. Cregan came to the United States for the surgery on March 14, 2007, the surgery was performed the same day, and she died three days later in St. Luke's Hospital.

At one time Dr. Sachs had been Chairman of the Department of Facial Plastics at New York Eye and Ear Infirmary, but his relationship with New York Eye and Ear terminated in 2001, and he

has not had operating privileges with any hospital since then. In 2004 the New York State Department of Health charged that he had committed misconduct through negligent practice of medicine on repeated occasions between May 1985 and December 1993. After he agreed to the charge his medical license was placed on probation for a period of three years. Dr. Sachs did not tell Ms. Cregan that his license was on probation or that he had been sued about 30 times by patients upon whom he performed facial surgery.

Co-defendant Dr. Subbaro is a board-certified anesthesiologist who, since about 1997, has provided anesthesia services for plastic surgeons who perform surgery in private offices. Starting in about 2003, Dr. Subbaro worked for Dr. Sachs about three or four days per month, for which he was paid $2,500 per day, regardless of how many patients he saw. On some days he saw as many as five or six patients, and was "[n]ot too sure" if it could be as many as ten.

On the date of Ms. Cregan's surgery, Dr. Subbaro worked on seven or eight patients, including a nasal reconstruction and several smaller procedures. He started the anesthesia for Ms. Cregan at 6:00 p.m., and the operation lasted about three hours, from 6:15 p.m. until 9:10 p.m. He stood to the right side of the patient throughout the operation administering agents. During

the operation bleeding resulted from the reconstruction of the nasal septum, as well as the other procedures.

Dr. Sachs left the office a few minutes after the surgery ended. Dr. Subbaro testified that he was "in and out" of the recovery room from 9:15 until 10:30 or 11:00, when he left. The recovery room nurse, defendant Susan Alonzo-Francisco, believed that Dr. Subbaro left shortly after the operation ended, sometime after Dr. Sachs, at around 9:30 p.m.

After the operation, Ms. Cregan was bandaged while in a drowsy state, and was moved to the adjacent recovery room. Dr. Sachs testified that moving the patient is generally the "province of the anesthesiologist and the nurses." Ms. Cregan and another patient were watched in the recovery room that night by nurse Alonzo-Francisco, who was retained by Dr. Sachs for evening work on occasion, and was paid by him on a per diem basis.

Dr. Subbaro testified that, before he left, nurse Alonzo-Francisco told him the patient was doing well and was comfortable. He himself spoke to the patient before he left the office, when she was groggy but able to answer and she said she was fine. Dr. Subbaro's only postoperative note indicated that the patient was "recovering, stable, sleepy" and that her oxygen saturation was 97 percent, heart rate 70, and blood pressure

100/61. He said that, before leaving, he "made sure" the nurse had his telephone numbers and told her to call him if she needed him. The nurse testified that she did not recall him giving her any instructions regarding patient care before he left. She already had his telephone number on her cell phone.

Dr. Subbaro stated that he had worked with nurse Alonzo-Francisco before and knew from talking to her that she was a "very knowledgeable person" and "not dumb." He knew she was "certified by the ACLS," i.e., Advanced Cardiovascular Life Support, and "knew exactly what to do" if complications occurred in the recovery room. He indicated that nurse Alonzo-Francisco was "certified to know the technique" for passing an endotracheal tube, and that she had told him she "took the course and she knows how to intubate." It was his understanding that ACLS training includes intubation. He stated that a laryngoscope and endotracheal tube were kept in the operating room in Dr. Sachs's office and the nurses were aware of their location.

Nurse Alonzo-Francisco testified that she received ACLS certification training every two years, but that she was never taught how to insert an endotracheal tube. Nor was she ever taught by Dr. Sachs, Dr. Subbaro or any other doctor how to intubate a patient. In the course of her practice, she had never intubated a patient, and nobody ever showed her where an

endotracheal tube was kept in Dr. Sachs's office. She pointedly testified, "We are not allowed to intubate patient[s]."

Referring to the medical notes she kept, Alonzo-Francisco testified that at 6:30 a.m. on March 15, the morning following the procedure, she was assisting Ms. Cregan in walking to the bathroom when the patient said she was dizzy. Ms. Cregan then said she was fainting, so the nurse helped her lie on the floor, and then reconnected her to the monitor. The patient's blood pressure was 84/56, which was good, and her heart rate was 72, which was normal, but her blood oxygen saturation was 70%. An oxygen saturation level below 90% is not normal, and a level below 88% is "bad." A level of 70% is indicative of hypoxemia, which shows that the blood has a low level of oxygen, and indicates a danger of respiratory distress.

The nurse started mouth-to-mouth resuscitation. She also took an "Ambu bag" and mask from a cabinet, got an oxygen canister, attached the bag to the canister, put the mask on the patient's mouth and began squeezing the bag. When she squeezed the bag, she felt resistance, which meant there was an obstruction in the airway. She squeezed a second time, and although the oxygen seemed to enter the passageway, she realized she needed assistance.

Using her cell phone, nurse Alonzo-Francisco called the operating room nurse, Liza, the building doorman, Dr. Sachs and Dr. Subbaro, though she did not recall the sequence or times of those calls. The doorman came into the office, which is on the lobby level, and called 911, while she continued CPR. She told Dr. Sachs the patient was not breathing and that she would call 911 right away. She told Dr. Subbaro that the patient had stopped breathing, and asked him to come down. He told her to call 911. She testified that he did not tell her to intubate the patient.

Dr. Subbaro testified that the nurse called him at his home between 6:30 a.m. and 7:00 a.m., and told him she was calling to let him know the patient had collapsed and that she had called Emergency Medical Services (EMS). After EMS personnel arrived, she told him that they were taking care of the patient, and would transfer her to the hospital.

The ambulance call report indicates that the ambulance arrived at 6:40 a.m., at which time Ms. Cregan was in cardiac arrest. EMS personnel intubated her, and performed life support treatment. She was taken to the emergency room at St. Luke's Hospital, where she arrived at 7:09 am. The hospital chart indicated that the suspected cause of cardiac arrest was a blood clot obstructing the airway. The patient was admitted to the

intensive care unit with a poor prognosis. She had no brain stem function the next day, and was declared dead the following day, March 17th.

This action was commenced against Dr. Sachs, his professional corporation, Dr. Subbaro, and the nurse. Plaintiffs' bill of particulars alleged that Dr. Subbaro's negligence included failing to ensure proper post-operative care, failing to have a qualified individual treat and monitor the decedent post-operatively, abandoning the patient post-operatively, and failing to timely intubate the patient.

After discovery, Dr. Subbaro moved for summary judgment. In support of his motion he offered the affirmation of his expert in anesthesiology, Dr. Martin Griffel, who opined that the anesthetic care rendered by Dr. Subbaro was appropriate, and that the patient was an "appropriate candidate for the procedures intended" based on her age and vital signs. He noted that Ms. Cregan had "tolerated the anesthesia and operative procedures very well and was taken into the recovery room in stable condition." In a conclusory fashion, he observed that Dr. Subbaro appropriately left the patient with a "qualified" nurse. Dr. Griffel did not recite what the nurse's qualifications were, or how he knew that she was qualified.

Dr. Griffel concluded that Dr. Subbaro appropriately monitored the patient postoperatively in accordance with good and accepted medical practice, and that this standard of care "would not require [him] or any other anesthesiologist to monitor a patient more than what was done." Further, the events that transpired the next morning at around 6:30 a.m. "had nothing to do with the surgical anesthesia or Dr. Subbaro's care of the decedent," and the patient was "fully recovered from the anesthesia" prior to that time. Dr. Subbaro "did not deviate or depart from any standards of care in his treatment of the patient."

In opposition, plaintiffs submitted an expert affidavit of a board certified anesthesiologist whose identity was redacted. Plaintiffs' expert concluded that Dr. Subbaro "departed from good and accepted medical practice in the care he rendered to Kay Cregan which directly resulted in her death." Plaintiffs' expert observed that the nurse's postoperative notes showed Ms. Cregan had significantly low blood pressure and normal oxygen saturation levels from 9:15 pm to 6:30 a.m. He also concluded that a drop from 96% oxygen saturation at 6:30 a.m. to 70%, after the nurse helped the patient lie down on the floor, was "impossible" because "[h]umans do not desaturate that rapidly to the critically hypoxemic level of 70% saturation while they are

spontaneously breathing 21% atmosphere air." Therefore, he stated, the nurse's documentation was inaccurate in depicting the patient's actual deterioration. The expert opined that Ms. Cregan's eventual cardiac arrest was due to departure from good medical practice by nurse Alonzo-Francisco in her monitoring of the patient.

He further concluded that the decedent received no oxygen during a 10-minute period between 6:30 a.m. and 6:40 a.m. due to the nurse's failure to follow appropriate airway management steps so oxygen could be delivered, and that the respiratory arrest was caused by post-operative bleeding resulting in airway obstruction. He also concluded that the nurse was not qualified to properly assess the situation and react to the emergency, nor to care for the patient, and that Dr. Subbaro deviated from the standard of care owed to his patient by leaving her in an office suite without qualified staff to monitor her condition. The expert specifically noted that since Ms. Cregan was not in a hospital setting it was even more crucial that she be attended by a qualified individual.

The expert opined, to a reasonable degree of medical certainty that, if Ms. Cregan had been oxygenated before EMS arrived, her respiratory arrest would not have evolved to cardiac arrest, and if she had been timely intubated and oxygen timely

administered, full blown cardiac arrest and death would have been avoided.

The motion court granted Dr. Subbaro's motion. The court found that defendant made a prima facie showing of entitlement to summary judgment based on his expert's affirmation, and had shown that he "provided a proper informed consent regarding the anesthesia," "appropriately left the patient with a nurse in the recovery room," and was "not required to stay with the patient and to monitor her." Further, the events that transpired at 6:30 a.m. the next morning "had nothing to do with the surgical anesthesia or with Dr. Subbaro's care of the patient." The court also concluded that Dr. Subbaro did not have any "duty ... to ensure that the recovery room nurse was qualified to manage an airway obstruction and to intubate the patient," since the nurse was an agent of Dr. Sachs, and not of Dr. Subbaro.

"In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "The failure to make ... a prima facie showing requires the denial of the motion [however,] and renders the sufficiency of

plaintiff's opposition immaterial" (*Wasserman v Carella*, 307 AD2d 225, 226 [2003]).

Our review of defendant's expert's affirmation reveals that it was not sufficient to meet defendant's burden of establishing a prima facie case. It totally ignored the nurse's admission that she did not how to intubate, when the expert stated that Dr. Subbaro left the patient with a nurse qualified to care for her. Absent a showing that the risk of a blood clot in the airways was not a potential consequence of the procedures the patient underwent, and that the need for intubation would be nonexistent, the expert's failure to address the nurse's qualifications, or the fact that the surgery was performed in a doctor's office, as opposed to a hospital, effectively precludes a finding that defendant met his prima facie burden.

"[T]he submission of the affidavit of a medical expert which fails to address the essential factual allegations set forth in the complaint, [is] insufficient to establish that defendant is entitled to summary judgment" (*Wasserman*, 307 AD2d at 226; *see also Mirabella v Mount Sinai Hosp.*, 43 AD3d 751, 752 [2007]). Plaintiffs' bill of particulars put the anesthesiologist on notice that he was being charged with failing to ensure that the decedent received appropriate post-operative care, and failing to supervise properly the nurse administering

the post-operative care. The conclusory averments that the nurse was qualified to care for the patient, and that there was no obligation that he stay with the patient, even though she was not in a hospital, were not sufficient.

Even if defendant had met his prima facie burden, the strength of the affidavit of plaintiffs' expert was sufficient to establish the existence of factual issues. He opined, with compelling logic, that a doctor is required to ensure that a patient who has undergone "major airway and facial surgery" be "left in the hands of properly trained medical and/or nursing staff who are qualified to assess and manage an airway obstruction and qualified to intubate patients," and that it was particularly "crucial" in a nonhospital setting that the nurse be so qualified. As discussed, there has been no showing that the blood clot in the airway was not a potential byproduct of the procedure. It makes eminent sense that certain precautions would be necessary in the event that such a situation arose. Plaintiffs' expert affidavit thus satisfied their burden of raising a question of fact as to whether "the doctor deviated from accepted medical practice and also [whether] the alleged deviation proximately caused [plaintiff's] injury" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306-307 [2007], citing *Koeppel v Park*, 228 AD2d 288, 289 [1996]). Thus, in view of the

conflicting expert affidavits, issues of fact and credibility are raised that cannot be resolved on a motion for summary judgment" (*Bradley v Soundview Healthcenter,* 4 AD3d 194, 194 [2004]; *Lewis v Capalbo,* 280 AD2d 257, 258-260 [2001]).

Indeed, there are also issues of fact as to whether Dr. Subbaro ever discussed with the nurse whether she was qualified to intubate patients. She denies having any conversation about this particular patient, and also stated that she did not know how to intubate a patient generally. Since Dr. Subbaro suggests otherwise, credibility issues arise.

The motion court granted defendant's motion with the observation that there was a threshold question of law as to whether Dr. Subbaro owed the decedent a duty of care, and concluded that he did not since the nurse was an agent of Dr. Sachs, not Dr. Subbaro. It then reasoned that after leaving instructions with the nurse for the patient's care, he was free to leave because nothing indicated that he should have been concerned about the decedent's postoperative status, or the nurse's ability to care for her.

Clearly, whether a duty of care is owed in the first instance "is a question for the court, and generally not an appropriate subject for expert opinion" (*Dallas-Stephenson v Waisman,* 39 AD3d at 307). The nature of the duty, however, is a

different issue. The law generally permits the medical profession to establish what the standard is (*Tope v Long Is. Jewish Med. Ctr.*, 55 NY2d 682, 689 [1981]). Once the existence of a duty has been established, resort to an expert is usually necessary. "To establish what the existing standard is or that there has been a departure from it, because laymen ordinarily are not deemed possessed of a sufficient knowledge, training or experience to have attained the competence to testify on this subject, a plaintiff nearly always will be required to produce expert testimony" (*id.* at 690).

In certain circumstances, the doctor's general duty of care "may be limited to those medical functions undertaken by the physician and relied on by the patient" (*Wasserman v Staten Is. Radiological Assoc.*, 2 AD3d 713, 714 [2003] [internal quotation marks and citation omitted]). For instance, in *Huffman v Linkow Inst. for Advanced Implantology, Reconstructive & Aesthetic Maxillo-Facial Surgery* (35 AD3d 214 [2006]), this Court held that the plaintiff's primary dentist owed no duty to plaintiff with respect to extensive reconstructive surgery performed by an oral surgeon on her upper jaw. The dentist had averred that he "neither participated in nor was responsible for the surgical aspects of plaintiff's treatment," but provided only subsequent postsurgical treatment which comported with good and accepted

dental practice (*id.* at 215-16). Although a dental expert opined that the dentist should have coordinated treatment with the oral surgeon and created a stent, this Court concluded that the dentist's duty was limited to the medical functions which he undertook (*id.* at 217).

In this case, however, the claim that Dr. Subbaro did not owe any postoperative duty is belied by his own testimony in which he stated that he transferred her to the recovery room and to the nurse, observed the monitors, inquired of the nurse as to the condition of the patient, spoke to the patient, and, before leaving, advised the nurse to call him if she needed anything. His duty of care clearly expanded past the immediacy of the procedure. As was observed in *Dallas-Stephenson v Waisman,* "a doctor who actually treats a patient has 'a duty of care' toward that patient" (39 AD3d at 307, citing *McNulty v City of New York,* 100 NY2d 227, 232 [2003]). How long after the procedure the duty expanded is a jury question that will turn on the jury's assessment of the experts' testimony, but that issue is not before us. We address only whether a duty existed, and find that it did.

Dr. Subbaro also argues that plaintiffs are, in effect, seeking to hold him vicariously liable for the nurse's

negligence, even though he was only an independent contractor with no responsibility for hiring the nurse and no authority to control her. Defendant is correct that he could not be held liable on a vicarious liability theory for acts which were not within the scope of his responsibility. Here, however, liability is based on the duty of care owed by Dr. Subbaro, as the treating anesthesiologist, directly to the patient, even if he delegated another to act on his behalf. Defendant suggests that it would impose an inappropriate burden on a doctor to require him to make inquiry concerning the qualifications of other medical staff in the office, but "[i]t is well established that a doctor who undertakes to examine and treat a patient (thus creating a doctor-patient relationship) and then abandons the patient may be held liable for medical malpractice" (*Lewis v Capalbo,* 280 AD2d at 258). Whether defendant abandoned the patient in dereliction of his responsibilities is a jury issue.

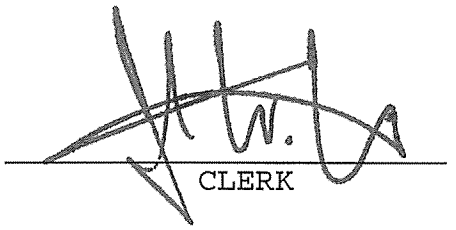
Accordingly, the order of the Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 21, 2008, which granted the motion of defendant Dr. Madhavarao Subbaro for summary judgment dismissing the complaint as against him, should

be reversed, on the law, without costs, the motion denied and the complaint reinstated.

All concur.

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

ENTERED: MAY 28, 2009



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