

D. Carruthers, J.), entered on or about September 23, 2004, which denied defendant's CPL 440.10 and 440.20 motions to vacate the judgment and set aside sentence, unanimously affirmed.

The court properly denied defendant's CPL 330.30(2) motion to set aside the verdict, without granting a hearing. Defendant based his juror misconduct claim on a belated hearsay statement from an attorney who overheard a conversation, two weeks earlier, allegedly relating to defendant's trial, which was then in progress. The allegations of premature discussion of the case were not supported with a sworn affidavit or affirmation from anyone, and hearsay statements will not suffice (see *People v Friedgood*, 58 NY2d 467, 473 [1983]; *People v Comfort*, 30 AD3d 1069 [2006], *lv denied* 7 NY2d 787 [2006]; *People v Salaam*, 187 AD2d 363, 364-365 [1992], *affd* 83 NY2d 51 [1983]). Nor do the hearsay statements establish how the fellow attorney knew that the people allegedly discussing the case were jurors instead of spectators. In any event, "not every misstep by a juror rises to the inherently prejudicial level at which reversal is required automatically" (*People v Brown*, 48 NY2d 388, 394 [1979]), and defendant's allegations did not demonstrate that the alleged misconduct deprived him of a fair trial (see *People v Horney*, 112 AD2d 841 [1985], *lv denied* 66 NY2d 615 [1985]).

The court properly exercised its discretion when it denied an application to relieve counsel made, during trial, by both

defendant and his attorney (see *People v Sawyer*, 57 NY2d 12, 19 [1982], *cert denied* 459 US 1178 [1983]; *People v Medina*, 44 NY2d 199, 207-209 [1978]; *People v Smith*, 192 AD2d 310, 312 [1993], *affd* 82 NY2d 731 [1993]). The essential basis for the application was a strategic difference between defendant and his attorney, who reasonably refused to pursue demonstrably futile lines of defense requested by his client, and this was not the kind of fundamental conflict that would require new counsel (see *People v Davis*, 270 AD2d 162 [2000], *lv denied* 95 NY2d 795 [2000]).

Defendant received effective assistance of counsel under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]). Counsel's admittedly "risky" decision to call a witness who had expressed hostility to defendant was appropriate, because the witness could have reasonably been expected to provide valuable exculpatory testimony (see *People v Brito*, 304 AD2d 320, 321 [2003], *lv denied* 100 NY2d 592 [2003]). While the witness was clearly hostile to defendant, counsel could not have anticipated that the witness would not merely be unhelpful, but would affirmatively inculcate defendant by blatantly lying under oath. Moreover, the record establishes that defendant was fully aware of the risk and approved of the decision. In any event, even if counsel should not have called this witness, his decision

to do so did not cause defendant any prejudice. The court prevented any prejudice when it gave a thorough curative instruction, in which it not only struck the testimony but expressly told the jury to discredit it and draw no adverse inferences against either side. Defendant's remaining ineffective assistance claims are without merit.

The grand jury proceedings were not unlawfully defective, and the possession of benefit cards conviction was not unconstitutionally obtained. We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

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

ENTERED: OCTOBER 23, 2007

CLERK

Lippman, P.J., Andrias, Williams, Malone, JJ.

1780-

1780A

1780B James J. D'Esposito,
Plaintiff-Appellant,

Index 106893/03

-against-

Gusrae, Kaplan & Bruno PLLC, et al.,
Defendants-Respondents,

Martin H. Kaplan,
Defendant.

Rosenberg Feldman Smith LLP, New York (Richard B. Feldman of counsel), for appellant.

Gusrae, Kaplan, Bruno & Nusbaum PLLC, New York (Brian D. Graifman of counsel), for respondents.

Judgment, Supreme Court, New York County (Karla Moskowitz, J.), entered January 24, 2007, dismissing the amended complaint, and order, same court and Justice, entered March 6, 2007, which granted defendants' motion to increase plaintiff's undertaking on the continuing counterclaims, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered January 24, 2007, which granted defendants' motions for summary judgment dismissing the complaint, unanimously dismissed, without costs, as superseded by the appeal from the judgment.

Following plaintiff's termination from defendant law firm, a professional limited liability company, he commenced this action asserting claims for a determination of his interest in the firm, an accounting, and claims for breach of contract, promissory

estoppel, specific performance, and fraud. At the conclusion of discovery, the motion court granted defendants' respective motions for summary dismissal of the amended complaint.

Plaintiff contends, at the outset, that the court incorrectly found he was not an equity member of the firm. However, the motion court properly relied on *Mazur v Greenberg, Cantor & Reiss* (110 AD2d 605 [1985], *affd* 66 NY2d 927 [1985]) in concluding that plaintiff's own deposition testimony established he was never a true equity member of the firm (*see also Baker v Kohler*, 28 AD3d 375 [2006], *lv denied* 7 NY3d 885 [2006]). Indeed, notwithstanding that plaintiff was called a partner and listed as such in Martindale-Hubble, on the firm's letterhead and tax return, and he received distributions of net profits from the firm at a fixed rate, he was not responsible for the firm's rent or losses, was not a signatory of the partnership and/or operating agreement, made no capital investment and had no ownership interest in the firm. Plaintiff has not only conceded all of the foregoing facts, but unlike the plaintiff in *Mazur*, who "did exercise some control in the firm" (110 AD2d at 606), plaintiff here had no control at all. Consequently, while the court correctly recognized that defendants' summary judgment motions did not rely upon the terms of the firm's operating agreement, such agreement was evidence of the fact that plaintiff never became an equity member.

The causes of action for promissory estoppel, specific performance and breach of contract, all based on the purported promise by defendants to make plaintiff a full partner/member of the firm, were also properly dismissed as barred by the statute of frauds. In the absence of any writing "subscribed by the party to be charged therewith," the documents offered by plaintiff were insufficient to overcome the mandate of General Obligations Law § 5-701(a)(1) (see *Nemelka v Questor Mgt. Co., LLC*, 40 AD3d 505 [2007]). Moreover, irrespective of whether plaintiff might have become a partner within one year, he claimed that his right to a membership/partnership was to have continued indefinitely and even after he left the firm. The oral agreement he relied on thus called for "performance of indefinite duration and was terminable within a year of its inception only by its breach and was thus barred by the statute of frauds" (*Sabharwal v Eminax*, 305 AD2d 336, 337 [2003]).

The cause of action for fraud fails for lack of any justifiable reliance on defendants' purported misrepresentation.

We have considered plaintiff's remaining arguments and find them unavailing.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 23, 2007

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Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1781-

1782 Ron B.,
 Petitioner-Appellant,

-against-

Tonya P.,
 Respondent-Respondent.

Lansner & Kubitschek, New York (David J. Lansner of counsel), for appellant.

Sonnenfeld & Richman, LLP, New York (Judith R. Richman and Brad Evan Serlen of counsel), for respondent.

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about May 31, 2006, which, insofar as appealed from as limited by the briefs, denied petitioner's objections to a portion of two orders of Support Magistrate Nicholas J. Palos, (1) dated February 10, 2005, denying petitioner's cross motion to renew those portions of Family Court orders dated May 10, 2002 and March 14, 2003 capping the amount of child support arrears incurred by respondent between May 7, 1998 and June 3, 2001, and (2) dated September 9, 2005, dismissing petitioner's application for enforcement of a child support order, unanimously affirmed, without costs.

Renewal was properly denied as the evidence petitioner sought to submit was either known or could have been known at the

time of the hearing (see *Matter of Cooke Ctr. for Learning & Dev. v Mills*, 19 AD3d 834, 837 [2005], *lv dismissed, lv denied* 5 NY3d 846 [2005]). Nor did petitioner demonstrate respondent's willful failure to obey a court order of support. We have considered petitioner's remaining arguments and find them without merit.

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

ENTERED: OCTOBER 23, 2007

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Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1784-

1785 Jacqueline Freimor, et al.,
 Plaintiffs-Respondents,

Index 107419/03
591365/03

-against-

City of New York,
Defendant-Respondent,

Consolidated Edison Company of
New York, Inc., et al.,
Defendants,

George Timothy Deason, et al.,
Defendants-Appellants.

[And A Third-Party Action]

Hoey, King, Toker & Epstein, New York (Angela P. Pensabene of
counsel), for appellants.

The Adam Law Office, P.C., New York (Richard Adam of counsel),
for Jacqueline Freimor and Barry Smith, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of
counsel), for City of New York, respondent.

Orders, Supreme Court, New York County (Karen S. Smith, J.),
entered March 16, 2007, which denied defendants-appellants'
motion for summary judgment dismissing the complaint as against
them and granted plaintiffs' motion for partial summary judgment
on the issue of liability against appellants, unanimously
reversed, on the law, without costs, appellants' motion granted,
and the complaint dismissed as against them. The Clerk is
directed to enter judgment in favor of defendants Deason and
Horan dismissing the complaint as against them.

Plaintiff Freimor was injured when she tripped over the edge of a flagstone, which was raised by the presence of tree roots, on a public sidewalk located in front of a one-family brownstone owned by appellants and adjacent to a curbside tree well. Dismissal of the complaint as against appellants is warranted because there is no evidence that they created the defective condition in the sidewalk or used the sidewalk for a special purpose, and at the time of the 2002 accident, there was no ordinance or statute shifting liability for injuries resulting from defects in public sidewalks from the municipality to appellants (see *Gitterman v City of New York*, 300 AD2d 157 [2002]). Although appellants had, in 1998, been issued a notice of violation by the Department of Transportation to remedy the subject sidewalk flag, Administrative Code of the City of New York § 19-152 does not expressly impose liability for injuries resulting from the breach of the duty to maintain the sidewalk (see *Sharif v City of New York*, 256 AD2d 111 [1998]). Furthermore, that appellants voluntarily undertook repairs to the sidewalk in 1996 by grinding down the edge of the sidewalk flag to make it even, does not warrant a different conclusion since there is no evidence that the 1996 repair, as opposed to the natural growth of the tree, caused or contributed to the sidewalk

defect involved in the 2002 accident (see *Zizzo v City of New York*, 176 AD2d 722, 723 [1991]; *Foley v Liogys*, 124 AD2d 641 [1986]).

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occurring on May 24 and May 31, 2004. The court properly exercised its discretion in denying defendant's motion to sever the trials of the two robberies. Defendant did not establish good cause for a severance under CPL 200.20(3)(a), since there was no material variance in the quantity of proof establishing the two crimes, and evidence as to the two incidents was presented separately and was capable of being easily segregated in the minds of the jurors (see e.g. *People v Streitferdt*, 169 AD2d 171, 176 [1991], lv denied 78 NY2d 1015 [1991]; *People v Ndeye*, 159 AD2d 397 [1990], lv denied 76 NY2d 793 [1990]). We have considered and rejected defendant's remaining arguments concerning the severance issue.

However, with respect to the May 31 robbery, the evidence was legally insufficient to establish first-degree robbery under Penal Law § 160.15(3), which requires use or threatened use of a dangerous instrument, in this case a knife. To satisfy this statute, a defendant must actually possess a dangerous instrument, as well as using or threatening to use it (*People v Pena*, 50 NY2d 400, 407 [1980], cert denied 449 US 1087 [1981]). "A defendant's statement that he has a weapon or a threat that he will kill or harm his alleged victim is insufficient, without more, to sustain a conviction for an offense requiring proof that the defendant used or threatened to use a dangerous instrument."

(*People v Peralta*, 3 AD3d 353, 355, *lv denied* 2 NY3d 764 [2004], citing *People v Moore*, 185 AD2d 825 [1992]; accord *People v Robare*, 109 AD2d 923, 924 [1985], *lv denied* 65 NY2d 699 [1985]).

Here, the victim testified that defendant said he had a knife and gestured toward his pants pocket. The witness never saw a knife, no knife was recovered, and the victim's only injuries were the result of being punched by defendant. Accordingly, there was no evidence that defendant actually possessed a knife, and the evidence is legally insufficient to sustain a conviction for first-degree robbery.

Contrary to the People's argument, defendant's declaration to the victim that he had a knife, when viewed in the context of a robbery, was not an "admission" that he possessed an actual knife, but a threat to use one, and such a threat has consistently been held to be insufficient. The court's jury charge, which made reference, among other things, to "*the knife*," rather than a hypothetical knife, was consistent with these principles, and there is no merit to the People's argument that the evidence was legally sufficient when viewed in light of the charge.

We remand for resentencing upon the reduced conviction of third-degree robbery. Since the record is unclear as to whether the court actually sentenced defendant under the second-degree robbery and controlled substance convictions, we remand for

resentencing on those convictions as well. However, we see no reason for resentencing on the first-degree robbery conviction relating to the May 24, 2004 incident.

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appeared "very nervous" and gave an inconsistent answer as to where he was coming from.

These observations by the officers provided a reasonable basis for them to fear for their safety which justified a limited intrusion into the console of the car (see *People v Anderson*, 17 AD3d 166 [2005]), especially since a passenger remained in the car and the console was within her reach (see *People v Alston*, 195 AD2d 396, 397-398 [1993]; see also *People v Jackson*, 79 NY2d 907, 908-09 [1992]). The evidence provided a satisfactory explanation for the decision by the police to permit the passenger to remain in the car, and that decision does not undermine the conclusion that the officers had a reasonable fear for their safety.

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ENTERED: OCTOBER 23, 2007

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Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1790 In re Commissioner of the Office of Index 213/90
 Mental Health,
 Petitioner-Appellant,

-against-

Glenn B.,
Respondent-Respondent.

Andrew M. Cuomo, Attorney General, New York (Ann P. Zybert of
counsel), for appellant.

Marvin Bernstein, New York (Sadie Z. Ishee of counsel), for
respondent.

Order, Supreme Court, Bronx County (Lucy Billings, J.),
entered May 14, 2007, which denied the petition for further
retention of respondent at a nonsecure facility and ordered his
conditional release, unanimously reversed, on the law, without
costs, the petition granted, and respondent remanded for
retention for a period not to exceed an additional two years.

The uncontroverted testimony provided by respondent's
treating psychiatrist established the need for continued
treatment in an inpatient facility, and that respondent would be
a danger to others if he were released into the community (see
Matter of Consilvio v Diana W., 269 AD2d 310, 312 [2000]).
Contrary to respondent's contentions, the medical progress notes,
dated September 23, 2006 through March 30, 2007, amply supported
the expert testimony.

The court, at hearing, based its ruling on a finding of

"scant evidence as to assaultive behavior," alluding to the remoteness of respondent's crime -- the 1982 attempted murder of his wife, which gave rise to his CPL 330.20 supervision. That predicate act was nonetheless violent in the extreme (see *Matter of Carpinello v Floyd A.*, 23 AD3d 179, 183 [2005]). "Although a finding of dangerousness may be supported by evidence of violence, dangerousness is not coterminous with violence" (*Matter of David B.*, 97 NY2d 267, 278 [2002]). Respondent's medical progress notes were replete with notations of his volatile behavior.

Those medical reports also indicate, time and again, that respondent feels no remorse and takes no responsibility for his crime. Lack of remorse and minimizing one's crime are relevant factors in continuing retention, indicating a patient's lack of insight into his mental illness (see *Matter of Jamie R. v Consilvio*, 17 AD3d 52, 62 [2005], *affd* 6 NY3d 138 [2006]). That lack of insight, according to psychiatric testimony, would cause respondent to "decompensate" outside an inpatient facility, an important factor to consider when determining whether he should be recommitted to a psychiatric facility (see *Matter of Crumpley v Wack*, 212 AD2d 299, 308 [1995], *lv denied* 86 NY2d 808 [1995]). The court's finding of no evidence that respondent was noncompliant in taking his medication is refuted by medical records consistently documenting his receipt of an antipsychotic

drug by injection, as opposed to mouth, because of his prior history of noncompliance.

Under these circumstances, there is a likelihood that respondent, as in the past, will not seek treatment for the symptoms of his medical illness, despite the court's order of conditions. Although respondent has shown some progress since he began taking a particular antipsychotic drug, his brief improvement within the confines of a psychiatric institution did not establish that he no longer posed a danger to himself or others should he be released into the community (see *Matter of Richard H. v Consilvio*, 6 AD3d 17 [2004], *lv denied* 3 NY3d 601 [2004]).

We have considered respondent's remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 23, 2007

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Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1791 Shiro Watanabe, Index 118627/03
Plaintiff-Appellant,

-against-

Mingmar Sherpa, et al.,
Defendants-Respondents,

Vera Feldman, et al.,
Defendants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellants.

Majorie E. Bornes, New York, for Mingmar Sherpa and Nicolae E. Klein, respondents.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Michael I. Josephs of counsel), for Mohamad Rabbani and Sobell Cab Corp., respondents.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered May 17, 2006, which, to the extent appealed from, denied plaintiff's motion for a new trial asserting the jury verdict was against the weight of the evidence, unanimously modified, on the facts, a new trial directed on damages for future pain and suffering only, and otherwise affirmed, without costs, unless defendant Sherpa stipulates to increase said award, before apportionment, to \$300,000.

Plaintiff was standing in a Manhattan street on Third Avenue near the intersection of 55th Street at about 2:30 in the morning, talking to defendant Rabbani, a taxicab driver, when he was struck by another taxicab driven by defendant Sherpa. The

record indicates that plaintiff had been drinking prior to the incident.

Plaintiff was able to testify about his state of mind and the nature of the accident, and was not prejudiced by the court's bifurcation of the trial (see *Fetterman v Evans*, 204 AD2d 888, 890 [1994]). His injuries were neither probative of how the incident occurred nor so intertwined with the damages as to require a unified trial (see *Berthoumieux v We Try Harder*, 170 AD2d 248 [1991]).

The jury's verdict apportioning liability 80% to plaintiff and 20% to Sherpa was not against the weight of the evidence (CPLR 4404[a]), given that plaintiff admitted he had been drinking and was standing in the street without looking at oncoming traffic; Sherpa testified that plaintiff suddenly moved into his lane of traffic just before impact (see *Rakich v Lawes*, 186 AD2d 932 [1992]).

The award of \$150,000 for past pain and suffering over a two-year period was reasonable, given that plaintiff, who sustained a fractured tibia, had to have only one surgery requiring a hospital stay of only six days (compare *Orellano v 29 E. 37th St. Realty Corp.*, 4 AD3d 247 [2004], *lv denied* 4 NY3d 702 [2004], with *Toribio v J.D. Posillico, Inc.*, 297 AD2d 216 [2002]). However, the award of \$100,000 for future pain and suffering for a 41.7 year life expectancy deviated materially

from what is reasonable compensation under the circumstances, and should be increased as indicated, given the uncontroverted testimony that plaintiff's injuries are permanent and he suffers ongoing pain, that he is likely to develop degenerative arthritis that could possibly require knee replacement surgery, that a future operation to remove the rod and screws is recommended, and that his injury resulted in atrophy of the left thigh, laxity in the ligaments, and limitation of his physical activities (see *Vasquez v City of New York*, 298 AD2d 187 [2002]).

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

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experienced by plaintiff (see *Thompson v Abassi*, 15 AD3d 95 [2005]). The expert also failed to identify any objective basis for the percentages attributed to the restricted ranges of motion, and did not objectively relate the MRI findings to plaintiff's current complaints (see *Taylor v Terrigno*, 27 AD3d 316 [2006]).

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On their motion for summary judgment, the supermarket defendants failed to make a prima facie showing of entitlement to judgment as a matter of law. The affidavit submitted from a corporate officer was conclusory and did not address the allegations regarding ownership or control of the baler, the machine alleged to have caused plaintiff's injury. Furthermore, defendant Squicciarini failed to demonstrate, as a matter of law, that he is a special employee of plaintiff's employer. There are also questions of fact regarding whether defendants Moskowitz and Gildea were co-employees of plaintiff or whether they were employed by an entity other than plaintiff's employer at the time of the alleged negligence.

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agreement (see *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Dismissal of the complaint was also warranted on the basis that plaintiff sponsor failed to join the superintendent and the union as necessary parties (CPLR 1001[a]; see *Hitchcock v Boyack*, 277 AD2d 557, 558 [2000]), and joinder would have been futile in light of the substantively defective complaint.

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

ENTERED: OCTOBER 23, 2007

CLERK

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1795 Diana Abalola, as Administrator Index 106735/04
of the Estate of Glennie Tindal,
et al.,
Plaintiffs-Respondents,

-against-

Flower Hospital now known as
Terence Cardinal Cooke Health
Care Center, etc.,
Defendant-Appellant.

Ptashnik & Associates, New York (Neil B. Ptashnik of counsel),
for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of
counsel), for respondents.

Order, Supreme Court, New York County (Alice Schlesinger,
J.), entered November 17, 2006, which denied defendant's motion
for summary judgment dismissing the complaint, unanimously
reversed, on the law, without costs, and the motion granted. The
Clerk is directed to enter judgment in favor defendants
dismissing the complaint.

Defendant made a prima facie case of entitlement to summary
judgment by submitting an affirmation of a medical expert
establishing that defendant had rendered acceptable medical care
to plaintiff's decedent. In response, plaintiff submitted
evidence insufficient to raise a triable issue of fact, as the
affirmation of plaintiff's physician not only failed to
controvert a number of points in defendant's expert affirmation,

but also was conclusory and devoid of analysis or reference to scientific data (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *DeCintio v Lawrence Hosp.*, 33 AD3d 329 [2006]; *Ramirez v Columbia-Presbyterian Med. Ctr.*, 16 AD3d 238 [2005]).

Plaintiff's physician expert also improperly raised, for the first time in opposition to the summary judgment motion, a new theory of liability regarding the treatment of plaintiff's decedent that had not been set forth in the complaint or bills of particulars (see *Golubov v Wolfson*, 22 AD3d 635 [2005]; *Winters v St. Vincent's Med. Ctr. of Richmond*, 273 AD2d 465 [2000]). The affidavit of plaintiff's nurse expert was similarly conclusory, and offered medical opinions and conclusions that the expert was not competent to render (see *Elliot v Long Island Home, Ltd.*, 12 AD3d 481, 482 [2004]; *Mills v Moriarty*, 302 AD2d 436 [2003], *lv denied* 100 NY2d 502 [2003]).

We need not reach defendant's remaining contentions in light of our determination.

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

ENTERED: OCTOBER 23, 2007

CLERK

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1796 Eleanor Forman, Index 100910/04
Plaintiff-Respondent,

-against-

Leon McFadden, et al.,
Defendants-Appellants.

Lewis Johs Avallone Aviles, LLP, Melville (Elizabeth A. Fitzpatrick of counsel), for appellants.

Adam D. White, New York, for respondent.

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered September 12, 2006, upon a jury verdict awarding plaintiff \$100,000 for past pain and suffering and \$400,000 for future pain and suffering over 30 years, unanimously affirmed, without costs.

The jury's finding that defendants were fully liable for causing the accident between their truck and plaintiff bicyclist is supported by a fair interpretation of the evidence. The truck, as it turned left, failed to yield the right-of-way to plaintiff, who was slowly proceeding through the crosswalk and had the walk signal in her favor. Plaintiff's medical evidence, including x-rays and an MRI, together with her testimony and the detailed testimony of her expert, an orthopedic surgeon, supported the jury's finding that the accident had caused two non-displaced fractures in the area of her right knee, as well as the rupture of the anterior cruciate ligament in that knee. The

jury's resolution of conflicting medical opinions offered by the parties on this issue was supported by the record (see e.g. *Brandwein v New York City Tr. Auth.*, 14 AD3d 396 [2005]).

Defendants did not preserve, by timely objection, their challenges to the trial court's redaction of testimony given by an officer who responded to the scene, or to the removal of the police report from evidence (see e.g. *Seay v Greenidge*, 292 AD2d 173 [2002]). Were we to consider these arguments, we would find them meritless. The officer was not a witness to the accident, and the police report was founded upon hearsay.

Defendants' argument of prejudice from the trial court's refusal to charge plaintiff's violation of a city ordinance against cycling on the left side of the road is misplaced. There was no evidence that plaintiff had been riding her bicycle on the left side of the road. Moreover, the accident occurred when she was midway across the road in the crosswalk. It would be prejudicial error to charge a statute when there is no evidence that the statute was violated (*Wilmot v City of New York*, 73 AD2d 201, 204 [1980]). Even assuming that there was some evidence of such a violation, it was a proper exercise of discretion not to charge the statute when no reasonable view of the evidence could support the conclusion that such a violation was a proximate cause of the accident (*Cranston v Oxford Resources Corp.*, 173 AD2d 757, 758-759 [1991], *lv denied* 78 NY2d 860 [1991]).

The jury's future damage award did not deviate materially from what would be reasonable compensation for plaintiff's injuries (CPLR 5501[c]; see e.g. *Lopez v Consolidated Edison Co. of N.Y., Inc.*, 40 AD3d 221, 223 [2007]; *Calzado v New York City Tr. Auth.*, 304 AD2d 385 [2003]; *Garcia v Queens Surface Corp.*, 271 AD2d 277 [2000]). The jury could find reasonable plaintiff's decision not to undergo surgery to reconstruct her ruptured anterior cruciate ligament, as plaintiff's expert testified. Furthermore, plaintiff testified to symptoms indicating arthritic development in her injured right knee, and her expert gave detailed testimony supporting his conclusion that plaintiff would suffer, in the future, from an arthritic knee condition.

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a special relationship (see *Kovit v Estate of Hallums*, 4 NY3d 499 [2005]). There are no issues of fact as to the existence of a special relationship.

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of the violation history of the building indicating over 450 violations issued against the building during the inquiry period, of which 150 remained pending at the time of petitioners' application.

Substantial evidence supports respondents' finding that petitioners engaged in harassment as that term is defined in the Housing Maintenance Code (N.Y. City Admin. Code § 27-2093[a]), and thus, the denial of the application for a certificate of no harassment was proper. No basis exists to disturb respondents' findings of credibility (*see Matter of Berenhaus v Ward*, 70 NY2d 436 [1987]). The testimony of the four witnesses who visited the premises during the inquiry period and described the conditions they observed was sufficient to sustain the allegations of harassment found by the Administrative Law Judge, including failure to keep public hallways and bathrooms clean, to adequately exterminate vermin, to repair holes in the ceiling, and permitting overcrowding (*see Matter of 235 Hotel v Department of Hous. Preserv. & Dev. of City of N.Y.*, 309 AD2d 587 [2003]).

Respondents' issuance of the reasonable cause determination in November 2004, two years after petitioners' application for a certificate of no harassment was filed, did not violate any statutorily prescribed time periods, and thus was not an abuse of discretion. In any event, petitioners have failed to demonstrate substantial prejudice from the delay.

Respondents did not exceed their statutory authority in directing that the denial of the certificate of no harassment for the subject premises remain in effect until January 19, 2009. The Building Code (N.Y. City Admin. Code § 27-198[b][7]) specifically precludes the consideration of any further application for 36 months after a denial, which is appropriate (see *Matter of Vaughan v Michetti*, 176 AD2d 144 [1991]).

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

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ENTERED: OCTOBER 23, 2007

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Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1800N Wonder Works Construction Corp., Index 116279/06
Plaintiff-Appellant,

-against-

RCDolner, LLC,
Defendant-Respondent.

Yevgeny Tsyngauz, Brooklyn, for appellant.

Wasserman Grubin & Rogers, LLP, New York (Suzan Arden of
counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.),
entered April 13, 2007, which granted defendant's motion to
vacate a default judgment entered March 9, 2007, unanimously
affirmed, without costs.

Defendant carried its burden of proving it had not received
notice of the summons in time to defend the action and had a
potentially meritorious defense (CPLR 317; see *Eugene Di Lorenzo,
Inc. v Dutton Lbr. Co.*, 67 NY2d 138 [1986]; *Franklin v 172
Aububon Corp.*, 32 AD3d 454 [2006]). Plaintiff did not serve the
additional notice required by CPLR 3215(g)(4)(I), and there is no
evidence that defendant, who moved swiftly to vacate its default
upon learning of the judgment, deliberately attempted to avoid

notice of this action (see *Grosso v MTO Assoc. Ltd. Partnership*,
12 AD3d 402 [2004]).

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

ENTERED: OCTOBER 23, 2007

CLERK

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1801

[M-4713] In re Dean Roberts,
Petitioner,

Index 51334/07

-against-

Hon. Sallie Manzanet-Daniels, etc.,
Respondent.

Dean Roberts, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Charles F. Sanders
of counsel), for respondent.

Application for an order pursuant to article 78 of the Civil
Practice Law and Rules denied and the petition dismissed as moot,
without costs or disbursements. All concur. No opinion. Order
filed.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

1802

[M-4827] In re Armando Gonzalez, etc., et al.,
Petitioners,

-against-

Hon. Charles Edward Ramos, etc., et al.,
Respondents.

Application for an order pursuant to article 78 of the Civil Practice Law and Rules withdrawn. All concur. No opinion. Order filed.

Marlow, J.P., Nardelli, Gonzalez, Sweeny, Malone, JJ.

935-

936

Carol Sawchuk,
Plaintiff-Respondent-Appellant,

Index 108058/02

-against-

335 Realty 58 Associates, a General
Partnership, et al.,
Defendants-Appellants,

Rockaway Fuel Oil Corp., et al.,
Defendants,

Marin Management Corp.,
Defendant-Respondent.

[And a Third-Party Action]

Rebore, Thorpe & Pisarello, P.C., Farmingdale (Paul Wesley
Thorpe, Jr. of counsel), for appellants and respondent.

Law Office of Gerry E. Feinberg, P.C., White Plains (Gerry E.
Feinberg of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Shirley Werner
Kornreich, J.), entered on or about November 3, 2006, which,
insofar as appealed from as limited by the briefs, granted
summary judgment in favor of defendant building management
company, and denied summary judgment motion in favor of defendant
building owner, a partnership, and defendants general partners of
the owner, unanimously affirmed, without costs.

An issue of fact exists whether the partnership and its
general partners had constructive notice of the unsafe hot water
condition described by plaintiff's expert. That issue is raised

by evidence that (1) one of the partners resided in the building, (2) he acted as its superintendent for nine years, performed maintenance on the boiler, and that a tag on the boiler warned against using the attached mixing valve for domestic applications. Whether plaintiff's inebriation was so extraordinary under the circumstances as to constitute a superseding act is a question of fact for the jury (*cf. Williams v Jeffmar Mgt. Corp.*, 31 AD3d 344, 345-346 [2006], *lv denied* 7 NY3d 718 [2006]; *Parker v New York City Hous. Auth.*, 203 AD2d 345 [1994]). The alleged knowledge of the partner who acted as the superintendent, while imputable to the other partners, cannot be imputed to defendant management company, although it is wholly owned by another partner. We have considered the parties' other arguments for affirmative relief and find them unavailing.

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

ENTERED: OCTOBER 23, 2007

CLERK

Andrias, J.P., Buckley, Catterson, Malone, Kavanagh, JJ.

1110 Victor Peri, et al., Index 17701/97
Plaintiffs-Respondents,

-against-

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

Annie Nebblett,
Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for City of New York, appellant.

Sills Cummis Epstein & Gross P.C., New York (Bennet Susser of counsel), for LSL Services Inc., appellant.

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for respondents.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered April 5, 2005, which granted the motion by defendant LSL Services for summary judgment only to the extent of dismissing claims on behalf of plaintiff Jose Peri, granted the motion of defendant City of New York (City) for partial summary judgment to the extent of dismissing all claims except those relating to plaintiffs' second period of occupancy in its building, and granted plaintiffs' cross motion to the extent of deeming later notices of claim against the City timely served, affirmed, without costs.

Plaintiff Eribel Peri brought this personal injury action on behalf of herself and her three infant children, Victor Peri,

Harvey Arzu and Jose Peri, to recover damages sustained when the three infant plaintiffs allegedly ingested lead paint while residing first at premises owned by the City, then at premises owned by co-defendant LSL Services, and then again at the City building where plaintiff's sister was the tenant of record. The City moved for summary judgment dismissing plaintiffs' complaint on the ground, inter alia, that it had no notice that any of the plaintiffs occupied its premises. The motion court denied summary judgment and the City now appeals asserting that it had no liability because it had no notice that a child under seven resided in the apartment at 1530 Bryant Avenue in the period 1993-1997. For the reasons set forth below, we find that whether the City had notice is a triable issue of fact which precludes summary judgment.

In plaintiff Eribel Peri's affidavit in opposition to the motions for summary judgment, Peri, in referring to 1530 Bryant Avenue, stated that the superintendent at the Bryant Avenue premises saw her son Victor at her sister's apartment, and that "[w]e still had the same super 'Borges' in the building and he recognized my sister and he saw the new child." Peri's sister, Dinora Castillo, submitted a similar affidavit in opposition and corroborated Peri's statement in haec verba.

The City characterizes the affidavits as "self-serving" and a "crafted and transparent attempt to raise a triable issue of

fact to defeat the City's motion." Finally, the City contends that the plaintiffs' allegations concerning the super are "directly contrary to the [sic] Ms. Peri's deposition testimony."

The affidavits of Peri and Castillo are sufficient to create an issue of fact on the question of notice to the City. The affidavits certainly are some evidence that the City was aware of the plaintiffs' presence on the premises at the time in question. Contrary to the City's rhetoric, the affidavits simply do not contradict the prior EBT testimony.

The overwhelming bulk of the attacks by the City on the alleged contradictions between the EBT testimony and the affidavits raised before the motion court and on appeal apply only to the period 1987-1991. Plaintiffs did not cross-appeal from the dismissal of their claims against the City for this earlier period. Thus, the bulk of the City's argument on appeal on the issue is irrelevant. More importantly, Peri's EBT testimony is not contradictory:

Q. Within the first six months of your moving in there, did you personally speak with the landlord or anyone from the landlord about your living there or for any reason?

A. No.

Q. At any time did you speak with anyone from the landlord or anyone who worked in the building at 1530 Bryant Avenue concerning any matters relating to the apartment?

A. No.

Peri testified that she did not *speak* to the landlord or any representative of the landlord. In her affidavit she indicates that her sister Castillo did speak to the superintendent. The City did not ask Peri whether or not anyone else who lived in the apartment put the City on notice of both the children's presence in the apartment and the peeling paint condition. Furthermore, and more importantly, the City failed to ask whether the super saw or spoke with plaintiff. The City never produced the super for an EBT, nor did the City submit an affidavit from the super for the time period in question. Finally, it is uncontroverted that the building had only 20 apartments. The small size of the building and the fact that the super was familiar with plaintiffs from the first period of occupancy, as well as the uncontroverted affidavits and EBT testimony, all serve to create an issue of fact on the question of notice to the City.

We have considered defendant LSL's arguments on appeal, and find them without merit.

All concur except Andrias, J.P. and Kavanagh, J. who dissents in a memorandum by Kavanagh, J. as follows:

KAVANAGH, J. (dissenting)

I must respectfully disagree with the majority's conclusion that two self-serving affidavits, so obviously at odds with sworn testimony given at a prior proceeding, can be considered to have created an authentic question of fact requiring denial of defendant City of New York's motion for summary judgment. Equally important, given plaintiffs' decision not to appeal that portion of Supreme Court's order dismissing all claims that arose from the first period of occupancy at the Bryant Avenue apartment, the affidavits, even if credible, do not create a genuine issue of fact as to the claims that remain. Therefore, the City's motion should have been granted.

Plaintiff Eribel Peri immigrated from Honduras in 1987 and moved with her sister and her husband, who had no children, into their one bedroom apartment on Bryant Avenue in the Bronx. While there, Peri gave birth to two children, Victor (d/o/b: January 20, 1988) and Harvey (d/o/b: March 18, 1989). On April 1, 1991, Peri and the children moved out of the Bryant Avenue apartment and for the next two and one half years lived in other apartments located within New York City. During this period, by her own admission, Peri was a weekly visitor to her sister's apartment and often stayed overnight.

In October 1993, Peri moved back to the Bryant Avenue apartment with her children and remained there until July 15,

1997.¹ On December 14, 1995, she filed a notice of claim with the City alleging that while she lived in the Bryant Avenue apartment, her children contracted lead poisoning from paint used on the premises.

The City's motion was based on the fact that Peri's sister was the tenant of record for the premises during both periods of plaintiffs' occupancy and that no documentation of any kind has ever been offered that confirms plaintiffs ever resided in the apartment. In addition, Peri, in sworn testimony, has acknowledged that she was never listed on the lease as a tenant in the apartment, that her sister always paid the landlord the rent, and that not only did she not know the landlord, but never had any conversation with the building superintendent or anyone who worked in the building, "for any reason" or "concerning any matters relating to the apartment".

In response to the City's motion, Peri submitted her affidavit and one from her sister, each dated November 11, 2003, which in substance claim that upon moving into the Bryant Avenue apartment, Peri was introduced to the building superintendent, a man named "Burgess", that he came to the apartment on many occasions, was aware of its condition and knew that plaintiffs resided there.

¹Peri gave birth to her third child, Jose Peri, on July 7, 1992.

Supreme Court recognized these affidavits for what they were, documents obviously authored and composed by plaintiffs' counsel to address their needs in this litigation, and for that reason completely discounted them (see *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). Other than these affidavits, plaintiffs have presented no evidence of any kind suggesting that the City or any of its representatives had knowledge, either actual or constructive, that she and her children ever lived at the Bryant Avenue apartment, and for that reason Supreme Court dismissed all of plaintiffs' claims that arose from the first period of occupancy (1987-1991). However, it did not dismiss those claims that arose from the second period of time that plaintiffs claims to have resided at the apartment (1993-1997). Instead, for this time period, Supreme Court found that the notice of claim filed on plaintiffs' behalf on December 14, 1995 was "sufficiently contemporaneous in time as to give the City notice of the underlying facts within a reasonable period of time after the claim accrued." By this ruling, it appears that Supreme Court found that the notice of claim put the City on notice that plaintiffs resided in the apartment for a period of time that pre-dated it. This was clearly error. A notice of claim is intended to inform a municipality of the circumstances involving an incident that may result in a claim so as to give it "an adequate opportunity to timely explore the merits of the

claim while the facts are still 'fresh'" (see *Matter of Nieves v New York City Hosp. Corp.*, 34 AD3d 336, 337 [2006]; *Peri v City of New York*, 8 Misc 3d 369 [2005]). It cannot be deemed to have a retroactive effect and impute to the City knowledge of plaintiffs' occupancy of an apartment for a period of time prior to the date of its filing.

Once Supreme Court determined that the affidavits submitted by plaintiffs were not credible, it should have dismissed not simply those claims arising from the first period of occupancy at Bryant Avenue, but the second as well. In that regard, plaintiffs, as the majority points out, did not appeal the dismissal of those claims arising between 1987-1991. That failure on its face appears to be a concession by plaintiffs that the City for that period of time did not have notice, either actual or constructive, that they resided in the Bryant Avenue apartment.

I disagree with the majority that "the bulk" of the City's arguments are irrelevant in that they pertain to the first period of occupancy. If that same test is applied to plaintiffs' evidence, and I believe that it should, the fact is that Peri's affidavit, and that of her sister, focus almost entirely on the first period she lived at the Bryant Avenue apartment and say very little about the period between 1993-1995 for which the remaining claims exist. In that regard, Peri merely states,

"[w]e still had the same Super named 'Burges' in the building and he recognized my sister and saw the new child. He did not come to fix the apartment during the time that my sister and her family moved in for the second residency".²

Assuming what is said here is true, it adds little, if anything, to what is already known about plaintiffs' occupancy of the premises during this period and Peri's contact with any representatives of the City. Peri was a frequent *visitor* to her sister's apartment during the two and a half years after she moved out of Bryant Avenue and before she claims to have moved back in 1993. In sworn testimony Peri has admitted visiting her sister at Bryant Avenue at least once, and as often as three times a week during this period, and on at least one occasion she actually stayed with her sister at the apartment for an entire week. Under these circumstances, the mere fact that "Burges" knew her and her children and saw them on the premises does not establish that he knew she resided there. What it does establish, at best, is that "Burges" knew Peri as a former tenant who was now a frequent visitor to her sister's apartment. That knowledge, even if proven, does not establish an essential element of plaintiffs' claim - - that the City for the period in

²Obviously these two sentences, while in plaintiff's affidavit, were intended for her sister's affidavit. The first sentence is repeated word for word in the sister's affidavit and is the only reference therein to plaintiff's second period of occupancy.

question (1993-1995), knew that children under seven years of age were residing in plaintiff's sister's apartment, and the failure to submit any credible evidence establishing that fact requires dismissal of plaintiff's remaining claims (see *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628 [1996]).

Simply put, plaintiffs' affidavits only establish their presence on the premises and not that they resided there during the period in question. No evidence of any kind has been submitted showing that the superintendent or any other member of the building's personnel had notice, either actual or constructive, that plaintiffs' status had changed from being a frequent visitor to the apartment to that of a permanent resident (see *Worthy v New York City Hous. Auth.*, 18 AD3d 352 [2005]; compare *Munoz v 42 Holding Corp.*, 30 AD3d 361 [2006]). The credible evidence, including the fact that Peri is not listed on a single document as ever having resided in the apartment and her sworn testimony that she never had any meaningful contact with any of the building personnel, compel a finding that the City's motion for summary judgment should have in all respects have been granted.

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

ENTERED: OCTOBER 23, 2007

CLERK

make the stool safe for use as a step stool (see *Brown v New York Med. Coll. for Comprehensive Health Practice*, 162 AD2d 139 [1990]) or warn plaintiff of the danger of using it as a step stool (see *Tagle v Jakob*, 97 NY2d 165, 169 [2001]). We have considered plaintiff's other arguments, including her reliance on the doctrine of *res ipsa loquitur*, and find them unavailing.

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

ENTERED: OCTOBER 23, 2007

CLERK

Mazzarelli, J.P., Marlow, Gonzalez, Catterson, Kavanagh, JJ.

1162 Miguel J. Montes, etc., Index 16073/02
Plaintiff-Appellant,

-against-

The New York City Transit Authority, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of
counsel), for appellants.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for
respondents.

Judgment, Supreme Court, Bronx County (Kenneth L. Thompson,
Jr., J.), entered December 19, 2005, affirmed, without costs.

Opinion by Kavanagh, J. All concur except Mazzarelli, J.P.
and Catterson, J. who concur in a separate Opinion by Catterson,
J.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
OCTOBER 23, 2007

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5294 People v Fulton, Tyrone, also known as Tybie, Tyrone

M-5296 People v Wattle, William

M-5324X Loewentheil v O'Hara

M-5325X Wasserstein v Kaufman

M-5326X Amell v O'Leary - Maroto

M-5357 People v Roldan, Ismeal, also known as Roldan, Ismael

M-5364X Telyas v Aronson's Floor Covering, Inc.

Appeals withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5327 Archer v Dowdle

Appeal, previously perfected for the October 2007 Term,
withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5363 Harvin v Sako

Appeal, previously perfected for the November 2007 Term, withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5305 In the Matter of Benjamin v Wing

Appeal, previously perfected for the November 2007 Term, withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5352 The Insurance Company of the State of Pennsylvania
v HSBC Bank USA

Appeal, previously perfected for the December 2007 Term, withdrawn.

Lippman, P.J., Andrias, Williams, Buckley, Kavanagh, JJ.

M-5168 Gordon v Yonkers General Hospital

Motion deemed withdrawn, as indicated.

Lippman, P.J., Andrias, Marlow, Buckley, Catterson, JJ.

M-4389 In the Matter of Z., Susan Elizabeth, also known as Z., Elizabeth; Z., Kayla Mary, also known as Z., Kayla; A., Priscilla Rose, also known as A., Priscilla - Catholic Guardian Society

Leave to prosecute appeal as a poor person granted, as indicated.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5073 People v Brown, Theodore

M-5074 People v Otero, Osvaldo, also known as Ortiz, Carlos

M-5108 People v Hodge, Elroy

M-5109 People v Pryor, Rickey

M-5110 People v Moore, Raheem

M-5111 People v Gray, Larry, also known as Bruce, Scott

M-5112 People v Yoy, Calvin

M-5113 People v Newton, Derick

M-5120 People v Keys, Kevin

M-5127 People v William, Jeffrey

M-5128 People v Peralta, Jairo

M-5129 People v Rivera, Chris

Leave to prosecute appeals as poor persons granted, as indicated.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4794 People v Taylor, William

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person granted, as indicated.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4695 People v Rivera, Alfredo

Time to perfect appeal enlarged to the February 2008 Term.

Lippman, P.J., Andrias, Williams, Buckley, Kavanagh, JJ.

M-5105 Marina Towers Associates, L.P. v Gulf Insurance Company

Time to perfect appeal enlarged to the February 2008 Term.

Lippman, P.J., Andrias, Williams, Buckley, Kavanagh, JJ.

M-5307 In the Matter of A., Brandon - Administration for Children's Services

Time to perfect consolidated appeals enlarged to the February 2008 Term.

Lippman, P.J., Mazzairelli, Friedman, Marlow, Buckley, JJ.

M-5150 People v Chandler, Barret

Enlargement of time to file pro se supplemental brief granted for the February 2008 Term, to which Term appeal adjourned; motion otherwise denied.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4637 Curbean v Kibel

Leave to compel plaintiffs to produce certain trial exhibits and other relief denied, as indicated.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-5035 Bender v JHC Consulting Engineer, P.C.

Appeals consolidated; time to perfect same enlarged to the March 2008 Term, as indicated.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4904 Craft v Craft

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Lippman, P.J., Mazzarelli, Friedman, Marlow, Buckley, JJ.

M-5151 People v Mali, Adib

Leave to file pro se supplemental brief and other relief denied.

Lippman, P.J., Andrias, Williams, Buckley, Kavanagh, JJ.

M-4876 Gonzalez v Societe Generale

Stay of trial granted on condition appeal perfected for the February 2008 Term, as indicated.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4928 People v Best, Antoine

Bail continued on condition appeal perfected for the March 2008 Term, as indicated.

Tom, J.P., Mazzarelli, Friedman, Sullivan, Nardelli, JJ.

M-2153 Vargas v Mardan Realty Co. LLC

Appeal deemed withdrawn.

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

M-3898 In the Matter of B., Victor v C., Cherisse -
Administration for Children's Services

Leave to prosecute appeal as a poor person granted, as indicated. (See M-3900, decided simultaneously herewith.)

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

M-3900 In the Matter of B., Brandon, D., Britney and
R., Shayna - Administration for Children's Services

Leave to prosecute appeal as a poor person granted,
as indicated. (See M-3898, decided simultaneously herewith.)

Tom, J.P., Saxe, Sullivan, Gonzalez, Sweeny, JJ.

M-5169 In the Matter of B., Kadiatou, also known as B.,
Khadiatou - Administration for Children's Services

Leave to respond to appeal as a poor person and other
relief denied, as indicated.

Tom, J.P., Mazzarelli, Andrias, Williams, Buckley, JJ.

M-3731 People v Nazario, Robert

Leave to prosecute appeal as a poor person granted,
as indicated.

Tom, J.P., Mazzarelli, Andrias, Williams, Buckley, JJ.

M-2966A People v Vargas, Julio

Motion transferred to Appellate Term of Supreme Court
for First Judicial Department for disposition (See 22 NYCRR 640.1
et seq.). The order of this Court entered on July 19, 2007
(M-2966) recalled and vacated.

Tom, J.P., Mazzarelli, Friedman, Sullivan, Nardelli, JJ.

M-4828 People v Merante, Sal

Leave to prosecute appeal as a poor person granted to the extent indicated.

Tom, J.P., Saxe, Sullivan, Gonzalez, Sweeny, JJ.

M-5050 People v Lance, Ely, also known as Ely, Lance

Leave to hold appeal in abeyance denied.

Mazzarelli, J.P., Saxe, Buckley, McGuire, Malone, JJ.

M-2841 Spitzer v Grasso

M-3107 (And other actions)

Leave to appeal to the Court of Appeals granted, as indicated.

Andrias, J.P., Friedman, Williams, Buckley, Sweeny, JJ.

M-5241 Alpha Manhattan, LLC v Ona Manhattan House, LLC

M-5358 (And another action)

Motion and appeal deemed withdrawn.

Andrias, J.P., Friedman, Williams, Buckley, Sweeny, JJ.

M-4882 People v Ramos, Damien

Leave to prosecute appeal as a poor person granted to the extent indicated.

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

M-4512 In the Matter of J., Kaylina Desire Shonte, also
known as J., Kaylina - Children's Aid Society

Leave to prosecute appeal as a poor person granted,
as indicated.

Andrias, J.P., Friedman, Williams, Buckley, Sweeny, JJ.

M-4911 Trump v Cheng

Time to perfect consolidated appeals enlarged to the
March 2008 Term.

Saxe, J.P., Marlow, Sweeny, McGuire, Kavanagh, JJ.

M-3920 In the Matter of C., Jose

Leave to prosecute appeal as a poor person granted,
as indicated.

Saxe, J.P., Marlow, Sweeny, McGuire, Kavanagh, JJ.

M-4235 In the Matter of P., Victoria Marie - Seamen's Society
For Children and Families

Leave to prosecute appeal as a poor person granted,
as indicated. (See M-4235A, decided simultaneously herewith.)

Saxe, J.P., Marlow, Sweeny, McGuire, Kavanagh, JJ.

M-4235A In the Matter of P., Victoria Marie - Seamen's Society
For Children and Families

Leave to prosecute appeal as a poor person granted,
as indicated. (See M-4235, decided simultaneously herewith.)

Saxe, J.P., Marlow, Williams, Sweeny, Malone, JJ.

M-4816 Shapiro v Sanders

Leave to prosecute appeal as a poor person granted to
the extent indicated.

Saxe, J.P., Marlow, Sweeny, McGuire, Kavanagh, JJ.

M-3796 In the Matter of J., Jessica and McN., Raeign -
Administration for Children's Services

Leave to prosecute appeal as a poor person granted,
as indicated.

Saxe, J.P., Marlow, Sweeny, Kavanagh, JJ.

M-2272 (DC #18) In the Matter of L.P., Mary Rachel -
M-4166 L., Jorge v V., Ana

Enlargement of time to perfect appeal denied (M-4166);
upon the Court's own motion, appeal dismissed (M-2272 [DC #18]).

Friedman, J.P., Gonzalez, Catterson, Malone, Kavanagh, JJ.

M-4768 People ex rel. Lewis, Herbert v Warden

Leave to prosecute appeal as a poor person granted,
as indicated.

Lippman, P.J.

M-4727 People v Mercado, Javier

Leave to appeal to this Court denied.

Marlow, J.

M-3855 People v Berry, James

Leave to appeal to this Court denied.

Sullivan, J.

M-2223 People v Harris, Yusuf

Leave to appeal to this Court denied.

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

M-4146 In the Matter of Alvin E. Leonard,
(admitted as Alvin Eugene Leonard),
an attorney and counselor-at-law:

Respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to July 31, 2007. Respondent directed to make monetary restitution, as indicated. Opinion Per Curiam. All concur.

Mazzarelli, J.P., Saxe, Sullivan, Catterson, Kavanagh, JJ.

M-4433 In the Matter of David M. Sheeger
(admitted as David Mitchell Sheeger),
an attorney and counselor-at-law:

Respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to August 1, 2007. Opinion Per Curiam. All concur.

Saxe, J.P., Sullivan, Gonzalez, Catterson, Kavanagh, JJ.

M-2043 In the Matter of Max D. Antoine,
M-3464 a licensed legal consultant:

Motion deemed one to be application for interim suspension and, as such, respondent suspended from practice as a licensed legal consultant in the State of New York, effective the date hereof, until such time as disciplinary matters pending before the Committee have been concluded and until further order of this Court, and motion otherwise denied. Cross motion granted to the extent indicated, and otherwise denied. Opinion Per Curiam. All concur.

The following orders were entered and filed on October 18, 2007:

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4905 In re: New York City Asbestos Litigation - Helfand v Amchem Products, Inc.; Nacht v Amchem Products, Inc.

Stay of all proceedings, including joint trial, denied; interim relief granted by order of a Justice of this Court, dated September 19, 2007, vacated. (See M-4906/M-4907/M-4908/M-4909/M-4910/M-4922/M-4958/M-4982).

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4906 In re: New York City Asbestos Litigation - Felten v A.W. Chesteron Co.

Stay of all proceedings, including joint trial, denied; interim relief granted by order of a Justice of this Court, dated September 19, 2007, vacated. (See M-4905/M-4907/M-4908/M-4909/M-4910/M-4922/M-4958/M-4982).

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4907 In re: New York City Asbestos Litigation - Felten v A.W. Chesteron Company; Zurn Industries LLC, formerly known as Zurn Industries, Inc. v The Mount Sinai Hospital

Stay of all proceedings, including joint trial, denied; interim relief granted by order of a Justice of this Court, dated September 19, 2007, vacated. (See M-4905/M-4906/M-4908/M-4909/M-4910/M-4922/M-4958/M-4982).

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4908 In re: New York City Asbestos Litigation - Bianco v
A.C. & S.

Stay of all proceedings, including joint trial, denied;
interim relief granted by order of a Justice of this Court,
dated September 19, 2007, vacated. (See M-4905/M-4906/M-4907/
M-4909/M-4910/M-4922/M-4958/M-4982).

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4909 In re: New York City Asbestos Litigation - Bianco v
A.O. Smith Water Products

Stay of all proceedings, including joint trial, denied;
interim relief granted by order of a Justice of this Court,
dated September 19, 2007, vacated. (See M-4905/M-4906/M-4907/
M-4908/M-4910/M-4922/M-4958/M-4982).

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4910 In re: New York City Asbestos Litigation - Bianco v
A.O. Smith Water Products Co.; Director v A.O. Smith
Water Products Co.; Ritzer v A.O. Smith Water Products
Co.

Stay of all proceedings, including joint trial, denied;
interim relief granted by order of a Justice of this Court,
dated September 19, 2007, vacated. (See M-4905/M-4906/M-4907/
M-4908/M-4909/M-4922/M-4958/M-4982).

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4922 In re: New York City Asbestos Litigation - Helfand v
Amchem Products, Inc.; Nacht v Amchem Products, Inc.

Stay of all proceedings, including joint trial, denied;
interim relief granted by order of a Justice of this Court,
dated September 19, 2007, vacated. (See M-4905/M-4906/M-4907/
M-4908/M-4909/M-4910/M-4958/M-4982).

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4958 In re: New York City Asbestos Litigation - Bianco v
A.O. Smith Water Products Co.; Nacht v Amchem Products,
Inc.

Stay of all proceedings, including joint trial, denied;
interim relief granted by order of a Justice of this Court,
dated September 19, 2007, vacated. (See M-4905/M-4906/M-4907/
M-4908/M-4909/M-4910/M-4922/M-4982).

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4982 In re: New York City Asbestos Litigation - Felten v
The Goodyear Tire & Rubber Company and Goodyear Canada
Inc.

Stay of all proceedings, including joint trial, denied;
interim relief granted by order of a Justice of this Court,
dated September 19, 2007, vacated. (See M-4905/M-4906/M-4907/
M-4908/M-4909/M-4910/M-4922/M-4958).

Lippman, P.J., Andrias, Williams, Buckley, Kavanagh, JJ.

M-4939 In the Matter of A., Raekwon Maxx - The Children's
Aid Society

Enlargement of record on appeal granted, as indicated.

Friedman, J.P., Gonzalez, Catterson, Malone, Kavanagh, JJ.

M-3378A People ex rel. Caban, Jose v New York State Division
of Parole

Leave to prosecute appeal as a poor person granted,
as indicated. The order of this Court entered on September 6,
2007 (M-3378) recalled and vacated.

Friedman, J.P., Marlow, Sweeny, Catterson, Malone, JJ.

M-226 People v Evans, Joel

M-471

Notice of appeal filed on December 27, 2005 from
the judgment of Supreme Court, New York County, rendered on
or about December 1, 2005 under Case No. 25254C/05 amended to
include the appeal from the judgment of said Court, rendered on
or about December 1, 2005 under Indictment No. 3412/04. Appeals
consolidated; leave to prosecute same as a poor person granted,
as indicated.