



From that date until September 9, 2005, a period of almost 20 years, she served as either a regular substitute teacher of social studies or a probationary teacher of "common branches," which are subjects generally taught to elementary school children. As specifically relevant to this appeal, petitioner was appointed as a probationary teacher of common branches on August 25, 2003, with a three-year probationary period. Immediately prior to such appointment, she had served in the capacity of a regular substitute teacher of social studies for eight years.

One year into her probationary period, petitioner began having problems with attendance and punctuality. Previously, she had received a written attendance policy from the school principal, and, in a letter dated October 20, 2004, she was notified by the principal that her excessive lateness for the first two months of the 2004 school year was unacceptable. The letter noted that petitioner had been late five times and absent four times during September and October 2004, and warned that a failure to improve could lead to an "Unsatisfactory" rating.

Between October 2004 and March 2005, petitioner was warned at least six additional times and had two meetings with her principal and union representative, during which she alleged that her lateness was the result of child care problems arising from

the fact that the school bus was often late in picking up her children. By March 2005, petitioner had been late 24 times and absent on 13 days, within a seven month period. On June 28, 2005, petitioner received an unsatisfactory rating for the 2004-2005 school year on the basis of her poor attendance record.

By letter dated July 1, 2005, the community superintendent of the New York City Department of Education (DOE) informed petitioner that "on August 5, 2005, I will review and consider whether your services as a probationer [will] be discontinued and your license terminated as of the close of business August 5, 2005." Petitioner was further advised that she could submit a written response by July 29, 2005. After this letter was returned to DOE as unclaimed, the community superintendent sent a second letter, dated August 15, 2005, this time including an apartment number in the address, informing petitioner that August 25, 2005 was the new date for the superintendent's consideration and decision. Petitioner submitted a response on August 23, 2005, reiterating her child-care problems and requesting that the Board not terminate her services.

By letter dated September 8, 2005, the community superintendent informed petitioner that she "affirm[ed] your Discontinuance of Probationary Service and license termination effective close of business September 9, 2005." The letter

further noted that petitioner had "the right to appeal this decision" within 15 days of this letter.

Petitioner filed an administrative appeal in September 2005, and filed the instant article 78 petition on December 13, 2005, challenging her termination. In the latter, petitioner sought: 1) a declaration that she had become a tenured teacher as of June 30, 2004, by estoppel; 2) a declaration that her termination was null and void, and in violation of Education Law §§ 2573(5) and 3020-a; 3) reinstatement as a tenured teacher with full back pay and interest, and 4) payment for the lack of 30 days' notice of termination and for nine additional days for which she had been deprived of her rightful pay.

Petitioner's argument for tenure was based on the doctrine of "tenure by estoppel," which may be invoked "when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term" (*Matter of McManus v Board of Educ. of Hempstead Union Free School District*, 87 NY2d 183, 187 [1995]). Petitioner alleges that she acquired tenure by estoppel because she was neither granted nor denied tenure prior to the expiration of her probationary period on June 30, 2004. She asserts that, although her three-year probationary period was

initially set to expire on August 25, 2006, such period was reduced by two years pursuant to Education Law § 2573(1)(a), because she was entitled to credit for two years of service as a regular substitute teacher, which has come to be known as "Jarema credit."

In its answer, DOE argued that the proceeding was time-barred because it was commenced more than four months after DOE's determination, and that petitioner was not entitled to Jarema credit for her prior service as a substitute teacher.

The article 78 court declined to consider petitioner's tenure-by-estoppel claim and, instead, dismissed the petition on the ground that it was premature in light of petitioner's pending request for administrative review. The court also construed that portion of the petition requesting recognition of petitioner's tenure status and reinstatement as seeking relief in the nature of mandamus to compel. The court found that mandamus to compel relief was unavailable because petitioner had failed to make a timely demand that respondents perform a duty enjoined by law prior to bringing this article 78 proceeding, and the instant proceeding could not be construed as such a demand.

Petitioner argues that the article 78 court erred in dismissing her petition as premature and in refusing to consider her claim that she had acquired tenure by estoppel. We agree

with both arguments. Addressing the timing of the petition first, the court erred in finding that petitioner's filing of an administrative appeal rendered DOE's determination non-final. The law is well established that a decision to terminate the employment of a probationary teacher is final and binding on the date the termination becomes effective (see *Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 766-767 [1988]; *Matter of Johnson v Board of Educ. of City of N.Y.*, 291 AD2d 450 [2002]; Education Law § 2573[1][a]), and this is true even in circumstances where administrative review is available (see *Frasier* at 766-767).

Here, petitioner was informed in a September 8, 2005 letter from DOE that her employment was terminated as of September 9, 2005. Thus, her commencement of this article 78 proceeding on December 13, 2005 was well within the four-month statute of limitations period and therefore timely. Contrary to DOE's argument, the record does not support its claim that petitioner was actually terminated on July 1, 2005. On the contrary, the record plainly establishes that the July 1, 2005 letter from the superintendent stated only that she would "review and consider" terminating petitioner's probationary employment as of August 5, 2005. It did not indicate that a decision to terminate petitioner had already been made.

Nor is the proceeding subject to dismissal on the ground of laches. The court's analysis hinged on its treatment of the petition as seeking mandamus to compel relief, which requires a demand and refusal by the respondent to perform a duty enjoined by law (see *Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 442 [1959]). However, in our view, the gravamen of the petition is a challenge to DOE's determination to terminate petitioner's employment, which is more in the nature of certiorari to review. For purposes of this case, however, the distinction is immaterial because, even if the petition were properly characterized as seeking mandamus relief, the law recognizes that the petition and respondents' answer can be construed as the necessary demand and refusal (see *Matter of Rapess v Ortiz*, 99 AD2d 413, 414 [1984]).

We now consider the tenure-by-estoppel claim for the first time, and conclude that petitioner has established her status as a tenured teacher. "The Education Law requires a probationary period of three years for a certified teacher to secure tenure (Education Law § 3014[1])" (additional citations omitted) (*Matter of Speichler v Board of Coop. Educ. Servs., Second Supervisory Dist.*, 90 NY2d 110, 113-114 [1997]). However, the three-year probationary period can be reduced to one year through "Jarema credit," which provides that "in the case of a teacher who has

rendered satisfactory service as a regular substitute for a period of two years . . . the probationary period shall be limited to one year" (Education Law § 2573[1][a]). The phrase "regular substitute" service is not defined in the statute, but the case law has required that such service be performed before the probationary appointment, and that it must be continuous for at least one school term (*see Speichler* at 114). There is no dispute in this case that petitioner served as a regular substitute teacher for two years prior to her probationary appointment, extending beyond one full school term, and therefore that she has satisfied the facial requirements for Jarema credit.

DOE, however, asserts an additional requirement for obtaining Jarema credit. It claims that the service as a regular substitute teacher must be in the same tenure area as that for which the teacher ultimately received a probationary appointment. Thus, DOE argues, petitioner's substitute service did not meet this test because it was in the tenure area of social studies, not common branches. DOE cites no case law discussing this requirement, but relies on the statutory language of Education Law § 2573(1)(a), which provides:

"in the case of a teacher who has rendered satisfactory service as a regular substitute for a period of two years *or as a seasonally licensed per session teacher of swimming in day schools who has served in that capacity*

*for a period of two years and has been appointed to teach the same subject in day schools on an annual salary, the probationary period shall be limited to one year" (emphasis added).*

DOE asserts that the above-quoted language requires that the "regular substitute" service must be in "the same subject" as the probationary appointment in order to qualify the teacher for Jarema credit. In our view, this reading of the statutory language is debatable, since it could just as easily be argued that the requirement of teaching the same subject applies only to the "seasonally licensed per session teacher of swimming in day schools."

Assuming, without deciding, that a requirement of service in the same subject exists with respect to regular substitute teachers, we reject DOE's argument that petitioner's service as a sixth-grade teacher of social studies is outside the common branches tenure area. In support of its position, DOE notes that the State Board of Regents Rules do not include social studies in the definition of common branch subjects:

*"any or all of the subjects usually included in the daily program of an elementary school classroom such as arithmetic, civics, visual arts, elementary science, English language, geography, history, hygiene, physical activities, practical arts, reading, music, writing, and such other similar subjects" (emphasis added) (8 NYCRR 30.1[b]).*

Although it is true that this section of the regulations does not expressly list social studies as one of the common branch subjects, DOE fails to discuss the catch-all provision at the end. From this clause, it is clear that the list of common branch subjects in this section is not intended to be exclusive, and, in our view, social studies could easily qualify as one "such other similar subject[]."

In addition, section 30.4 of the same rules, titled "Tenure areas," states that "[k]indergarten ... together with the first six grades shall constitute the elementary tenure area." This would appear to include petitioner's service as a sixth-grade social studies teacher. Further, section 30.5, titled "Elementary tenure area," provides that "[a] professional educator who is employed to devote a substantial portion of his time to classroom instruction in the common branch subjects at the kindergarten . . . level and/or in any of the first six grades shall be deemed to serve in the elementary tenure area." Thus, there is ample authority for petitioner's argument that her regular substitute service as a sixth-grade social studies teacher qualifies her for credit in either the common branch or elementary tenure areas, which in substance appear to be identical.

The case law in the area of tenure further supports the

conclusion that petitioner's service as a regular substitute teacher qualifies her for Jarema credit. Indeed, the Court of Appeals has consistently made clear that "tenure rules should be read broadly in favor of the teacher and that function rather than label should control when a probationary period commences" (*Speichler*, 90 NY2d at 117). For instance, in *Speichler*, the petitioner teacher sought Jarema credit for 11 months of service as a "per diem" substitute teacher in order to establish her claim of tenure by estoppel. BOCES, which had terminated petitioner allegedly during her probationary period, opposed her tenure claim by arguing that her service as a per diem substitute for an "indefinite" period did not constitute "regular substitute" service within the meaning of the Education Law. In reversing the Appellate Division's dismissal of the proceeding, the Court of Appeals held that a determination of the status of a substitute teacher should not depend on whether the service was for a definite or indefinite period, but rather "should be based on the substitute's actual service" (*id.* at 116).

Similarly, in *McManus* (87 NY2d at 187-188), the Court held that a school district's label "acting" principal did not negate the fact that the petitioner was performing probationary service as a principal, for which she was entitled to credit. Although *McManus* did not involve Jarema credit, which is available only to

teachers, the Court found that the governing tenure principle was the same, namely, that the district was improperly denying the petitioner credit toward her probationary period by relying on a temporary label, instead of on her actual work functions.

Likewise, in *Ricca v Board of Educ. of City School Dist. of City of N.Y.* (47 NY2d 385, 391 [1979]), the Court held that “[a] school district may not avoid strict application of the statutory scheme for granting tenure to qualified and experienced teachers by the stratagem of unduly delaying formal appointment of a teacher to a position which that teacher is already filling.” Significantly, the *Ricca* Court further stated that, even if some of the teacher’s probationary service was outside of the subject area of his appointment, it was irrelevant “because the decision of a probationary teacher to accept a temporary assignment out of position in order to accommodate the needs of the school district does not serve to disrupt that teacher’s probationary period, nor may it lead to an increase in the length of that probationary period” (*id.* at 394).

We also point to additional evidence that tenure areas in this State’s educational system are divided primarily by grade area, and not specific subjects, at least at the elementary school level. As noted, state rules provide that teachers of common branch subjects in grades 1 through 6 will generally be

deemed to serve in the elementary tenure area (8 NYCRR 30.5), while those working in grades 7 and 8 will be deemed to serve in the middle grades tenure area (8 NYCRR 30.6). Thus, under the rules, tenure areas are not divided into specific subject areas until seventh or eighth grade, and only then if the instruction in core academic subjects has not been "departmentalized" (8 NYCRR 30.1[d]; 30.6).

There is also case law supporting the general idea that tenure is based primarily on grade level, not subject area (see *Matter of Silver v Board of Educ. of W. Canada Vall. Cent. Sch. Dist., Newport*, 46 AD2d 427, 431 [1975] [petitioner's tenure area was secondary teachers, and was not limited to social studies, for purposes of seniority credit]; *Matter of Greco v Board of Educ. of Patchogue-Medford Union Free School Dist.*, 98 AD2d 721, 722-723 [1983], quoting *Matter of Cuff*, 9 Ed Dept Rep 101, 103 ["a teacher who has been transferred to a new tenure area which encompasses the same grade levels in which he taught in his former tenure area . . . does not lose any rights he had acquired before he was affected by such a transfer"] [internal quotation marks omitted]).

The facts here show that petitioner had consistently taught social studies to sixth graders for approximately 17 years prior to this probationary appointment in common branches. Moreover,

she had previously been appointed as a probationary teacher of common branches for a six-year period (1989-1995), even though DOE actually assigned her to teach social studies to sixth graders during the entire time. Thus, the distinction now drawn by DOE with respect to tenure areas is one that DOE itself has not followed in the past.

Accordingly, we conclude that petitioner's service as a regular substitute teacher of sixth grade social studies qualifies her for Jarema credit, thereby bringing the expiration date of her probationary period as a teacher of common branches to June 30, 2004. Since DOE failed to grant or deny petitioner tenure before that date, she has acquired tenure by estoppel. As a tenured teacher, petitioner could not be terminated without first being subject to formal disciplinary proceedings (see Education Law § 3020-a; see also Education Law § 2573[5]). Therefore, DOE's termination of petitioner without a hearing is annulled, petitioner is declared to have tenure in the common branches area, and she is reinstated with back pay, retroactive to September 1, 2005.

Given this holding, it is unnecessary to consider

petitioner's alternative claims for pay. We take no position on whether petitioner's termination as a tenured teacher would be justified based on the allegations of poor attendance.

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

ENTERED: JANUARY 31, 2008

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Lippman, P.J., Marlow, Williams, Gonzalez, Catterson, JJ.

2411 Gerard Miglionico, Index 104786/03  
Plaintiff-Respondent,

-against-

Bovis Lend Lease, Inc., et al.,  
Defendants-Appellants.

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Fabiani Cohen & Hall, LLP, New York (John V. Fabiani of counsel),  
for appellants.

Silverson Pareres & Lombardi, LLP, New York (Joseph T. Pareres of  
counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.),  
entered May 2, 2007, which granted plaintiff's motion for summary  
judgment as to liability on his Labor Law § 240(1) cause of  
action, affirmed, without costs.

In August of 2002, plaintiff was employed as a journeyman  
carpenter by Sorbara Construction, Inc. at the AOL/Time Warner  
Center construction site. Defendants Columbus Centre and The  
Related Companies were the owners of the premises and defendant  
Bovis Lend Lease was the general contractor. On the morning of  
August 8, plaintiff was working on the 39<sup>th</sup> floor with another  
carpenter, Christopher Morelli, clamping perimeter columns. That  
process involves placing metal clamps around wooden column forms  
so that they do not collapse when they are filled with cement.  
The clamps, each weighing approximately 20-30 pounds, are placed

at 10- to 16-inch intervals from the bottom to the top of the form.

In order to reach the upper portions of the column, plaintiff and Morelli stood on the clamps that they had already secured. Near the middle of the form, plaintiff attempted to hand a clamp around the form to Morelli and fell to a wooden platform five stories below, sustaining serious injuries. Plaintiff and his partner were not wearing harnesses or using any other safety devices.

Plaintiff commenced this action asserting claims under Labor Law § 240(1), § 241(6) and § 200. He moved for partial summary judgment on his section 240(1) claim, solely on the issue of liability. In support of the motion, plaintiff's expert provided an affidavit stating that defendants' failure to provide plaintiff with safe elevation devices or personal fall protection "was a departure from good and accepted construction safety standards and a substantial factor in causing this accident." In addition to the failure to provide a harness, lanyard, perimeter protection (netting or guardrails) or a secured ladder or scaffold, plaintiff's expert opined, "Defendants had a non-delegable duty to provide Mr. Miglionico with . . . an appropriately 5,000 pound tested anchorage point. This accident would not have occurred had these devices, which the Defendants

were obligated to provide, [been] in fact provided.”

The expert opinion was supported by the deposition testimony of plaintiff’s co-workers and Bovis’s Site Safety Plan for the Time Warner project. Specifically, the safety manual states that “[l]anyards and vertical lifelines shall have a minimum breaking strength of 5000 pounds” and that the anchorage points “for fall arrest devices are to be capable of supporting at least 5000 pounds per employee.” In addition, Bovis’s incident investigation report lists the primary cause of the accident as “[n]o fall protection.”

Another carpenter on the Time Warner site, Robert Ramirez, testified at his deposition that he was not required to attend a safety class before he started work clamping columns and that the carpenters at this job site routinely did not wear harnesses. He further stated that, even if they did wear harnesses, there was no anchor point to which a harness could be attached. Specifically, he noted that there was neither a cable nor an eye-bolt on the 39<sup>th</sup> floor to which the harness could have been fastened.

Likewise, Morelli testified that he was never provided with any type of harness or lifeline and that there was no perimeter protection on the 39<sup>th</sup> floor. Morelli also stated that there was no adequate place to which the carpenters could anchor themselves

had they been wearing harnesses. Morelli testified that they were working on a "temporary makeshift floor" that was in the process of being built and that there was not any structure or item of sufficient stability to which they could anchor that would hold the necessary 5,000 pounds.

In opposition, defendants produced their own expert and several fact witnesses. Defendants' expert, Howard Edelson, stated that Sorbara provided fall protection devices to all its employees, and site managers for both Sorbara and Bovis instructed the employees to tie off to column rebars. Notably, while Edelson opined that plaintiff's accident was not caused by the violation of Labor Law § 240(1), nowhere does he state that the accident would have been prevented if plaintiff had properly used the safety equipment that was allegedly provided by the employer or if he had tied off to the column rebars. Rather, he stated only that "there is no causation between the absence of [safety] railing and the plaintiff's fall."

Defendants also provided the testimony of several fact witnesses. Site Safety Manager Michael Tierney testified that, in general, a worker could have attached a harness to anchor points such as a hook in the floor or a cable around the column. He was unfamiliar with the condition of the 39<sup>th</sup> floor at the time of the accident and could not remember if there was a hook

in that floor at any point. He also stated that the workers could have attached harnesses to the column they were working on or that they could have built a scaffold. Site Safety Manager Robert Wright also testified at his deposition that "[t]here is always an anchorage point." However, he could not remember any specific anchorage points on the 39<sup>th</sup> floor. He did state that the appropriate anchorage point would have been the horizontal support beams located behind the columns.

Defendants also provided several affidavits from other employees at the site, stating that all employees were provided with harnesses and other appropriate safety equipment, that safety devices were kept on each floor, and that both an initial safety orientation for the project and weekly safety meetings were held.

Supreme Court granted plaintiff's motion for summary judgment on the issue of liability. The court found that plaintiff established a prima facie case that defendants' failure to provide him with safety devices caused his injuries and that defendants failed to raise an issue of fact whether plaintiff had been provided with any safety devices or safety training.

The function of Labor Law § 240(1) "is to protect workers and to impose the responsibility for safety practices on those

best situated to bear that responsibility" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). In addition, the Court of Appeals has observed that "the statute is to be construed as liberally as may be for the accomplishment of the purpose for which it was . . . framed" (*id.* [citations and quotation marks omitted]). In order for liability to be imposed under this section, the owner or contractor must fail to provide appropriate safety devices, and that lapse must be the proximate cause of plaintiff's injuries (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Conversely, if the worker's own actions constitute the sole proximate cause of his or her injuries, the owner or contractor will not be held liable under the statute (*id.*).

Here, as the dissent points out, there is a significant factual dispute as to whether proper fall protection devices either were available on site or were provided directly to plaintiff. However, this factual dispute is not determinative since defendants failed to rebut plaintiff's expert proof establishing that, even if harnesses were provided, there was not an appropriate anchorage point to which they could have been attached. The statute requires defendants to provide safety devices that will "give proper protection" to the employee (Labor Law § 240[1]). Even assuming the harnesses had been provided,

the only conclusion supported by this record is that they would not have provided the necessary protection.

Contrary to the dissent's argument, this is not a determination that plaintiff's evidence is worthy of belief and defendants' is not. Rather, we conclude that defendants' evidence does not raise an issue of fact whether the harnesses, even if present, were adequate safety devices. Plaintiff's expert opined that the accident would not have occurred if plaintiff had been provided with a 5,000-pound anchorage point. Bovis's site safety plan and plaintiff's fact witnesses supported her conclusion. In response, defendants failed to come forward with evidence to rebut plaintiff's expert's conclusion, as they were bound to do in order to create an issue of fact under well-settled principles of summary judgment. Notably, in none of the affidavits did defendants' witnesses indicate that there was an adequate 5,000 pound anchorage point available to plaintiff while he was performing the work in question. This is information that is available to defendants, if it exists, and that they would be expected to provide in response to a motion for summary judgment.

Defendants' fact witnesses were not familiar with the specifics of the 39<sup>th</sup> floor and did not testify that the objects they suggested as anchor points had sufficient weight-bearing capability to have been useful. Significantly, defendant's

expert failed to take issue either with plaintiff's expert opinion that an appropriate anchorage point must be capable of holding 5,000 pounds or that there was no such anchorage point on the 39<sup>th</sup> floor. Further, although Edelson stated that workers were instructed to tie off to the column rebars, he did not opine as to whether that procedure would have provided adequate protection for a falling worker.

In the absence of some proof that a harness, if provided, would have actually furnished adequate protection, defendants failed to raise an issue of fact whether plaintiff's actions were the sole proximate cause of his injuries.

All concur except Marlow and Gonzalez, JJ.  
who dissent in a memorandum by Gonzalez, J.  
as follows:

GONZALEZ, J. (dissenting)

Because the record includes conflicting evidence regarding whether plaintiff was provided with adequate safety devices at the work site, yet failed to use them, a triable issue of fact has been raised whether plaintiff's conduct was the sole proximate cause of his injuries (see *Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]). Accordingly, I respectfully dissent from the majority's holding affirming the grant of summary judgment to plaintiff as to liability on his Labor Law § 240(1) claim.

Plaintiff was injured while employed as a journeyman carpenter by nonparty Sorbara Construction on the 39<sup>th</sup> floor of the AOL/Time Warner building. His job was to place clamps on wooden perimeter columns, known as "forms," in order to secure them before concrete was poured into each one. The job required that plaintiff and a coworker install clamps at 10 to 16-inch intervals, all the way up to the top of the form. When it became necessary to install a clamp that was too high on the form to reach, plaintiff and his coworker would stand on the lower clamps already installed to perform the work. About halfway up the column, when they were eight feet above the floor and standing on clamps, plaintiff reached around the form to hand his coworker the clamp and fell approximately five floors, sustaining

injuries.

After commencing this action, plaintiff moved for summary judgment on the issue of liability on his Labor Law § 240(1) claim. Plaintiff submitted his own deposition testimony, in which he alleged that he was not provided with any protective devices to prevent him from falling and that he did not attend any safety meetings and was not provided with any safety manuals or other written instructions as to how to perform his work. Plaintiff's coworker testified that there were no adequate safety devices provided in the area in which they were working, and another employee testified that the carpenters involved in clamping routinely did not use harnesses because they interfered with the job. Plaintiff also submitted an affidavit by an expert who averred that the conditions under which plaintiff was working were unsafe and contrary to accepted safety practices. She stated that plaintiff was not provided with a ladder, scaffold or netting, and that, in any event, there was no "appropriate anchorage point" in the area of plaintiff's work to which any of these devices could be attached.

In opposition, defendants submitted affidavits from a Sorbara site safety manager, two carpenter foremen, a laborer and a superintendent, all of whom worked on the AOL/Time Warner project and asserted that adequate safety devices and

instructions were provided to all Sorbara employees working on the project. Specifically, the site manager's affidavit asserted that, "before his accident, [plaintiff] was issued his own fall protection devices, which included a harness, a lanyard and a safety strap system along with specific instructions on how to use them effectively when clamping perimeter columns." In addition, the site manager stated that "[u]pon receiving an assignment calling for the clamping of a perimeter column, [plaintiff] was instructed to wear his fall protection devices and to tie them off to secured hooks located on interior columns, to steel cables placed between poured columns or to steel rebars located at the floor deck."

In the order appealed from, the motion court granted plaintiff's motion for summary judgment, ruling that plaintiff had met his initial burden of showing an absence of safety devices and instructions, and that the site manager's affidavit failed to raise a triable issue because "it fails to set forth the affiant's basis of knowledge; that is, the affiant fails to set forth that the plaintiff intentionally failed to attend a mandatory safety meeting or that plaintiff was observed receiving safety equipment."

In my view, the site manager's affidavit and the additional affidavits submitted were sufficient to create a factual dispute

as to whether adequate safety devices were provided to plaintiff and whether he deliberately chose not to use them. While the affidavit could have provided more detail as to when and by whom the safety equipment was given to plaintiff, the absence of these evidentiary details does not render the affidavit conclusory. The statements therein are still clear and unequivocal sworn assertions of fact that plaintiff was given a harness by Sorbara and instructed as to when to use it; that other safety devices were available at the work site; and that the carpenters were reminded at weekly safety meetings as to how to use such devices. Whether these statements are true or not, or, as plaintiff suggests, are based on unwarranted assumptions, is not a proper question for the motion court or this Court to decide. Indeed, it is inappropriate for the motion court or this Court to simply discount the site manager's statements because the affiant did not disclose the basis for his knowledge.

In addition, the affidavits submitted from the other Sorbara employees support many of the averments in the site manager's affidavit. For instance, one carpenter foreman submitted an affidavit stating that "[a]ll Sorbara employees performing work at an elevated height - such as clamping perimeter columns - were required to wear proper fall protection devices," and that "ladders and scaffolds were present on each floor of the building

and all carpenters were instructed to use them to perform work at elevated height."

Another foreman's affidavit stated that "all Sorbara employees had access to fall safety protection devices in good working condition and were instructed to use them when they performed work at elevated heights." This foreman's affidavit further stated that both Bovis and Sorbara conducted "weekly safety meetings," during which Sorbara "emphasized the importance of wearing harnesses and lanyards and to tie them off securely when performing clamping of perimeter columns."

A third affidavit was provided by a Sorbara laborer who observed plaintiff's fall, which stated that "all Sorbara employees had access to personal fall safety protection devices that were in good working condition, and were reminded to use them when they performed work at elevated heights. This includes harnesses and lanyards, as well as ladders and scaffolds."

Taken together, these affidavits directly contradict plaintiff's and his coworkers' deposition testimony that they were given no safety devices and were never instructed as to when and how to use them. The lack of evidentiary detail in the affidavits is not a proper basis for disregarding them, especially since they are all consistent with one another. A trial is required to resolve the issue.

The majority erroneously finds no triable issue on the ground that, even if adequate safety devices were provided to plaintiff, defendants are still liable under § 240(1) because, as plaintiff's expert opined, those devices were inadequate under the circumstances since there was no sufficient anchorage point to which they could be attached. Rebutting the opinion of plaintiff's expert, both Sorbara foremen stated in their affidavits that there were many appropriate places for plaintiff to "tie off" while clamping the perimeter columns, and that if he had tied off in this manner, he would not have fallen. While these statements also lack detail, so too did the statement of plaintiff's expert, who simply stated that "[d]efendants had a non-delegable duty to provide [plaintiff] with personal fall protection including an appropriately 5,000 pound tested anchorage point." Obviously, plaintiff's expert was not present at the scene of the accident, and her opinion that there was no appropriately tested anchorage point appears to be nothing more than speculation. In short, the majority's position boils down to nothing more than that plaintiff's evidence should be believed and defendant's discredited, a position completely at odds with our summary judgment jurisprudence.

The majority's reference to the site safety plan and plaintiff's fact witnesses misses the point. That such plan

required a 5,000 lb. anchorage point, and that plaintiff's witnesses testified that no such point was available, does not end the matter, where defendant's affidavits directly state that specific and adequate anchorage points were available.

Accordingly, because the issues whether plaintiff was provided with adequate safety devices and whether he was instructed in how to use them cannot be determined as a matter of law, plaintiff's motion for summary judgment on liability on its Labor Law § 240(1) should have been denied.

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

ENTERED: JANUARY 31, 2008

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allocution, defendant admitted to facts supporting the inference that he acted recklessly (see *People v McGowen*, 42 NY2d 905 [1977]). He admitted that he was aware of the potential danger of the scaffolding, that he designed it himself rather than comply with his legal duty to hire a licensed professional engineer to design the scaffold, and that he did so without knowing or calculating its load capacities.

Defendant's guilty plea to one count manslaughter in the second degree, in full satisfaction of the indictment, was knowing, intelligent and voluntary. The fact that defendant did not recite every element of the crime to which he pleaded did not trigger a duty to inquire further (*People v Lopez*, 71 NY2d 662, 666 n 2 [1988]). Moreover, defendant swore under oath that he had "thoroughly" discussed the plea with his counsel, and "there is no requirement that the Judge conduct a *pro forma* inquisition in each case on the off-chance that a defendant who is adequately represented by counsel and who admits the underlying facts may nevertheless not know what he is doing" (*People v Francis*, 38 NY2d 150, 154 [1975]).

For substantially the same reasons stated by Supreme Court in its written decision dated October 6, 2005, we agree that defendant's motion to set aside the judgment of conviction pursuant to CPL 440.10(1)(h) on the ground of ineffective

assistance of counsel was properly denied without a hearing. In particular, as Supreme Court noted, defendant's claim that counsel advised him that to prove recklessness the People were required to prove only that he disregarded the applicable federal and local regulations is belied by the plea allocution and is not supported either by the affidavit provided by counsel at the request of defendant's new attorneys or by the affidavit of defendant's wife. Moreover, the record fully supports Supreme Court's conclusion that counsel's "thorough familiarity with the law of reckless manslaughter was manifest from his many appearances on defendant's behalf and the substance and high quality of his written submissions, as well as his status at the bar as a knowledgeable and experienced defense attorney. [Counsel] clearly understood every aspect of the case including, but not limited to, the *mens rea* of reckless manslaughter."

On appeal, defendant places great emphasis on evidence that after constructing the scaffold, he walked on it himself. According to defendant, that evidence negates any justification for counsel's advice, upon which defendant asserts he placed great reliance, that defendant was "virtually certain" to be convicted if he proceeded to trial. The record, however, establishes that counsel was fully cognizant of that evidence and of the requirement that the People prove that defendant was aware

of and consciously disregarded a substantial and unjustifiable risk of death. Even assuming the truth of defendant's assertion in support of his motion that he "did not understand" when he pleaded guilty that the People were required to prove that he had been aware of and consciously disregarded such a risk of death, defendant's failure to understand does not itself establish a failure by counsel, let alone that "his attorney's performance was so deficient and his actions so unreasonable that they fell outside the scope of professional competence" (*People v Alexander*, 162 AD2d 164, 164 [1990]). In any event, like his evaluation of each of the other items of evidence, favorable and unfavorable, and of the cumulative effect of all the evidence, counsel's evaluation of the evidence that defendant walked on the structure after it was constructed entails professional judgment. That one item of evidence is not sufficient to establish that counsel's advice that defendant should plead guilty to a lesser

charge was "so unreasonable [as to] f[a]ll outside the scope of professional competence" (*id.*).

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

ENTERED: JANUARY 31, 2008

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We disagree with Appellate Term that tenant's damages, assessed by Civil Court in the principal amount of \$2,307,223.15, and allegedly caused by an inability to procure Public Health Law article 28 healthcare facilities or providers as subtenants due to the lack of a certificate of occupancy, were not contemplated by the parties at the time they executed the lease obligating landlord to obtain a certificate of occupancy. It is undisputed that landlord, whose principals operate a nursing home next door to the premises in question, was aware of article 28 and the enhanced reimbursement rate it affords to providers serving Medicare and Medicaid patients, and that such providers would be among the subtenants that tenant would hope to attract (see *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]; cf. *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [2002]).

Nevertheless, we affirm, since, as Appellate Term alternatively held, it does not appear that landlord's failure to obtain a permanent certificate of occupancy prevented tenant from renting space in the building to article 28 providers. The building was in fact tenanted at times by different doctors and programs, including some article 28 providers, despite the lack

of a permanent certificate of occupancy, and tenant provided no evidence that the building's underutilization, and the short duration of the tenancies, were a result of that lack; indeed there was uncontroverted expert testimony to the contrary (*cf. Cambridge Assoc. v Town of N. Salem*, 282 AD2d 702 [2001]).

Furthermore, as Appellate Term also alternatively held, the trial court erred in calculating tenant's "total lost gross income" based solely on the amount of monthly sublet rent reserved in the 1996 sublease between tenant and a closely affiliated subtenant for the first floor. That sublease clearly was not the product of an arm's length transaction (*see Matter of Queens-Nassau Nursing Home v Axelrod*, 91 AD2d 776 [1982]) where tenant's president, who executed the main lease on tenant's behalf in 1995, was a 10% shareholder of both tenant and its subtenant/affiliate, and all of the subtenant's principals were principals of tenant.

In seeking leave to appeal the Appellate Term's order granting a new trial, a nonfinal order, tenant stipulated "to the entry of judgment absolute against it in the event permission is granted to appeal and there is a subsequent affirmance by the

Appellate Division" (see Rules of App Div, 1<sup>st</sup> Dept [22 NYCRR] § 600.3[b][2]). Insofar as these two pre-conditions have occurred, "judgment absolute" should be entered against the tenant (see CPLR 5703[a]). Indeed, "[t]he giving of such a stipulation is an act that is always fraught with dangerous consequences" (see *Tai on Luck Corp. v Cirola*, 35 AD2d 380, 382 [1970], *lv dismissed* 29 NY2d 747 [1971]; see also *Hiscock v Harris*, 80 NY 402 [1880]; *Mackay v Lewis*, 73 NY 382 [1878]).

We reject any suggestion that, in the event an appellant so stipulates and the order on appeal is affirmed, the use of the words "judgment absolute may be entered against him" in CPLR 5703(a) distinguishes that statute from its counterpart statute CPLR 5601(c), which employs the word "shall" instead of "may" (see *City of New York v Scott*, 178 Misc 2d 836, 841 [1998], relying on *Tai On Luck Corp.*, 35 AD2d at 382-383). In any event, in its leave application, tenant stipulated to absolute judgment upon affirmance (see *Mackay v Lewis*, 73 NY2d 782 [1878], *supra* [court cannot relieve party from stipulation]). Accordingly, tenant's claim for damages based on breach of the lease agreement

should be dismissed, and judgment absolute entered against tenant.

The Decision and Order of this Court entered herein on November 8, 2007 is hereby recalled and vacated (see M-6383 decided simultaneously herewith).

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

ENTERED: JANUARY 31, 2008

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CLERK

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

1911            In re Kayla W.,

A Child Under the Age  
of Eighteen Years, etc.,

Atara W.,  
Respondent-Appellant,

Commissioner of the Administration For  
Children's Services,  
Petitioner-Respondent.

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Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), Law Guardian.

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Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about January 6, 2006, which, after a fact-finding determination of neglect, placed the subject child in the custody of the Commissioner of Social Services of New York County for six months, affirmed, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed, without costs.

The finding of neglect is supported by a preponderance of the evidence which established that respondent suffers from a mental illness, namely, major depressive disorder, and, as a result, presently is and for the foreseeable future will be

unable to adequately care for the child (see *Matter of Laura D.*, 270 AD2d 260 [2000]; see also *Matter of Naticia Q.*, 195 AD2d 616, 617-618 [1993]). In particular, Dr. Matta, deemed an expert in the field of psychiatry, testified that, at his initial interview with respondent following her admission to St. Vincent's Hospital, respondent was "very depressed and tearful," "not very cooperative with the interview," and did not want to discuss her symptoms. Before Dr. Matta was able to conduct a second interview three days later, respondent became "extremely agitated," exhibited "low frustration tolerance," was tearful, and unable to respond to verbal direction. In addition, respondent was cursing at and threatening the staff. Consequently, respondent had to be sedated and restrained. When Dr. Matta finally was able to interview respondent, she exhibited poor insight into her condition and the need for treatment. The next day, respondent punched a wall so hard that she caused visible damage to her hand.

Contrary to respondent's contention, Dr. Matta did relate respondent's behavior, lack of insight, inability to cope, poor judgment, and poor prognosis for follow-up treatment to her ability to care for her daughter. Specifically, Dr. Matta testified that "at that time, given [respondent's] impulsivity and inability to care for her child, ... she would be a danger to

her child ...”

Dr. Moore, a psychologist at Covenant House, met with respondent before referring her to St. Vincent’s. Dr. Moore testified that during their session, respondent was “extraordinarily tired” and “very unresponsive.” Although Dr. Moore eventually elicited a slight response during the session, respondent exploded when, after being told that a taxi would be provided for her transportation home, she was given a MetroCard instead. Even after being advised that a taxi would still be provided, respondent “started screaming and yelling and waving her hands in the air.” Dr. Moore testified that respondent “threw her pocketbook down and ...said...she was fed up with everybody and everything.” In addition, Dr. Moore testified that the child was frightened, and the doctor was concerned for the child’s safety.

A single incident “where the parent’s judgment was strongly impaired and the child exposed to a risk of substantial harm” can sustain a finding of neglect (*Matter of Pedro C. [Josephine B.]*), 1 AD3d 267, 268 [2003]). Here, respondent’s behavior was not limited to a single incident. Rather, respondent’s poor impulse control, poor insight into her condition and depression continued over the course of several days. From this evidence, the doctors concluded a concomitant inability to care adequately for the

child (see e.g. *Matter of Jason Brian B.*, 33 AD3d 995 [2006];  
*Matter of Aaron MM.*, 152 AD2d 817 [1989]). In addition, it does  
not avail respondent that the child did not suffer actual injury  
(see *Matter of Pedro C. [Josephine B.]*, 1 AD3d at 268).

All concur except Catterson and Kavanagh, JJ.  
who dissent in a memorandum by Catterson, J.  
as follows:

CATTERSON, J. (dissenting)

Because, in my view, the petitioner utterly failed to submit sufficient admissible proof to establish that appellant mother neglected her child, Kayla W., as a result of her mental illness, I respectfully dissent.

In support of its allegations that the appellant suffers mental illness, the petitioner relies almost entirely on the testimony of two doctors. The first, Dr. Moore, a psychologist employed by Covenant House Homeless Shelter, interviewed the appellant for two hours and initially recommended sending her to the Foundling Hospital for a period of rest because she seemed physically exhausted.

On the way out of Covenant House, with no cab fare, carrying her two-year-old daughter in her arms, and discovering that she faced a 10-block walk to the subway, the appellant became agitated. Consequently, Dr. Moore coaxed the appellant into a cab by asking her whether she would like to go to the hospital to get some rest. However, instead of sending her to the Foundling Hospital, Dr. Moore sent the appellant to St. Vincent's Hospital for mental evaluation without informing the appellant of her destination.

At St. Vincent's, Dr. Matta, the second doctor to testify for the petitioner, observed the appellant for no more than a

week after she was admitted. Dr. Matta testified that, while the appellant was severely depressed she was "without psychosis" and that her agitated and depressed mental state was a result of stress due to traumatic experiences including being homeless, suffering a miscarriage in the prior week and a history of physical and sexual abuse and domestic violence.<sup>1</sup>

Specifically, Dr. Matta's opinion of the appellant's condition was that she suffered from major depressive disorder, without psychosis, and post traumatic stress disorder. In Dr. Matta's opinion, the appellant was unable to take care of her daughter because of emotional volatility, and the fact that the appellant required Haldol injections to calm her on a *couple of occasions* during her stay at the hospital. Dr. Matta further testified that, as the appellant's stay at the hospital progressed "she became more cooperative."

It is well established that to support a finding of neglect the petitioner is required to prove by a preponderance of the evidence that the physical, mental or emotional condition of the appellant's child is in imminent danger of becoming impaired due

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<sup>1</sup>It is important to note that the first time the appellant became aware that she was not admitted to a hospital for exhaustion was when she awoke the next day in the psychiatric ward subject to a psychiatric hold. Needless to say, this came as something of a shock to the appellant.

to the appellant's mental condition. FAM. CT. ACT § 1046[b][i];  
FAM. CT. ACT § 1012 [f][i]. Further, Social Services Law  
§ 384-b[6] defines mental illness as:

"an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act."

In my opinion, the psychiatric testimony provided by Dr. Moore and Dr. Matta was simply insufficient to satisfy the petitioner's burden of proof of establishing that the appellant suffered from a mental illness. Neither doctor observed the appellant for any extended period. Moreover, both doctors met and evaluated the appellant just a week after she had experienced the trauma of a miscarriage. Cf. Matter of Jesse DD. 223 A.D.2d 929, 931, 636 N.Y.S.2d 925, 927 (3rd Dept. 1996), lv. denied, 88 N.Y.2d 803, 645 N.Y.S.2d 445, 668 N.E.2d 416 (1996) (where the court relied on the testimony of five mental health professionals over a five month period).

Further, Dr. Moore initially diagnosed physical exhaustion, which in my view, could have been a reasonable explanation for the appellant's outburst when faced with the long walk to the subway with the added burden of carrying a two-year-old. Later, the appellant characterized her agitation by acknowledging in her

testimony that she had "lost it." The act of "losing it" in what was undeniably a stressful situation prompted Dr. Moore to immediately send the appellant for a psychiatric evaluation in a hospital. It does not warrant further conjecture as to the consequences of treating every mother who temporarily "loses it" in the same way as appellant was treated. Lastly, while a parent need not be psychotic for the court to find neglect based upon mental illness, the finding that a parent is "without psychosis," as in this case, remains relevant. See Matter of G.A.B., 4 Misc. 3d 1011(A), 791 N.Y.S.2d 869 (N.Y. Fam. Ct. 2004) (court relied on lack of psychotic symptomatology in dismissing petition).

In the light of the foregoing, I believe there is insufficient evidence to conclude that the appellant was mentally ill within the meaning of the Social Services Law. See Social Services Law § 384-b[6]. In any event, even assuming arguendo that the evidence permitted an inference that the appellant suffers from mental illness, I further believe that a finding of neglect is not warranted where, as here, there is no demonstration of any threat to the welfare of the appellant's child. Matter of G.A.B., supra.

It is well settled that proof of mental illness alone will not support a finding of neglect. The evidence must establish a causal connection between the respondent's condition, and actual

or potential harm to the child. See Matter of H. Children, 156 A.D.2d 520, 548 N.Y.S.2d 586 (2d Dept. 1989) (where petitioner proved some mental illness but did not show it had an effect on the children); Matter of Erica M., 206 A.D.2d 876, 615 N.Y.S.2d 152 (4<sup>th</sup> Dept. 1994).

The petitioner contends that the appellant's child was subject to an imminent threat of harm due to the appellant's mental illness. Yet, petitioner has failed to submit sufficient evidence to connect the appellant's condition with the strong probability of future neglect. See id. at 877, 615 N.Y.S.2d at 153 (error to find neglect where there was some evidence of mild mental instability, specifically that the respondent was "deteriorating," needed an in-patient examination, and was manic-depressive but no proof that the child was in danger).

On the contrary, the record evinces that the appellant exhibits a considerable concern for the welfare of her child. She has visited her child regularly with just a couple of missed visitations due to her need to find housing; she has successfully found adequate housing for herself and her child; and she has agreed to therapy, to take medications and to attend a parenting class. Furthermore, the petitioner's caseworker, Roy Warren, despite his recommendation that Kayla W. should not be returned to her mother based on her failure to comply with referrals,

testified that the interaction between the appellant and her child during visitations was good, that the child was "very taken to her mother" and that the appellant "shows a lot of care and attention to the child."

While the petitioner points to the appellant's outburst in front of her child on the evening she was sedated at Covenant House as evidence of maltreatment of her child, there is simply a lack of proof concerning the impact of this incident on the child's physical, mental or emotional condition. Nor is there any proof that the incident was part of a pattern of aberrant behavior. Matter of Susan "B", 102 A.D.2d 938, 477 N.Y.S.2d 759 (3rd Dept. 1984)

The only evidence submitted to support a finding that Kayla W. was placed in imminent harm was the testimony of Dr. Moore, a witness to the incident, who stated that Kayla W. was frightened by her mother's outburst. A single incident of this kind, where the parent's judgment was strongly impaired by exhaustion and the trauma from experiencing a miscarriage in the prior week, and where there was no injury and the danger to the child was not great, does not constitute neglect. See Matter of Amanda E., 279 A.D.2d 917, 719 N.Y.S.2d 763 (3rd Dept. 2001) (given the circumstances under which the altercation occurred and the isolated nature of father's admittedly inappropriate conduct,

father's conduct in striking his daughter did not constitute abuse or neglect). It is worth repeating here that not all objectionable parental behavior falls within the legal definition of neglect. Matter of William EE, 157 A.D.2d 974, 550 N.Y.S.2d 455 (3rd Dept. 1990).

Finally, where the petitioner points to the testimony of the doctors as to the appellant's lack of insight into her condition and her non-compliance with medication and treatment as evidence that her daughter is subject to an imminent risk of harm, this testimony is undermined by the brevity of contact that these doctors had with the appellant. In any event, the appellant explicitly testified that if given medication, and if referred to therapy once a week, she would cooperate. Cf. Matter of Domaniqua H. (Arlene H.), 1 A.D.3d 438, 766 N.Y.S.2d 900 (2d Dept. 2003), lv. denied, 1 N.Y.3d 507, 776 N.Y.S.2d 539, 808 N.E.2d 859 (2004) (where the finding of neglect was supported by a preponderance of the credible evidence, which demonstrated that the mother's mental illness and refusal to undergo psychiatric treatment placed her child in imminent danger).

Although it is well settled that neither expert testimony nor a definitive psychiatric diagnosis are necessary to establish a finding of neglect predicated upon a parent's mental illness

(Matter of Caress S., 250 A.D.2d 490, 673 N.Y.S.2d 123 (1st Dept. 1998); Matter of Zariyasta S., 158 A.D.2d 45, 557 N.Y.S.2d 895 (1st Dept. 1990)) nevertheless, the quantum of proof should, at the very least, include demonstrable behavioral manifestations on the part of the parent sufficient to support a conclusion that there would be a "substantial probability of neglect" causing the subject child to be at risk if placed in the parent's custody. Matter of Baby Boy E., 187 A.D.2d 512, 512, 589 N.Y.S.2d 587, 588 (2d Dept. 1992); Matter of Eugene G., 76 A.D.2d 781, 429 N.Y.S.2d 17 (1980), lv. dismissed, 51 N.Y.2d 878 (1980).

I fail to see that such a conclusion is permitted here. Therefore, I would reverse the finding of neglect and dismiss the neglect petition.

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

ENTERED: JANUARY 31, 2008

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in Nyack, New York approximately four years before the faxes were sent, and he is not a party to this action.

The faxes are entitled "Attorney Malpractice Report" and subtitled "Free Monthly report on Attorney Malpractice From the Law Office of Andrew Lavcott Bluestone." Bluestone authored the faxes, and his legal practice consists primarily of representing plaintiffs in attorney malpractice claims.

Each "Attorney Malpractice Report" consists of a one-page essay on legal malpractice containing information regarding issues and trends in that area. The faxes include generic statements about the elements of professional malpractice; the most common causes of attorney malpractice litigation; and brief discussions of situations that have given rise to attorney malpractice cases. At the bottom of each fax is a box containing Bluestone's contact information, office address, telephone number, fax number and web site address. Another web site address appears at the top of the faxes. In seven of the faxes, the box also contains a telephone number to call in order to be removed "from this list." Six of the faxes contain the notation: "This is not an advertisement of the availability of services." Two of the faxes state that the report is "[p]resented as an [e]ducational document by the [l]aw offices of Andrew Lavcott Bluestone." Bluestone obtained Stern's fax number from the New

York Lawyers Diary and Manual.

Stern's complaint contains two causes of actions. The first cause of action seeks monetary damages of \$500 for each fax sent, for a total of \$7,000, as well as treble damages for Bluestone's willful and knowing violation of the TCPA, for a total of \$21,000. The second cause of action seeks injunctive relief as provided by the TCPA.

Bluestone served an answer denying the material allegations of the complaint and asserting five affirmative defenses: the complaint fails to state a cause of action; the action is barred by the statute of limitations; unclean hands; laches; and the TCPA as applied in this case is unconstitutional.<sup>1</sup>

Insofar as it is relevant to the issue of treble damages, Bluestone was served with a similar complaint for violation of the TCPA in 2003, by an unrelated attorney named Antollino. In that case before the same court and Justice, summary judgment was granted in favor of Antollino, with the court explicitly rejecting Bluestone's claim that the faxes were purely informational and did not explicitly offer services, finding that

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<sup>1</sup>Bluestone does not raise any arguments on appeal concerning the court's dismissal of his affirmative defenses of unclean hands and laches. Thus, he has abandoned those claims.

they constituted prohibited advertisements (*Antollino v LaSalle Services, Inc.*, Sup Ct, NY County, May 12 2004, Solomon, J., index No. 116629/03). The faxes involved in *Antollino*, are virtually identical to those involved in the instant case except for the fact that in the box at the bottom in the *Antollino* faxes, it stated "Presented by the Law offices of Andrew Lavoott Bluestone, concentrating in Attorney Malpractice Litigation ... Inquiries are welcome." In the faxes at issue here, the phrases "Concentrating in Attorney Malpractice Litigation," and "Inquiries are welcome," have been deleted.

In the instant case, Stern moved for summary judgment as to liability on his first cause of action for money damages and requested a finding that, as a matter of law, Bluestone willfully and knowingly violated the TCPA. In addition, Stern sought summary judgment on his second cause of action for injunctive relief, and dismissal of Bluestone's affirmative defenses. In his affidavit in support of the motion, Stern asserted that he never authorized Bluestone to transmit the faxes to him, or to anyone in his office; he never had a business relationship with Bluestone; and he had never heard of Bluestone until he began receiving the faxes.

An affidavit in support of the motion was also submitted by Stern's secretary, stating, inter alia, that she never authorized

Bluestone to send faxes to Stern's office; and that she never had a business relationship with Bluestone.

Stern's former subtenant also submitted an affidavit stating that he shared a fax machine and office space with Stern until 1999 when he moved into his office in Nyack. The subtenant stated that he never authorized or gave Bluestone permission to transmit faxes to Stern or to anyone else; he stated that he had never heard of or had a business relationship with Bluestone; and he did not own the telephone line or fax machine upon which Stern received the faxes.

In opposition to Stern's motion, Bluestone asserted, *inter alia*, that as an attorney whose practice is primarily concerned with the representation of individuals who have been harmed by legal malpractice, and who does not defend attorneys who are accused of committing legal malpractice, The Attorney Malpractice Report is not a solicitation for his services. Bluestone averred that while he is not opposed to referrals from other attorneys and does enjoy the enhancement of his reputation that comes from being the author of the Report, it was never intended to be an advertisement and it is not an advertisement.

In further opposition to Stern's motion, Bluestone argued, *inter alia*, that The Attorney Malpractice Report, is a fully protected non commercial exercise of Bluestone's First Amendment

right of free speech; that Bluestone, in response to the court's decision in *Antollino*, removed the offending language, i.e. "Inquiries are welcome" from his faxes; and accordingly, if the court does not hold as a matter of law that The Attorney Malpractice Report does not fall within the language of the TCPA, then at worst, it presents a question of fact for a jury to determine whether it is an exercise of First Amendment rights or an advertisement.

Bluestone further argued that Stern's complaint should be dismissed for failure to state a cause of action because, among other things, seven of the faxes were not sent to Stern, and Stern has no right to sue on his former subtenant's behalf. Bluestone also claimed that the applicable statute of limitations in this case is one year pursuant to CPLR 215(4), and therefore only six of the faxes fall within the one-year period, and only three were sent to Stern.

The motion court found that Bluestone's faxes were prohibited advertisements within the meaning of the TCPA and granted partial summary judgment to Stern as to liability. It also found that because Bluestone had been sued previously for violating the same statute he was undoubtedly aware of the TCPA's proscriptions and should have known that his conduct violated the statute. Thus, it found as a matter of law that Bluestone

willfully and knowingly violated the TCPA. The court dismissed all of Bluestone's affirmative defenses.

The TCPA prohibits unsolicited faxes that have the effect and purpose of advertising services, directly or indirectly (*Rudgayzer & Gratt v Enine, Inc.*, 4 Misc 3d 4 [App Term, 2004]). In enacting the TCPA, Congress aimed to prevent cost-shifting to unwilling fax recipients and their deprivation of fax machine use (*id.* at 8). The relevant statute, 47 USC § 227(b)(1)[C] of the TCPA, provides in its pertinent part:

It shall be unlawful for any person within the United States, . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless

[i] the unsolicited advertisement is from a sender with an established business relationship with the recipient;

[ii] the sender obtained the number of the telephone facsimile machine through -

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, . . . and

[iii] the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D). . .

The covered material is that which "advertis[es] the commercial availability or quality of any... service []." (47 USC §227[a][5]).

47 USC § 227 (b) (3) authorizes a private right of action in state court to enjoin violation of the TCPA and to recover for actual monetary loss from such violation, and/or to receive \$500 in damages for each such violation, whichever is greater. If the court finds that a defendant willfully or knowingly violated the TCPA, it may, in its discretion, award treble damages.

As a threshold matter, Bluestone is liable to Stern for the faxes he sent to the former subtenant on Stern's fax machine. Otherwise, a fax sender could easily avoid the purpose of the TCPA by putting an incorrect name on the addressee portion of the fax.

Further, all 14 of the faxes sent by Bluestone to Stern constituted unsolicited advertisements. While Bluestone contends that his faxes were purely informational and do not explicitly offer services, his position defies common-sense. The faxes at issue certainly have the purpose and effect of influencing

recipients to procure Bluestone's services, which are for the specialized field of legal malpractice claims. First, the faxes include the name of Bluestone's law firm and contact information. Second, while the faxes do not directly offer Bluestone's services as a legal malpractice attorney, they indirectly advertise the commercial availability and quality of such services. Not only do the faxes invite contact for further information but they also list two web sites that boast Bluestone's specialization in attorney malpractice suits. Thus, it is clear that the faxes indirectly proposed a commercial transaction and had the effect of influencing recipients to procure Bluestone's services. Contrary to the dissent's viewpoint, Bluestone's motive is not a factor in the determination that these faxes are advertisements. It is not necessary to probe that deeply, since simply looking at the faxes in the context in which they were sent is sufficient to establish them to be advertisements. The faxed "commentaries" are not just information with an author's name attached, but include the name of the author's law firm and direct readers to his web sites which advertise his professional services. By merely stating on the faxes that they are not advertisements of the availability of

services does not make it so, nor should it allow Bluestone to evade the prohibitions of the TCPA (see *Rudgayzer & Graft v Enine, Inc.*, 4 Misc 3d at 7 [finding that a fax mentioning the defendant's company name and contact information that pitches a service under the guise of providing information about it is an advertisement within the meaning of the TCPA]). Moreover, Bluestone's professional role as an attorney specializing in legal malpractice claims supports the conclusion that the faxes advertise his services (*id.* at 8, [finding that the sender's identity, motives, purposes, and intentions are relevant to whether the fax was merely "information" or "advertising"]).

Stern's affidavits establish that the faxes were sent to his fax machine without prior written permission as required by the TCPA and Bluestone also concedes that he sent them. Furthermore, Bluestone was served with a similar complaint for violation of the TCPA in 2003, leading to summary judgment against him in 2004 (*Antollino v LaSalle Services, Inc.*, Sup Ct, NY County, May 21, 2004, Solomon, J., index No. 116629/03, *supra*). As such, the motion court properly awarded plaintiff partial summary judgment on the issue of liability since Bluestone was aware of the TCPA's proscription and should have known that his conduct violated the statute.

Moreover, the motion court properly awarded treble damages. The TCPA permits treble damages for a willful or knowing violation of the statute (47 USC § 227[b][3]). A “willful or knowing” violation of the TCPA requires only that the sender have reason to know, or should have known that his conduct would violate the statute (*id.*; see generally *Texas v American Blastfax, Inc.*, 164 F Supp 2d 892 [2001]). Bad faith is not required to award treble damages (*id.* at 899). Since Bluestone was served with a summons and complaint for possible violations of the TCPA on September 22, 2003 in the *Antollino* case, he was fully aware of the TCPA’s proscriptions, yet he sent similar faxes to Stern beginning November 25, 2003 even though at that point he knew or should have known that his conduct would violate the statute (cf. *Kaplan v First City Mtge.*, 183 Misc 2d 24 [1999] [a telephone solicitor’s violation of the TCPA was not willful and knowing, so that imposition of treble damages was not warranted, where the solicitor was not aware of statutory restrictions concerning telemarketing, and had innocently violated the statute]). Moreover, in light of the fact that Bluestone was found liable in *Antollino* in May 2004, but continued to send similar faxes through March 2005, there is no

question that he acted in willful or knowing disregard of the statute. Accordingly, treble damages are an appropriate sanction.

In his second affirmative defense, Bluestone states that the action is barred by the expiration of the statute of limitations. The TCPA does not have an express statute of limitations; it authorizes a private right of action "if otherwise permitted by the laws or rules of court of a State." Bluestone contends that the present action falls under the category of "an action to enforce a penalty or forfeiture created by statute" under CPLR 215(4) requiring a one-year statute of limitations. Bluestone points to the TCPA's treble damages provision as support that TCPA creates a penalty.

Stern asserts on the other hand that actions under the TCPA are governed by 28 USC § 1658, which provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of [28 USC § 1658]" has a four-year statute of limitations. This has been interpreted to provide a cause of action created by a federal statute enacted after December 1, 1990 with a four-year statute of limitations, unless otherwise specified (*Jones v R.R. Donnelly & Sons Co.*, 541 US 369 [2004]).

Given the TCPA's lack of an express limitations period and the inherent uncertainty in selecting an analogous state statute of limitations, 28 USC § 1658's four-year statute of limitations is appropriate for TCPA actions, and therefore Stern's motion seeking dismissal of Bluestone's statute-of-limitations defense was correctly granted.

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

KAVANAGH, J. (dissenting)

Where I part company with the majority is not over whether these faxes are advertisements - they may well be. I simply cannot agree that on this record that fact has been established by plaintiff as a matter of law entitling him to summary judgment. This is especially true where the content of each fax is almost totally devoted to a commentary on issues involving attorney malpractice and not one contains a single word that can be fairly read as promoting the author's law practice or inviting the recipient to employ his legal services.

Defendant appeals from an order finding him liable under the Telephone Consumer Protection Act of 1991 (TCPA) (47 USC § 227) for transmitting to plaintiff by fax machine 14 unsolicited messages that were in effect found to be advertisements for his legal services. The principal issue raised in this proceeding is whether these fax are in fact advertisements for defendant's law practice, or simply commentaries distributed by him to practicing attorneys on issues involving legal malpractice.

The TCPA provides in relevant part that subject to certain enumerated exceptions, it is unlawful for any person in the United States to send an unsolicited advertisement to another

person's fax machine (47 USC §227 [b][1][C]).<sup>1</sup> An unsolicited advertisement is defined as:

any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise

(47 USC §227[a][5]).<sup>2</sup>

Defendant concedes that he sent the faxes at issue to a fax machine number he obtained from the New York Lawyers Diary and Manual and that each of them was unsolicited.<sup>3</sup> However, he contends that they are not advertisements for his law practice, but instead commentaries that "express his thoughts and opinions on a subject of great public concern, attorney error and incompetence." Plaintiff concedes that there is no direct

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<sup>1</sup>The stated purpose of this statute was to reduce the number of unsolicited advertisements sent to consumers by fax because such activity not only interfered with the consumer's use of their fax machine, but also shifted the cost of them for the promotion of such advertisements (*Missouri ex rel. Nixon v American Blast Fax, Inc.*, 323 F3d 649 [2003], cert denied 540 US 1104 [2004]).

<sup>2</sup>New York has a similar albeit less restrictive provision that seeks to limit this type of activity (General Business Law § 396-aa).

<sup>3</sup>The TCPA does not prohibit unsolicited advertisements being sent to fax numbers that had been voluntarily listed in a public directory for public distribution (47 USC §227 [b][1][C][ii]). Defendant has not argued that this provision has any application to this proceeding on this appeal.

solicitation in the message that either constitutes an offer of defendant's legal services or a comment on them, but argues that defendant's occupation and the nature of his practice (prosecuting other attorneys for legal malpractice) defines the true purpose behind these faxes and has the effect of transforming what would otherwise be noncommercial speech fully protected by the First Amendment of the US Constitution to unsolicited advertisements barred from fax transmission by the TCPA.

There are a total of 14 faxes at issue; each is one page and bears the heading "Attorney Malpractice Report."<sup>4</sup> Each is largely devoted to a discussion of some issue involving attorney malpractice and are titled: "Termination and Attorney's Fees"; "What are the elements of Professional Malpractice"; "Liens in New York"; "Unexpected Circumstances"; "What is Professional Malpractice"; and finally, "The most common causes of attorney malpractice litigation." Each fax identifies defendant as its author and lists his law office address, phone and fax number and two Web site addresses. Seven faxes contain a telephone number to be called if the recipient wants to be removed from the list, six carry a disclaimer which reads "This is not an advertisement

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<sup>4</sup>While there are 14 in total, 7 are actually duplicates.

of the availability of services" and two describe the report as one "Presented as an Educational document by the Law offices of Andrew Lavooott Bluestone." Each is almost entirely devoted to defendant's commentary on substantive and procedural law as it relates to legal malpractice, and there is a complete absence of any wording that invites the recipient to enter into any commercial activity with defendant or purchase his services.<sup>5</sup> But for the contact information, none of which is written so as to expressly invite an inquiry of any kind, each fax is informational by its express terms and cannot be fairly read as an advertisement of a commercial activity or the promotion of a legal service.

What plaintiff argues is not that the faxes as written contain such a direct solicitation of goods or services, but instead that the faxes to be fully understood must be read in the context of defendant's occupational specialty - the prosecution of attorney malpractice actions - and that by including the name of his law firm, its Websites and other contact information, each fax indirectly proposes to the recipient a commercial

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<sup>5</sup>In a prior proceeding, faxes sent by defendant contain wording identifying his law office as "Concentrating in Attorney Malpractice Litigation" and invite contact by stating "Inquiries are Welcome". This wording or any equivalent phrasing is not present in these faxes.

transaction with defendant (see *Rudgayzer & Gratt v Enine, Inc.*, 4 Misc 3d 4 [App Term, 2d Dept 2004]). In effect, he argues that the connection between defendant's law firm and the content of these communications transforms them into nothing more than an advertisement for his law office and his legal services. Such a broad interpretation has the effect of focusing the prohibitions contained in this statute not on the content of the material transmitted, but instead on the ascribed motives of the sender and carries with it an enhanced risk that this statute will be applied to ban what is otherwise fully protected speech under the First Amendment.

The TCPA's constitutionality is grounded in its limitation to commercial speech (*Central Hudson Gas & Elec. Corp v Public Service Comm. of N.Y.*, 447 US 557, 562-563 [1980]). It cannot be used to ban noncommercial speech - and by its terms does not seek to do so. Keeping with that commitment, it should not be read to ban what is otherwise noncommercial speech simply because under the circumstances presented it could be argued that the transmission in question may have some commercial value to the sender. There can be no doubt that fully protected free speech

can also contain some element of self-promotion (see generally *Bigelow v Virginia*, 421 US 809, 818 [1975]; *Ginzburg v United States*, 383 US 463, 474 [1966]; *Thornhill v Alabama*, 310 US 88 [1940]), and the mere existence of such a reality does not serve to convert such speech into a solicitation which may be banned by this statute.

Commercial speech is that which "does no more than propose a commercial transaction" (*Bolger v Youngs Drug Products Corp.*, 463 US 60, 66 [1983] [citations and internal quotation marks omitted]). The faxes sent by defendant to plaintiff seek to speak to legal issues involving attorney malpractice; not once by its terms does it propose a commercial transaction of any kind. The fact that its author is a lawyer who specializes in this field does not have the effect of converting what would otherwise be fully protected speech under the Constitution to an advertisement that promotes the availability of the sender's services. Without a doubt, there may well be an incidental commercial benefit to defendant from the publication of these pieces - and that fact is obviously relevant in determining if under all of the circumstances the material in question is an advertisement as opposed to a noncommercial publication. However, this is a question that cannot be resolved as a matter of law on the facts as presented.

In effect, the finding of the majority is that the character of these transmissions will not necessarily be determined by their content, but by the motive of the parties sending them. It is difficult to see how on this record such a determination can be made as a matter of law. Defendant says that these faxes are not advertisements, but represent his "commentary on the state of the legal profession, and how we, as attorneys, can perform our functions better for our clients." Given this sworn assertion and the content of these faxes, at the very least, a question exists as to whether they are in fact advertisements.

In addition, the publication by defendant of similar faxes that were the subject of a prior proceeding ought to be considered in any determination that defendant has willfully violated this statute. His attempt to fashion a fax that addressed criticisms raised in that proceeding certainly is evidence of his effort to comply with this law and raises factual issues that are incompatible with the grant of summary judgment.

For all of the reasons previously stated, it is respectfully

submitted that plaintiff's motion for a summary judgment must be in all respects denied.

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

ENTERED: JANUARY 31, 2008

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CLERK



properly allowed P&W, as well as a group of its clients, to intervene and seek disclosure of certain documents in support of a settlement order dated November 7, 2001. "The remedy for fraud allegedly committed during the course of a legal proceeding must be exercised in that lawsuit by moving to vacate the civil judgment (CPLR 5015[a][3]), and not by another plenary action collaterally attacking that judgment" (*St. Clement v Londa*, 8 AD3d 89, 90 [2004]). P&W and its clients properly so moved. Furthermore, P&W's action in moving to intervene was not untimely. To the contrary, any delay in P&W's motion was due largely to NKB's own action in moving ex parte for the settlement order despite its own awareness that P&W disputed the settlement allocations.

We have considered NKB's other contentions and find them unavailing.

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

ENTERED: JANUARY 31, 2008

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CLERK



car, looked at the car and became "startled," looking "straight ahead as if he was very nervous or he saw like a ghost." While continuing to "look straight ahead" as he walked, defendant "still ha[d] his hand on his right side." As Officer Hoffman stopped the car, the other officers got out and approached defendant, who fled. Officer Hoffman, who continued to follow defendant with the car, noticed that defendant ran with his arm clutched on his right side. After a brief chase, the police apprehended defendant and recovered a gun that defendant had thrown under a parked car as he was being chased, as well as a quantity of narcotics.

Defendant was charged with criminal possession of a weapon in the second and third degrees, and criminal possession of a controlled substance in the third degree. Defendant moved, among other things, to suppress evidence that the police had recovered upon his arrest. A *Mapp* hearing was ordered.

At the hearing, Officer Hoffman, a nine-year veteran of the New York City Police Department, testified that he was initially alerted by defendant's actions because there had been "robberies in the area with male blacks robbing [people] at gunpoint" and that "it looked very odd[,] based on [his] experience[,] that two individuals would be so close to another individual walking in that area." Moreover, according to Officer Hoffman, who had been

trained to identify a person carrying a firearm, people carrying guns walked in a noticeably different manner<sup>1</sup>. Thus, Officer Hoffman was further alerted by defendant's actions because defendant was walking in a manner consistent with the likelihood that he was carrying a firearm. The officer then testified that he could see "no reason why someone runs ... with one hand swinging, the other hand on his person unless he is holding something."

The hearing court found Officer Hoffman to be "completely credible" and "scrupulously honest." Nonetheless, the court concluded that the defendant's motion to suppress must be granted because his conduct, including the subsequent flight, did not give rise to a reasonable suspicion that he had committed or was about to commit a crime. The court found that "[b]roken down in a frame-by-frame analysis, the defendant's behavior [was] innocuous."

The court held that, even assuming the defendant knew that

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<sup>1</sup>In this regard, Officer Hoffman testified:

"[t]hey would walk heavy on one side. They would actually motion in a nervous reaction, motion their side where there could possibly be a weapon. If they walk up and down a curb they will clutch their weapons. Most criminals don't carry a holster. It is in their pants or waistband. See their overall body movement to see if they were walking with a possible weapon."

the men approaching him were police officers and then fled, that behavior still would not have provided the necessary legal predicate to chase him, as flight alone was insufficient to justify pursuit. The court then found there was nothing remarkable about the defendant walking with another man, behind a third man, at 10:00 P.M. on a city street. The court also found that the defendant's act in walking with one hand held to his waistband area while allowing the other hand to swing freely was not sufficient to justify a stop of the defendant. It also failed to comport with Officer Hoffman's own training standards, as it did not fit with the signs that he had described as part of the police training on how to identify people carrying concealed weapons. Finally, the court noted that it gave no consideration to Officer Hoffman's testimony that he had received reports of male blacks robbing people at gunpoint near the street that Officer Hoffman spotted defendant.

For the reasons set forth below we disagree with the hearing court's use of a narrowly focused frame-by-frame analysis and find that the totality of the circumstances gave the police a reasonable suspicion to believe that the defendant had committed or was involved in a crime.

The law is well settled that any inquiry into the propriety of police conduct must weigh the degree of intrusion entailed

against the precipitating and attending circumstances out of which the encounter arose (*People v Salaman*, 71 NY2d 869, 870 [1988]; *People v De Bour*, 40 NY2d 210, 223 [1976]). Thus, the court must concentrate on whether the conduct of the police was reasonable at the time in view of the totality of the circumstances (*People v Batista*, 88 NY2d 650, 653 [1996]; *People v Lomiller*, 30 AD3d 276, 277 [2006], *lv dismissed* 7NY3d 850 [2006]). In determining whether a police officer has reasonable suspicion to justify his actions, "the emphasis should not be narrowly focused on...any...single factor, but on an evaluation of the totality of the circumstances, which takes into account the realities of everyday life unfolding before a trained officer" (*People v Graham*, 211 AD2d 55, 58 [1995], *lv denied* 86 NY2d 795 [1995][citation and internal quotation marks omitted]).

Officer Hoffman saw defendant at 10:00 P.M., in an area where there had been a number of gunpoint robberies. Defendant was following another man while clutching his waistband and keeping his right arm tight against his body as he walked. Moreover, the defendant looked startled when he saw the police. Officer Hoffman suspected that defendant was carrying a weapon and his suspicion was immediately heightened when defendant and his companion ran away from the police before they could ask any questions. These actions taken together, justified the officers'

pursuit of the defendant, as well as the recovery of the gun and narcotics (*People v Pines*, 281 AD2d 311 [2001], *affd* 99 NY2d 525 [2002] [where defendant's ensuing flight escalated the encounter and provided reasonable suspicion of criminality justifying pursuit]; *Matter of Steven McC.*, 304 AD2d 68 [2003], *lv denied* 100 NY2d 511 [2003] [where the appellant saw the police car, quickened his pace and separated himself from his companions to walk over to a building near an alley and discard something, and the Court found that these actions gave rise to a founded suspicion, which ripened into reasonable suspicion upon the appellant's flight when the police approached]). Therefore, the weapon defendant discarded in the course of his flight, and the subsequent contraband found on his person, were lawfully obtained and the motion to suppress was improperly granted.

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

ENTERED: JANUARY 31, 2008

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of a condition precedent, thus vitiating the contract as a matter of law, even without a showing of prejudice (*Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]).

Plaintiff became aware of the claimant's accident within three days, but did not notify Tower of the possibility of a claim until eight months later. Where a reasonable person could envision liability, that person has a duty to make some inquiry as to potential liability (*White v City of New York*, 81 NY2d 955, 958 [1993]). Although a good-faith belief in non-liability may excuse the failure to give timely notice (see *Great Canal Realty Corp.*, 5 NY3d at 743), there is no indication that plaintiff ever took any action to ascertain the possibility of its liability for the claimant's accident. Had plaintiff's president questioned his employees, some of whom had witnessed the accident, he would have learned that the claimant, after falling in front of the premises, had been taken away in an ambulance. Since he made no investigation at all, there is no basis for a good-faith belief in plaintiff's non-liability.

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

ENTERED: JANUARY 31, 2008

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Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

2637-

2638-

2639           In re Helen H.,  
                  Petitioner-Appellant,

-against-

          Christopher T.,  
          Respondent-Respondent.

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Berkman Bottger & Rodd, LLP, New York (Walter F. Bottger of  
counsel), for appellant.

Rosemary Rivieccio, New York, for respondent.

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          Order, Family Court, New York County (Helen C. Sturm, J.),  
entered on or about August 14, 2007, which, insofar as appealed  
from, denied petitioner mother's motion to relocate to Australia  
with the subject child, and granted petitioner's application for  
custody of the subject child on condition that she remain in New  
York, unanimously affirmed, without costs. Order, same court and  
Justice, entered on or about October 12, 2007, which, upon  
petitioner's relocation to Australia, insofar as appealed from,  
awarded custody of the subject child to respondent father,  
unanimously affirmed, without costs. Appeal from order, same  
court and Justice, entered on or about January 8, 2007,  
unanimously dismissed, without costs, as superseded by the  
subsequent appeals.

No basis exists to disturb Family Court's findings, or the weight assigned thereto (*see Yolanda R. v Eugene I. G.*, 38 AD3d 288, 289 [2007]), that petitioner's financial circumstances and immigration status are not so exigent as to require her immediate relocation to Australia (*see Salichs v James*, 268 AD2d 168, 172-173), that such relocation would irreparably harm respondent's necessary and positive relationship with the child (*see id.* at 170-172), that respondent is a viable custodial resource notwithstanding petitioner's attempts "to thwart the paternal relationship" (*cf. id.* at 173), and that petitioner's relocation to Australia reflects an "ambivalence and lack of insight into the child's needs and interests" sufficiently pronounced to warrant a change in custody (*see Matter of Tropea v Tropea*, 87 NY2d 727, 739-740 [1996]).

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

ENTERED: JANUARY 31, 2008

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CLERK



concurrently with the other sentences, unanimously affirmed.

At his first trial, defendant was charged with two drug sales, made to the same undercover officer but under different factual circumstances, about 30 minutes apart. Defendant asserted an agency defense with respect to both sales, and the jury convicted him of misdemeanor drug possession as to the second sale but failed to agree on a verdict as to the first. At a retrial, defendant was convicted of the first sale. At each of these trials defendant testified and admitted that his grand jury testimony concerning the two drug transactions had been false, and, at a third trial, defendant was convicted of perjury on the basis of his false grand jury testimony.

At defendant's second trial, concerning the first drug sale by defendant to the undercover officer, the court properly exercised its discretion by precluding defendant from introducing evidence of the factually dissimilar second sale, of which he had been acquitted at his first trial. This evidence was of little or no probative value on the issue of whether defendant acted merely as an agent of the undercover officer at the time of the first sale (see *People v Primo*, 96 NY2d 351, 355 [2001]; *People v Aska*, 91 NY2d 979, 981 [1998]), but would have prejudiced the People by causing the jury to speculate why defendant was not being tried for that crime in this second

trial. This was not a situation where a defendant's contemporaneous, similar transactions were probative of issues such as intent (see e.g. *People v Carter*, 77 NY2d 95, 107 [1990], cert denied 499 US 967 [1991]). Since the only issue litigated was the relevance of this evidence as a matter of state evidentiary law, and since defendant never asserted a constitutional right to introduce it, his present constitutional claim is unpreserved (*People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court's ruling did not deprive defendant of a fair trial or his right to present a defense (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]).

Defendant also claims that at the second trial, the court failed to provide defense counsel with notice of a jury note and an opportunity to be heard regarding the court's response (see *People v O'Rama*, 78 NY2d 270 [1991]). However, defendant failed to make a record that is sufficient to permit appellate review of this claim (see *People v Kinchen*, 60 NY2d 772, 773-774 [1983]; *People v Johnson*, \_\_AD3d\_\_ [Dec 20, 2007], 2007 WL 4443251, 2007 NY App Div LEXIS 12791). Moreover, a presumption of regularity attaches to judicial proceedings and may be overcome only by

substantial evidence (see *People v Velasquez*, 1 NY3d 44, 48 [2003]). Viewed in light of that presumption, the existing record, to the extent it permits review, demonstrates that there was there was an unrecorded colloquy between the court and counsel concerning the jury note immediately preceding the court's response. Although that colloquy should have been placed on the record, we find no basis for reversal. This case is unlike *People v Kisoan* (8 NY3d 129, 135 [2007]), where the record established the court's failure to satisfy its "core responsibility" to disclose a jury note and permit comment by counsel.

At the first trial, at which defendant was convicted of seventh-degree possession relating to the second transaction, the court made rulings on defendant's *Sandoval* motion and his request for an adverse inference charge relating to the undercover officer's lost memo book, each of which constituted a proper exercise of discretion. With respect to the second trial, his arguments concerning these issues are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Defendant was not deprived of his right to conflict-free representation at his perjury trial. The fact that the attorney

who represented him at the two drug trials also represented him at the perjury trial did not create a potential conflict of interest, and even if such potential conflict existed, defendant has not established that such potential conflict affected his defense (*see People v Jordan*, 83 NY2d 785, 787-788 [1994]). The perjury was committed when defendant testified before the grand jury, where a different attorney represented him. The conduct of the *trial* attorney was never an actual or potential issue in any respect at the perjury trial, and that attorney would have had no reason to testify.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 31, 2008

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CLERK



the record concerning counsel's strategic decisions (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982])). To the extent the existing record permits review, it establishes that defendant received effective assistance 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])). Defense counsel's decision to permit introduction of testimony concerning photographic identifications appears to have been part of a legitimate strategy aimed at establishing that the identification testimony was unreliable and the product of police suggestion (see *People v Pennington*, 27 AD3d 269 [2006], *lv denied* 6 NY3d 897 [2006]; *People v Silvestre*, 279 AD2d 364, 365 [2001], *lv denied* 96 NY2d 763 [2001])). Although counsel inadvertently elicited a detective's belief that defendant had a prior arrest for robbery, the court minimized any prejudice by immediately striking that response.

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

ENTERED: JANUARY 31, 2008

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CLERK

Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

2645-

2645A Brian Cohen, et al.,  
Plaintiffs-Appellants,

Index 603972/05

-against-

Michael Weitzner, Esq., et al.,  
Defendants-Respondents.

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Steven R. Goldberg, New York, for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York  
(Cristina R. Yannucci of counsel), for respondents.

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Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered August 18, 2006, dismissing the complaint pursuant to an order, same court and Justice, entered August 7, 2006, which, in this action for legal malpractice and negligent misrepresentation, granted defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs were delinquent in filing tax returns for the years 1997 through 2002 and finally filed them all in 2003, after which they received from the IRS a statement of their tax liability as they and their accountant had computed and reported it, penalties assessed for late filing and late payment, and

interest. Plaintiffs then retained defendants to seek an abatement of the late filing and late payment penalties on the ground of plaintiff Brian Cohen's medical condition. The IRS proposed, and plaintiffs accepted, a settlement pursuant to which the penalties for 1997 and 1998 were fully abated and plaintiffs were given one year to pay the remaining taxes, penalties and interest owed.

Plaintiffs allege that the settlement required them to pay more in taxes than they had anticipated based on a spreadsheet prepared for them by defendants in which, due to a typographical error, their tax liability for the year 2000 was understated by \$121,000, and that they have been damaged in that amount by defendants' misrepresentation. However, plaintiffs' tax liability was correctly reflected in the returns they filed before retaining defendants and entering into the settlement agreement. In any event, their tax liability was not the subject of the negotiations with the IRS. Thus, plaintiffs fail to allege how defendants' error damaged them (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421-422 [1996]; *Zarin v Reid & Priest*, 184 AD2d 385, 386-387 [1992]). Further, as defendants were retained to try to obtain a reduction in the penalties assessed against plaintiffs, and they succeeded, there can be no claim

that they breached a duty to plaintiffs (*see generally Dweck Law Firm v Mann*, 283 AD2d 292, 293 [2001]).

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

ENTERED: JANUARY 31, 2008

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CLERK





referred cases, (5) refused to award damages against the individual defendants for cases that were resolved after September 11, 1989, and (6) computed interest on the breach of contract claims from the date of plaintiff's demand for payment, unanimously affirmed, with costs.

On a prior appeal, this Court held that plaintiff may recover on his breach of contract claims for cases he referred and which were disposed of prior to his disbarment on January 23, 1992, and on a quantum meruit basis, for cases on which he worked and were still pending at the time of his disbarment (see 307 AD2d 817 [2003]). The Court also determined that the breach of contract claims accrued when defendants received fees for the referred cases and refused demands for payment, and that the statute of limitations for any quantum meruit recovery began to run when such cases were disposed of (*id.*). In light of our prior decision, the trial court properly determined that plaintiff's breach of contract claims were not time-barred and were triggered upon plaintiff's letter demanding payment dated April 11, 1997 (*Soeiro v Brewer*, 237 AD2d 208, 209 [1997]). However, the court appropriately declined to award damages to plaintiff on a number of the referred cases where he failed to

demonstrate sufficiently the payment of legal fees to defendants in those instances.

The award of damages against Feder individually for cases that plaintiff referred to him and resolved prior to September 11, 1989 was proper, where Feder offered testimony that his professional corporation terminated in the early 1980's and he practiced as an individual until September 11, 1989 at which time defendant Feder Connick & Goldstein, P.C. (FCG) formed. For cases resolved after the formation of FCG, the court appropriately declined to award damages against the individual defendants, because there was an inadequate showing that the individual defendants performed work on the subject cases or received any specific portion of the fees earned from the cases.

The trial court also properly declined to credit Feder for monies purportedly owed to him for cases he referred to plaintiff pursuant to their agreement. Feder failed to produce competent evidence demonstrating that he is entitled to a set-off for those cases.

The computation of interest on the breach of contract claims from April 11, 1997, the date that plaintiff demanded payment,

was proper because it is the date that the claims accrued (CPLR 5001; *Eisen v Feder*, 307 AD2d at 818).

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

ENTERED: JANUARY 31, 2008

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CLERK



made an implicit request for assignment of new counsel, we conclude that the hearing court properly denied it. There was a series of colloquies during which defendant had ample opportunity to establish good cause for such a substitution but failed to do so (see *People v Linares*, 2 NY3d 507, 510 [2004]; *People v Beriguette*, 84 NY2d 978 [1994]; *People v Sides*, 75 NY2d 822 [1990]). Defendant's implicit request was supported by nothing more than his unjustified lack of confidence in his attorney (see *People v Morris*, 21 AD3d 251 [2005], *lv denied* 5 NY3d 831 [2005]).

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

ENTERED: JANUARY 31, 2008

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Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

2651 David A. Kipper, M.D., Index 116587/04  
Plaintiff-Respondent,

David A. Kipper, M.D., a Professional Corporation,  
Plaintiff,

-against-

NYP Holdings Co., Inc.  
doing business as The New York Post,  
Defendant-Appellant.

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Hogan & Hartson LLP, New York (Slade R. Metcalf of counsel), for  
appellant.

Jaroslawicz & Jaros, LLC, New York (Robert J. Tolchin of  
counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman,  
J.), entered May 22, 2007, which, to the extent appealed from,  
denied defendant's motion for summary judgment to dismiss the  
claim of plaintiff in his individual capacity, unanimously  
reversed, on the law, with costs, and the motion granted. The  
Clerk is directed to enter judgment in favor of defendant  
dismissing the complaint.

This libel action was commenced after defendant, in  
rewriting an article first published in the Los Angeles Times,  
changed a sentence that originally stated the California Medical  
Board had "moved to" revoke plaintiff's medical license for  
overprescribing medication, to assert incorrectly that the State

Board had in fact revoked his license. Although defendant subsequently published a retraction and pointed out its error, plaintiff still seeks damages for the admitted falsity. However, it is well settled that where a plaintiff is a public figure, he must establish, with convincing clarity, that the purportedly defamatory statement was made with "actual malice," i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not" (*New York Times v Sullivan*, 376 US 254, 279-280 [1964]).

The omission of the words "moved to" from the sentence concerning the actions of the California Medical Board with respect to plaintiff does not, without more, demonstrate defendant's malice toward plaintiff (see *Millus v Newsday, Inc.*, 89 NY2d 840 [1996], *cert denied* 520 US 1144 [1997]). Indeed, plaintiff does not claim, much less show, that defendant knowingly published a falsity about him in an effort to harm his reputation. He alleges, instead, that defendant acted recklessly, carelessly and/or negligently in not determining the veracity of statements it made about him; but negligence alone does not constitute malice. In the absence of any evidence that would support a jury verdict in favor of plaintiff, defendant is

entitled to summary judgment dismissing the complaint (see *Freeman v Johnston*, 84 NY2d 52, 57 [1994], cert denied 513 US 1016 [1994]).

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

ENTERED: JANUARY 31, 2008

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CLERK



Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

2653N Samuel Cosentino, Index 121296/03  
Plaintiff-Appellant,

-against-

Sullivan Papain Block McGrath  
& Cannavo, P.C.,  
Defendant-Respondent.

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Curtis & Associates, P.C., New York (W. Robert Curtis of  
counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP, New York (Richard  
E. Lerner of counsel), for respondent.

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Order, Supreme Court, New York County (Edward H. Lehner,  
J.), entered June 26, 2006, which, in an action for legal  
malpractice, denied plaintiff's motion to amend the complaint to  
add a cause of action for breach of fiduciary duty, unanimously  
affirmed, without costs.

The proposed fiduciary breach claim lacks merit in that it  
fails to allege facts, rather than conclusions, to support the  
element of "but for" causation (see *Weil, Gotschal & Manges, LLP  
v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-272  
[2004]), and was therefore properly rejected (see *Thompson v  
Cooper*, 24 AD3d 203, 205 [2005]) even if, arguendo, the alleged  
conduct involved ethical violations (see *Schwartz v Olshan  
Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [2003]). The

damages sought are speculative or otherwise not recoverable (see *Postel Jaffe & Segal*, 37 AD2d 127 [1997]). In view of the foregoing, it is unnecessary to address the timeliness of the proposed claim. We have considered plaintiff's other contentions and find them unavailing.

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

ENTERED: JANUARY 31, 2008

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CLERK

Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

2654N Naomi Reyes, etc.,  
Plaintiff-Appellant,

Index 21492/04

-against-

Riverside Park Community  
(Stage I), Inc., et al.,  
Defendants-Respondents.

Riverside Maintenance Corp., et al.,  
Defendants.

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Madeline Lee Bryer, P.C., New York (Madeline Lee Bryer and  
Jonathan I. Edelstein of counsel), for appellant.

Gordon & Silber, P.C., New York (David Henry Sculnick of  
counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.),  
entered May 18, 2007, which, insofar as appealed from in an  
action for personal injuries, denied plaintiff's motions to  
strike the answers of defendants, provide a certain discovery,  
and to impose sanctions, unanimously affirmed, without costs.

Plaintiff's motion to strike defendants' answers was  
properly denied since there was no showing that defendants'  
conduct during discovery was willful, contumacious or in bad  
faith (*see Dauria v City of New York*, 127 AD2d 459 [1987]).

Indeed, defendants complied with plaintiff's discovery requests and provided responses pursuant to these requests.

The motion court's determination on the remainder of the discovery order was a provident exercise of discretion. The full disclosure requirement of CPLR 3101(a) is subject to a test of "usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]), and the documents sought by plaintiff, including, inter alia, the operating budget of the building in which plaintiff's minor daughter was attacked and the contract that the building had with a prior security company, are neither material nor necessary to this action. Furthermore, although the court denied plaintiff's request for defendant RPC Associates to produce a witness for deposition, it did direct RPC to provide an affidavit from one of its partners specifying its responsibilities in relation to the building.

Plaintiff's application for sanctions was appropriately denied where the affirmation of good faith submitted in support

failed to detail the good faith effort to resolve the discovery disputes (22 NYCRR 202.7[a][2]; see also *Cerreta v New Jersey Tr. Corp.*, 251 AD2d 190 [1998]).

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

ENTERED: JANUARY 31, 2008

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CLERK

Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

2655

[M-6528] In re Sulayman Batchilly,  
Petitioner,

Index 419/02

-against-

Hon. Megan Tallmer, etc., et al.,  
Respondents.

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Sulayman Batchilly, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Anthony J. Tomari of  
counsel), for Hon. Megan Tallmer, respondent.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone  
of counsel), for Hon. Robert T. Johnson, respondent.

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

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

1900 Dennis Bellamy,  
Plaintiff-Respondent,

Index 23003/04

-against-

Columbia University,  
Defendant-Appellant.

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Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for  
appellant.

Quaranta & Associates, Mount Kisco (Kevin J. Quaranta and  
Virginia D. Mallon of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alexander Hunter, J.),  
entered January 25, 2007, affirmed, without costs.

Opinion by Lippman, P.J. All concur except Friedman and  
Marlow, JJ. who dissent in an Opinion by Marlow, J.

Order filed.

Mazzarelli, J.P., Saxe, Marlow, Catterson, Malone, JJ.

2221            Proceeding for Judicial Declaration            Index 3542/03  
                 of Death of Sneha Anne Philip, etc.,

Ronald Lieberman,  
                  Petitioner-Appellant.

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Marc Bogatin, New York, for appellant.

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Decree, Surrogate's Court, New York County (Renee R. Roth, S.), entered June 29, 2006, reversed, on the law and the facts, the petition granted insofar as it seeks a declaration that Sneha Anne Philip's death occurred on September 11, 2001, at the World Trade Center.

Opinion by Saxe, J. All concur except Malone, J. who dissents in an Opinion.

Order filed.



**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**JANUARY 31, 2008**

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

M-305 Doe v Madison Medical - The Private Practice Group of  
New York, L.L.P.

Appeal, previously perfected for the March 2008 Term,  
withdrawn.

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

M-329 Estate of Dutan - Andramunio v 3402 Land  
Acquisition LLC  
(And other actions)

Appeal and cross appeal, previously perfected for the  
February 2008 Term, withdrawn.

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

M-166 People v Bradford, Melic

M-167 Cortez, Noel

M-168 Emiliano, Lenny

M-169 Encarnacion, Samuel

M-170 Lacayo, Pablo

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

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

M-174 People v Martinez, Jose

M-171 McNeil, Joseph, also known as McNeil, Steven

M-172 Stephens, Phillip

M-173 Velasquez, Shane

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

Lippman, P.J., Mazzarelli, Andrias, Buckley, Sweeny, JJ.

M-6720 Jersey Partners, Inc. v McCully

Reargument or other relief denied.

Lippman, P.J., Tom, Buckley, Gonzalez, JJ.

M-80 Hoisington v Santos

Stay of proceedings and trial granted.

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

M-5721 Wilcox v Black Rock Properties, Inc. - Mohammed

Appeal dismissed.

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

M-6102 People v Hernandez, Ismael

Reargument or other relief denied.

Lippman, P.J., Mazzairelli, Nardelli, Sweeny, JJ.

M-5400 S., Jill v S., Steven

Reargument or other relief denied.

Lippman, P.J., Mazzairelli, Gonzalez, Sweeny, Acosta, JJ.

M-6517 In the Matter of V., Trevon S.; M., Takiah N., also known as M., Takia; M., Tacarha M., also known as M., Taccaria V. - Children's Village

Appeal dismissed.

Lippman, P.J., Andrias, Nardelli, Gonzalez, JJ.

M-6555 Concourse Rehabilitation & Nursing Center, Inc. v Novello

Reargument or other relief denied.

Lippman, P.J., Saxe, Buckley, Gonzalez, JJ.

M-6656 People v Polanco, Alberto

Counsel substituted.

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

M-6199 Harwin v The New York City Transit Authority

Leave to cite decision of this Court denied, as indicated.

Tom, J.P., Mazzarelli, Saxe, Marlow, Williams, JJ.

M-6607 Haber v Citibank, N.A.

M-6739

Reargument denied (M-6607); costs, sanctions and attorneys fees denied (M-6739).

Tom, J.P., Mazzarelli, Nardelli, Williams, JJ.

M-6706 People v Syville, Nathaniel

Renewal denied.

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

M-6141 Miranda-Rivera v Ambassador Fuel and Oil Burner Corp.

M-6477 (And other actions)

Reargument or other relief denied.

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

M-5944 Vitti v Hermitage Insurance Company

Reargument or other relief denied.

Tom, J.P., Saxe, Buckley, Gonzalez, Catterson, JJ.

M-6661 Skyview Acquisition LLC, as successor to Skyview Holdings, LLC v Cunningham

Appeal dismissed.

Tom, J.P., Saxe, Buckley, Gonzalez, Catterson, JJ.

M-6724 Leonard Rosen & Co., P.C. v East Hudson Urology Group  
P.C.  
(And another action)

Time to perfect appeal enlarged to the June 2008 Term,  
as indicated.

Tom, J.P., Saxe, Buckley, Gonzalez, Catterson, JJ.

M-6692 EMI Music Marketing (formerly known as EMI Music  
Distribution), a division of Capital Records, Inc.  
v Orpheus Music, Inc.

Time to perfect appeal enlarged to the June 2008 Term,  
as indicated.

Tom, J.P., Saxe, Buckley, Gonzalez, Catterson, JJ.

M-197 Djeddah v Djeddah  
M-198

Time to perfect appeal enlarged to the September 2008  
Term, appeal dismissed unless perfected for said Term, as  
indicated.

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

M-6527 People v Vaello, Jose  
  
Appeals deemed withdrawn.

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

M-6602 Donati v Daily News, L.P.  
  
Appeal dismissed.

Tom, J.P., Friedman, Gonzalez, Sweeny, Kavanagh, JJ.

M-6465 Fluellen v Hanley

Reargument or other relief denied.

Tom, J.P., Friedman, Gonzalez, Sweeny, Kavanagh, JJ.

M-6334 Cruz v Montefiore Medical Center

Reargument denied.

Tom, J.P., Friedman, Nardelli, Gonzalez, JJ.

M-4094 People v Ramirez, Jefferson

Writ of error coram nobis denied.

Tom, J.P., Nardelli, Buckley, Gonzalez, JJ.

M-6202 International Flavors & Fragrances, Inc. v Royal

M-6621 Insurance Company of America

Reargument or other relief denied.

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-16 Amarosa v The City of New York - Tishman Construction  
Company  
(And another action)

Time to perfect cross appeal enlarged to the May 2008  
Term, to which Term direct appeal adjourned, as indicated.

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-122        Gonzalez v Société Générale  
M-322

Leave to submit amended brief granted and deemed filed.  
Stay of trial previously granted by order of this Court entered  
January 10, 2008 (M-6270) continued, as indicated; consolidated  
appeals adjourned to the April 2008 Term (M-122). Dismissal of  
appeal denied (M-322).

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-6744       Brenner v Hartford Life Insurance Company  
  
Enlargement of record on appeal denied.

Mazzarelli, J.P., Saxe, Marlow, Catterson, JJ.

M-6702       People v Bustamante, Joaquin

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

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

M-6240       SMD Capital Group LLC v EPR Capital LLC  
  
Reargument or other relief denied.

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

M-6413       Estate of Sakow - Sakow v Breslaw  
  
Reargument denied.

Mazzarelli, J.P., Marlow, Williams, Catterson, JJ.

M-6383      Bailystoker Center & Bikur Cholim, Inc.  
              v Lower East Side Health Care Holding Corp.  
              (And another action)

              Motion for amendment/modification granted to the extent  
of recalling and vacating the decision and order of this Court  
entered on November 8, 2007 (Appeal No. 1910) and a new decision  
and order substituted therefor (See Appeal No. 1910, decided  
simultaneously herewith.)

Andrias, J.P., Saxe, Nardelli, McGuire, JJ.

M-6623      Tri State Construction, LLC v Vaij Realty Associates  
  
              Reargument denied.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-138        Zyskind v Industrial Enterprises of America, Inc.,  
              formerly known as Advanced Bio/Chem, Inc.

              Time to perfect appeal enlarged to the June 2008 Term,  
as indicated.

Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

M-6614      In the Matter of Pearson v New York City Housing  
              Authority

              Appeal dismissed.

Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

M-6262 Kamin v James G. Kennedy & Co., Inc.  
(And a third-party action)

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

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-6611 In re Kufeld - Peskowitz v Kufeld

Clerk directed to calendar appeals for hearing together in the May 2008 Term, for which Term cross petitioner directed to perfect appeal from order entered on or about December 17, 2007.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-252 In the Matter of Patel v Daines  
CPLR 5704(a) relief denied.

Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

M-6745 1050 Tenants Corp. v Lapidus  
Leave to appeal from the Appellate Term denied.

Saxe, J.P., Nardelli, Gonzalez, Sweeny, Catterson, JJ.

M-6006 In re Neal v White  
Leave to appeal to the Court of Appeals denied.

Friedman, J.P., Marlow, Buckley, McGuire, JJ.

M-6689 Wechsler v Wechsler

Appeal deemed reinstated.

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

M-5698 In re Omnicom Group Inc. Shareholder Derivative  
Litigation - Otterbach v Crawford

Reargument or other relief denied.

Lippman, P.J.

M-6328 People v Bravo, Omar

Leave to appeal to this Court granted, as indicated.

Lippman, P.J.

M-6376 People v Joyner, Eric

Leave to appeal to this Court denied.

Lippman, P.J.

M-6100 People v Torres, Carlos

Leave to appeal to this Court denied.

Lippman, P.J.

M-6675 People v Moore, Kenneth, also known as Jackson, James  
Leave to appeal to this Court denied.

Buckley, J.

M-5895 People v King, James  
Leave to appeal to this Court denied.

Buckley, J.

M-5764 People v Spencer, Herman, also known as Powell, Herman  
Leave to appeal to this Court denied.

Andrias, J.P., Saxe, Nardelli, Sweeny, McGuire, JJ.

M-5004 In the Matter of Leah Larsen,  
an attorney and counselor-at-law:

Respondent suspended from the practice of law in the State of New York for a period of two and one-half years, effective February 29, 2008 and until further order of this Court. Respondent directed to pay monetary restitution, as indicated. Opinion Per Curiam. All concur except McGuire, J., who dissents in an Opinion and would disbar respondent.

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

M-3361 In the Matter of Michael Caliguiri,  
an attorney and counselor-at-law:

Respondent suspended from the practice of law in  
the State of New York for a period of one year, effective  
February 29, 2008 and until further order of this Court.  
Opinion Per Curiam. All concur.

**The following orders were entered and filed on January 29, 2008:**

Lippman, P.J., Mazzairelli, Friedman, Sweeny, Moskowitz, JJ.

M-4 Carter v Carter

Enlargement of record on appeal and related relief  
denied.

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

M-6484 People v Council, Marilyn Walwyn, also known as  
M-6485 Council, Marilyn; People v Council, Roosevelt  
M-6693

Reargument denied (M-6484/M-6485). Enlargement of  
record on appeal granted, as indicated (M-6693).