

The issue presented by this appeal is whether General Municipal Law (GML) § 50-e(6) authorizes amendment of a timely served notice of claim to add a wrongful death claim.

On July 28, 2004, Doris Ramos, age 66 and confined to a wheelchair, was traveling south on an M11 bus along on 9th Avenue in Manhattan. She alleged that she was injured when the bus driver negligently placed her in the wheelchair lift at 60th Street and 9th Avenue. Ramos claimed that her wheelchair rolled off the lift, and that she was thrown to the ground, face first, thereby sustaining serious injuries.

On September 10, 2004, Doris Ramos and Vincent Ramos timely served a notice of claim describing the accident and detailing the injuries at that point in time. Following Doris Ramos's death on January 5, 2005, letters of administration were granted to Vincent Ramos on September 26, 2005. On November 10, 2005, Ramos filed a verified summons and complaint setting forth causes of action for wrongful death, conscious pain and suffering, and loss of services; the summons and complaint were served on November 22, 2005. On or about January 23, 2006, defendant served a verified answer, and issue was joined.

By notice of motion dated May 22, 2007, defendant moved to dismiss the wrongful death cause of action, alleging that Ramos had failed to state a cause of action and had failed to meet the notice of claim requirements of GML 50-e and Public Authorities

Law § 1212.

Ramos opposed defendant's motion, and cross-moved to amend the original notice of claim to add a claim for wrongful death arising out of the same circumstances set forth in the original notice of claim. Ramos argued, among other things, that it was permissible under GML 50-e(6) to amend an existing and timely filed notice of claim to add a claim for wrongful death arising out of the circumstances enumerated in the original notice of claim.

By order entered on December 12, 2007, the motion court granted defendant's motion to dismiss, and denied Ramos's cross motion to amend the original notice of claim. The court determined that GML 50-e(6) authorized merely the amendment of technical defects or omissions, not substantive changes in the theory of liability. In that regard, the court found that an action to recover damages for conscious pain and suffering is materially distinct from a cause of action to recover damages resulting from a decedent's death. The court explained that recovery for conscious pain and suffering accrues to the decedent's estate, whereas the damages for wrongful death are for the benefit of the decedent's distributees who have suffered pecuniary injury, and thus are predicated on different theories of loss which accrue to different parties.

For the reasons set forth below, we find that it was error

for the motion court to deny Ramos's cross motion.

It is true that the summons and complaint served by plaintiff within 90 days of his appointment as the decedent's administrator were not a substitute for the notice of claim for wrongful death required by Public Authorities Law § 1212(2) and § 2980 and GML 50-e(1). However, GML 50-e(6) provides that any "mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section . . . may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby." In fact, we have consistently held that a plaintiff may amend a notice of claim to include derivative claims predicated on the same facts already included in the original notice of claim (see *Sciolto v New York City Tr. Auth.*, 288 AD2d 144 [2001]). Similarly, the Fourth Department has squarely held that a plaintiff may add a claim for wrongful death pursuant to GML 50-e(6) (*Matter of Scheel v City of Syracuse*, 97 AD2d 978 [1983]).

In the instant matter, it cannot be disputed that the wrongful death claim results from the same facts as were alleged in a timely and otherwise admittedly valid notice of claim for personal injuries. Because the wrongful death claim simply adds an item of damages that must be proven by the aggrieved party, we find that plaintiff should be granted leave to amend the notice

of claim pursuant to GML 50-e(6).

Furthermore, we find that allowing an amendment to the original notice of claim in order to add a claim for wrongful death does not cause defendant any prejudice (GML 50-e[6]). It is well settled that the purpose of the notice of claim requirement is to allow the municipality to investigate the claim while the information is still available and before witnesses depart or conditions change (see *Matter of Beary v City of Rye*, 44 NY2d 398, 412-413 [1978]). The test of the notice's sufficiency is "whether it includes information sufficient to enable the city to investigate the claim" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 68 [2007], quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]).

We note that defendant waited two and one-half years to move to dismiss for failure to file a notice of claim. Setting that fact aside, there can be no dispute that the facts giving rise to the wrongful death claim are identical to that series of events which formed the basis for the original claim for personal injuries. Thus, the delay in asserting the wrongful death claim could not possibly have prejudiced defendant in maintaining its defense on the merits. Accordingly, the amendment to the

original notice of claim should be allowed (see *Scheel*, 97 AD2d at 978; cf. *Perry v City of New York*, 246 AD2d 380 [1998]). In view of the foregoing, we do not reach plaintiff's other arguments.

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

ENTERED: MARCH 19, 2009

CLERK

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5248 Lisa Rose,
Plaintiff-Respondent,

Index 15109/06

-against-

Citywide Auto Leasing, Inc.,
Defendant,

Ibrahima Sow, et al.,
Defendants-Appellants.

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

The Edelsteins, Faegenburg & Brown, LLP, New York (Evan M. Landa of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 11, 2008, which denied the motion of defendants Sow and Jejote for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against all defendants.

Defendants satisfied their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Based on their physical examinations of plaintiff and review of her MRI reports, as well as plaintiff's own statements, defendants' experts concluded that any limitations were either degenerative in nature or attributable to a workplace accident subsequent to the instant

occurrence (see *Valentin v Pomilla*, __ AD3d __, 2009 NY Slip Op 981 [1st Dept 2009]). Plaintiff failed to raise a triable issue by offering factually based medical opinions ruling out the subsequent accident and degenerative conditions as the cause of her limitations, and therefore summary judgment should have been granted to the moving defendants (see *Lunkins v Toure*, 50 AD3d 399 [2008]). We dismiss the complaint as against all defendants, since "if plaintiff cannot meet the threshold for serious injury against one defendant, she cannot meet it against the other[s]" (*Lopez v Simpson*, 39 AD3d 420, 421 [2007]).

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

ENTERED: MARCH 19, 2009

CLERK

Mazzarelli, J.P., Gonzalez, Sweeny, McGuire, DeGrasse, JJ.

5391N Regina Carter, etc., Index 118304/04
Plaintiff-Appellant,

-against-

Isabella Geriatric Center, Inc.,
Defendant-Respondent.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of counsel), for respondent.

Appeal from an order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered on or about January 10, 2008, which precluded plaintiff from offering expert testimony at trial based on her failure to provide sufficient expert disclosure and, based on that preclusion, dismissed the complaint, unanimously dismissed, without costs.

The order on appeal, which was issued at a conference, is not appealable as of right because it did not decide a motion made on notice (see CPLR 5701[a][2]; *Sidilev v Tsal-Tsalko*, 52 AD3d 398 [2008]; *Turbel v Societe Generale*, 37 AD3d 187 [2007]). We decline to grant leave to appeal (see CPLR 5701[c]) because the record is not sufficiently developed to permit us to consider the issues raised by the parties. Notably, neither party made arguments or submitted evidence before Supreme Court touching on the fact-based issue of which of plaintiff's claims sound in

medical malpractice and which sound in ordinary negligence (see *Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787-788 [1996]).

Relatedly, neither party made arguments or submitted evidence addressing which of plaintiff's claims need to be supported by expert testimony and which do not. Plaintiff's remedy is a motion to vacate the order precluding her from calling expert witnesses and dismissing the complaint.

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5439 Cristobal Alicea,
Plaintiff-Appellant,

Index 117522/05

-against-

Troy Trans, Inc., et al.,
Defendants-Respondents.

Stephen D. Chakwin, Jr., New York, for appellant.

Filip L. Tiffenberg, P.C., New York (Filip L. Tiffenberg of
counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan,
J.), entered December 24, 2007, which granted defendants' motion
for summary judgment dismissing the complaint for lack of a
serious injury as required by Insurance Law § 5102(d),
unanimously affirmed, without costs.

The affirmed medical report of defendants' physician
stating, *inter alia*, that he examined plaintiff on August 24,
2006 and found no objective clinical evidence of the injuries
alleged in plaintiff's bill of particulars, nor any evidence of
limited range of motion or other residual injury as a result of
the accident of October 26, 2005, sufficed to show, *prima facie*,
that plaintiff did not sustain a permanent or significant
limitation as a result of the October 26, 2005 accident (see
Nagbe v Minigreen Hacking Group, 22 AD3d 326, 326 [2005]). We
decline to consider, because improperly raised for the first time
on appeal, plaintiff's argument that the physician's affirmation

was rendered deficient by his acknowledgment that he did not receive or review medical records and diagnostic films (see *Vasquez v Reluzco*, 28 AD3d 365, 366 [2006]). Summary judgment was properly granted because plaintiff's opposition failed to adduce evidence of a limitation of range of motion based on objective medical findings made within a reasonable time after the accident (see *Thompson v Abbasi*, 15 AD3d 95, 99 [2005]; *Toulson v Young Han Pae*, 13 AD3d 317, 319 [2004]). The report of the physician who examined plaintiff five days after the accident, on October 31, 2005, may not be considered for this purpose because it was not sworn or affirmed (see *Toulson, id.*; *Petinrin v Levering*, 17 AD3d 173, 174 [2005]).

In any event, we would reach the same conclusion even if we were to consider this physician's report, the records of the hospital to which plaintiff was taken after the accident, the unsworn MRI reports taken within two weeks of the accident, the unsworn report of the surgeon who operated on plaintiff's shoulder on January 24, 2006, the unsworn "follow-up examination" dated February 23, 2006, and the affidavit of the physician who examined plaintiff on January 29, 2007. While these materials show continuing complaints of pain, a shoulder tear, shoulder surgery, and bulging and herniated discs in the cervical and lumbar spine, they do not contain a contemporaneous quantitative or qualitative assessment of the extent and duration of resulting

range-of-motion limitations (see *Nagbe*, 22 AD3d at 326; *Thompson*, 15 AD3d at 97-98; *Arjona v Calcano*, 7 AD3d 279 [2004]). Such assessment is required even where there has been surgery (see *Danvers v New York City Tr. Auth.*, 57 AD3d 252, [2008]). The physician's affidavit fails in this respect because it merely describes tests that were performed in the past, and provides no specific, objective evidence of how the doctor arrived at his findings of limited range of motion at the time of his examination, or why he attributed the limitations to the accident (see *Bent v Jackson*, 15 AD3d 46, 49 [2005]).

Plaintiff's bill of particulars alleging that he stayed home from work for only two weeks after the accident establishes defendants' entitlement to summary judgment on plaintiff's 90/180-day claim (see *Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]).

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ENTERED: MARCH 19, 2009

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other witnesses (see *People v Macana*, 84 NY2d 173, 180 [1994]).

Defendant's remaining claims do not warrant reversal.

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.,

100 Eleanor Capogrosso,
Plaintiff-Appellant,

Index 112291/06

-against-

Tina Kansas,
Defendant-Respondent.

Eleanor Capogrosso, New York, appellant pro se.

Tina Kansas, New York, respondent pro se.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered July 24, 2007, in an action for legal malpractice, dismissing the complaint pursuant to an order, which, inter alia, granted defendant's motion to dismiss the complaint and enjoined plaintiff from initiating any further litigation without prior approval of the administrative judge of the court in which she seeks to bring a further motion or future action, unanimously affirmed, with costs.

Plaintiff's action for legal malpractice is barred by the statute of limitations, which began to run no later than the day the order dismissing her underlying medical malpractice action was entered (*see McCoy v Feinman*, 99 NY2d 295, 298 [2002]). The injunction barring plaintiff from initiating further litigation without prior court approval was justified in light of the evidence of plaintiff's repeated abuse of the judicial process

and her penchant for vexatious conduct (*Sassower v Signorelli*, 99 AD2d 358 [1984]).

We have considered plaintiff's remaining contentions, including that the motion to dismiss was jurisdictionally defective, and find them unavailing.

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ENTERED: MARCH 19, 2009

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violation of § 240(1) (see *Kielar v Metro. Museum of Art*, 55 AD3d 456, 458 [2008]; *Greaves v Obayashi Corp.*, 55 AD3d 409 [2008]), and plaintiff was not, under any view of the evidence, the sole proximate cause of his injuries (see *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [2007]; *Kyle v City of New York*, 268 AD2d 192, 196 [2000], *lv denied* 97 NY2d 608 [2002]).

The court properly denied defendant's motion for summary judgment on plaintiffs' § 241(6) claim premised on Industrial Code (12 NYCRR) § 23-1.7(a)(1). This rule is sufficiently specific to support a cause of action under § 241(6) (see *Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1998]), and a material question of fact remains as to whether the area where the accident occurred was an area "normally exposed to falling material or objects," and as to whether the sidewalk bridge without safety netting provided appropriate overhead protection to workers in that area.

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

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

102 In re Dimetreus A.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris
of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Susan
R. Larabee, J.), entered on or about June 12, 2008, which
adjudicated appellant a juvenile delinquent upon a fact-finding
determination that he had committed acts which, if committed by
an adult, would constitute the crimes of attempted robbery in the
first and second degrees and menacing in the second degree, and
placed him with the Office of Children and Family Services for a
period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence
and was not against the weight of the evidence (see *People v*
Danielson, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the court's decision to credit the complainant's testimony and not that of appellant.

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Saxe, Sweeny, Freedman, JJ.

103 Gerasimos Voultepsis, et al., Index 103370/04
 Plaintiffs-Respondents-Appellants,

-against-

Gumley-Haft-Klierer, Inc.,
Defendant,

Gumley-Haft LLC,
Defendant-Appellant-Respondent.

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for
appellant-respondent.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for
respondents-appellants.

Order, Supreme Court, New York County (Joan Madden, J.),
entered July 14, 2008, which denied defendant-appellant's motion
for summary judgment dismissing the complaint, and denied
plaintiffs' motion for partial summary judgment on the issue of
liability on their claim under Labor Law § 240(1), to strike
appellant's affirmative defense based on the Workers'
Compensation Law, and to strike appellant's answer as a sanction
for spoliation of evidence, unanimously modified, on the law,
plaintiffs' motion granted solely to the extent of striking
appellant's affirmative defense based on the Workers'
Compensation Law, and otherwise affirmed, without costs.

This action arises out of an accident in a cooperative
apartment building, where plaintiff was the superintendent, his
employer was the cooperative corporation, and appellant was the

building's managing agent pursuant to an agreement with the cooperative corporation. Plaintiff was injured when, while replacing a wooden floor in the building's sub-basement, the ladder he was using slid, causing him to fall to the ground.

On plaintiffs' claim under Labor Law § 240(1), appellant can be held liable only if it was a "statutory agent" of the owner. Statutory agency turns on the authority to supervise and control the employee (see *Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 98-99 [1999]), and "[o]nly upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Here, the motion court properly contrasted evidence that appellant was responsible for overseeing such special projects as the floor replacement, and that its employee assigned to manage the building had a role in ensuring that such projects were done safely, with proof that such authority was limited. Accordingly, there are questions of fact as to the "scope" of appellant's "oversight and control of the work" for statutory agency purposes (see *Aponte v City of New York*, 55 AD3d 485, 485 [2008]). The record also presents triable issues regarding plaintiffs' claim under Labor Law § 200, both as to whether appellant had the authority to control the activity that brought about plaintiff's alleged injury, and as to whether

appellant had actual or constructive notice of the alleged dangerous condition (see e.g. *Fresco v 157 E. 72nd St. Condominium*, 2 AD3d 326, 328 [2003], *lv dismissed* 3 NY3d 630 [2004]).

The Workers' Compensation Law defense, however, turns on the actual exercise by the defendant of authority to control plaintiff employee's work (see *Fox*, 266 AD2d at 99). The putative special employer must demonstrate that its actual working relationship with plaintiff employee allowed it to control and direct "the manner, details and ultimate result of" plaintiff's work, and determine "all essential, locational and commonly recognizable components" of that work (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 550 [2008] [internal quotation marks and citations omitted]). Here, appellant essentially concedes that it lacked the required level of control, and the record fails to raise any question of fact on the point.

Denial of plaintiffs' motion to strike appellant's answer as a sanction for spoliation of evidence was a provident exercise of discretion, where appellant explained that it searched for the

requested documents and could not find them (*see Positive Influence Fashions, Inc. v Seneca Ins. Co.*, 43 AD3d 796 [2007]; *Diaz v Rose*, 40 AD3d 429, 430 [2007])).

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

104-

104A Muriel Siebert,
Plaintiff-Appellant,

Index 117696/05

-against-

Nicholas Dermigny,
Defendant-Respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Stephen M. Sinaiko of counsel), for appellant.

The Law Offices of Fred Van Remortel, P.C., New York (Allan J. Berlowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered May 30, 2007, after nonjury trial, dismissing the action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about same date, which dismissed the action after findings of fact and conclusions of law, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff bore the burden of proof in this action on an unpaid loan. The question was whether the money advanced to defendant was actually a loan in the form of a down payment on a Manhattan co-op apartment, as alleged, or whether it was simply payment on a debt in the form of reimbursement of rent on a New Jersey apartment. As the trial court determined, the testimony of neither party was credible, and there is no basis for concluding that the findings of fact could not have been reached

under any fair interpretation of the evidence, especially where those findings rest in large part on witness credibility (see *Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]).

The court noted the absence of a written agreement between the parties or any purpose memorialized on plaintiff's check that might have indicated the funds advanced to defendant constituted a loan. Furthermore, plaintiff failed to demand payment from defendant even after the latter received substantial bonuses. Whether a notation in plaintiff's check ledger (that the check represented a loan) constituted a contemporaneous writing rested on plaintiff's credibility, which the court found lacking.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: MARCH 19, 2009

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Defendant's remaining claim, although arguably raised in a pretrial motion, was never addressed by the motion court, and defendant not only abandoned but affirmatively waived this claim at trial. As an alternative holding, we find no basis for reversal.

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

107 Janice Clement,
Plaintiff-Respondent,

Index 109799/07

-against-

Kateri Residence,
Defendant-Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmecci of counsel), for appellant.

The Cochran Firm, New York (Paul A. Marber of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 30, 2008, which, insofar as appealed from as limited by the briefs, in this action for personal injury and negligent hiring and retention allegedly arising out of the care afforded plaintiff during her stay at defendant nursing home, granted plaintiff's motion to compel disclosure of certain documents and denied defendant's cross motion for a protective order, unanimously affirmed, without costs.

Plaintiff's disclosure demand for negative outcome and incident reports involving conditions and occurrences like those alleged in the complaint are not protected by the quality assurance privilege, since such reports, although utilized by defendant's quality assurance committee, were not prepared by or at the behest of such committee, but rather were of the type

routinely prepared and maintained pursuant to 10 NYCRR 415.15(a)(3)(i) (see *Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 440 [2003]). As indicated in the affidavit of defendant's Director of Quality Management, the function of defendant's quality assurance committee, as it pertains to the negative outcome and incident reports, appears to be no more than one of compliance with the requirements 10 NYCRR 415.15(a)(3)(i), and, thus, subject to disclosure (see *Kivlehan v Waltner*, 36 AD3d 597, 599 [2007]).

Furthermore, plaintiff's demands, as time-limited by the court, as to, inter alia, personnel information regarding each employee who had contact with plaintiff while she was in defendant's residence, staff medical policies, and system-wide operational materials such as contracts, licenses, and by-laws, are material and necessary (see generally *Anonymous v High School for Env'tl. Studies*, 32 AD3d 353, 358 [2006]), and are not overly broad or unduly burdensome, inasmuch defendant is compelled by statute and regulation to maintain and continuously collect such information (see e.g. Public Health Law § 2805-e; 10 NYCRR 415.15[a][3][i]; 10 NYCRR 415.30[h], [n]; 10 NYCRR 412.1; *Simmons v Northern Manhattan Nursing Home, Inc.*, 52 AD3d 351 [2008]).

We have considered defendant's remaining contentions and find them unavailing.

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.,

108 R&R Capital LLC, et al.,
Plaintiffs-Appellants,

Index 604080/05

-against-

Linda Merritt, etc.,
Defendant-Respondent.

Hogan & Hartson LLP, New York (Paul B. Sweeney of counsel), for appellants.

Joseph M. Fioravanti, Media, PA (of the Pennsylvania Bar, admitted pro hac vice), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 12, 2008, which granted defendant's motion for disbursement of proceeds of the sale of certain property located in Pennsylvania, unanimously reversed, on the law, with costs, and the motion denied.

The motion court did not have jurisdiction over plaintiff's claim for a final accounting of the proceeds of the sale of the Pennsylvania property at issue, which was the sole asset of a limited liability corporation in which plaintiffs and defendant were equal members. Although plaintiffs initially commenced this action in New York relating to defendant's alleged mismanagement of several limited liability corporations, the claims were heard and dismissed after a nonjury trial.

Defendant subsequently sold the property at issue and plaintiff commenced an action in Pennsylvania for, inter alia, a

final accounting based on the sale of the property and defendant's alleged mishandling of the proceeds. The Pennsylvania court placed the proceeds of the sale in escrow pending a determination by Supreme Court, New York County regarding how the funds should be disbursed and defendant moved the court for disbursement of the funds pursuant to a schedule submitted with the motion.

The motion court, in granting the motion and permitting the disbursements sought by defendant with limited exceptions, lacked jurisdiction over plaintiff's claims, since the relief sought did not relate to a cause of action raised in the initial complaint, nor was the issue involved previously litigated in this action (see *P.A. Bldg. Co. v City of New York*, 236 AD2d 275 [1997]; *Ward-Carpenter Engrs. v Sassower*, 193 AD2d 730 [1993]).

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aggravating factors supporting the court's discretionary upward departure. The risk assessment instrument did not adequately account for the full extent of defendant's prior record (see *People v Wilkens*, 33 AD3d 399 [2006], *lv denied* 8 NY3d 801 [2007]) and the serious circumstances of the current offense requiring registration (see *People v Ellis*, 52 AD3d 1272 [2008], *lv denied* 11 NY3d 707 [2008]).

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

112 Angelo Lopez,
Plaintiff-Respondent,

Index 108663/04

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

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

Sullivan, Papain, Block, McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for respondent.

Judgment, Supreme Court, New York County (Donna M. Mills, J.; Robert D. Lippmann, J., at jury trial), entered March 26, 2007, awarding plaintiff \$2,100,000 for past pain and suffering and \$5,600,000 for future pain and suffering, after adjustment to reflect the jury's apportionment of responsibility, unanimously modified, on the facts, to vacate the award for future pain and suffering and remand for a new trial on that issue only and otherwise affirmed, without costs, unless plaintiff, within 20 days of service of a copy of this order, stipulates to reduce the award for future pain and suffering, after apportionment, to \$4,600,000 and to entry of an amended judgment in accordance therewith.

Plaintiff was riding his bicycle when it collided with a bus owned and operated by defendants. The jury's conclusion was based on a fair interpretation of the evidence that, when

considered in a light most favorable to plaintiff, was legally sufficient to support the verdict (*see Cohen v Hallmark Cards*, 45 NY2d 493 [1978]). Great deference must be accorded to the fact-finding function of the jury, which had the opportunity to see and hear the witnesses and assess their credibility (*see Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 [2006]), as well as the weight it gave to conflicting expert testimony. The jury was justified in crediting the opinion of plaintiff's expert witness that notwithstanding plaintiff's own negligence, the driver of the bus was much more at fault for making no effort to avert the accident (*id.* at 492-493).

The court did not err in permitting the jury to hear that the driver had violated Transit Authority rules by not remaining at the scene of the accident. Although an agency's internal rules and practices are inadmissible when they require a standard of care transcending that imposed by common law (*see Rahimi v Manhattan & Bronx Surface Tr. Operating Auth.*, 43 AD3d 802, 804 [2007]), the bulletin at issue merely declared that incidents involving injury or vehicle damage must be reported as soon as possible, which is no more than what is required under common law (*see Danbois v New York Cent. R.R. Co.*, 12 NY2d 234, 240 [1963]). Indeed, the jury was not informed that the Transit Authority had found the driver to be at fault, but was instead accurately advised that he continued without stopping for five blocks after

the event.

The amount of damages awarded plaintiff for future pain and suffering deviates materially from what is reasonable compensation under the circumstances (CPLR 5501[c]).

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: MARCH 19, 2009

CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

114 In re Matter of Jewish Association Index 402583/07
 for Services for the Aged Community
 Guardian Program,
 Petitioner-Respondent,

-against-

David Kramer,
Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Namita Gupta of counsel), for appellant.

Miller, Canfield, Paddock & Stone, P.L.L.C., New York (Susan I. Robbins of counsel), for respondent.

Order, Supreme Court, New York County (John E. H. Stackhouse, J.), entered April 8, 2008, which, to the extent appealed from, directed reimbursement of petitioner for \$10,131.56 in temporary guardianship expenses and legal fees incurred in December 2007 in connection with an interim stay of the guardianship powers obtained by respondent's appointed Mental Hygiene Legal Services counsel, unanimously reversed, on the law, without costs, and the matter remanded for re-evaluation of the legal fees to be imposed, if any.

Attorney fees were improvidently imposed without the requisite written decision setting forth the basis for the award (22 NYCRR 36.4[b][3]) and an explanation as to the reasonableness of the fees imposed (*Matter of Martha O.J.*, 22 AD3d 756 [2005]; *cf. Matter of Freeman*, 34 NY2d 1 [1974]). An evaluation de novo

is further warranted as to whether the legal fees sought were occasioned by procedural mistakes possibly committed by respondent's counsel.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: MARCH 19, 2009

CLERK

against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]).

The court properly exercised its discretion in denying defendant's mistrial motion, made on the basis of a portion of the prosecutor's summation that allegedly misstated the law. Any possible confusion in this regard was prevented by the court's correct and thorough jury instruction on the particular subject at issue.

We decline to vacate the third-degree possession conviction in the interest of justice.

We perceive no basis for reducing the sentence.

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that the brokers provide evidence of a competing bid, which statement and request the brokers relayed to the owner.

Plaintiffs claim that defendants acted wrongfully in failing to disclose to the owner the entirety of the March 12 conversation, and mischaracterizing their counsel's "buyer's remorse" statement, which was allegedly said in a jocular manner. These allegations do not rise to the level of such "wrongful means" as physical violence, fraud or misrepresentation, which are necessary to establish a claim for tortious interference with a contract (see *NBT Bancorp Inc. v Fleet/Norstar Fin. Group*, 87 NY2d 614, 624 [1996]). Similarly lacking is proof that defendants were solely motivated by malice, as defendants have set forth that they disclosed the subject telephone call to the owner based on their contractual and fiduciary duty to do so (see *Snyder v Sony Music Entertainment*, 252 AD2d 294, 300 [1999]). Indeed, as brokers, defendants had a clear economic interest in closing the deal, separate from any possible malice (see *Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

**M-591 - 110 Amity Associates, LLC, et al.
v Grubb & Ellis New York, Inc., et al.,**

Motion seeking leave to strike portion of
reply brief denied.

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

ENTERED: MARCH 19, 2009

CLERK

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
MARCH 19, 2009

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

1143X Cherry v Akam Associates, Inc.; Akam Associates, Inc.
 v Allied Barton Security Services

1156 People v Claudio, Donny

1157 People v Villaneuva, Michael

 Appeals withdrawn.

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

M-818 Campuzano v Board of Education of the City of New York
 (And other actions)

 Motion withdrawn.

Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

M-901 349 Amsterdam Avenue Corp. v Good Sports Ltd.
 Partnership

 Enlargement of time to perfect appeal denied; appeal
dismissed.

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-190 B.J.K., doing business as Chem Rx v Margaret Tietz
 Nursing & Rehabilitation Center

 Appeal dismissed unless perfected for the September
2009 Term, as indicated.

Tom, J.P., Saxe, Sweeny, Acosta, JJ.

M-353 Spodek v Barrett
M-768

Dismissal of appeal as untimely taken granted (M-353);
dismissal of appeal for lack of jurisdiction denied (M-768).

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-7 Rochester v Mattingly

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

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-754 People v Dobson, Rohan

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

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-764 People v Vasquez, Anibal

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

Tom, J.P., Mazzairelli, Andrias, Saxe, Friedman, JJ.

M-4623
M-5132 [DC #36] People v Hall, Ralph

Writ of error coram nobis denied (M-4623). Upon the
Court's own motion and upon papers filed, time to perfect appeal
enlarged to the September 2009 Term, as indicated (M-5132 [DC
#36]).

Tom, J.P., Mazzarelli, Buckley, Catterson, JJ.

M-5746 People v Bello, Anthony

Writ of error coram nobis denied.

Tom, J.P., Andrias, Saxe, DeGrasse, JJ.

M-227 Hotel 71 Mezz Lender LLC v Falor

Reargument denied; leave to appeal to the Court of Appeal granted, as indicated.

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

M-212 Crawford v Liz Claiborne, Inc.

Reargument or other relief denied.

Tom, J.P., Saxe, Gonzalez, Moskowitz, JJ.

M-3357 People v Harrison, Darius

Writ of error coram nobis denied.

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-698 111 Realty Co. v Sulkowska

Leave to appeal from the Appellate Term denied.

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-984 Wellstone Mills LLC v Dillon Yarn Corporation

Stay granted on condition appeal perfected for the
September 2009 Term, as indicated.

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-992 Haxhaj v The Central Park Conservancy

Time to perfect appeal enlarged to the September 2009
Term.

Tom, J.P., Gonzalez, Sweeny, Catterson, Renwick, JJ.

M-946 Kline v Kline

Stay of trial granted.

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

M-4866 People v Rodriguez, Jeffrey

Prospective appeal deemed withdrawn.

Mazzarelli, J.P., Buckley, McGuire, DeGrasse, JJ.

M-5062 [DC #11] People v Billip, Alkim, also known as
Billips, Alkim

Upon the Court's own motion, motion deemed withdrawn,
as indicated.

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-420 Morrison v Yaroshefsky

Appeal dismissed.

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, JJ.

M-795 People v Roque, Apolinar

Counsel substituted.

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-535 Gryphon Domestic VI v APP International Finance
Company, B.V.

Time to perfect appeal enlarged to the December 2009
Term.

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-604 Balkany v Village Voice Media, Inc.

Time to perfect appeal enlarged to the September 2009
Term.

Mazzarelli, J.P., Buckley, McGuire, DeGrasse, JJ.

M-5076 [DC #17] People v Carrion, Jose

M-5126 [DC #28] People v Feliciano, Wilson

M-5159 [DC #63] People v Ortiz, Junior

Upon the Court's own motions, time to perfect appeals
enlarged to the September 2009 Term, as indicated.

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

M-469 Angel v O'Neill

Stay denied.

Andrias, J.P., Saxe, Sweeny, DeGrasse, JJ.

M-361 Castle Village Owners Corp. v Greater New York Mutual
Insurance Company; Langan Engineering and Environmental
Services, Inc. v Muser Rutledge Consulting Engineers

Leave to appeal to the Court of Appeal denied.

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-747 Double C Realty Corp. v Craps, LLC

Reargument denied.

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

M-671 Tapia v MCSAM Management, LLC

Appeal deemed withdrawn.

Friedman, J.P., McGuire, Acosta, DeGrasse, Freedman, JJ.

M-5394 In the Matter of O., Margarita - Edwin Gould Services
For Children and Families

Appeal dismissed.

Gonzalez, J.P., Sweeny, Catterson, DeGrasse, JJ.

M-6169 Barnan Associates v 196 Owners Corp.

Leave to appeal to the Court of Appeals denied.

Buckley, J.P., Moskowitz, Renwick, Freedman, JJ.

M-415 Wong v Lee

Appeal dismissed.

Sweeny, J.P., McGuire, Renwick, Freedman, JJ.

M-558 Chen v Citibank

Renewal and/or reconsideration denied.

Gonzalez, J.

M-5805 People v Gray, William

Leave to appeal to this Court granted, as indicated.

Acosta, J.

M-492 People v Davidson, Noel

Reargument denied.

Renwick, J.

M-659 People v Acevedo, Guillermo

Leave to appeal to this Court denied.

Mazzarelli, J.P., Saxe, Friedman, Nardelli, Buckley, JJ.

In the Matter of Attorneys Who Are in Violation
of Judiciary Law Section 468-a:

M-557 Robert Edwards, admitted on 5-6-91,
at a Term of the Appellate Division,
First Department

Respondent reinstated as an attorney and counselor-at-
law in the State of New York, effective the date hereof. No
opinion. All concur.

Mazzarelli, J.P., Saxe, Friedman, Nardelli, Buckley, JJ.

In the Matter of Attorneys Who Are in Violation
of Judiciary Law Section 468-a:

M-978 Matthew T. Dushoff
(admitted as Matthew Todd Dushoff),
admitted in 1991,
at a Term of the Appellate Division,
Second Department

Respondent reinstated as an attorney and counselor-at-
law in the State of New York, effective the date hereof. No
opinion. All concur.

Mazzarelli, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

M-281 In the Matter of Thomas P. Burke
(admitted as Thomas Patrick Burke),
a suspended attorney:

Respondent disbarred and his name stricken from the
roll of attorneys and counselors-at-law in the State of New York,
effective the date hereof. Opinion Per Curiam. All concur.

The following orders were entered and filed on March 17, 2009.

Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

M-832 In the Matter of B., Gregory L. v G., Magdalena
Time to perfect appeal enlarged to the June 2009 Term.

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

M-1021 Fabrikant v Fabrikant
Stay denied.

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

M-1080 Campbell v McKeon
Stay granted on condition direct appeal perfected for
the June 2009 Term, as indicated.

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

M-1139 Cucinotta v The City of New York - Meriken Ltd., doing
business as Meriken Restaurant
(And a third-party action)
Stay of trial denied.

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

M-916 Chelli v The Kelly Group, P.C.
Stay granted on condition appeal perfected for the
June 2009 Term, as indicated.

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

M-1014 G., Luis v Limniatis - G., Luisa

Stay of trial denied.

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

M-1089 Melendez v Atid Company, LLC; Salanter Akiba Riverdale
Academy LLC v Hudson Construction Management, Inc.

Stay of trial denied.

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

M-1151

M-1152 Rabinowitz v M., James - Spota

Time to perfect appeal enlarged to the June 2009 Term
and stay granted by order of this Court entered January 13, 2009
(M-5727) continued on condition appeal so perfected (M-1151);
caption amended, as indicated (M-1152).

Andrias, J.P., Gonzalez, Buckley, Acosta, JJ.

M-1071 Woods v 126 Riverside Drive Corp.

Leave to strike appellants' brief granted to the extent
indicated; appeal adjourned to the June 2009 Term.