

motion in the divorce action (*Granato v Granato*, 51 AD3d 589 [2008]; *Thelander v Thelander*, 42 AD3d 495 [2007]; *Zavaglia v Zavaglia*, 234 AD2d 1010 [1996]). As a result, the motion court properly declined to vacate the child support provisions of the parties' separation agreement.

At oral argument, defendant former husband's counsel informed the court that he had simultaneously filed a plenary action to set aside the child support provisions of the separation agreement. Plaintiff's counsel agreed to consolidate that action with the divorce action, and the court stated that it would so order the stipulation. Despite this, defendant's counsel never submitted a stipulation to the court nor took any further steps to prosecute the plenary action. Nor does defendant claim he could not have sought a stay of execution of the money judgment so the court could determine the validity of the child support provisions in the plenary action. Thus, defendant had remedies available to him to ensure that his objections could be timely considered.

In setting the amount of the judgment, the motion court accepted plaintiff's calculations for 2005, which included \$26,665 attributable to child care, an amount far exceeding the \$1,590 in child care expenses she actually incurred for that year. There is no basis for awarding plaintiff an amount greater

than her actual child care costs, in light of the language of the parties' separation agreement providing for payment of child care expenses "incurred" by plaintiff. Thus, the award should be reduced by \$25,075.

In light of our determination, we need not reach defendant's remaining contentions.

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

ENTERED: JANUARY 12, 2010


DEPUTY CLERK

connection with the infant's neonatal care and alleges that injury was sustained as the result of birth trauma. The instant motion dated August 30, 2007 seeks an order deeming the notice of claim served to be timely or, in the alternative, granting leave to serve a late notice of claim.

In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50-e(5), the key factors considered are "whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative" (*Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [2003] [internal citations omitted]). The failure to set forth a reasonable excuse is not, by itself, fatal to the application (see *Matter of Ansong v City of New York*, 308 AD2d 333, 334 [2003]).

While analysis of the medical record will be required to assess the propriety of the treatment rendered by defendant, plaintiffs have failed to demonstrate that the record alone suffices to put defendant on notice of the alleged malpractice

(*cf. Rechenberger v Nassau County Med. Ctr.*, 112 AD2d 150, 153 [1985]). That the infant experienced complications due to premature birth does not serve to alert defendant that, years later, he would develop cerebral palsy and other conditions now alleged to be the result of negligence in his perinatal care and treatment. "Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process" (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; see also *Matter of Nieves v New York City Health & Hosps. Corp.*, 34 AD3d 336, 338 [2006]). Thus, the failure to serve a timely notice of claim has deprived defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford (see *Adkins v City of New York*, 43 NY2d 346, 350 [1977]).

Plaintiffs state no excuse for the 8½-year delay in serving a notice of claim or for the additional 1-year delay in seeking leave to file late notice (see *Rechenberger*, 112 AD2d 152), arguing instead that defendant has not sustained prejudice as a consequence. However, this is not a case in which the plaintiff is unavailable due to death or incapacity so that the propriety

of treatment will be determined solely on the basis of the medical record and, thus, "the knowledge of the claim possessed by the public corporation is at least coextensive with, if not superior to, that of the representative of the injured party and is contemporaneous with the alleged acts of malpractice" (*Matter of Banegas-Nobles v New York City Health & Hosps. Corp.*, 184 AD2d 379, 380 [1992]). Nor is this a case in which delay in serving notice results from difficulty in discovering the alleged act of malpractice (see *Myette v New York City Hous. Auth.*, 204 AD2d 54 [1994]); to the contrary, plaintiffs contend that the alleged malpractice is evident from the difficulties attendant upon the birth.

In the absence of evidence that defendant should have been alerted to malpractice giving rise to the claims asserted in the complaint (see *Matter of Ruiz v New York City Health & Hosps. Corp.*, 165 AD2d 75, 81 [1991]) and the absence of any excuse for the considerable delay in bringing the motion for leave to serve

a late notice of claim (see *Gaudio v City of New York*, 235 AD2d 228 [1997]), Supreme Court improvidently exercised its discretion in granting plaintiffs' application.

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ENTERED: JANUARY 12, 2010


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Mazzarelli, J.P., Sweeny, Catterson, Freedman, Román, JJ.

1621-

1622N Able Energy, Inc., etc., et al., Index 603224/07
Plaintiffs-Appellants-Respondents,

-against-

Marcum & Kliegman LLP, etc., et al.,
Defendants-Respondents-Appellants.

Kane Kessler, P.C., New York (Dana M. Sussman of counsel), and
Cozen O'Connor, New York (Devindra Kissoon of counsel), for
appellants-respondents.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Scott
E. Kossove of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Richard B. Lowe III,
J.), entered May 13, 2008, which granted defendants' motion to
the extent of dismissing the third, fourth, fifth and sixth
causes of action against all defendants and the seventh and
eighth causes of action against the individual defendants,
unanimously modified, on the law, to the extent that the seventh
and eighth causes of action are dismissed in their entirety, and
otherwise affirmed without costs. Order, same court and Justice,
entered June 19, 2009, which held that the 2008 order did not
limit the amount of damages recoverable on the first and second
causes of action, and that plaintiffs were entitled to discovery
related thereto, unanimously affirmed, without costs.

The causes of action alleging breach of the covenant of good

faith and fair dealing against the accounting firm of Marcum & Kliegman, and negligence and gross negligence against the firm and its individual accountants, were properly dismissed for failure to allege actual ascertainable damages arising in connection with such claims, which were nonduplicative of the damages asserted in connection with its breach of contract claims (see *Pelligrino v File*, 291 AD2d 60, 63 [2002], *lv denied* 98 NY2d 606 [2002]; see also *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]). The claim for breach of fiduciary duty, against all defendants, was properly dismissed since the duty owed by an accountant to a client is generally not fiduciary in nature (see *DG Liquidation v Anchin, Block & Anchin*, 300 AD2d 70 [2002], and plaintiffs did not plead any of the limited circumstances in which such a duty may arise.

The defamation claims against all defendants, predicated on information contained in an August 24, 2007 letter to the SEC, were properly dismissed as to the individually named defendants, given the evidence that the letter was signed solely in the firm's capacity as a limited liability partnership. However, the firm's argument for dismissal of the defamation claims against the firm itself based on an "absolute privilege" defense is sufficiently supported, and those claims should also have been dismissed. The letter of August 24, 2007 to the SEC's finance

division potentially could be used by the SEC in a quasi-judicial proceeding. It is irrelevant whether or not the SEC actually commenced such a proceeding (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 367-368 [2007]). Thus, the statements made in the August 24, 2007 letter are protected by an absolute privilege.

Contrary to the firm's argument, we find no basis for limiting the alleged contract damages to claims of overcharge at this pre-answer, pre-discovery juncture.

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workers' compensation is not a "protected activity" within the meaning of that provision, because it does not constitute "opposing or complaining about unlawful discrimination" (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Jimenez v Potter*, 211 Fed Appx 289, 290 [5th Cir 2006] [filing of a workers' compensation claim not a protected activity under Title VII, 42 USC § 2000e-3(a)]). Plaintiff's sole remedy for retaliatory discharge in violation of Workers' Compensation Law § 120 is to file a complaint with the Workers' Compensation Board (*Rice v University of Rochester Med. Ctr.*, 46 AD3d 1421 [2007]). Even when the complaint is liberally construed to allege that plaintiff's employment was terminated in retaliation for requesting an accommodation for her disability, it does not state a cause of action because it fails to allege that she opposed her employer's discriminatory failure to make reasonable accommodation (see *Forrest*, 3 NY3d at 313; *Iannone v ING Fin. Servs., LLC*, 49 AD3d 391 [2008], *lv dismissed* 11 NY3d 808 [2008]; *Unotti v American Broadcasting Cos.*, 273 AD2d 68 [2000]).

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"testimony that his general function was to observe the undercover purchaser did not establish his actual position" (*People v Tavaréz*, 288 AD2d 120, 120 [2001], lv denied 97 NY2d 709 [2002]). Defendant did not preserve his claim that the court should have delivered a missing witness charge concerning the failure of the ghost officer to testify concerning the initial, presale meeting between the testifying undercover officer and defendant, and we decline to review it in the interest of justice. As an alternative holding, we similarly reject it on the merits. Finally, defendant's claim that the missing witness charge the court provided with regard to a confidential informant should have been expanded to include the informant's presence at the initial meeting is without merit, because the informant's testimony about that event would have been entirely cumulative (see *People v Macana*, 84 NY2d 173, 180 [1994]).

The court properly exercised its discretion in denying defendant's mistrial motion, made after the undercover officer made a brief unresponsive comment, cut off in midsentence, that defendant was a known subject wanted by the narcotics bureau. The court struck this testimony and gave thorough curative instructions that were sufficient to prevent any prejudice (see *People v Santiago*, 52 NY2d 865 [1981]), and which the jury is

presumed to have followed (see *People v Davis*, 58 NY2d 1102, 1104 [1983]). Moreover, the officer's remark was not unduly prejudicial under the circumstances of the case, because the jury was well aware that defendant was the target of a long term investigation.

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ENTERED: JANUARY 12, 2010


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Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1961-

1961A Joseph A. LoRiggio,
Plaintiff-Appellant,

Index 602632/05

-against-

Steven Sabba, et al.,
Defendants-Respondents.

Weidenbaum & Harari, LLP, New York (Allan H. Carlin of counsel),
for appellant.

Ellenoff Grossman & Schole, LLP, New York (Gabriel Mendelberg of
counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.),
entered March 21, 2008, which granted defendants' motion for
partial summary judgment dismissing plaintiff's cause of action
for breach of contract, unanimously reversed, on the law, without
costs, and the cause of action for breach of contract reinstated.
Order, same court and Justice, entered February 20, 2009, which
granted defendants' motion for summary judgment dismissing
plaintiff's remaining cause of action under New York Civil Rights
Law § 51, and denied plaintiff's cross motion for summary
judgment and for leave to serve an amended complaint, unanimously
modified, on the law, to deny defendants' motion and to grant
plaintiff's cross motion on the issue of defendants' liability
under Civil Rights Law § 51, the cause of action under Civil

Rights Law § 51 reinstated for the purpose of assessing plaintiff's damages thereunder, and otherwise affirmed, without costs.

Pursuant to a Shareholder's Agreement between plaintiff, an attorney and certified public accountant, and defendant Sabba, the principal shareholder of defendant TaxPro, plaintiff became an employee of Taxpro and acquired a 10% equity interest therein by paying Sabba \$100,000 in cash and assuming an obligation to pay Sabba an additional \$100,000 with 7.5% interest in five semiannual installment payments. The Agreement gave plaintiff the right to rescind "at any time," sell his shares back to Sabba for the "original purchase price," and receive "any accrued profits up to and including the effective date of rescission." Two weeks before the first semiannual payment was due, Sabba announced that a distribution of 75% of income, or \$470,000, would be made to the shareholders, and six days after that, plaintiff elected to rescind the Agreement. Defendants returned the \$100,000 that plaintiff had paid in cash for his shares, but, after initially telling him that payment of his share of accrued profits would be made after the end of the year, they refused to make any further payment. Plaintiff's ensuing claim for breach of contract was dismissed by the motion court on the ground that he was not entitled to accrued profits, after rescinding the

Agreement and receiving the return of his initial \$100,000 investment, without having completed the five semiannual installments for the remaining \$100,000 due on his purchase of TaxPro's shares. This was error.

The Agreement clearly and unambiguously gave plaintiff the right to rescind "at any time," i.e., regardless of whether he had completed payment to Sabba for his shares, and, upon rescission, to receive return of the "original purchase price," i.e., \$100,000 cash and cancellation of his obligation to pay Sabba another \$100,000 (*cf.* Business Corporation Law § 504[a]), *plus* "any accrued profits up to and including the effective date of rescission."

The court also erred in dismissing plaintiff's claim under Civil Rights Law § 51, which creates a cause of action in favor of any person whose name, portrait, picture or voice is used for advertising or trade purposes without written consent (*see Cohen v Herbal Concepts*, 63 NY2d 379, 383 [1984]). It appears that Sabba is an "unenrolled return preparer" who can represent taxpayers in examinations of tax returns he prepared but cannot, among other things, execute claims for a refund, as can an attorney or CPA (*see* IRS Instructions for Form 2848 [Rev June 2008]). In support of the section 51 claim, plaintiff submitted unrefuted evidence establishing that, after he left TaxPro, Sabba

caused two powers of attorney, purportedly signed by plaintiff after his departure date, to be filed with the Internal Revenue Service without plaintiff's written authorization. In addition, Sabba signed plaintiff's name to a financial reference letter submitted to a bank in connection with a client's mortgage application, after the bank had rejected a letter signed by Sabba because he was not a CPA. Defendants' unauthorized use of plaintiff's name and professional qualifications in furtherance of their tax return preparation business was a clear violation of plaintiff's right to control the professional use of his own name (see *Binns v Vitagraph Co. of Am.*, 210 NY 51, 55 [1913]). Any authorization given by plaintiff while he was employed by the firm did not continue after he had resigned and departed (see *Welch v Mr. Christmas*, 57 NY2d 143, 148 [1982]). Accordingly, plaintiff is entitled to summary judgment as to defendants' liability under section 51.

Plaintiff's proposed claims are either duplicative of the reinstated breach of contract claim or without merit.

Accordingly, we affirm denial of his motion for leave to amend the complaint.

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

ENTERED: JANUARY 12, 2010


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Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1962 In re James M.,
 Petitioner-Respondent,

-against-

Rosana R.,
Respondent-Appellant.

Howard M. Simms, New York, for appellant.

Hal Silverman, Lawyers for Children, Inc., New York (Beverly A. Farrell of counsel), Law Guardian.

Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about July 17, 2008, which, to the extent appealed, denied the mother's requested modification of a prior order of visitation entered on or about September 9, 2005, same court (Patricia E. Henry, J.), unanimously affirmed, without costs.

Family Court properly denied the mother's request to extend her visitation further, to direct that a cell phone be given to her 11-year-old daughter, and to direct that she have "meaningful input" on non-emergency decisions. The mother failed to demonstrate a change in circumstances, which would have warranted modification of the September 9, 2005 order of visitation (see *Matter of Alexander v Alexander*, 62 AD3d 866 [2009]). Given the modifications made by Family Court to the existing schedule based

on the parties' agreement, there is no reason to conclude that further changes are needed to protect the child's best interests (see *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]).

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the determination (see *Matter of Strong v New York City Dept. of Educ.*, 62 AD3d 592, 592-593 [2009]).

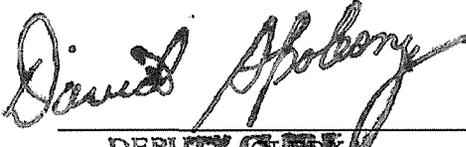
To the extent petitioner challenges the proceedings of the Chancellor's committee, the petition is timely, but petitioner failed to demonstrate that he was deprived of a substantial right by the committee, which found in his favor (see *Matter of Persico v Board of Educ., City School Dist., City of N.Y.*, 220 AD2d 512, 513 [1995]).

In any event, the determination to discontinue petitioner's employment was not arbitrary and capricious, but rationally based on the evidence (see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]); nor did petitioner demonstrate that it was for a constitutionally impermissible purpose, violative of a statute or performed in bad faith (see *Matter of Frasier v Board of Educ. of Dept. of City School Dist. of City of N.Y.*, 71 NY2d 763, 765 [1999]). The fact that the director of the Board of Education's Office of Labor Relations and Collective Bargaining reviewed the committee's report in order to render legal advice to the Chancellor's designee did not impermissibly alter the review process mandated by Board of Education by-law § 4.3.2. Petitioner identified no rule or

regulation which barred the Chancellor's designee from obtaining legal advice. Moreover, he conceded that it was the Chancellor's designee and not the director who made the determination.

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Instead, they are analogous to the requirements of the Sex Offender Registration Act, and a SORA determination (for which the Legislature has provided a right to a separate civil appeal) may not be reviewed on an appeal from a criminal judgment (see *People v Kearns*, 95 NY2d 816, 817 [2000]; *People v Stevens*, 91 NY2d 270, 277 [1998]). Moreover, here the court did not make any kind of certification or determination regarding GORA, or make GORA compliance a condition of a nonincarceratory sentence under Penal Law article 65; its only involvement was to inform defendant of his legal obligations and to obtain his signature on a registration form.

Since the appeal is properly before us as an appeal from a judgment, we do not dismiss the appeal, but affirm on the ground that no reviewable issue has been raised (see *People v Callahan*, 80 NY2d 273, 285 [1992]). In any event, defendant's challenge to GORA is both unpreserved and without merit.

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dismissed the counterclaim on the ground that there is no fiduciary relationship between an employer and an at-will employee. That was error.

"[A] lawyer, as one in a confidential relationship and as any fiduciary, is charged with a high degree of undivided loyalty to his client" (*Matter of Kelly*, 23 NY2d 368, 375-376 [1968]). Indeed, the duty to preserve client confidences and secrets continues even after representation ends (see *Nesenoff v Dinerstein & Lesser, P.C.*, 12 AD3d 427, 428 [2004]; *Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30, 37 [1997]). Thus, we conclude that an in-house attorney, his status as an at-will employee notwithstanding, owes his employer-client a fiduciary duty. We note that plaintiff also had a contractual duty pursuant to his employment agreement to maintain the confidentiality of confidential materials.

Plaintiff failed to establish prima facie that he did not disclose confidential information or communications with Loews. The complaint alleges that plaintiff gave tax advice that was relied on by Loews in deciding not to spin off a subsidiary.

However, plaintiff's testimony creates an issue of fact as to whether the information contained in the complaint was based on plaintiff's legal advice to Loews.

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(see *People v Santos*, 14 AD3d 411, 412 [2005], lv denied 4 NY3d 856 [2005]).

While defendant sufficiently preserved his hearsay argument concerning a police officer's testimony that several passersby told him defendant stabbed the victim (see *People v Rosen*, 81 NY2d 237, 245 [1993]), the argument is unavailing. The trial court providently exercised its discretion in admitting this testimony for the legitimate nonhearsay purpose of completing the narrative and explaining why the officer approached and arrested defendant (*People v Tosca*, 98 NY2d 660, 661 [2002]), particularly since defense counsel's opening statement raised an issue about whether the police had any basis for arresting defendant. Defendant failed to preserve his arguments that the testimony could have been presented in a "less prejudicial manner" and that the court should have provided a limiting instruction, and we decline to review them in the interest of justice.

Defendant's ineffective assistance of counsel claims primarily involve matters outside the record concerning counsel's strategic decisions and are thus unreviewable on direct appeal (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find defendant received effective assistance

under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 714 [1998]; see also *Strickland v Washington*, 466 US 668, 691-692 [1984]). Nothing in the record suggests that trial counsel should have pursued an intoxication defense (see *People v Robetoy*, 48 AD3d 881, 882 [2008]; *People v Giannattasio*, 235 AD2d 548 [1997], lv denied 89 NY2d 1093 [1997]). Furthermore, since counsel chose an "all or nothing" defense tactic of seeking an acquittal on all charges based upon alleged lack of proof that defendant stabbed the victim, counsel's failure to request a justification charge was not ineffective (see *People v Castano*, 236 AD2d 215, [1997], lv denied 89 NY2d 1033 [1997]).

Defendant's other contentions, including his remaining pro se claims, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits, except we find that it was inappropriate for the prosecutor to suggest on summation that defendant's brother's presence in the courtroom may have been a device to confuse the witnesses. However, this isolated remark was not egregious (compare *People v Alicea*, 37 NY2d 601 [1975]), and we find it to

he harmless error (see *People v D'Alessandro*, 184 AD2d 114, 120 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JANUARY 12, 2010


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Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1972 Kelly Thompson, Index 24380/05
Plaintiff-Respondent,

-against-

Pibly Residential Programs, Inc.,
Defendant-Appellant,

Catherine Coleman,
Defendant.

Fumuso, Kelly DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge
(Albert E. Risebrow of counsel), for appellant.

Carro, Carro & Mitchell, LLP, New York (John S. Carro of
counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.),
entered May 15, 2009, which, in an action against a State-
certified residential program for mentally ill adults alleging
negligent failure to prevent defendant resident's assault against
plaintiff resident, inter alia, after an in camera review,
directed defendant program to provide plaintiff with certain of
its records, redacted so as to pertain only to defendant
resident's prior threatening or assaultive behavior toward
plaintiff, unanimously affirmed, without costs.

Defendant resident's records, redacted so as not to pertain
to diagnosis or treatment but only to behavior, are not
privileged and may be used to establish defendant program's prior

actual or constructive knowledge of defendant resident's propensity for violence toward plaintiff (see *J.Z. v South Oaks Hosp.*, 67 AD3d 645 [2009]; *Moore v St. John's Episcopal Hosp.*, 89 AD2d 618, 619 [1982]). Since records of diagnosis or treatment were not sought and are not at issue, it is irrelevant whether defendant resident placed her medical condition in controversy or that she denied consent to release of the records. Neither Mental Hygiene Law 33.13 nor the Health Insurance Portability and Accountability Act of 1996 bar court-ordered disclosure (see *Arons v Jutkowitz*, 9 NY3d 393, 414 [2007]). We have considered defendant program's other contentions and find them unavailing.

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period (*Murphy v Hoppenstein*, 279 AD2d 410 [2001]; see also *Earle v Valente*, 302 AD2d 353, 354 [2003]). "Such 'extensions of time should be liberally granted whenever plaintiffs have been reasonably diligent in attempting service,' regardless of the expiration of the Statute of Limitations after filing and before service" (*Murphy*, 279 AD2d at 410-411 [internal citation omitted]). Plaintiff's efforts to serve defendants were reasonably diligent. This state court action asserted essentially the same state law claims alleged in his federal action, and was timely commenced within six months after that action was dismissed due to lack of subject matter jurisdiction (CPLR 205[a]; *Jordan v Bates Adv. Holdings*, 292 AD2d 205 [2002]). Defendants have not demonstrated any prejudice (see *Griffin v Our Lady of Mercy Med. Ctr.*, 276 AD2d 391 [2000]).

Limiting the extension of time for service to the causes of action for malicious prosecution and abuse of process was not an abuse of the court's discretion. Plaintiff was collaterally estopped from contesting the absence of merit in his remaining causes (see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]), as the time periods were previously determined by the federal court. Thus, such causes of action are barred by the applicable statutes of limitations. Plaintiff's theory that the limitations periods were tolled by operation of CPLR 203(e),

raised for the first time on this appeal, is unpreserved for our review (see *Sean M. v City of New York*, 20 AD3d 146, 149-150 [2005]).

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ENTERED: JANUARY 12, 2010


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CORRECTED ORDER - FEBRUARY 8, 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzairelli, J.P.
David B. Saxe
James M. Catterson
Leland G. DeGrasse, JJ.

957
Index 41294/86

In re Liquidation of Midland
Insurance Company

- - - - -
Claims of American Standard Inc., et al.,
Claimants-Respondents,

-against-

Swiss Reinsurance America Corporation, et al.,
Intervening Reinsurers-Appellants,

Superintendent of Insurance of the
State of New York, etc., et al.,
Appellants.

Appeal from the order of the Supreme Court, New York County
(Michael D. Stallman, J.), entered April 21,
2008, which, granted the major policyholders'
motion for partial summary judgment declaring
that for each policyholder an individualized
choice-of-law review must be undertaken
following the "grouping of contacts" approach
and giving predominant weight to the
insured's principal place of business, and
denied the intervening reinsurers' cross
motion for partial summary judgment on the
applicability of New York substantive law to
all policyholder claims under the Midland
policies in the liquidation.

Simpson Thacher & Bartlett LLP, New York (Jeffrey Coviello, Barry R. Ostrager and Mary Kay Vyskocil of counsel), for Swiss Reinsurance America Corporation, GE Reinsurance Corporation, and Westport Insurance Corporation, reinsurers-appellants.

Crowell & Moring LLP, New York (Paul W. Kalish and Harry P. Cohen of counsel), for Everest Reinsurance Company, reinsurer-appellant.

Andrew J. Lorin, New York (James E. D'Auguste, Andrew J. Lorin and Judy H. Kim of counsel), and McCarthy, Leonard & Kaemmerer L.C., Chesterfield, MO (James C. Owen of counsel), for Superintendent of Insurance of the State of New York, appellant.

Sugarman, Rogers, Barshak & Cohen, P.C., Boston, MA (Andrew Kanter of counsel), for National Casualty Company, Nationwide Mutual Insurance Company, and Employers Insurance Company of Wausau, appellants.

Gilbert Oshinsky, LLP, Washington, DC (Ted J. Feldman of counsel), for The Babcock & Wilcox Company Asbestos PI Trust, CertainTeed Corporation, Echlin, Inc., and National Service Industries, Inc., respondents.

Eckert Seamans Cherin & Mellott, LLC, White Plains (Steven R. Kramer of counsel), for CBS Corporation, respondent.

Pillsbury Winthrop LLP, New York (Kerry A. Brennan of counsel), for Congoleum Corporation, respondent.

McCarter & English, LLP, New York (Gita F. Rothschild and Brian J. Osias of counsel), for The Flintkote Company, respondent.

DeGRASSE, J.

This appeal centers on the precedential effect of our opinion in *Matter of Midland Insurance Company (Lac D'Amiante du Quebec, Ltee.)* (269 AD2d 50 [2000]) (hereinafter referred to as *Midland LAQ*), which we followed in this liquidation proceeding. The issues before us involve the doctrines of *stare decisis* and law of the case as well as public policy.

Midland Insurance Company was incorporated under New York law as a stock casualty insurer in 1959. Under its charter, Midland was authorized to transact business in all 50 states, the District of Columbia, Puerto Rico, the United States Virgin Islands and Canada. As a multiline carrier, Midland wrote a substantial amount of excess coverage for Fortune 500 companies that began to face significant environmental, asbestos and product liability claims in the 1980s. By Supreme Court order in 1986, Midland was adjudged insolvent and placed in liquidation. The Superintendent of Insurance, Midland's statutory liquidator, has made recommendations to the court regarding distribution payments out of the liquidation estate. Since 1994 objections to the Superintendent's recommendations for the denial of policyholders' claims have been referred to a referee to hear and report. Citing *Midland LAQ*, the Superintendent has recommended the denial of many of these claims on the ground that they are

not maintainable under New York law as opposed to the laws of other jurisdictions. To facilitate the handling of hundreds of claims, certain major policyholders (MPHs), the Superintendent and Midland's reinsurers stipulated to a case management order that provides for the IAS court's determination of the common issue of

whether New York substantive law governs the interpretation and application of the Midland insurance policies at issue in this litigation or whether the Court must conduct an analysis utilizing the New York choice-of-law test to determine which jurisdiction's or jurisdictions' law(s) apply.

After briefing, the IAS court determined that the referee should evaluate each objection on the basis of an individualized choice-of-law analysis, giving predominant weight to the insured's principal place of business, where appropriate. For reasons that follow, we now reverse and find the substantive law of New York applicable. A brief discussion of *Midland LAQ* is necessary in order to bring into focus the issues before us.

Lac D'Amiante du Quebec, Ltee. (LAQ) was a Delaware corporation with a principal place of business in Quebec, Canada. It was also a wholly owned subsidiary of American Smelting & Refining Co. (ASARCO), a New Jersey corporation with a principal place of business in New York. LAQ, which mined, milled and sold asbestos until it ceased operations in 1986, was named as an

additional insured under liability insurance policies obtained by ASARCO. Those policies included a follow-form excess policy issued by Midland. In 1983, LAQ brought an action in United States District Court for the District of New Jersey, for a declaratory judgment on the issue of what triggered coverage. Midland and two other carriers were defendants in that action. The district court resolved the issue based upon an interpretation of New Jersey law, and found Midland and the other defendant insurers jointly and severally liable under each triggered policy (see *Lac D'Amiante du Quebec v American Home Assur. Co.*, 613 F Supp 1549 [D NJ 1985]). The United States Court of Appeals for the Third Circuit vacated the judgment against Midland in light of the pendency of this liquidation proceeding and directed the district court to dismiss that portion of the action (864 F2d 1033 [1988]).

Following the dismissal, LAQ filed a claim in this proceeding for indemnity under Midland's policy for payments it had made in asbestos-related claims. By stipulation, two issues were to be decided by this Court in *Midland LAQ* (269 AD2d at 56). The first issue concerned the factor or factors deemed sufficient to trigger coverage under Midland's policy for asbestos-related bodily injuries. The second issue involved the proper application of the "prior insurance" and "other insurance"

clauses in another carrier's umbrella policy under the follow-form provision of Midland's policy. In resolving the first issue, we defined a "triggering event" based upon an interpretation of the language of the policies involved (*id.* at 59-62). We resolved the second issue by determining that Midland, as an insurer in liquidation, did not have collectible insurance, which is a condition precedent to the application of the "other insurance" clause under any policy (*id.* at 67). Furthermore, we recognized public policy's requirement that in a liquidation proceeding all creditors must be treated equally. Therefore, "[i]n order to assure that all Midland creditors are treated equally and in accordance with conflicts of law principles, it is necessary that the court apply New York law in ascertaining" when coverage is triggered (*id.* at 63). The first issue on the instant appeal is whether this enunciation of the applicability of New York law is binding under the doctrine of stare decisis.

As noted above, we held in *Midland LAQ* that New York law controls (*id.* at 58). The MPHs contend that stare decisis does not apply because the choice-of-law issue was not actually litigated at the time of that appeal. Nevertheless, the absence of briefing is not what distinguishes a dictum from a holding (*United States v Pierre*, 781 F2d 329, 333 [2^d Cir 1986]). "[T]he

mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding" (*Monell v Department of Social Servs.*, 436 US 658, 709 n 6 [1978, Powell, J., concurring]). To be sure, in *Midland LAQ* we did not consider the dictates of public policy in a vacuum. The precise issue addressed by our now disputed holding was briefed before the IAS court that rendered the underlying decision. Accordingly, with respect to the issue framed by the case management order, our application of New York law in *Midland LAQ* is binding upon the IAS court under the doctrine of stare decisis.

Midland LAQ's holding is also binding because it is the law of the case. Under that doctrine, parties and their privies are precluded from relitigating an issue decided in an ongoing proceeding where there previously was a full and fair opportunity to address the issue (see *Briggs v Chapman*, 53 AD3d 900, 901 [2008]). It does not avail the MPHs to argue that they are not privies of the parties that appeared when *Midland LAQ* was decided. Privity is established where the interests of the nonparty can be said to have been represented in the prior proceeding (*Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]). For example, there can be privity, in an action brought by a trustee in bankruptcy, to make a judgment preclusive of a

subsequent action by a creditor (*id.*, citing *Stissing Natl. Bank v Kaplan*, 28 AD2d 1159, 1160 [1967]). Accordingly, we find that privity exists between LAQ and the MPHs by reason of their identical interests as policyholders-claimants in the same liquidation proceeding.

The IAS court recognized that *Midland LAQ* stands for the proposition that New York law must apply to all claims in a liquidation proceeding, but held that it was overruled by our subsequent decision in *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.* (36 AD3d 17 [2006], *affd* 9 NY3d 928 [2007]). That conclusion is erroneous.

The issue in *Foster Wheeler* was whether New York or New Jersey law governed excess liability insurance policies under which an insured sought indemnity and defense costs for asbestos-related personal injury claims asserted against it.

In *Foster Wheeler* we held that "[u]nder New York's 'center of gravity' or 'grouping of contacts' approach to choice-of-law questions in contract cases, we are required to apply the law of the state with the 'most significant relationship to the transaction and the parties'" (36 AD3d at 21, quoting *Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 [1994]). Under the facts before us in *Foster Wheeler*, we applied the law of New Jersey -- the insured's principal place of business -- to its

claims for partial indemnity and defense costs under its excess liability insurance policies (36 AD3d at 25). The "center of gravity" or "grouping of contacts" approach, however, is not absolute. In the subset of contracts involving insurance, it is applied unless with respect to a particular issue some other state has a more significant relationship to the transaction and the parties (*Zurich*, 84 NY2d at 318).

Here, New York has a more significant relationship to liquidation and the parties affected thereby by virtue of the Legislature's interest in making distributions from an insolvent insurer's estate "in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims" (Insurance Law § 7434[a][1]). As noted by the Court of Appeals, Article 74 of the Insurance Law is a "comprehensive mechanism" devised for the protection of creditors, policyholders and the general public (*Matter of Dinallo v DiNapoli*, 9 NY3d 94, 97 [2007]). Based on this paramount state interest, we distinguish *Foster Wheeler*, which involved contract claims against a solvent insurer. Accordingly, we find that *Foster Wheeler* provides no reason to depart from our holding that public policy requires all creditors in a liquidation proceeding to be treated equally.

In 1999, Insurance Law § 7434(a) was amended to establish a priority for the distribution of an insolvent insurer's estate among nine classes of creditors (L 1999, ch 135, § 5). The statute provides that no subclasses shall be established within any class (§ 7434[a][1]). In 2005, subsection (e) was added to the statute, making the distribution hierarchy applicable as of its effective date regardless of when the liquidation proceeding was commenced (L 2005, ch 33, § 2). **The claims of the MPHs and other policyholders fall within Class two, claims under policies (§ 7434[a][1][ii]).** The interpretation of Midland's policies under the laws of more than one state would cause disparate results in the determination of policyholders' claims. These differences in treatment would run afoul of the statute by creating subclasses among the policyholder-creditors. Therefore, § 7434 necessitates the interpretation of Midland's policies under the law of one state, even accepting the MPHs' argument that the statute's amendment abrogated the requirement of equality among creditors in liquidation.

Accordingly, the order of the Supreme Court, New York County (Michael D. Stallman, J.), entered April 21, 2008, which granted the major policyholders' motion for partial summary judgment declaring that for each policyholder an individualized choice-of-law review must be undertaken following the "grouping of

contacts" approach and giving predominant weight to the policyholder's principal place of business, and denied the intervening reinsurers' cross motion for partial summary judgment on the applicability of New York substantive law to all policyholder claims under the Midland policies in the liquidation, should be reversed, on the law, without costs, the MPHs' motion denied, and the intervening reinsurers' cross motion granted, declaring that New York substantive law governs the interpretation and application of the Midland insurance policies at issue in this liquidation proceeding.

All concur.

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

ENTERED: JANUARY 12, 2010

A handwritten signature in black ink, reading "David Apolony", written in a cursive style. The signature is positioned above a horizontal line.

CLERK