



defendant does challenge the ensuing warrantless search of the car that yielded the narcotics evidence providing the basis for the criminal possession charge to which he pleaded guilty.<sup>1</sup> Supreme Court denied defendant's motion to suppress this evidence based on its finding that the People established at the suppression hearing that the evidence was recovered in the course of a valid inventory search. We now reverse.

An inventory search is "a search designed to properly catalogue the contents of the item searched" (*People v Johnson*, 1 NY3d 252, 256 [2003]). "The specific objectives of an inventory search, particularly in the context of a vehicle, are to protect the property of the defendant, to protect the police against any claim of lost property, and to protect police personnel and others from any dangerous instruments" (*id.*, citing *Florida v Wells*, 495 US 1, 4 [1990]). To establish that evidence was recovered in the course of a valid inventory search of a vehicle, the People are required to offer proof that the search was "conducted pursuant to 'an established procedure clearly limiting the conduct of individual officers that assures that the searches

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<sup>1</sup>Such evidence included the following items found in the car's trunk at the scene of the arrest: a "Banana Republic" bag containing a clear plastic bag apparently filled with cocaine powder, an electric scale, and an empty, clear plastic bag apparently coated with cocaine residue, and (outside the "Banana Republic" bag) a brown manila envelope containing several red pills. In addition, after the car was driven to the precinct, 45 empty plastic "baggies" were found inside the panel of the driver's door.

are carried out consistently and reasonably'" (*Johnson*, 1 NY3d at 256, quoting *People v Galak*, 80 NY2d 715, 719 [1993]). In addition, the People are required to establish that the search actually produced "a meaningful inventory list" (*Johnson*, 1 NY3d at 256; see also *Galak*, 80 NY2d at 720 [an inventory search must "create a usable inventory"])).

In this case, the People failed to meet their initial burden of coming forward with evidence that the search of defendant's car was conducted in accordance with a standardized procedure established by the Police Department that was "rationally designed to meet the objectives that justify the search in the first place" and "limit[ed] the discretion of the officer in the field" so as to "assure[] that the searches are carried out consistently and reasonably and do not become little more than an excuse for general rummaging to discover incriminating evidence" (*Galak*, 80 NY2d at 719). While it was not necessarily fatal to the People's case that they did not place in evidence the Patrol Guide's written guidelines for conducting an inventory search, the People also failed to elicit from the police witness the relevant content of those guidelines. The only testimony the People elicited about the content of the Patrol Guide's inventory search procedure was that it permits such a search to be conducted either at the scene or at the precinct and that it provides that such a search should be conducted "of a vehicle

that is going to be vouchered." No additional relevant details of the procedure for inventory searches were adduced. In particular, although the drugs in this case were found in the trunk of defendant's car, and other evidence was found inside a door panel, the People did not establish the circumstances that would justify opening a closed trunk or a door panel under the Patrol Guide procedure (see *People v Colon*, 202 AD2d 708 [1994], lv denied 84 NY2d 824 [1994] [drugs found during inventory of vehicle "in a paper bag located in the trunk and hidden behind some of the vehicle's interior paneling" were suppressed due to failure to establish that trooper was "acting pursuant to any standardized procedure in conducting the inventory"]; cf. *People v Lesane*, 284 AD2d 249, 250 [2001] [locked metal compartment in vehicle was opened during inventory search in accordance with applicable procedure]; *People v Watson*, 213 AD2d 996, 997 [1995], lv denied 86 NY2d 804 [1995] [vehicle's door panel was opened during inventory search in accordance with applicable procedure]; *People v Walker*, 194 AD2d 92, 94 [1993], lv denied 83 NY2d 811 [1994] [vehicle's trunk was opened during inventory search in accordance with applicable procedure]).<sup>2</sup>

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<sup>2</sup>The police witness testified that the search of defendant's car was motivated in part by the officer's recollection that, during an encounter he had with defendant in an apartment the night before the arrest, defendant had claimed to have a gun. However, the officer never explained how defendant's claim the night before (which had not prompted any search at the time) affected the manner in which the inventory search of defendant's

Since the People failed to establish<sup>1</sup> the content of any standardized procedure for inventory searches promulgated by the New York City Police Department, it necessarily follows that the People also failed to come forward with evidence that the search of defendant's car was conducted in accordance with any such standardized procedure. Further, even if the People had established that the search was otherwise conducted in accordance with a reasonable standardized procedure for conducting inventory searches, suppression would still be required on the ground that the People completely failed to establish that the police created any actual inventory list of the items found in the car, such a list being "the hallmark of an inventory search" (*Johnson*, 1 NY3d at 256). While the police witness testified that a voucher and forfeiture papers were prepared for the car itself, there is no indication that such paperwork included any itemization of the car's contents. As to the officer's testimony that he prepared vouchers for the various items found in the car that were to be held for use as evidence, such disparate and selective documentation of the car's contents could not substitute for a single "meaningful inventory list" (*id.*; see also *Galak*, 80 NY2d at 720 [the requirement of "a detailed and carefully recorded

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car could properly be conducted under the Patrol Guide's standards. The People have not argued that defendant's prior statement that he had a gun created probable cause for searching his car when he was arrested on an unrelated charge the next day.

inventory" was not satisfied where, inter alia, "no record was kept of what property, if any, was left in the car or returned to defendant"). The People did not place in evidence any comprehensive inventory list "catalogu[ing] the contents of the [vehicle] searched" (*Johnson*, 1 NY3d at 256) and noting the disposition of each item found therein, whether or not that item was retained by the police. Further, not only did the police witness not testify that any such list had been created, he affirmatively testified that he believed that no official form for inventory lists had been promulgated:

Q. But there is a special form when you do an inventory search of what was in the vehicle, what was recovered from the vehicle, if it was brought somewhere for safekeeping, correct?

A. No, there is not.

Q. There's no form at all?

A. No.<sup>3</sup>

We observe that, if vouchers for items held as evidence were deemed to constitute, collectively, an inventory list of the contents of the vehicle from which those items were recovered,

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<sup>3</sup>In their brief, the People concede that, contrary to the officer's testimony, "[p]olice officers operating under the Patrol Guide are directed to voucher valuables recovered in an inventory search on a Property Clerk's Invoice (Document Number PD521-141)," as set forth in Patrol Guide Procedure No. 218-13 ("Inventory Searches of Automobiles and Other Property"). The People do not argue that the voucher that was filled out for the evidence found in defendant's car constituted the functional equivalent of PD521-141, the inventory form prescribed by the Procedure No. 218-13.

the requirement that an inventory search produce an inventory list would be eviscerated, since the police create vouchers, as a matter of course, for items being retained for use as evidence. Moreover, to the extent the police document only those contents of a vehicle that have potential evidentiary value (as appears to have been the case here), it tends to show that the purpose of the search of the vehicle was "a general rummaging in order to discover incriminating evidence" (*Johnson*, 1 NY3d at 256, quoting *Florida v Wells*, 495 US at 4), which is not an appropriate aim of an inventory search. "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*Johnson*, 1 NY3d at 256).<sup>4</sup>

Contrary to the view of the dissent, defendant preserved both the issue of the People's failure to establish that the search of the vehicle was conducted in accordance with an established procedure for inventory searches and the issue of the failure of any meaningful inventory list to result from the search of the vehicle. Indeed, the People -- who are not

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<sup>4</sup>The dissent's remark that the People showed "that all of the items of *contraband* were recorded in the voucher" (emphasis added) underscores the point that the purpose of the search of defendant's car was to discover incriminating evidence, not to produce a general inventory of all of the vehicle's contents. Moreover, we do not share the dissent's view that it is "a more reasonable inference" from the officer's testimony that he "recorded all of the items found in the vehicle." In this regard, we reiterate that it was the People's initial burden to come forward with affirmative evidence that an inventory list was, in fact, created.

reticent to argue that arguments have not been preserved for appellate review -- do not argue that defendant failed to preserve the arguments he makes on this appeal. The following excerpts from defense counsel's argument at the *Mapp* hearing demonstrate the preservation of these issues:

"[The cases] all say, if there is going to be an inventory search, certain safeguards and certain procedures have to be followed. There needs to be a form that's filled out. And although the officer denied there is a form, there actually is one, and I have the form number here, somewhere. I have it listed somewhere. But there is a form that has to be filled out. This officer said he never filled out an inventory search form.

"And the reason they have to have procedures is, the cases say this can't be some sort of rouse [sic] to search a vehicle, if you have no other reason to search the vehicle. This officer testified that on an arrest for driving with a suspended license, with the car double-parked, with one car, one door unable to be opened, where he couldn't even do an entire inventory search, he had to bring the car to the precinct to open up the [panel of the] door, where the glassine envelopes [sic] were allegedly found, with two other police officers there. It was unknown whether cars could pass, because he said he didn't remember.

"You are going to stop everything at 1 o'clock in the morning, and stop [sic] doing an inventory search, and you don't have a form writing down what you are taking, why you are taking it, what you are keeping for safekeeping? The Courts are very clear, and the Court of Appeals, I believe, unanimously in [*People v Johnson, supra*] said that -- I am going to quote from the Court of Appeals, Judge.

"They [the Court of Appeals] said [counsel here read from *Johnson*, 1 NY3d at 256] that 'an inventory search must not be a rouse [sic; Court of Appeals wrote "ruse"] for general rummaging in order to discover incriminating evidence. To guard against this danger [an] inventory search [sh]ould be conducted pursuant to [an] established procedure, clearly limiting the conduct of individual officers. That assures that the searches are carried out consistently and reasonably. The procedure must be

standardized, so as to limit the discretion of the officer in the field. While inventory [sic; Court of Appeals wrote "incriminating"] evidence may be [a] consequence of [an] inventory search, it should not be its purpose, and the prosecution has the initial burden of establishing a valid inventory search.' [Here the inexact reading from *Johnson* ends.]

"It is the prosecution's burden to prove that this was a valid inventory search. I think the officer's testimony after arresting someone for driving with a suspended license, that he was going to just start an inventory search, without having the form to fill out, right in the middle of the street, at 1 o'clock in the morning, is ludicrous.

"I submit to the Court that what this officer was doing was attempting to search the car, perhaps because the defendant, the day before, was taken to a hospital, maybe suspected there may have drugs in the car. He was trying to find a reason to search that car, and that is what he was doing. Whether or not he thought of that reason afterwards, because he realized that you can't search a car when you stop somebody and arrest someone for driving with a suspended license unless you have probable cause to believe there is contraband, I don't know when he decided that. But at some point, he thought up this rouse [sic].

"Well, this was [not] an inventory search. It is obvious what this is. This is very similar to the *Johnson* case, where the officer went into a glove compartment to look, and he said, to inventory the car at the scene, and gun was recovered. And the Court of Appeals unanimously held that you can't do that. An inventory search has to be a standardized procedure.

"If this vehicle had been brought back and if they had a search of the vehicle, and if they have a form listing what they were taking out, it would be a different story. That is not what happened here, Judge. So based upon the evidence, and based upon the leading cases in this state, I am going to ask the Court to suppress all of the evidence that was removed from the vehicle. There was absolutely no probable cause to search this vehicle, and this was obviously not an inventory search, it was just rouse [sic]

by the officer to justify searching the vehicle."<sup>5</sup>

In sum, because the People failed to establish that the Police Department's inventory search procedure was reasonable and that the search of defendant's car was conducted in accordance with that procedure and produced a legitimate inventory list, defendant was entitled to have the evidence produced by that search suppressed. We note that the People did not raise an argument of inevitable discovery in opposition to the suppression motion, and we therefore have no occasion to consider such a theory.

All concur except McGuire, J. who dissents in a memorandum as follows:

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<sup>5</sup>Even if we were to accept (which we do not) the dissent's position that defendant did not preserve the issue of the People's failure to show that the arresting officer followed an established procedure for inventory searches (although, to reiterate, the People have made no such argument), the above-quoted portions of the hearing transcript establish to our satisfaction that, contrary to the dissent's view, defendant preserved the issue of the People's failure to produce any actual inventory list that resulted from the search of the vehicle. The latter issue, by itself, suffices to require a reversal.

McGUIRE, J. (dissenting)

I respectfully dissent. All of the claims advanced by defendant on appeal in support of his contention that the motion to suppress should have been granted are unpreserved. The interest of justice does not support reviewing these claims; it requires, to the contrary, that we not review them and affirm the judgment in all respects.

The sole witness at the suppression hearing was Police Officer Vetell. With respect to the inventory search of defendant's car that followed his arrest for driving with a suspended license, Officer Vetell testified that the car had to be "vouchered for safekeeping" and that he vouchered the car because it had to be inventoried according to the standard procedures for the New York City Police Department. Vetell also testified that the Patrol Guide "la[id] out procedures for an inventory search" and that he was familiar with those procedures.

As Vetell explained, the car was vouchered for safekeeping "[b]ecause it was in an illegal parking space, defendant was, obviously, not allowed to drive it, and I was not going to take responsibility and park it in the street. Procedurally, we were going to bring it back to the precinct and safeguard the vehicle until the defendant got out." One purpose of the inventory search was to make sure there were no valuables in the car. As Vetell also testified, a police officer was going to have to

drive the car to the precinct and the officers "were going to make sure there was no weapon in the vehicle." The officers were going to make sure there was no weapon because defendant had threatened Vetell the day before, stating that he had a gun and was going to kill him. Thus, there were two reasons for the search of the vehicle: because it was being taken to the precinct and vouchered and because of the threat.

The inventory search began at the scene of arrest, but was hampered because one of the doors was blocked due to the way the car was double parked. At the scene, however, one of Officer Vetell's fellow officers removed a white bag from the trunk. Inside the bag was a clear plastic bag of powdered cocaine, an electric scale and another clear plastic bag containing cocaine residue. A brown manila envelope with several red pills inside also was found in and removed from the trunk.

After the drugs were found in the trunk, a group of people was gathering on the sidewalk and Vetell's sergeant directed that the inventory search be completed at the precinct. Under the Patrol Guide, an officer may perform an inventory search either at the scene of arrest or at the precinct. The search was completed at the precinct. The sergeant at some point discovered "45 empty baggies" in the door panel of the driver's door. Officer Vetell prepared both a voucher form relating to the car and "forfeiture paper[work]." Asked on direct examination what

he did with the 45 plastic baggies, Officer Vetell answered: "[t]hey were vouchered." When he was next asked what he did with the white bag containing the cocaine, the scale, the empty bag with the residue and the red pills, Officer Vetell stated: "[t]hose were vouchered, as well." Asked by defense counsel on cross-examination if he "fill[ed] out any form about doing an inventory search on what was found in the vehicle," Officer Vetell answered: "[t]he voucher." When counsel went on to ask if there was a "special form when you do an inventory search of what was ... recovered from the car," Vetell responded: "[n]o, there is not."

None of the foregoing testimony from Officer Vetell was contradicted at the hearing. The suppression court found Officer Vetell to be credible, made findings of fact that were consistent with the testimony in every relevant respect and upheld the reasonableness of the inventory search.

The majority reverses, grants the motion to suppress and dismisses the indictment because: (1) "the People ... failed to elicit from the police witness the relevant content of [the Patrol Guide's written guidelines for conducting an inventory search]," (2) "the People did not establish the circumstances that would justify opening a closed trunk or a door panel under the Patrol Guide procedure" and (3) "the People completely failed to establish that the police created any actual inventory list of

the items found in the car."

Not a single one of these grounds for suppression was raised at the hearing. As discussed below, defendant placed his eggs in a very different basket. Rather than advance specific arguments that the People could meet with additional evidence, defendant attacked the veracity of Officer Vetell, arguing that the asserted basis for searching the vehicle, an inventory search, was just a pretext. Accordingly, all of these grounds (and each of the arguments defendant raises on appeal) are unpreserved and, as is also discussed below, should not be relied upon now for the first time when the People are unable to counter them with evidence.

Before focusing on the arguments advanced by defendant at the hearing, another flaw in the majority's position should be noted. With respect to the last of the three grounds for reversal it posits, the majority elaborates on it in three respects. The first two are: (a) although Officer Vetell "testified that a voucher and forfeiture papers were prepared for the car itself, there is no indication that such paperwork included any itemization of the car's contents"; and (b) "[t]he People did not place in evidence any comprehensive inventory list cataloguing the contents of the vehicle searched and noting the disposition of each item found therein, whether or not that item was retained by the police" (internal quotation marks, citation

and brackets omitted). The third elaboration is less easily stated. In essence, however, the majority appears to be of the view that the "voucher" that Officer Vetell testified he prepared was defective because incomplete. Thus, the majority first notes that "the police create vouchers, as a matter of course, for items being retained for use as evidence." The majority then goes on to argue that "to the extent the police document only those contents of a vehicle that have potential evidentiary value (*as appears to have been the case here*), it tends to show" that the search was conducted for an improper purpose (emphasis added).

Again, however, defendant did not make a single one of these arguments in urging that the motion to suppress should be granted. That is, defendant never objected on any of the following grounds: the paperwork did not "include[] any itemization of the car's contents"; "[t]he People did not place in evidence any comprehensive inventory list"; the voucher or other paperwork "document[ed] only those contents ... that ha[d] potential evidentiary value." The majority's assertion that it "appears to have been the case here" that Officer Vetell documented only items found in the car with "potential evidentiary value" is unexplained and appears to rest on an unwarranted inference. Officer Vetell testified in response to specific questions about specific items found in the car (the

drugs, the scale and the baggies) that he vouchered them. From this, the majority apparently but illogically concludes that Officer Vetell noted only these items on the voucher relating to the case, even though he certainly never testified that he included only these items on the voucher.<sup>1</sup> The opposite and more reasonable inference is suggested by the only other testimony on point. As noted, defense counsel asked the officer if he "fill[ed] out any form about doing an inventory search on *what was found in the vehicle*" and if there was "a special form when you do an inventory search of what was ... *recovered from the vehicle*" (emphasis added). The italicized language in both these questions is unqualified and neither the questions nor the answers (which were, respectively, "[t]he voucher" and "[n]o, there is not") suggest that the voucher Officer Vetell filled out was limited to items of potential evidentiary value.

Indeed, defendant never offered any argument that the motion to suppress should be granted on account of the contents of the voucher.<sup>2</sup> Rather, the only protest counsel registered that bears

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<sup>1</sup>The majority makes precisely this logical error in the first sentence of its footnote 4. To reiterate: from the indisputable fact that at the very least the voucher recorded all the items of contraband, it cannot sensibly be maintained that the voucher recorded only the items of contraband.

<sup>2</sup>At the hearing, the People of course were obligated to provide the defense with the paperwork prepared by Officer Vetell (CPL 240.44[1]). Defense counsel never protested that he had not been provided with the voucher.

at all on this subject was that Officer Vetell should have filled out some particular form other than the voucher. Apart from the fact that this protest does not entail or suggest any objection to the content of the voucher, it is beside the point for another reason. There was no testimony at the hearing that supported counsel's unsworn assertion during oral argument that such a form exists and that it must be filled out.<sup>3</sup>

Although the majority quotes at some length from defense counsel's arguments in support of the motion to suppress, those arguments should be quoted in full. Counsel argued as follows:

"The People are going to argue, or I assume they are going to argue because the officer has stated the three basic reasons for searching the vehicle and recovering the contraband in this case. The first one was a search, incident to a lawful arrest. But I would submit to the Court that the cases are very clear, the leading cases being *People v.*

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<sup>3</sup>Defendant's appellate counsel unsuccessfully attempts to support trial counsel's claim by expanding the record. Counsel asserts that "the New York City Police Department Patrol Guide states that when conducting an inventory search of an automobile, the officers should 'remove all valuables from the vehicle and voucher on a separate PROPERTY CLERK'S INVOICE (PD521-141).' Barry Kamins, *New York Police Department Patrol Guide*, 1175 (2005)." Thus, appellate counsel simply assumes that the voucher described by Officer Vetell is not such an invoice. Ironically, moreover, the very procedure from which counsel quotes (Procedure No. 218-13), articulates the guidelines for conducting an inventory search and sets forth the circumstances relating to opening and searching a trunk, container and other areas within a vehicle. Suffice it to say, Procedure No. 218-13 is fully consistent with Officer Vetell's testimony and with the manner in which the search was conducted. It cannot be that this Court can take judicial notice only of language in the procedure that counsel regards as helpful to defendant.

Belton and *People v. Langen*, Court of Appeals cases, that there has to be a nexus between the search and arrest, probable cause for the contraband in the vehicle.

"In this case there was merely an arrest for a VTL misdemeanor, driver's suspended license. There was absolutely no reason at all for this officer to believe there was contraband in the vehicle.

"He gave a second reason for the search that is tied with this, and that is, the day before when the defendant, who obviously was having some psychiatric problems, was taken to the hospital and threatened to hurt himself and threatened to kill the officer. So the officer testified that, well, I wanted to see if there was a gun in the vehicle.

"The Court heard the condition that the defendant was in. He had no shirt on, he locked himself in a room. Obviously, this was somebody who was having a lot of problems. He never said 'I have a gun, I am going to shoot you.'<sup>4</sup> The officer never asked the mother if he had a gun, never had a search warrant to search the house, or any of that.

"All of a sudden he gives that as a reason as to why he wanted to search the car. I ask the Court to reach the conclusion that that is just ludicrous. The officer is just trying to find any reason to justify the search. There is no reason to believe this defendant ever had a gun.

Just because he was taken to the hospital and screamed out 'I am going to kill you,' and 'I am going to hurt myself,' that is ridiculous. He never said 'I have a gun

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<sup>4</sup>Counsel was wrong. Although the validity of the search hardly turns on it, Officer Vetell unequivocally testified that defendant had stated the previous day that he, defendant, had a gun and was going to kill the officer.

in the car' or 'I have a gun in the trunk.'

"So I submit to the Court, knowing that those two justifications for searching the car aren't going to work, the officer tried using the rouse [sic] of, well, this is an inventory search.

"I submit to the Court, it was just a rouse [sic], and the cases are clear. I have a number of them. I don't know if the Court has the same as I do. *People versus Johnson*, which is the leading case. Actually, Mr. Arnold Levine is sitting right here, and he was the one who argued that case in front of Judge Atlas.

"*People versus Atlas*, which is a second department case, that cites *Johnson*. *People versus Russell*, which is another second department case. *People versus Galak*, another Court of Appeals case.

"They all say, if there is going to be an inventory search, certain safeguards and certain procedures have to be followed. There needs to be a form that's filled out. And although the officer denied there is a form, there actually is one, and I have the form number here, somewhere. But there is a form that has to be filled out.<sup>5</sup> This officer said he never filled out an inventory search form.

"And the reason they have to have procedures is, the cases say this can't be some sort of rouse [sic] to search a vehicle, if you have no other reason to search the vehicle. This officer testified that on an arrest for driving with a suspended license,

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<sup>5</sup>As noted, there was no evidentiary support for this assertion by counsel that some form other than a voucher had to be filled out. In any event, as also noted, this protest cannot be equated with any objection relating to the contents of or any other inadequacy regarding the voucher that the officer unquestionably did fill out.

with the car double-parked, with one car, one door unable to be opened, where he couldn't even do an entire inventory search, he had to bring the car to the precinct to open up the door, where the glassine envelopes were allegedly found, with two other police officers there. It was unknown whether cars could pass, because he said he didn't remember.

"You are going to stop everything at 1 o'clock in the morning, and stop doing an inventory search, and you don't have a form writing down what you are taking, why you are taking it, what you are keeping for safekeeping? The Courts are very clear, and the Court of Appeals, I believe, unanimously in *Johnson* said that -- I am going to quote from the Court of Appeals, Judge.

"They said that an 'inventory search must not be a rouse [sic] for general rummaging in order to discover incriminating evidence. To guard against this danger [an] inventory search [sh]ould be conducted pursuant to [an] established procedure, clearly limiting the conduct of individual officers. That assures that the searches are carried out consistently and reasonably. The procedure must be standardized, so as to limit the discretion of the officer in the field. While inventory [sic] evidence may be [a] consequence of [an] inventory search, it should not be its purpose, and the prosecution has the initial burden of establishing a valid inventory search.'

"It is the prosecution's burden to prove that this was a valid inventory search.<sup>6</sup> I think the officer's testimony after arresting someone for driving with a suspended license,

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<sup>6</sup>Of course, as the quotation from *Johnson* indicates, the People bore only the initial burden of going forward with evidence that the inventory search was lawful. The ultimate burden of persuasion was on defendant to show that the search was unlawful (*People v Di Stefano*, 38 NY2d 640, 652 [1976]).

that he was going to just start an inventory search, without having the form to fill out, right in the middle of the street, at 1 o'clock in the morning, is ludicrous.

"I submit to the Court that what this officer was doing was attempting to search the car, perhaps because the defendant, the day before, was taken to a hospital, maybe suspected there may have been drugs in the car. He was trying to find a reason to search that car, and that is what he was doing. Whether or not he thought of that reason afterwards, because he realized that you can't search a car when you stop somebody and arrest someone for driving with a suspended license unless you have probable cause to believe there is contraband, I don't know when he decided that. But at some point, he thought up this rouse [sic].

"Well, this was [not] an inventory search. It is obvious what this is. This is very similar to the *Johnson* case, where the officer went into a glove compartment to look, and he said, to inventory the car at the scene, and a gun was recovered. And the Court of Appeals unanimously held that you can't do that. An inventory search has to be standardized procedure.

"If this vehicle had been brought back, and if they had a search of the vehicle, and if they have a form listing what they were taking out, it would be a different story. That is not what happened here, Judge. So based upon the evidence, and based upon the leading cases in this state, I am going to ask this Court to suppress all of the evidence that was removed from the vehicle. There was absolutely no probable cause to search this vehicle, and this was obviously not an inventory search, it was just a rouse [sic] by the officer to justify searching the vehicle."

After the prosecutor argued in opposition to the motion to

suppress, counsel offered the following in reply:

"Your Honor, may I briefly, very briefly, talk about the Prosecutions [sic] cases that she mentioned?

"*Dickens, Middleton, Solo, Cammick*, all involve a car that was going to be towed by private towing companies, so the officer had to inventory the car first, because some private company was going to have it.

"As far as *Salazar*, the Court makes a point to say that the inventory form was filled out, which was not done here. And *Gonzales* involves a brown bag, suspended from a wire from under the dashboard that the defendant was trying to secrete, and the Court held that because of the unusual location, the manner in which it was affixed, and the effort to conceal it, the police reasonably concluded that the bag, requiring items of discovery, of inventory, that there might be a danger there. It was so unusual.

"Nothing like that happened here. There was nothing unusual in this vehicle until there was a full blown search of the vehicle at the scene."

As is evident, in urging suppression, counsel attacked the credibility and motivations of Officer Vetell, characterizing his testimony that the search at 1:00 a.m. was an inventory search as "ludicrous." Counsel's constant and unvarying contention was that the officer's testimony that the search was an inventory search was a ruse. Although counsel expressed some uncertainty about whether the testimony that the search was an inventory search was an after-the-fact or before-the-fact invention, he expressly argued no less than three times that this testimony was

a ruse and twice argued in the same vein that the officer was "just trying to find any reason to justify the search" and he "was trying to find a reason to search that car."

The linchpin in counsel's argument was the specific form that counsel insisted, without any support in the evidence, was required to be filled out. Thus, counsel asserted that such a form "has to be filled out" and misleadingly argued that the officer "said he never filled out an inventory search form." Counsel went on to scoff at "the officer's testimony ... that he was going to just start an inventory search, without having the form to fill out, right in the middle of the street, at 1 o'clock in the morning," deriding that testimony as "ludicrous." To reiterate, moreover, counsel never argued either that Officer Vetell had failed to record on the voucher all of the items found in the car or that the motion to suppress should be granted because the People did not introduce the voucher into evidence. Rather, counsel was arguing that if the search had been an inventory search, the officer would have filled out the particular form the existence of which counsel insisted upon.

The specific grounds upon which the majority relies are glaringly absent from counsel's argument. But another specific aspect of counsel's argument, one based on both the ostensible existence of the form and the location of the search, should be underscored, for it makes clear beyond any doubt that counsel's

argument had nothing remotely to do with two of the three specific grounds upon which the majority relies. That is, as counsel was summarizing his argument, he stated: "If this vehicle had been brought back, and if they had a search of the vehicle, and if they had a form listing what they were taking out,<sup>7</sup> *it would be a different story*" (emphasis added). If counsel had been arguing that the motion to suppress should be granted either because the relevant content of the Patrol Guide's written guidelines had not been elicited at all or in sufficient detail or because the procedures under the Patrol Guide relating to opening a closed trunk or a door panel were not elicited, counsel could not have made this concession.

Because defendant "did not raise th[e]se specific arguments before the hearing court" they are unpreserved (*People v Cherry*, 302 AD2d 472 [2003], *lv denied* 100 NY2d 537 [2003]; see CPL

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<sup>7</sup>Only the article "a" rather than "the" in this clause provides superficial support for the majority's contention that "defendant preserved the issue of the People's failure to produce any actual inventory list that resulted from the search of the vehicle." In context, however, it is clear that counsel was once again stressing the absence of the particular form that he asserted was required. Indeed, in his reply to the prosecutor's arguments, counsel once again referred to "the inventory form" that supposedly existed. Moreover, during her argument, the prosecutor contended that forfeiture paperwork for the car was prepared and that "paperwork, as well as the voucher for the vehicle, as well as all property recovered was, in fact, documented and vouchered as evidence in this case." For these reasons, this lone reference to "a" form hardly was sufficient to alert the hearing court to defendant's current claim that Officer Vetell did not fill out a "meaningful inventory list" (see *People v Goode* 87 NY2d 1045, 1047 [1996]).

470.05[2])). Moreover, they are unpreserved for a reason going to the heart of the requirement of a timely and specific objection. By not raising these arguments at the hearing, defendant deprived the People of an opportunity to meet them with evidence (see *People v Luperon*, 85 NY2d 71, 78 [1995] [preservation rules "require, at the very least, that any matter which a party wishes the appellate court to decide have been brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error"]; *People v Tutt*, 38 NY2d 1011, 1013 [1976] ["[w]here ... the defendant fails at the suppression hearing to challenge a narrow aspect of the sufficiency of the admonitions given him, at a time when the People would have an evidentiary opportunity to counter his assertion, he may not then be heard to complain on appeal"]). As the majority correctly notes, the People do not contend in their brief that defendant failed to preserve for review the arguments he raises on appeal. That failure is startling but irrelevant. After all, even if the People had conceded that the arguments were preserved, that concession would not be binding on us (*cf. People v Berrios*, 28 NY2d 361, 366-367 [1971]) and would not "relieve us from the performance of our judicial function" (*id.* at 366) of determining whether defendant has preserved an issue of law for review.

Even if defendant had preserved for review the contention

that the People did not fill out a "meaningful inventory list," we should affirm the conviction just the same. To be sure, in the course of holding in *People v Johnson* (1 NY3d 252, 256 [2003]) that the evidence was insufficient "to satisfy the prosecutor's initial burden of establishing a valid inventory search," the Court of Appeals stated that the officer "did not fill out the hallmark of an inventory search: a meaningful inventory list." But here the evidence established beyond cavil that all of the items of contraband were recorded in the voucher. In addition, as argued above, the more reasonable inference from the testimony on cross-examination is that the voucher prepared by Officer Vetell recorded all of the items found in the vehicle. Accordingly, the People met their initial burden and defendant failed to meet his ultimate burden of persuasion on the issue of whether a "meaningful inventory list" was prepared (see *People v DiStefano*, 38 NY2d at 652 ["it is the accused, not the People, who must shoulder the burden of persuasion on a motion to suppress evidence"]).

The majority correctly notes that in their brief the People state that "[p]olice officers operating under the Patrol Guide are directed to voucher valuables recovered in an inventory search on a Property Clerk's Invoice (Document Number PD521-141)." In finding the People thus to have made a "conce[ssion]," however, the majority fails to quote the preceding sentence:

"Vetell testified that no 'special form' is used in an inventory search." The majority simply assumes without any support whatsoever in the hearing evidence that there is some difference between the voucher that Officer Vetell filled out and "Document Number PD521-141." The majority immediately goes on to state that "[t]he People do not argue that the voucher that was filled out for the evidence found in defendant's car constituted the functional equivalent of PD521-141, the inventory form prescribed by the Procedure No. 218-13." This statement is sheer sophistry as it is true only in the sense that the People do not use the phrase "functional equivalent" in their brief. The People's argument is that all of the items found in the vehicle were listed in the voucher. Even assuming that Officer Vetell blundered with regard to the number or title of the form he was required to fill out, it surely would be absurd to invalidate the search in this case if the voucher did record all of the items found in the vehicle.

Finally, as to the merits generally, the People -- in addition to relying on Officer Vetell's testimony relating to the voucher -- note that Vetell testified that the Patrol Guide lays out procedures for an inventory search, that he was familiar with those procedures and that the Patrol Guide permits an inventory search either at the scene or at the precinct, and explained the reasons why the vehicle was being held for safekeeping and an

inventory search was conducted. Moreover, he was asked the following compound question: "Is it standard procedure for the New York City Police Department to inventory a vehicle that is going to be ultimately, be vouchered for safekeeping, at the scene, or at the precinct, or both?" In responding, "[y]ou can do either/or," Officer Vetell did not expressly state that it was standard procedure to conduct an inventory search of a vehicle that was vouchered for safekeeping. But that is a fair inference from all of his testimony. The People also correctly argue that the existence of a valid inventory search procedure can be proven by testimony and that they were not required to introduce into evidence the actual provisions of the Patrol Guide (see *United States v Thompson*, 29 F3d 62, 65 [2d Cir 1994]; cf. *People v Di Stefano*, 38 NY2d at 652 ["no reason is offered, as indeed there cannot be, why testimonial evidence alone is inadequate to sustain the prosecution burden [of going forward]" ]). My point is that it is far from obvious that the People did not meet their initial burden of going forward and that defendant did meet his ultimate burden of establishing the

invalidity of the search. Given my view that defendant's appellate challenges to the inventory search are unpreserved, I need not and do not decide these issues.

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

ENTERED: APRIL 10, 2008



CLERK

Tom, J.P., Mazzairelli, Saxe, Nardelli, Kavanagh, JJ.

2096-  
2097

Miliha Ferluckaj,  
Plaintiff-Respondent-Appellant,

Index 120760/04

-against-

Goldman Sachs & Co.,  
Defendant-Appellant-Respondent,

Henegan Construction Co., Inc.,  
Defendant.

- - - - -

Goldman Sachs & Co.,  
Third-party Plaintiff-Appellant,

-against-

American Building Maintenance Co.,  
Third-Party Defendant-Respondent.

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Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York  
(Christine Bernstock of counsel), for appellant-  
respondent/appellant.

Michael J. Gaffney, Staten Island, for respondent-appellant.

Jeffrey Samel & Partners, New York (David Samel of counsel), for  
respondent.

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Order, Supreme Court, New York County (Rolando T. Acosta,  
J.), entered March 20, 2007, which, upon reargument, granted the  
motion of defendant Goldman Sachs (Goldman) for summary judgment  
to the extent of dismissing plaintiff's Labor Law § 240(1) claim  
as against it, and granted third-party defendant American  
Building Maintenance Co.'s motion to dismiss Goldman's third-  
party claim against it for indemnification, modified, on the law,  
to deny Goldman summary judgment dismissing plaintiff's Labor Law

§ 240(1) claim as against it, and otherwise affirmed, without costs. Order, same court and Justice, entered August 24, 2006, to the extent not superseded by the March 20, 2007 order, which, to the extent appealed from, denied Goldman summary judgment dismissing the complaint as against it, modified, on the law, to grant Goldman summary judgment only to the extent of dismissing the claims pursuant to Labor Law § 200 and § 241(6) as against it, and otherwise affirmed, without costs.

Defendant Goldman leased several floors in the building at 32 Old Slip Road in Manhattan, including the 29<sup>th</sup> floor. Its lease provided that the building's owner, which is not a party to this action, would furnish cleaning services, including window washing. The owner contracted with plaintiff's employer, third-party defendant American Building Maintenance Co. (ABM), to provide those cleaning services. The agreement between the owner and ABM required ABM to clean the exterior and interior of the building's windows every three months. It further provided for ABM, at the owner's request, to perform the initial cleaning of all interior windows at no extra charge "prior to tenant occupancy." From time to time, Goldman purchased cleaning services not covered by its lease directly from ABM. The services Goldman states it purchased directly from ABM were pantry maintenance and carpet care. Goldman maintains that it never purchased any exterior window cleaning (including cleaning

of the interiors of such windows) directly from ABM.

It is unclear from the record when Goldman's lease commenced or when Goldman initially took occupancy of the 29<sup>th</sup> floor. It is undisputed, however, that between January and March 2001, defendant Henegan Construction Co. performed a complete build-out of several floors leased by Goldman in the building. This was pursuant to an agreement with Goldman and included the 29<sup>th</sup> floor. Plaintiff's accident occurred on March 22, 2001. By that date, Henegan had completed its construction work on the 29<sup>th</sup> floor, although some minor punch-list work may have been outstanding. Indeed, on the morning of the accident, plaintiff noticed some "construction material" and tools on the 29<sup>th</sup> floor and observed that it was "dusty."

On March 22, 2001, plaintiff was directed to go to the 29<sup>th</sup> floor to assist in cleaning the window interiors. The windows in the offices on the 29<sup>th</sup> floor rose from a point three feet above the floor and extended upward an additional six feet. Plaintiff was equipped with nothing other than a hand cloth to clean the windows. She stated in an affidavit submitted in support of her motion for summary judgment on her Labor Law § 240(1) claims that she was "cleaning dust off the windows that was from the construction." Plaintiff took instructions related to the window cleaning exclusively from her ABM supervisor.

To clean the top of a window in one of the offices,

plaintiff climbed on top of a desk adjacent to the windows. As she was moving along the width of the window, she fell off the desk to the floor, injuring herself. Plaintiff testified at her deposition that she knew at the time of the accident that there was a step stool with two steps in a supply closet maintained by ABM in the building but that she never asked for it. Plaintiff was not asked at her deposition, nor does the record otherwise reveal, how high the step stool was. Plaintiff further testified that her supervisor was aware that the cleaning staff stood on office desks to reach the tops of the windows.

Supreme Court initially denied plaintiff's motion for summary judgment on her Labor Law § 240(1) claim and Goldman's cross motion for summary judgment dismissing the complaint in its entirety as against Goldman. The court found that the window cleaning could only be protected activity under the Labor Law if it was incidental to the construction work performed by Henegan, but found that an issue of fact existed regarding the nature of the work. Upon ABM's motion for reargument, however, the court dismissed plaintiff's § 240(1) claim. The court did not revisit the issue of whether Goldman and Henegan were, respectively, an owner and contractor for purposes of Labor Law liability. Rather, the court found that, because she did not avail herself of the step stool, plaintiff was the sole proximate cause of her accident. The court also dismissed Goldman's claim against ABM

for indemnification. Goldman had argued that ABM had a duty to indemnify it in accordance with ABM's agreement with the owner that ABM would indemnify the owner in connection with actions arising out of, inter alia, "any sub-contracted operations."

We modify Supreme Court's orders to reinstate plaintiff's claim against Goldman pursuant to Labor Law § 240(1) and to dismiss plaintiff's claims against Goldman pursuant to Labor Law § 200 and § 241(6). In its initial order, the court stated that plaintiff could only recover under Labor Law § 240(1) upon a showing that the window cleaning was incidental to construction work. Since that finding, however, the Court of Appeals has clarified the law, holding that "'cleaning' is expressly afforded protection under § 240(1) whether or not incidental to any other enumerated activity" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 680 [2007]). Moreover, it was error to dismiss the complaint on the basis that plaintiff was the sole proximate cause of her accident. On their own motions, defendants did not establish as a matter of law that the step stool would have been sufficient to permit plaintiff to avoid the accident (see *Balbuena v New York Stock Exch., Inc.*, 45 AD3d 279 [2007]).

Indeed, on plaintiff's motion, defendants failed to even raise a triable issue of fact regarding sole proximate cause (see *id.*). It is "unclear," as the concurrence concedes, whether a

step stool would have been provided to plaintiff had she asked for one. This lack of clarity is not the result of conflicting factual allegations; rather, it is because defendants failed to set forth any evidence regarding the availability of the step stool. Furthermore, even if it were clear that a step stool would have been provided had plaintiff requested one, defendants, again, failed to present any evidence as to whether it would have constituted an adequate safety device.

The statement in the concurrence that an issue of fact exists as to whether plaintiff's inattentiveness was the sole proximate cause of her accident is similarly unavailing. The sole proximate cause defense does not apply where plaintiff was not provided with an adequate safety device as required by the Labor Law (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Here, the desk that plaintiff was working on at the time of her accident did not constitute an adequate safety device.

Nevertheless, we decline to award summary judgment to either party at this juncture. A question exists as to whether Goldman, as a lessee, is liable here pursuant to Labor Law § 240(1). That provision enumerates only contractors, owners and their agents as persons charged with providing protective devices to workers. However, a lessee may have liability as an "owner" under the Labor Law when it had the right or authority to control the work

site (see *Bart v Universal Pictures*, 277 AD2d 4, 5 [2000]). Goldman argues that it had no authority over plaintiff's window cleaning because the work was being performed strictly pursuant to ABM's agreement with the owner. The dissent agrees, submitting that the contract between ABM and the building owner is prima facie evidence that Goldman did not request the work. However, the contract is not dispositive on its face. Accordingly, Goldman did not meet its prima facie burden merely by placing it in the record.

For the contract to have had any probative value for purposes of summary judgment, Goldman would have had to establish that the work that plaintiff was performing at the time of her accident was pursuant to one of two provisions in the contract: the provision requiring quarterly window cleaning or the provision requiring ABM, at the owner's request, to perform a one-time window cleaning prior to a tenant's occupancy. Goldman's own witness eliminated the first possibility (at least for summary judgment purposes) by testifying that the quarterly cleanings were only for in-possession tenants and that he did not know when Goldman occupied the space. Moreover, plaintiff presented some evidence that her accident occurred pre-occupancy, by stating that construction tools and construction-related materials and dust were still present. As for the second provision, the dissent criticizes as "oblique" plaintiff's

statement that "[t]here has been no testimony that [the building owner] requested the cleaning of the interior windows"; however, that statement, when one is cognizant of the fact that the burden was on Goldman, is entirely appropriate and correct. We further note that Goldman's witness was not even aware of the provision, and that, moreover, Goldman did not offer the testimony or affidavit of anybody with personal knowledge regarding whether plaintiff's work was being performed pursuant to it.

Regardless of Goldman's status, plaintiff's Labor Law § 241(6) claim against it should have been dismissed. The two Industrial Code sections cited by plaintiff in her brief - 12 NYCRR 23-1.15 and 23-1.16 - apply only where a worker was provided with safety railings and safety belts (23-1.17) in the first instance (see *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337-338 [2006]). Plaintiff's Labor Law § 200 claim should also have been dismissed, since Goldman did not supervise plaintiff's work and any dangerous condition resulted from her employer's methods (see *Lombardi v Stout*, 80 NY2d 290, 294-295 [1992]). We decline, however, to dismiss plaintiff's claim pursuant to Labor Law § 202, which requires owners, lessees, agents and managers of buildings and contractors to provide "safe means for the cleaning of the windows and of exterior surfaces." Contrary to Goldman's argument, that section does apply to the cleaning of interior

windows (see *Bauer v Female Academy of Sacred Heart*, 250 AD2d 298, 301 n \* [1998]).

Goldman's claim against ABM for indemnification was properly dismissed as precluded by Workers' Compensation Law § 11, since Goldman did not have a written indemnification agreement with ABM and there are no allegations of grave injury (see *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). The provision in the contract between ABM and the owner relied on by Goldman cannot be read to cover work performed by ABM pursuant to a direct contract with Goldman.

All concur except Nardelli, J. who concurs and Tom, J.P. who dissents in part in separate memoranda as follows:

NARDELLI, J. (concurring)

I concur with the result reached by the majority, but I also find that issues of fact exist as to whether plaintiff's own acts or omissions were the sole proximate cause of the accident, thereby precluding summary judgment in her favor.

Labor Law § 240(1), which is commonly referred to as the scaffold law, provides, in pertinent part, that:

"[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders ... which shall be so constructed, placed and operated as to give proper protection to a person so employed" (emphasis added).

The Court of Appeals has often observed that the purpose of the statute is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owners and general contractors, instead of on the individual workers, who are not in a position to protect themselves (*Martinez v City of New York*, 93 NY2d 322, 325-326 [1999]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]; *Koenig v Patrick Constr. Corp.*, 298 NY 313, 318 [1948]). Consistent with this objective, the Court of Appeals has stated that the statute places absolute liability upon owners,

contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly, it is to be construed as liberally as necessary to accomplish the purpose for which it was framed (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]).

The application of "absolute liability" in section 240(1) cases has, apparently, generated some confusion. Accordingly, in *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280, 286-287 [2003]), the Court of Appeals clarified the use of the words strict or absolute liability in conjunction with the statute, noting that those terms do not appear in the current, or any former variation of the statute but, rather, were first used by the Court of Appeals in 1923 to describe an employer's duty under that section. The Court in *Blake* went on to caution that:

"[i]t is imperative ... to recognize that the phrase 'strict (or absolute) liability' in the Labor Law § 240(1) context is different from the use of the term elsewhere. Often, the term means 'liability without fault' (see generally 3 Harper, James and Gray, Torts § 14.1 et seq. [2d ed 1986]), as where a person is held automatically liable for causing injury even though the activity violates no law and is carried out with the utmost care" (*id.* at 287-288).

The Court of Appeals further commented that:

"[g]iven the varying meanings of strict (or absolute) liability in these different settings, it is not surprising that the concept has generated a good deal of

litigation under Labor Law § 240(1). The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise" (*id.* at 288).

In sum, to prevail on a § 240(1) cause of action, the plaintiff must demonstrate that the statute was violated and that such violation was a proximate cause of the injuries sustained (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2007]).

Initially, I agree with the majority's conclusion that, in view of the recent Court of Appeals decision in *Broggy v Rockefeller Group, Inc.* (8 NY3d 675, 680 [2007]), the interior window cleaning being performed by plaintiff on the 29<sup>th</sup> floor of a 40-story office building is expressly afforded protection under section 240(1), regardless of whether it is incidental to any of the other activities delineated in the statute.

The Court in *Broggy*, however, went on to state that:

"liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.

"The burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff" (emphasis added) (*id.* at 681).

In this matter, I find that there is a plausible view of the

evidence, sufficient to raise issues of fact, that no statutory violation occurred, and/or that plaintiff's own acts or omissions were the sole cause of the accident. Plaintiff testified that she was aware of the availability of step stools but neglected to request one, and it is unclear if one would have been provided had she so requested. It is also unclear if the section of the desk on which plaintiff was standing, which was located directly in front of the window, could have been removed, or was left in place because it was a convenient platform from which plaintiff could perform her task. What is clear is that the desk did not move, shift or wobble, but remained stable. Moreover, plaintiff testified that at the time of her fall off the desk, she was not looking where she was going or how far it was to the end of the desk, and that a fellow worker called her name immediately prior to her fall, possibly distracting her as she simply stepped off the end of the desk.

I disagree with the majority's conclusion that "even if it were clear that a step stool would have been provided had plaintiff requested one, defendants, again, failed to present any evidence as to whether it would have constituted an adequate safety device," for, as the Court of Appeals in *Broggy* made clear, "[t]he burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff" (*Broggy*, 8 NY3d at 681).

Moreover, while the majority succinctly states that a desk does not constitute an adequate safety device, a point with which I agree, the use of a desk to wash windows, depending on the facts presented, also does not, in and of itself, preclude summary judgment in defendants' favor (see generally *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675 [2007], *supra*).

I also find this Court's recent decision in *Miro v Plaza Constr. Corp.* (38 AD3d 454 [2007]), and the Court of Appeals' subsequent modification of that decision (9 NY3d 948 [2007]), to be instructive. In *Miro*, the plaintiff was allegedly injured when he slipped and fell from a ladder that was partially covered with sprayed-on fireproofing material, which purportedly caused him to lose his footing. Plaintiff was aware of the undesirability of the ladder, but failed to request a clean replacement, although it was clear that there was no replacement on the job site and that one would have to have been delivered from an off-site storage area. The three-Justice majority, in dismissing plaintiff's section 240(1) claim, concluded that "a plaintiff who knowingly chooses to use defective or inadequate equipment, notwithstanding being aware that he or she could request or obtain proper equipment, has no claim under Labor Law § 240(1)" (38 AD3d at 455). The two dissenting Justices would have granted plaintiff partial summary judgment on the issue of liability under section 240(1), finding, *inter alia*, that there

was no replacement ladder on site and that plaintiff had testified that he complained to a superintendent about the condition of the ladder, but the superintendent simply shrugged.

The Court of Appeals modified, reinstated the section 240(1) claim, and held, in its entirety, that "[a]ssuming that the ladder was unsafe, it is not clear from the record how easily a replacement ladder could have been procured" (9 NY3d at 949). Here, assuming the desk was unsafe, plaintiff was aware of the availability of a step stool and failed to request one, although it is unclear if one would have been provided had she done so.

Accordingly, I find that a jury could conclude that either plaintiff's admitted inattentiveness, which caused her to step into midair, or her failure to request a step stool, was the sole proximate cause of the accident. Summary judgment, therefore, in either plaintiff's or defendant's favor, is not warranted.

TOM, J.P. (dissenting in part)

The issue dividing this Court is whether there is any basis under Labor Law § 240(1) for imposing liability on a tenant because an employee of a cleaning service company, engaged by the building's owner, sustained injury while performing work specified in the contract between the owner and the cleaning company. The tenant, defendant Goldman Sachs & Co., is a stranger to the contract, and the injured plaintiff has failed to provide any proof to establish that Goldman either contracted for, or exercised control over, the window cleaning work. Thus, there is no basis upon which liability may be imposed on Goldman, and its cross motion to dismiss plaintiff's Labor Law § 240(1) claim was properly granted.

Defendant Goldman was the tenant of the 29th floor of a building owned by non-party Paramount Group, Inc. Paramount engaged third-party defendant American Building Maintenance Co. (ABM), plaintiff's employer, to perform cleaning services for the building. The 29th floor had been undergoing renovation work by defendant Henegan Construction Co., hired by Goldman. On March 22, 2001, plaintiff was assigned to work overtime by an ABM supervisor. She was directed to proceed to the 29th floor of the building, located at 32 Old Slip Road in Manhattan, to clean interior office windows. Plaintiff was supplied with only a rag to clean the windows, and she found it necessary to climb onto

office desks "to reach the top of the windows." She sustained injury while "she was cleaning the window in front of her and was moving to the left and fell off the desk on to the floor."

Plaintiff sought summary judgment as to liability against Goldman and Henegan on her Labor Law § 240(1) claim. Goldman cross-moved to dismiss the claims asserted by plaintiff against it under the Labor Law. Henegan also moved for summary judgment dismissing the complaint, adopting the arguments advanced by Goldman. Henegan additionally sought dismissal of Goldman's cross claims against it.

To recover under Labor Law § 200, § 240 and § 241 as a member of the special class for whose protection these provisions were enacted, it must be established that the plaintiff was hired by the owner, general contractor or an agent of the owner or general contractor (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]; *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Liability will not be imposed under Labor Law § 240 merely because injury was sustained in the vicinity of an ongoing construction project, even if the injured party was performing a function related to that project (see *Martinez v City of New York*, 93 NY2d 322 [1999] [entity for which plaintiff acted not engaged to perform statutorily protected activity]; *Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109 [1991] [same]). As this Court has noted, "A lessee is

liable under the statute only where it can be shown that it was in control of the work site, and one test of such control is where the lessee actually hires the general contractor" (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1999], citing *Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 611 [1993]).

In support of its motion, Goldman submitted the service contract executed by ABM and Paramount. The contract provides that ABM, as contractor, will perform all window cleaning, encompassing the cleaning of "all interior and exterior windows and frames," to be performed "every three (3) months." The contract further states:

"Prior to tenant occupancy, contractor shall provide the initial cleaning o[f] all interior windows for which there will be no charge to Paramount Group, Inc. or tenant. Work to be performed upon request of Paramount Group Inc."

The cleaning service contract unambiguously provides that, at Paramount's request, ABM will clean all interior windows prior to tenant occupancy. Plaintiff has conceded that, as of the date of her injury, March 22, 2001, Goldman had not yet taken occupancy of the 29th floor. Her supporting affidavit states that Goldman's employees "moved in their personal items to the 29th floor on March 23 and 24, 2001." She further restated in her opposition to the cross motion that Goldman's "employees had not moved into the 29<sup>th</sup> floor." Thus, on the motion, plaintiff did not raise any factual issue as to whether the work in which

she was engaged at the time of her accident was performed pursuant to ABM's contract with Paramount requiring a one-time cleaning of the interior windows prior to tenant occupancy.

On its cross motion, Goldman also submitted the transcript of deposition testimony given by Robert Barriero, its vice president for corporate services, to demonstrate that it did not independently order window cleaning services from ABM. Barriero stated that Goldman received "base building cleaning services from Paramount as part of our lease," which services were provided by Paramount's vendor, ABM. He noted that Goldman was required to use the base building cleaning services contractor, and he acknowledged that Goldman's agent, Hines Interests, Ltd., contracted directly with ABM for cleaning work that was not included in the base cleaning services provided under the lease. The supplemental cleaning services he described were limited to "[p]antry maintenance, some carpet care, shampooing."

In her opposition to the cross motion, plaintiff did not address the significance of the contract between Paramount and ABM except to concede that ABM "had been hired by Paramount Group, the owner . . . to do cleaning for the tenants in the building." Plaintiff also acknowledged that Goldman had directly contracted with ABM for "extra services . . . such as cleaning pantries, stripping and waxing floors and shampooing carpets." She cited the deposition testimony of Al Hoti, an ABM employee,

who stated that the cleaning ABM performed directly for Goldman consisted of the activities plaintiff described as well as "cleaning refrigerators [and] providing plastic liners," presumably for trash receptacles. Thus, the record is clear that any extra cleaning services provided to Goldman by ABM did not include the cleaning of windows.

The dispositive evidence in this matter consists of the testimony of Robert Barriero, Goldman's vice president for corporate services, the testimony of Al Hoti, ABM's employee, and the contract between ABM and Paramount. Thus, Goldman provided evidence from persons with personal knowledge of the facts to establish that plaintiff was hired by ABM, as agent for the building's owner, Paramount Group. No proof was offered by plaintiff, in rebuttal, to support the intimation that she might have been hired by Goldman or its agent, Henegan. Thus, there is no basis for imposing vicarious liability on Goldman on the ground that plaintiff was hired either by it or by its general contractor.

It should be emphasized that the sole theory of recovery against Goldman advanced by plaintiff before the motion court was that Goldman is an "owner," as defined under the Labor Law, because it hired Henegan to perform renovation work at the leased premises. Because she was performing cleaning that was "incidental" to Henegan's construction work, plaintiff reasoned

that she is therefore covered by the Labor Law, irrespective of who hired her, and that Goldman is vicariously liable under Labor Law § 240(1). Significantly, plaintiff did not contend that Goldman hired ABM to perform the window cleaning in which she was engaged at the time of her fall. In fact, she failed to identify any cleaning work that she, as an employee of ABM, performed for Goldman, either directly or at the behest of Goldman's agent, Hines.

Throughout this litigation, plaintiff has never claimed that Goldman is subject to liability under Labor Law § 240(1) because it exercised, or had authority to exercise, control over the work she was performing at the time she sustained injury or because Goldman contracted, either directly or through its agent, with ABM for the window cleaning work in which she was engaged. On appeal, plaintiff continues to assert that Goldman's liability under Labor Law § 240(1) is vicarious, contending that Henegan's duties as construction manager "determine its status as a contractor or agent of Goldman"; that Goldman and Henegan failed in their statutory duty to provide any safety devices to plaintiff, "a cleaner at a construction site"; that her activities were related to the construction work and therefore covered under Labor Law § 240(1); and that Goldman is liable for her injuries, which were proximately caused by its breach of the statute. The defect in plaintiff's position is that Henegan did

not hire or request plaintiff to clean the subject windows, and therefore Goldman cannot be held vicariously liable to plaintiff for her injuries. Furthermore, plaintiff's Labor Law § 240(1) claim against Henegan has since been dismissed, and this avenue of recovery is unavailing as against either party to the renovation contract.

Plaintiff now obliquely asserts, for the first time on appeal, that "[t]here has been no testimony that Paramount requested the cleaning of the interior windows." She adds, "Goldman has just made the assumption that Paramount requested the cleaning of the interior windows." She goes on to state that "Henegan had laborers on site at 32 Old Slip through March 28, 2001," six days after her accident. Plaintiff intimates that Henegan or Goldman might have requested ABM to assist in cleaning up the 29th floor, but she points to no evidence to support such a theory.

In view of plaintiff's concession that she was employed by ABM and that window cleaning was undertaken just prior to Goldman's occupancy of the 29th floor, the only explanation for her work on the date of the accident is ABM's performance of its contract with Paramount providing for the preoccupancy cleaning of interior windows at the building owner's request. Goldman therefore demonstrated its prima facie entitlement to summary judgment, placing the burden upon plaintiff to come forward with

evidence in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Although Goldman squarely raised the issue in its opposing papers, plaintiff failed to come forward with any evidence in rebuttal to demonstrate that either Goldman or Henegan had entered into a contract for window cleaning services with ABM. This omission is notable in view of Barrierero's testimony that both Goldman and its agent, Hines, maintained a record of any funding request made in connection with ABM's provision of services outside those provided under the lease in accordance with ABM's contract with Paramount.

This Court has consistently observed the rule that a party may not "argue on appeal a theory never presented to the court of original jurisdiction" (*Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988], citing *Huston v County of Chenango*, 253 App Div 56, 60-61 [1937], *affd* 278 NY 646 [1938]; see e.g. *Sean M. v City of New York*, 20 AD3d 146, 149-150 [2005]). As stated in *Cohn v Goldman* (76 NY 284, 287 [1879]), "It is, indeed, a rule, that questions not raised at the trial court, which might have been obviated by the action of the court then, or by that of the other party, will not be heard on appeal as ground of error." Plaintiff should not be heard to argue, for the first time, that Goldman is liable for her injuries because it might have had the

authority to exercise control over the work site, and, indeed, plaintiff makes no such argument.

This is precisely the theory of recovery postulated by the majority on plaintiff's behalf, relying on this Court's decision in *Bart v Universal Pictures* (277 AD2d 4 [2000]). It should be noted, however, that the lessee in *Bart* was contractually obligated to control the work site and to ensure that the work was safely performed (*id.* at 5-6; see also *Shun Jian Ke v Hsu & Assoc., Inc.*, 300 AD2d 140 [2002]). There is no proof that Goldman had a contract with ABM for window cleaning services, let alone that Goldman was under a contractual obligation to ensure the safety of the work site. Moreover, the majority has cited no case in which liability under Labor Law § 240 has been predicated on a tenant's mere right to reenter the premises rather than on the basis of its actual control over the work being performed (cf. *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565-566 [1987] [owner with right of reentry and inspection liable for injury due to defect on premises under Multiple Dwelling Law § 78]).<sup>1</sup>

The majority takes the position that the evidence is insufficient to entitle Goldman to summary judgment dismissing plaintiff's Labor Law 240(1) claim against it because it failed

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<sup>1</sup> It is clear that the majority finds no liability based on Goldman's actual control over the premises because it agrees that there is no basis for common-law liability under Labor Law § 200.

to offer evidence by someone with personal knowledge of the facts that plaintiff's window cleaning work was performed pursuant to the contract between ABM and Paramount. Quite apart from ignoring substantial evidence, this supposition presumes that Goldman was capable of contracting directly with ABM for the window cleaning work, a proposition that is simply untenable. As a matter of fact, it defies credulity that Goldman would contract with ABM for the same window cleaning services ABM was obligated to provide for Goldman's benefit under its agreement with Paramount. More significantly, as a matter of law, Goldman could not contract with ABM for window cleaning services ABM was already obligated to provide under its existing contract with Paramount (*Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 212-213 [1991] ["one cannot be induced to tender a performance which is required as a part of a preexisting contractual obligation"]). As the Court of Appeals has succinctly observed, "A covenant to do what one is already under a legal obligation to do is not sufficient consideration for another contract" (*Ripley v International Rys. of Cent. Am.*, 8 NY2d 430, 441 [1960]).

That the window cleaning work was performed pursuant to the agreement between ABM and Paramount is confirmed by explicit contract language. It is further supported by Barriero's testimony that Goldman was obligated under its lease to use ABM's services. Barriero and Hoti both stated that supplemental

cleaning services provided directly to Goldman by ABM did not include window cleaning. Thus, there is both documentary and testimonial evidence supporting Goldman's contention that plaintiff's presence at the work site was due to ABM's obligation to provide initial cleaning of interior windows under its contract with the building owner.

While the opponent of a summary judgment motion may normally offer an excuse for the failure to present opposing proof in admissible form (*Zuckerman*, 49 NY2d at 562), where the opposing party has likewise moved for summary judgment, this option is unavailable. By moving for an accelerated disposition, plaintiff represented that the record proof was sufficient to warrant judgment in her favor. As this Court observed in *News Am. Mktg., Inc. v Lepage Bakeries, Inc.* (16 AD3d 146, 149 [2005]):

"By moving for accelerated judgment, a party submits the case for disposition on the record evidence, and the propriety of the court's decision will be reviewed on the basis of that same evidence. It is settled that an appellate court is bound by the record (*Block v Nelson*, 71 AD2d 509 [1979]), and, absent matter that is subject to judicial notice, review is limited to the evidence before the motion court (*Broida v Bancroft*, 103 AD2d 88, 93 [1984]; see also *Becker v City of New York*, 249 AD2d 96, 98 [1998]). As we stated in *Ritt v Lenox Hill Hosp.* (182 AD2d 560, 562 [1992]), 'If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be

submitted.'"

Having moved for judgment on the record, plaintiff cannot now assert, contrariwise, that the record does not support the motion court's disposition on the evidence before it.

Finally, plaintiff has not proffered any excuse for her failure to submit admissible opposing evidence in opposition to the cross motion to warrant trial of an issue of fact. Thus, she has offered neither proof to controvert Goldman's evidence demonstrating that she performed window cleaning in accordance with Paramount's contract with her employer nor an excuse for her failure to do so, and her opposition fails to meet the requirements to defeat a motion for summary judgment (*Zuckerman*, 49 NY2d at 562). The intimation that Goldman might have directly hired ABM to do unspecified cleaning work, for reasons not even suggested, is speculative and does not suffice to meet her obligation "to submit evidentiary facts or materials, by affidavit or otherwise, rebutting the prima facie showing . . . and demonstrating the existence of a triable issue of ultimate fact" (*Indig v Finkelstein*, 23 NY2d 728, 729 [1968]). It is settled that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562).

Accordingly, plaintiff failed to rebut Goldman's prima facie

showing that it did not hire her employer to perform window cleaning work, and her Labor Law § 240(1) claim against said defendant was properly dismissed.

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

ENTERED: APRIL 10, 2008



CLERK

Lippman, P.J., Mazzairelli, Catterson, Kavanagh, JJ.

2164 Reynolds Brown, Index 107423/01  
Plaintiff-Appellant-Respondent, 590618/01  
590764/02

-against-

VJB Construction Corp., et al.,  
Defendants-Respondents.

- - - - -

[And a Third-Party Action]

- - - - -

VJB Construction, Corp.,  
Second Third-Party  
Plaintiff-Respondent-Respondent,

-against-

Skylift Corporation,  
Second Third-Party  
Defendant-Respondent-Appellant.

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Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant-respondent.

Nicoletti, Gonson, Spinner & Owen, LLP, New York (Edward S. Benson of counsel), for VJB Construction, respondent.

Melito & Adolfsen P.C., New York (Steven I. Lewbel of counsel), for 400 East 66<sup>th</sup> Street Co., L.L.C., respondent, and respondent-appellant.

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Order, Supreme Court, New York County (Leland DeGrasse, J.), entered May 16, 2006, which, in an action for personal injuries sustained by a worker on a construction site, insofar as appealed from, granted motions by defendant site owner (400 East), defendant construction manager (VJB) and third-party defendant contractor and plaintiff's employer (Skylift) for summary judgment dismissing the complaint, denied plaintiff's cross

motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240(1), and granted VJB's motion for summary judgment on its third-party cause of action against Skylift for contractual indemnification, unanimously modified, on the law, to the extent of granting plaintiff's motion for partial summary judgment on his Labor Law 240(1) claim against VJB and 400 East, and otherwise affirmed, without costs.

Plaintiff, a stone erector and welder for Skylift, working under the supervision of another Skylift employee, was placing 1000-pound granite slabs against the side of 400 East's building at ground-floor level. Directions for placement of the stone slabs were given by plaintiff's foreman. The slabs were moved to the installation location by a forklift known as a Hi-Lo. Each stone was lifted about three feet from the ground when secured to the forklift by a steel U-shaped "stone clamp." The slabs were thus suspended from the forklift during transport. One Skylift employee drove the Hi-Lo and the other walked alongside, steadying the slab by hand until they reached plaintiff who guided it into place at the building wall.

The accident occurred when one of the 1000-pound slabs fell from the Hi-Lo as it approached the wall, struck the ground and tilted over, pinning plaintiff's right wrist between the stone panel and the wall.

Plaintiff commenced this action alleging violations of Labor

Law § 200, § 240(1) and § 241(6) against VJB and 400 East. Plaintiff stated the accident was caused because the clamp was originally too small for the slabs being moved that day. The clamp was then modified by being cut and stretched in order to fit around the slab. In his affidavit, plaintiff's supervisor agreed that the clamp failed, but attributed the failure to difficult surface conditions at the site, particularly construction debris, which compelled the use of a forklift. A hand truck was ordinarily the preferred method of moving slabs. Plaintiff's supervisor further stated that he had repeatedly complained of these conditions to VJB, but nothing was done, and that Skylift had no duty or authority to police the site. Skylift could not remove the debris of other contractors and fill in or patch holes in the ground or rearrange the wood planking on the ground.

400 East and VJB answered and cross-claimed against each other. 400 East and VJB also commenced third-party actions against Skylift. Skylift answered, cross-claimed and asserted a counterclaim against 400 East for indemnification.

After completion of discovery, VJB moved, inter alia, for summary judgment dismissing plaintiff's complaint and against Skylift for contractual indemnity and attorneys' fees. 400 East and Skylift cross-moved for summary judgment dismissing, inter alia, all Labor Law claims. Plaintiff cross-moved for partial

summary judgment on his Labor Law § 240 (i) claim.

The motion court denied plaintiff's cross motion and granted defendants' motion and cross motions for summary judgment and dismissed all plaintiff's Labor Law and common law negligence claims. The court held that, to trigger Labor Law § 240 in a falling object accident, the worksite must be elevated above or positioned below the area where the object was being hoisted or secured, citing numerous First Department cases, and that Labor Law § 240 did not apply here because the granite slab and worksite were both at ground level.

The court also dismissed plaintiff's Labor Law § 200 and common-law negligence claims because VJB and 400 East did not exercise supervisory control over Skylift's operations. The Labor Law § 241(6) claim was dismissed because the Industrial Code section invoked excluded forklifts from its application. The court further held that VJB was entitled to contractual indemnification by Skylift pursuant to the indemnification provision in the rider to Skylift's contract.

On appeal, plaintiff argues that the court erred in dismissing his Labor Law § 240(1) claim since the accident was caused by the inadequacy of the hoisting apparatus, and that the court erred in dismissing the Labor Law § 200 claim because of the existence of questions of fact as to whether the accident was due to a defective condition on the premises for which VJB had

actual or constructive notice.

400 East and Skylift argue that the court erred in granting contractual indemnification against Skylift because material issues of fact exist as to whether VJB was negligent in carrying out its duties which proximately contributed to the accident.

For the reasons set forth below, we modify to the extent of granting plaintiff summary judgment on his Labor Law § 240(1) claim as against VJB and 400 East. It is well settled that Labor Law § 240(1) is implicated where protective devices prove "inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In the seminal case of *Ross*, the Court of Appeals made clear that § 240(1) is not implicated in all gravity-related accidents but is limited to such specific gravity-related accidents as being struck by a falling object that was improperly hoisted or inadequately secured (*id.*; see also *Tavarez v Sea-Cargoes*, 278 AD2d 94, 95 [2000] [the purpose of section 240(1) is to safeguard a worker from injury caused by an inadequate scaffold, hoist, stay ladder or other protective device designed to shield him from the fall of an object or person]).

There is no dispute in this case that, due to the failure of the clamp, the 1000-pound slab of granite fell a distance of about three feet as it was being hoisted from one location on the

construction site to the wall of the building.

Defendants argue that Labor Law § 240(1) requires a "substantial" elevation differential. They further argue that there was no such differential in this case since the forklift that hoisted the slab was positioned at the same level as plaintiff. Defendants are incorrect as to the requirement of a substantial differential. While it is true that section 240(1) liability requires an elevation differential between the worker and the object being hoisted (*Daley v City of New York Metro. Transp. Auth.*, 277 AD2d 88, 89-90 [2000]), the extent of the elevation differential is not necessarily determinative of whether an accident falls within the ambit of Labor Law § 240(1) (see *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514-515 [1991]; see also *Outar v City of New York*, 5 NY3d 731 [2005] [5 ½ feet height differential was sufficient]; *Cammon v City of New York*, 21 AD3d 196 [2005]; *Casabianca v Port Auth. of N.Y. & N.J.*, 237 AD2d 112 [1997] [a rolling scaffold elevated just two feet off the ground brought injured worker within section 240(1) protection]). Indeed, a more recent determination by this Court in a case evincing similar circumstances requires that we grant this plaintiff summary judgment on his Labor Law § 240(1) claim. In *Gonzalez v Glenwood Mason Supply Co. Inc.*, (41 AD3d 338 [2007]), the plaintiff was hit with a load of cinder blocks that became loose and fell on him as it was being hoisted by a

fork boom from a flatbed truck and lowered onto a pallet near where he was standing. This Court found that this elevation risk fell within the ambit of Labor Law § 240 (*id.* at 339).

Similarly, in this case, it is of no consequence that the ultimate destination of the slab was the same level where the forklift was positioned, or where plaintiff was standing. The relevant facts are that a slab of granite measuring four by three feet and weighing 1000 pounds had to be hoisted three feet above grade in order to transport it, and that the accident occurred while it was hoisted in the air due to the effects of gravity and the defective clamp (see *Rocovich*, 78 NY2d at 514). Undisputed evidence demonstrates that the clamp clearly failed in its core objective of preventing the object from falling because the slab, in fact, fell, injuring plaintiff.

Plaintiff's Labor Law § 200 and common-law claims as against VJB and 400 East were correctly dismissed because Skylift provided and operated the forklift and clamp and alone controlled the method of transporting the slabs and installing them (see *Reilly v Newireen Assoc.*, 303 AD2d 214, 219-221, *lv denied* 100 NY2d 508 [2003]). If the surface conditions necessitated a different clamp or a different method of moving the slabs, such failures to alter their own operating procedures were Skylift's. Further, VJB was correctly awarded indemnification against Skylift based on the latter's contract with 400 East and the

absence of evidence that any negligence by VJB proximately caused the accident. The affidavit of plaintiff's supervisor, opining that the slab fell because of rough ground conditions over which the forklift traveled and for which VJB was responsible, fails to show the supervisor's qualifications to so opine, makes no reference to the allegedly undersized clamp, and is otherwise speculative and lacking in evidentiary value.

We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: APRIL 10, 2008



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

3329 Crystal Brown,  
Plaintiff-Appellant,

Index 122328/00

-against-

New York City Transit Authority,  
Defendant-Respondent.

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Thomas Torto, New York, for appellant.

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

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Judgment, Supreme Court, New York County (Faviola Soto, J.),  
entered October 13, 2006, after a jury trial, in defendant's  
favor, unanimously affirmed, without costs.

Plaintiff's argument that the verdict was irreconcilably  
inconsistent is unpreserved, since this issue was not raised  
prior to discharge of the jury (*see Martinez v New York City Tr.  
Auth.*, 41 AD3d 174 [2007]). Moreover, this matter does not  
present a situation where the questions of negligence and  
proximate cause are inextricably interwoven (*see Dwight v New  
York City Tr. Auth.*, 30 AD3d 270 [2006], *lv denied* 7 NY3d 711  
[2006]). The jury's determination that defendant's negligence  
was not a substantial factor in causing plaintiff's injury was  
not inconsistent or against the weight of the evidence (*see id.*).  
Finally, the trial court properly rejected plaintiff's attempt to

impeach the jury's verdict by the posttrial submission of affidavits from two of its members (see *Sharrow v Dick Corp.*, 86 NY2d 54, 60-61 [1995]).

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

ENTERED: APRIL 10, 2008



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

3330 In re Saraphina Ameila S.,  
A Dependent Child Under the  
Age of Eighteen Years, etc.,

Rosa Mary W.,  
Respondent-Appellant,

New Alternatives For Children, Inc.,  
Petitioner-Respondent.

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Nancy Botwinik, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti  
of counsel), for respondent.

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

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Order, Family Court, New York County (Susan K. Knipps, J.),  
entered on or about January 22, 2007, which, after a hearing,  
determined that respondent mother had permanently neglected the  
subject child, terminated her parental rights, and awarded  
custody and guardianship to petitioner for the purpose of  
adoption, unanimously affirmed, without costs.

Respondent's argument that her admission of neglect was  
invalid lacks merit, since the record reflects she was informed  
by the court of the consequences of her admission, and of the  
fact that she did not have to make an admission and could proceed  
to a hearing where she could present and cross-examine witnesses.  
She admitted that she was not forced or threatened to make the

admission, and she had ample time to discuss the matter with her attorney. Furthermore, in addition to admitting, through her counsel, her alcohol abuse, she admitted having neglected the child by failing to comply with the rehabilitation referrals made by petitioner during the year-long period when petitioner was trying to help her. Based on this record, the admission was valid (see *Matter of Victoria B.*, 185 AD2d 811 [1992]; *Matter of William D.*, 178 AD2d 475 [1991], appeal dismissed 79 NY2d 1040 [1992], cert denied sub nom. *Dorothy W. v Commissioner of Social Servs. of City of N.Y.*, 506 US 1038 [1992]).

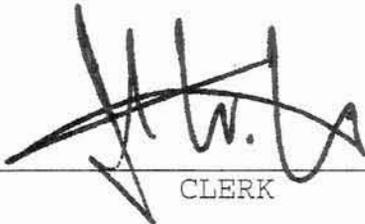
Respondent failed to object to the date of termination of the suspended judgment stated in the order of disposition, and did not move to vacate that order. She also failed to raise the argument that the violation petition was untimely. Accordingly, she failed to preserve this issue for appellate review.

The finding that termination of respondent's parental rights is in the child's best interest is supported by a preponderance of the evidence showing that the child, now eight years old, has been well cared for and has bonded with the foster family, with whom she has lived since infancy, and which includes her biological brother who has been adopted by the same foster mother. Respondent's recent commendable effort in overcoming her alcohol abuse is belated. For more than six years, she failed to complete a drug and alcohol program. The evidence shows the

child would be adversely affected by removal at this point from the only home she has ever known (*Matter of Rochon Lela D.*, 37 AD3d 311 [2007], *lv denied* 8 NY3d 815 [2007]).

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

ENTERED: APRIL 10, 2008



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to the warnings requirement (see *Pennsylvania v. Muniz*, 496 US 582, 601-602 [1990]; *People v. Rodney*, 85 NY2d 289, 292-293 [1995]; *People v. Velazquez*, 33 AD3d 352, 353 [2006], lv denied 7 NY3d 929 [2006]). Since asking for the true name of an arrestee is the quintessential routine booking question, without which it is impossible to process an arrest properly, it is irrelevant whether the answer is reasonably likely to be incriminating (*People v. Alleyne*, 34 AD3d 367 [2006], lv denied 8 NY3d 918 [2007], cert denied \_\_\_US\_\_\_, 128 S Ct 192 [2007]). Furthermore, the court was not required to submit to the jury the issue of the voluntariness of defendant's statements as to his name. Since, as noted, *Miranda* warnings were not required, that was not a proper issue for the jury, and there was no other factual issue raised at trial concerning voluntariness (see *People v. Cefaro*, 23 NY2d 283, 288-289 [1968]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence, viewed in light of the court's charge (see *People v. Danielson*, 9 NY3d 342, 348-349 [2007]). The trial testimony showed that defendant attempted to make a purchase with a stolen credit card (Penal Law § 165.45[2]). It is immaterial whether the credit card either had expired or been cancelled or revoked when the defendant attempted

to use it (see e.g. *People v Peterson*, 216 AD2d 10 [1995] lv denied 86 NY2d 800 [1995]; *People v Johnson*, 214 AD2d 478 [1995], lv denied 86 NY2d 733 [1995]). An expired or otherwise inactive credit card may be used to make a purchase on credit, within the meaning of General Business Law § 511(1), if a merchant accepts it, albeit improvidently, thus extending credit to the purchaser. We have considered and rejected defendant's remaining arguments on this issue.

The motion court properly denied the *Mapp/Dunaway* portion of defendant's suppression motion, without granting a hearing. Although the court incorrectly denied a hearing on the basis of defendant's failure to allege standing (see *People v Burton*, 6 NY3d 584 [2006]), the court was correct in its additional ruling that defendant's motion papers were insufficient to raise a factual issue warranting a hearing. Defendant was on notice that the People were alleging he gave the credit card at issue to an officer acting in an undercover capacity, under circumstances presenting no Fourth Amendment issue whatsoever (see *Hoffa v United States*, 385 US 293 [1966]; *Lewis v United States*, 385 US 206 [1966]), and his allegations failed to set forth an alternative scenario or assert any basis for suppression (cf. *People v Kolon*, 37 AD3d 340, 341 [2007], lv denied 8 NY3d 947 [2007]).

The court properly denied defendant's application made

pursuant to *Batson v Kentucky* (476 US 79 [1986]). Regardless of whether hybrid groups are cognizable under *Batson*, the People's peremptory challenge to the only African-American male panelist did not, by itself, raise an inference of discrimination (see *Johnson v California*, 545 US 162, 170 [2005]). While a prima facie showing of discrimination "may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination" (*People v Smocum*, 99 NY2d 418, 422 [2003]), here there was no evidence that could raise such an inference, and defendant's assertion that the panelist appeared favorable to the prosecution is without merit. We reject defendant's argument that a challenge to the sole member of a cognizable class automatically creates a prima facie case of discrimination, without any supporting circumstances (see *People v Henderson*, 305 AD2d 940, 940-941 [2003], lv denied 100 NY2d 582 [2003]).

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

ENTERED: APRIL 10, 2008



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permanently or for an indefinite period (see *Lundgren*, 145 AD2d at 793). The record shows that when Jenkins moved to New York in March 2004, his daughter hoped he would get better and go back to his home in South Carolina, and on June 11, 2004, he indicated an intent to return to South Carolina upon his release from petitioner nursing home. Although petitioner's Benefits Coordinator testified that Jenkins' intent later changed, courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 444 [1987]; see also *Lundgren*, 145 AD2d at 793-794). Regarding 42 CFR 435.403(i)(3), there was no evidence that Jenkins was incapable of indicating intent as of the date of his Medicaid application, and as for 42 CFR 435.403(m), respondent could reasonably find that petitioner had not proven that New York and South Carolina could not resolve which was the state of residence (see *Bethesda Lutheran Homes & Servs., Inc. v Born*, 238 F3d 853, 859 [2001]).

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

ENTERED: APRIL 10, 2008

  
CLERK

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

3333            John Cruz, as the Executor of            Index 28018/02  
                 the Estate of Milagros Carrero,            84611/05  
                 Deceased,  
                 Plaintiff-Respondent,

-against-

St. Barnabas Hospital,  
Defendant/Third-Party  
Plaintiff-Respondent-Appellant,

-against-

Christopher Leong, M.D.,  
Third-Party Defendant-Appellant-Respondent.

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Law Office of James W. Tuffin, Manhasset, (James W. Tuffin of  
counsel), for appellant-respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of  
counsel), for respondent-appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of  
counsel), for respondent.

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Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.),  
entered March 24, 2006, which, in this medical malpractice  
action, denied the hospital's motion for summary judgment  
dismissing the complaint and Dr. Leong's cross motion for summary  
judgment dismissing the third-party complaint, unanimously  
affirmed, without costs.

In view of the experts' conflicting opinions, it cannot be  
concluded as a matter of law that the delay in diagnosis and  
treatment of the decedent's breast cancer did not diminish her

chance of survival or hasten her death (see *Schaub v Cooper*, 34 AD3d 268 [2006]). Issues of fact also exist as to Dr. Leong's treatment of the decedent arising from the opinion of the hospital's expert that Dr. Leong should have examined the decedent's breasts and evidence that by doing so he could have discovered the cancer and pursued a more aggressive plan of treatment (see *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357, 358 [2006]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: APRIL 10, 2008



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

3334 In re Tyrell L.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

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Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of  
counsel), for presentment agency.

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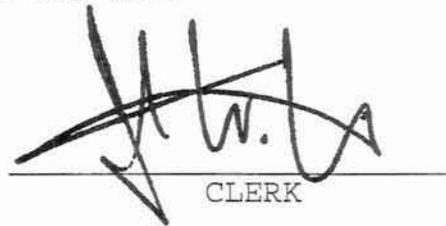
Order of disposition, Family Court, New York County (Susan  
R. Larabee, J.), entered on or about April 2, 2007, which  
adjudicated appellant a juvenile delinquent, upon a fact-finding  
determination that he committed acts which, if committed by an  
adult, would constitute the crime of assault in the third degree,  
and placed him with the Office of Children and Family Services  
for a period of 12 months, unanimously affirmed, without costs.

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

The evidence established the element of physical injury (see *People v Chiddick*, 8 NY3d 445 [2007]; *People v Haith*, 44 AD3d 369 [2007], lv denied 9 NY3d 1034 [2008]), and disproved appellant's justification defense.

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

ENTERED: APRIL 10, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 10, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding  
Richard T. Andrias  
Luis A. Gonzalez  
Rolando T. Acosta, Justices.

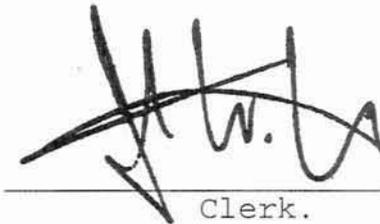
\_\_\_\_\_ x  
The People of the State of New York, SCI 31345C/05  
Respondent,  
-against- 3335  
Paul Jenkins,  
Defendant-Appellant.

\_\_\_\_\_ x  
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Byrne, J.), rendered on or about July 14, 2005,

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

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

ENTER:

  
\_\_\_\_\_  
Clerk.

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

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

3336-

3336A

Letter Grade, Inc.,  
Plaintiff-Appellant,

Index 603412/06

-against-

Jasmine Technologies, Inc.,  
Defendant-Respondent.

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Martin S. Rapaport, New York (Karen F. Neuwirth of counsel), for appellant.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered February 21, 2007, in plaintiff's favor in the sum of \$500,000, unanimously modified, on the law and the facts, to increase the sum to \$1,000,000, plus 15,043.09 in attorneys' fees and expenses, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly. Appeal from order, same court and Justice, entered on or about February 13, 2007, which denied plaintiff's motion to correct the judgment, unanimously dismissed, without costs, as superseded by the appeal from the judgment.

Under the terms of the promissory note, plaintiff was entitled to accelerate the entire debt upon defendant's failure to make the first principal payment (*see Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 577 [1979]). The affirmation of plaintiff's counsel sufficiently detailed the work performed and the expenses incurred by plaintiff in connection with this

matter to establish that the amount of fees and expenses was fair and reasonable (see *Bankers Fed. Sav. Bank v Off W. Broadway Devs.*, 224 AD2d 376, 377-378 [1996]).

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

ENTERED: APRIL 10, 2008



CLERK



2003 to June 20, 2003 is unpreserved and we decline to review it in the interest of justice. The period from September 16, 2003 to December 7, 2005 was also properly excluded. During this time, defendant had been deported to Jamaica, a deportation that was ultimately rescinded. Although the People knew that defendant was in Jamaica, they did not know his whereabouts. Since defendant failed to appear for trial and there was an outstanding bench warrant for his arrest, the period is excludable regardless of whether or not the People used due diligence in attempting to locate defendant and return him for trial (see CPL 30.30[4][c][ii]). Furthermore, the People were also excused from making a showing of diligence because this period occurred after they had declared their readiness (see *People v Carter*, 91 NY2d 795, 799, n [1998]). We have considered and rejected defendant's procedural arguments regarding our review of these issues. In response to defendant's motions, the People established the necessary facts, including the fact that they had made a valid statement of readiness, and defendant was not deprived of an opportunity to litigate these matters (compare *People v Chavis*, 91 NY2d 500, 506 [1998]). Finally, to the extent that defendant is arguing that, through prompt action, the

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

3338 In re Yitzhak "James" Pastreich, Index 101965/06  
Petitioner-Appellant,

-against-

New York State Division of Housing and  
Community Renewal,  
Respondent-Respondent,

251 CPW Housing LLC,  
Intervenor Respondent-Respondent.

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Barry J. Yellen, New York, for appellant.

Gary R. Connor, New York (Patrice Huss of counsel), for  
respondent.

Gale Fieldman, New York, for intervenor respondent.

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Judgment, Supreme Court, New York County (Lottie E. Wilkins,  
J.), entered November 3, 2006, insofar as appealed from as  
limited by the briefs, dismissing petitioner tenant's article 78  
proceeding challenging respondent DHCR's determination denying  
tenant's rent overcharge complaint, unanimously reversed, on the  
law, without costs, and the petition granted to the extent of  
remanding to DHCR for an evidentiary hearing on the issue of  
tenant's and intervenor-respondent landlord's intent concerning  
the duration of preferential rent.

The August 1991 rent stabilized lease entered into by tenant  
and landlord recited a monthly rent of \$5,747.52, but included a  
rider, denominated "Rider to Preferential Lease Agreement,"  
providing for a "preferential rent" of \$3,000 on condition that

tenant accept the apartment in "as is" condition (see generally Rent Stabilization Code [9 NYCRR] § 2521.2). The term of the lease was from October 1, 1991 to September 30, 1993, with a right of renewal set forth as follows: "At the end of the term of this initial Preferential Lease, Tenant has the option to renew Preferential Lease. The new monthly preferential rent will be \$3,000.00 adjusted by the corresponding RSA rent guidelines." Tenant thereafter renewed the lease five times. All five renewal leases were for two-year terms, used \$3,000 as the basis for increases, and stated the legal rent amount in addition to the preferential rent amount. The fifth renewal lease commencing June 1, 2002 had a preferential rent of \$3,715.64 and recited a legal rent of \$7,118.57. In 2004, landlord offered a renewal lease at the legal rent amount of \$7,652.26, but with no preferential amount stated. Tenant refused to execute this renewal lease and filed a rent overcharge complaint with respondent DHCR; landlord responded by filing a holdover proceeding in Housing Court. Housing Court came down with a decision first, finding triable issues of fact as to whether the parties intended that the preferential rent continue for the duration of the tenancy; shortly thereafter, DHCR denied tenant's rent overcharge complaint without conducting a hearing. Tenant filed a PAR, arguing, inter alia, that, as found by Housing Court, issues of fact as to the parties' intent required a trial,

and that the Rent Administrator's denial of the rent overcharge complaint was premature since Housing Court had not yet held the trial it had ordered. The Deputy Commissioner denied the PAR without conducting a hearing, finding that the Rent Administrator's order was not prematurely issued since Housing Court, on landlord's motion to reargue, subsequently marked the case off its calendar, deferring to DHCR's jurisdiction. On the merits, DHCR ruled that the preferential lease could not be considered because it was entered into prior to the base date, namely, November 2000, more than four years prior to the filing of the rent overcharge complaint.

While DHCR was not bound by Housing Court's determination that issues of fact as to the parties' intent warranted a trial, under the circumstances it was irrational for DHCR to determine such issue without itself conducting an evidentiary hearing. Since both the Rent Administrator and the Deputy Commissioner had the discretion to grant a hearing (9 NYCRR 2527.5[h], 2529.7[f]), it was inconsequential that tenant did not initially request a hearing before the Rent Administrator. Nor was tenant, in first requesting a hearing in his PAR, seeking to present new materials or facts for the first time in a PAR. Tenant was simply requesting a hearing on the same facts presented to the Rent Administrator.

In concluding that any agreement entered into before the

November 2000 base date could not be considered, the Deputy Commissioner relied on 9 NYCRR 2521.2(c), prohibiting examination of rental history prior to the four-year period preceding the filing of the complaint. Here, however, the most recent renewal, like each prior renewal, expressly stated that it was based on the same terms and conditions as the expiring lease, and "further attached lawful provisions and attached written agreements, if any." Thus, the 1991 preferential lease rider was incorporated into the most recent lease renewal, and was not barred from consideration by the four-year limitation period (compare *Matter of Century Operating Corp. v Popilizio*, 60 NY2d 483 [1983]). Nor is a different result required by 9 NYCRR § 2521.2(a), which gives a landlord the option, once a preferential rent is charged, to renew based on either the preferential rent or the legal regulated rent. That provision was not intended to obviate the terms of a lease agreement where both the landlord and the tenant are aware that the rent charged could legally be higher, but agree, under a specific set of circumstances, to allow the tenant to pay less, either for a specified period of time or for the duration of the tenancy (see *Matter of Missionary Sisters of Sacred Heart, Ill. v New York State Div. of Hous. & Community Renewal*, 283 AD2d 284, 287 [2001]).

The terms of the preferential lease rider, expressly incorporated into all renewal leases, appear to be open-ended

concerning the duration of the preferential rent, and not clearly limited to a maximum of two lease terms, totaling four years, as landlord argues, an interpretation not entirely consistent with landlord's own actions in offering renewal leases at the preferential rent for 10 years. Accordingly, since the 1991 preferential lease agreement controls, and the parties' intent cannot be unequivocally ascertained from the four corners of that agreement, DHCR acted irrationally in disregarding the terms of that agreement (see *Century Operating Corp.*, 60 NY2d at 488), and in not holding an evidentiary hearing on the issue of the parties' intent concerning the duration of the preferential rent.

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

ENTERED: APRIL 10, 2008



CLERK

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

3339 James Spiegel,  
Plaintiff-Appellant,

Index 109258/01

-against-

Vanguard Construction and  
Development Company, et al.,  
Defendants-Respondents.

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Law Offices of Barry E. Schulman, Brooklyn (Barry E. Schulman of  
counsel), for appellant.

Law Offices of Charles J. Siegel, New York (Robert S. Cypher of  
counsel), for Vanguard Construction and Development Company,  
respondent.

Law Office of John P. Humphreys, New York (Scott M. Karpel of  
counsel), for 500-512 Seventh Avenue Associates and Helmsley-  
Spear, Inc., respondents.

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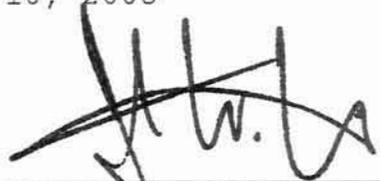
Order, Supreme Court, New York County (Edward H. Lehner,  
J.), entered November 9, 2006, which granted defendants' motions  
for summary judgment dismissing the complaint, unanimously  
affirmed, without costs.

The record establishes defendants' entitlement to summary  
judgment by demonstrating that the height differential of one  
inch between the carpeted area of the floor and the adjacent  
cement floor did not have any of the characteristics of a trap or

snare, and was not actionable (see *Kwitny v Westchester Towers Owners Corp.*, 47 AD3d 495 [2008]; *Martin v Lafayette Morrison Hous. Corp.*, 31 AD3d 300 [2006]; *Morales v Riverbay Corp.*, 226 AD2d 271 [1996]). No specificity of detail beyond the one-inch differential is presented here. Plaintiff testified that he was looking at the subject area when he fell. However, the photographs do not evidence a trap such as an edge posing a tripping hazard, or a situation where a defect might have been masked from view. Moreover, plaintiff is unable to establish that defendants 500-512 Seventh Avenue Associates, an out-of-possession landlord, and Helmsley-Spear, its managing agent, had actual or constructive notice of the alleged defect (see *Morchik v Trinity School*, 257 AD2d 534, 536 [1999]).

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

ENTERED: APRIL 10, 2008



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undercover officer.

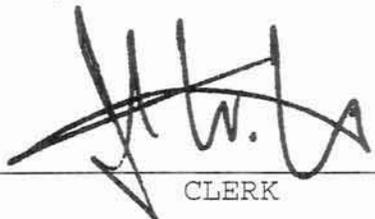
Defendant did not preserve any objection to the court's ruling that the courtroom would be closed, except to defendant's family, during the undercover officer's testimony. At the conclusion of the *Hinton* hearing, the only relief requested by defense counsel was that a member of defendant's family be permitted to attend. Furthermore, although counsel later called the court's attention to a fact arguably relevant to the closure ruling, he did not ask the court to reconsider that ruling. We decline to review defendant's present arguments in the interest of justice. As an alternative holding, we conclude that the People established an overriding interest that warranted closure of the courtroom (see *Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], cert denied sub nom. *Ayala v New York*, 522 US 1002 [1997]; *People v Miller*, 190 AD2d 609 [1993], lv denied 81 NY2d 974 [1993]). Similarly, defendant's argument that the undercover officer should not have been permitted to testify anonymously under his shield number is both unpreserved and without merit.

To the extent there were improprieties in the prosecutor's elicitation of opinion testimony and in summation, the court's

curative actions were sufficient to prevent any prejudice to defendant.

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

ENTERED: APRIL 10, 2008



CLERK

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

3341-

3341A One Beacon Insurance Company  
as subrogee of Dooney Bourke, Inc.,  
Plaintiff-Appellant,

Index 113997/05

-against-

French Institute Alliance Francais NYC,  
Defendant-Respondent,

Lehr Construction Corp., et al.,  
Defendants.

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Sheps Law Group, P.C., Melville (Robert C. Sheps of counsel), for  
appellant.

Hoey, King, Toker & Epstein, New York (Robert O. Pritchard, Jr.  
of counsel), for respondent.

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Order, Supreme Court, New York County (Edward H. Lehner,  
J.), entered January 10, 2007, which granted the motion of  
defendant French Institute Alliance Francais NYC (FIAP) for  
summary judgment dismissing the complaint as against it,  
unanimously reversed, on the law, without costs, the motion  
denied, and the complaint reinstated against FIAP. Appeal from  
order, same court and Justice, entered April 24, 2007, which  
denied so much of plaintiff's motion insofar as it sought to  
renew, and granted its motion insofar as it sought to reargue,  
and upon reargument, adhered to the prior determination,  
unanimously dismissed, without costs, as academic in view of the  
foregoing.

Dooney & Burke was a tenant in a building owned by FIAP,

which also occupied the upstairs premises," and its lease provided for a waiver of subrogation with respect to claims alleging damages to its premises. In January 2005 water was discharged from FIAF's premises into Dooney & Burke's, resulting in damage. Plaintiff, Dooney & Burke's insurer, reimbursed it for the loss, and commenced this subrogation action against FIAF, alleging that, as "an occupier" of the premises, it had been negligent in maintaining the heating and sprinkler systems and in supervising the contractors working in its space.

We disagree with the motion court's determination that the waiver of subrogation clause in the lease barred plaintiff's claim on the basis that the allegations of negligence emanated from the landlord-tenant relationship. Instead, we find that the record establishes that there are triable issues of fact with respect to whether the cause of Dooney and Burke's loss arose from a condition in FIAF's premises, or from a building-wide condition for which FIAF was responsible in its capacity as landlord (see *Interested Underwriters at Lloyds v Ducor's, Inc.*, 103 AD2d 76 [1984], *affd* 65 NY2d 647 [1985]). The motion court inappropriately determined the factual issue on the record then before it, i.e., that the source of the problem was the building-wide heating system, and not the thermostat in the premises occupied by FIAF. Furthermore, plaintiff had expeditiously sought discovery on the issue, and its claimed need for such

discovery to oppose the motion was genuine (cf. *Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [2005]).

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

ENTERED: APRIL 10, 2008



CLERK

Mazzarelli, J.P., Andrias, Friedman, González, JJ.

3343 In re Judith L. Hancock, Index 604417/06  
Petitioner-Respondent-Appellant,

-against-

Arts4All, Ltd., etc.,  
Respondent-Appellant-Respondent.

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Law Offices of Zachary R. Greenhill, P.C., New York (Zachary R. Greenhill of counsel), for appellant-respondent.

Judith L. Hancock, New York, respondent-appellant, pro se.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 17, 2007, which, in a proceeding pursuant to Business Corporation Law § 725 and § 1315 seeking, inter alia, the production of books and records of respondent corporation Arts4All, Ltd. (Arts), denied the petition on the grounds of res judicata, and dismissed, as moot, Arts' motion to hold petitioner and her former attorney in contempt, unanimously reversed, on the law, without costs, to reinstate the petition, to deny the motion for contempt on the merits, and the matter remanded to Supreme Court for a determination of the petition on the merits.

The court improperly dismissed the petition on the grounds of res judicata, where some of the relief sought did not mirror that sought in petitioner's counterclaims in a previous proceeding. Moreover, "[t]he standards governing motions for

summary judgment are applicable to special proceedings generally" *Matter of Brusco v Braun*, 199 AD2d 27, 31 [1993], *affd* 84 NY2d 674 [1994]), and here, the record reveals significant questions of fact regarding whether Arts complied with the continuing directive of the prior court as to various obligations to its shareholders, which should be addressed on the merits.

The court's directive to petitioner to refrain from communicating directly with her adversary was overly broad, since petitioner is a shareholder of Arts and has the right to certain materials independent of the litigation. Caution, however, should be taken that exercise of these rights not be used as an extra-judicial discovery device.

Furthermore, the court improperly dismissed, as moot, Arts' motion to hold petitioner and her former counsel in contempt. However, denial of the motion on the merits is appropriate, where petitioner's demand made pursuant to Business Corporation Law § 1315 was authorized by statute, and does not constitute an improper discovery demand.

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

*M-1206 - Hancock v Arts4All Ltd*

Motion seeking an order directing respondent to pay 50% of petitioner's printing costs and seeking to strike materials denied.

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

ENTERED: APRIL 10, 2008

  
CLERK

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

3344N In re Michael A. Santopietro, et al., Index 117934/06  
Petitioners-Appellants,

-against-

The City Of New York,  
Respondent-Respondent,

Triborough Bridge and Tunnel Authority, et al.,  
Respondents.

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Diamond & Diamond, LLC, New York (Stuart Diamond of counsel), for appellants.

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

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 3, 2007, which denied petitioner's application for leave to file a late notice of claim, unanimously affirmed, without costs.

The court did not improvidently exercise its discretion, under General Municipal Law § 50-e(5), in denying petitioners' motion to file a late notice of claim (see e.g. *Williams v Nassau County Med. Ctr.*, 6 NY3d 531 [2006]). While the failure to proffer a reasonable excuse for delay in serving a notice of claim is not alone fatal to a motion for leave to file a late notice, plaintiffs also failed to demonstrate that the City had timely actual notice of the claim and suffered no prejudice by

reason of the delay (see General Municipal Law § 50-e[1][a], [5];  
*Matter of Schifano v City of New York*, 6 AD3d 259 [2004], lv  
denied 4 NY3d 703 [2005]; *Harris v City of New York*, 297 AD2d 473  
[2002], lv denied 99 NY2d 503 [2002]).

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

ENTERED: APRIL 10, 2008



CLERK

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

3345N Thomas Bowman,  
Plaintiff-Appellant,

Index 103824/03

-against-

Beach Concerts, Inc., et al.,  
Defendants-Respondents.

---

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

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Jonathan A.  
Judd of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun,  
J.), entered November 6, 2006, which denied plaintiff's motion to  
vacate an order of dismissal, unanimously modified, on the law  
and the facts, to reinstate the Labor Law § 200 and common-law  
negligence claims, and otherwise affirmed, without costs.

Plaintiff demonstrated a reasonable excuse for his default,  
i.e., law office failure (see *ICBC Broadcast Holdings-NY, Inc. v  
Prime Time Adv., Inc.*, 26 AD3d 239, 240 [2006]; *Mediavilla v  
Gurman*, 272 AD2d 146, 148 [2000]), and meritorious Labor Law  
§ 200 and common-law negligence claims, based on evidence that  
the operation of a forklift by an untrained, self-designated  
coworker created an unsafe workplace (see *Griffin v New York City  
Tr. Auth.*, 16 AD3d 202 [2005]). As to his Labor Law § 241(6)

claim, however, plaintiff failed to demonstrate that his injury occurred in the context of construction, excavation or demolition work (see *Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002]).

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

ENTERED: APRIL 10, 2008



CLERK

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

3346N Marilou Ordillas,  
Plaintiff-Appellant,

Index 110086/06

-against-

MTA New York City Transit,  
Defendant-Respondent.

Budd Larner, P.C., New York (Averim Stavsky of counsel), for appellant.

Wallace D. Gossett, New York (Renee L. Cyr of counsel), and Steve S. Efron, New York, for respondent.

Order, Supreme Court, New York County (Robert D. Lippmann, J.), entered October 23, 2006, which denied plaintiff's motion for leave to file a late notice of claim, unanimously affirmed, without costs.

Plaintiff's proffered excuse of law office failure does not adequately excuse the year-long delay in filing a notice of claim (see *Seif v City of New York*, 218 AD2d 595 [1995]). She does not contend that defendant had actual knowledge of the facts and circumstances constituting her claim within the statutorily prescribed 90-day filing period or within a reasonable time thereafter (see General Municipal Law § 50-e[5]; *Quinn v Manhattan & Bronx Surface Tr. Operating Auth.*, 273 AD2d 144 [2000]). Her unsupported assertion that the condition of a staircase at a subway entrance in Grand Central Station remained unchanged a year after her accident is insufficient to refute

defendant's contention that its ability to meaningfully investigate her claim had been prejudiced by the passage of time (*Lefkowitz v City of New York*, 272 AD2d 56 [2000]), given the likelihood that the condition of the stairs would have changed during that time due to heavy traffic by the public, and the loss of opportunity to locate witnesses while memories were still fresh (see *Tavarez v City of New York*, 26 AD3d 297 [2006]).

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

ENTERED: APRIL 10, 2008



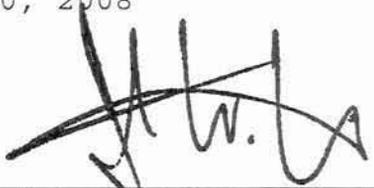
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his client wore blue jeans, rather than blue sweat pants, at arraignment. Counsel neither stated, nor even suggested, that a new attorney, unfamiliar with the case, would be able to take over the trial in progress. Thus, as a practical matter, granting the application would have necessitated a mistrial. Furthermore, the proposed testimony had little probative value because the clothing discrepancy could either be explained by the possibility that defendant exchanged pants with another detainee during the lengthy period of prearraignment custody, or as a trivial mistake by the officers having little bearing on their credibility. Similarly, the court's ruling did not deprive defendant of his right to a fair trial and to present a defense (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]). Defendant would have been able to introduce the evidence in question had the issue been raised in a timely fashion, and the evidence had minimal exculpatory value in any event.

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

ENTERED: APRIL 10, 2008



CLERK

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

3348 In re Eric Josey, Index 105659/06  
Petitioner-Respondent,

-against-

New York City Police Department, et al.,  
Respondents-Appellants.

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

Michael T. Murray, New York (Christopher J. McGrath of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert D. Lippmann, J.), entered December 4, 2006, which annulled the determination of respondent Police Pension Fund Board of Trustees denying petitioner's application for accidental disability retirement (ADR) benefits, and directed respondent to grant petitioner ADR benefits, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

Respondent's determination was based on "some credible evidence" and was not arbitrary or capricious (see *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]). There is no evidence in the record that supports petitioner's belated claim that his injury occurred in the line of duty.

We note that, upon finding that there was no credible evidence to support respondent's determination, the court should

have remanded the proceeding for further consideration (*Matter of Perkins v Board of Trustees of N.Y. Fire Dept. Art. 1-B Pension Fund*, 86 AD2d 808 [1982]).

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

ENTERED: APRIL 10, 2008



CLERK

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

3349 Kanto Vushaj, et al., Index 17610/03  
Plaintiffs-Respondents,

-against-

Insignia Residential Group, Inc.,  
Defendant-Appellant,

Roy Snyder, et al.,  
Defendants.

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Fabiani Cohen & Hall, LLP, New York (Lisa A. Sokoloff of  
counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels,  
J.), entered on or about October 17, 2007, which denied defendant  
Insignia's motion for summary judgment dismissing the complaint,  
unanimously reversed, on the law, without costs, and the motion  
granted. The Clerk is directed to enter judgment in favor of  
defendant Insignia dismissing the complaint as against it.

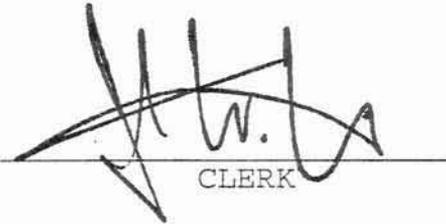
Plaintiff Kanto Vushaj, a handyman employee of the nonparty  
cooperative corporation, was injured while performing a fuse box  
electrical repair. Insignia, the management company, owed this  
plaintiff no duty to conduct inspection and maintenance of the  
building's removable fuse "blocks," one of which exploded while  
he was replacing fuses. While Insignia's agreement with the  
owner granted it broad authority to make repairs costing less

inapplicable, since there is no evidence of any such reliance by the injured plaintiff on -- or even awareness of -- Insignia's limited involvement with maintaining the building's electrical system.

Furthermore, there is no evidence that Insignia had actual notice of the particular fuse block defect that caused the accident (compare *Tushaj v Elm Mg. Assoc.*, 293 AD2d 44, *supra*, with *DeVizio v Hobart Corp.*, 142 AD2d 508, 510 [1988]). Nor was there any evidence that the defect was visible or apparent, or that it existed for a sufficient length of time prior to the accident to have allowed Insignia's employees to discover and remedy it, such as would have afforded constructive notice (*id.* at 511).

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

ENTERED: APRIL 10, 2008

  
CLERK

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

3350-  
3351-  
3352-  
3353

In re Brandon A.,  
  
A Child Freed for Adoption, etc.,  
  
Jo Ann M.,  
Movant-Appellant,  
  
Administration for Children's Services,  
Petitioner-Respondent.

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Lansner & Kubitschek, New York (Carolyn A. Kubitschek of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

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

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Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about June 6, 2006, which, to the extent appealed from as limited by the briefs, denied the motion of the subject child's former foster parent to intervene in the permanency hearings, unanimously affirmed, without costs. Order, same court and Judge, entered on or about October 17, 2006, which, after a hearing, determined that it was in the child's best interests not to be returned to the movant's care, unanimously affirmed, without costs. Order, same court and Judge, entered on or about November 14, 2006, which, to the extent appealed from as limited by the briefs, denied a further motion for visitation and to

adopt the child, unanimously affirmed, without costs.

Family Court providently exercised its discretion in denying the non-kinship former foster mother's motion to intervene in the permanency hearings (see *Matter of George "Joey" S.*, 194 AD2d 328 [1993]). Since the movant was not the child's foster parent at the time of the hearings and had not lived with him for a continuous period of more than 12 months, she was not entitled to intervene as of right in any of the custody proceedings pursuant to Social Services Law § 383(3) (see e.g. *Matter of Bessette v Saratoga County Commr. of Social Servs.*, 209 AD2d 838 [1994]; *Matter of Minella v Amhrein*, 131 AD2d 578 [1987]), nor was she entitled to be a party at the permanency hearing (see Family Court Act § 1089[b][2]). The movant was not entitled to intervene as of right pursuant to CPLR 1012(a)(2) because she was not legally bound by any judgment in the custody proceeding (see e.g. *Matter of Tyrone G. v Fifi N.*, 189 AD2d 8, 17 [1993]).

Family Court had jurisdiction to stay the child's return to the movant's care pending a best interests hearing regarding the changed circumstances and, after the hearing, to determine against such return, even in the face of the fair hearing decision of the New York State Office of Children and Family Services (see *Matter of Shinice H.*, 194 AD2d 444 [1993]).

The movant had no protected liberty interest in the foster-

parent-and-child relationship (see *Rodriguez v McLoughlin*, 214 F3d 328 [2d Cir 2000], cert denied 532 US 1051 [2001]; see also *Matter of Roxanne F.*, 79 AD2d 505 [1980], appeal dismissed 53 NY2d 674 [1981]), and was accorded all the process she was due, given her notice of the custody hearings and her opportunity to be heard. Her argument that the Family Court improperly found it not in the child's best interests to be returned to her care is not properly before this Court because it was raised for the first time in her reply brief (see *Matter of Deuel v Dalton*, 33 AD3d 1158, 1159 [2006]), and we decline to consider it.

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

ENTERED: APRIL 10, 2008



CLERK

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

3354 The People of the State of New York, Ind. 4105/05  
Respondent,

-against-

Jeff Ibe,  
Defendant-Appellant.

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James E. Neuman, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Rena Paul of  
counsel), for respondent.

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Judgment, Supreme Court, New York County (Maxwell Wiley,  
J.), rendered March 22, 2006, convicting defendant, after a jury  
trial, of assault in the second degree and reckless endangerment  
in the second degree, and sentencing him, as a second felony  
offender, to an aggregate term of 3 years, unanimously affirmed.

Defendant's argument that the People failed to prove the  
element of physical injury (Penal Law § 10.00[9]) is unpreserved  
and we decline to review it in the interest of justice. As an  
alternative holding, we find that the verdict was based on  
legally sufficient evidence. We also find that the verdict was  
not against the weight of the evidence (see *People v Danielson*, 9  
NY3d 342, 348-349 [2007]). There was ample proof that the police  
officer sustained a physical injury (see *People v Chiddick*, 8  
NY3d 445 [2007]), including the officer's testimony as to  
substantial pain, as well as medical testimony. To the extent  
that defendant is arguing that the element of physical injury

requires a showing of long-term effects, that argument is without merit (see e.g. *People v Jackson*, 296 AD2d 313 [2002], lv denied 98 NY2d 768 [2002]).

The court properly admitted evidence that, at the time of the incident, defendant was driving a taxi without a valid license to do so. Without this evidence, it would have been difficult for the jury to understand why defendant fled from the police and engaged in a course of unusual conduct rather than simply submitting to being stopped for a traffic violation (see *People v Till*, 87 NY2d 835, 837 [1995]). The court's thorough limiting instruction minimized any prejudice.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: APRIL 10, 2008

  
CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 10, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding  
Eugene Nardelli  
John T. Buckley  
James M. Catterson, Justices.

The People of the State of New York, Ind. 52119C/05  
Respondent,

-against- 3356

Cesar Lamb, etc.,  
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Albert Lorenzo, J.), rendered on or about August 7, 2006,

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

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

ENTER:

  
Clerk.

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



without allegations of separate tortious acts (*DeCastro v Bhokari*, 201 AD2d 382 [1994]; see also *Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324 [1998]). The proposed cause of action in the first counterclaim ascribes no independent tortious conduct to any individual director, and is thus deficient as a matter of law. Since defendants have failed to state a claim sufficiently for breach of fiduciary duty against the individual directors, their claim against Rosette Willig also fails.

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

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

ENTERED: APRIL 10, 2008



CLERK



dismissed, because such misrepresentations, even if they induced plaintiffs to invest in certain companies, did not relate to the financial condition of any of the companies and therefore did not directly cause the loss about which plaintiffs complain (see *Laub v Faessel*, 297 AD2d 28, 31 [2002]).

Dismissal was warranted also because the claims based on alleged misrepresentations lacked "the requisite particularity" (*Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 116 [1998]; *Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220 [1994]; CPLR 3016[b]). The complaint refers to "certain plaintiffs," "various plaintiffs," and "the Del Valle Defendants," which, as the court observed, makes it impossible to determine which plaintiffs relied on alleged misstatements and which defendants made the misstatements.

Claims based upon defendants' projections of returns on investment, such as the expected acquisition of the Orient Cruise Lines and the projected Southeast Cruise Holdings acquisitions, are not actionable because such projections are merely statements of prediction or expectation (see *Naturopathic Labs Intl., Inc. v SSL Ams., Inc.*, 18 AD3d 404, 404 [2005]).

The court also properly dismissed the fraud claims as duplicative of the breach of contract claims, since they arose directly from the written provisions of the various subscription

and other agreements (see e.g. *Meehan v Meehan*, 227 AD2d 268, 270 [1996]). Plaintiffs' contention that many of the alleged misrepresentations are extraneous to the contracts is unavailing, since none of these misrepresentations caused the actual investment losses. Moreover, that plaintiffs seek different remedies for the breaches of contract does not alter the nature of the underlying cause of action.

The court properly dismissed the claims against defendant Carstens individually, since the complaint alleges no specific representations or actions attributable to him. Any remark Carstens may have made to the effect that Southeast Cruise was a great project is a "nonactionable expression[] of opinion, mere puffing" (*Longo v Butler Equities II*, 278 AD2d 97, 97 [2000]).

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

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

ENTERED: APRIL 10, 2008

  
CLERK



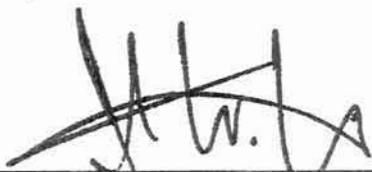
radiologist who found no abnormalities as a result of the accident (see *Lloyd v Green*, 45 AD3d 373 [2007]).

Plaintiff's opposition failed to raise a triable issue of fact as to whether she sustained a serious injury. Her deposition testimony revealed that she was involved in a second motor vehicle accident more than one year after the subject accident, in which she injured her neck, back and shoulder. The conclusion of plaintiff's treating orthopedist regarding the range of motion limitations found in plaintiff's neck, back and right shoulder two years after the subject accident, failed to adequately address the possibility that plaintiff's limitations were caused by the second accident (see *Lopez v Simpson*, 39 AD3d 420, 421 [2007]; see also *Montgomery v Pena*, 19 AD3d 288, 289-290 [2005]). Plaintiff also failed to raise a triable issue of fact in the form of competent objective evidence substantiating her 90/180-day claim (see *Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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

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

ENTERED: APRIL 10, 2008

  
CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 10, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding  
Eugene Nardelli  
John T. Buckley  
James M. Catterson, Justices.

The People of the State of New York, Ind. 3024/04  
Respondent,

-against- 3363

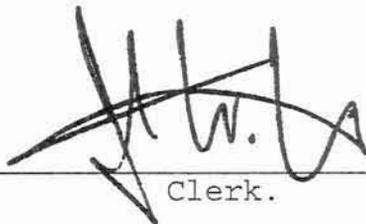
Exaudis Keaway,  
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about February 15, 2007,

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

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

ENTER:

  
Clerk.

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



summary judgment and plaintiffs did not seek permission to file the statements nunc pro tunc. Nor did plaintiffs offer a reasonable excuse for their failure to timely file (compare *Matter of Abreu*, 168 Misc 2d 229, 234 [1996]).

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

*M-1489 - Fishkin, et al., v Taras, et al.,*

Motion seeking leave to enlarge the record and for such and any other further relief that the Court deem just and proper granted.

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

ENTERED: APRIL 10, 2008

  
CLERK

seemingly intent on making a purchase, interacted with store personnel as defendant entered the pharmacy area, which in each case, was enclosed by a wall and counter and accessible only through a door, although the door was unlocked. In the first store, an employee directed defendant to leave the pharmacy area, and defendant departed without taking anything. In the second store, defendant stole boxes of expensive diabetic test strips from the pharmacy area, and when an employee tried to stop him, defendant pushed an employee out of the way with considerable force.

Defendant's act of forcibly pushing the employee out of the way as he attempted to leave the store with stolen merchandise established the crime of robbery (see Penal Law § 160.00[1]; *People v Green*, 277 AD2d 82 [2000], lv denied 96 NY2d 784 [2001]). The conduct of the codefendant in apparently casing each store, distracting employees while defendant entered the pharmacy area, and fleeing with him after the theft supported the conclusion that defendant was aided by another person actually present, thereby satisfying that element of second-degree robbery (see Penal Law § 160.10[1]; *People v Hazel*, 26 AD3d 191 [2006], lv denied 6 NY3d 848 [2006]). Each pharmacy area was unmistakably closed to the public notwithstanding the absence of any warning sign or additional security measures (see *People v Powell*, 58 NY2d 1009, 1010 [1983]), thus establishing the

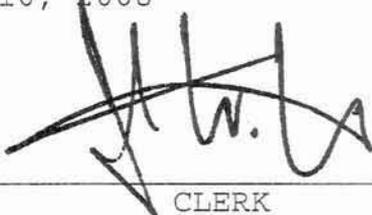
trespass element of burglary. The evidence also supports the inference that defendant entered each pharmacy area with intent to commit a crime.

The court properly exercised its discretion in declining to declare a mistrial based on alleged juror misconduct, or to conduct a further investigation regarding the identity of the juror involved therein. After making a thorough individual inquiry of each juror, the court properly concluded that the initially unidentified juror who had engaged in the improper conduct in question was a juror whom the court had discharged for other reasons (see *People v Ortiz*, 45 AD3d 368 [2007]). The circumstances did not warrant any further efforts to identify the errant juror.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 10, 2008



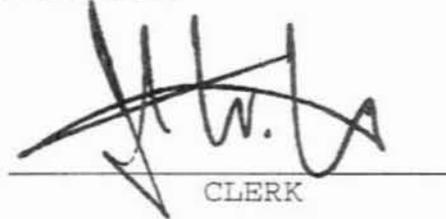
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judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 10, 2008



CLERK

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

3367 Nicholas Castro, a minor, Index 104826/05  
by his mother and natural guardian,  
Linda Vinueza, et al.,  
Plaintiffs-Respondents,

-against-

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

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Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge  
(Scott G. Christensen of counsel), for appellants.

Miller & Eisenman, LLP, New York (Michael P. Eisenman of  
counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner  
Kornreich, J.), entered April 13, 2007, which denied defendants'  
motion for summary judgment, unanimously affirmed, without costs.

The infant plaintiff, a three-year-old "special needs"  
student at defendant Birch's early childhood center, was  
allegedly injured by another student at school on three occasions  
in late 2002 and early 2003. The final injury was a broken  
femur. Plaintiffs seek to hold defendants liable for negligent  
supervision.

The school authorities were not entitled to summary judgment  
on this record (see *Garcia v City of New York*, 222 AD2d 192, 195  
[1996], lv denied 89 NY2d 808 [1997]). Plaintiffs introduced  
sufficient evidence, in addition to the challenged alleged

hearsay (see *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [2002]), to raise a triable issue of fact as to the school's awareness of prior injuries to this child while in its care and custody, and to raise factual issues as to the adequacy of defendants' supervision (see *Mirand v City of New York*, 84 NY2d 44 [1994]).

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

ENTERED: APRIL 10, 2008



CLERK

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

3368 Norman Behagan,  
Plaintiff-Respondent,

Index 18044/04

-against-

L&L Painting Co., Inc.,  
Defendant-Appellant.

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Fabiani Cohen & Hall, LLP, New York (Lisa A. Sokoloff of  
counsel), for appellant.

Pecoraro & Schiesel, New York (Steven G. Schiesel of counsel),  
for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.),  
entered March 23, 2007, which, to the extent appealed from,  
denied defendant's motion for summary judgment dismissing the  
complaint, unanimously affirmed, without costs.

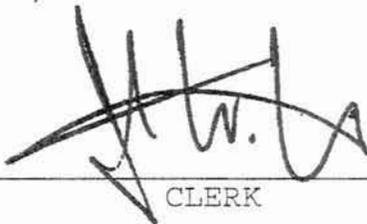
A subcontractor may be held liable for injury to an employee  
of the general contractor under certain circumstances (see  
*generally Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]). There  
was ample evidence, in the form of plaintiff's deposition  
testimony and the L&L subcontract requirements, to raise an issue  
of fact whether defendant subcontractor had controlled, directed  
and supervised plaintiff's work in scraping steel as a "prep" to  
painting, and whether such work had been expressly delegated to  
defendant under the terms of the subcontract. The L&L  
subcontract required defendant to "clean" the steel, to provide  
all painting equipment and safety materials, and to be

responsible for any liability arising from its obligations thereunder. Based on this and other evidence, the court properly found issues of fact as to defendant's liability for plaintiff's injury under Labor Law § 240 and § 241.

There are also issues of fact as to whether defendant exercised control over the injury-producing activity, such as would sustain plaintiff's claims under Labor Law § 200 and for common law negligence. Plaintiff's deposition testimony and the terms of the subcontract indicate that defendant controlled the painting phase of the project, including the scraping and safety equipment requirements. Plaintiff, a painter by trade, testified that he received his work assignments from defendant, including his safety equipment, and that he was instructed by defendant to build a portion of the scaffold, which he was doing at the time he fell. The court properly concluded that plaintiff's testimony, based on personal knowledge, raised issues of fact as to defendant's control of the work, and that the factfinder should determine issues of credibility and the weight to be accorded such testimony.

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

ENTERED: APRIL 10, 2008

  
CLERK

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

3369 In re Gilberto S. Gomez, Index 114838/05  
Petitioner-Appellant,

-against-

Neil Hernandez, as Commissioner of  
the New York City Department  
of Juvenile Justice, et al.,  
Respondents-Respondents.

Robert N. Felix, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman  
Corenthal of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York  
County (Joan A. Madden, J.), entered June 7, 2007, which denied  
the petition seeking to annul a determination by the Department  
of Juvenile Justice denying promotion to the permanent position  
of Associate Juvenile Counselor (AJC), unanimously affirmed,  
without costs.

A person whose name appears on a list of eligible candidates  
does not have a vested right to appointment (see *Matter of  
Andriola v Ortiz*, 82 NY2d 320, 324 [1993], cert denied 511 US  
1031 [1994]). Examination scores are not the sole determinant of  
fitness, as "the appointing authority must be cloaked with the  
power to choose a qualified appointee who possesses all the  
attributes necessary for the responsible performance of his  
duties" (*Matter of Cassidy v Municipal Civ. Serv. Commn. Of City  
of New Rochelle*, 37 NY2d 526, 529 [1975]). Administrative

actions taken arbitrarily or in bad faith will, of course, not be tolerated, but the petitioner in such circumstances bears a heavy burden of proof (see *Matter of Aladin v Schultz*, 176 AD2d 205, 206 [1991]), for which conclusory allegations and speculative assertions will not suffice (see *Matter of Knight v County of Nassau*, 27 AD3d 470 [2006], *lv denied* 7 NY3d 712 [2006]).

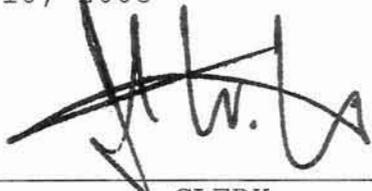
The failure to provide particular reasons for an appointing official's exercise of discretion in declining to appoint a specific candidate is not evidence of arbitrariness or capriciousness (*Matter of Delicati v Schechter*, 3 AD2d 19 [1956]; see also *Matter of Kaminsky v Leary*, 33 AD2d 552 [1969], *affd* 28 NY2d 959 [1971]). Even candidates such as petitioner, who has a very good service record, can be denied promotions provided appropriate discretion is used within the confines of the "one-of-three" rule in Civil Service Law § 61 (see *Matter of Archer v Riccio*, 201 AD2d 395 [1994]).

Applying these standards, respondent's determination not to appoint petitioner permanently to the title of AJC was neither arbitrary, capricious, nor an abuse of discretion, and cannot be invalidated as contrary to the merit and fitness requirements of the State Constitution (*id.* at 397). Petitioner's challenge is, in essence, simply a statement of incredulity that despite his "very good" performance evaluations and being number 7 on the certified list, he was passed over for the permanent promotion.

A provisional appointment may ripen into a permanent appointment pursuant to Civil Service Law § 65(4) (see *Matter of Becker v New York State Civ. Serv. Commn.*, 61 NY2d 252 [1984]), but this petitioner was not entitled to a permanent position as an AJC by operation of law. His contention that the record was insufficient to determine whether the list was adequate to fill all the positions held on a probationary basis is belied by respondents' submissions demonstrating that all available positions had been filled, that the eligible list remained unexhausted, and that after the appointments were made from the list, no provisional appointees remained in the position of AJC.

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

ENTERED: APRIL 10, 2008



CLERK

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

3370N        Nicholas Divito,  
                 Plaintiff-Appellant,

Index 600132/07

-against-

Dennis J. Farrell, et al.,  
Defendants-Respondents.

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Davidoff Malito & Hutcher LLP, New York (Martin H. Samson of counsel), for appellant.

Blank Rome LLP, New York (Laurie J. McPherson of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 13, 2007, which denied plaintiff's motion for a preliminary injunction, unanimously dismissed as moot, with costs in favor of defendants, payable by plaintiff.

Plaintiff sought a declaratory judgment to bar termination of his rights in a certain company. His application for a temporary restraining order and a preliminary injunction was granted only to the extent of temporarily enjoining the purchase of his shares in the company pending a hearing on the matter. At the conclusion of the hearing, the court denied preliminary injunctive relief and lifted the restraining order. Unable to obtain a stay of the court's decision, plaintiff was provided with written notice that pursuant to its rights and obligations under the 1990 shareholders' agreement, the company in which he

held shares intended to acquire his stock as soon as practicable. When he refused to cooperate in scheduling a closing of the transaction, a date for the closing was set. Plaintiff was again unable to procure a stay of the closing, and the transaction then took place.

Plaintiff now argues that the motion court erred in not granting injunctive relief, and that the subsequent closing was invalid because it purportedly violated the temporary restraining order, which, he maintains, was in effect until formally terminated by the entry of the court's written decision denying his motion for a preliminary injunction. He contends that he should have been granted the injunction because he satisfied all the requirements for such relief. However, the TRO was, by its terms, only in force pending the hearing of the motion, and further, the court announced its lifting of the restraint at the hearing. Plaintiff was unable to procure a stay of the impending acquisition of his shares, so defendants were not precluded from compelling their purchase (see *Da Silva v Musso*, 76 NY2d 436, 440 [1990]; *Sakow v 633 Seafood Rest., Inc.*, 1 AD3d 298 [2003]). Accordingly, the remedy plaintiff now seeks is a legal

impossibility (see *Local 798 Realty Corp. v 152 W. Condominium*, 37 AD3d 239 [2007]), thus rendering moot the challenge to the denial of his motion for a preliminary injunction.

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

ENTERED: APRIL 10, 2008



CLERK

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

3371N Jit Chandan, Index 110831/06  
Plaintiff-Appellant-Respondent,

-against-

Ved Gulati,  
Defendant-Respondent-Appellant.

Ofodile & Associates, P.C., Brooklyn (Anthony C. Ofodile of  
counsel), for appellant-respondent.

Thomas N. Rothschild, Brooklyn, for respondent-appellant.

Order, Supreme Court, New York County (Robert D. Lippmann,  
J.), entered December 12, 2006, which denied defendant's motion  
to permanently enjoin plaintiff from commencing the instant  
action or any other future action or proceeding against defendant  
without leave of court and for sanctions, and directed  
"petitioner to pay the amount of \$47,000," unanimously modified,  
on the facts, to the extent of clarifying so much of the order  
that directs "petitioner to pay the amount of \$47,000" and  
substituting "defendant" for "petitioner," and increasing the  
amount to be paid by defendant to plaintiff to \$47,116.59, and  
otherwise affirmed, without costs.

The order is modified to the extent indicated because it is  
clear that, in this action for breach of a 1998 settlement  
agreement arising from three related corporate dissolution  
proceedings, the court intended for defendant to make payment to  
plaintiff in accordance with the parties' stipulation of

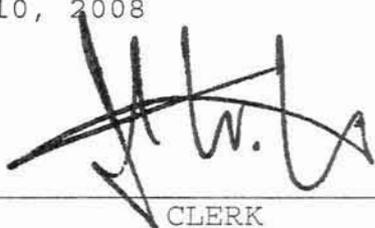
settlement, and that the balance owed by defendant was \$47,116.59. Contrary to plaintiff's contention, pursuant to the stipulation of settlement, plaintiff's remedy for non-payment by defendant was to commence an action for the amount owed, and not for rescission of the agreement. Furthermore, given the repeated findings in prior orders that it was plaintiff that had failed to close, as required by the stipulation of settlement, the court properly declined to impose interest on the payment.

Plaintiff's conduct in bringing 2 proceedings in 12 years for a purported breach of the settlement agreement does not rise to the level sufficient to condition his access to the courts on prior court approval, or to impose sanctions and costs (*compare Matter of Sud v Sud*, 227 AD2d 319 [1996]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: APRIL 10, 2008

  
CLERK

APR 10 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.  
David Friedman  
Eugene Nardelli  
James M. Catterson  
Bernard J. Malone, Jr., JJ.

9994  
Index 101996/02

x

Norma Rose, et al.,  
Plaintiffs-Respondents,

-against-

Brown & Williamson Tobacco  
Corporation, etc., et al.,  
Defendants-Appellants,

R.J. Reynolds Tobacco Company,  
Defendant.

x

Defendants appeal from a judgment of the Supreme Court,  
New York County (Karen S. Smith, J.), entered  
July 18, 2005, which, insofar as appealed  
from, after a jury trial, awarded plaintiffs  
damages against defendants Brown & Williamson  
Holdings, Inc., and Philip Morris USA Inc.,  
based on a cause of action for negligent  
product design.

Mayer, Brown, Rowe & Maw LLP, New York (Andrew H. Schapiro, Andrew L. Frey and Lauren R. Goldman of counsel), and Winston & Strawn LLP, New York (Thomas J. Quigley and Luke A. Connelly of counsel), for Philip Morris USA Inc., appellant.

Chadbourne & Parke LLP, New York (Thomas E. Riley and Allison M. Alcasabas of counsel), for Brown & Williamson Holdings, Inc., appellant.

Whiteman Osterman & Hanna LLP, Albany (Howard A. Levine, Alan J. Goldberg, Christopher W. Meyer, William S. Nolan and Christopher M. McDonald of counsel), and Finz & Finz, P.C., Jericho (Stuart L. Finz, Jay L. Feigenbaum and Todd M. Rubin of counsel), for respondents.

FRIEDMAN, J.

Plaintiff Norma Rose developed lung cancer and neurological damage as the result (it is undisputed) of decades of cigarette-smoking. In this action, a jury returned a verdict in favor of Ms. Rose and her husband (suing derivatively) on their claim that the cigarettes she smoked from the 1960s to 1993 were negligently designed. Specifically, it was plaintiffs' contention that, during the years in question, the relevant tobacco companies should have sold only "light" cigarettes (which contain relatively low levels of cancer-causing tar and addictive nicotine) and should not have sold regular cigarettes of the kind Ms. Rose smoked (which contain significantly higher levels of the aforementioned harmful substances). While light cigarettes were available during the relevant period, plaintiffs failed to present any evidence that such cigarettes appeal to more than a small portion of the cigarette-smoking public. Stated otherwise, the record contains no basis for a finding that light cigarettes have the same utility for the vast majority of smokers as do regular cigarettes.

The critical question on this appeal is whether plaintiffs presented a legally sufficient case on their negligent design claim -- the only cause of action submitted to the jury -- without offering any evidence that the alternative product design

they propose (low-tar, low-nicotine cigarettes) would have been acceptable to the consumers that constituted the market for the allegedly defective product (regular cigarettes). In our view, this question must be answered in the negative. Under New York law, a manufacturer cannot be held liable for failing to adopt an alternative product design that has not been shown to retain the "inherent usefulness" the product offers when manufactured according to the more risky (but otherwise lawful) design that was actually used (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983]). In the case of cigarettes, in which the product's "usefulness" (such as it is) is the production, not of any objectively observable results, but of certain subjective sensations and feelings in the user (the taste of tar and the psychological effect of nicotine), the product's functionality can only be demonstrated by its acceptability to consumers. Absent any evidence that cigarettes with the low levels of tar and nicotine advocated by plaintiffs would be acceptable in the market for the cigarettes Norma Rose smoked, it cannot be said that plaintiffs have carried their burden of proving that it was "feasible to design [the offending product] in a safer manner" (*id.*). Thus, defendants' motions for a directed verdict and for judgment notwithstanding the verdict should have been granted. We therefore reverse the judgment in plaintiffs' favor and

dismiss the complaint.

The standard to be applied in determining (in both negligence and strict product liability actions) whether or not a product is defectively designed is

"whether the product as designed was 'not reasonably safe' -- that is, whether it is a product which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner" (*Voss*, 59 NY2d at 108; see also *Giunta v Delta Intl. Mach.*, 300 AD2d 350, 353 [2002]).

In trying a case under this standard,

"[t]he plaintiff . . . is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner. The defendant manufacturer, on the other hand, may present evidence in opposition seeking to show that the product is a safe product -- that is, one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost." (*Voss*, 59 NY2d at 108 [citations omitted].)

Among the factors to be considered in the risk-utility analysis is "the availability of a safer design" (*id.* at 109). Further, "[w]here a court, after considering the relevant facts and risk-utility factors, determines that the plaintiff has failed to make out a prima facie case of a design defect, the claim should not be submitted to the jury" (*Scarangella v Thomas Built Buses*, 93 NY2d 655, 659 [1999]).

As the Court of Appeals has noted, the risk-utility analysis mandated by Voss is

*"rooted in a recognition that there are both risks and benefits associated with many products and that there are instances in which a product's inherent dangers cannot be eliminated without simultaneously compromising or completely nullifying its benefits" (Denny v Ford Motor Co., 87 NY2d 248, 257 [1995] [emphasis added]).*

Plaintiffs do not dispute that, under the foregoing case law, they cannot prevail on their negligent design claim, as a matter of law, without demonstrating the feasibility of a safer (or, to put it better here, measurably less dangerous) alternative design for the cigarettes Norma Rose smoked. Plaintiffs argue, however, that they carried this burden by showing that, during the years Ms. Rose smoked regular Pall Mall and Benson & Hedges cigarettes, tobacco companies also marketed light cigarettes with lower levels of tar and nicotine. As plaintiffs conceded on the record at trial, they established only the technical feasibility of light cigarettes, which they claimed was all that was required. "The feasibility aspect," their counsel asserted, "is whether or not it can be made." Plaintiffs admittedly offered no evidence on the extent to which light cigarettes would have been acceptable to smokers of regular cigarettes as a substitute for the latter. Plaintiffs' counsel told the court: "[I]t's a whole different trial to determine what

is acceptable to a consumer. That's a different case tha[n] we have been trying before your Honor."

In our view, plaintiffs could not make out a prima facie case that light cigarettes were a feasible alternative to regular cigarettes without presenting evidence on consumer acceptability. Contrary to the trial court's stated view, a cigarette's function is not simply "to be lit, burned and inhaled." A person presumably could smoke lettuce if cigarettes existed only to provide the smoker with the opportunity to light up and inhale. To the contrary, the record establishes that people smoke cigarettes to obtain the additional "utility" of the taste provided by the tar and the psychological effect provided by the nicotine; in fact, one of plaintiff's experts testified that "nicotine is the product that sells cigarettes." It is undisputed that the reduced amounts of tar and nicotine in light cigarettes provide less taste and less psychological effect, respectively. It was plaintiff's burden to prove that, notwithstanding the reduced taste and psychological effect they provide, light cigarettes could feasibly serve the same function as regular cigarettes for cigarette smokers generally. Again, given the subjective nature of the benefits of smoking, the viability of light cigarettes as an alternative to regular cigarettes could not be demonstrated directly, but only through

evidence of their acceptability to consumers -- which, to reiterate, was admittedly not part of plaintiffs' case. The issue is not (as plaintiffs suggest) whether tobacco companies would make a profit, but whether the alternative product design would fulfill the public's demand.

In further considering the issue of feasibility of a safer alternative design, it must be recognized that two differently designed products that, like regular cigarettes and light cigarettes, are generally similar in function, may nonetheless yield results so different in quality as to make it impossible to characterize the design of the safer product as a feasible alternative to the design of the more hazardous product. In *Felix v Akzo Nobel Coatings* (262 AD2d 447 [1999]), for example, the plaintiff argued that a quick-drying lacquer sealer, with a highly flammable solvent base, was defective by reason of the availability of water-based lacquer sealers, which, although slow-drying, were safer. The Second Department, noting that quick-drying, solvent-based lacquer sealers "comprise approximately 95% of the lacquer sealer market" (*id.* at 448), disagreed:

"The plaintiff's own expert testified . . . that there was no way to make a quick-drying lacquer sealer offering the same results as those from solvent-based lacquer sealers using alternative fluids and that the very nature of quick-drying lacquer sealer necessitates that it contain a highly

flammable solvent. He further testified that nothing can be introduced to the formula to make it safer without creating an entirely different product. . . .

"Further, contrary to the plaintiff's contention, the evidence presented clearly shows that water-based products are not essentially the same as the solvent-based lacquer sealer at issue. The plaintiff's expert admitted that the water-based products take hours longer to dry, so that there is a functional difference. . . . Additionally, the plaintiff's expert could not name any water-based lacquer sealers matching the results obtained by the quick-drying, solvent-based lacquer sealer with respect to appearance of the finish, its hardness, and its scratch-resistant properties." (*Id.* at 448-449)

Since the record established that "the volatile solvent contained in the defendant's quick-drying lacquer sealer [was] critical to the product's performance," there was no issue as to the availability of "an alternative, safer design," and the complaint was dismissed insofar as it sought recovery based on a theory of design defect (*id.* at 449); accord *Perez v Radar Realty*, 34 AD3d 305, 306 (2007) (dismissing claim that volatile lacquer sealer was defectively designed where plaintiff "made no showing that utilization of [a] water-based sealer instead of the complained-of [volatile] lacquer-based product would be similarly efficacious"), *affg* 7 Misc 3d 1015A, 2005 NY Slip Op 50599[U] (Sup Ct, Bronx County 2005).<sup>1</sup>

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<sup>1</sup>The dissent posits that light and regular cigarettes must be deemed functionally interchangeable unless it is shown that most smokers of regulars would quit smoking if lights were the only cigarettes available. This notion is inconsistent with the

Regular and light cigarettes differ from each other, not in the nature of the relevant ingredients (as is the case with solvent-based and water-based sealers), but in the proportions of those ingredients. Still, plaintiffs in this case made no showing that regular and light cigarettes "offer[] the same results" (*Felix*, 262 AD2d at 448), or had no "functional difference" from each other (*id.*), in terms of the taste and psychological experience delivered to the consumer. To the contrary, plaintiffs' own experts apparently agreed that the great majority of smokers reject both low-tar and low-nicotine cigarettes. In any event, plaintiffs, not defendants, had the burden of production and persuasion on the issue of the feasibility of an alternative design (see *Voss*, 59 NY2d at 108 ["The plaintiff, of course, is under an obligation to present evidence that . . . it was feasible to design the product in a safer manner"]). Since, as their counsel admitted at trial, plaintiffs offered no evidence of the consumer acceptability of light cigarettes -- which was the only way to prove that light cigarettes were a feasible alternative design -- plaintiffs failed to make out a prima facie case of negligent design, and

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*Felix* and *Perez* decisions, which held that slow-drying sealers are not feasible alternatives to fast-drying sealers, notwithstanding that consumers would undoubtedly turn to slow-drying sealers if fast-drying sealers became unavailable.

were not entitled to have this claim (the only one at issue on appeal) submitted to the jury.<sup>2</sup>

Nor can it plausibly be argued that plaintiffs established defendants' liability on the ground that the cigarettes Ms. Rose smoked did not pass the three-factor test for non-defectiveness set forth in *Scarangella* (93 NY2d at 661). The *Scarangella* factors are not generally applicable in all design defect cases, but are only used to determine whether "a product without an optional safety feature is defectively designed because the equipment was not standard" (*id.*). The question of whether an optional feature should have been made standard does not arise unless the product would have served essentially the same function with or without that feature.<sup>3</sup> This was clearly true of

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<sup>2</sup>On appeal, plaintiffs point to testimony by one of their experts that low-nicotine cigarettes would "have some stimulating action, but not be addicting." Plaintiffs now assert that, to the extent they were required to prove that light cigarettes serve the function of producing a "stimulatory effect," the referenced testimony "supports the conclusion that cigarettes with nicotine levels below the addiction threshold would serve that function." The question, however, is not whether low-nicotine cigarettes would have any "stimulatory effect" at all, but whether that effect would be of sufficient magnitude to satisfy the smoking public.

<sup>3</sup>An automobile and a motorcycle are both means of motorized transportation, for example, but that does not mean that they are so interchangeable in function that a motorcycle is defective because it provides the rider with less protection than an automobile. Even plaintiffs presumably would not go so far as to argue that light cigarettes are feasible alternatives to cigars

the bus in *Scarangella* (which lacked an optional back-up alarm), but, to reiterate, plaintiffs here failed to establish that light and regular cigarettes serve the same function. The dispositive question in this case is whether these two differently designed products have the same utility for the consumer, and the *Scarangella* factors simply are not addressed to that inquiry. Thus, in *Perez v Radar Realty* (*supra*), the lacquer case in which we faced a question similar to the one presented here, we did not refer to the *Scarangella* factors.

Further, while plaintiffs and the dissent argue that evidence of the market acceptability of light cigarettes is not relevant to the issue of their feasibility as an alternative to regular cigarettes, they do not suggest any other means of proving the functional interchangeability of two products that (unlike the lacquers at issue in *Felix* and *Perez*) serve a utility that is entirely subjective. The result of plaintiffs' approach would be to assume that they have proven one element of their cause of action without presenting any evidence on it. This would be error.

It is no answer to say, as the dissent does, that, even if consumer acceptability is relevant, the evidence *defendants*

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and pipes.

proffered on that issue was insufficient to establish that light cigarettes are not a feasible alternative to regular cigarettes. It must be borne in mind that the feasibility of the alternative design was an element of *plaintiffs'* affirmative case, on which *plaintiffs* had the burden of proof. As previously discussed, consumer acceptability is the only way to demonstrate the feasibility of light cigarettes as an alternative to regular cigarettes, and plaintiffs have admitted that they presented no evidence of the acceptability of light cigarettes to consumers of regular cigarettes. Thus, whether or not the dissent is correct about the strength of defendants' evidence on consumer acceptability (and we do not think it is), plaintiffs failed to prove their case.<sup>4</sup>

The dissent also argues that plaintiffs should not be required to show the consumer acceptability of light cigarettes because the consumers in question are "nicotine addicts -- a

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<sup>4</sup>The position of plaintiffs and the dissent -- that evidence of consumer acceptability is never needed to demonstrate the feasibility of an alternative product design -- finds no support in decisions like *Voss*, which concerned products used to produce objective, physical results (e.g., the power saw in *Voss*). Given the nature of the products at issue, *Voss* and similar cases presented no occasion to discuss consumer acceptability as a measure of the feasibility of a proposed alternative product design. Again, consumer acceptability becomes relevant to the feasibility inquiry only where, as here, the product at issue is one used to produce subjective results in the user.

class of consumer created by the defendants-appellants [and other tobacco companies] through their admitted manipulation of nicotine levels."<sup>5</sup> The premise of this argument is that it is appropriate for a court, through the imposition of tort liability, to retroactively outlaw the satisfaction of the demand for a given product, notwithstanding that the satisfaction of that demand has long been consciously tolerated -- and taxed and regulated -- by the political branches of government. For the reasons that follow, we reject this premise.

It is, of course, incongruous to speak of a toxic product, which offers only fleeting sensual pleasure while sickening, disabling and killing multitudes each year, as serving a "function," or having "utility," for the consumer. Nonetheless, cigarettes plainly serve some subjective function or utility for smokers; if this were not true, the tobacco companies would

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<sup>5</sup>It is not strictly accurate to say, as the dissent seems to imply, that nicotine addiction originated with the manipulation of the nicotine levels of cigarettes. After all, it is undisputed that people were smoking cigarettes long before the 1950s and 1960s, when the tobacco industry developed the capability to adjust nicotine levels. We also note that the injured plaintiff in this case, Norma Rose, began smoking in the late 1940s, and thus had already been addicted to cigarettes for more than a decade when she began smoking the brands (Pall Malls in the 1960s and Benson & Hedges in the 1970s) for which the defendants bringing this appeal are responsible. The jury exonerated defendant R.J. Reynolds Tobacco Company, the maker of the brand Ms. Rose smoked in the 1950s (Camels).

quickly go out of business. Thus, an affirmance of the judgment holding defendants liable for the severe health effects of regular cigarettes, regardless of plaintiffs' failure to prove that any alternative product design would feasibly serve the same function, would essentially outlaw the satisfaction of the demand for any product serving that function. As a Federal judge of the Southern District of New York recently observed in rejecting an argument similar to the one made by plaintiffs here, such an "impos[ition] [of] state law tort liability on the manufacture and sale of virtually every cigarette now on the market" would constitute "a virtual ban on cigarettes, just as a requirement that allows only 'alcohol-free' liquor to be sold would be a ban on whiskey" (*Clinton v Brown & Williamson Holdings, Inc.*, 498 F Supp 2d 639, 648 [SD NY 2007]).

One could reasonably argue, on both moral and policy grounds, that regular cigarettes are so dangerous that they should be outlawed, regardless of the absence of any feasible alternative design that would serve the same function. Then again, one could also argue that the virtual prohibition of a product that has been as widely used, and for as long a period of time, as regular cigarettes, would be too costly, and too difficult to enforce, to say nothing of the fact that it could be

considered an unwarranted intrusion on individual autonomy.<sup>6</sup> Whatever position one takes on the merits of this important policy issue, we believe that whether to make as sharp a break with past practice as the one plaintiffs advocate, and to accept the undoubtedly vast social and economic consequences of such a change of course, is a political decision resting with the legislative branch of government or with regulators acting pursuant to a legislative grant of authority. The decision is not, we submit, one appropriately made by the judicial branch. According to one scholar, this is the view taken by most courts that have been presented with the issue (see Owen, *Inherent Product Hazards*, 93 Ky LJ 377, 383 [2004-2005] ["the vast majority of courts have been markedly unreceptive to the call that they displace markets, legislatures, and governmental agencies by decreeing whole categories of products to be 'outlaws'"], quoted in *Clinton*, 498 F Supp 2d at 648).

In our view, the foregoing considerations warrant reversing the judgment appealed from, and dismissing the complaint, without reaching defendants' other arguments. It is worth reiterating, however, that, on the issue of proximate cause, the record

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<sup>6</sup>As noted by Dr. Blackie, a defense expert witness quoted in the dissenting opinion, one possible consequence of prohibiting a product that has been widely used for generations is the creation of a "black market" for that product.

contains evidence suggesting, not only that light cigarettes are inherently unsafe products (which no one disputes), but that they may create even greater risk of harm by inducing smokers to "compensate" for the reduced delivery of tar and nicotine by increasing the number of cigarettes smoked, the frequency of puffing, or the depth and duration of inhalation. Plaintiffs do not identify any expert evidence in the record providing a reasoned basis for concluding that, in spite of the possibility of such "compensation," the net effect of smoking light cigarettes is, on average, to reduce the smoker's ingestion of tar and nicotine and thereby to reduce the risk of cancer. Nor do plaintiffs identify expert evidence specifically excluding the possibility that a previously nicotine-addicted person may, due to such "compensation," maintain the addiction by smoking light cigarettes with nicotine content below the generally recognized addiction threshold. In this regard, it is significant that, as previously noted, Ms. Rose was already addicted to cigarettes when she began smoking the brands of the defendants that were held liable by the jury.

For the reasons discussed above, we reverse the judgment and dismiss the complaint. Of course, since plaintiffs failed to make out a prima facie case for holding defendants liable for compensatory damages, there is no basis for the award of punitive

damages against defendant Philip Morris USA Inc.

Accordingly, the judgment of the Supreme Court, New York County (Karen S. Smith, J.), entered July 18, 2005, which, insofar as appealed from, after a jury trial, awarded plaintiffs damages against defendants Brown & Williamson Holdings, Inc. and Philip Morris USA Inc. based on a cause of action for negligent product design, should be reversed, on the law, without costs, the aforesaid defendants' motions for a directed verdict and for judgment notwithstanding the verdict granted, and the second amended verified complaint dismissed. The Clerk is directed to enter judgment accordingly.

All concur except Nardelli and Catterson, JJ.  
who dissent in an Opinion by Catterson, J.

CATTERSON, J. (dissenting)

Because I believe that consistent with well-established principles of products liability jurisprudence the plaintiffs fulfilled their burden of demonstrating that a safer alternative was not only feasible but, in fact, was manufactured, I must respectfully dissent. Evidence adduced at trial sufficiently established that the safer alternative ultra light was the same as a regular cigarette in all respects save for its non-addictive levels of nicotine and cancer-causing tar. Thus, I find no legal merit in the defendants' assertion, which the majority supports, that the plaintiffs had an additional burden to show consumer acceptability of the non-addictive product. In my view, this is nothing more than a cynical effort by the defendants to maintain the commercial advantages of continuing to sell unreasonably dangerous addictive products to addicts.

This appeal arises from a jury verdict of liability on the grounds of negligent design defect. It presents a singular issue: whether the defendant cigarette manufacturers negligently designed and marketed cigarettes containing addictive levels of nicotine, and whether the design increased the plaintiff Norma Rose's exposure to cigarette tar and known carcinogens.

In my view, the plaintiffs fulfilled their burden of showing defective design by establishing that there was a

feasible safer alternative and that the defendant manufacturers should have ceased manufacturing and marketing cigarettes with .4 milligrams of nicotine and more per cigarette (hereinafter referred to as "regular" cigarettes).

In summary, evidence adduced at trial established that the defendants knew that .4 milligrams of nicotine per cigarette was a threshold level for creating and sustaining addiction; that defendants were able to manipulate the levels of nicotine in cigarettes as far back as the 1950s and 1960s; and that defendants were able to, and in fact, did produce cigarettes with lower levels of nicotine and lesser amounts of tar (hereinafter referred to as "ultra lights").

Further, the testimony of expert witnesses established that in virtually every respect ultra lights were the same product as regular cigarettes. The essential difference lay in the different amounts of nicotine and tar, rendering ultra lights with the lesser and non-addictive levels of nicotine the safer alternative because they would not create or sustain addiction. Thus, in my opinion, the evidence established that ultra lights were a feasible safer alternative within the generally accepted meaning of feasibility.

It is the defendants' contention, however, that such a traditional analysis is insufficient. The defendants argue, and

the majority supports their view, that an additional element is required to establish feasibility in this case. Evidence notwithstanding, they argue that utility, and therefore feasibility, may only be demonstrated by evidence of consumer acceptability. Moreover, the defendants submit that they acted reasonably in marketing both regular cigarettes and ultra lights, and that they were not obligated to cease manufacturing and marketing cigarettes with addictive levels of nicotine because consumers rejected ultra lights.

I do not find this argument persuasive. First, consumer acceptability cannot be a factor in determining feasibility when the consumers are nicotine addicts -- a class of consumer created by the defendants through their admitted manipulation of nicotine levels. It is hardly illuminating that sales and marketing data would show that nicotine addicts prefer cigarettes with sufficient levels of nicotine to sustain their addiction with minimum effort. Second, much of the evidence that the defendants wanted to proffer to establish consumer rejection of ultra lights amounted to testimony of consumer complaints about taste and the difficulties with "draw." None of the proffered evidence would have established that given the choice between ultra lights or no cigarette at all, smokers would have rejected the ultra lights and quit smoking, and thus that ultra lights were unacceptable to

consumers.

Further, the uncontroverted evidence was that plaintiff Norma Rose was determined to quit smoking but that she engaged in 15 failed attempts because she was severely addicted. Thus, a jury could rationally conclude that it was the addictive level of nicotine in regular cigarettes that thwarted her attempts to quit, and so it was the design defect that led to more than 50 years' continued exposure to cancer-causing tar which was a substantial factor in causing her lung cancer.

It is undisputed that Norma Rose, now 73 years of age, began smoking cigarettes in the late 1940s. In the 1950s she became a regular smoker, preferring Camels, manufactured by R.J. Reynolds. She soon began smoking at least a pack a day. In the 1960s, she began smoking Pall Malls, manufactured by The American Tobacco Company, now non-existent by reason of merger with Brown & Williamson Tobacco Co.

She continued smoking Pall Malls until 1973 or 1974, when she began smoking filtered cigarettes. Briefly, she used two low tar brands, Merit and Vantage, but did not like their taste. She then began smoking Benson & Hedges, manufactured by defendant Philip Morris USA. Norma Rose finally quit smoking in 1993 after approximately 15 failed attempts to do so.

In 1995, she was diagnosed with lung cancer and a

related neurological condition, paraneoplastic cerebellar degeneration. The lung cancer is in remission, but she still suffers from the neurological condition, which has caused permanent brain damage.

This lawsuit was brought against six cigarette manufacturers and two tobacco-industry research organizations. Many defendants were dismissed from the action, and only Phillip Morris, R.J. Reynolds, and Brown & Williamson were remaining at the time of trial.

Ultimately, the trial proceeded on a single theory of liability with all other claims being either dismissed or withdrawn before trial. The plaintiffs alleged that the defendants negligently designed and marketed cigarettes containing addictive levels of nicotine which was a substantial factor causing plaintiff's injury because it significantly increased her aggregate exposure to cancer-causing cigarette tar. The plaintiffs' theory was that an ultra light cigarette, containing very low tar, or very little nicotine so as to be non-addictive was the reasonable feasible alternative design to the cigarettes manufactured by defendants, and that defendants should have ceased manufacturing regular cigarettes with more than .4 milligrams of nicotine per cigarette.

The trial proceeded in three phases. During Phase I, the

jury determined liability and compensatory damages. At trial, the defendants conceded that cigarettes cause cancer. The plaintiffs submitted evidence that one in every six deaths in the United States results from cigarette smoking. A 1979 Surgeon General's Report documented cigarette smoking as the single most important preventable environmental factor contributing to illness, disability and death in the United States. American Tobacco was aware as early as the 1930s that cigarette smoke contained carcinogens, and Philip Morris knew as of the 1950s that there were carcinogens and cancer promoters in cigarettes. In 1961, during a Philip Morris presentation, it was indicated that at least 40 compounds in cigarette smoke were carcinogens.

The plaintiffs proffered evidence that the greater a smoker's cumulative exposure to tar, the greater the risk of developing cancer. Conversely, less aggregate exposure to tar results in lower cancer risks. Exposure to reduced levels of tar, such as cigarettes with 5-6 milligrams of tar, in comparison with 16 or 17 milligrams of tar, results in a 20 to 50% reduction in lung cancer risk.

There was also substantial evidence as to the addictive properties of nicotine, of which the defendants were aware as of 1959. According to the plaintiffs' expert psychopharmacologist, Dr. Glassman, Mrs. Rose was "severely addicted" to nicotine.

Another plaintiffs' expert, Dr. Wigand, testified that .4 milligrams of nicotine represents a key threshold, below which cigarettes would not initiate a new addiction, and would not sustain an existing addiction. The defendants were able to design and manufacture cigarettes with less than .4 milligrams of nicotine in the 1950s and 1960s.

Notably, American Tobacco released its Carlton brand in 1964, containing .3 milligrams of nicotine. Philip Morris introduced Benson & Hedges lowest-nicotine brand, with .1 milligram of nicotine, in 1978. Both companies simultaneously continued production of brands containing higher nicotine levels.

As early as 1968, American Tobacco conducted experiments to increase nicotine content in cigarettes. Dr. Wigand testified that cigarette manufacturers added sugars and other additives to enhance the effects and release of nicotine. A 1978 Philip Morris document referred to research aimed at ensuring the total nicotine in the system remains at or near the nicotine need threshold, maximizing the proportion of the day's cigarette consumption which is smoked out of need.

After seven weeks of trial, the court denied the defendants' motion for a directed verdict. The court held that the plaintiffs had established a prima facie claim because the defendants knew that cigarettes caused lung cancer and addiction;

that at the time they had the knowledge and technical feasibility to manufacture a safer product; that they chose to continue marketing the regular (defectively designed) cigarettes; and that the defectively designed product was a substantial factor in the plaintiff's injuries. Subsequently, the jury returned a verdict for the plaintiffs, assessing damages in the amount of \$3,420,000 to be divided equally between Philip Morris and B&W. The jury found no liability against R.J. Reynolds. The defendants moved for judgment notwithstanding the verdict. The court denied this motion also finding that the defendants had failed to sustain their burden of proving either that there was no valid line of reasoning or permissible inferences which could possibly lead rational persons to the conclusion reached by the jury, or that there was no fair interpretation of the credible evidence to support the jury's verdict.

During Phase II, the jury considered punitive liability, and in Phase III, the amount of punitive damages. At the end of Phase II, the jury found that only Philip Morris was liable for punitive damages. After hearing evidence in Phase III of Philip Morris's financial structure and resources, the jury awarded the the plaintiffs \$17,100,000 in punitive damages.

On appeal, the defendants-appellants, Brown & Williamson and Philip Morris, contend that the plaintiffs failed to establish

the essential elements of their claim. They also argue that the trial court excluded key, relevant evidence including that of consumer awareness, preferences and acceptability, and improperly charged the jury during the liability phase of the trial. The defendants further submit that the plaintiffs' negligence claim, as it was sent to the jury, was preempted by federal law. Finally, defendant Philip Morris argues that the punitive damages award is not sustainable.

For the reasons set forth below, I disagree with the majority and believe we should affirm the jury verdict of liability.

In a defective design cause of action, a claim for negligent design defect is functionally synonymous with a claim for strict products liability with respect to the manufacturer. Denny v. Ford Motor Co., 87 N.Y.2d 248, 258, 639 N.Y.S.2d 250, 662 N.E.2d 730 (1995). In order to establish a prima facie case of negligent design defect, the plaintiff must prove that the manufacturer failed to exercise reasonable care in designing the product, and that he knew or should have known of the dangerous condition of the product. Giunta v. Delta Intern. Mach., 300 A.D.2d 350, 352, 751 N.Y.S.2d 512, 515 (2d Dept. 2002). To prevail in strict products liability, a plaintiff must prove that the product contained an unreasonably dangerous design defect.

Id., 751 N.Y.S.2d at 515. Thus, the plaintiff in a design defect action "must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury." Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 107, 463 N.Y.S.2d 398, 402, 450 N.E.2d 204, 208 (1983).

It is the plaintiff's obligation to present evidence that "the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." Id., at 108, 463 N.Y.S.2d at 402.

The defendant manufacturer, on the other hand, may present evidence in opposition seeking to show that the product is a safe product, - that is, "one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greater extent possible while retaining the product's inherent usefulness at an acceptable cost." Id.

The defendants conceded at trial that tar and nicotine are dangerous and that it is technologically feasible to produce a cigarette that has safer levels of tar and nicotine. Indeed, evidence showed that the defendants had manufactured and marketed safer alternatives including ultra lights with markedly lower

levels of nicotine and tar.

The defendants, however, assert that it was not feasible to cease manufacturing and marketing regular cigarettes because ultra lights do not have the same consumer acceptability. Further, they argue that they are insulated from liability because they offered consumers the safer alternatives including ultra lights alongside the regular cigarettes. For the latter assertion, the defendants rely on Scarangella v. Thomas Built Buses, 93 N.Y.2d 655, 695 N.Y.S.2d 520, 717 N.E.2d 679 (1999).

In Scarangella, an employee of a school bus company who was injured when he was struck by a bus operated in reverse, argued that a back-up alarm, which was an optional safety feature, should have been a standard feature for the bus. The Court found, as a matter of law, that where evidence and reasonable inferences show that the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and there is a well-considered decision by the buyer to dispense with the optional safety equipment this would excuse the manufacturer from liability. See also Pigliavento v. Tyler Equip. Corp., 248 A.D.2d 840, 669 N.Y.S.2d 747 (3d Dept. 1998), lv. dismissed and denied, 92 N.Y.2d 868, 677 N.Y.S.2d 773, 700 N.E.2d 312 (1998) (no negligent design where platform guardrail was available as optional equipment and 85% of concrete truck purchasers declined

this option primarily because of its tendency to catch trees); see also Jackson v. Bomag GmbH, 225 A.D.2d 879, 638 N.Y.S.2d 819 (1996), lv. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985 (1996).

Scarangella applies the fundamental precept of products liability jurisprudence holding a manufacturer liable for selling a defectively designed product "because the manufacturer is in the superior position to discover any design defects and alter the design before making the product available to the public." Scarangella, 93 N.Y.2d at 659, 695 N.Y.S.2d at 522 (internal quotation marks and citations omitted). Nevertheless, the Court found that, if three essential elements are all met, a moderately priced safety feature need not be incorporated into the product design as standard equipment, but can be offered to consumers as an add-on option. The three elements are:

(1) the buyer is *thoroughly knowledgeable* regarding the product and its use and is actually aware that the safety feature is available; (2) there exist *normal circumstances of use* in which the product is not *unreasonably dangerous* without the optional equipment; and (3) the *buyer is in a position* given the range of uses of the product, to *balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use* of the product. Id. at 661, 695 N.Y.S.2d at 525 (emphasis added).

In my view, to the extent the defendants cite Scarangella in order to assert that they satisfied their duty of care by offering safer ultra lights as an option, they clearly fail.

First, the optional safety features in Scarangella were safety devices that were added on to the standard product. In this case, nothing can be added by the consumer onto or into regular cigarettes to render them safer. Further, it was the defendants' burden to show compliance with all three of the required Scarangella elements to excuse the manufacturer from liability.

The record on appeal indicates that not one of the three essential Scarangella elements was satisfied. First, the defendants could not show that the plaintiff was "thoroughly knowledgeable" regarding the product and "in a position to balance the benefits and the risks of smoking high-yield cigarettes, so that she, not the manufacturer (of cigarettes) was in the *superior* position to make the risk-utility assessment to smoke regular cigarettes. Indeed, the evidence is directly to the contrary.

Specifically, the defendants knew by 1959 that cigarettes were addictive. At least by 1972, the industry knew that nicotine was the active addictive constituent of cigarettes. As set forth above, the defendants knew in the 1960s that cigarette smoke contained at least 40 carcinogenic compounds, possibly including nitrosamines, "the most potent carcinogens known." The industry confirmed in 1982 that nitrosamines were present in "significant amounts." The plaintiff, on the other hand, was a

consumer who typically would have received information about the hazards of smoking from the news outlets of the time, and from the warnings on cigarette packs. The warning labels were not mandatory until 1969.

The defendants argue that they were erroneously precluded from submitting evidence of consumers' knowledge of the health risks of smoking. In my opinion, the evidence properly precluded by the court included, inter alia, the defendants' "string-and-flash" 40-minute video showing every newspaper headline and TV show that purported to have any information whatsoever about tobacco at the time. Moreover, there was no attendant offer of proof that the plaintiff or any other rational consumer had actually read or seen any of this information. Second, the defendants' burden pursuant to a Scarangella analysis was to show that the plaintiff had *superior* knowledge and was in a *superior* position as a buyer to make the relevant decision as to which cigarette to purchase and smoke. Since the record clearly establishes that it was the defendants, not the plaintiffs, who were actively and extensively researching tobacco and smoking habits since the early 1930s, any conceivable suggestion that the defendants could satisfy the first and third Scarangella elements with regards to the plaintiff is patently absurd.

It is, however, the second Scarangella element that, in my

opinion, ultimately defeats any defense that the defendants have, since they cannot show that there are any "normal circumstances of use" under which regular cigarettes are "not unreasonably dangerous." The plaintiffs assert that there simply are no circumstances, normal or otherwise, when regular cigarettes are "not unreasonably dangerous." They point to the statistics in the 1989 Surgeon General's report that show, for example, that one in every six deaths in the U.S. is the result of smoking and that smoking causes 87% of lung cancer deaths.

The plaintiffs, however, cannot rest on that assertion. It is not sufficient to show that a product is dangerous. As the defendants correctly contend, manufacturing and marketing dangerous products is not per se negligent. See Forni v. Ferguson, 232 A.D.2d 176, 648 N.Y.S.2d 73 (1st. Dept. 1996); see also Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 479, 426 N.Y.S.2d 717, 720, 403 N.E.2d 440, 443 (1980) (some products, for example, knives, must by their very nature be dangerous to be functional). Instead, a defective design cause of action must establish that a product is unreasonably dangerous or "not reasonably safe" - that is, there is a substantial likelihood of harm and a feasible safer alternative design. Voss, 59 N.Y.2d at 108, 463 N.Y.S.2d at 402.

Conversely, for the defendants to succeed in their claim

that there are circumstances when regular cigarettes are "not unreasonably dangerous", they must show that there are normal circumstances when the utility of regular cigarettes outweighs the risk inherent in them. Id.; see also Rainbow v. Elia Bldg. Co., 79 A.D.2d 287, 294, 436 N.Y.S.2d 480, 485 (1981) (balancing process weighs the benefits of a particular manufacturing design against the risks of using it).

When pressed at oral argument, however, the defendants had no rejoinder to the question of what circumstances might render regular cigarettes "not unreasonably dangerous" or, in other words, when they would be "reasonably safe." Understandably so. As one federal court recently observed, defendants in tobacco cases "wish to avoid having to make the awkward argument that their product's 'utility' outweighs its risk, when their product is known to 'sicken and kill hundreds of thousands of Americans each year for the 'benefit' of satisfying an addiction.'" See Clinton v. Brown & Williamson Holdings, Inc., 498 F.Supp.2d 639, 647 (S.D.N.Y. 2007), quoting David G. Owen, Inherent Product Hazards (93 Ky. LJ 377, 381-382 (2004-2005)).

The defendants' desire to avoid that particular line of reasoning is abundantly clear in the instant case. Indeed, the defendants construct an entire defense - 120 pages of briefs and reply briefs- around the proverbial "800-pound gorilla" without

even alluding to its presence in the room. The defendants simply ignore the fact that the overwhelming majority of smokers smoke because they are addicted to nicotine.

Instead, the defendants' risk-utility assessment proceeds along the following lines:

"[P]eople smoke cigarettes because they like the taste that tar creates in the smoke", and they "desire the pharmacological effect of nicotine";

Because a sensory experience is subjective, the utility of regular cigarettes can only be demonstrated by consumer choice;

In this case, utility is unquestionably demonstrated by the fact that "many people choose to smoke [regular cigarettes] in the face of Congressional warnings and with the full knowledge of the risks including addiction";

The lesson of Scarangella ... as well as the long line of New York cases holding that it is not negligent simply to sell dangerous products - is that *consumer choice* is a critical component of the *reasonableness* of a product's risks";

Further, smokers' choice of regular cigarettes shows that while safer ultra lights are technologically feasible, it is not feasible to cease manufacturing and marketing regular cigarettes because ultra lights are not the same product;

Sales and marketing data would have provided proof of all of the above, had the trial court not erroneously excluded that evidence.

Thus, the defendants persuade the majority that regular cigarettes are "not unreasonably dangerous" because the majority of smokers, knowing they risk sickness, cancer, disability and death, nevertheless choose to smoke regular cigarettes simply because they are enjoyable, tasty and relaxing, and they cannot

get the same "benefits" from ultra lights.

First, in my view, the foregoing circumstances cannot be characterized as in any way "normal." The conduct of smokers as described is in direct contravention to normal consumer reaction. As noted, for example, in the apple/Alar scare of 1989, generally mass rejection, if not panic, follows when a product is identified as containing carcinogens or ingredients likely to cause sickness and death. See Elizabeth Whelan, The Chemical Scare: Are Politics Driving the Fear? Heritage Lecture #295, The Heritage Foundation (1990).

Second, the defendants' argument that because a cigarette's function is to provide a sensory experience its utility can only be measured by consumer choice and acceptability is, in my view, circular, self-serving, and without legal merit. While smoking can indeed be described as a sensory experience, the focus of the argument in this case - the relative levels of nicotine with their attendant amounts of tar - is a factor that does not foreclose an objective assessment as to utility or feasibility.

Both the plaintiffs and the defendants agree that the essential function of a cigarette is as a delivery system for nicotine, and that cigarettes provide "pleasure and relaxation." Both sides agree that both ultra lights and regular cigarettes deliver nicotine as well as tar. Although there was some

testimony about the differences in taste, along with the dubious assertion by the defendants that smokers "like" the taste of tar in regular cigarettes, there is no evidence in the record to suggest that an ultra light looks any different or feels any different to hold between the lips or between fingers. Nor is there any evidence that an ultra light either costs more to manufacture or to purchase. As such, an ultra light cannot be characterized as a product that is different from a regular cigarette. In this regard, the defendants', and the majority's reliance on Felix v. Akzo Nobel Coatings, (262 A.D.2d 447, 692 N.Y.S.2d 413 (2d Dept. 1999)) is misplaced. In Felix, the Court found that a water-based wood sealer offered as an alternative to an petroleum-based highly flammable product was a different product. Setting aside the fact that the plaintiff's expert testified that the alternative was a different product, in that case, in addition to the difference between the ingredients contained in the product (petroleum-based ingredients versus water), there were several other considerable differences between them including the time taken for the drying process, the look of the finished product, and a prohibitive cost difference. Additionally, the danger of explosions by using the petroleum-based wood sealer was limited to a negligible number of accidents among a very limited population. In this case, not even the

ingredients are different; the difference lies simply in the levels of nicotine and the amount of tar, that is, an ultra light contains less than .4 milligrams of nicotine per cigarette while a regular cigarette contains .4 milligrams or more of nicotine. The record shows .4 milligrams is indisputably the level that creates and sustains addiction, and so increases exposure to tar.

Consequently, consumer acceptability cannot be a measure for utility or feasibility in this case. To proffer sales and marketing data as evidence that given a choice, a smoker who is addicted to nicotine will choose a product that satisfies the addiction is, in my opinion, a tautological exercise and therefore meaningless. Second, the concept of choice is itself suspect in this situation. As the trial court aptly observed: "one who is addicted has lost the ability to make free choices concerning the substance of the addiction... By definition one who suffers from addiction is compelled to continue an activity even though he or she knows the activity is detrimental [because] even though a cigarette smoker may be made fully aware of the elevated risks, if he or she is addicted to smoking, he or she may not be making a free choice to participate in the activity of continued smoking." Rose v. Brown & Williamson Tobacco Corp., 10 Misc.3d 680, 690, 809 N.Y.S.2d 784, 792-793 (Sup. Ct. N.Y.Co. 2005).

Third, case law is replete with products liability actions where consumers have found safer alternatives "unacceptable" and have modified safety features without manufacturers or courts declaring these safer alternatives, unfeasible. See Montufar v. Shiva Automation Serv., 256 A.D.2d 607, 683 N.Y.S.2d 125 (2d Dept. 1998); Mackney v. Ford Motor Co., 251 A.D.2d 298, 673 N.Y.S.2d 718 (2d Dept. 1998); Wyda v. Makita Elec. Works, 232 A.D.2d 407, 648 N.Y.S.2d 154 (2d Dept. 1996).

In this case, while the issue of taste (the amount of tar in the cigarette) was raised in testimony as one factor that made ultra lights unacceptable, more significant was the testimony of Dr. Blackie, an expert witness for the defendants, that smokers did not like ultra lights because of the problem with "draw." In the sense that smokers complained about the effort involved in getting nicotine into their system, their "lack of acceptance" is analogous to that of workers or employers in the foregoing cases discarding or removing safety features because they slow down the work process. The decisions in those cases, however, do not reflect any support for the argument that lack of acceptance by consumers absolves the manufacturer from manufacturing the technologically feasible safer alternative, or even from warning a consumer about the danger of modifying a safety feature. See Montufar, 256 A.D.2d at 607-698, 683 N.Y.S.2d at 126.

In any event, any sales or marketing data the defendants may have submitted to the jury on the issue of consumer acceptability or preferences would merely have shown that when ultra lights and regular cigarettes were offered side by side, and incidentally at a time when consumers had little idea of the health effects, consumers *preferred* to smoke the high-yield cigarettes. Demonstrating consumer preference when options are available is a far cry from the unequivocal statement that given only one type of product, smokers would have rejected it.

In my opinion, the plaintiffs are correct in their assertion that traditional products liability jurisprudence does not require consumer acceptability to be an element proving feasibility. See Rypkema v. Time Mfg Co., 263 F.Supp.2d 687, 692 (S.D.N.Y. 2003) (a federal court applying New York law to a design defect case held that plaintiff may prove a feasible safer alternative design with evidence that such design is "within the realm of practical engineering feasibility"); see also Micallef v. Miehle Co., 39 N.Y.2d 376, 386, 384 N.Y.S.2d 115, 121 (1976) (alternative is not feasible if product was "unworkable" or so expensive as to be priced out of the market).

According to those principles, I believe the plaintiffs in this case established that there was a feasible safer alternative. The defendants agreed that a safer alternative was

technologically feasible. They argued, however, that it was not feasible to manufacture and market only the safer alternative because the safer alternative did not have the same utility as the regular cigarettes. It therefore became the defendants' burden to show that the safer alternative had not retained its inherent usefulness. See Voss, 59 N.Y.2d at 108 ([t]he plaintiff is under an obligation to present evidence that[...]it was feasible to design the product in a safer manner[...]The defendant manufacturer on the other hand may present evidence in opposition"). The defendants then argued that "inherent usefulness" or utility could only be demonstrated by evidence of consumer acceptability - an assertion with which I disagree for the reasons already noted.

The defendants further maintained that they had acted reasonably in manufacturing and marketing both regular and ultra light cigarettes because consumers rejected ultra lights and showed a clear preference for regular cigarettes. On appeal, the defendants asserted that a new trial is warranted on the grounds that the trial court excluded evidence of consumer preferences.

In my opinion, the proffered evidence which the trial court ruled out did not establish that smokers had rejected ultra lights. There was no evidence or testimony from the defendants that established that smokers would not purchase ultra lights.

Rather, the evidence proffered by the defendants established that there were characteristics that smokers did not like about ultra lights. Surveys conducted by the defendants found that safer levels of nicotine and tar "adversely affected taste." There was abundant testimony as to consumer complaints about "draw" and the inability to "get any flavor through." There was also testimony that the modifications used to make cigarettes safer "result in significant changes in the flavor and the sensory characteristics of the product[...]That's always been a problem."

At no time, however, did the defendants effectively connect the dots and offer evidence to show that smokers who were faced with purchasing either ultra lights or no cigarette at all had refused to purchase the ultra lights. In fact, as one line of questioning established, consumer acceptance, preferences and taste have little to do with feasibility where cigarettes are concerned. Upon cross-examination of Dr. Blackie, an expert witness for the defendants, the plaintiffs established that during the 1960s, most smokers preferred unfiltered cigarettes to cigarettes with filters which reduced carcinogens. Dr. Blackie testified that therefore the unfiltered cigarettes were "considerably more feasible." She then stated, "consumers wanted to buy [unfiltered cigarettes] and[...]nobody was telling us to stop making them." The cross-examination also established that

over a period of time the market "dramatically switched" and that there was "a significant swing from non-filtered cigarettes to filtered cigarettes." The following Q and A then ensued:

Plaintiff: That's proof that it [the filtered cigarette] was feasible, right?

Dr. Blackie: No, it's not. Because if you ask consumers to change tastes dramatically from one day to the next, what other countries experience has shown you end up with a black market for the products that they want. And, so they tend to go and buy overseas or they have cigarettes shipped in from another country... Whether that would have happened in this particular case... nobody can say... But, it's entirely possible[...]"

Based upon the foregoing, it is evident that had tobacco litigation existed in the 1960s, manufacturer-defendants would have argued that filtered cigarettes were not a feasible alternative because consumers "wanted" to buy non-filtered. Today, not even the defendants in the instant case attempt to claim that a filtered regular Marlboro is not functionally interchangeable with a non-filtered Camel.

What then should one effectively make of their argument that cigarettes manufactured with reduced carcinogen levels and lower nicotine yields are likewise not feasible alternatives because the overwhelming majority of smokers "want" regular cigarettes?

Specifically, what should be made of such an argument when the further testimony of Dr. Blackie ("[y]ou train the consumer to accept new products") indicates that consumer tastes are nothing more than sensory experiences that can be influenced and molded by manufacturers?

I would therefore find "there is *no justification* for departure from the accepted rationale imposing strict liability upon the manufacturer because it 'is in the superior position to discover any design defects.'" See Scarangella 93 N.Y.2d at 661, quoting Voss, 59 N.Y.2d at 107 (emphasis added).

If there is any argument at all to be made about ultra lights lacking the inherent usefulness of regular cigarettes or lacking the "ingredient critical to performance", then it must be made in context. The sole utility of regular cigarettes is to satisfy an addiction which, albeit an addiction to a legal substance, nevertheless increases exposure to cancer-causing tar.

However, that should not help the defendants in this negligent design defect action where the focus must move to the conduct of the manufacturer, and the question of whether the manufacturer acted unreasonably in designing the product. See Gonzalez v. Morflo Indus. Inc., 931 F.Supp. 159, 165 (E.D.N.Y. 1996) ("the focus shifts from whether the product as designed was not reasonably safe to whether the manufacturer was aware of that

condition and chose to market the product anyway").

The record shows that the defendants possessed information about the reasons for smoking as far back as the 1950s. One exhibit, a 1959 report aimed at discovering why people smoke or do not smoke, showed that available data suggested the following physiological reasons why people smoked: gratification of senses such as oral and digital satisfaction, and stimulation or relaxation; and it suggested the following psychological reasons: conformity, sociability, sophistication, ritual, mimicry, and boredom.

The defendants conceded that their research established that nicotine was a "major pharmacological substance in tobacco smoke"; that nicotine satisfaction was the dominant desire of smokers; and that .4 milligrams was the tolerance level below which the addiction process does not start.

Further, evidence showed that Phillip Morris had aimed its research at establishing that level of nicotine that was required to cause addiction. Testimony was also elicited as to the defendants' manipulation of nicotine levels after determining the level needed to keep smokers addicted. An expert for the plaintiffs, Dr. Wigand testified that, "nicotine is the product that sells cigarettes *and unless you keep people addicted, you cannot sell cigarettes.*" (Emphasis added).

Thus, it is clear from the record that a cigarette could be manufactured to deliver more or less nicotine with greater or lesser attendant levels of cancer-causing tar depending on the purpose for which it was to be smoked. However, after the defendants discovered that .4 milligrams was the threshold level to sustain addiction, they chose to manufacture not the lower level product, but one that delivered nicotine at addictive levels thereby creating for themselves a captive commercial market.

If, as defendants now assert, an ultra light does not serve the same function as a regular cigarette, it is because the defendants manipulated the product so that the function became almost exclusively to satisfy addiction, and it is clear that the defendants were not interested in those consumers who would smoke a cigarette "for other aspects" that would allow them to take or leave the smoking habit.

Proximate cause:

The defendants further argue that the plaintiffs failed to prove that the failure to adopt the proffered alternative design caused the plaintiff Norma Rose's injuries. The defendants assert that the plaintiffs were required to show that the design caused her cancer rather than the cigarettes themselves. The defendants further state that there was no proof that the difference in the

tar and nicotine yields between the brands was a substantial contributing cause. The defendants point to the plaintiffs' own expert acknowledging that ultra lights are unsafe, and contend that evidence was adduced that smokers of ultra lights sometimes compensate by smoking more cigarettes .

It is true that proximate cause in a products liability case serves a different role than in a case sounding in negligence because the cause of action seeks to impute liability to the manufacturer not on the basis of its negligence but because the product is not reasonably safe as it was designed. Voss, 59 N.Y.2d at 110; 463 N.Y.S.2d at 403. Thus, in order to impose liability on the manufacturer, the plaintiff's burden is to tie the design defect of the product to the injury - that is, the plaintiff must show that the design defect in the product was a substantial factor in causing his or her injury. Id.

In this case, however, I believe the defendants miss the point because the plaintiffs' theory is not that the safer design would have delivered less tar and nicotine, and thus less exposure to carcinogens. Rather, the plaintiffs' theory is that because the design was defective in maintaining the level of nicotine at an addictive level it caused Norma Rose to *continue smoking* and thus continued her exposure to cancer-causing carcinogens which, in fact, caused her cancer.

Additionally, the plaintiffs assert that the defendants should have ceased manufacturing and marketing the defectively designed cigarettes. Consequently, the plaintiffs did not have to establish that Norma Rose would have smoked the safer cigarette (there would have been no other kind). Nor were they obligated to present expert evidence to exclude the possibility that she could have maintained her addiction on ultra lights by smoking more given that the evidence indisputably established that Norma Rose wanted to quit smoking, and attempted to do so 15 times. Her testimony further established that when she tried to quit she exhibited all the characteristics of a severely addicted smoker including being "very nervous", "very nasty" and preoccupied with smoking. In my opinion, the evidence was sufficient to demonstrate that Norma Rose's undisputed genuine, recurring desire to quit would not have been thwarted by her addiction if her addiction was non-existent or not sustainable on ultra lights. In turn, had she been able to quit when she desired, her exposure to cancer-causing tar would have been terminated.

"Proximate cause is a question of fact for the jury where

varying inferences are possible." Mirand v. City of New York, 84 N.Y.2d 44, 51, 614 N.Y.S.2d 372, 376 (1994), citing O'Neill v. City of Port Jervis, 253 N.Y. 423, 433, 171 N.E. 694, 697 (1930); see Nowlin v. City of New York, 81 N.Y.2d 81, 89, 595 N.Y.S.2d 927, 931, 612 N.E.2d 285, 289 (1993); Mercado v. Vega, 77 N.Y.2d 918, 920, 569 N.Y.S.2d 595, 596, 572 N.E.2d 36, 37 (1991). Given that causation is an inherently factual issue, "[a]s a general rule, the question of proximate cause is to be decided by the finder of fact, once negligence has been shown." Equitable Life Assur. Soc. Of U.S. v. Nico Constr. Co., 245 A.D.2d 194, 196, 666 N.Y.S.2d 602, 604 (1<sup>st</sup> Dept. 1997); see Mortensen v. Memorial Hosp., 105 A.D.2d 151, 157, 483 N.Y.S.2d 264, 269 (1<sup>st</sup> Dept. 1984); McKinnon v. Bell Sec., 268 A.D.2d 220, 221, 700 N.Y.S.2d 469, 471 (1<sup>st</sup> Dept. 2000). Further, a jury's causation finding should stand unless there is simply no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury on the basis of evidence presented at trial. See Cohen v. Hallmark Cards, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 285, 382 N.E.2d 1145, 1148 (1978).

In my view, the factual record here was more than sufficient to support a rational conclusion that the negligent design at issue - high-yield cigarettes containing .4 milligrams or more

nicotine - was a substantial factor in causing Norma Rose's exposure to the tar in the cigarettes she smoked for more than four decades. This in turn caused her lung cancer and her brain injuries. It is undisputed that cigarette tar contains especially powerful carcinogens and the more cumulative exposure to tar, the greater the cancer risk. Conversely, less aggregate exposure to tar results in substantially lower cancer risk.

There is no dispute that the cigarettes the plaintiff smoked contained levels of nicotine well above the addictive threshold, and that that nicotine caused her to become severely addicted. Both the strength of her addiction and her motivation to stop smoking were demonstrated by her approximately 15 failed attempts to stop smoking in the late 1970s and early 1980s.

Thus, the record contains evidence from which rational inferences could be drawn that the unreasonably unsafe design at issue here - cigarettes with .4 milligrams or more of nicotine - (1) resulted in the maintenance of Norma Rose's nicotine addiction, which (2) compelled her to continue smoking high-yield cigarettes despite her motivation and serious attempts to quit, and/or to smoke more cigarettes than she otherwise would have in order to satisfy the addiction, and (3) thus significantly increased her exposure to the cigarette tar which, it is undisputed, caused her cancer. Conversely, the jury could

rationally conclude that if the cigarettes Norma Rose smoked had contained less than .4 milligrams of nicotine, her addiction would not have been sustained and either her efforts to quit smoking would have succeeded or she would have smoked far fewer cigarettes, thereby substantially lowering her cancer risk.

Federal preemption:

The defendants claim, and the majority supports their view, that the trial court's finding of liability on the negligent design defect claim effectively bans the sale of all cigarettes currently on the market in New York State, and that such ban is preempted by federal law. See e.g., Geier v. American Honda Motor Co., 529 U.S. 861, 120 S.Ct 1913, 146 L.Ed.2d 914 (2000) (common-law tort action alleging that automobile manufacturer was negligent in failing to equip automobile with driver's side airbag was preempted in that it actually conflicted National Traffic and Motor Vehicle Safety Act, requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles).

The defendants assert that Congress has foreclosed a cigarette ban (see Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)), instead regulating cigarette sales by imposing

requirements for labeling and advertising. See Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. § 1331, et. seq. The defendants claim that allowing the plaintiffs to recover damages based upon the dangers inherent in tobacco products would preclude the defendants from selling virtually all cigarettes currently on the market. See e.g., Conley v. R.J. Reynolds Tobacco Co., 286 F.Supp.2d 1097, 1107-1108 (N.D. Cal. 2002) (claims were preempted to the extent that they relied on design defect so inherent in tobacco products that its removal was not scientifically or commercially feasible); Insolia v. Philip Morris Inc., 128 F.Supp.2d 1220, 1224 (W.D. Wisc. 2000) (Congress's considered decision that sale of cigarettes was not illegal and was part of market that government supported preempted state law negligence claim against tobacco manufacturers based on their continuing to manufacture and sell cigarettes once they realized danger that cigarettes posed, even though no statute or regulation explicitly preempted such claims).

I find the defendants' contentions to be unpersuasive. "Under the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, [2]), state law may be preempted in three circumstances: first, through express statutory language; second, when it regulates conduct in a field that Congress intended the

Federal Government to occupy exclusively; and third, when it actually conflicts with federal law. Feldman v. CSX Transp. Inc., 31 A.D.3d 698, 701, 821 N.Y.S.2d 85, 88 (1<sup>st</sup> Dept. 2006). The defendants do not point to express statutory language of preemption. Further, although there is federal regulation of labeling and advertising (15 U.S.C. § 1331 et. seq.), there is no federal regulation of tar and nicotine content in cigarettes. Cf. Cipollone v. Liggett Group Inc., 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (state failure to warn claims against cigarette manufacturers were preempted by Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969).

In my opinion, contrary to the defendants' contentions, Congress's omission in not wholly banning cigarettes or regulating tar and nicotine levels cannot serve to preempt state law tort claims premised on their danger to the public. Finally, there is no actual conflict with federal law, since there is no law on the subject matter serving as the basis of this lawsuit.

In Food & Drug Admin. v. Brown & Williamson Tobacco Corp., (529 U.S. 120, 120 S.Ct. 1291, 14 L.Ed.2d 121 (2000)) the Supreme Court held that the FDA lacked authority under the Federal Food, Drug & Cosmetic Act, to regulate tobacco products as customarily marketed, primarily because FDA regulation would result in a

cigarette ban given the FDA's mandate under the statute. The Court found that Congress, by regulating advertising and labeling under a separate legislative directive, had not intended the FDA to regulate this subject matter under the Federal Food, Drug & Cosmetic Act. Clearly, this case did not foreclose state tort claims on defective products.

Further, in my view, the damages award in this case is not, synonymous with a ban on cigarettes. Instead, it holds the defendants liable for a failure to limit dangerous ingredients in their products, i.e., failure to sell a safer product. See Conley v. R.J. Reynolds Tobacco Co., 286 F.Supp.2d 1097, 1107-1108 (N.D. Cal. 2002) (to the extent that claims targeted design defect in manufacturers' cigarettes which was scientifically and commercially feasible to remove from products used by smoker before his death, state-law design defect claims against cigarette manufacturers were not preempted, through conflict preemption, based on congressional policy precluding complete ban of tobacco products, inasmuch as successful claims would result in ban only as to those products which suffered from defective design, and thus involved only selective regulation of tobacco products). Thus, I would find that negligent design cases like this one against cigarette manufacturers are not preempted by federal law.

Punitive damages:

Finally, Philip Morris contends that its conduct in marketing different cigarette brands with a range of tar and nicotine yields cannot subject it to punishment in New York. Philip Morris argues that, as a matter of due process, an award of punitive damages cannot be based upon conduct that it could reasonably have believed to be lawful. On this issue, I agree with the defendant.

To warrant an award of punitive damages, there must be proof of recklessness, or a conscious disregard of the rights of others. See Hartford Acc. & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737 (1979). It is also well settled that punitive damages may not be premised upon mere negligence. See Everett v. Loretto Adult Community, Inc., 32 A.D.3d 1273, 822 N.Y.S.2d 681 (4<sup>th</sup> Dept. 2006); Morton v. Brookhaven Memorial Hosp., 32 A.D.3d 381, 820 N.Y.S.2d 294 (2d Dept. 2006) ("[p]unitive damages are recoverable where the conduct in question evidences a high degree of moral culpability, or the conduct is so flagrant as to transcend mere carelessness, or the conduct constitutes willful or wanton negligence or recklessness) (internal quotation marks and citations omitted).

In this case, the record established that Philip Morris was aware that cigarettes caused cancer, and were addictive. They

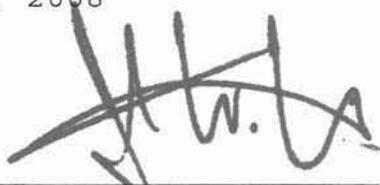
knew the threshold for a smoker's need, and could control the precise levels of nicotine in cigarettes. Further, Philip Morris continued to sell cigarettes with nicotine above the addictive threshold, and the plaintiffs presented documentation where Philip Morris set this as its goal. Thus, there was evidence to suggest that the defendant consciously disregarded the health risks posed to billions of consumers.

Nevertheless, Philip Morris's conduct in marketing different cigarette brands with a range of tar and nicotine yields cannot subject it to punishment under New York law. As a matter of due process, an award of punitive damages cannot be based upon conduct - such as that at issue here - that the defendant could reasonably have believed to be lawful. In BMW of N. Am., Inc. v. Gore, (517 U.S. 599, 574, 116 S.Ct 1589, 1598, 134 L.Ed.2d 809, 826 (1996)), the Supreme Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice... of the conduct that will subject him to punishment." See also Bouie v. City of Columbia, 378 U.S. 347, 355, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894, 900 (1964) (when punishment is imposed based on novel construction of statute, "the effect is to deprive [defendant] of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime").

Philip Morris did not have "fair notice" that the conduct at issue in this case might result in severe punishment. Indeed, the verdict in this case is novel. Congress not only has made a purposeful choice to regulate sales and advertising rather than to bar the sales of regular cigarettes, but has also blocked attempts to regulate tar and nicotine levels. The Surgeon General has never recommended removing regular-yield cigarettes from the market. No state or federal legislator or regulator has ever adopted a rule banning or restricting full-flavored cigarettes. And until this case, no court had ever held any tobacco manufacturer liable simply for continuing to sell regular brands, much less suggested that such conduct was punishable. In my view, punitive damages may not be imposed under such circumstances.

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

ENTERED: APRIL 10, 2008



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.  
James M. Catterson  
James M. McGuire  
Bernard J. Malone, Jr., JJ.

1616  
M-5044 & 5264  
Index 603652/05

\_\_\_\_\_x  
Freeford Limited,  
Plaintiff-Respondent,

-against-

Lane P. Pendleton, et al.,  
Defendants-Appellants,

John Does 1 through 10,  
Defendants.

\_\_\_\_\_x

Defendants appeal from an order of the Supreme Court,  
New York County (Helen E. Freedman, J.),  
entered on or about July 10, 2006, which  
denied their motion to dismiss for lack of  
personal jurisdiction, prior action pending  
and forum non conveniens. Motions seeking  
leave to file supplemental brief and leave to  
file responsive supplemental brief granted.

Hoguet Newman Regal & Kenney, LLP, New York (John J. Kenney, Tai-Heng Cheng and Juan A. Skirrow of counsel), and Bondurant, Mixson & Elmore, Atlanta, GA (Steven J. Rosenwasser of counsel), for Lane P. Pendleton, appellant.

Hangley Aronchick Segal & Pudlin, Philadelphia, PA (Zachary R. Davis of counsel), and Debevoise & Plimpton LLP, New York (Robert H. Chandler of counsel), for Kirk Pendleton, Laird P. Pendleton, Cairwood Capital Management, LLC, Cairwood Capital Partners, LLC, Cairwood Capital International, Ltd., and Cairwood Group, LLC, appellants.

LeBoeuf, Lamb, Greene & MacRae, LLP, New York (John G. Nicolich and Jaime M. Jackson of counsel), for respondent.

CATTERSON, J.

The underlying action for, inter alia, fraud and breach of contractual obligations and fiduciary duties arises out of a series of agreements between the plaintiff and a stupefying array of corporate entities and individual, but related, participants. The agreements made between 2000 and 2003 relate to the structure and financing of Orient Network Holdings Ltd., a Cayman Island corporation, with its principal place of business in Singapore. The plaintiff Freeford Limited (hereinafter referred to as "Freeford") is an investment company whose sole director at all relevant times was Karim Karaman, a London resident. Between 2000 and 2003 Freeford made substantial investments totaling \$4.75 million in Orient Holdings.

The defendant corporate entities are collectively known as the Cairwood Entities. The defendant Lane P. Pendleton controls or has interests in defendants Cairwood Capital Management, LLC (hereinafter referred to as "Cairwood Management"), Cairwood Capital Partners LLC (hereinafter referred to as "Cairwood Partners"), Cairwood Capital International, Ltd. (hereinafter referred to as "Cairwood International"), and Cairwood Group, LLC (hereinafter referred to as "Cairwood Group"), as well as other Cairwood entities. Cairwood Entities owned substantial shares of Orient Holdings. At all times, Lane Pendleton was co-

chairman and executive director of Orient Holdings, which he controlled through Cairnwood Entities and as Cairnwood International's CEO and managing director.

Defendant Kirk Pendleton was the chief executive and chairman of Cairnwood, Inc., and held interests in various Cairnwood Entities. Defendant Laird Pendleton held interests in various Cairnwood Entities, and was a principal of Cairnwood Group. Both individual defendants were involved in the business affairs of Orient Holdings.

At the crux of this appeal on the issue of personal jurisdiction are five separate agreements, all of which include a forum selection clause binding the parties to the jurisdiction of New York courts. In October 2000, Freeford made a \$1 million investment in Orient Holdings pursuant to "the 2000 Stock Purchase Agreement." The parties to the 2000 Stock Purchase Agreement were Orient Holdings and approximately 20 investors, including Freeford. None of the defendants were parties to that agreement.

In January 2002, Freeford entered into the 2002 Shareholders Agreement wherein it consented to the conversion into Class B Preferred Shares of a \$1 million promissory note it was holding as a result of an additional \$1 million loan it made to Orient Holdings in September 2001. The parties to this agreement, among

others, were Orient Holdings, a new investor Newco also known by the name of Alexandrite International Finance Ltd. (Alexandrite) and certain existing investors that included Freeford and defendants-appellants Cairnwood Partners and Cairnwood Group. None of the other defendants were parties to this agreement although Lane Pendleton signed in his representative capacity for various Cairnwood entities.

The purpose of the 2002 Shareholders Agreement was to set forth how Orient Holdings would be managed, and to delineate the rights and duties of the shareholders of Orient Holdings. The 2002 Shareholders Agreement included the following clauses:

"(D) Pursuant to a Share Purchase Agreement to be entered into today, [Alexandrite] will subscribe for the issue of B Preferred Shares. *Various Existing Investors will also be converting existing Convertible Promissory Notes into B Preferred Shares.*" (Emphasis added).

"(G) The Founders and the Existing Investors have agreed to replace the Former Shareholders' Agreements in their entirety with the provisions as set out in the Agreement and to *enter into this Agreement as an inducement to the investment by [Alexandrite] in the Company.*" (Emphasis added).

On the same day, Lane Pendleton and Cairnwood Management, as well as Orient Holdings and Alexandrite, entered into the 2002 Stock Purchase Agreement pursuant to which Alexandrite invested

approximately \$7.5 million in Orient Holdings for approximately 4 million Class B Preferred Shares. This agreement also referred to the contemporaneous conversion of a number of promissory notes held by existing investors including Freeford. Moreover, the agreement plainly contemplated the delivery of the conversion notices to Alexandrite at closing as a condition of the deal. A number of provisions in the agreement indicate that the parties incorporated the 2002 Shareholders Agreement into the 2002 Stock Purchase Agreement.

In 2003, on the basis of further numerous written and oral communications between Freeford and Lane Pendleton, Freeford entered into "the 2003 Stock Purchase Agreement" and "the 2003 Shareholder Agreement." The parties to the 2003 Stock Purchase Agreement included Freeford, Orient Holdings, and a Cairwood entity controlled by Lane Pendleton called Newfirst Limited. The parties to the 2003 Shareholders Agreement include Freeford, Orient Holdings, Cairwood Partners and Cairwood Group, and several other Cairwood entities, including Newfirst Limited. Lane Pendleton did not sign either agreement in his personal capacity.

In effect, of the five agreements containing forum-selection clauses subjecting the parties to jurisdiction in the courts of New York, Freeford signed four. Cairwood Partners and Cairwood

Group signed both the 2002 Shareholders Agreement and the 2003 Shareholders Agreement. Lane Pendleton and Cairnwood Management each signed one, the 2002 Stock Purchase Agreement, which was the only agreement to which Freeford was not a party. Cairnwood International, Kirk Pendleton and Laird Pendleton did not sign any of the five agreements.

Subsequently, Freeford commenced an action against the defendants alleging fraudulent inducement to purchase securities and to loan money to the now insolvent Orient Holdings, breach of contract and breach of fiduciary duty. The complaint alleges that these wrongs arise out of the various agreements described above. The defendants did not argue the validity of the causes of actions but moved to dismiss Freeford's complaint pursuant to CPLR 3211(a) on the grounds of lack of personal jurisdiction, the "first filed" rule,<sup>1</sup> and forum non conveniens.

The court denied the motion on the basis that it found personal jurisdiction with respect to all seven of the defendants under the choice of forum provisions of General Obligations Law § 5-1402.

For the reasons set forth below, we modify. As a threshold

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<sup>1</sup>Freeford commenced a separate action in Singapore against Lane Pendleton, Newfirst Ltd., and Cairnwood International prior to the action in New York.

matter, since none of the parties reside in New York and none of the alleged conduct took place in New York, it is undisputed that there is no other basis to extend jurisdiction over this action other than through enforcement of one or more of the forum selection clauses. Section 5-1402 provides for enforcement of forum selection clauses found in contracts worth over \$1 million, even among foreign parties, but only if the parties submit to jurisdiction in New York. Specifically, section 5-1402(1) provides:

"[A]ny person may maintain an action or proceeding against a ... non-resident... where the action or proceeding arises out of or relates to any contract... covering in the aggregate, not less than one million dollars, and ... which contains a provision or provisions whereby such ... non-resident agrees to submit to the jurisdiction of the courts of this state."

The motion court therefore correctly found that jurisdiction exists over Cairnwood Partners and Cairnwood Group under General Obligations Law § 5-1402 because they were parties to the 2002 Shareholders Agreement to which Freeford was also a party. Since the forum selection clause in that agreement extends to any controversy "arising out of or relating to this agreement" the court properly found that it covered the allegations in this case.

Jurisdiction over the remaining defendants is more

problematic. The motion court held that the 2002 Shareholders Agreement and the 2002 Stock Purchase Agreement should be treated as one. The court employed this conclusion for further holding that Lane Pendleton and Cairnwood Management (signatories to the 2002 Stock Purchase Agreement) consented to the forum selection clause contained in the 2002 Shareholders Agreement, an agreement that neither Lane Pendleton nor Cairnwood Management signed. Alternatively, the court held that the forum selection clause contained in the 2002 Shareholders Agreement binds Lane Pendleton and Cairnwood Management because of their close relationships to Cairnwood Partners and Cairnwood Group, both of which are parties to the 2002 Shareholders Agreement.

Furthermore, the motion court found that it also had jurisdiction over Kirk Pendleton and Laird Pendleton, because they were closely related to the parties<sup>2</sup> such that it was foreseeable that they would be bound by the forum selection clause. Finally, the court determined that it had jurisdiction over Cairnwood International because it was an aider and abetter of the actions of the other defendants.

On appeal, Laird Pendleton, Kirk Pendleton and Cairnwood

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<sup>2</sup>The court refers to Laird Pendleton's relationship with Cairnwood, Inc. but Cairnwood, Inc. did not sign any the agreements involved in this case nor was it named as a defendant in the action.

International correctly argue that there is no basis for jurisdiction over them because they did not sign any agreement containing a forum selection clause consenting to jurisdiction in the courts of New York, nor were they "closely related" to any party involved in the action. Laird Pendleton, Kirk Pendleton and Cairnwood International also correctly argue that in light of the fact that no conspiracy is alleged in the complaint, there is no possible way that they were "co-conspirators" and thus bound by any of the forum selection clauses agreed to by the other defendants in the case.

Lastly, Lane Pendleton and Cairnwood Management argue that there was no consent to jurisdiction in New York simply because the 2002 Shareholders Agreement is incorporated by reference in the 2002 Stock Purchase Agreement. Lane Pendleton asserts that the agreements had different purposes and different parties, that the forum selection clauses are independent and cannot be conflated.

The question raised at oral argument on this appeal, and subsequently briefed by the plaintiff and the defendants, is whether Freeford was made a party to the 2002 Stock Purchase Agreement by virtue of the incorporation so as to afford it the benefit of the forum selection clause.

In their supplemental briefs, Lane Pendleton and Cairnwood

Management argue that incorporation provisions do not create privity of contract between parties to separate agreements. Lane Pendleton asserts that since there is no agreement with a New York forum selection clause which both he and Freeford are parties, Freeford may not enforce the forum selection as a non-party.

Freeford argues that by executing the 2002 Stock Purchase Agreement which incorporated the 2002 Shareholders Agreement, Lane Pendleton and Cairwood Management consented to the jurisdiction of the New York courts for any suit relating to 2002 Shareholders Agreement. Freeford also argues in its supplemental brief that the dealings and relationships between Lane Pendleton and Freeford were so closely related that they "approach privity" and so Freeford has the right to enforce the forum selection provisions against Lane Pendleton.

The defendants correctly submit that generally only parties in privity of contract may enforce terms of the contract such as a forum selection clause found within the agreement. ComJet Aviation Mgt. v. Aviation Invs. Holdings, 303 A.D.2d 272; 758 N.Y.S.2d 607 (1<sup>st</sup> Dept. 2003). The defendants are also correct that incorporation by reference does not per se establish privity between the parties to both contracts. But see, Greene's Ready Mixed Concrete Co., v Fillmore Pacific Assoc., 808 F.Supp 307

(S.D.N.Y. 1992) (promissory notes, security agreement and subscription designated New York as the forum state but the guaranties did not: nevertheless guaranties subjected guarantors to jurisdiction in New York because guaranties referred to the contract wherein New York forum selection clause appeared]. In any event, the defendants' reliance on U.S. Steel Corp. v. Turner Const. Co., (560 F. Supp. 871 (S.D.N.Y. 1983)), is inapposite here. In that case, the issue was whether the plaintiff, a party to a subcontract that was incorporated by reference into the primary contract, was bound by a clause in the primary contract to which it was not a party. Here, the issue is whether a non-party Freeford can bind Lane Pendleton and Cairnwood Management to the forum selection clause found in the subsidiary 2002 Stock Purchase Agreement rather than the primary 2002 Shareholders Agreement.

We find that there are three sets of circumstances under which a non-party may invoke a forum selection clause: First, it is well settled that an entity or individual that is a third-party beneficiary of the agreement may enforce a forum selection clause found within the agreement. See ComJet Aviation Mgt., 303 A.D.2d at 272; 758 N.Y.S.2d at 608. Second, parties to a "global transaction" who are not signatories to a specific agreement within that transaction may nonetheless benefit from a forum

selection clause contained in such agreement if the agreements are executed at the same time, by the same parties or for the same purpose. See PT. Bank Mizuho Indonesia v. PT. Indah Kiat Pulp & Paper Corp., 25 A.D.3d 470, 471, 808 N.Y.S.2d 72, 73 (1<sup>st</sup> Dept. 2006). Third, a nonparty that is "closely related" to one of the signatories can enforce a forum selection clause. See ComJet Aviation Mgt., 303 A.D.2d at 273; 758 N.Y.S.2d at 608; Direct Mail Prod. Servs. Ltd. v. MBNA Corp., 2000 WL 1277597, 2000 US Dist LEXIS 12945 (S.D.N.Y. 2000). The relationship between the nonparty and the signatory in such cases must be sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them.

In this case, we find that the plaintiff does not qualify as a third-party beneficiary. At most, the plaintiff, as an existing investor, might be an incidental beneficiary who presumably would gain a pecuniary benefit from the additional investment in the corporation pursuant to the 2002 Stock Purchase Agreement. However, there is no clear intention to confer the benefit of the promised performance on Freeford itself. See State of Cal. Pub. Employees Retirement Sys. v. Shearman & Sterling, 95 N.Y.2d 427, 434-436, 718 N.Y.S.2d 256, 259-260, 741 N.E.2d 101, 104-105 (2000). Certainly, Freeford cannot establish that the benefit to it is "sufficiently immediate, [...] to indicate the

assumption by the contracting parties of a duty to compensate [it] if the benefit is lost." Id. at 434-435; See also Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 43-46, 495 N.Y.S.2d 1, 4-6, 485 N.E.2d 208, 211-213 (1985).

We find, however, that the plaintiff may invoke the forum selection clause of the Stock Purchase Agreement on the grounds of the two agreements being part of a "global transaction." In PT. Bank Mizhuo Indonesia, (25 A.D.3d at 471, 808 N.Y.S.2d at 73), we stated, "[o]ccasionally, parties to a global transaction who are not signatories to a specific agreement within that transaction may nonetheless benefit from a selection clause contained in such agreement." We decline to hold that a "global transaction" necessarily requires the absolute identity of all signatories to the individual component agreements. Here, the agreements were executed on the same day and were essentially executed for the same purpose: to secure financing for Orient Holdings. The 2002 Shareholders Agreement and the 2002 Stock Purchase Agreement were parts of a single business transaction. The explicit language in the 2002 Shareholder's Agreement stating that the existing investors are entering into the agreement as an "inducement" for Alexandrite's investment taken together with the language of the 2002 Stock Purchase Agreement where the conversion notices are to be delivered to Alexandrite as a

condition of closing makes it clear that the two agreements qualify as parts of a "global transaction." Additionally, Lane Pendleton states in his brief that the purpose of the Stock Purchase Agreement was to effectuate financing through four million plus shares at \$1.41 per share by Alexandrite and "to set forth that holders of promissory notes not parties thereto would convert their notes to shares pursuant to other agreements."

Moreover, we find that Freeford may invoke the forum selection clause found in the 2002 Stock Purchase Agreement by virtue of its close relationship with Lane Pendleton and Cairnwood Management, both signatories to the 2002 Stock Purchase Agreement. It is well established that a non-signatory may invoke a forum selection clause if the relationship between the nonparty and the signatory is sufficiently close so that the nonparty's enforcement of the forum selection clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound. See Direct Mail Prod. Servs. Ltd., 2000 WL 1277597, \*3-5, 2000 U.S. Dist. LEXIS 12945, \*7-14 (S.D.N.Y. 2000); see also Dogmoch Int'l Corp. v. Dresdner Bank AG, 304 A.D.2d 396, 397, 757 N.Y.S.2d 557, 558 (1<sup>st</sup> Dept. 2003). In discerning whether parties are "closely related," the U.S. Court of Appeals for the Second Circuit has looked to whether the non-signatory "[is an] intended beneficiar[y] entitled to enforce"

the clause in question..." Direct Mail Prod. Servs. Ltd., 2000 WL 1277597, \*3, 2000 U.S. Dist. LEXIS 12945, \*8-9 quoting Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1358 (2d Cir. 1993), cert denied, 510 U.S. 945, 114 S.Ct. 385, 126 L.Ed.2d 333 (1993). However, third-party beneficiary status is not required. See Nanopierce Tech. Inc. v. Southridge Capital Mgt. LLC, 2003 WL 22882137, \*5, 2003 U.S. Dist. LEXIS 21858, \*17 (S.D.N.Y. 2003) ("[w]hile it may be true that third-party beneficiaries to a contract would, by definition, satisfy the "closely related" and "foreseeability" requirements, a third party beneficiary status is not required") (internal quotations marks and citation omitted).

Even a cursory examination of these two agreements makes clear that Lane Pendleton and Cairnwood Management had every reason to foresee that Freeford would seek to enforce the forum selection clause against them. Freeford's involvement in the 2002 Stock Purchase Agreement was hardly peripheral, particularly in light of Freeford's agreement to execute a conversion notice as an inducement for Alexandrite to enter the contract.

Finally, the court properly declined to dismiss on forum non conveniens grounds, inasmuch as the action concerns a contract to which General Obligations Law § 5-1402 applied. See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley, 257 A.D.2d 228,

230-31, 690 N.Y.S.2d 57, 59 (1<sup>st</sup> Dept. 1999).

The defendants' claim that the action must be dismissed on the grounds of a prior action pending was not raised in their briefs and is thus deemed abandoned. We have considered the defendants' remaining arguments and find them without merit.

Accordingly, order, Supreme Court, New York County (Helen E. Freedman, J.), entered on or about July 10, 2006, which denied the defendants' motion to dismiss for lack of personal jurisdiction, prior action pending and forum non conveniens, should be modified, on the law, to the extent of granting the motion to dismiss as to defendants-appellants Kirk Pendleton, Laird Pendleton, and Cairnwood Capital International for lack of personal jurisdiction, and otherwise affirmed, without costs.

*M-5044*

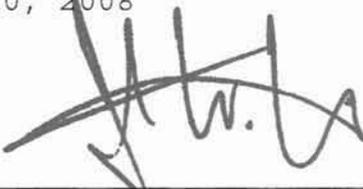
*M-5264 - Freeford Ltd. v. Pendleton, et al.,*

Motions seeking leave to file supplemental brief and leave to file responsive supplemental brief granted.

All concur.

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

ENTERED: APRIL 10, 2008

  
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