

<b>Matter of Morales v Kelly</b>
2009 NY Slip Op 30866(U)
April 8, 2009
Supreme Court, New York County
Docket Number: 107299/2008
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. M. Davis

PART 1/1

Index Number : 107299/2008  
**MORALES, ALBERTO**  
VS.  
**KELLY, RAYMOND**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 11-20-08

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

*Per*  
this motion to/for Article 78 review

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

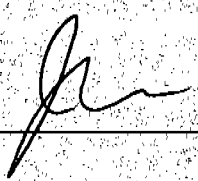
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *per her* is decided in accordance with the attached Memorandum Decision & Order.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 8, 2009

  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
In the Matter of the Application of  
ALBERTO MORALES

Petitioner,

Index No. 107299/08

For a Judgment under Article 78 of the Civil Practice Law  
and Rules,

- against -

RAYMOND KELLY, as Police Commissioner of  
of New York, and as Chairman of the Board of  
Article II, THE BOARD OF TRUSTEES of the Police Pension  
Fund, Article II, NEW YORK CITY POLICE DEPARTMENT  
and THE CITY OF NEW YORK,

Respondents.  
-----X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Alberto Morales seeks a judgment annulling the determination of the respondents, which denied him a line of duty accident disability retirement pursuant to Administrative Code § 13-252; and ordering Respondents to retire petitioner with a line of duty accident disability retirement allowance, retroactive to the date of his service retirement. In the alternative, petitioner requests that the court direct a hearing on the matter or that petitioner be allowed to present testimony to the Board of Trustees in order to prove his entitlement to accident disability retirement. Respondents seek dismissal of the petition, and contend that they acted reasonably, lawfully and properly in denying petitioner accident disability retirement.

Background

Petitioner joined the uniformed force of the New York City Police Department ("NYPD") on January 26, 1982 and became a member of the Police Pension Fund ("PPF") thereafter. He retired from the NYPD on October 18, 2002. On September 11, 2001, and for

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multiple days afterwards, the NYPD assigned petitioner to the World Trade Center disaster and recovery efforts. On August 1, 2002, petitioner submitted a Line of Duty (“LOD”) injury report alleging that he developed asthma as a result of working at the World Trade Center from September 11, 2001 until June 29, 2002. This injury did not receive approval for LOD-injury status.

On August 7, 2002, petitioner submitted an application for accident disability retirement (“ADR”) alleging that due to the pulmonary conditions that he acquired from working at the World Trade Center, he was disabled from performing full police duty. At a later date, the Police Commissioner also applied for Ordinary Disability Retirement (“ODR”) on petitioner’s behalf for his pulmonary condition. The denial of petitioner’s ODR for his pulmonary condition is not being contested in this proceeding. Petitioner also submitted an application for ADR due to a neck injury that he sustained in the LOD on February 4, 1983.

In response to petitioner’s applications, the Police Commissioner submitted an application for ODR on behalf of Petitioner, based on his neck injuries. A memorandum dated March 18, 2005 denied Petitioner’s application for ADR based on his neck injury, but approved the Police Commissioner’s application for ODR based on the neck injury. The ODR application based on the neck injury was later withdrawn at Petitioner’s request, and the Petitioner retired based on his twenty years of service. Notably, petitioner’s neck injury is not an issue in the current proceedings.

#### Medical Board’s First Review of Petitioner’s Pulmonary Condition

The Medical Board Police Pension Fund (“Medical Board” or “Board”) first examined petitioner on January 15, 2003 and disapproved his application for ADR based on his pulmonary disability. The Medical Board reviewed the petitioner’s medical records including petitioner’s two pulmonary function tests to date. Petitioner’s physician Dr. Andrew Berman, M.D.,

Diplomate, American Board of Internal Medicine (Pulmonary Disease, Critical Care Medicine) conducted the tests. The first test, a spirometry<sup>1</sup> dated August 1, 2002, yielded the assessment that petitioner had a “[m]ild obstructive disease, [but that a] restrictive disease cannot be excluded . . . .” (Respondent’s Ex. 8). Dr. Berman indicated on the NYPD Summary Report form accompanying the test, that between the options “Full duty (patrol),” “Desk Duty,” and “Continue Sick,” that petitioner was capable of desk duty (Id.). The second test, dated October 31, 2002, consisted of lung volumes evaluation and a spirometry. It found petitioner had “[m]ixed restriction and obstruction. . . . Mild diffusion effect is noted” (Id.).

In its evaluation dated January 15, 2003, the Medical Board observed, “at the present time, [petitioner] does do some expectorating, which is somewhat yellow in color. . . . He uses an Advair inhaler, at least twice a day” (Respondents’ Exhibit 7 at ¶ 3). The Medical Board also conducted its own evaluation of the petitioner that day and stated among other things, “His color is good. There does not appear to be any stridor<sup>[2]</sup> present. Percussion of his chest is normal. [Listening to petitioner’s lungs] reveals normal breath sounds, no rales,<sup>[3]</sup> rhonchi<sup>[4]</sup> or wheezing.” (Id. at ¶ 5).

The Medical Board also noted that the two tests occurred, and recited their results (Id. at ¶ 4), but asserted without explanation that they were “insufficient evidence” of disability (Id. at ¶ 11). It thus disapproved the application for ADR, and despite petitioner’s confinement to desk

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<sup>1</sup> Spirometry is the “measurement by means of a spirometer of the air entering and leaving the lungs.” Merriam-Webster’s Medical Dictionary (2005), available at <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=spirometry>.

<sup>2</sup> Stridor is “a harsh vibrating sound heard during respiration in cases of obstruction of the air passages <laryngeal stridor>.” Merriam-Webster’s Medical Dictionary 723 (2nd Ed. 2006).

<sup>3</sup> Rale is “an abnormal sound heard accompanying the normal respiratory sounds on auscultation of the chest.” Merriam-Webster’s Medical Dictionary 635 (2nd Ed. 2006).

<sup>4</sup> Rhonchus is “a whistling or snoring sound heard on auscultation of the chest when the air channels are partly obstructed.” Merriam-Webster’s Medical Dictionary 656 (2nd Ed. 2006).

duty, found petitioner able to “perform[] the full duties of a New York City police officer” (Id. at ¶ 11).

Medical Board’s Second Review:

On April 9, 2003, the Board of Trustees remanded petitioner’s case to the Medical Board for further review. On July 30, 2003, the Medical Board re-examined the petitioner and reiterated the same decision as on January 15, 2003, disapproving petitioner’s application for ADR for his pulmonary condition, (Respondents’ Ex. 15 at ¶ 7).

Medical Board’s Third Review:

In light of a new respiratory test, dated March 17, 2003 (“third test”), the Board of Trustees again remanded petitioner’s case back to the Medical Board. In its April 28, 2004 review, the Medical Board again disapproved of petitioner’s application for ADR based on his pulmonary condition. The Medical Board reviewed a new report regarding petitioner’s pulmonary condition, reviewed the new test, and also conducted its own examination (Respondents’ Ex. 22 at ¶¶ 7-9).

In the new report, Dr. Berman “cites the reasons why this officer cannot do his work.” Specifically, Dr. Berman’s report stated, inter alia, “He has been diagnosed with reactive airway disease after his exposure to the World Trade Center site. Airway obstruction is now persistent. . . . These conditions seem to be causally related to exposure to multiple circulating particulates as a consequence of the World Trade Center disaster” (Id. at ¶ 7).

The March 17, 2003 pulmonary function test, conducted by Dr. Jay Dobkin, stated that the “[s]tudy [was] suggestive of restrictive lung disease” (Respondent’s Ex. 24). Regarding that test, as well as the prior tests dated August 1, 2002 and October 31, 2002, the Medical Board remarked, when referencing the three tests, that it does “[n]ot find these pulmonary function tests

to be reliable . . . with regard to reproducibility and based upon the flow loop curves<sup>5</sup>

(Respondent's Ex. 22 at ¶ 8).

The Medical Board went on also to observe that, even though petitioner constantly used his inhalers, had only a two block walking tolerance, and stated that his life had changed as a result, petitioner did not have any emergency room visits, nor did he seek any urgent care visits for exacerbations of obstructive pulmonary disease (Id. at ¶ 9).

Consequently, the Medical Board reaffirmed its decision to deny ADR for pulmonary disease (Id. at ¶ 10).

On March 12, 2004, petitioner received an eligibility and award decision from Kenneth R. Feinberg, Special Master, U.S. Department of Justice September 11th Victims' Compensation Fund awarding him \$125,000 as a result of a "pulmonary injury" (Ver. Pet. Ex. K).

#### Medical Board's Fourth Review:

After a fourth test dated June 17, 2004 (Respondent's Ex. 30), and after petitioner's counsel had sent a letter to the Detectives' Endowment Association requesting reconsideration of petitioner's case, the Board of Trustees remanded the petitioner's case to the Medical Board once more for reconsideration of the evidence (Petitioner's Exhibits 25, 26). On December 15, 2004, the Medical Board considered petitioner's case for the fourth time.

In the fourth test, Dr. Berman summarized the study as "[m]oderate restrictive defect, though this is not evident on lung volumes. . . . No significant obstruction. Possible diffusion defect although value may be underestimated due to low alveolar volume relative to measured

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<sup>5</sup> "Flow-volume loop" is "a graph of the rate of airflow as a function of lung volume during a complete respiratory cycle consisting of a forced respiration followed by a forced expiration. The plotted curve appears as a loop and is used in assessing pulmonary function." Mosby's Medical Dictionary (8th ed. 2009), available at <http://medical-dictionary.thefreedictionary.com/flow-volume+loop>.

total lung capacity” (Respondents’ Ex. 30). He also wrote that the “expiratory time was less than six seconds, which may underestimate the degree of obstruction. Patient effort was erratic which makes it impossible to evaluate flow volume loops” (Id.). The Medical Board acknowledged that the “reduced diffusion capacity indicates a moderately severe loss of functional alveolar capillary service,”<sup>6</sup> but contended that “the diffusion capacity was not corrected for the patient’s hemoglobin” (Respondents’ Ex. 28 at ¶ 5).

As with previous tests, the Medical Board found the flow volume loop curve problematic (Id.). It remarked, “With regard to the pulmonary function study submitted, the Medical Board reiterates previous findings, that there were significant inconsistencies in the test, with only the comment about it being a ‘fair study’” (Id. at ¶ 8).

The conclusion of the report dated December 15, 2004 stated that the Medical Board would defer its decision until it discussed the pulmonary function study with Dr. Berman (Id.).

#### Medical Board’s Fifth Review:

After a discussion with Dr. Berman regarding the “variable results” of the pulmonary function tests and the “inconsistencies of the flow loop curves,” the Medical Board again disapproved Petitioner’s application for ADR based on his pulmonary condition. The Medical Board described its discussion with Dr. Berman as “centered around the variable results found in previous pulmonary functions test and the inconsistencies of the flow loop . . . . Dr. Berman felt that the quality of the flow loop would make it difficult, at best, to determine the degree of

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<sup>6</sup> “Alveolar” means “[r]elating to an alveolus.” Stedman’s Medical Dictionary 56 (28th Ed. 2006). “Alveolus” is “(b) any of the small[,] thin-walled[,] air-containing compartments of the lungs that are typically arranged in saclike clusters into which . . . [a] duct terminates and from which respiratory gases are exchanged with the pulmonary capillaries.” Merriam-Webster’s Medical Dictionary (2005), <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=alveolus>. A capillary is “any of the smallest blood vessels connecting [larger blood vessels] and forming networks throughout the body.” Id., available at <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=capillary>.

Detective Morales' pulmonary disability" (Respondents Exhibit 31 at ¶ 2). The Medical Board then wrote that it "finds that the documentary and clinical evidence fail to substantiate that the officer is disabled from performing full police duties as a result of his pulmonary condition" (*Id.* at ¶ 3).

Medical Board's Sixth Review:

In June of 2005, Petitioner commenced an Article 78 proceeding seeking to annul the denial of his ADR applications by the Medical Board and the Board of Trustees. On September 12, 2006, Justice Michael D. Stallman, of this court, issued an order remanding petitioner's case to respondents for further consideration of petitioner's pulmonary condition and for reconsideration by a pulmonary specialist. While acknowledging that the Medical Board was not required to have a pulmonary specialist as a part of the board, Justice Stallman indicated that the "accounts of the medical evidence appear to be conflicting and difficult for the Court to analyze on this record. . . . Based on the record the court is unable to determine whether credible, medical evidence supports the respondents' determination that petitioner is not disabled by a pulmonological condition" (Respondents' Ex. 33).

As a result of Justice Stallman's order, the Medical Board reviewed petitioner's application, and in its June 27, 2007 memo to the Board of Trustees, stated that the "case is referred to the Article II Medical Board which meets on Friday and has a member who is a certified pulmonologist" (Respondents Ex. 35 at ¶ 4).

On July 20, 2007, the Medical Board reconsidered the petitioner's case, and "reaffirm[ed] its previous decision . . . ." (Respondents' Ex. 36 at ¶ 7). It reviewed his medical records and tests dating back to 2002, and conducted an evaluation and interview (*Id.* at ¶¶ 3, 4, 6).

In the interview, Petitioner told the Medical Board in pertinent part that he experiences wheezing, does not sleep well and also awakens with shortness of breath. Petitioner mentioned that he is taking multiple medications as a result of his asthma. He stated that since his exposure to the World Trade Center, he started to experience a dry cough and shortness of breath which has only gotten worse. He felt that his exercise capacity was limited, he frequently saw Dr. Berman, and he went to the emergency room for shortness of breath. The report noted that the Petitioner is currently receiving Social Security Disability both for neck problems as well as breathing problems (Id. at ¶ 4).

The Medical Board again asserted that the previous tests had “inconsistencies” and were of poor quality (Id. at ¶ 6). The Board stated that “[c]omparison [of the tests] . . . showed variation from time to time,” but that the last test “was consistent with a restrictive pattern” (Id.). The Board also remarked that the last test’s “low volume loop is inadequate to make any observation related to an obstructive detail” (Id.), though they nevertheless concluded that the test showed “[t]here was no significant obstruction” (Id. at ¶ 3). The Medical Board recommended denial of ADR by saying, “[b]ased upon the available data there is no objective evidence to support the detective’s claim of pulmonary disability. He does have considerable symptoms and subjective information suggesting disability but no objective evidence” (Id. at ¶ 7).<sup>7</sup>

On February 13, 2008, the Board of Trustees adopted the Medical Board’s recommendation and disapproved petitioner’s pulmonary ADR application. On or about May

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<sup>7</sup> Following the Medical Board’s determination, petitioner underwent further tests and submitted the results to the Board of Trustees. The Court cannot consider these test results, which the Verified Petition has annexed as Exhibits V, W, and X, since such evidence was not before the Medical Board and are thus outside the administrative record. See Plaza Realty Investors v. New York City Conciliation & Appeals Bd., 110 A.D.2d 704, 704 (2d Dep’t 1985).

22, 2008, petitioner commenced this Article 78 proceeding. Petitioner contends that the Medical Board's conclusions regarding disability should not be binding on the Board of Trustees because it cannot be shown that the Medical Board based its decision on substantial or credible evidence, and that its decision is irrational. Respondents reject that contention, claiming instead that they acted lawfully, and that petitioner has failed to meet his evidentiary burden.

#### Discussion

In an Article 78 proceeding challenging a disability determination, the Medical Board's determination will be sustained unless it lacks a rational basis, or is arbitrary or capricious. See Matter of Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d 756, 760 (1996); Matter of Canfora v. Bd. of Trs. of Police Pension Fund of Police Dep't of City of New York, 60 N.Y.2d 347, 351 (1983). Ordinarily, the Medical Board's disability determination will not be disturbed if it is supported by substantial evidence which, in the context of disability cases, has been construed "to require some credible evidence." Borenstein, 88 N.Y.2d at 760; Matter of Rubiano v. New York City Employees' Retirement System, 268 A.D.2d 261 (1st Dep't 2000). Credible evidence is "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered . . . [and] must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion." Matter of Meyer v. Bd. of Trustees of the New York City Fire Dep't, 90 N.Y.2d 139, 146-147 (N.Y. 1997). Where the medical evidence is conflicting, it is the sole province of the Medical Board to resolve any conflicts. Borenstein, 88 N.Y.2d at 760.

However, courts have annulled and remanded for further review the determinations of the Medical Board and the Board of Trustees, "where the medical issues presented by a petitioner were not adequately addressed or when the medical evidence did not sustain the determination."

Brady v. Bd. of Trs. New York City Police Pension Fund, Index No. 116273/2007, (Sup. Ct.

N.Y. Co. Sept. \_\_, 2008), Slip Op. at 12 (citing Matter of Rodriguez v. Bd. of Trs. of the New York City Fire Dep't, 3 A.D.3d 501 (2d Dep't 2004)). The Board must at least rationally evaluate the medical evidence. See McAdams v. Kelly, 117 Misc.3d 1112(A), 2007 WL 2965402 (Sup. Ct. N.Y. Co. Oct. 2, 2007), 2007 N.Y. Slip Op. 51938(U) (holding that the Medical Board's summary denial of petitioner's application for ADR benefits based on his PTSD resulting from his assignment at the WTC site was arbitrary and capricious), Weller v. Kelly, Index No. 109357/2006, (Sup. Ct. Co. Feb. 23, 2007), Slip. Op. at 11 (holding that the Medical Board may not "cherry pick portions of letters and reports it received [or] disregard information, without inclusion or comment, that do not support its position.").

Applying this standard to the instant case, the Court concludes that the Medical Board failed to adequately address and account for medical evidence indicating that the petitioner suffered from a pulmonary condition. Most significantly, while the Board states that "[t]he detective continues to show a number of inconsistencies and the quality of the tests make it difficult to determine the degree of petitioner's pulmonary impairment" (Respondents' Ex. 36 at ¶ 6), the record does not adequately delineate the nature of these inconsistencies, or evince how such inconsistencies led to the Medical Board's determination that petitioner is not disabled. In its discussion of these "inconsistencies," the Medical Board offers what seems to be an incongruity between "the restrictive impairment of limited reduced vital capacity" and "the normal total lung capacity," but this apparent incongruity could not be an inconsistency, since they then conclude that "[o]verall, [the test] is consistent with a restrictive pattern" (Id.).

Indeed, it appears from the record that while the test results differ as to specifics, they consistently conclude that petitioner suffers from pulmonary disease. Specifically, the first two tests, and the fourth test, each regarded both obstruction defects and restrictive defects as possible explanations (Respondents' Ex. 8, 9, 30), and the third test finds it was a "restrictive

lung disease” (Respondents’ Ex. 24). Thus, a restrictive condition is consistent with all the tests and, in fact, with the Medical Board’s own narration (See Respondents’ Ex. 36 at ¶ 6) (acknowledging the evidence’s consistency with “a restrictive pattern”). Additionally, the Medical Board noted that spirometry between the last two tests remained unchanged (Id. at ¶ 3), which arguably undermines the Medical Board’s claim of inconsistency. At the very least, it raises questions about the Medical Board’s earlier claim that the third test’s results were not “reliable with regard to reproducibility . . . .” (Respondents’ Ex. 22 at ¶ 8). Lastly, the significance of any problems with the tests in diagnosing petitioner with a disabling pulmonary condition is unclear from the record. In an earlier review, the Board consulted Dr. Berman, who “felt that the quality of the flow loop would make it difficult, at best, to determine the degree of Detective Morales’ pulmonary disability,” but who did not doubt the existence of such disability (Respondents’ Ex. 31 at ¶ 2).

Further, the Medical Board acknowledged that petitioner had “considerable symptoms” such as wheezing, shortness of breath, and his use of various medications, and that when it examined petitioner, he was “unable to take a deep breath and could not do any forced breathing maneuvers” (Respondents’ Ex. 36 at ¶ 5). The Medical Board did not specify any inconsistencies in petitioner’s physical symptoms. The Medical Board found, without explanation, that these symptoms were “subjective information suggesting disability,” and that there was “no objective evidence” of a pulmonary condition. Even assuming arguendo that observable physical symptoms do not constitute objective evidence, the test results and the reports of Dr. Berman and Dr. Jay Dobkin provided credible, objective evidence, and as indicated above, the record is unclear as to the nature of the inconsistencies which caused the Medical Board to reject these objective findings.

Next, when the Honorable Justice Stallman remanded the case back to the Medical Board, he directed the Medical Board to include a pulmonologist since, “in the absence of a specialist, . . . the job of the Court (and of the medical board) is complicated, particularly when . . . [the tests’] significance [is] not adequately explained and where the Court cannot adequately assess the conclusions stated.” (Respondents’ Ex. 33). While the Medical Board included a pulmonologist in its review on remand, as indicated above, it failed to address Justice Stallman’s other concern, which was the record’s lack of clarity as to how the medical evidence resulted in the Medical Board’s finding that petitioner was not disabled as a result of his pulmonary condition.

Finally, as the Medical Board did not find that the petitioner was “physically or mentally incapacitated for the performance of city-service,” it was not required to determine whether the condition was a “proximate and natural result of an accidental injury received in such city service.” Meyer, 90 N.Y.2d at 144. The court notes, however, that it appears from the record that if petitioner were found to be disabled, that the presumption under the WTC bill that such condition or impairment of health “was incurred in the performance or discharge of duty and [was] the natural and proximate result of an accident,” (See Administrative Code §13-252.1), would apply under the circumstances here.

Accordingly, the petition should be granted to the extent of annulling the findings of the Board of Trustees and this matter is remanded for new findings to the Medical Board and the Board of Trustees. While it is remanding this matter, the court is troubled by the Medical Board’s cursory evaluation of petitioner’s medical condition, and its failure to provide an analysis which clearly delineates the medical basis for its finding that petitioner is not disabled and to follow Justice Stallman’s instruction to clarify the record.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted to the extent of annulling the findings of the Medical Board and the Board of Trustees with respect to the disapproval of the petitioner's application for ADR; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent of directing that the Medical Board conduct a further evaluation of petitioner's application for ADR and issue a determination on the subject application which delineates the medical conclusion and the evidence it finds supports such conclusion and identifies specific inconsistencies in the medical evidence, if any, and, upon issuance of its determination, the Medical Board shall present such determination to the Board of Trustees, and the petition is otherwise denied.

DATED: April 8, 2009

  
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J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).