Onondaga County Clerk's Index No. 004977/2021
Appellate Division, Fourth Department Docket No. CA 21-01301

Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

JUN WANG, M.D.,

Petitioner-Appellant,

For a Judgment Pursuant to CPLR Article 78
and CPLR Section 3001

against

LETITIA JAMES, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Respondent-Respondent.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

GALE GALE & HUNT, LLC
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Date Completed: August 2, 2022

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of:

JUN WANG, M.D.,

Petitioner-Appellant,

For a Judgment Pursuant to CPLR Article 78 and CPLR Section 3001

-against-

LETITIA JAMES, Attorney General of The State of New York

Respondent-Respondent.

NOTICE OF MOTION

Appellate Division, Fourth Department Docket No. CA 21-01301

Onondaga County Clerk's Index No.: 004977/2021

MOTION MADE BY:	Gale Gale & Hunt, LLC, on behalf of Petitioner-Appellant Jun Wang, M.D.
DATE, TIME AND PLACE OF	August 22, 2022 at 10:00 a. m. on submission before the Court of Appeals, 20 Eagle Street, Albany, New York 12207.
SUPPORTING PAPERS:	Legal Brief on behalf of Petitioner-Appellant, dated August 2, 2022 with exhibits attached thereto; Record of prior appeal in this case to the Appellate Division, Fourth Judicial Department (to be uploaded digitally in accordance with the Rules of the Court of Appeals [22 NYCRR] § 500.22 [c], [e]).
RELIEF DEMANDED:	An Order, pursuant to CPLR § 5602 (a) (1) (i) and Rules of the Court of Appeals (22 NYCRR) § 500.22, granting leave to appeal to the Court of Appeals from a Memorandum and Order of the Fourth Judicial Department, entered on July 8,

2022; and for such other and further relief as the Court deems just and proper.

GROUNDS FOR RELIEF: New York CPLR § 5602 (a) (1) (i) and 22 NYCRR § 500.22.

ANSWERING AFFIDAVITS: Answering papers, if any, must be served on or before the return date of the motion in accordance with 22 NYCRR § 500.21 (c).

Dated: August 2, 2022

Andrew R. Borelli, Esq.
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TO: Clerk of the Court
Court of Appeals
20 Eagle Street
Albany, New York 12207

Letitia James, Esq.
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STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of:

JUN WANG, M.D.,

Petitioner-Appellant,

For a Judgment Pursuant to CPLR Article 78 and CPLR Section 3001

-against-

LETITIA JAMES, Attorney General of The State of New York

Respondent-Respondent.

LEGAL BRIEF OF PETITIONER-APPELLANT IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO APPEAL

Appellate Division, Fourth Department Docket No. CA 21-01301

Onondaga County Clerk's Index No.: 004977/2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Exhibits

INTRODUCTION AND TIMELINESS OF MOTION

This brief is respectfully submitted on behalf of Petitioner-Appellant, Jun Wang, M.D., in support of his motion, pursuant to CPLR § 5602 (a) (1) (i), for leave to appeal to the Court of Appeals from the Memorandum and Order of the New York State Supreme Court, Appellate Division, Fourth Judicial Department, entered on July 8, 2022, which affirmed the denial of Dr. Wang's petition to vacate the determination of Respondent Attorney General of the State of New York (the Attorney General or the State) denying Dr. Wang defense and indemnification under Correction Law § 24-a.

The Attorney General served the Fourth Department's Memorandum and Order with Notice of Entry via electronic filing on July 21, 2022. As such, upon information and belief, Dr. Wang's time to move for permission to appeal to the Court of Appeals expires August 20, 2022. The instant motion for leave to appeal is therefore timely inasmuch as the motion is being filed and served within thirty (30) days of service with notice of entry (*see* CPLR § 5513 [b]). No prior application for leave to appeal has been made either to the Appellate Division, Fourth Judicial Department or to the Court of Appeals. To further confirm the timeliness of the instant motion, attached collectively hereto as Exhibit "A" is a copy of the Fourth Department's Memorandum and Order entered July 8, 2022 and the State's Notice of Entry of same on July 21, 2022.

Although the parties to the underlying medical malpractice and third-party actions (as discussed below) recently reached a settlement, and settlement documents are being drafted and exchanged, the law suggests that an insurance carrier may still seek indemnification from the State *after* the settlement of a medical malpractice action where the State is legally (and financially) responsible for the medical providers at issue (*see e.g. Frontier v State*, 239 AD2d 92, 93-96 [3d Dept 1997], *lv denied* 92 NY2d 807 [1998]). Whether the State is responsible for Dr. Wang is the threshold issue that the instant motion seeks to have the Court of Appeals decide.

PROCEDURAL HISTORY AND BACKGROUND OF THE CASE

On March 1, 2021, Cortland Regional Medical Center (CRMC) commenced a third-party action against Dr. Wang and his group, Cortland Pathology, P.C., in an underlying medical malpractice action (*Alvarez v Cortland Regional Medical Center, Inc. et al. v Jun Wang, M.D. et al.*) that Plaintiff Omar Alvarez—who was an incarcerated individual in the custody of the New York State Department of Corrections and Community Supervision (DOCCS)—had previously commenced (along with his spouse) in New York County Supreme Court (Index No. 805085/2015) (R. at 27-38 [primary action], 511-528 [third-party action]).[1]

[1]All references to "R. at __" refer to the record before the Appellate Division, Fourth Judicial Department, a copy of which will be uploaded digitally along with copies of the parties'

By way of brief background, the underlying medical malpractice action involved an alleged failure to timely diagnose Mr. Alvarez with Hodgkin's lymphoma (*see* R. at 28, 32). DOCCS had approved an excisional biopsy of Mr. Alvarez's right axillary mass, which DOCCS-contracted surgeon R. Wayne Cotie, M.D. performed at CRMC on September 10, 2012 (*see* R. at 44-45, 480-481, 658-660). Dr. Cotie removed a portion of the mass containing lymph nodes, which was sent to Dr. Wang's pathology laboratory services group for analysis at CRMC (R. at 113-115, 480-481, 871-884). Dr. Wang performed the pathology review of the specimen and concluded it was not malignant (R. at 120, 485-486).

Dr. Wang was served with the third-party summons and complaint on March 2, 2021 (R. at 527-528). On March 3, 2021, Dr. Wang requested defense and indemnification from the New York State Attorney General's Office pursuant to Public Officers Law § 17 and Correction Law § 24-a (R. at 633-634). On March 4, 2021, the Attorney General's Office denied Dr. Wang's request (R. at 636). On March 16, 2021, Dr. Wang asked the Attorney General's Office to reconsider its determination (R. at 637-638). On March 23, 2021, the Attorney General's Office denied Dr. Wang's request a second time (R. at 639-640). Thereafter, on May 28, 2021, Dr. Wang filed a petition in Supreme Court, Onondaga County (Hon.

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briefs from the Fourth Department appeal, in accordance with Rules of the Court of Appeals (22 NYCRR) § 500.22 (c), (e).

Donald A. Greenwood, J.S.C.) pursuant to CPLR article 78 seeking to vacate the Attorney General's determination denying defense and indemnification (R. at 14-642). The Attorney General opposed (R. at 643-895). Dr. Wang replied, reiterating his position that he was entitled to the protections of Correction Law § 24-a (R. at 896-903). By Decision and Order entered August 11, 2021, Supreme Court denied Dr. Wang's petition (R. at 5-13). Attached as Exhibit "B" is a copy of the decision and order of the Supreme Court, dated August 11, 2021 with notice of entry and initial and amended notices of appeal of same (*see also* R. at 2-13).

Dr. Wang appealed the Supreme Court's decision on his CPLR article 78 petition to the Appellate Division, Fourth Judicial Department (*see* Exhibit B). In its Memorandum and Order, the Fourth Department unanimously affirmed the judgment (denominated order) of the Supreme Court (*see* Exhibit A).

JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction over the instant motion for leave to appeal and the proposed appeal pursuant to CPLR § 5602 (a) (1) (i) because the motion and proposed appeal arise from a Memorandum and Order of the Appellate Division, Fourth Judicial Department that finally determined Dr. Wang's petition. Indeed, the decisions of the Supreme Court and the Fourth Department both disposed of the entire relief sought by Dr. Wang in his petition (i.e., to vacate the State's determination denying Dr. Wang defense and indemnification as it relates

to his involvement with Mr. Alvarez). The instant motion is not otherwise appealable as of right because it involved a unanimous decision and does not directly involve the construction of the State Constitution or United States Constitution or the validity of a state or federal statutory provision under the Constitution of the State or United States.

QUESTION PRESENTED FOR REVIEW

There is a single question of law that should be reviewed by the Court of Appeals:

Was it reversible error to uphold the New York State Attorney General's determination that Dr. Wang—a physician licensed in New York State who provided pathology services to an incarcerated individual at the time of the events at issue— did not act at the request of DOCCS and therefore was not entitled to defense and indemnification from the State under Correction Law § 24-a?

In accordance with Rules of the Court of Appeals (22 NYCRR) § 500.22 (b) (4), this question is preserved for this Court's review because it was before both the trial court and Fourth Department, which decided the question in the State's favor (*see* Exhibit A; Exhibit B; R. at 11-12 [Decision and Order], 21-23 [Verified Petition], 637-638 [Gale 3/16/21 Correspondence], 639-640 [the State's 3/23/21 Email Correspondence], 655 [the State's Return], 896-899 [Dr. Wang's Reply]).

ARGUMENT

THIS COURT SHOULD REVIEW WHETHER IT WAS AN ERROR TO UPHOLD THE ATTORNEY GENERAL'S DETERMINATION THAT DR. WANG WAS NOT ENTITLED TO DEFENSE AND INDEMNIFICATION UNDER CORRECTION LAW § 24-a BECAUSE IT IS A NOVEL ISSUE AND ONE THAT IS LIKELY TO RECUR.

It was a reversible error to uphold the Attorney General's determination that Dr. Wang did not provide pathology services at DOCCS' request and therefore was not entitled to defense and indemnification from the State.

This question merits review by this Court because it is novel (i.e., an issue of first impression) and is of particular importance to medical malpractice cases involving independent physicians who provide ancillary medical services (e.g., radiology and pathology) to incarcerated individuals as part of DOCCS-approved procedures at medical facilities outside DOCCS (*see* 22 NYCRR § 500.22 [b] [4]; *see e.g. generally Matter of Add'l Jan 1979 Grand Jury of Albany Supreme Court v Doe*, 50 NY2d 14, 17 [1980] [noting that "[l]eave to appeal was granted by this court to examine the novel issues raised herein"]; *Matter of DeLuca (Motor Veh. Acc. Indem. Corp.*, 17 NY2d 76, 79 [1966] [noting that "(w)e granted leave to appeal in order to resolve the question—of first impression in this court—whether the three-year (tort) or the six-year (contract) Statute of Limitations applies"]).

In pertinent part, Public Officers Law § 17 (2) (a) and § (3) (a) provide that the State must defend and indemnify an employee in a civil action for any alleged

act or omission committed while the employee acted within the scope of his or her employment or duties with the State. As relevant here, Correction Law § 24-a purports to extend the protections of Public Officers Law § 17:

> "to any person holding a license to practice a [certain] profession . . . , who is rendering or has rendered professional services authorized under such license while acting at the request of [DOCCS] or a facility of [DOCCS] in providing health care and treatment or professional consultation to incarcerated individuals of state correctional facilities . . . without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility."

Insofar as it concerns the instant motion for leave to appeal and the proposed appeal before this Court, the entire analysis for this question concerns only whether Dr. Wang is considered to have acted "at the request of [DOCCS]" when he, in order to complete the DOCCS-approved biopsy, analyzed a specimen excised from Mr. Alvarez's right axilla.

There is no case law that could be located that is directly on point in stating whether Correction Law § 24-a applies to ancillary independent medical providers, such as pathologists and radiologists, who do not have a formal professional arrangement with DOCCS, but nevertheless provide services necessary for a DOCCS-contracted physician to complete his or her DOCCS-approved service or

procedure for a patient.[2] To date, the closest insight on the matter—which does not address the specific question at issue—comes from an opinion of the Attorney General that is over forty (40) years old (*see* 1980 NY Ops Atty Gen No. 40 [Note: formal opinion]). In that opinion, the Attorney General was asked whether health care providers who provide professional services to DOCCS under contract were entitled to defense and indemnification from the State in litigation arising out of the performance of those professional services (*see id.*). The Attorney General's response was therefore limited to answering this specific question. In reaching its determination, the Attorney General relied, in part, on the New York State Department of Health's memorandum to the Governor when Correction Law § 24-a was being promulgated, which indicated that the bill extended the benefits of Public Officers Law § 17 to non-employee health professionals of DOCCS and the Department of Mental Hygiene who provided care at the request of those agencies (*see id.*). The Attorney General therefore ultimately concluded that such health care providers, i.e., independent contractors of DOCCS, were entitled to defense and indemnification (*see id.*).

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[2]It seems that, depending on the facts of the case, the State may be held vicariously liable for independent physicians contracted by DOCCS to provide medical services to incarcerated individuals under a theory of apparent, or ostensible, agency (*see Rothschild v Braselmann*, 157 AD3d 1027, 1028-1029 [3d Dept 2018]) and that non-employee health professionals providing medical services to incarcerated individuals at the request of DOCCS are generally entitled to defense and indemnification from the State in medical malpractice matters pursuant to Correction Law § 24-a (*cf. Snyder v State*, 70 Misc 3d 801, 814 [Ct Cl 2020]).

However, the Attorney General's opinion does not answer whether Correction Law § 24-a applies to independent ancillary medical providers whose services are necessary for a DOCCS-contracted physician to treat an incarcerated individual. Although judicial review of an administrative determination is limited to whether the action is arbitrary and capricious or lacks a rational basis (*see generally Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Walker v State Univ. of N.Y.*, 19 AD3d 1058, 1059 [4th Dept 2005], *lv denied* 5 NY3d 713 [2005]), the agency's determination should not be upheld if it is unreasonable (*cf. Matter of Nearpass v Seneca Indus. Dev. Agency*, 152 AD3d 1192, 1193 [4th Dept 2017]). Statutes must be given a reasonable interpretation and administrative agencies and courts should not elevate form over substance in interpreting a statute (*see* Statutes § 143; *see generally Matter of Am. Tr. Ins. Co. v Corcoran*, 105 AD2d 30, 32 [1st Dept 1984], *affd* 65 NY2d 828 [1985]).

Here, without arguing the full merits of the proposed appeal, the Attorney General's determination that Dr. Wang is not entitled to the protection of Correction Law § 24-a lacks any sound basis in reason and elevates form over substance because Mr. Alvarez's DOCCS-approved biopsy could not be completed without the pathological interpretation of the specimen (*see generally* R. at 188-189). Moreover, Dr. Wang would not have even been involved in Mr. Alvarez's treatment if not for DOCCS approving the biopsy of Mr. Alvarez's right axillary

mass. It cannot seriously be argued that DOCCS would not have approved the pathology analysis necessary to complete the biopsy that it had already approved and, in fact, DOCCS actually paid for the pathology review (*see* R. at 505-510).

Rather, as demonstrated by the facts of this case, the reasonable interpretation of Correction Law § 24-a would find that independent medical providers, such as pathologists and radiologists, should be considered to have acted at the request of DOCCS in situations where DOCCS-approved procedures cannot be completed without the involvement of those independent medical providers. For example, as relevant here, an excisional biopsy necessarily involves two indivisible steps: (1) excision of a specimen of a questionable lesion by a surgeon; and (2) examination of the specimen by the pathologist (*see generally* R. at 188-189). The surgeon's work is meaningless without the pathological interpretation (*see id.*). As another example, a physician generally requires radiology imaging to determine definitively if a patient has suffered brain injury after a fall, meaning that, again, the treating physician's evaluation of the patient is meaningless without the results of the imaging studies. Thus, the reasonable application of Correction Law § 24-a is to conclude that Dr. Wang must be considered to have acted at the request of DOCCS in analyzing the biopsy specimen. The Attorney General's determination is therefore arbitrary and capricious and is without sound basis in reason on the facts of this case.

Furthermore, this issue is likely to recur any time the services of a pathologist or radiologist, for example, are required for the DOCCS-contracted physician to complete the DOCCS-approved procedure and/or evaluation of the patient. The DOCCS-contracted physician generally relies on the pathologist's analysis of a biopsy specimen or a radiologist's interpretation of an imaging study to determine the next steps in treating a patient. Therefore, to allow DOCCS to claim that it did not "request" the services of the ancillary independent medical provider that are necessary to complete the DOCCS-approved procedure for a patient, simply because it did not have a formal communication or professional arrangement with the provider, amounts to elevating form over substance and results in a gross injustice to such ancillary medical providers.

Accordingly, this question is undoubtedly novel and of particular importance in medical malpractice actions brought by incarcerated individuals statewide where an independent physician provides a necessary medical service for a DOCCS-approved procedure by the DOCCS-contracted physician. This Court should therefore not hesitate to take the question up for review.

CONCLUSION

Based on the foregoing, answering this question is not simply about correcting a lower court's error. Rather, answering this question will develop the law and provide guidance for the lower courts, members of the bar, and the public

as to the scope of Correction Law § 24-a, questions about which will likely recur as long as incarcerated individuals require medical care and treatment outside of DOCCS facilities on various occasions (*see generally* Arthur Karger, Powers of the New York Court of Appeals § 10:3 [Sept. 2021 Update]). As such, this Court should grant Dr. Wang leave to appeal, and such other relief this Court deems just and proper.

Dated: August 2, 2022
Fayetteville, New York

Respectfully submitted,

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Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

409

CA 21-01301

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF JUN WANG, M.D.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LETITIA JAMES, ATTORNEY GENERAL OF THE
STATE OF NEW YORK, RESPONDENT-RESPONDENT.

GALE, GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORELLI OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 11, 2021 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: This CPLR article 78 proceeding arises out of a medical malpractice action. Petitioner is a pathologist who is purported to have rendered a misdiagnosis upon reviewing a biopsy sample taken from an inmate in the custody of the Department of Corrections and Community Supervision (DOCCS). DOCCS had initially referred the inmate to a general surgeon who provided medical services to inmates of the prison where the inmate was incarcerated, pursuant to a contract with DOCCS. The general surgeon performed a biopsy on the inmate at Cortland Regional Medical Center (CRMC), and the biopsy sample was sent to petitioner's pathology laboratory services practice group for analysis.

After the inmate was subsequently diagnosed with Hodgkin's lymphoma, the inmate commenced an action against, inter alia, CRMC and the general surgeon, seeking damages for injuries caused by their failure to timely diagnose his cancer. In turn, CRMC commenced a third-party action against petitioner and his practice group, seeking indemnification and contribution. Thereafter, petitioner informed respondent of the third-party action, and sought defense and indemnification pursuant to Public Officers Law § 17 and Correction Law § 24-a. Respondent denied petitioner's application, concluding, inter alia, that DOCCS had not directly requested that petitioner undertake services to treat the inmate, and therefore the protections

afforded under Public Officers Law § 17 and Correction Law § 24-a did not apply. Petitioner commenced this proceeding, seeking, inter alia, to annul pursuant to CPLR 7803 (3) respondent's determination that he was not entitled to defense and indemnification under Public Officers Law § 17 and Correction Law § 24-a. Petitioner appeals from a judgment denying the petition. We affirm.

"[J]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis" (*Matter of Green Thumb Lawn Care, Inc. v Iwanowicz*, 107 AD3d 1402, 1403 [4th Dept 2013], *lv denied* 22 NY3d 866 [2014]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]), and such a determination is entitled to great deference (*see Matter of Walker v State Univ. of N.Y. [Upstate Med. Univ.]*, 19 AD3d 1058, 1059 [4th Dept 2005], *lv denied* 5 NY3d 713 [2005]). A determination is arbitrary and capricious when it is made " 'without sound basis in reason or regard to the facts' " (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [4th Dept 2014], quoting *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). A court "must sustain the determination even if the court concludes that it would have reached a different result," so long as "the determination is supported by a rational basis" (*Peckham*, 12 NY3d at 431).

Public Officers Law § 17 (2) (a) and (3) (a) provide that the state shall defend and indemnify an "employee" in a civil action arising out of any alleged act or omission that occurred while the employee was acting within the scope of his or her public employment or duties (*see also Matter of LoRusso v New York State Off. of Ct. Admin.*, 229 AD2d 995, 995-996 [4th Dept 1996]). As relevant here, Correction Law § 24-a applies Public Officers Law § 17 "to any person holding a license to practice a [specified] profession . . . , who is rendering or has rendered professional services authorized under such license while acting at the request of [DOCCS] or a facility of [DOCCS] in providing health care and treatment or professional consultation to incarcerated individuals of state correctional facilities, . . . without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility."

Here, there is no dispute that petitioner's licensed profession is covered by Correction Law § 24-a. Rather, respondent's determination denying defense and indemnification to petitioner hinged on respondent's conclusion that petitioner did not "render[ ] professional services . . . while acting at the *request of [DOCCS]*" (Correction Law § 24-a [emphasis added]). We conclude that respondent's determination that Correction Law § 24-a does not apply to petitioner is entitled to judicial deference because the relevant "question is one of specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [internal quotation marks omitted]). Specifically, respondent's determination that Correction Law § 24-a applies only where DOCCS has expressly

requested the services of a particular health care provider "is a reasonable one" that "courts should not second-guess" (*O'Brien*, 7 NY3d at 242). Here, there is no evidence in the record supporting the conclusion that DOCCS ever expressly requested that petitioner perform pathology services on the biopsy sample (*see generally id.* at 243). Instead, petitioner's pathology services here were retained by CRMC, without any input from DOCCS. We reject petitioner's contention that the language in Correction Law § 24-a requiring that the professional services be rendered "at the request of [DOCCS]" in order to entitle the service provider to defense and indemnification also applies where DOCCS has impliedly requested a particular health care service.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **Ann Dillon Flynn**, *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this July 8, 2022*

Ann Dillon Flynn

Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

In the Matter of the Application of
JUN WANG, M.D.,

Petitioner-Appellant,

NOTICE OF ENTRY

-against-

CA 21-01301

LETITIA JAMES, Attorney General of the State of New York,

Respondent-Respondent.

PLEASE TAKE NOTICE that the within is a true and complete copy of the Memorandum and Order duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Fourth Department on July 8, 2022.

Dated: Albany, New York
July 21, 2022

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

By: _____
KEVIN C. HU
Assistant Solicitor General

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To (via NYSCEF):

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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

409

CA 21-01301

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND CURRAN, JJ.

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After the inmate was subsequently diagnosed with Hodgkin's lymphoma, the inmate commenced an action against, inter alia, CRMC and the general surgeon, seeking damages for injuries caused by their failure to timely diagnose his cancer. In turn, CRMC commenced a third-party action against petitioner and his practice group, seeking indemnification and contribution. Thereafter, petitioner informed respondent of the third-party action, and sought defense and indemnification pursuant to Public Officers Law § 17 and Correction Law § 24-a. Respondent denied petitioner's application, concluding, inter alia, that DOCCS had not directly requested that petitioner

undertake services to treat the inmate, and therefore the protections afforded under Public Officers Law § 17 and Correction Law § 24-a did not apply. Petitioner commenced this proceeding, seeking, inter alia, to annul pursuant to CPLR 7803 (3) respondent's determination that he was not entitled to defense and indemnification under Public Officers Law § 17 and Correction Law § 24-a. Petitioner appeals from a judgment denying the petition. We affirm.

"[J]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis" (*Matter of Green Thumb Lawn Care, Inc. v Iwanowicz*, 107 AD3d 1402, 1403 [4th Dept 2013], *lv denied* 22 NY3d 866 [2014]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]), and such a determination is entitled to great deference (*see Matter of Walker v State Univ. of N.Y. [Upstate Med. Univ.]*, 19 AD3d 1058, 1059 [4th Dept 2005], *lv denied* 5 NY3d 713 [2005]). A determination is arbitrary and capricious when it is made " 'without sound basis in reason or regard to the facts' " (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [4th Dept 2014], quoting *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). A court "must sustain the determination even if the court concludes that it would have reached a different result," so long as "the determination is supported by a rational basis" (*Peckham*, 12 NY3d at 431).

Public Officers Law § 17 (2) (a) and (3) (a) provide that the state shall defend and indemnify an "employee" in a civil action arising out of any alleged act or omission that occurred while the employee was acting within the scope of his or her public employment or duties (*see also Matter of LoRusso v New York State Off. of Ct. Admin.*, 229 AD2d 995, 995-996 [4th Dept 1996]). As relevant here, Correction Law § 24-a applies Public Officers Law § 17 "to any person holding a license to practice a [specified] profession . . . , who is rendering or has rendered professional services authorized under such license while acting at the request of [DOCCS] or a facility of [DOCCS] in providing health care and treatment or professional consultation to incarcerated individuals of state correctional facilities, . . . without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility."

Here, there is no dispute that petitioner's licensed profession is covered by Correction Law § 24-a. Rather, respondent's determination denying defense and indemnification to petitioner hinged on respondent's conclusion that petitioner did not "render[ ] professional services . . . while acting at the *request of* [*DOCCS*]" (Correction Law § 24-a [emphasis added]). We conclude that respondent's determination that Correction Law § 24-a does not apply to petitioner is entitled to judicial deference because the relevant "question is one of specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [internal quotation marks omitted]). Specifically, respondent's determination

that Correction Law § 24-a applies only where DOCCS has expressly requested the services of a particular health care provider "is a reasonable one" that "courts should not second-guess" (*O'Brien*, 7 NY3d at 242). Here, there is no evidence in the record supporting the conclusion that DOCCS ever expressly requested that petitioner perform pathology services on the biopsy sample (*see generally id.* at 243). Instead, petitioner's pathology services here were retained by CRMC, without any input from DOCCS. We reject petitioner's contention that the language in Correction Law § 24-a requiring that the professional services be rendered "at the request of [DOCCS]" in order to entitle the service provider to defense and indemnification also applies where DOCCS has impliedly requested a particular health care service.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

Exhibit B

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of:

JUN WANG, M.D.,
Petitioner,

AMENDED NOTICE OF APPEAL

For a Judgment Pursuant to CPLR Article 78 and CPLR Section 3001

Index No.: 004977/2021

-against-

LETITIA JAMES, Attorney General of The State of New York

Respondent.

PLEASE TAKE NOTICE that Petitioner Jun Wang, M.D., by and through his attorneys, Gale Gale & Hunt, LLC, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Department, from a Decision and Order of the Hon. Donald A. Greenwood, dated August 11, 2021, entered and electronically filed on August 11, 2021 in the Office of the Clerk of the County of Onondaga, and served with Notice of Entry via NYSCEF on September 15, 2021. Petitioner appeals each and every portion of said Decision and Order as well as the whole thereof insofar as it denies the relief sought by Petitioner. Copies of said Decision and Order executed by Justice Greenwood with Notice of Entry and initial Notice of Appeal dated September 13, 2021 are collectively attached as Exhibit A.

Dated: September 15, 2021

Minla Kim, Esq.
GALE GALE & HUNT, LLC
Attorneys for PetitionerJun Wang, M.D.
P. O. Box 6527
Syracuse, New York 13217-6527
(315) 637-3663

TO: Maureen MacPherson, Esq.
Assistant Attorney General, of Counsel
Attorneys for Plaintiff
615 Erie Boulevard West
Syracuse, New York 13204
(315) 448-4800

Exhibit A

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on August 3, 3021.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF

JUN WANG, M.D.,

Petitioner,

FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78 AND CPLR SECTION 3001

v.

LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

DECISION AND ORDER ON PETITION

Index No.: 004977/2021

APPEARANCES: **CATHERINE A. GALE, ESQ., OF GALE GALE & HUNT, LLC**
For Petitioner

MAUREEN A. MACPHERSON, ESQ., OF OFFICE OF THE ATTORNEY GENERAL
For Respondent

The petitioner commenced this special proceeding to challenge the determination of the respondent made on March 4, 2021 declining the petitioner's request for representation by the Department of Law of the State of New York in the case of *Omar Alvarez v. Cortland Regional Medical Center, Inc., et al,* (Index No. 805085/2015), commenced in New York County Supreme Court. The petition seeks the following relief: a determination pursuant to CPLR

Article 78 vacating respondent's determination and a declaratory judgment[1] that the State of New York defend and indemnify petitioner for legal actions arising from care he provided to Alvarez in September of 2012. The petitioner made said request pursuant to Public Officers Law (POL) section 17 and Correction Law section 24-a. POL section 17 provides state employees defense and indemnification in any civil action arising out of any alleged acts or omissions committed while acting within the scope of employment. Correction Law section 24-a extends the benefits of section 17 to "any person holding a license to practice", such as a physician "who is rendering or has rendered professional services authorized under such license while acting at the request of the department or a facility of the department in providing health care and treatment ...to inmates of state correctional facilities ...without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility." *Correction Law § 24-a.*

Alvarez commenced the medical malpractice action in March of 2015 alleging negligent medical care by defendants, including Cortland Regional Hospital f/k/a Cortland Memorial Hospital. He was an inmate of the Department of Corrections and Community Supervision (DOCCS) and was housed at Auburn Correctional Facility. Dr. James Dolan, a physician at the facility, treated Alvarez for a possible boil or cyst with antibiotics and then recommended a surgical evaluation for excision/biopsy or drainage after it failed to resolve. He referred Alvarez to Robert Cotie, M.D., who provided general surgery services to inmates. Cotie recommended an excisional biopsy and Dr. Pang Kooi, the facility's Health Services Director and a named defendant in the underlying civil matter, approved the biopsy recommendation. DOCCS approved the biopsy and scheduled in September of 2012 at defendant Cortland Hospital. The

[1] Petitioner subsequently withdrew the request for said relief.

petitioner here interpreted the specimen and submitted it to SUNY Upstate and opined that the specimen was "lymph node with reactive lymphoid hyperplasia," a benign condition. Approximately a year later, Alvarez was diagnosed with Hodgkin's lymphoma and commenced the medical malpractice action, alleging that the cancer was present in September of 2012 and defendants failed to diagnose the mass. Defendant Cortland Hospital commenced a third-party action against petitioner on March 2, 2021. A tender of defense letter requesting defense and indemnification of petitioner was served on respondent on March 4, 2021 and on the same date respondent denied the request, finding that petitioner treated and billed Alvarez within the scope of his employment with the hospital through a private practice and billing arrangement, that there was no contract or agreement between the State and either petitioner or his private business, Cortland Pathology, P.C., for any work performed upon inmates by the hospital laboratory or petitioner, and concluded that the work performed was not within the scope of any agreement that would authorize the State to provide petitioner or Cortland Pathology, P.C. with legal representation. Petitioner requested reconsideration and respondent reiterated its previous decision in its March 23,2021 letter.

Petitioner argues that the denial was improper because he was acting at the request of DOCCS as the specimen was removed by Cotie, who recommended the biopsy and submitted the request to DOCCS, that DOCCS approved it and that both DOCCS and Cotie were aware that the purpose of the procedure was not only removal of the lesion if possible but to determine the nature of the specimen and whether it was cancerous. Petitioner argues that he was working under the approval obtained by Cotie, which was paid by DOCCS and that therefore, Correction Law section 24-a explicitly applies and mandates the State to defend and indemnify him.

The respondent provided the Return in this matter and points to the Cotie deposition testimony concerning the civil matter that establishes that he was a private surgeon retained as an outside consultant/independent contractor by DOCCS. In his private practice, he was affiliated with Cortland Hospital. He further testified that he took surgical specimens of the mass for a pathology inspection. He sent the specimen, as he routinely did, to the hospital pathology department lab. Cotie further testified that whenever he sent any specimen to the hospital's department of pathology for interpretation, he relied on whatever pathologist was on duty in the lab to inform him of the results. He testified that he was never able to select or choose a particular pathologist, and he did not request the petitioner in this case. The respondent also points to the deposition testimony of petitioner's business partner, Dr. William Shang, who testified that both his and petitioner's pathology services were contracted for the hospital through a contract with their private group that he and petitioner owned, Cortland Pathology Services, P.C. Shang testified that they were paid a flat fee for their services at the hospital pursuant to a Pathology Services Contract, which forbade both of them from engaging in other outside consultant jobs without advance permission of the hospital board. Respondent points to petitioner's pathology report, which was printed on Cortland Hospital letterhead. According to Shang, DOCCS had no input into the contract between the hospital and the petitioner. Petitioner has not submitted any evidence that DOCCS had such authority or any supervisory authority over petitioner or Shang during the relevant time. Only petitioner, Shang, and the hospital had any control over the staff who worked at the hospital pathology laboratory. Both Kooi and Cotie testified that they relied on petitioner's pathology report that the mass was benign in formulating their treatment plans. Respondent likewise points to the bill that DOCCS paid for the surgical pathology services performed on the biopsy specimen was issued by and paid to the hospital,

which made no reference to petitioner. No separate bill was submitted by petitioner to DOCCS and no bill was paid separately to petitioner. Respondent, therefore. contends that at the time petitioner issued his pathology report, he was not an employee or independent contractor of DOCCS.

Based upon the record before it, this Court finds that the respondent's determination was proper in this matter. While POL section 17 permits the state to fund the defense and indemnification of employees and certain volunteers sued in the course of their employment. it does not provide such coverage for independent contractors. *See. POL § 17.* Corrections Law section 24-a provides an exception for DOCSS independent contractors by and provides section 17 coverage to independent contractors who are licensed medical professionals under certain circumstances. *See. Correction Law § 24-a.* Respondent is correct that the statute does not provide defense and indemnification of all medical professionals who treat inmates. A 1980 Attorney General's opinion which confirms the legislative history of the statute and further confirms how strictly construed the grant of section 17 rights must be, stating: "the legislative history of chapter 466 of the Laws of 1978 by which both Correction Law section 24-a and Public Officers Law section 17 were enacted contains very little discussion of Correction Law section 24-a. The memorandum to the Governor ...makes no mention of Correction Law section 24-a or its provisions. The Department of Health ...pointed out however that: this bill extends the benefits Public Officers Law section 17 to non-employee health professionals of both the Department of Correction and the Department of Mental Hygiene who render professional care at the request of those agencies. This Department has proposed legislation providing similar protection for consultant physicians rendering part- time health care services in hospitals operated by it ." *1980 Op Atty Gen 40.* It further provides that that the Department of Health

proposed legislation by which the benefits of section 17 could be made available to persons rendering professional services "on a contract basis" to the department and that the memorandum therefore reflects the preference as a matter of policy for an interpretation which would make such indemnification available. *See, id.* It also states that section 17 applies to the negligence or alleged negligence of both non- professional and professional "employees" of the State and that section 24-a would therefore add little if anything to the law existing in its absence if it were interpreted so strictly as to deny extension of the benefits of section 17 to "identified independent contractors", concluding that "such an interpretation should be avoided ." *Id. citing. McKinney's Statutes § 98.*

The burden of proof in an Article 78 proceeding rests with the petitioner alone. *See. NYS Inspection Sec. In Law Enforcement Employees v. NYS Civil Service Commission*, 213 AD2d 826 (3rd Dept. 1995). This Court's review of an administrative decision is limited to whether the challenged determination was arbitrary and capricious or otherwise unsupported by substantial evidence. *See, O'Rourke v. Kirby*, 54 NY2d 8 (1981); *see also, Pell v. Board of Education*, 34 NY2d 222 (1974). An action is arbitrary and capricious if taken without sound basis in reason and without regard to the facts. *See, Pell, supra.* In addition, this Court is without authority to substitute its own judgment for that of the respondent unless the decision clearly appears to be arbitrary or contrary to law. *See, Diocese of Rochester v. Planning Board*, 1 NY3d 508 (1956); *see also, Walker v. SUNY*, 19 AD3d 1058 (4th Dept. 2005). This Court may not disturb rational inferences drawn from the evidence. *See, DiMaria v. Ross*, 52 NY2d 771 (1980). Nor may this Court usurp the administrative function by directing respondents to proceed in a specific manner which is instead within their discretion. *See, Burke's Autobody v. Ameruso*, 115 AD2d 198 (1st Dept. 1985). In addition, the respondent's determination must be judged under the deferential

standard accorded to agency determinations, specifically what constitutes an "employee" and the specific factual circumstances. *See, O'Brien v. Spitzer*, 7 NY3d 239 (2006); *see also, New York State Superfund Coalition , Inc. v. New York State Department of Environmental Conservation*, 18 NY3d 289 (2011).

The respondent has demonstrated that the determination was proper and petitioner has not established any employment relationship with DOCCS so that he may qualify for a defense and indemnification under the statutes. The Public Officers Law strictly limits state defense and indemnification to employees only, stating that those "benefits will only inure to employees." *POL § 17(5)*. It further provides that "[t]he term employee shall mean any person holding a position by election, appointment, or employment in the service of the state, including clinical practice pursuant to subdivision fourteen of section two hundred and six of the public health law, whether or not compensated, a volunteer expressly authorized to participate in a state sponsored volunteer program, but shall not include an independent contractor ." *POL § 17(1)(a)*. It also directs that "the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties." *POL § 17(2)(a)*. In the present case, petitioner has been named in a third party action concerning a medical malpractice case where petitioner was randomly assigned to read a specimen removed from an inmate and there is nothing in the record to support the determination that petitioner had an employment or independent contractor relationship with DOCCS.

In addition, while Correction Law 24-a makes section 17 scheme available independent contractors working with DOCCS who are delivering services at the request of the department,

this does not apply to petitioner. Although he argues that coverage should be provided to him due to Cotie's status as an independent contractor, adopting such an argument would extend section 17 coverage to any medical provider who provides services to any inmate in any capacity. The central inquiry here is whether petitioner was acting within the scope of his public employment or duties pursuant to section 17 and the respondent's determination that petitioner does not qualify under the statutes was reasonable. Inasmuch as there is no legal basis on which the State can be held liable for coverage, there is no obligation to provide a defense. *See. Board of Education of East Syracuse Minoa District v. Continental Ins. Co.*, 198 AD2d at 816 (4th Dept. 1993). The denial of petitioner's defense was proper because as a matter of law there is no possible factual or legal basis on which the State might eventually be held to be obligated to indemnify a petitioner under section 17. *See. Servidone Construction Corp. v. Security Insurance Company*, 64 NY2d 419 (1985).

It is also important to note that the Attorney General's determination is entitled to deference. *See, O'Brien. supra.* While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term. *See, id.* Courts generally defer to the governmental agency charged with the responsibility of administration of a statute in those cases where interpretation or application entails an evaluation of factual data and inferences to be drawn there from and the agency's interpretation is not irrational or unreasonable. *See. New York State Superfund Coalition, supra.* It is for the Attorney General in the first instance to determine whether a petitioner is acting in the scope of his employment and therefore entitled to legal representation; such determination will only be set aside if it is arbitrary and capricious and lacks a factual basis in the record. *See, Kaufman v. Spitzer*, 2007 NY Slip OP 31095(U) Suffolk

County 2007. Therefore, the respondent's denial was based upon the determination of the facts which were so clear cut their reasonable minds could reach no other conclusion. *See, Sharrow v. State of New* York, 216 AD2d 844 (3rd Dept. 1990).

NOW, therefore, for the foregoing reasons, it is

ORDERED, that that the relief sought in the petition is denied.

ENTER

Dated: August 11, 2021
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Petition, dated May 28, 2021, and attached exhibits.
2. Notice of Verified Petition, undated.
3. Amended Notice of Verified Petition, dated June 1, 2021.
4. So Ordered Letter, dated June 7, 2021.
5. Verified Answer and Return, dated July 25, 2021, and attached exhibits.
6. Memorandum of Law in Opposition to the Petition, dated July 26, 2021.
7. Reply Affirmation of Minla Kim, Esq., dated July 29, 2021, and attached exhibits.
8. Letter of Maureen A. MacPherson, Esq., dated August 5, 2021.
9. So Ordered Letter, dated August 11, 2021.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of:

JUN WANG, M.D.,
Petitioner,

For a Judgment Pursuant to CPLR Article 78 and CPLR Section 3001

-against-

LETITIA JAMES, Attorney General of The State of New York

Respondent.

NOTICE OF ENTRY

Index No.: 004977/2021

PLEASE TAKE NOTICE, that the attached is a true and correct copy of Decision and Order of Hon. Donald A. Greenwood (NYSCEF Document No. 32), dated August 11, 2021 and duly entered and filed electronically in the office of the Clerk of the County of Onondaga on August 11, 2021.

Dated: September 15, 2021

Minla Kim, Esq.
GALE GALE & HUNT, LLC
Attorneys for Defendant Chittenango Center, LLC
d/b/a The Grand at Chittenango
P. O. Box 6527
Syracuse, New York 13217-6527
(315) 637-3663

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on August 3, 3021.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF

JUN WANG, M.D.,

Petitioner,

FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78 AND CPLR SECTION 3001

v.

LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

DECISION AND ORDER ON PETITION

Index No.: 004977/2021

APPEARANCES: **CATHERINE A. GALE, ESQ., OF GALE GALE & HUNT, LLC**
For Petitioner

MAUREEN A. MACPHERSON, ESQ., OF OFFICE OF THE ATTORNEY GENERAL
For Respondent

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Article 78 vacating respondent's determination and a declaratory judgment[1] that the State of New York defend and indemnify petitioner for legal actions arising from care he provided to Alvarez in September of 2012. The petitioner made said request pursuant to Public Officers Law (POL) section 17 and Correction Law section 24-a. POL section 17 provides state employees defense and indemnification in any civil action arising out of any alleged acts or omissions committed while acting within the scope of employment. Correction Law section 24-a extends the benefits of section 17 to "any person holding a license to practice", such as a physician "who is rendering or has rendered professional services authorized under such license while acting at the request of the department or a facility of the department in providing health care and treatment ...to inmates of state correctional facilities ...without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility." *Correction Law § 24-a.*

Alvarez commenced the medical malpractice action in March of 2015 alleging negligent medical care by defendants, including Cortland Regional Hospital f/k/a Cortland Memorial Hospital. He was an inmate of the Department of Corrections and Community Supervision (DOCCS) and was housed at Auburn Correctional Facility. Dr. James Dolan, a physician at the facility, treated Alvarez for a possible boil or cyst with antibiotics and then recommended a surgical evaluation for excision/biopsy or drainage after it failed to resolve. He referred Alvarez to Robert Cotie, M.D., who provided general surgery services to inmates. Cotie recommended an excisional biopsy and Dr. Pang Kooi, the facility's Health Services Director and a named defendant in the underlying civil matter, approved the biopsy recommendation. DOCCS approved the biopsy and scheduled in September of 2012 at defendant Cortland Hospital. The

[1] Petitioner subsequently withdrew the request for said relief.

petitioner here interpreted the specimen and submitted it to SUNY Upstate and opined that the specimen was "lymph node with reactive lymphoid hyperplasia," a benign condition. Approximately a year later, Alvarez was diagnosed with Hodgkin's lymphoma and commenced the medical malpractice action, alleging that the cancer was present in September of 2012 and defendants failed to diagnose the mass. Defendant Cortland Hospital commenced a third-party action against petitioner on March 2, 2021. A tender of defense letter requesting defense and indemnification of petitioner was served on respondent on March 4, 2021 and on the same date respondent denied the request, finding that petitioner treated and billed Alvarez within the scope of his employment with the hospital through a private practice and billing arrangement, that there was no contract or agreement between the State and either petitioner or his private business, Cortland Pathology, P.C., for any work performed upon inmates by the hospital laboratory or petitioner, and concluded that the work performed was not within the scope of any agreement that would authorize the State to provide petitioner or Cortland Pathology, P.C. with legal representation. Petitioner requested reconsideration and respondent reiterated its previous decision in its March 23,2021 letter.

Petitioner argues that the denial was improper because he was acting at the request of DOCCS as the specimen was removed by Cotie, who recommended the biopsy and submitted the request to DOCCS, that DOCCS approved it and that both DOCCS and Cotie were aware that the purpose of the procedure was not only removal of the lesion if possible but to determine the nature of the specimen and whether it was cancerous. Petitioner argues that he was working under the approval obtained by Cotie, which was paid by DOCCS and that therefore, Correction Law section 24-a explicitly applies and mandates the State to defend and indemnify him.

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which made no reference to petitioner. No separate bill was submitted by petitioner to DOCCS and no bill was paid separately to petitioner. Respondent, therefore, contends that at the time petitioner issued his pathology report, he was not an employee or independent contractor of DOCCS.

Based upon the record before it, this Court finds that the respondent's determination was proper in this matter. While POL section 17 permits the state to fund the defense and indemnification of employees and certain volunteers sued in the course of their employment, it does not provide such coverage for independent contractors. *See, POL § 17.* Corrections Law section 24-a provides an exception for DOCSS independent contractors by and provides section 17 coverage to independent contractors who are licensed medical professionals under certain circumstances. *See, Correction Law § 24-a.* Respondent is correct that the statute does not provide defense and indemnification of all medical professionals who treat inmates. A 1980 Attorney General's opinion which confirms the legislative history of the statute and further confirms how strictly construed the grant of section 17 rights must be, stating: "the legislative history of chapter 466 of the Laws of 1978 by which both Correction Law section 24-a and Public Officers Law section 17 were enacted contains very little discussion of Correction Law section 24-a. The memorandum to the Governor ...makes no mention of Correction Law section 24-a or its provisions. The Department of Health ...pointed out however that: this bill extends the benefits Public Officers Law section 17 to non-employee health professionals of both the Department of Correction and the Department of Mental Hygiene who render professional care at the request of those agencies. This Department has proposed legislation providing similar protection for consultant physicians rendering part- time health care services in hospitals operated by it ." *1980 Op Atty Gen 40.* It further provides that that the Department of Health

proposed legislation by which the benefits of section 17 could be made available to persons rendering professional services "on a contract basis" to the department and that the memorandum therefore reflects the preference as a matter of policy for an interpretation which would make such indemnification available. *See, id.* It also states that section 17 applies to the negligence or alleged negligence of both non- professional and professional "employees" of the State and that section 24-a would therefore add little if anything to the law existing in its absence if it were interpreted so strictly as to deny extension of the benefits of section 17 to "identified independent contractors", concluding that "such an interpretation should be avoided ." *Id. citing, McKinney's Statutes § 98.*

The burden of proof in an Article 78 proceeding rests with the petitioner alone. *See, NYS Inspection Sec. In Law Enforcement Employees v. NYS Civil Service Commission,* 213 AD2d 826 (3rd Dept. 1995). This Court's review of an administrative decision is limited to whether the challenged determination was arbitrary and capricious or otherwise unsupported by substantial evidence. *See. O'Rourke v. Kirby*, 54 NY2d 8 (1981); *see also, Pell v. Board of Education*, 34 NY2d 222 (1974). An action is arbitrary and capricious if taken without sound basis in reason and without regard to the facts. *See, Pell, supra.* In addition, this Court is without authority to substitute its own judgment for that of the respondent unless the decision clearly appears to be arbitrary or contrary to law. *See, Diocese of Rochester v. Planning Board*, 1 NY3d 508 (1956); *see also, Walker v. SUNY*, 19 AD3d 1058 (4th Dept. 2005). This Court may not disturb rational inferences drawn from the evidence. *See, DiMaria v. Ross*, 52 NY2d 771 (1980). Nor may this Court usurp the administrative function by directing respondents to proceed in a specific manner which is instead within their discretion. *See, Burke's Autobody v. Ameruso,* 115 AD2d 198 (1st Dept. 1985). In addition, the respondent's determination must be judged under the deferential

standard accorded to agency determinations, specifically what constitutes an "employee" and the specific factual circumstances. *See, O'Brien v. Spitzer*, 7 NY3d 239 (2006); *see also, New York State Superfund Coalition , Inc. v. New York State Department of Environmental Conservation*, 18 NY3d 289 (2011).

The respondent has demonstrated that the determination was proper and petitioner has not established any employment relationship with DOCCS so that he may qualify for a defense and indemnification under the statutes. The Public Officers Law strictly limits state defense and indemnification to employees only, stating that those "benefits will only inure to employees." *POL § 17(5)*. It further provides that "[t]he term employee shall mean any person holding a position by election, appointment, or employment in the service of the state, including clinical practice pursuant to subdivision fourteen of section two hundred and six of the public health law, whether or not compensated, a volunteer expressly authorized to participate in a state sponsored volunteer program, but shall not include an independent contractor ." *POL § 17(1)(a)*. It also directs that "the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties." *POL § 17(2)(a)*. In the present case, petitioner has been named in a third party action concerning a medical malpractice case where petitioner was randomly assigned to read a specimen removed from an inmate and there is nothing in the record to support the determination that petitioner had an employment or independent contractor relationship with DOCCS.

In addition, while Correction Law 24-a makes section 17 scheme available independent contractors working with DOCCS who are delivering services at the request of the department,

this does not apply to petitioner. Although he argues that coverage should be provided to him due to Cotie's status as an independent contractor, adopting such an argument would extend section 17 coverage to any medical provider who provides services to any inmate in any capacity. The central inquiry here is whether petitioner was acting within the scope of his public employment or duties pursuant to section 17 and the respondent's determination that petitioner does not qualify under the statutes was reasonable. Inasmuch as there is no legal basis on which the State can be held liable for coverage, there is no obligation to provide a defense. *See, Board of Education of East Syracuse Minoa District v. Continental Ins. Co.*, 198 AD2d at 816 (4th Dept. 1993). The denial of petitioner's defense was proper because as a matter of law there is no possible factual or legal basis on which the State might eventually be held to be obligated to indemnify a petitioner under section 17. *See, Servidone Construction Corp. v. Security Insurance Company*, 64 NY2d 419 (1985).

It is also important to note that the Attorney General's determination is entitled to deference. *See, O'Brien, supra.* While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term. *See, id.* Courts generally defer to the governmental agency charged with the responsibility of administration of a statute in those cases where interpretation or application entails an evaluation of factual data and inferences to be drawn there from and the agency's interpretation is not irrational or unreasonable. *See, New York State Superfund Coalition, supra.* It is for the Attorney General in the first instance to determine whether a petitioner is acting in the scope of his employment and therefore entitled to legal representation; such determination will only be set aside if it is arbitrary and capricious and lacks a factual basis in the record. *See, Kaufman v. Spitzer*, 2007 NY Slip OP 31095(U) Suffolk

County 2007. Therefore, the respondent's denial was based upon the determination of the facts which were so clear cut their reasonable minds could reach no other conclusion. *See, Sharrow v. State of New* York, 216 AD2d 844 (3rd Dept. 1990).

NOW, therefore, for the foregoing reasons, it is

ORDERED, that that the relief sought in the petition is denied.

ENTER

Dated: August 11, 2021
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Petition, dated May 28, 2021, and attached exhibits.
2. Notice of Verified Petition, undated.
3. Amended Notice of Verified Petition, dated June 1, 2021.
4. So Ordered Letter, dated June 7, 2021.
5. Verified Answer and Return, dated July 25, 2021, and attached exhibits.
6. Memorandum of Law in Opposition to the Petition, dated July 26, 2021.
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8. Letter of Maureen A. MacPherson, Esq., dated August 5, 2021.
9. So Ordered Letter, dated August 11, 2021.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of:

JUN WANG, M.D.,
Petitioner,

NOTICE OF APPEAL

Index No.: 004977/2021

For a Judgment Pursuant to CPLR Article 78 and CPLR Section 3001

-against-

LETITIA JAMES, Attorney General of The State of New York

Respondent.

PLEASE TAKE NOTICE that Petitioner Jun Wang, M.D., by and through his attorneys, Gale Gale & Hunt, LLC, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Department, from a Decision and Order of the Hon. Donald A. Greenwood, issued on August 11, 2021. Petitioner appeals each and every portion of said Decision and Order as well as the whole thereof insofar as it denies the relief sought by Petitioner. A copy of said Decision and Order executed by Justice Greenwood is attached as Exhibit A.

Dated: September 13, 2021

Minla Kim, Esq.
GALE GALE & HUNT, LLC
Attorneys for PetitionerJun Wang, M.D.
P. O. Box 6527
Syracuse, New York 13217-6527
(315) 637-3663

TO: Maureen MacPherson, Esq.
Assistant Attorney General, of Counsel
Attorneys for Plaintiff
615 Erie Boulevard West
Syracuse, New York 13204
(315) 448-4800

Exhibit A

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on August 3, 3021.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF

JUN WANG, M.D.,

Petitioner,

FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78 AND CPLR SECTION 3001

v.

LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

DECISION AND ORDER ON PETITION

Index No.: 004977/2021

APPEARANCES: **CATHERINE A. GALE, ESQ., OF GALE GALE & HUNT, LLC**
For Petitioner

MAUREEN A. MACPHERSON, ESQ., OF OFFICE OF THE ATTORNEY GENERAL
For Respondent

The petitioner commenced this special proceeding to challenge the determination of the respondent made on March 4, 2021 declining the petitioner's request for representation by the Department of Law of the State of New York in the case of *Omar Alvarez v. Cortland Regional Medical Center, Inc., et al,* (Index No. 805085/2015), commenced in New York County Supreme Court. The petition seeks the following relief: a determination pursuant to CPLR

Article 78 vacating respondent's determination and a declaratory judgment[1] that the State of New York defend and indemnify petitioner for legal actions arising from care he provided to Alvarez in September of 2012. The petitioner made said request pursuant to Public Officers Law (POL) section 17 and Correction Law section 24-a. POL section 17 provides state employees defense and indemnification in any civil action arising out of any alleged acts or omissions committed while acting within the scope of employment. Correction Law section 24-a extends the benefits of section 17 to "any person holding a license to practice", such as a physician "who is rendering or has rendered professional services authorized under such license while acting at the request of the department or a facility of the department in providing health care and treatment ...to inmates of state correctional facilities ...without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility." *Correction Law § 24-a.*

Alvarez commenced the medical malpractice action in March of 2015 alleging negligent medical care by defendants, including Cortland Regional Hospital f/k/a Cortland Memorial Hospital. He was an inmate of the Department of Corrections and Community Supervision (DOCCS) and was housed at Auburn Correctional Facility. Dr. James Dolan, a physician at the facility, treated Alvarez for a possible boil or cyst with antibiotics and then recommended a surgical evaluation for excision/biopsy or drainage after it failed to resolve. He referred Alvarez to Robert Cotie, M.D., who provided general surgery services to inmates. Cotie recommended an excisional biopsy and Dr. Pang Kooi, the facility's Health Services Director and a named defendant in the underlying civil matter, approved the biopsy recommendation. DOCCS approved the biopsy and scheduled in September of 2012 at defendant Cortland Hospital. The

[1] Petitioner subsequently withdrew the request for said relief.

petitioner here interpreted the specimen and submitted it to SUNY Upstate and opined that the specimen was "lymph node with reactive lymphoid hyperplasia," a benign condition. Approximately a year later, Alvarez was diagnosed with Hodgkin's lymphoma and commenced the medical malpractice action, alleging that the cancer was present in September of 2012 and defendants failed to diagnose the mass. Defendant Cortland Hospital commenced a third-party action against petitioner on March 2, 2021. A tender of defense letter requesting defense and indemnification of petitioner was served on respondent on March 4, 2021 and on the same date respondent denied the request, finding that petitioner treated and billed Alvarez within the scope of his employment with the hospital through a private practice and billing arrangement, that there was no contract or agreement between the State and either petitioner or his private business, Cortland Pathology, P.C., for any work performed upon inmates by the hospital laboratory or petitioner, and concluded that the work performed was not within the scope of any agreement that would authorize the State to provide petitioner or Cortland Pathology, P.C. with legal representation. Petitioner requested reconsideration and respondent reiterated its previous decision in its March 23,2021 letter.

Petitioner argues that the denial was improper because he was acting at the request of DOCCS as the specimen was removed by Cotie, who recommended the biopsy and submitted the request to DOCCS, that DOCCS approved it and that both DOCCS and Cotie were aware that the purpose of the procedure was not only removal of the lesion if possible but to determine the nature of the specimen and whether it was cancerous. Petitioner argues that he was working under the approval obtained by Cotie, which was paid by DOCCS and that therefore, Correction Law section 24-a explicitly applies and mandates the State to defend and indemnify him.

The respondent provided the Return in this matter and points to the Cotie deposition testimony concerning the civil matter that establishes that he was a private surgeon retained as an outside consultant/independent contractor by DOCCS. In his private practice, he was affiliated with Cortland Hospital. He further testified that he took surgical specimens of the mass for a pathology inspection. He sent the specimen, as he routinely did, to the hospital pathology department lab. Cotie further testified that whenever he sent any specimen to the hospital's department of pathology for interpretation, he relied on whatever pathologist was on duty in the lab to inform him of the results. He testified that he was never able to select or choose a particular pathologist, and he did not request the petitioner in this case. The respondent also points to the deposition testimony of petitioner's business partner, Dr. William Shang, who testified that both his and petitioner's pathology services were contracted for the hospital through a contract with their private group that he and petitioner owned, Cortland Pathology Services, P.C. Shang testified that they were paid a flat fee for their services at the hospital pursuant to a Pathology Services Contract, which forbade both of them from engaging in other outside consultant jobs without advance permission of the hospital board. Respondent points to petitioner's pathology report, which was printed on Cortland Hospital letterhead. According to Shang, DOCCS had no input into the contract between the hospital and the petitioner. Petitioner has not submitted any evidence that DOCCS had such authority or any supervisory authority over petitioner or Shang during the relevant time. Only petitioner, Shang, and the hospital had any control over the staff who worked at the hospital pathology laboratory. Both Kooi and Cotie testified that they relied on petitioner's pathology report that the mass was benign in formulating their treatment plans. Respondent likewise points to the bill that DOCCS paid for the surgical pathology services performed on the biopsy specimen was issued by and paid to the hospital,

which made no reference to petitioner. No separate bill was submitted by petitioner to DOCCS and no bill was paid separately to petitioner. Respondent, therefore. contends that at the time petitioner issued his pathology report, he was not an employee or independent contractor of DOCCS.

Based upon the record before it, this Court finds that the respondent's determination was proper in this matter. While POL section 17 permits the state to fund the defense and indemnification of employees and certain volunteers sued in the course of their employment, it does not provide such coverage for independent contractors. *See, POL § 17.* Corrections Law section 24-a provides an exception for DOCSS independent contractors by and provides section 17 coverage to independent contractors who are licensed medical professionals under certain circumstances. *See, Correction Law § 24-a.* Respondent is correct that the statute does not provide defense and indemnification of all medical professionals who treat inmates. A 1980 Attorney General's opinion which confirms the legislative history of the statute and further confirms how strictly construed the grant of section 17 rights must be, stating: "the legislative history of chapter 466 of the Laws of 1978 by which both Correction Law section 24-a and Public Officers Law section 17 were enacted contains very little discussion of Correction Law section 24-a. The memorandum to the Governor ...makes no mention of Correction Law section 24-a or its provisions. The Department of Health ...pointed out however that: this bill extends the benefits Public Officers Law section 17 to non-employee health professionals of both the Department of Correction and the Department of Mental Hygiene who render professional care at the request of those agencies. This Department has proposed legislation providing similar protection for consultant physicians rendering part- time health care services in hospitals operated by it ." *1980 Op Atty Gen 40.* It further provides that that the Department of Health

proposed legislation by which the benefits of section 17 could be made available to persons rendering professional services "on a contract basis" to the department and that the memorandum therefore reflects the preference as a matter of policy for an interpretation which would make such indemnification available. *See, id.* It also states that section 17 applies to the negligence or alleged negligence of both non- professional and professional "employees" of the State and that section 24-a would therefore add little if anything to the law existing in its absence if it were interpreted so strictly as to deny extension of the benefits of section 17 to "identified independent contractors", concluding that "such an interpretation should be avoided ." *Id. citing, McKinney's Statutes § 98.*

The burden of proof in an Article 78 proceeding rests with the petitioner alone. *See, NYS Inspection Sec. In Law Enforcement Employees v. NYS Civil Service Commission*, 213 AD2d 826 (3rd Dept. 1995). This Court's review of an administrative decision is limited to whether the challenged determination was arbitrary and capricious or otherwise unsupported by substantial evidence. *See, O'Rourke v. Kirby*, 54 NY2d 8 (1981); *see also, Pell v. Board of Education*, 34 NY2d 222 (1974). An action is arbitrary and capricious if taken without sound basis in reason and without regard to the facts. *See, Pell, supra.* In addition, this Court is without authority to substitute its own judgment for that of the respondent unless the decision clearly appears to be arbitrary or contrary to law. *See, Diocese of Rochester v. Planning Board*, 1 NY3d 508 (1956); *see also, Walker v. SUNY*, 19 AD3d 1058 (4th Dept. 2005). This Court may not disturb rational inferences drawn from the evidence. *See, DiMaria v. Ross*, 52 NY2d 771 (1980). Nor may this Court usurp the administrative function by directing respondents to proceed in a specific manner which is instead within their discretion. *See, Burke's Autobody v. Ameruso*, 115 AD2d 198 (1st Dept. 1985). In addition, the respondent's determination must be judged under the deferential

standard accorded to agency determinations, specifically what constitutes an "employee" and the specific factual circumstances. *See, O'Brien v. Spitzer,* 7 NY3d 239 (2006); *see also, New York State Superfund Coalition , Inc. v. New York State Department of Environmental Conservation,* 18 NY3d 289 (2011).

The respondent has demonstrated that the determination was proper and petitioner has not established any employment relationship with DOCCS so that he may qualify for a defense and indemnification under the statutes. The Public Officers Law strictly limits state defense and indemnification to employees only, stating that those "benefits will only inure to employees." *POL § 17(5).* It further provides that "[t]he term employee shall mean any person holding a position by election, appointment, or employment in the service of the state, including clinical practice pursuant to subdivision fourteen of section two hundred and six of the public health law, whether or not compensated, a volunteer expressly authorized to participate in a state sponsored volunteer program, but shall not include an independent contractor ." *POL § 17(1)(a).* It also directs that "the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties." *POL § 17(2)(a).* In the present case, petitioner has been named in a third party action concerning a medical malpractice case where petitioner was randomly assigned to read a specimen removed from an inmate and there is nothing in the record to support the determination that petitioner had an employment or independent contractor relationship with DOCCS.

In addition, while Correction Law 24-a makes section 17 scheme available independent contractors working with DOCCS who are delivering services at the request of the department,

this does not apply to petitioner. Although he argues that coverage should be provided to him due to Cotie's status as an independent contractor, adopting such an argument would extend section 17 coverage to any medical provider who provides services to any inmate in any capacity. The central inquiry here is whether petitioner was acting within the scope of his public employment or duties pursuant to section 17 and the respondent's determination that petitioner does not qualify under the statutes was reasonable. Inasmuch as there is no legal basis on which the State can be held liable for coverage, there is no obligation to provide a defense. *See, Board of Education of East Syracuse Minoa District v. Continental Ins. Co.*, 198 AD2d at 816 (4th Dept. 1993). The denial of petitioner's defense was proper because as a matter of law there is no possible factual or legal basis on which the State might eventually be held to be obligated to indemnify a petitioner under section 17. *See, Servidone Construction Corp. v. Security Insurance Company*, 64 NY2d 419 (1985).

It is also important to note that the Attorney General's determination is entitled to deference. *See, O'Brien. supra.* While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term. *See, id.* Courts generally defer to the governmental agency charged with the responsibility of administration of a statute in those cases where interpretation or application entails an evaluation of factual data and inferences to be drawn there from and the agency's interpretation is not irrational or unreasonable. *See, New York State Superfund Coalition, supra.* It is for the Attorney General in the first instance to determine whether a petitioner is acting in the scope of his employment and therefore entitled to legal representation; such determination will only be set aside if it is arbitrary and capricious and lacks a factual basis in the record. *See, Kaufman v. Spitzer*, 2007 NY Slip OP 31095(U) Suffolk

County 2007. Therefore, the respondent's denial was based upon the determination of the facts which were so clear cut their reasonable minds could reach no other conclusion. *See, Sharrow v. State of New* York, 216 AD2d 844 (3rd Dept. 1990).

NOW, therefore, for the foregoing reasons, it is

ORDERED, that that the relief sought in the petition is denied.

ENTER

Dated: August 11, 2021
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of:

JUN WANG, M.D.,
Petitioner,

AFFIDAVIT OF SERVICE

Index No.: 004977/2021

For a Judgment Pursuant to CPLR Article 78 and CPLR Section 3001

-against-

LETITIA JAMES, Attorney General of The State of New York

Respondent.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

MINLA KIM, being duly sworn, deposes and says that I am not a party to this action, am over 18 years of age, and reside in Manlius, New York. On September 15, 2021, I electronically filed the amended notice of appeal with attached exhibit with the Clerk of the Court using the NYSCEF system, which sent notification of such filing to the following:

Maureen MacPherson
maureen.macpherson@ag.ny.gov

Dated: September 15, 2021

Minla Kim, Esq.
GALE GALE & HUNT, LLC
Attorneys for Petitioner Jun Wang, M.D.
P. O. Box 6527
Syracuse, New York 13217-6527
(315) 637-3663

Sworn to & subscribed before me
This 15th day of September 2021

Notary Public

Olga S. Camperlino, Notary Public
State of NY, No. 01CA6236900
Qualified in Onondaga County
Commission Expires March 7, 2023

Prepared by PrintingHouse Press, Ltd. 10 East 39th Street, New York, NY 10016
Tel No: (212) 719-0990 Fax No: (212) 398-9253

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Willie Addison, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

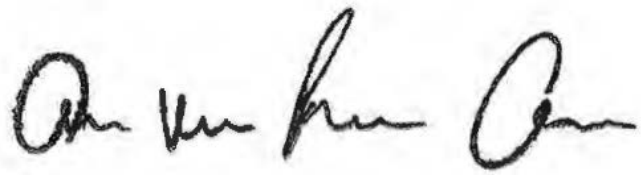
That on 8/4/2022 deponent caused to be served 1 copy(s) of the within

Motion for Leave To Appeal

upon the attorneys at the address below, and by the following method:

By Overnight Delivery

The Honorable Letitia James
Attorney General of the
State of New York
Attorneys for
Respondent-Respondent
Attn: Kevin C. Hu
The Capitol
Albany, New York 12224
518-776-2007
kevin.hu@ag.ny.gov



Sworn to me this
Thursday, August 4, 2022

Antoine Victoria Robertson Coston
Notary Public, State of New York
No.01RO6286515
Qualified in Nassau County
Commission Expires on 7/29/2025

Case Name: ITMO Jun Wang, M.D. v. Letitia James (2)

Docket/Case No: CA 21-01301

Index: 004977/2021