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COURT OF APPEALS

STATE OF NEW YORK

MARIA AUQUI,

Respondent,

-against-

No. 18

SEVEN THIRTY ONE LIMITED
PARTNERSHIP, et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
January 8, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 18, Auqui v.
2 Seven Thirty One Limited Partnership.

3 Counselor, would you like any rebuttal
4 time?

5 MR. MONTES: Two minutes, please, Your
6 Honor.

7 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

8 MR. MONTES: Good afternoon. My name is
9 Richard Montes. I'm an attorney for the defendants.

10 There are two basic principles upon which
11 the parties agree in this case. First, factual
12 determinations made by quasi-judicial proceedings.

13 CHIEF JUDGE LIPPMAN: What was the
14 determination made here?

15 MR. MONTES: It was a purely factual
16 determination about whether or not he had an ongoing
17 disability. The parties agree that he applied for
18 disability benefits, that those benefits were
19 granted, and they were granted based on a causally
20 related disability. Then in 2005, the parties agree
21 that the Workers' Compensation carrier requested that
22 disability benefits be discontinued because there was
23 no further disability.

24 That's what prompted the hearing. And for
25 that hearing, the Workers' Compensation Law judge

1 asked for witness testimony from two medical experts
2 for the Workers' Comp carrier, two medical experts
3 for the claimant.

4 CHIEF JUDGE LIPPMAN: Dealing with what?
5 The duration of the disability?

6 MR. MONTES: For the duration of the
7 disability.

8 CHIEF JUDGE LIPPMAN: That - - - is that
9 the long and the short of what was decided here?

10 MR. MONTES: That's the long and short of
11 it. If the claim - - -

12 JUDGE SMITH: Does it change if they're
13 concerned with the cause of the disability?

14 MR. MONTES: No, not at all. And in fact,
15 we've cited a number of cases from this court and the
16 Appellate Divisions, all of which say that causally
17 related disability is a factual question - - -

18 JUDGE GRAFFEO: Does the - - -

19 MR. MONTES: - - - within the context of
20 the - - -

21 JUDGE GRAFFEO: - - - later Article 81
22 proceeding have anything to do with whether or not we
23 apply collateral estoppel? Because I think we've
24 said it can be a flexible doctrine in certain
25 circumstances.

1 MR. MONTES: It's - - -

2 JUDGE GRAFFEO: Does that add a different
3 wrinkle?

4 MR. MONTES: The flexibility that comes
5 with the collateral estoppel doctrine only applies if
6 there are certain factors: whether or not the issue
7 was actually litigated, or whether or not there was a
8 full and fair opportunity. And the issue of the
9 guardianship order, there's nothing new that's
10 presented in the guardianship order, and there's also
11 nothing about the guardianship order that would
12 undercut or undermine the veracity of the Workers'
13 Compensation proceeding. The guardianship proceeding
14 is not an adversarial proceeding.

15 JUDGE SMITH: Well, they did - - - Judge
16 Schafer did find that he was - - - that he had a
17 rather serious problem as of the time she signed her
18 order.

19 MR. MONTES: But at the time that she did
20 that, that was in 2009, and that was based on a court
21 evaluator's opinion. And that court evaluator's
22 opinion, coincidentally, was the same exact opinion
23 that - - -

24 JUDGE SMITH: Well - - -

25 MR. MONTES: - - - was provided in 2006.

1 JUDGE SMITH: - - - but if two - - - if two
2 fact finders reached opposite results on the same
3 evidence, then you can't have collateral estoppel,
4 can you?

5 MR. MONTES: But it's not the same
6 evidence, because Judge Shafer didn't have in front
7 of her the testimony from the neurologist - - -

8 JUDGE SMITH: If you did not have - - - I
9 understand that point. If you did not have the ex
10 parte, or at least lopsided nature of the proceeding,
11 would that - - - would the - - - in general, if you
12 had a fully litigated proceeding which came out the
13 other way, would that defeat collateral estoppel?

14 MR. MONTES: Are you - - - so if there was
15 opposing evidence in the guardianship proceeding,
16 would that defeat - - -

17 JUDGE SMITH: Yes, suppose the guardianship
18 had been contested.

19 MR. MONTES: - - - collateral - - -

20 JUDGE SMITH: Suppose the guardianship had
21 been contested, and Justice Shafer had found that
22 he's disabled?

23 MR. MONTES: And if that proceeding was
24 done before the Workers' Comp proceeding or at the
25 same time?

1 JUDGE SMITH: After.

2 MR. MONTES: After. I still don't think it
3 would be collateral estoppel, because when you're
4 talk - - - especially given the number of years in
5 between - - -

6 JUDGE SMITH: I mean, you think the old one
7 still would be - - - you think it would not vitiate
8 the Workers' Comp battle?

9 MR. MONTES: No. Especially in this
10 context, where it appears that the primary purpose of
11 the guardianship proceeding was to try to do an end
12 run around the Workers' Compensation proceeding.

13 The other significant fact about the
14 guardianship proceeding is that it's not new in the
15 sense that there was a petition for guardianship made
16 in April of 2006 - - -

17 JUDGE SMITH: Isn't the idea of the
18 guardianship so that they can settle the case?

19 MR. MONTES: I'm not - - - if that was the
20 purpose in this particular instance, it's not stated
21 in this record. It hasn't been provided.

22 And even if - - - and even if it was the
23 purpose of the proceeding, there - - - it's the
24 plaintiff's burden to provide a full and fair op - -
25 - to say that - - - to argue that they didn't have a

1 full and fair opportunity to litigate the issue.

2 And if they're saying that they didn't have
3 a full and fair opportunity because the plaintiff was
4 disabled, then they have a procedure that they can
5 follow in order - - - see, at the end of the day, the
6 problem here is that they don't like the Workers'
7 Compensation decision. And there's a mechanism for
8 going about challenging that.

9 You take an appeal to the Workers'
10 Compensation Board. You can appeal to the Third
11 Department. You can then, within seven years of the
12 accident, you can move to reopen the Workers'
13 Compensation proceeding. They took all of those
14 avenues.

15 And we shouldn't allow a party to proceed
16 with attempting to circumvent all of those different
17 rulings within the context of that proceeding.

18 CHIEF JUDGE LIPPMAN: Counselor, was there
19 any causation determination at all, here?

20 MR. MONTES: In order to have a causation
21 determination, there's two different ways of looking
22 at it. But again, I don't think causation was
23 involved here. If the question is arising out of
24 versus was it a negligence as a substantial factor,
25 then I would agree, that's causation. That's

1 similar.

2 But we're not dealing with whether it arose
3 out of. We're not dealing with the circumstances of
4 the accident and how it - - -

5 CHIEF JUDGE LIPPMAN: What are we dealing
6 with, just duration?

7 MR. MONTES: We're dealing - - - just
8 duration. And the question of duration is the same
9 as the amount of damages, which is a question of
10 fact. And the amount of damages - - - and there's
11 been an issue raised about whether or not
12 preservation is involved in this case - - - that
13 argument was made in the lower court. It was made in
14 the Appellate Division. And it's been acknowledged
15 in their motion papers in opposition that we move to
16 estop them from arguing future damages. Future
17 damages is a question of fact. And what was decided
18 here was a pure question of credibility: do I
19 believe these witnesses or do I believe these
20 witnesses?

21 Credibility is a quintessential fact-
22 finding function. In the case - - - in the Matter of
23 Palmero, which was decided by this court, it was a
24 Workers' Compensation proceeding. The question was,
25 there was a car accident, and thirty days after the

1 car accident he died of a coronary thrombosis. The
2 question was, is that a factual decision? Which one
3 do you believe of the competing medical experts?

4 And this court decided, "There are, in this
5 case, two conflicting expert opinions. The selection
6 of either is an exercise of fact-finding power, which
7 is entirely within the province of the board. The
8 testimony of each was sufficient to create an issue
9 of fact that that warranted a finding for or against
10 causal relation."

11 So again, this whole notion of causal-
12 related, it's a complete misnomer. It - - -

13 CHIEF JUDGE LIPPMAN: What's left to be
14 resolved here?

15 MR. MONTES: It's just simply whether or
16 not - - -

17 CHIEF JUDGE LIPPMAN: I mean - - -

18 MR. MONTES: - - - the damages prior to
19 that date that's determined by the Workers'
20 Compensation Law judge, January 24th, 2006, are any
21 of the injuries between the date of the accident and
22 that date causally related to the accident? What is
23 the quantum of damages during that period of time?
24 And there's nothing inconsistent or inappropriate - -
25 -

1 CHIEF JUDGE LIPPMAN: What about
2 afterwards? Is there nothing else to be dealt with
3 in terms of the - - -

4 MR. MONTES: In terms of future injury?

5 CHIEF JUDGE LIPPMAN: Yes, yes.

6 MR. MONTES: No, because they've had the
7 opportunity. And this Workers' Compensation Law
8 proceeding - - -

9 CHIEF JUDGE LIPPMAN: Nothing on post-
10 traumatic stress or anything like that?

11 MR. MONTES: All of that was before the
12 judge - - - the Workers' Compensation Law judge.
13 They had every opportunity to provide evidence. And
14 all of that evidence that they claim which is now new
15 was all available during the Workers' Compensation
16 Law proceeding.

17 They had until May 24th, 2006 to provide
18 that information, and they had it May 16th, May 13th,
19 and they didn't ask to provide that.

20 JUDGE GRAFFEO: How much time passed
21 between the Workers' Comp determination and the
22 guardianship - - -

23 MR. MONTES: Three years.

24 JUDGE GRAFFEO: - - - determination?

25 MR. MONTES: Three years. And the

1 guardianship - - -

2 JUDGE GRAFFEO: Could there not have been
3 some change in his cognitive abilities - - -

4 MR. MONTES: If there was - - -

5 JUDGE GRAFFEO: - - - during that period of
6 time?

7 MR. MONTES: - - - if there was, then they
8 were - - - they had the opportunity, in their
9 opposition to the motion for preclusion, to present
10 arguments that there was substantial new evidence
11 which would have changed the result. The only
12 evidence that they provided was not new. The only
13 evidence they provided was Dr. Bonafina's report in
14 May of 2006, and the MRIs in May of 2006.

15 And if this court takes a look at the
16 Matter of Ryan - - - the Ryan case, which is a
17 seminal case involving collateral estoppel - - - in
18 the Ryan case, there was a question about whether or
19 not he stole property. And then he applied for
20 disability benefits. And the determination was,
21 you're not entitled to benefits because you
22 misappropriated the property.

23 Then he want - - - then there was a
24 subsequent determination that there was no theft of
25 property, criminal conviction, criminal dis - - -

1 there was a - - - the complaint was dismissed. And
2 they then make a civil action asking for false - - -
3 claiming false arrest, false imprisonment.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 JUDGE SMITH: Why - - - I'm sorry.

6 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
7 Smith, go ahead.

8 JUDGE SMITH: Thank you. I have a
9 procedural question. Suppose we agree with you on
10 the main issue that the board did decide a question
11 of fact, which would make collateral estoppel, and we
12 would then - - - we would then either get to or not
13 get to the second issue, which is whether the
14 guardianship proceeding changes the result, is that
15 really before us? The Appellate Division dismissed
16 the appeal on - - - from the second of the Supreme
17 Court justice's orders - - - Justice Edmead's orders.

18 MR. MONTES: She - - - well, they did - - -
19 I guess that's correct. I mean, she - - - they
20 dismissed it only because they granted the original
21 hearing - - -

22 JUDGE SMITH: Yes, which puzzled me,
23 because actually she says she's rescinding her first
24 order and - - -

25 MR. MONTES: That's correct.

1 JUDGE SMITH: - - - replacing it with the
2 second order. But they, nevertheless, affirmed the
3 first order, dismissed the appeal from the second.
4 If you win, don't we have to send it back for them to
5 worry about what to do about the second order?

6 MR. MONTES: From a purely technical
7 standpoint, I suppose that's the case.

8 CHIEF JUDGE LIPPMAN: Okay, thanks,
9 counselor.

10 Counselor?

11 MS. HASAPIDIS: Good afternoon. May it
12 please the court, I'm Annette Hasapidis, appearing
13 for the plaintiffs in this case.

14 There's an overarching issue that has to be
15 addressed before we even reach what - - - the
16 arguments of counsel. The methodology that's been
17 employed here to identify further causally related
18 disability as a pure question of fact, is something
19 that the court should review.

20 In this case, the dissenting justices of
21 the First Department and the defendant have argued
22 that the finding at page 135 of the record, that the
23 plaintiff was suffering from no further causally
24 related disability, was a pure question of fact,
25 based upon a review of the Workers' Comp proceedings.

1 I would submit to you that in order to
2 identify an issue as a mixed question of law and
3 fact, or one of fact, for collateral estoppel
4 purposes, we don't review - - - make the
5 determination on a case-by-case basis, but we make -
6 - - and by looking at the proceedings underlying the
7 determination, but we look at the legal authority
8 that gives, in this case, the WCLJ, the ability to
9 make that determination.

10 JUDGE SMITH: What says it's not a case-by-
11 case determination?

12 MS. HASAPIDIS: In terms of identifying the
13 issue. If - - - in this case, if you were to hold -
14 - -

15 JUDGE SMITH: I think I understand what you
16 said. But can you cite some authority for it?

17 MS. HASAPIDIS: Well, the authority is more
18 logic. To adopt their rationale, would mean to open
19 the floodgates and allow everyone to question whether
20 a finding of no further causally related disability
21 is a mixed question of law and fact - - -

22 JUDGE SMITH: But haven't we done that in
23 the case - - - like in Hinchey v. Sellers, we look at
24 the New Hampshire record and we say, well, they de -
25 - - yes, they decided the legal question of

1 employment; but then look here, they found the
2 underlying facts? I mean, don't we always - - -
3 don't we always go case-by-case and look at the
4 record?

5 MS. HASAPIDIS: Well, we - - - but then
6 you'd be presuming that there was no public policy
7 concerns at play here. And the issue of further
8 cause - - - no further causally related disability is
9 based on a determination of the WCLJ that there's no
10 - - - nothing that prevents the claimant from
11 returning to work, not that he's incapable - - - that
12 all of his injuries are resolved.

13 The Workers' Compensation scheme was
14 established pursuant to our constitution, so that
15 employers would not be subject to civil lawsuits from
16 their employees. And the purpose of the scheme was
17 to resolve that loss in a separate, more consistent,
18 and predictable manner. The purpose of those
19 proceedings is to determine whether or not the
20 employee is capable of resuming his place in the
21 workforce and whether or not the employer must
22 continue to pay for lost wages and medical expenses.

23 JUDGE SMITH: Well, every - - -

24 MS. HASAPIDIS: So - - -

25 JUDGE SMITH: - - - every legal proceeding

1 is presumably designed, ultimately, to give some
2 legal label or classification to a particular set of
3 facts.

4 MS. HASAPIDIS: Right. But the defendants
5 here were defining a term of art, a further causally
6 related disability, by virtue - - - by referring to
7 the record. They're arguing that that has almost no
8 meaning here. But it does. It has a legal
9 significance, and it has a policy significance.

10 JUDGE SMITH: They're arguing that the
11 Workers' Comp judge found as a fact that your guy was
12 not disabled as of January 2006, whatever it was.

13 MS. HASAPIDIS: Yes. But he did not - - -

14 JUDGE SMITH: You say he didn't?

15 MS. HASAPIDIS: I am saying he did not.

16 The findings of fact relate - - - pertain to the
17 credibility of the physicians. The ultimate fact, as
18 the First Department found, was that there was no
19 further causally related disability. And that issue
20 means that he - - - that the finding was imbued with
21 the policy concerns within the province of the WC - -
22 -

23 JUDGE SMITH: So you're saying that if they
24 - - - if what they ultimately found was not a pure
25 factual question, we can't even look at the

1 underlying factual findings?

2 MS. HASAPIDIS: Correct. That the ultimate
3 determination - - -

4 JUDGE SMITH: Again, is there anything - -
5 - that seemed - - - that doesn't sound to me like
6 what the cases say. Is there any case that says
7 that, so you can't look at - - -

8 MS. HASAPIDIS: Well, I can refer you to
9 some of the defendant's cases. For instance, in
10 Matter of - - - excuse me - - - in Matter of Hare,
11 the determination was that the disability did not
12 prohibit employment. In Matter of Lechar, there was
13 no further causally related disability, based upon
14 the testimony of Dr. Chow - - - excuse me - - - of
15 Dr. Simon, who said that the claimant exhibits no
16 further causally related disability and - - - oh, I
17 apologize. I'm citing from the wrong case.

18 In Matter of Lechar, the court said that
19 there was no further causally related disability,
20 based upon a physician's testimony "that the claimant
21 was capable of returning to work in some capacity."
22 The issue of further causally related disability is
23 not - - - is an ultimate determination - - -

24 JUDGE SMITH: I guess - - - let me make
25 sure. You're distinguishing those cases from this

1 case. Is that the point of what you're reading
2 there?

3 MS. HASAPIDIS: Yes, to give - - - because
4 no court has defined the term of art "further
5 causally related disability". And I would submit to
6 you, it is akin to proximate cause. And this court
7 in Derdiarian said that proximate cause is imbued
8 with the policy concern of placing manageable limits
9 on the liability of a tortfeasor. Further causally
10 related disability, in this case, is intended to
11 allow a WCLJ to make a determination of whether the
12 employee is capable of returning to work in some
13 capacity. The defendants have asked - - -

14 JUDGE SMITH: Is it implicit in your
15 argument that no determination of whether there's a
16 further causally related disability could ever be
17 collateral estoppelled, because it's not a fact
18 issue?

19 MS. HASAPIDIS: That's correct. They can
20 seek to apply - - - have preclusive effect to the
21 underlying findings. They didn't here because,
22 frankly, no court has accorded collateral estoppel
23 effect to a credibility determination. And the
24 underpinnings of the WCLJ's determination was related
25 to the credibility of - - -

1 JUDGE SMITH: No court has ever accorded
2 collateral estoppel effect to a credibility
3 determination?

4 MS. HASAPIDIS: There's - - -

5 JUDGE SMITH: You surprised me. I mean, I
6 thought that's what collateral estoppel was for. You
7 have a trial on facts, which is usually on
8 credibility.

9 MS. HASAPIDIS: No, no.

10 THE COURT: A jury - - -

11 MS. HASAPIDIS: To a deter - - - to a
12 determination that a witness is not credible. That's
13 what I'm saying here. There are issues of fact that
14 are resolved based on credibility determinations.
15 There was no issue of fact resolved on a credibility
16 determination - - -

17 CHIEF JUDGE LIPPMAN: Let me switch gears
18 on you.

19 MS. HASAPIDIS: Sure.

20 CHIEF JUDGE LIPPMAN: What's the
21 significance of the uncontested guardian proceeding?

22 MS. HASAPIDIS: The significance of the
23 uncontested guardianship proceedings - - -

24 CHIEF JUDGE LIPPMAN: Why would it have any
25 significance based on the fact that it was

1 uncontested, no new evidence presented?

2 MS. HASAPIDIS: There was new evidence.

3 CHIEF JUDGE LIPPMAN: What's the new
4 evidence?

5 MS. HASAPIDIS: With all due respect. Dr.
6 Bonafina's report, which is included in this record,
7 indicated that the plaintiff had sustained a brain
8 shear injury. This was based upon testing that had
9 been requested by the Workers' Compensation physician
10 who testified for the plaintiff. Both - - -

11 JUDGE GRAFFEO: Did the judge in the
12 guardianship - - - was there evidence of the
13 determination of the Workers' Comp board?

14 MS. HASAPIDIS: The record that I have
15 indicates that that information was not before the
16 judge in the guardianship proceeding. But that's - -
17 - but that's not relevant. They're seeking to
18 establish, essentially, summary judgment on the
19 duration of damages. And this guardianship order,
20 which had to be based upon clear and convincing
21 evidence under Section 8112 of the Mental Hygiene
22 Law, raised a question of fact.

23 Dr. Kuhn initially, in the 2006
24 guardianship proceeding, had indicated that he
25 believed at the time, that the plaintiff could handle

1 some of his affairs. After reviewing Dr. Bonafina's
2 report, he had advised the court evaluator that he
3 changed his opinion and he believed that Mr. Verdugo
4 was irreparably harmed.

5 JUDGE GRAFFEO: Did the evaluator know what
6 happened in front of Workers' Comp?

7 MS. HASAPIDIS: I believe she knew that the
8 dam - - - that the benefits had been terminated, but
9 not the circumstances of termination.

10 JUDGE GRAFFEO: I'm trying to figure out
11 why all this information wasn't put in front of the
12 second judge. Because it seems to give the
13 appearance that it was an attempt to try to reopen
14 this issue - - -

15 MS. HASAPIDIS: Well - - -

16 JUDGE GRAFFEO: - - - and create new
17 evidence.

18 MS. HASAPIDIS: - - - well, Judge Graffeo,
19 second judge - - - there were - - - you mean the
20 guardianship judge?

21 JUDGE GRAFFEO: Yes.

22 MS. HASAPIDIS: Well, it was unnecessary.
23 The court evaluator was retained. And all issues and
24 questions asked of the court evaluator - - - asked by
25 the court evaluator, were answered. And there's no

1 indication anyone made an overt attempt.

2 The information about the finances of the
3 family were before the court evaluator, and she did
4 not inquire further about any termination of
5 benefits.

6 I think - - - but I would go back to - - -
7 the reason why this is new evidence and why it was
8 not in front of the Workers' Comp board, is because
9 the testing was not requested. Assuming you get to -
10 - - you rule that the collateral estoppel doctrine
11 applies here because the issue of no further causally
12 related disability raises a pure question of fact in
13 this proceeding, then you have to conclude that my
14 clients were not given a full and fair opportunity.
15 Drs. Kuhn and Dr. Zaretsky both asked and represented
16 on the stand that the plaintiff was suffering from a
17 neurological deficit that could not be identified
18 further in the absence of neuropsychological testing.
19 And the WC - - -

20 CHIEF JUDGE LIPPMAN: Counselor - - -

21 MS. HASAPIDIS: Yes.

22 CHIEF JUDGE LIPPMAN: - - - assuming we
23 don't agree with you and that we agree with your
24 adversary on duration, are there any other issues
25 left to be dealt with, like post-traumatic stress, et

1 cetera?

2 MS. HASAPIDIS: Well, the post-traumatic
3 stress, the order was rescinded and modified to
4 sustain it for post-traumatic stress, although Mr.
5 Verdugo - - -

6 CHIEF JUDGE LIPPMAN: Going forward, I
7 mean, yes.

8 MS. HASAPIDIS: - - - Mr. Verdugo was not
9 given any benefits from Workers' Compensation. So my
10 understanding would be that it would have preclusive
11 effect if you ruled that this raised a pure question
12 of fact.

13 The final point I'd like to raise is that
14 the defendants have argued that we did not prove a
15 full and fair opportunity here simply because the
16 testimony by the physicians on the stand that Mr.
17 Verdugo required further testing, was insufficient to
18 raise the issue. And the defendant's own case, the
19 Matter of Lucky Wok, which is cited in their reply
20 brief, is a case in which further neuropsychological
21 testing was ordered by the WCLJ, based upon the
22 testing - - - the testimony of the physician.

23 CHIEF JUDGE LIPPMAN: Okay, thank you - - -

24 JUDGE SMITH: Can I just sneak in one - - -

25 CHIEF JUDGE LIPPMAN: Judge Smith, go

1 ahead.

2 JUDGE SMITH: - - - again, one extra
3 question?

4 CHIEF JUDGE LIPPMAN: Sure.

5 JUDGE SMITH: Your adversary says that the
6 purpose of the guardianship was an end run around the
7 Workers' Comp board. What do you say to that?

8 MS. HASAPIDIS: No. I say that that was
9 not an end run. There was a great deal - - -

10 JUDGE SMITH: What was the purpose of it?

11 MS. HASAPIDIS: To protect the injured
12 plaintiff, because, as the record shows, when he was
13 - - - when he did not have a guardian, prior counsel
14 had him sign off on Peachtree Settlement Funding
15 loans, to which - - - for which he would be held
16 responsible. The wife was not called into counsel's
17 office at the time.

18 JUDGE SMITH: And the plaintiff didn't get
19 all the money, or didn't get very much of the money?

20 MS. HASAPIDIS: Did - - - right. Did not
21 get the money. No accounting has been provided for
22 it. So when new counsel came in, his first and
23 foremost concern was that something like this did not
24 happen again, and that his client would be protected.

25 And this was represented to Justice Edmead

1 in the lower court. He re - - - counsel requested a
2 stay of the proceedings so that the guardianship
3 order could be secured, and so Justice - - - and
4 Justice Edmead denied the stay.

5 CHIEF JUDGE LIPPMAN: Okay. Thanks,
6 counsel.

7 MS. HASAPIDIS: Thank you.

8 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

9 MR. MONTES: Going back to the guardianship
10 order and whether this is anything new. In the Ryan
11 case the plaintiff claimed that he had receipts and
12 that these receipts were brand new, that they would
13 have proved that he didn't steal the property, and
14 that this would change - - - was substantial evidence
15 that would change the result. It was a defense to
16 collateral estoppel.

17 This court held that this alleged new
18 evidence was available, and they provide no
19 explanation why they didn't present it at the admin
20 hearing. Having been afforded a full and fair
21 opportunity to present the receipts, the failure to
22 do so, not only at the hearing, but also at every
23 related proceeding, does not somehow transform them
24 into new evidence, and is certainly not a basis for
25 defeating the application of collateral estoppel.

1 The important point about Ryan is that the
2 guardianship proceeding that was commenced in 2006,
3 resulted in a court evaluator recommendation for a
4 guardian in June of 2006, prior to the Workers'
5 Compensation Law judge decision. That recommendation
6 could have been brought to the attention of the
7 Workers' Compensation Law judge. It then could have
8 been brought to the attention of the Workers'
9 Compensation board. It then could have been brought
10 to the attention of the Workers' Compensation board
11 when they moved to reopen.

12 All three of those instances, that
13 information could have been presented to Workers'
14 Compensation, and it wasn't. So like in the Ryan
15 case, it's not anything new. It's not new evidence.

16 And on the last point - - -

17 JUDGE PIGOTT: I don't recall this from the
18 record, but quite often people have different lawyers
19 for Workers' Comp as opposed to personal injury and
20 things like that, and the decisions are quite narrow.
21 And what occurred to me is that if somebody lost a
22 leg, they may have no causally related disability if
23 they're a typist. I mean, they can do their work
24 even though maybe they miss three weeks because they
25 had to get the leg fixed.

1 So they go to Workers' Comp and it says,
2 well, there's no causally related disability here.
3 You can still type. At the same time, though, he's
4 got a pretty good cause of action, it would seem to
5 me, for all kinds of future damages. Wouldn't you
6 agree?

7 MR. MONTES: Right. The issue here,
8 though, wasn't can he go back to work. And that's
9 something that we disagree with the plaintiff. Had
10 the experts testified yes, he's disabled, but not
11 disabled so much that he can't go back to work, then
12 I would agree that that might be an issue. But that
13 was not the basis here - - -

14 JUDGE PIGOTT: No, but my point is that no
15 one's aiming over the horizon at the Worker's Comp
16 board. I mean, they're focused on a very narrow
17 issue of causal relationship, things like that.
18 They're not looking at a larger panorama of issues
19 that come out in a personal injury action.

20 MR. MONTES: But the emphasis in that
21 proceeding was, was he disabled, period. And that is
22 a question that goes broadly beyond not just this
23 case, but overall.

24 JUDGE GRAFFEO: Was all this neurological
25 testing that your adversary discussed done before - -

1 -

2 MR. MONTES: Yes.

3 JUDGE GRAFFEO: - - - the determination of
4 the Workers' - - -

5 MR. MONTES: Yes.

6 JUDGE GRAFFEO: - - - Comp board?

7 MR. MONTES: It was done - - - it was done
8 on May 13th, and the final date to present evidence
9 to the Workers' Compensation Law judge was May 24th.
10 So all of it was available. All of it could have
11 been provided.

12 And if I may just answer a quick technical
13 question that Judge Smith asked?

14 CHIEF JUDGE LIPPMAN: Very quickly,
15 counsel.

16 MR. MONTES: Judge Smith, I answered your
17 question that technically speaking I think that you
18 might be correct that you would have to remand. But
19 the - - - what they ordered was - - - the question
20 that's been presented to this court was, was their
21 order correct. And to the extent that their order
22 was based upon the original order and not the order
23 on renewal, I think this Court has the ability to say
24 that that was incorrect, that they should have done
25 it based on the renewal motion, because it superseded

1 the original one. And since the issues were
2 litigated in the Appellate Division, and had been
3 presented to this court - - -

4 JUDGE SMITH: In other words, we're not
5 bound - - - I mean, if the Appellate Division erred
6 in saying - - -

7 MR. MONTES: Correct.

8 JUDGE SMITH: - - - that they were
9 reviewing the first order when they were really
10 reviewing the second one, we can look through that
11 and review the second one?

12 MR. MONTES: Exactly. Because why send it
13 back to have this court - - -

14 CHIEF JUDGE LIPPMAN: Okay, counselor.
15 Thanks. Thank you both.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Maria Auqui v. Seven Thirty One Limited Partnership, et al., No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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