SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 23, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4094 The People of the State of New York, Respondent, Ind. 4891/06

-against-

Calvin Yoy,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about September 11, 2007, unanimously affirmed.

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

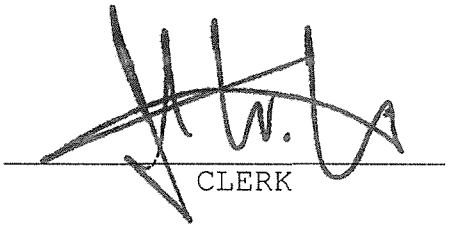
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department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

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: SEPTEMBER 23, 2008



CLERK

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4095 Herbert Feinberg, et al., Index 105403/06
Plaintiffs-Appellants,

-against-

Marsh USA Inc., et al.,
Defendants-Respondents,

Metropolitan Life Insurance Company, etc.,
Defendant.

Richard L. Derzaw, New York, for appellants.

Seyfarth Shaw LLP, New York (Jonathan P. Wolfert of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 18, 2007, which, in an action against an insurance broker seeking damages for fraud, violation of General Business Law § 349, violation of Insurance Law § 2117, and negligence, arising out of the broker's alleged failure to disclose certain information about the life insurance policies it had procured and the issuing insurer, granted the broker's motion to dismiss the complaint, unanimously affirmed, with costs.

The motion court correctly found that the broker is a released party within the broad but unambiguous definition of "Agent" contained in a release that settled a class action against the insurer (*see Savoy Mgt. Corp. v Leviev Fulton Club, LLC*, 51 AD3d 520, 520-521 [2008]), and, in the absence of other argument concerning the applicability of the release, correctly

ruled that it conclusively bars all of plaintiffs' claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). As an alternative holding, we also conclude that each of plaintiffs' causes of action is time-barred.

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

ENTERED: SEPTEMBER 23, 2008

CLERK

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4096 Felix Reyes, Index 26845/04
Plaintiff-Appellant,

-against-

Jose M. Esquilin,
Defendant-Respondent,

Shivanie Ramnarine, et al.,
Defendants.

The Law Offices of Alvin M. Bernstone, LLP, New York (Matthew Albert Schroeder of counsel), for appellant.

Litchfield Cavo LLP, New York (Sean Hyun-Baek Chung of counsel), for respondent.

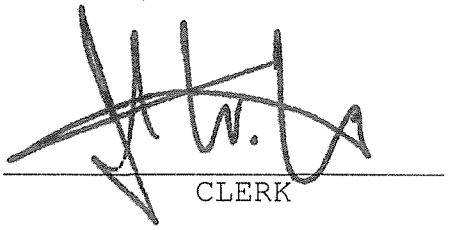
Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered July 5, 2007, which granted defendants' motions for summary judgment dismissing the complaint for lack of a serious injury as required by Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff failed to present objective medical evidence responsive to defendants' showing that the MRIs of plaintiff taken shortly after the accident revealed only age-related degenerative changes, not any sudden trauma that can be causally related to the accident (*see Pommells v Perez*, 4 NY3d 566, 579 [2005]; *Ronda v Friendly Baptist Church*, 52 AD3d 440 [2008]; *Becerril v Sol Cab Corp.*, 50 AD3d 261 [2008]). Absent such evidence, it does not avail plaintiff's 90/180-day claim that defendants' experts did not address his condition during the

relevant period of time (*see Blackwell v Fraser*, 13 AD3d 157, 157 [2004]; *cf. Webb v Johnson*, 13 AD3d 54, 55 [2004]).

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

ENTERED: SEPTEMBER 23, 2008



CLERK

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4102 Myra Sutin, Index 102618/01
Plaintiff-Respondent,

-against-

Manhattan and Bronx Surface Transit
Operating Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellant.

Joelson & Rochkind, New York (Geofrey C. Liu of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered on or about June 22, 2007, which, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

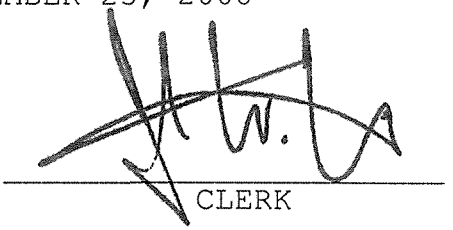
A triable issue of fact exists as to whether defendant breached its duty to plaintiff to stop the bus at a place from which she could safely disembark and leave the area since the parties offer conflicting accounts regarding the positioning of the bus in relation to the curb when it came to a stop (*see Malawer v New York City Tr. Auth.*, 6 NY3d 800 [2006], *affg* 18 AD3d 293 [2005]). Specifically, a triable issue of fact exists regarding how far from the curb the bus stopped.

We note, however, that plaintiff impermissibly raised a theory of liability in opposition to the motion that was not articulated in her notice of claim. The notice of claim states

that the bus driver "failed to provide a safe location for passengers to exit"; her complaint contained a substantially similar allegation. Nowhere in her notice of claim, complaint or bill of particulars did plaintiff allege that the bus driver failed to "kneel," i.e., lower, the bus prior to letting her off. Moreover, plaintiff's General Municipal Law § 50-e hearing testimony makes plain that her theory of liability is that "the positioning of the bus," i.e., its proximity to the curb when plaintiff disembarked, caused her trip-and-fall accident. Accordingly, plaintiff is precluded from raising this new theory in opposition to the motion for summary judgment (*see Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3 AD3d 410 [2004]; *see also Barksdale v New York City Tr. Auth.*, 294 AD2d 210 [2002] [Supreme Court correctly granted defendant's motion in limine to preclude plaintiff from offering evidence at trial respecting theory of liability not set forth in notice of claim]).

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

ENTERED: SEPTEMBER 23, 2008



CLERK

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4103 In re Victoria D.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), presentment agency.

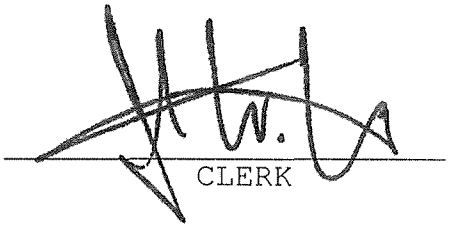
Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about October 30, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she committed acts which, if committed by an adult, would constitute the crimes of petit larceny and criminal possession of stolen property in the fifth degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to vacate the fact-finding determination on the ground that her attorney deprived her of the right to effective assistance of counsel. The record establishes that counsel consulted with appellant and her mother at the conclusion of the presentment agency's case, and advised appellant not to testify. Thereafter, without any protest by appellant or her mother, appellant's counsel informed the court that "[a]fter speaking to my client and her mother at

this point the respondent rests." The record does not support appellant's claim that counsel defied her wishes by resting before she had an opportunity to testify. Although appellant had a personal right to testify (*see People v Mason*, 263 AD2d 73, 76-77 [2000]), the record indicates that "counsel dissuaded, rather than foreclosed, [appellant] from testifying" (*People v Bussey*, 276 AD2d 331, 332 [2000], *lv denied* 96 NY2d 732 [2001]). Indeed, appellant did not claim in her motion that before her attorney rested she informed him that she wished to testify and that he acted in defiance of her wishes. Rather, appellant claimed only that she did not understand that once she rested she would be foreclosed from testifying. Even assuming appellant was laboring under such a misapprehension, appellant failed to allege facts that would warrant imputing that misapprehension to any actions or statements by her counsel, let alone actions or statements evincing any error by her counsel. Accordingly, we reject appellant's argument that a hearing was necessary to determine the content of appellant's consultations with her attorney.

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

ENTERED: SEPTEMBER 23, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 23, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
Milton L. Williams
James M. McGuire
Helen E. Freedman, Justices.

The People of the State of New York, SCI 3708/07
Respondent,

-against- 4104

Raymond Williamson, also known as
Randolph Williamson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert G. Seewald, J.), rendered on or about October 25, 2007,

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

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

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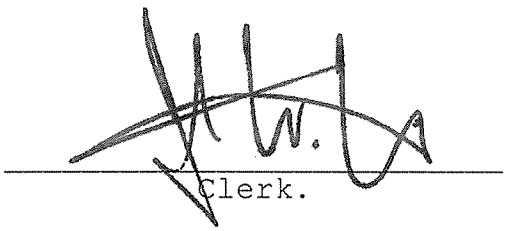


Clerk.

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

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4105 The People of the State of New York, Respondent,

-against-

John Andrew, Defendant-Appellant. Ind. 2482/06

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

Robert M. Morgenthau, District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered February 13, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 4½ 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, including its resolution of the minor inconsistencies in testimony that defendant cites.

The court properly exercised its discretion when it denied defendant's request to question the arresting detective regarding certain federal lawsuits, and when it declined to disclose, or

review in camera, the detective's disciplinary file. The detective was one of several officers named as defendants in two actions, principally against the City of New York, that involved a single incident that occurred one year before the incident at issue in this case. The mere existence of the federal litigation was not a proper subject for cross-examination (*see People v Antonetty*, 268 AD2d 254 [2000], *lv denied* 94 NY2d 945 [2000]), and the defense failed to establish a good faith basis for eliciting the underlying facts as prior bad acts (*see id.*), as the complaints and amended complaints in the federal actions did not allege, or even support an inference, that this detective personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers. There is also no evidence that the detective intentionally misled anyone about his involvement in the federal case; accordingly, this was neither a proper subject for an inquiry in itself, nor a basis for any other inquiry. Similarly, defendant failed to make a sufficient showing to warrant disclosure or in camera review of the detective's disciplinary record (*see* Civil Rights Law § 50-a[2]; *People v Gissendanner*, 48 NY2d 543, 548-551 [1979]). In any event, any error in failing to permit cross-examination based on the federal litigation or to review the disciplinary records was harmless, as the People's case rested primarily on the testimony of an undercover officer, and the arresting detective at issue

primarily testified to facts confirmed by defendant's own testimony.

The court also properly exercised its discretion when it precluded defendant from calling his girlfriend to give testimony that would have been cumulative to other testimony, of dubious relevance to any material issue at trial, and of little, if any, probative value (*see People v Hector*, 248 AD2d 184 [1998], *lv denied* 92 NY2d 898 [1998]). We also find that any error in precluding the witness's testimony was harmless.

The court also properly exercised its discretion when it precluded defense counsel from arguing in summation that the jury should draw a negative inference from the People's failure to call additional police officers to testify, as there is no reason to believe that any uncalled officers were in a position to see the drug transaction, or were otherwise able to provide any relevant testimony (*see People v Vasquez*, 288 AD2d 17 [2001], *lv denied* 97 NY2d 734 [2002]).

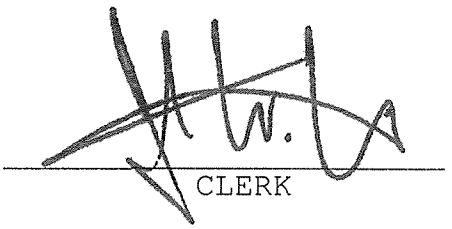
Defendant failed to preserve his constitutional arguments with regard to the above-discussed issues (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Green*, 27 AD3d 231, 233 [2006], *lv denied* 6 NY3d 894 [2006]), or any of his claims concerning the court's alleged interference with the presentation of the defense

case, and we decline to review them in the interest of justice.

As an alternative holding, we also reject them on the merits.

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

ENTERED: SEPTEMBER 23, 2008



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Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4106 Adam Stawski, et al., Index 570438/06
Plaintiffs-Appellants,

-against-

Pasternack, Popish & Reif, P.C., et al.,
Defendants-Respondents,

Michael B. Parson, Esq., et al.,
Defendants.

Morelli Ratner, P.C., New York (Scott J. Kreppein of counsel), for appellants.

Hawkins, Feretic & Daly, L.L.P., New York (Matthew J. Zizzamia of counsel), for respondents.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered May 23, 2007, which reversed, to the extent appealed from, an order of the Civil Court, New York County (Jeffrey K. Oing, J.), entered September 14, 2005, denying the motion of defendants-respondents for summary judgment dismissing plaintiffs' legal malpractice claim as it relates to Labor Law § 240(1), unanimously reversed, on the law, without costs, respondents' motion denied and plaintiffs' cross motion for summary judgment on the legal malpractice claim as it relates to Labor Law § 240(1) granted.

Plaintiffs commenced this action for legal malpractice based on respondents' representation of them in a personal injury action arising from injuries sustained by plaintiff Adam Stawski while working on a construction project. Plaintiffs allege that

as a result of respondents' failure to file a timely notice of claim, they were precluded from prosecuting their claims against the owner of the school building under construction, including a claim for violations of Labor Law § 240(1).

To establish a prima facie case of legal malpractice, plaintiffs must show that they would have succeeded on the merits of the underlying action but for the attorney's negligence (*Davis v Klein*, 88 NY2d 1008 [1996]; *Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 218-219 [2007]). The evidence demonstrates that plaintiffs established their entitlement to summary judgment on the legal malpractice claim as it relates to Labor Law § 240(1). It is undisputed that while installing a temporary window, plaintiff was injured after he was struck by a falling cinder block. Part of the construction project involved work on pipes inside a cinder block column approximately 10 feet above where plaintiff was working. To facilitate this work, a cinder block was cut from the column, and was returned to the open cavity from which it had been cut without being cemented or secured in any way. Under these circumstances and inasmuch as falling-object liability is not limited to cases in which the falling object is being hoisted or secured at the precise time it falls, plaintiffs would have succeeded on the merits of a Labor

Law § 240(1) claim (*Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404 [2007]; *see Quattrocchi v F.J. Sciame Constr. Co., Inc.*, __ NY3d __, 2008 NY Slip Op 06736 [Sept 9, 2008]; *Outar v City of New York*, 5 NY3d 731 [2005]; *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479 [2007]; *cf. Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]).

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

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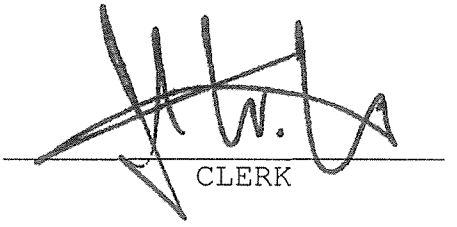

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Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4108 Elias Crespo, Index 113301/05
Plaintiff-Appellant,

-against-

Kwon F. Chan, et al.,
Defendants-Respondents.

Ogen & Associates, P.C., New York (Eitan Alexander Ogen of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

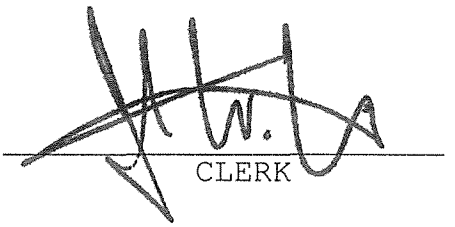
Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered May 11, 2007, which denied plaintiff's motion to set aside a jury verdict in defendants' favor, unanimously affirmed, without costs.

A fair interpretation of the evidence in this action arising out of an alleged motor vehicle accident supports the finding that the vehicle in which plaintiff was a passenger and the vehicle driven by defendant Phan never even came into contact, as defendant Phan testified. Accordingly, the jury reasonably could have concluded that defendant Phan did not cause the injury to plaintiff's right arm that plaintiff claimed he suffered (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). Issues of credibility are for the jury and its resolution of such issues is entitled to deference (*see White v New York City Tr. Auth.*, 40 AD3d 297, 297-298 [2007]). Furthermore, the evidence

shows that it was reasonable to conclude that Phan exercised due care when checking the traffic conditions prior to backing his taxi out of an angled-in parking space.

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

ENTERED: SEPTEMBER 23, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 23, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
Milton L. Williams
James M. McGuire
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 22025C/05
Respondent,

-against- 4109

Kerrell Brown, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about February 16, 2006

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

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

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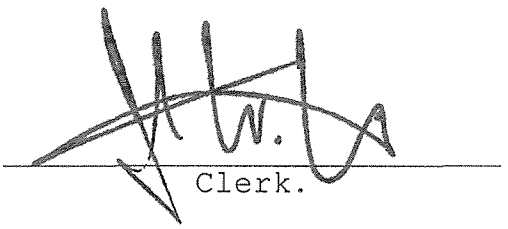


Clerk.

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

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4110 The People of the State of New York, Respondent,

-against-

Juan Colon, also known as Rafael Juan Colon, Defendant-Appellant.

Ind. 2506/02

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

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered April 22, 2004, convicting defendant, after a jury trial, of two counts of murder in the first degree, and sentencing him to concurrent terms of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. The People established that the statements defendant made prior to *Miranda* warnings were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought he was in custody (*see People v Centano*, 76 NY2d 837 [1990]; *People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]). Defendant voluntarily accompanied the police to the precinct, where he was expressly told he was not under arrest and was free to leave. Although he remained there over an extended period of time and

was questioned with increasing intensity, he was never handcuffed or otherwise restrained, he was left alone and unguarded in an unlocked interview room for significant periods of time, and he was permitted to go to the bathroom unescorted (*see e.g. People v Hernandez,* 25 AD3d 377, 379 [2006], *lv denied,* 6 NY3d 834 [2006]). The fact that the police expressed skepticism about defendant's story did not render the questioning custodial (*see People v Dillhunt,* 41 AD3d 216 [2007], *lv denied* 10 NY3d 764 [2008]). "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest" (*Stansbury v California,* 511 US 318, 325 [1994]). Furthermore, it was defendant who initiated the conversation with a detective, whom he knew from the neighborhood, in which he first admitted having had sex with the elderly victim on the day of the murder. The detective immediately stopped the conversation and, after *Miranda* warnings were administered, defendant waived his rights and gave a written statement implicating himself in the murder.

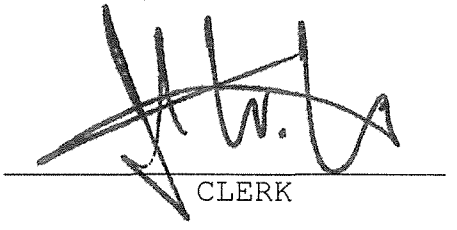
Following a six-and-one-half hour break, and after readministration of warnings, defendant made a videotaped confession to two assistant district attorneys. The evidence also supports the hearing court's finding that the videotaped statement was sufficiently attenuated from the earlier police

questioning to remove any possible taint arising from any prior constitutional violation, and render the videotape independently admissible (*see People v Paulman*, 5 NY3d 122, 130-134 [2005]).

Although defendant would have been entitled to a jury charge on the issue of the voluntariness of his pre-*Miranda* precinct statements (*see People v Cefaro*, 23 NY2d 283, 288-89 [1968]), defense counsel withdrew the request for such a charge after the court declined to give a voluntariness charge with respect to the videotaped statement. We find that, under the circumstances, the trial court correctly declined the request because the trial evidence did not raise an issue of fact for the jury as to whether the videotaped statement was voluntarily given after a clear break in questioning (*see id.*). In any event, there is no reasonable possibility that, had it been instructed on the issue of voluntariness, the jury would have found the videotaped statement, or any of defendant's other statements, to be involuntary.

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

ENTERED: SEPTEMBER 23, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 23, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
Milton L. Williams
James M. McGuire
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 8512/98
Respondent,

-against- 4111

Darius Harrison,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Martin Marcus, J.), rendered on or about March 30, 2007,

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

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

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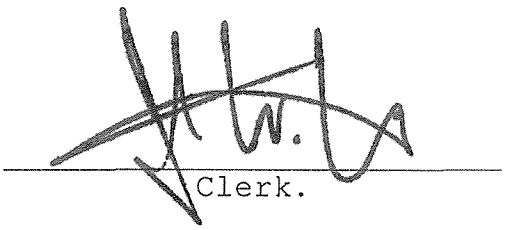


Clerk.

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

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4112N Samantha Carroll, et al.,
Plaintiffs-Appellants,

Index 109293/02
590007/06

-against-

Nostra Realty Corporation,
Defendant-Respondent.

[And a Third Party Action]

Warner & Scheuerman, New York (Karl E. Scheuerman of counsel), for appellants.

Thomas D. Hughes, New York (David D. Hess of counsel), for respondent.

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered February 27, 2007, which denied plaintiffs' motion to vacate the court's dismissal of the action and restore the case to the calendar, unanimously affirmed, without costs.

It is well established that in order to obtain relief from a judgment or order on the basis of an excusable default pursuant to CPLR § 5015(a)(1), the moving party must provide a reasonable excuse for the failure to appear and must further demonstrate that the case or defense has merit (*Goldman v Cotter*, 10 AD3d 289 [2004]). Assessment of the sufficiency of the proffered excuse and the adequacy of merit rests within the sound discretion of the court (*Mediavilla v Gurman*, 272 AD2d 146 [2000]).

In this matter, the discovery phase of the case was delayed for a number of years. Eventually, the Supreme Court directed

plaintiffs to file a note of issue and proceed to trial. In an order dated August 14, 2006, the parties were directed to appear for trial on September 18, 2006 and were instructed that "no adjournments shall be granted."

On September 18, 2006, counsel for all parties appeared before Justice Gammerman as directed. Over the objections of defendant's counsel, and at the request of plaintiffs' counsel, Frederic M. Gold, the trial was adjourned to October 12, 2006, based on Mr. Gold's schedule.

On October 11, 2006, Mr. Gold appeared on another matter in Westchester County, was issued a jury slip on that matter, and was instructed to return on October 16, 2006 for jury selection.

On October 12, 2006, Mr. Gold's partner, Jesse Sable, appeared in Part 40 before Justice Gammerman with an "Affirmation of Engagement," in which Mr. Gold affirmed that he was actually on trial in another matter. However, the court learned that Mr. Gold was not on trial on that date, and that the other matter had been scheduled for jury selection on October 16, 2006. The court then rejected the affirmation of engagement as misleading, and dismissed this action. On appeal, plaintiffs contend that they demonstrated a reasonable excuse because their counsel was actually engaged on trial on October 12, 2006.

Section 125.1(b) of the Rules of the Chief Administrator of the Courts states: "[e]ngagement of counsel shall mean actual

engagement on trial or in argument before any state or federal trial or appellate court, or in a proceeding conducted pursuant to rule 3405 of the CPLR and the rules promulgated thereunder." On October 12, 2006, Mr. Gold was not actually engaged on trial or in argument before any court, and as the record reveals, was actually preparing witnesses on another matter. Accordingly, we reject plaintiffs' contention that they demonstrated a reasonable excuse for failing to proceed to trial in this action.

While there is no express definition of the term "on trial" in the applicable rules, it is commonly understood that a trial commences with the selection of a jury (*see Draves v Chua*, 168 Misc2d 314, 315 [Sup Ct, Erie County 1996]; *Wright v Centurion Investigations, Inc.*, 109 Misc2d 624 [Civil Court, Kings County 1981]; *see also* CPL 1.20[11]). In any event, under no reasonable understanding of that term can an attorney who is directed to appear days later to select a jury be considered to be on trial on the day the direction is given. Contrary to plaintiffs' contention, an attorney is not actually engaged on trial when he is issued a jury slip. Accordingly, Mr. Gold was not actually engaged on trial in another matter on October 12, 2006 since he had not commenced selecting a jury in that case.

At a minimum, even if Mr. Gold believed that he was actually

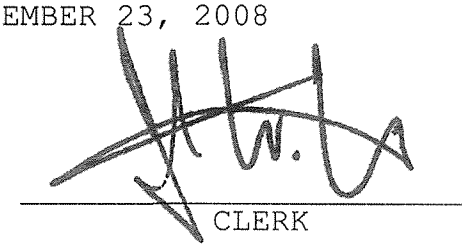
engaged on another matter, he was required to appear on October 12, 2006 on this action, and, pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 125.1(c), permit the courts to determine which trial should proceed first.

We also find that plaintiffs failed to demonstrate a meritorious cause of action. Specifically, the pleadings and affidavits submitted by plaintiffs were self-serving and conclusory. Further, plaintiffs failed to submit any sworn affirmations from physicians detailing their injuries and linking them to the alleged mold in their apartment.

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

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

ENTERED: SEPTEMBER 23, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 23, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
Milton L. Williams
James M. McGuire
Helen E. Freedman, Justices.

In re Seann Patrick Riley, on behalf of Paul Germain
Petitioner,

-against-

4113
[M-3158]

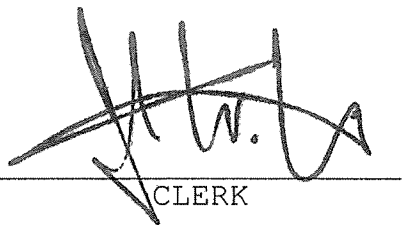
Hon. Ralph Fabrizio, etc., et al.,
Respondents.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED:



CLERK

Tom, J.P., Williams, McGuire, Freedman, JJ.

4107 Alejandro Chittick, et al., Index 20955/04
Plaintiffs-Appellants,

Jose Hildago, et al.,
Plaintiffs,

-against-

USA Cycling Inc., doing business
as "U.S.C.F.," "N.O.R.B.A." "U.S. Pro,"
Defendant-Respondent,

Anthony Van Dunk, doing business as
"Metropolitan Cycling Association," et al.,
Defendants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for Alejandro Chittick, appellant.

David J. DeToffol, New York, for David Fields, appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Steven H. Rosenfeld of counsel), for respondent.

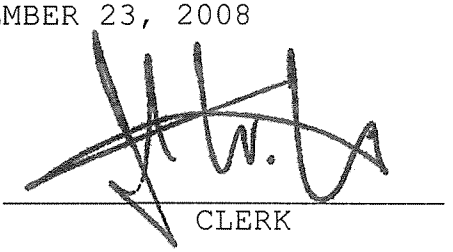
Order, Supreme Court, Bronx County (Alan J. Saks, J.), entered October 3, 2007, which granted the motion of defendant USA Cycling, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The record establishes that USA Cycling merely sanctioned, i.e., lent its name to, the bicycle race during which plaintiff spectators were struck by the three-wheel scooter operating as the rear pace vehicle. Since it had no control over the race, USA Cycling had no duty to prevent any negligence involved therein (*see e.g. Mauro v City of Yonkers*, 282 AD2d 720 [2001]).

The fact that USA Cycling provided its rule book to defendant Van Dunk, the organizer of the race, did not impose a duty upon USA Cycling to enforce any of the rules therein (*see id.*). Nor does the fact raise an inference as to the existence of a principal-agency relationship between USA Cycling and Van Dunk.

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

ENTERED: SEPTEMBER 23, 2008



CLERK

SEP 23 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
James M. McGuire
Rolando T. Acosta, JJ.

3850
Index 603624/05
590185/07

Executive Risk Indemnity Inc.,
Plaintiff-Respondent,

-against-

Pepper Hamilton LLP, et al.,
Defendants-Appellants,

Westport Insurance Corporation,
Defendant-Respondent-Appellant.

- - - - - - - - - - -

Pepper Hamilton LLP, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Continental Casualty Company, et al.,
Third-Party Defendants-Respondents.

Defendants Pepper Hamilton LLP and W. Roderick Gagné appeal from an order of the Supreme Court, New York County (Karla Moskowitz, J.), entered on or about January 4, 2008, which, inter alia, granted the motion and cross motion of plaintiff Executive Risk Indemnity, Inc. and third-party defendants Continental Casualty Company and Twin City Fire Insurance Company, and declared that they are not obligated to defend and indemnify defendants Pepper Hamilton LLP and W. Roderick Gagné under the subject excess professional liability insurance policies.

Cahill Gordon & Reindel LLP, New York (Charles A. Gilman of counsel), and Dickstein Shapiro LLP, New York (Randy Paar, Edward Tessler, Joseph D. Jean and Jesse P. Levine of counsel), for Pepper Hamilton LLP and W. Roderick Gagné, appellants.

Garbarini & Scher, P.C., New York (William D. Buckley and Gregg D. Weinstock of counsel), for Westport Insurance Corporation, respondent-appellant.

Kornstein Veisz Wexler & Pollard, LLP, New York (William B. Pollard, III, Howard S. Veisz, Catherine M. Irwin and Amy C. Gross of counsel), for Executive Risk Indemnity Inc., respondent.

Cozen O'Connor, New York (Kevin M. Mattessich and Sandra Schultz Newman of counsel), for Continental Casualty Company, respondent.

Edwards Angell Palmer & Dodge LLP, New York (Ira G. Greenberg, John F. McCarrick, Samuel B. Mayer and Scott H. Casher of counsel), for Twin City Fire Insurance Company, respondent.

SAXE, J.

The law firm Pepper Hamilton and one of its members, W. Roderick Gagné, were deprived of millions of dollars in professional liability insurance coverage purchased by the firm, by the order of the motion court declaring that the three excess insurance carriers have no obligation to indemnify the firm. The court reasoned that because the law firm knew of misconduct on the part of its client, and of the likelihood that claims would be made against the firm itself based upon its representation of that client while the misconduct took place, it had an obligation to inform the insurers of its knowledge of the misconduct and its concern that it might be subject to suit as a result when applying for coverage or for renewal of coverage. As to two of the insurers, the court precluded coverage under the policies' "prior knowledge" exclusions, and as to the third, it held that the insurer was entitled to rescission of the policy effective the year the claims were made.

The underlying claims against counsel arise out of an alleged securities fraud scheme by the firm's former client, Student Finance Corporation (SFC) and its principal, Andrew Yao. SFC was in the business of financing loans to students in trade schools, primarily truck driving schools; it then pooled the loans into certificates or securities that it sold to investors,

using private placement memoranda prepared by Pepper Hamilton. Another client of Pepper Hamilton, Royal Indemnity Company, provided credit risk insurance for the pooled loans.

It is asserted that in order to make its operations appear more successful, SFC falsely represented to investors that student loans in its securitized loan pool were not more than 90 days overdue and in default, when in fact, significant numbers of them were in default. In order to make it appear that student loans in the securitized loan pool were current, rather than more than 90 days overdue, SFC made forbearance payments from reserve accounts of its own. This practice resulted in SFC's understating its default rates, skewing its performance data for the student loans and making the certificates more attractive to investors, underwriters and credit risk insurers.

SFC's inaccurate representation of its default rates apparently began to come to light in or around March 2002, when a round of financing fell through after the lender uncovered SFC's use of forbearance payments through careful scrutiny of its financial documents. Without the new financing, SFC no longer had the liquidity to make up the monthly shortfalls in loan payments. According to Gagné, Yao first directly informed him in mid-March of SFC's practice of making forbearance payments for loans that would otherwise be declared in default. While Pepper

Hamilton initially continued to represent SFC, after further consideration and interoffice consultation, it withdrew from its representation of SFC on April 24, 2002.

SFC was eventually forced into bankruptcy, and in April 2004, the bankruptcy trustee contacted Pepper Hamilton to request that it enter into a tolling agreement while he considered whether to bring any claims against the law firm. At this point, Pepper Hamilton notified its primary professional liability insurer, Westport Insurance Corporation, of the potential claim; the excess insurers -- Executive Risk Indemnity Inc. (ERII), Continental Casualty Company and Twin City Fire Insurance Company -- were notified as well.

In November 2004, the bankruptcy trustee commenced an action against the firm and Gagné; another action was commenced by Royal Indemnity in March 2005. These underlying professional liability claims against Pepper Hamilton and Gagné allege negligence in their failure to discover SFC's securities fraud, as well as actual complicity in SFC's fraudulent scheme.

Pepper Hamilton's professional liability coverage for the period from 2001 to 2004 was as follows:

April 27, 2001 to October 27, 2002 ("Year 1")		
Primary	Westport	$20 million
1st Excess	Continental	$30 million

October 27, 2002 to October 27, 2003 ("Year 2")		
Primary	Westport	$10 million
1st Excess	Twin City	$10 million
2nd Excess	Executive Risk	$10 million
3rd Excess	Continental	$10 million

October 27, 2003 to October 27, 2004 ("Year 3")		
Primary	Westport	$10 million
1st Excess	Twin City	$10 million
2nd Excess	Executive Risk	$10 million
3rd Excess	Continental	$10 million

While Westport did not contest its obligation to defend Pepper Hamilton, the excess insurers interposed various challenges to coverage, and all the insurers disputed the proper period in which the claims should be deemed to fall. On October 12, 2005, ERII commenced this action against Pepper Hamilton, Gagné and Westport, seeking a declaration that it had no obligation to indemnify the firm or its partner in connection with the actions brought by the bankruptcy trustee and Royal. Pepper Hamilton and Gagné counterclaimed for a declaration in their favor and brought third-party claims against the other two excess carriers. Continental cross-claimed for rescission of its excess policies for 2002-2003 and 2003-2004, based upon the alleged nondisclosure of information known to the law firm prior to their issuance.

The excess insurers all moved for summary judgment, contending that they had no coverage obligation, due to the application of the prior knowledge exclusion in their policies,

or because the claim should be deemed to fall within a period in which they had no coverage obligation, or on the ground that rescission of their policy covering the period of the claim was required based upon a misrepresentation of facts in Pepper Hamilton's application for insurance. The motion court granted the excess insurers' motions. It declared that the prior knowledge exclusion applied as a matter of law, reasoning that the documentary submissions -- numerous e-mails and memoranda acknowledging the possibility of a lawsuit against them -- establish as a matter of law that in 2002 Gagné and Pepper Hamilton were aware of facts that could lead a reasonable attorney to anticipate litigation arising from its representation of SFC. The motion court also granted Continental's cross motion, concluding that Continental was entitled to rescind its 2002-2003 and 2003-2004 policies based upon Pepper Hamilton's failure to disclose the SFC circumstances in its renewal applications and that the claim could not fall within Continental's 2001-2002 policy, since the insurer was not notified of the claim until 2004, and the rescission of the later policies meant that the continuous coverage provision did not apply.

This appeal ensued. For the reasons that follow, we reverse.

The insurance coverage is dictated by the terms of the primary Westport policies, since the ERII, Twin City and Continental excess policies expressly incorporate the majority of the terms of the primary Westport policies. The Westport primary policies contain the following Insuring Agreement clauses:

> "I.A. The Company shall pay on behalf of any INSURED all LOSS in excess of the deductible which any INSURED becomes legally obligated to pay as a result of CLAIMS first made against any INSURED during the POLICY PERIOD and reported to the Company in writing during the POLICY PERIOD or within sixty (60) days thereafter, by reason of any WRONGFUL ACT occurring on or after the RETROACTIVE DATE, if any.
>
> "I.B. If, during the current POLICY PERIOD, any INSURED first becomes aware of a POTENTIAL CLAIM and gives written notice of such POTENTIAL CLAIM to the Company either during the current POLICY PERIOD, or during the POLICY PERIOD of any subsequent policy issued to the NAMED INSURED as a result of continuous and uninterrupted coverage with the Company, any CLAIMS subsequently made against any INSURED arising from the POTENTIAL CLAIM shall be considered to have been first made during the POLICY PERIOD the INSURED first became aware of a POTENTIAL CLAIM."

The policies define the term "claim" as a demand made upon the insured for a loss, including by a suit or an arbitration proceeding or administrative proceeding against the insured, while a potential claim is defined as either "any act, error, omission, circumstance or PERSONAL INJURY which might reasonably

be expected to give rise to a CLAIM against any INSURED under the POLICY," or "any breach of duty to a client or third party which has not resulted in a CLAIM against an INSURED."

The "prior knowledge" exclusion upon which ERII and Twin City rely provides that the policies do not apply to any claim "arising out of any act, error, or omission committed prior to the inception date of the policy which the insured knew or should have known could result in a claim, but failed to disclose to the Company at inception."

We disagree with the motion court's broad view of the nature and extent of the acts, errors or omissions and the type of knowledge to which the prior knowledge exclusion may be applied.

The two-step analysis set out in *Coregis Ins. Co. v Baratta & Fenerty, Ltd.* (264 F3d 302, 306 [3d Cir 2001]) should be used to determine whether the exclusion applies. In *Coregis*, the Third Circuit employed what it referred to as a "mixed subjective/objective standard" to determine whether a professional liability policy's similarly-worded exclusion applied. That standard asks first the subjective question of whether the insured had knowledge of the relevant facts, and second, the objective question of whether a reasonable lawyer would foresee that those facts might be the basis of a claim.

The primary focus of our analysis here is the objective

requirement that there be a basis on which to reasonably expect a claim against the law firm. Notably, it has been held that this prong of the test "does not require that the insured actually form such an expectation [that a suit or claim will result]" (*Colliers Lanard & Axilbund v Lloyds of London*, 458 F3d 231 [3d Cir 2006]), but that a reasonable person would expect the claim. By the same token, even if the evidence establishes as a matter of law that the insured *has* formed a subjective belief that a suit may ensue based upon some other party's misconduct, that does not alone establish the existence of objective facts which would support the conclusion of a reasonable professional that the insured will be subjected to professional liability claims.

Here, while evidence strongly suggests that defendant Gagné and other firm members subjectively either believed or feared that the firm might be subjected to professional liability claims by entities claiming injury as a result of SFC's conduct, his or the firm's subjective belief that a suit may ensue based upon SFC's misconduct is not enough. Pepper Hamilton's knowledge of *SFC*'s actions, and of its own legal work related to SFC's operations, may have provided objective evidence that *SFC* might be sued and supported a concomitant suspicion that those with claims against SFC might seek relief against SFC's law firm as well. But we find nothing in the record constituting objective

evidence permitting a reasonable professional to conclude that Pepper Hamilton itself did anything that would subject it to suit or other claim. Certainly, no wrongful conduct on Pepper Hamilton's part is established as a matter of law so as to entitle the insurers to summary judgment declaring that the firm knew or should have known that a claim might be made against the firm.

We recognize that the policy here, unlike that in *Selko v Home Ins. Co.* (139 F3d 146 [3d Cir 1998]), does not specify that the prior knowledge exclusion applies where there is "basis to believe that the insured had breached a professional duty." Therefore, *Selko*'s holding is not directly applicable insofar as, in accordance with that insurance policy, it requires the insurer to present facts establishing that the insured breached a professional duty. We further recognize that *Coregis v Baratta & Fenerty, supra*, may not be relied upon to require the insurers to establish a breach of a professional duty. Although the court in that matter stated that such a breach and a basis for a claim are "two peas in a pod" and that a breach of a professional duty will tend to establish a basis for a claim (264 F3d at 307 n 3), as a matter of logic, the converse of that statement is not necessarily true. Under the terms of the policies at issue here, the insurers are not required to establish that facts known to

Pepper Hamilton establish that the firm breached a professional duty.

Nevertheless, even though the terms of the policy exclusion here do not require that the insured had prior knowledge that it breached its professional duty, we cannot read the exclusion as the insurers suggest, that is, to apply whenever the insured has knowledge of a *client*'s misconduct and represented the client while the misconduct occurred. Construing the prior knowledge exclusions strictly and narrowly, as we must (*see Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003]), we conclude that the "known of" act, error or omission at the heart of such a potential claim must be that of the insured, not that of its client. Furthermore, such act, error or omission must constitute wrongful conduct on the part of the insured; the firm's mere representation of a client while the client itself -- unknown to the firm -- engages in wrongful conduct cannot suffice.

ERII and Twin City contend that the requisite "act, error, or omission" that the law firm knew or should have known about before the policies' inception and of which it should have notified its insurers is established by numerous pieces of evidence, including the private placement memoranda the law firm prepared for SFC's use in selling the certificates, which memoranda inaccurately stated that the pooled student loans were

not in default; Gagné's e-mails informing the law firm of SFC's conduct; his memorandum to the firm's Finance and Ethics Committee seeking its input and advice; a memorandum from the firm's general counsel advising all the firm's attorneys who had been involved in providing services to SFC to save all records and to refrain from discussing the matter with anyone outside the firm, in order to protect the firm's interests; and other documents containing similar content. Other submissions, primarily e-mails from Gagné to Yao referring to SFC's use of school reserves, were offered to establish that before April 2001 Pepper Hamilton was aware of SFC's forbearance payments from reserve accounts to cover loan defaults.

The insurers' focus on evidence establishing Pepper Hamilton's and Gagné's knowledge of *SFC*'s misconduct misperceives the nature of the "act, error, omission, or circumstance" requirement for the application of the prior knowledge exclusion. The difficulty with their position is that these pieces of evidence tend to establish wrongful acts by *SFC*, not wrongful acts by Pepper Hamilton or Gagné. Even Pepper Hamilton's preparation of the private placement memoranda, in which it included information that apparently was inaccurate regarding the existence of loan defaults, does not establish -- at least not as a matter of law on a summary judgment motion -- the commission of

wrongful or improper acts by Pepper Hamilton.

We reject the suggestion that the prior knowledge exclusion applies when the knowledge possessed by the insured is that it drafted documents that the client then used to further its scheme. In our view, the policy cannot be properly read to require Pepper Hamilton to notify its potential insurers of its client's misconduct and its own recognition that it may be subjected to legal claims brought by those injured as a result of its client's misconduct. It is not enough that the firm has adverse information about a client; the firm must have itself acted improperly, so as to have itself created the possibility of a professional liability claim against it.

Although the prior knowledge exclusion pertains to "any act" of the insured and is not specifically limited to wrongful acts that will result in claims of malpractice or breach of professional duty, the provision's use of the words "any act" cannot reasonably be understood to apply to the mere act of providing professional services. Any other interpretation would require a law firm with such coverage to notify its carrier any time the firm performed ordinary and usual professional services in the course of representing a client, including the preparation of standard documents, if it discovered that the client might then have used those properly prepared documents in the course of

possibly perpetrating a fraud or other illegal act against others. It is simply unreasonable that in order to protect its liability coverage, a law firm must inform its professional liability carrier as soon as it finds out about its *client*'s possible misconduct, any time the firm believes that it could be subject as a deep pocket to claims by the *client*'s creditors.

We recognize that the plaintiffs in the underlying actions against the law firm have alleged misconduct on the part of Pepper Hamilton and Gagné and, further, that Gagné is said to have possessed enough knowledge of SFC's use of reserve accounts to render the firm complicit with SFC's scheme. If it is ultimately established that the law firm participated in the misconduct, such as by preparing documents on behalf of the client knowing that the documents contained false or insufficient information, or by knowingly creating the forbearance payment mechanism in order to assist SFC in defrauding investors, then application of the prior knowledge exclusion could be justified. But, in this context and on this evidence, those are not conclusively established facts but merely disputed factual assertions, which fail to establish, as a matter of law, the firm's knowledge of an act of misconduct of which it should have informed its professional liability insurance carriers.

We further reject ERII and Twin City's alternative argument

that as a matter of law they have no insurance obligation because the underlying claims triggered policy coverage in Year 1 (April 27, 2001 to October 27, 2002). The record before us does not support such a determination. We therefore conclude that summary judgment in favor of ERII and Twin City was improper.

A similar analysis requires the reversal of the grant of summary judgment to Continental.

The motion court granted rescission of the 2002-2003 and 2003-2004 excess policies Continental issued to Pepper Hamilton, based on Pepper Hamilton's failure to disclose, in its renewal applications, its knowledge of SFC's misconduct and the claims it believed might result. However, an insurance policy may only be rescinded due to a misrepresentation in the application when the subject matter of the misrepresentation is material to the risk and the applicant knew of the falsity and made the misrepresentation in bad faith (*see Allstate Ins. Co. v Stinger*, 400 Pa 533, 539, 163 A2d 74, 78 [1960]). Moreover, the party seeking rescission has the burden of establishing these elements by clear and convincing evidence (*Justofin v Metropolitan Life Ins. Co.*, 372 F3d 517, 521 [3d Cir 2004]).

The evidence relied upon here, as discussed, simply shows that Pepper Hamilton knew of SFC's misconduct and believed (correctly) that it might itself be subjected to lawsuits brought

by parties injured by SFC's actions. The questions of whether Pepper Hamilton gave false answers on Continental's renewal application and whether any such false answers were given in bad faith are questions of fact and cannot properly be determined as a matter of law in the context of a summary judgment motion. Even if we were to accept that the information omitted constituted information that was required by the policy renewal application, Continental fails to establish as a matter of law that if it had been informed of the client's misconduct and the firm's concern about being subject to suit as a result, it would have handled the renewal application differently. The affidavit of an underwriter asserting that, had the information been disclosed, the renewal application would have been handled differently, is not by itself sufficient to satisfy the insurer's burden (*see Feldman v Friedman*, 241 AD2d 433 [1997]; *Chicago Ins. Co. v Kreitzer & Vogelman*, 210 F Supp 2d 407, 412-413 [2002]).

Unless and until it is established that the later policies are rescinded, the continuous coverage provision of Westport's policy applies to provide for coverage based upon the 2004 notice. The grant of summary judgment to Continental was therefore improper.

Accordingly, the order of the Supreme Court, New York County (Karla Moskowitz, J.), entered on or about January 4, 2008,

which, inter alia, granted the motion and cross motion of plaintiff Executive Risk Indemnity, Inc. and third-party defendants Continental Casualty Company and Twin City Fire Insurance Company, and declared that they are not obligated to defend and indemnify defendants Pepper Hamilton LLP and W. Roderick Gagné under the subject excess professional liability insurance policies, should be reversed, on the law, without costs, and the motion and cross motion for summary judgment denied.

M-2182 ***Executive Risk Indemnity Inc. v Pepper Hamilton LLP, et al.***

Motion seeking leave to take judicial notice and for other related relief granted.

All concur.

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

ENTERED: SEPTEMBER 23, 2008