SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 18, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7377 The People of the State of New York, Respondent, Ind. 1543/98

-against-

Kersey Jannestil,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 2, 2008, convicting defendant, upon his plea of guilty, of forgery in the second degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court properly imposed a felony sentence based on defendant's violation of his plea agreement. After being rejected by a drug program, defendant absconded, adopted an alias, remained at large for 10 years, and was returned on a

bench warrant. Defendant thus forfeited the opportunity to have his felony conviction replaced by a misdemeanor conviction (*see People v Jenkins*, 11 NY3d 282 [2008]). Although the court could have imposed a more severe sentence under the agreement, it imposed the minimum lawful sentence for a second felony offender.

Given the circumstances, the court properly exercised its discretion in denying defendant's new attorney's request for an adjournment to permit further preparation for sentencing, and that ruling did not deprive defendant of effective assistance of counsel (*see People v Chappotin*, 56 AD3d 327 [1st Dept 2009], *lv denied* 11 NY3d 923 [2009]). Both the attorney and defendant addressed the court at sentencing, and "there is no reason to believe that counsel could have persuaded the court to impose a more lenient sentence if he had received more time to prepare" (*People v Krasnovsky*, 45 AD3d 446, 447 [1st Dept 2007], *lv denied* 10 NY3d 767 [2008]). There was no need for either counsel or the court to inquire into defendant's 2008 arrest in Queens County, or his immigration status, because neither of these factors played any role in defendant's sentence.

To the extent defendant may seek to vacate his plea, he must do so by motion in the trial court upon a proper evidentiary record.

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8777 Tower Insurance Company of New York, Index 108391/10
Plaintiff-Appellant,

-against-

Rong Rong Sun also known as
Andy Xu, etc., et al.,
Defendants,

Alejo Gomez, an Infant by her
Mother and Natural Guardian,
Fulvia Rodriguez, etc., et al.,
Defendants-Respondents.

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Law Office of Max W. Gershweir, New York (Max W. Gershweir of counsel), for appellant.

Morelli Ratner PC, New York (David T. Sirotkin of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 11, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff insurer's motion for summary judgment declaring that it is not obligated to indemnify or defend its insured, defendant Andy Xu, in the underlying personal injury action, reversed, on the law, the motion granted, without costs, and it is so declared.

On this record, plaintiff, Tower Insurance Company of New York, is entitled to summary judgment declaring it free of any obligation to defend or indemnify its insured in the underlying

personal injury action. As discussed below, neither the insured nor the injured party ever gave Tower notice of the underlying incident or the ensuing lawsuit. In particular, the injured party failed to give Tower notice, or even to conduct further inquiry, for nearly two months after his counsel received a policy renewal certificate evidencing that Tower had renewed the insured's policy only five months after the incident. Under these circumstances, to deny Tower summary judgment would be to abrogate any duty of an injured party to make a reasonable effort, judged by "the means available" to it (*Appel v Allstate Ins. Co.*, 20 AD3d 367, 369 [1st Dept 2005] [internal quotation marks omitted]), to give notice to an insurer pursuant to Insurance Law § 3420(a)(3). We find no warrant for this result in the statute or in case law.

It is undisputed that the insured alleged tortfeasor (Xu) never gave Tower notice of the May 2007 incident giving rise to the claim or of the underlying lawsuit, in which the injured party (Gomez) sued Xu and the school district on whose premises the incident occurred. It is also undisputed that, on or about October 29, 2008, Xu served on counsel for the other parties to the underlying action an amended discovery response to which was attached a "Homeowners Policy Renewal Certificate" representing

that Xu had been covered by a Tower *renewal* homeowners policy for the year commencing October 8, 2007 — five months after the subject incident. In spite of his counsel's receipt of this information, Gomez neither contacted Tower nor took any other action to investigate whether a Tower policy had been in effect on the date of the incident. The school district, however, based on the same renewal certificate that Gomez ignored, did notify Tower of the matter, by letter dated November 13, 2008. Thereafter, by letter to all parties to the underlying action, dated December 19, 2008, Tower disclaimed coverage.

The question before us is whether Tower may be required to afford coverage to its defaulting insured (Xu) for the benefit of the injured party (Gomez) pursuant to Insurance Law § 3420(a)(3). Gomez is not accountable, of course, for Xu's failure to provide notice to Tower during the period of nearly a year and a half from May 3, 2007, the date of the incident, to October 29, 2008, the date of Xu's amended discovery response providing to Gomez the Tower "Homeowners Policy Renewal Certificate" (*see Appel*, 20 AD3d at 368 ["Having been statutorily granted an independent right to give notice and recover directly from the insurer, the injured party . . . is not to be charged vicariously with the

insured's delay"] [internal quotation marks omitted]).[1] Still, even though "[i]n determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insureds" (*id.* [internal quotation marks omitted]), some level of diligence was required of Gomez, as the dissent reluctantly concedes, once his counsel, upon receipt of the certificate evidencing that coverage had been *renewed* five months after the incident, was put on notice of the likelihood (even if not a certainty) that Xu had been covered by a Tower policy at the time of the incident (*see Kalthoff v Arrowood Indem. Co.*, 95 AD3d 1413, 1415 [3d Dept 2012] [where the insured has failed to comply with the notice conditions of the policy, "the injured party bears the burden of demonstrating that it made reasonable efforts to identify the insurer and provide it with prompt notice"], *lv denied* 19 NY3d 815 [2012]).

It is undisputed that Gomez took no action after his counsel finally received the policy renewal certificate. Again, not only did Gomez not give Tower notice of the claim, but he also made no

[1]The dissent's assertion that our reversal "penaliz[es] Gomez for Xu's dilatory and obstructive behavior" is simply false. The question is whether Gomez acted reasonably and diligently *after* his counsel received the renewal certificate from Xu.

effort to seek further information about the possibility of coverage from either Xu or Tower. After about seven weeks of inaction by Gomez, Tower issued its letter disclaiming coverage in response to the notice it had received from the school district. "Since [Gomez] did not assert [his] own right to provide notice, but rather relied on the insured to do so, [his] rights are derivative of the insured's" (*Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 309 [1st Dept 2008]). Unfortunately, it is established and undisputed that, in this case, the insured forfeited his right to coverage by failing to provide Tower with timely notice — or, indeed, any notice at all — as required by the policy. We conclude, therefore, that Tower is entitled to summary judgment.

The dissent asserts that, because the renewal certificate did not itself directly prove that a policy had been in effect at the time of the incident, Gomez's receipt of that certificate "imposed [no] obligation to investigate further."[2] The only

[2]Contrary to the dissent's assertion that "the word 'renewal' [in the certificate] is not capitalized," the certificate bears the heading "Homeowners Policy Renewal Certificate," with the first letter of each word capitalized. Even if the certificate were as characterized by the dissent, we fail to see how that would absolve Gomez of the obligation to make further inquiry.

reason given for this conclusion is that "multiple discovery requests had been served and Xu's responses thereto were less than forthcoming." Putting aside the fact that the record does not contain an affirmation by Gomez's counsel offering this excuse for his inaction, we do not see how these circumstances made it reasonable for Gomez's counsel to ignore the information with which he had finally been provided. Plainly, a certificate stating that a policy has been renewed means that a policy preexisted the renewal. Further, whatever problems Gomez's counsel may have had in dealing with Xu's counsel, we fail to see how those problems prevented counsel from directing a letter to Tower, based on the renewal certificate in his hands, advising Tower of the incident. At a minimum, having received the renewal certificate, further inquiry to Tower and/or Xu's counsel was in order. Apparently, however, it is the dissent's position that one is only put upon inquiry notice when there is no longer a need for inquiry.

In the end, the dissent invokes the notice that Tower received from the school district as justification for requiring Tower to provide coverage in an action in which neither its insured nor the injured party gave Tower any notice. We fail to see how the school district's notice can be imputed to Gomez,

given that Gomez's interests were entirely adverse to those of the school district, which is being sued by Gomez in the underlying action. Where an insurer covers more than one insured for liability arising out of the same incident, and each insured has an independent duty to give timely notice, notice by one insured cannot be imputed to another (*see Continental Cas. Co. v Employers Ins. Co. of Wausau*, 85 AD3d 403, 409 [1st Dept 2011]; *City of New York v St. Paul Fire & Mar. Ins. Co.*, 21 AD3d 978, 981 [2d Dept 2005]; *American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373 [1st Dept 1998]). Here, by analogy, the notice given to Tower by the school district, an alleged co-tortfeasor with Tower's insured, should not be imputed to Gomez, the injured party, because Gomez had an independent statutory duty to give Tower notice and is an adversary of the school district in the underlying action. The dissent does not cite a single case supporting a contrary conclusion. Further, the dissent's assertion that it would have been "a futile act" for Gomez to give Tower notice because the school district had already done so is not cogent. Apart from the fact that Gomez could not rely on the school district's notice before he learned of it, this Court has held that an injured person's notice, if given promptly based on the information available to him or her, is effective even if

given after the insurer has disclaimed in response to late notice from its insured (*see Appel*, 20 AD3d at 369).

In sum, it is difficult to avoid the conclusion that the dissent would have us decide this appeal based on sympathy for the injured party. While the loss giving rise to this claim is indeed tragic, our sympathy for the injured party provides no warrant for departing from established law.

All concur except Manzanet-Daniels and Gische, JJ. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

I would affirm the order of the motion court denying plaintiff insurer's motion for summary judgment declaring that it is not obligated to indemnify Gomez, the plaintiff in the underlying personal injury action.[1]

Where the insured fails to give timely notice, an injured party can give notice himself, thereby preserving his or her right to proceed directly against the carrier (*Appel v Allstate Ins. Co.*, 20 AD3d 367 [1st Dept 2005]). Section 3420(a) of the Insurance Law confers on the injured party an independent right to give notice, so long as he or she acts diligently in endeavoring to ascertain the identity of the insurer, and gives notice as soon as it is reasonably possible to do so (*see Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564 [1st Dept 1957], *affd* 4 NY2d 1028 [1958]). In determining whether notice has been timely given, the standard to which an injured party is held is understandably less rigorous than the one applicable to an insured. "Having been statutorily granted an independent right to give notice and recover directly from the insurer, the

[1]On reargument, the motion court granted the insurer's request to enter a default judgment against Barry Xu, the father of the infant defendant. Plaintiff has accordingly withdrawn its appeal as respects Xu.

injured party or other claimant is not to be charged vicariously with the insured's delay" (*Appel*, 20 AD3d at 368 [denying insurer's motion for summary judgment where the plaintiff did not become aware that the insurer was the carrier for the defendants in the underlying action until approximately two days before the insurer sent its disclaimer letter]; *Denneny v Lizzie's Buggies*, 306 AD2d 89, 89 [1st Dept 2003] [denying insurer's motion for summary judgment where the plaintiff tried several times over the course of a year to ascertain the identity of the defendant's insurer, especially in view of the "misleading conduct and subterfuge" of the defendant's owner to prevent disclosure of the insurance information sought by the plaintiff]; *see also Cirone v Tower Ins. Co. of N.Y.*, 39 AD3d 435, 435-36 [1st Dept 2007] [motion court properly found that the plaintiffs' action was not barred by the failure to give the defendant's insurer separate, formal written notice], *lv denied* 9 NY3d 808 [2007]).

I disagree with the majority's conclusion that Gomez failed to act diligently, depriving him of the protection of Section 3420(a). In response to explicit discovery requests from Gomez demanding copies of any applicable insurance policies, Xu responded "none." After many months of Gomez's attempting to ascertain whether Xu had insurance coverage, Xu produced a

certificate for a homeowners policy for the year *after* the incident occurred (from October 8, 2007 through October 8, 2008). Contrary to the majority, I do not believe that the fact that the certificate was denominated "renewal"[2] automatically leads to the conclusion that liability coverage was in effect on May 3, 2007, the date of the incident, or imposed an obligation to investigate further, particularly where multiple discovery requests had been served and Xu's responses thereto were less than forthcoming. Indeed, Gomez was under a reasonable belief that no coverage existed, since he had no documentation whatsoever of an insurance policy covering Xu on the date of the incident. The first Gomez learned of the existence of the Xu policy was on the date he received a notice from plaintiff insurer disclaiming coverage. The majority, in ruling that Gomez is not entitled to coverage under the Xu policy, is effectively penalizing Gomez for Xu's dilatory and obstructive behavior.

The insurer had been apprised of the action by the school district, Xu's codefendant in the underlying suit. Thus, it cannot be said that the insurer was in any way prejudiced or

[2]It bears further noting that Xu produced not the policy itself, but merely a certificate, and that the word "renewal" is not capitalized or otherwise highlighted.

otherwise hampered in its investigation of the claim.

Gomez lost vision in an eye as a result of the incident. The majority now holds that Gomez is not entitled to coverage under Xu's policy because he neglected to give notice, even though doing so would have essentially been a futile act since the insurer had already been apprised of the suit by the school district and had already disclaimed coverage as to Gomez. I must respectfully disagree with the majority's conclusion that Gomez is not entitled to coverage under the circumstances of this case.

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9787 In re Kenneth E. Fisherman,
Petitioner-Respondent,

-against-

Hanane Zdeg,
Respondent-Appellant.

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Bruce A. Young, New York, for appellant.

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 5, 2012, which denied respondent mother's objections to the order (Support Magistrate Paul Ryneski), entered on or about April 17, 2012, denying her motion to vacate an order of support, modified on default, in the amount of $2,521.16 monthly, retroactive to August 4, 2011, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a hearing to determine the amount of support owed by the mother for the period August 4, 2011 to July 24, 2012.

Family Court abused its discretion in denying the mother's objection, because she demonstrated a reasonable excuse for her nonappearance at the March 1, 2012 hearing before the Support Magistrate (*see* CPLR 5015). Although the Family Court did not reach the issue of whether the mother established a potentially meritorious defense, upon our independent review of the record,

we find that she did.

The mother was present in court March 1, 2012 for an afternoon hearing on custody and visitation before a different Family Court judge and understandably assumed that the support hearing would follow the related hearing as had been the usual practice on prior appearances. When, after appearing on the custody and visitation matter, she immediately went to the courtroom where the support matter was being heard, the mother learned that the support hearing had continued in her absence in the morning, and that the Support Magistrate had entered a default order modifying her support payments to the father from $25.00 weekly to $2,521.16 per month, notwithstanding that the mother's unemployment was undisputed, and that the father was only seeking $1,000.00 per month. The mother, who had never previously failed to appear for a hearing, and who had been current in her support payments to that point, then promptly moved to vacate her default. Under the circumstances of this

case, the mother's de minimis default in appearing should have been excused and the matter resolved on its merits. Accordingly, we remand for a hearing to determine the appropriate amount, if any, owed by the mother.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9816-
9817 The People of the State of New York,
Respondent,

-against-

Ronald Sally,
Defendant-Appellant.

Ind. 1791/07

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Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schumann-Ortega of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ethan Greenberg, J.), entered on or about July 6, 2010, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), and order, same court (Megan Tallmer, J.), entered on or about February 16, 2012, which effectively denied defendant's motion for renewal, and also denied defendant's Correction Law § 168-o petition for modification, unanimously affirmed, without costs.

The People met their burden of proving, by clear and convincing evidence, the risk factor for sexual intercourse. Although defendant was permitted to plead guilty to first-degree sexual abuse in the underlying case, the victim's grand jury

testimony constituted "reliable hearsay" (Correction Law § 168-n [3]) that satisfied the People's burden (*see People v Mingo*, 12 NY3d 563, 572-574, 576-577 [2009]) and established the element of penetration.

The record relating to the February 16, 2012 order establishes that the court effectively denied renewal, and that the denial was proper given that defendant failed to explain why, had he exercised due diligence, the allegedly new evidence could not have been presented at the original hearing (*see* CPLR 2221[e][3]). To the extent the court deemed defendant's motion to renew to be a request for modification under Correction Law § 168-o, it properly required defendant to establish whether he was entitled to a downward departure by clear and convincing evidence (*People v Conway*, 47 AD3d 492 [1st Dept 2008], *lv denied* 10 NY3d 708 [2008]). In any event, regardless of how the proceedings are characterized, we find no basis for a discretionary departure (*see People v Pettigrew*, 14 NY3d 406, 409 [2010]; *Mingo*, 12 NY3d at 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]) to level one. The underlying sex crime was committed against a 10-

year-old child, and defendant's arguments regarding mitigating factors are unpersuasive. In particular, defendant cites medical conditions that did not prevent him from committing the underlying crime.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9818 Earlene Jenkins, Index 302092/11
Plaintiff-Appellant,

-against-

Rising Development-BPS, LLC,
Defendant-Respondent.

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Law Offices of Alan M. Greenberg, P.C., New York (Robert J. Menna of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, White Plains (David C. Zegarelli of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered October 10, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff alleges that she fell on a patch of gray, bumpy ice, located under one to two inches of fresh snow on the sidewalk adjacent to defendant's building. Defendant demonstrated that it lacked actual or constructive notice of the icy condition by submitting the testimony of its property manager who stated that she was present at the subject location the night before plaintiff's fall shortly after it began to snow; that she oversaw snow removal; and that

when she left the location, there was no snow or ice on the sidewalk and salt had been applied (*see Herrera v E. 103rd St. & Lexington Ave. Realty Corp.*, 95 AD3d 463 [1st Dept 2012]; *see also Disla v City of New York*, 65 AD3d 949 [1st Dept 2009]).

Even assuming that the patch of ice upon which plaintiff allegedly fell preexisted the snowfall that occurred the night before the accident, plaintiff's opposition failed to raise a triable issue as to whether defendant had actual or constructive notice of the ice patch, or whether defendant's snow and ice removal efforts created or exacerbated the defect. There is no evidence that defendant had actual notice of the condition and in order to impute constructive notice, there must be evidence that the condition was visible and apparent and existed for a sufficient period of time to allow defendant to discover and remedy it (*see Laster v Port Auth. of N.Y. & N.J.*, 251 AD2d 204 [1st Dept 1998], *lv denied* 92 NY2d 812 [1998]). Plaintiff and her witnesses did not testify or aver that any patch of ice they saw the night before the accident was the same patch or in the same area where plaintiff fell (*see Meyers v Big Six Towers, Inc.*, 85 AD3d 877 [2d Dept 2011]). Nor did plaintiff and her witnesses describe the size or thickness of the patch of ice, from which it might be inferred that it was visible and apparent,

without pure speculation, especially given the property manager's testimony that they had cleared the area and no snow or ice remained (*see Ravida v Stuyvesant Plaza, Inc.*, 101 AD3d 1421 [3d Dept 2012]; *Wilson v Walgreen Drug Store*, 42 AD3d 899 [4th Dept 2007]; *compare Rivas v New York City Hous. Auth.*, 261 AD3d 148 [1st Dept 1999]).

Furthermore, the mere fact that defendant removed snow and ice prior to the commencement of the storm, the night before the accident, standing alone, does not raise a triable issue as to whether defendant created or exacerbated the alleged defect (*see Nadel v Cucinella*, 299 AD2d 250 [1st Dept 2002]).

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9820 In re Tyleel T.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
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 (Marta Ross of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about February 7, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it adjudicated appellant a juvenile delinquent and placed him on probation. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's

need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The seriousness of the offense as well as appellant's unsatisfactory academic, attendance and disciplinary record at school warranted a 12-month period of supervision.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9821 Peter Casanas, et al., Index 101057/12
Plaintiffs-Respondents,

-against-

The Carlei Group, LLC, et al.,
Defendants-Appellants.

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Rosenberg & Estis, P.C., New York (Alexander Lycoyannis of counsel), for appellants.

Profeta & Eisenstein, New York (Jethro M. Eisenstein of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 27, 2012, which, inter alia, denied defendants' motion to dismiss the action as against Richard Casanas, denied defendants' motion to cancel a notice of pendency filed by plaintiffs, and granted plaintiffs' cross motion to compel compliance with much of their first request for production of documents, unanimously affirmed, with costs.

In this declaratory judgment action concerning the lease for apartments 3W and 3C (the apartments) at 73 West 82nd Street in Manhattan (the building), the record shows that defendant Carlei Group LLC paid nothing to acquire the subject building from its former owner, Aleida Realty Corp. Aleida Casanas, the mother of defendant Richard Casanas and plaintiff Peter Casanas, signed the

purported transfer of title for both Aleida Realty, the seller, and Carlei, the buyer. The record also shows that Aleida Casanas was immediately replaced as manager of Carlei by Richard Casanas, who has since had complete control of Carlei. Thus, plaintiffs joined Richard Casanas as a defendant to insure that he is collaterally estopped by the judgment in this case from further conveying the property or contesting the validity of their leases. To achieve that result, he must be a party (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485-486 [1979]).

Since this action seeks a declaration of plaintiffs' rights as lessees of the apartments, pursuant to a lease they allegedly executed on January 10, 1990 with then building owner Aleida Realty Corp., and will "affect . . . the possession, use or enjoyment of[] real property" (CPLR 6501), the motion court properly sustained the notice of pendency (*see Lawlor v 543 Second Ave. LLC*, 49 AD3d 449, 449 [1st Dept 2008]).

The rules governing the scope of discovery in New York are liberally construed (*see Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358 [1st Dept 2006]), and here, the motion court did not abuse its discretion (*see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]) when it ordered compliance with plaintiffs' discovery demands. The

contested demands relate directly to the issues in this case: i.e. the purported transfer of title between Aleida Realty Corp. and Carlei; whether Carlei had authority to issue the notices to quit; the characterization of plaintiffs' tenancy in insurance records involving a 2009 fire; documents bearing the true signatures of Aleida P. Casanas and Carlos Casanas, since defendants claim that plaintiffs' lease is a forgery; and communications with Richard Casanas, with whom plaintiffs claim a history of animus.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9822 Gold Coast Advantage, Ltd., Index 603002/07
Plaintiff-Appellant, 590965/07

-against-

Tushar Trivedi, et al.,
Defendants-Respondents.

[And a Third-Party Action]

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Leitner & Getz LLP, New York (Gregory J. Getz of counsel), for appellant.

Edward J. Boyle, Manhasset, for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 26, 2012, which, after a bench trial, granted defendants' motion for judgment pursuant to CPLR 4401 dismissing plaintiff's complaint, unanimously affirmed, with costs.

Plaintiff failed to meet its burden of showing that there was a meeting of the minds as to the terms of a joint venture, or even that a joint venture was contemplated (*see Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317-318 [1958], *appeal dismissed* 358 US 39 [1958]). Indeed, the record is filled with lengthy, handwritten, sometimes illegible documents by Donald Ferrarini, who had no authority to bind plaintiff to any contract. Moreover, the documents were written by Donald from his prison

cell and thus had to be based only on his recall, as he was not allowed to give or receive documents from visitors. The record contains multiple versions of what plaintiff asserts to be the alleged joint venture agreement (also handwritten), yet not one of these documents is signed by both parties. As found by the trial court, the various versions of the agreements are oddly numbered, sometimes missing pages, and missing clauses plaintiff asserts were both material and agreed upon. Further, as also found by the trial court, the testimony of plaintiff's witnesses, who were all self-interested and sometimes gave patently unbelievable testimony, did not tend to cure the deficiencies in the documentary evidence.

The same failures that prevent plaintiff from showing an express contract prevent it from showing an implied contract (*see Brennan Beer Gorman/Architects, LLP v Cappelli Enters., Inc.*, 85

AD3d 482, 483 [1st Dept 2011]).

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 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, JJ.

9823 In re Anthony R.,

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 (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about February 1, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the third and fourth degrees, and placed him on probation for a period of 18 months, unanimously modified, on the law, to the extent of vacating the finding as to criminal possession of a weapon in the fourth degree and dismissing that count of the petition, and otherwise 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 and identification, including its resolution of any inconsistency between police testimony and scientific evidence.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and imposing a period of probation of 18 months. Given the seriousness of the offense, consisting of appellant's possession of a loaded pistol along with strong indications that he fired it, this was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

The fourth-degree possession count should be dismissed as a lesser included offense.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9824 The People of the State of New York, Ind. 4307/09
Respondent,

-against-

Robert Wadiak,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Adrienne Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered September 29, 2010, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of two years, with two years' postrelease supervision, unanimously affirmed.

Defendant was properly sentenced as a second felony offender. A review of the Pennsylvania accusatory instrument establishes that his conviction in that state was for the equivalent of the New York felony of grand larceny in the fourth degree (*see People v Gonzalez*, 61 NY2d 586, 590-591 [1984]; *People v Tyler*, 4 AD3d 183 [1st Dept 2004], *lv denied* 2 NY3d 808 [2004]). The theft of over $2000 is an essential element of

defendant's Pennsylvania felony, and his present argument to the contrary is unavailing.

We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9825 Verizon New York Inc., Index 105535/08
Plaintiff-Respondent,

-against-

Skanska USA Civil Northeast Inc.,
formerly known as Slattery Skanska Inc.,
Defendant-Appellant.

_____

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for appellant.

Solomon and Solomon, P.C., Albany (Harold L. Solomon of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered October 10, 2012, which, to the extent appealed from, denied defendant's motion for summary judgment, unanimously affirmed, without costs.

Defendant failed to make a prima facie showing that its construction activities did not contribute to the damage suffered by plaintiff's cables. Specifically, while defendant set forth evidence that it was not performing work in the vicinity of the water main break at the time that the leak was first observed, it failed to address evidence that it had performed secant pile drilling operations in the area of the leak, a few days prior. Since no evidence was offered that proper precautions were taken

during the drilling, defendant failed to meet its initial burden as movant (*see Hixon v Congregation Beit Yaakov*, 57 AD3d 328 [1st Dept 2008]).

Plaintiff's cables were not "key evidence" on the issue being litigated — namely, whether defendant caused the water main break that led to the cables becoming wet and failing. Thus, the motion court properly denied that portion of defendant's motion seeking summary judgment based upon plaintiff's disposal of portions of the involved cables six months after the incident (*see Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 476 [1st Dept 2010]).

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9827 Transcontinental Insurance Company, et al.,
Plaintiffs-Appellants,

-against-

Twin City Fire Insurance Company,
Defendant-Respondent.

Index 600292/09

_____

Carroll, McNulty & Kull LLC, New York (Douglas K. Eisenstein of counsel), for appellants.

Churbuck Calabria Jones & Materazo PC, Hicksville (Nicholas P. Calabria of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered February 15, 2012, which, to the extent appealed from, declared that defendant is only obligated to indemnify in the underlying personal injury action within its stated policy limit, unanimously affirmed, with costs.

The motion court correctly followed *Preserver Ins. Co. v Ryba* (10 NY3d 635 [2008]) in holding that the insured's work in New York did not entitle it to unlimited employer's liability coverage under the policy issued by defendant. Assuming arguendo that notice of the insured's work in New York is a factor in

triggering the coverage sought by plaintiffs, the motion court properly found such notice lacking.

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

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9828 In re Bianca J.,
Petitioner-Respondent,

-against-

Dwayne A.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

_____

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 9, 2012, which denied respondent's objections to the Support Magistrate's order denying his petition for a downward modification of the support order and granting the petition for an upward modification, unanimously affirmed, without costs.

Respondent failed to submit credible evidence of his income, assets or means of support, and therefore did not meet his burden of showing an inability to pay his court-ordered child support so as to rebut petitioner's prima facie evidence of a willful violation of the support order (*see Matter of Powers v Powers*, 86 NY2d 63 [1995]).

Although respondent presented evidence that he was terminated from his job after taking an extended medical leave, he failed to establish that he thereafter "used his best efforts

to obtain employment commensurate with his qualifications and experience" so as to show that his loss of employment constituted a change of circumstances warranting a downward modification (*see Matter of Heyward v Goldman*, 23 AD3d 468 [2d Dept 2005] [internal quotation marks omitted]).

Petitioner established a decrease in her salary, and, as set forth in her financial disclosure affidavit, increases in her rent, child care, and food expenses, thereby showing a substantial change in her circumstances sufficient to warrant an upward modification (*see Webb v Webb*, 197 AD2d 847 [4th Dept 1993]; *Beck v Beck*, 236 AD2d 703 [3d Dept 1997]). The Support Magistrate properly credited petitioner's explanation that she was forced to accept a decrease in pay or risk termination of her employment (*see Matter of Heyward*, 23 AD3d at 469).

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9829 Nelson Martino, Index 111864/11
Plaintiff-Respondent,

-against-

Consolidated Edison Company
of New York, Inc.,
Defendant-Appellant.

_____

Advocates for Justice Chartered Attorneys, New York (Richard Soto of counsel), for appellant.

Barbara Jane Carey, New York (Paul Limmiatis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 23, 2012, which granted defendant's motion to dismiss the complaint alleging wrongful termination, pursuant CPLR 3211(a)(7), unanimously affirmed, without costs.

Defendant Consolidated Edison Company of New York, Inc. terminated plaintiff from his position as a "project specialist" based on a conviction, and a subsequent arrest, for driving while intoxicated, unrelated to his job duties. Plaintiff alleges that his termination violated Correction Law Article 23-A (Correction Law §§ 750-755), which prohibits "unfair discrimination" in the employment of persons "previously convicted of one or more criminal offenses" (*see* Correction Law § 752). He contends that

Correction Law § 752 protects current employees against adverse actions by employers based on convictions and arrests incurred while they are employed with the employers.

However, Correction Law § 751 specifically states that "[t]he provisions of this article shall apply . . . to any . . . employment held by any person whose conviction of one or more criminal offenses . . . *preceded such employment*" (emphasis added; *see also* L 2007, ch 284; Senate Introducer Mem in Support, Bill Jacket, L 2007, ch 284, 2006 S.B. 7730). Because plaintiff's conviction, and an additional subsequent arrest, occurred when he was already employed by Consolidated Edison, they do not provide a basis for a claim under Correction Law Article 23-A.

Plaintiff's reliance on *Matter of Association of Surrogates & Supreme Ct. Reporters Within City of N.Y. v State of N.Y. Unified Ct. Sys.* (48 AD3d 228 [1st Dept 2008]) is unavailing, as the issue of whether Correction Law Article 23-A protects

employees from adverse actions based on convictions and arrests incurred during employment was neither briefed nor presented to this Court for adjudication in that case (*see Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 168 [1st Dept 2000]).

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9830 The People of the State of New York, Ind. 2438/10
Respondent,

-against-

Loquan Bruzzley,
Defendant-Appellant.

_____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 16, 2011, as amended June 27, 2011, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 13 years, unanimously affirmed.

The court properly granted the People's reverse-*Batson* application (*Batson v Kentucky*, 476 US 79 [1986]; *People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]). The record supports the court's express and implied findings (*see People v Payne*, 88 NY2d 172, 185 [1996]) that the race-neutral reasons provided by defense counsel for the peremptory challenges at issue were pretextual. Since these findings are based primarily on the court's assessment of counsel's credibility, they are

entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]). To the extent that defendant is challenging the adequacy of the court's findings or explanations of its reasoning, and alleging that the court did not follow the three-step *Batson* procedure, those claims are unpreserved (*see People v Richardson*, 100 NY2d 847, 853 [2003]), and we decline to review them in the interest of justice. As an alternative holding, we reject his arguments on the merits, as the court followed proper *Batson* procedures (*see Payne*, 88 NY2d at 184).

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9831 & M-1446 Nicole Lawi Zekry, Plaintiff-Respondent, Index 102550/08

-against-

Pinhas Zekry, et al., Defendants-Appellants.

_____

Berke & Berke, New York (Jeffrey R. Berke of counsel), for appellants.

Kaye Scholer LLP, New York (Michael A. Lynn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered July 11, 2012, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendants argue that the amount of revenues generated by defendant corporation from 2004 through 2007 establishes that plaintiff's claim that her husband, the individual defendant, was diverting monies from the corporation has no merit. Their sole supporting proof is an affidavit by the husband in which he purports to "analyze" the revenues and expenses of the business in 2008, while it was run by a temporary receiver, and then extrapolates therefrom the corporation's profits in the earlier years.

The affidavit is inadmissible. First, defendants are precluded from presenting any evidence of the revenues of the business by two court orders issued as a result of their admitted spoliation of relevant financial records and their obstruction of discovery. Second, the husband invoked his Fifth Amendment right against self-incrimination at his deposition to avoid answering a wide range of questions about the revenues of the business during the relevant period, and cannot now selectively provide testimony on that very subject (*see Federal Chandros v Silverite Constr. Co.*, 167 AD2d 315 [1st Dept 1990], *appeal dismissed* 77 NY2d 893 [1991]). Third, the husband may not testify as an "expert," since he neither has the proper credentials nor was identified by defendants as an expert (*see* CPLR 3101[d]). We note also that the husband's analysis is contradicted by plaintiff's accounting expert's analysis, which in any event would preclude summary judgment.

Defendants failed to preserve their argument in support of dismissing plaintiff's claims based on her allegation that the husband misled her about the amount of his own initial capital contribution to the corporation, thereby inducing her to provide substantially more than the 40% of the contribution she was required to pay. This fact-based issue is therefore not properly

before us (*see Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1st Dept 1988]). In any event, defendants failed to establish prima facie that plaintiff's claims are false. Even if the documents they submitted for that purpose were not subject to an order precluding any evidence of the husband's initial capital contribution other than the 2003 corporate income tax return, and were properly authenticated, the inferences to be drawn therefrom are contradicted by plaintiff's expert's analysis, which in any event would preclude summary judgment.

M-1446 - *Nicole Lawi Zekry v Pinhas Zekry, et al.*

Motion seeking costs and attorneys' fees granted to the extent of imposing costs on the appeal, and otherwise denied, without prejudice to further proceedings in Supreme Court.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9832 The People of the State of New York, Ind. 5012/99
Respondent,

-against-

William Epps,
Defendant-Appellant.

_____

Law Office of Robert DiDio, Kew Gardens (Danielle Muscatello of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Caleb Kruckenberg of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Jill Konviser, J.), entered on or about September 11, 2012, which denied resentencing under Correction Law § 601-d, unanimously dismissed, as taken from a nonappealable order.

Citing double jeopardy concerns, the court declined to add postrelease supervision to defendant's original sentence. Defendant, who asserts that he would derive certain benefits from being resentenced, argues that he should still be resentenced to his original prison term, without adding PRS. Since this appeal was not taken from a sentence or a resentence, but rather, from the denial of resentencing, it must be dismissed (*see People v Pagan*, 19 NY3d 368 [2012]; *People v De Jesus*, 54 NY2d 447 [1981]). "[N]o appeal lies from an order arising out of a

criminal proceeding absent specific statutory authorization" (*People v Santos*, 64 NY2d 702, 704 [1984]).

Defendant's further contention that he should be permitted to withdraw his plea of guilty is not properly before this Court.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9833 Barbara Green, Index 105146/09
Plaintiff-Respondent,

-against-

Gracie Muse Restaurant Corp.,
Defendant-Appellant.

_____

Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for appellant.

Mallilo & Grossman, Brooklyn (Beth J. Girsch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about July 10, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant restaurant established its entitlement to judgment as a matter of law, in this action where plaintiff allegedly slipped and fell on a slippery substance on the restaurant's floor. Defendant demonstrated that it had no notice of the allegedly defective condition by submitting, inter alia, the testimony of its manager who stated that on the day of the accident, he had been on duty for several hours before plaintiff's fall, and walked around and inspected the entire

restaurant every three to four minutes. He also testified that he did not see any spills of food, liquid, or debris on that day, and did not receive any complaints about such conditions. The hostess on duty at the time also testified that she did not receive any such complaints. Moreover, the manager observed that the floor was clean and dry prior to the accident, and inspected the area where plaintiff fell shortly thereafter and saw that it was still clean and dry. Plaintiff also testified that she passed the same area in the restaurant about 45 minutes before her accident and did not observe a hazardous condition (*see Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636, 637 [1st Dept 2012]; *compare Porco v Marshalls Dept. Stores*, 30 AD3d 284 [1st Dept 2006]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff did not perceive a defective condition on the floor either prior to or subsequent to her fall. She first observed a greasy substance on the soles of her sandals a day later, in her hospital room. There is a lack of evidence that the substance on the bottom of her sandals was on the part of the restaurant floor where she slipped, let alone for a long enough period of time to permit defendant to notice it (*see Berger v ISK Manhattan, Inc.*, 10 AD3d 510 [1st Dept 2004]; *Segretti v*

Shorenstein Co., E., 256 AD2d 234 [1st Dept 1998]).

The opinion of plaintiff's expert that the coefficient of friction of the subject area of the restaurant floor was below the generally accepted minimum, causing the floor to be dangerously slippery even when it was clean and dry, failed to raise a triable issue of fact. Such inherent slipperiness alone is not actionable (*see DeMartini v Trump 767 5th Ave.*, LLC, 41 AD3d 181 [1st Dept 2007]), and the expert failed to connect any observation of the floor to the accident (*see Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). The expert also failed to show that the floor's condition when he inspected it was the same as on the day of the accident, almost a year and a half earlier (*see Alston v Zabar's & Co., Inc.*, 92 AD3d 553 [1st Dept 2012]).

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9834 The People of the State of New York, SCI. 2299/09
Respondent,

-against-

Davon White,
Defendant-Appellant.

_____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert G. Seewald, J. at plea; John Collins, J. at sentencing), rendered March 18, 2011, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The sentencing court properly denied defendant's motion to withdraw his plea (*see generally People v Frederick*, 45 NY2d 520 [1978]). The motion was based entirely on postplea information about a testing chemist's misconduct, which allegedly undermined the People's ability to prove the identity of the drugs defendant sold. This information did not tend to establish defendant's innocence. Instead, it constituted impeachment material (*see*

People v Holloway, 33 AD3d 442 [1st Dept 2006], *lv denied* 7 NY3d 902 [2006]).

Furthermore, the People assured the court that they could have still established the identity of the drugs by way of several forms of untainted evidence. "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). Accordingly, the sentencing court was not obligated to conduct a minitrial on the issue of the identity of the drugs.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248 [2006]). Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9835 Richard S. Grimaldi, Index 150182/08
Plaintiff-Appellant,

-against-

Newman & Okun, P.C., et al.,
Defendants-Respondents.

_____

Schwartz & Ponterio, PLLC, New York (John Ponterio of counsel), for appellant.

Litchfield Cavo, LLP, New York (Daniel T. Hughes of counsel), for respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 23, 2012, which granted defendants' motion for summary judgment dismissing the complaint alleging legal malpractice, unanimously affirmed, without costs.

Plaintiff argues that defendants were negligent in failing to seek leave to file a late notice of claim in plaintiff's underlying personal injury action, and/or by providing incorrect legal advice regarding the applicable statute of limitations for commencing a malpractice claim against his prior counsel, who failed to file a timely notice of claim, (*see generally Brooks v Lewin*, 21 AD3d 731 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]; *Garten v Shearman & Sterling LLP*, 102 AD3d 436 [1st Dept 2013]).

Defendants contend that the legal malpractice action was

correctly dismissed because, notwithstanding any alleged failure on counsel's part, plaintiff would not have prevailed in the underlying serious injury action since the record evidence shows that plaintiff could not have raised a triable issue of fact as to whether he suffered a serious injury.

Plaintiff alleged that the July 2003 accident resulted in serious injury to his right knee under three statutory categories. Defendants' evidence in the form of, inter alia, (a) pre-2003 medical reports noting prior incidents of trauma to plaintiff's right knee, (b) plaintiff's sworn statements regarding his daily activities in the first 180 days following his 2003 accident, and (c) a medical examination and opinion from defendants' expert orthopedist, was sufficient to establish prima facie entitlement to summary judgment dismissing plaintiff's serious injury allegations.

Plaintiff's proof of the alleged serious injury was insufficient to support his claim. Plaintiff did not offer proof of objective testing, accompanied by quantified results as would support the claimed knee limitations, apart from early range-of-motion flexion tests whose findings, as to restrictions, were improperly premised upon subjective complaints of pain (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). The

qualified assessment of plaintiff's right knee condition, made by plaintiff's treating orthopedist, whose opinion in support of plaintiff's serious injury claim was premised upon his observations made during an arthroscopic procedure he performed on plaintiff's knee in 2006, failed to address the "unremarkable" findings of a 2003 MRI study, which was ordered approximately nine days after plaintiff's accident. Moreover, the surgical observations made by plaintiff's orthopedist did not objectively explain how alleged limitations in plaintiff's right knee differed from what would be the knee's normal function, purpose and use (*see Toure*, 98 NY2d at 350). Further, by 2011, plaintiff's orthopedist acknowledged that plaintiff had noted only occasional weather-related complaints with his right knee. Plaintiff was able to resume skiing, but not running.

Plaintiff's own sworn statements, including that he returned to work a week after the accident and was primarily unable to partake in regular recreational exercise, undermined his claim that he was unable to partake in substantially all the material acts that constituted his usual and customary daily activities for at least 90 of the first 180 days (*see Valdez v Benjamin*, 101 AD3d 622, 623 [1st Dept 2012]; *Atkinson v Oliver*, 36 AD3d 552 [1st Dept 2007]). Moreover, plaintiff's treating orthopedist

failed to substantiate, via a medically objective opinion, whether plaintiff lacked the capacity to engage in substantially all of his customary daily activities for 90 out of the first 180 days (*see e.g. DeSouza v Hamilton*, 55 AD3d 352 [1st Dept 2008]; *Ortega v Maldonado*, 38 AD3d 388 [1st Dept 2007]).

Further, as found by the motion court, plaintiff's unexplained gap in treatment between April 2006 and February 2011 undermined his serious injury claim (*see e.g. Pommells v Perez*, 4 NY3d 566 [2005]; *Valdez*, 101 AD3d at 623).

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

ENTERED: APRIL 18, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9836N Michael Madison, Index 103066/08
Plaintiff-Respondent,

-against-

Andrew A. Sama, M.D., et al.,
Defendants-Appellants.

_____

Peltz & Walker, New York (Bhalinder L. Rikhye of counsel), for appellants.

Arthur G. Nevins, Jr., New York, for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered September 26, 2012, which denied defendants' preclusion motion, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff previously moved for leave to further depose defendant doctor on a previously unspecified theory of liability, excessive blood loss during two surgeries. The motion court granted the relief requested and, in an interim decision, directed plaintiff to serve an amended bill of particulars to spell out more clearly the new theory of liability. On appeal, we reversed the motion court's grant of the motion for further depositions, finding that plaintiff did not "establish that 'unusual or unanticipated circumstances' had developed requiring further discovery 'to

prevent substantial prejudice'" (92 AD3d 607, 607 [1st Dept 2012]). In identifying the order on appeal, our prior order mentioned the interim direction that plaintiff serve an amended bill of particulars. However, our decision did not discuss, let alone determine, the propriety of the motion court's sua sponte directive to plaintiff's counsel to file an amended bill of particulars. The only question presented on the prior appeal, as crafted by defendants, limited itself to the issue of the supplemental examination before trial of the defendant Sama. Accordingly, the law of the case doctrine did not mandate that plaintiff be precluded from presenting evidence on the new theories and injuries alleged in the amended bill of particulars (*see Jumax Assoc. v 350 Cabrini Owners Corp.*, 71 AD3d 584 [1st Dept 2010]; *Transport Workers Union of Am. Local 100 AFL-CIO v Schwartz*, 32 AD3d 710, 715 [1st Dept 2006], *lv dismissed* 7 NY3d 922 [2006]).

The motion court did not improvidently exercise its authority by deferring to the trial court for a determination as to the preclusion and limitation of expert testimony, limiting plaintiff's two neurologists' testimony to their anticipated roles - fact witness and expert witness - and directing the

parties to expeditiously notify each other of their intentions with regard to expert testimony at trial.

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

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9837 The People of the State of New York, Ind. 7136/97
Respondent,

-against-

Raymond Vega,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Richard Joselson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about September 7, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The motion court properly found that defendant's 1988 adjudication as a second violent felony offender rendered him ineligible for resentencing on his drug conviction (*see* CPL 440.46[5][b]). Defendant asserts that this adjudication should not render him ineligible, because his sentence on his underlying 1983 violent felony conviction was allegedly unlawful under *People v Rodney E.* (77 NY2d 672 [1991]), which invalidated certain sentences that followed unauthorized periods of interim probation. That argument is without merit, for each of the

reasons stated by the motion court: (1) defendant is procedurally barred from challenging his adjudication as a second violent felony offender (*see* CPL 400.15[8]); (2) the record is unclear whether defendant was actually placed on interim probation in connection with his 1983 conviction; (3) even assuming that to be the case, the record does not establish that defendant's 1983 sentence was unlawfully enhanced on the basis of his behavior while on interim probation (*see People v Avery*, 85 NY2d 503, 506 [1995]); and (4) even assuming there was a sentencing defect, that would not affect defendant's second violent felony offender status (*see People v Ashley*, 71 AD3d 1286, 1287 [3d Dept 2010], *affd on other grounds* 16 NY3d 725 [2011]). We have considered and rejected defendant's arguments regarding each of these issues.

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9838 In re Tamia C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about February 27, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the third degree, attempted assault in the third degree and menacing in the third degree, and placed her on probation for a period of 12 months, unanimously modified, on the law, to the extent of vacating the finding as to assault in the third degree and replacing it with a finding of attempted assault in the third degree, and otherwise affirmed, without costs.

Except as indicated, 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 credibility determinations.

In each of the two incidents at issue, appellant's intent to cause physical injury could be readily inferred from her violent and unprovoked conduct (*see e.g. Matter of Keene J.*, 253 AD2d 679 [1st Dept 1998]). In one incident appellant punched the victim in the face, and in the other incident appellant repeatedly stomped on the victim's head as she lay on the ground.

The evidence also established third-degree menacing regarding the second incident, where appellant stomped on the victim's head while stating that she was going to "finish that girl," which the victim interpreted to mean appellant was going to injure her. This established that appellant, by physical menace, intentionally placed the victim in fear of physical injury (*see Matter of Daniel R.*, 49 AD3d 266 [1st Dept 2008]).

As the presentment agency concedes, the evidence regarding the first incident only established an attempted assault.

The court properly exercised its discretion when it denied appellant's request to convert the proceeding to a person in need of supervision proceeding, and instead adjudicated her a juvenile

delinquent and placed her on probation. That disposition was appropriate in light of the violent, unprovoked nature of the underlying incidents, appellant's pattern of aggressive behavior in and out of the home, and her poor school record (*see e.g. Matter of Steven C.*, 99 AD3d 570 [1st Dept 2012]).

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9839 Ramon Ortiz, Index 302254/11
Plaintiff-Respondent,

-against-

Eugene Lynch,
Defendant-Appellant.

_____

Saretsky Katz Dranoff & Glass, LLP, New York (Allen L. Sheridan of counsel), for appellant.

Siler & Ingber, LLP, Mineola (Jed N. Kirsch of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered November 5, 2012, which, to the extent appealed from, granted plaintiff's motion for summary judgment on the issue of liability, and denied defendant's cross motion to dismiss the complaint, unanimously affirmed, without costs.

Defendant contends that workers' compensation benefits are plaintiff's exclusive remedy for the injuries he sustained when he was struck by the truck defendant was driving (*see* Workers' Compensation Law § 29[6]). However, issues of fact exist whether the parties were "acting within the scope of their employment, as coemployees, at the time of injury" (*see Macchirole v Giamboi*, 97 NY2d 147, 150 [2001]). Both were working on a film set in midtown Manhattan. However, defendant testified that he believed

he was an employee of Entertainment Partners, while the Workers' Compensation Board found that plaintiff was employed by ESPG Management Services. At the time of injury, plaintiff was engaged in keeping unauthorized vehicles from parking along the curb in the vicinity of the set, one of his duties; defendant had just arrived for work and was trying to park his truck. While, generally, traveling to and from work is not deemed to be within the scope of employment, as an employee approaches the site of his employment, "there develops a gray area where the risks of street travel merge with the risks attendant with employment" (*Matter of Husted v Seneca Steel Serv.*, 41 NY2d 140, 144 [1976]). Then the test of compensability is whether there is a causal relationship between the employment and the accident and whether the employee "was exposed to a particular risk not shared by the public generally" (*id.* at 145). Issues of fact exist whether defendant's accident was causally related to a risk attendant with his employment rather than one shared by the public generally.

As to plaintiff's motion for partial summary judgment, defendant was entitled to rely on the certified, albeit unsigned, copy of his own deposition transcript, the accuracy of which even plaintiff did not dispute (*see e.g. Bennett v Berger*, 283 AD2d

374 [1st Dept 2001]). Indeed, plaintiff submitted a signed, sworn, and certified copy of defendant's deposition testimony in support of his own motion. However, in any event, the testimony failed to raise an issue of fact in support of defendant's theory that plaintiff was comparatively negligent (*see Garcia v Verizon N.Y., Inc.*, 10 AD3d 339 [1st Dept 2004]).

Plaintiff established prima facie that defendant failed to take proper precautions when he backed his truck and struck plaintiff. The evidence shows that defendant checked his side view mirrors, but not his rearview mirror, before backing (*see* Vehicle and Traffic Law § 1211[a]; *Gill v Braasch*, 100 AD3d 1415 [4th Dept 2012]; *Bukharetsky v Ct. St. Off. Supplies, Inc.*, 82 AD3d 812 [2d Dept 2011]). In opposition, defendant argued that plaintiff may have been talking on his cell phone at the time, because as he began backing his truck, he heard a bump, and when he looked through his driver's-side mirror he saw a cell phone flying through the air. Defendant's argument is speculative and is refuted not only by his own testimony that he was backing his vehicle into oncoming traffic on a one-way five-lane avenue, without sounding a horn or using appropriate signals, that he did not see plaintiff before the accident, and that he never tried to

locate the cell phone, but also by plaintiff's testimony that his hands were free while directing the movie trucks into their parking locations.

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9841 Samuel Navarro, Index 21788/04
Plaintiff-Appellant,

-against-

Plus Endopothetik, et al.,
Defendants-Respondents,

Michael Duncan, et al.,
Defendants.

_____

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

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered November 2, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to vacate an order, same court and Justice, entered March 2, 2011, upon plaintiff's default, granting defendants Henry Insler, M.D. and Signature Health Center, LLC's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff failed to demonstrate a reasonable excuse for his failure to appear on the return date of the motion and a meritorious cause of action (*see Goldman v Cotter*, 10 AD3d 289

[1st Dept 2004]; CPLR 5015[a][1]). The record reflects that it was only after counsel for defendant Health and Hospitals Corporation (HHC) called plaintiff's counsel (from the courthouse) that plaintiff's counsel said he would not be appearing and requested an adjournment. There is no indication that he sought an adjournment from Dr. Insler and Signature Health Center with regard to their separately calendared motion. Moreover, plaintiff never opposed either of the motions returnable on that date, despite his counsel's having informed HHC's counsel on the telephone that he had submitted his opposition to HHC's motion (*see e.g. Wilf v Halpern*, 234 AD2d 154 [1st Dept 1996]).

Plaintiff failed to submit "expert medical opinion evidence" to demonstrate the merit of his action (*see Mosberg v Elahi*, 80 NY2d 941, 942 [1992]).

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 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9842 320 West 13th Street, LLC, Index 603730/07
Plaintiff-Respondent,

-against-

Wolf Shevack, Inc., et al.,
Defendants-Appellants,

Wolf Advertising Limited, et al.,
Defendants.

_____

Bragar Eagel & Squire, PC, New York (Raymond A. Bragar of counsel), for appellants.

Kucker & Bruh, LLP, New York (William D. Hummell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 3, 2012, which, to the extent appealed from, granted plaintiff's motion to strike the answer of defendants-appellants (defendants) to the extent of allowing a negative inference charge against them, and denied defendants' cross motion for sanctions against plaintiff, unanimously affirmed, with costs.

Contrary to defendants' arguments, this Court has frequently upheld orders striking pleadings or granting negative inference charges in cases of inadvertent destruction of evidence (*see e.g. Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 478-

479 [1st Dept 2011]). Since it is not clear from the record in this case that the destruction of evidence was in all instances inadvertent, the court properly granted a negative inference charge, leaving it to the factfinder to determine whether defendants' explanations for the destruction are reasonable and the inference to be drawn from the destruction if they are not (*see Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 255 [1st Dept 2011]; *see also General Motors Acceptance Corp. v NY Cent. Mut. Fire Ins.* Co., __ AD3d __, 2013 NY Slip Op 1774 [1st Dept 2013]).

Even assuming plaintiff violated the one court order identified by defendants, it was the only such violation, and defendants failed to show that it was intentional. Nor do defendants cite any authority for the proposition that every unsatisfactory answer to a demand for a bill of particulars and

every unsatisfactory answer given at a deposition constitutes a separate and distinct discovery violation.

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

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9843 Sand Canyon Corporation, Index 650504/12
Plaintiff-Respondent,

-against-

Homeward Residential, Inc.,
Defendant-Appellant.

_____

Hunton & Williams LLP, New York (Brian V. Otero of counsel), for appellant.

Cahill Gordon & Reindel LLP, New York (Joel Kurtzberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 27, 2012, which denied defendant's motion to dismiss the complaint, unanimously modified, on the law, the motion granted as to the breach of contract claim based on the confidentiality provision and the claim for breach of the covenant of good faith and fair dealing, and otherwise affirmed, without costs.

Plaintiff alleges that defendant breached the cooperation provision of the parties' agreement by refusing to accede to its request that defendant not give potential plaintiffs greater access to loan information than is required by the pooling and servicing agreement (PSA). This raises a question of fact not appropriate for resolution on a motion to dismiss (*see Argentina*

v Otsego Mut. Fire Ins. Co., 86 NY2d 748, 750 [1995]). Moreover, it is not an actionable breach of the confidentiality provision of the agreement to give persons entitled to see the loan files a different means of access to those same files than is required by the PSA. Nor can we conclude as a matter of law that limiting access to loan information to business hours at defendant's offices, to which the parties expressly agreed in the PSA, so restricts investors' access to the courts as to be void as against public policy (*compare Lachman v Sperry-Sun Well Surveying Co.*, 457 F2d 850 [10th Cir 1972]). The claim for violation of the covenant of good faith is based on the same facts as the claim for breach of the cooperation clause and is therefore duplicative thereof (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Plaintiff's assertion that defendant's breach of the cooperation agreement will subject it to numerous meritless claims and damage its reputation is sufficient to state irreparable harm (*see Biosynexus, Inc. v Glaxo Group Ltd.*, 40 AD3d 384 [1st Dept

2007]). Moreover, given the nature of the irreparable injury, we cannot conclude as a matter of law that the balance of the equities is against plaintiff.

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9844 The People of the State of New York, Ind. 4594/07
Respondent,

-against-

John Buckley,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George R. Villegas, J.), rendered January 19, 2010, convicting defendant, after a jury trial, of attempted assault in the third degree, and sentencing him to a conditional discharge, unanimously affirmed.

The verdict 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 jury's determinations concerning identification and credibility. The fact that the jury acquitted defendant of robbery and larceny

charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]), particularly since the jury could have found that defendant was correctly identified as the victim's assailant, but that there was insufficient proof that defendant took property.

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9845-
9845A In re Keydra R.,

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

Robert R.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Michael J. Pastor of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

_____

Order of fact-finding, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about January 18, 2011, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, determined that respondent-appellant uncle had neglected and sexually abused the subject child, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about June 3, 2011, unanimously dismissed, without costs, as abandoned.

Respondent failed to preserve his argument that he was not a

person legally responsible for the subject child, and we decline to consider it (*see Matter of Sharnaza Q. (Clarence W.)*, 68 AD3d 436 [1st Dept 2009]).

The findings of sexual abuse and neglect were supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *see Matter of Dayanara v [Carlos V.]*, 101 AD3d 411, 412 [1st Dept 2012]). There is no basis to disturb the court's credibility determinations crediting the testimony given by the subject child and discrediting the testimony given by respondent (*see id.*).

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9846 Montefiore Medical Center, Index 20178/12E
Plaintiff-Respondent,

-against-

Touchstone Health Partnership, Inc.,
Defendant-Appellant.

_____

Moses & Singer LLP, New York (David M. Rabinowitz of counsel), for appellant.

Garfunkel Wild, P.C., Great Neck (Michael J. Keane of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about August 2, 2012, which denied defendant's motion to dismiss the second cause of action, unanimously affirmed, without costs.

On this motion to dismiss, the complaint is to be "afforded a liberal construction" and "the facts as alleged in the complaint [are accepted] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The written agreement, which undisputedly awaited a more complete one, was performed for several years and did not

utterly refute the allegations of the complaint (*see e.g. Four Seasons Hotels v Vinnik*, 127 AD2d 310, 317 [1st Dept 1987]).

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9848 Efosa Idemudia, Index 110057/10
Plaintiff-Appellant,

-against-

Susan Fields,
Defendant-Respondent.

_____

Laurence M. Savedoff, PLLC, Bronx (Laurence M. Savedoff of counsel), for appellant.

DeCicco, Gibbons & McNamara, P.C., New York (Joseph T. Gibbons of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered July 2, 2012, which, insofar as appealed from, in this action for personal injuries sustained in a motor vehicle accident, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The affirmed reports of defendant's expert established prima facie that plaintiff's injuries were not permanent or significant. Defendant's orthopedist found that plaintiff had full range of motion in his lumbar spine and right wrist. The orthopedist further found that, even if plaintiff tore a ligament in his wrist as a result of the accident, it had healed completely, and there was no objective clinical evidence of this injury.

In opposition, plaintiff's expert, who averred that she personally examined plaintiff approximately two years after the accident, found range of motion limitations in plaintiff's lumbar spine and right wrist, but offered no explanation for earlier examinations by her colleagues that found normal range of motion. The failure to explain the inconsistencies between the earlier findings of full range of motion and her present findings of deficits entitles defendant to summary judgment (*see Dorrian v Cantalicio*, 101 AD3d 578 [1st Dept 2012]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]).

The record further demonstrates that there is no viable claim under the 90/180-day category of Insurance Law § 5102(d), inasmuch as plaintiff testified that he missed only two days of work following the accident (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9849 The People of the State of New York, Respondent, Ind. 3679/08 2172/10

-against-

Harold Hill, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lauren Springer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J. at plea under Indictment 3679/08; Michael R. Sonberg, J. at plea under Indictment 2172/10, and sentencing under both indictments), rendered on or about March 29, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: APRIL 18, 2013

CLERK

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

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9850 In re Arben Krasniqi, Index 111953/11
Petitioner-Appellant,

-against-

The Department of Citywide
Administrative Services, et al.,
Respondents-Respondents.

Law Offices of Gregory T. Chillino, New York (Christopher M. Slowik of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondents.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered May 22, 2012, denying the petition to annul a determination of respondent Department of Buildings (DOB), which denied petitioner's application for a master plumber's license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DOB's determination that petitioner failed to supply satisfactory proof of at least seven years of experience "in the design and installation of plumbing systems" within the previous 10 years had a rational basis (Administrative Code of City of NY § 28-408.3.1[1]; *see Matter of Rasole v Department of Citywide Admin. Servs.*, 83 AD3d 509 [1st Dept 2011]). DOB heard, and

declined to credit, petitioner's assertion that he worked full-time as a plumber while attending college full-time, and this credibility determination is entitled to deference (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). DOB's determination is further supported by the limited earnings revealed by petitioner's tax records and his inability to provide details about the nature of his work during the relevant time period (*see Matter of Blatt v New York City Dept. of Citywide Admin. Servs.*, 12 AD3d 164 [1st Dept 2004]).

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9851 The People of the State of New York, Ind. 1105/11
Respondent,

-against-

Anthony Jules,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about June 22, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: APRIL 18, 2013

CLERK

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

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9852 Angelo Ruotolo, Index 109449/08
Plaintiff-Appellant,

-against-

Mussman & Northey, et al.,
Defendants-Respondents.

_____

Angelo Ruotolo, appellant pro se.

Traub Lieberman Straus & Shrewsberry, LLP, Hawthorne (Hillary J. Raimondi of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 5, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this legal malpractice action, plaintiff, a retired New York City police officer, retained defendants to represent him in a lawsuit against the New York City Police Department (NYPD) and the City of New York. The complaint in that lawsuit alleged retaliation in violation of the First Amendment based on plaintiff's writing of a report, written pursuant to his duties as a safety officer, that identified certain possible environmental hazards at his police precinct. The complaint was dismissed because, while the case was pending, the United States

Supreme Court held, in *Garcetti v Ceballos* (547 US 410 [2006]), that a government employee cannot claim First Amendment violations against his employer based on speech made "pursuant to" the employee's official duties (*id.* at 421).

Plaintiff subsequently brought this malpractice action, primarily due to defendants' alleged failure to amend the complaint to include claims that, allegedly, would not have been dismissed in light of *Garcetti*.

Supreme Court correctly held that defendants made a prima facie showing of lack of causation, and that plaintiff failed to present evidence in admissible form sufficient to raise a triable issue of fact (*see e.g. GUS Consulting GmbH v Chadbourne & Parke LLP*, 74 AD3d 677, 679 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]). In particular, plaintiff failed to demonstrate that he would have succeeded on the merits of the underlying action "but for" defendants' alleged negligence in failing to amend the complaint (*Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 218-219 [1st Dept 2007]).

Indeed, plaintiff would not have prevailed on his First Amendment retaliation claim even if defendants had amended the complaint to include plaintiff's April 2000 conversation with a Police Benevolent Association (PBA) attorney regarding his

report. The NYPD Patrol Guide states that, as a safety officer, he was required to "[a]ct as liaison for command on safety and health issues," which he did in meeting with the PBA attorney. In addition, plaintiff stated, in his deposition in the civil rights matter, that the PBA attorney sought him out specifically to discuss the report, and that he spoke to the PBA attorney at the precinct, on work time, with his supervisor's knowledge. Thus, his conversation with the PBA attorney was undoubtedly "pursuant to" his duties as a safety officer and did not amount to speech protected by the First Amendment (*Garcetti*, 547 US at 421).

Plaintiff also would not have prevailed on any claim of a due process violation based on NYPD's confiscation of his weapons before his retirement. Indeed, plaintiff does not dispute that there were postdeprivation state remedies available to him (*Hudson v Palmer*, 468 US 517, 533 [1984]; *Hellenic American Neighborhood Action Committee v City of New York*, 101 F3d 877, 880 [2d Cir 1996], *cert dismissed* 521 US 1140 [1997]). Although there is a factual issue as to whether defendants advised plaintiff to obtain counsel to pursue his claim in state court, it is not a material issue because plaintiff never alleged malpractice on this basis. Nor does it warrant further discovery

pursuant to CPLR 3212(f).

Supreme Court correctly held that plaintiff failed to show that he would have obtained relief under any of the whistleblower provisions listed in his complaint, which, he alleges, defendants failed to plead in the civil rights action. Plaintiff merely cites conclusory allegations in the civil rights complaint stating that certain chemical leaks "exceeded OSHA and EPA standards," and he does not otherwise state facts or any basis for relief under any of the whistleblower statutes.

Supreme Court also correctly rejected plaintiff's claim that defendant Mussman's position as a New York City Housing Authority judge constituted a conflict of interest. Mussman claims that his position as a Housing Authority judge began in 2008, well after defendants' representation of plaintiff had ended. The motion court was entitled to credit Mussman's affidavit and reject unsubstantiated claims in plaintiff's affidavit regarding Mussman's employment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff failed to preserve his arguments that defendants' filing of the summary judgment motion in this action violated a stipulation and time restrictions in CPLR 3212(a) (*see Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1st Dept 1988]). In

any event, those arguments are unavailing. CPLR 3212(a) allows a party to move for summary judgment "after issue has been joined." Defendants filed their answer, and thus joined issue, before they moved for summary judgment. Thus, their motion was not premature (*see Moezinia v Damaghi*, 152 AD2d 453, 456 [1st Dept 1989]). Nor did defendants violate the stipulation filed with the court on October 31, 2011, which notes only that there was a "summary judgment motion pending," and that the time for filing the note of issue was extended in order to permit the conclusion of pretrial discovery. The stipulation does not suggest that the motion would be stayed pending discovery.

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

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9853 Joan Linker, also known as Joni Linker-Hufnagel,
Plaintiff-Respondent,

-against-

Pasquale J. Malpeso, D.M.D., et al.,
Defendants-Appellants.

Index 800319/11

Murphy Higgins & Schiavetta PLLC, New Rochelle (Dan Schiavetta, Jr. of counsel), for appellants.

Albert W. Chianese & Associates, P.C., Rockville Centre (Thomas P. Reilly of counsel), for respondent.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered November 27, 2012, which, in this action alleging dental malpractice, denied defendants' motion to dismiss the complaint as barred by the statute of limitations, unanimously affirmed, without costs.

Defendant Dr. Pasquale J. Malpeso demonstrated prima facie that he completed a full mouth restoration for plaintiff, which involved placement of 20 implants replacing teeth # 3-14 and # 19-30, on September 11, 2008, and that the instant action, commenced on September 14, 2011, more than 2½ years later, is barred by the applicable statute of limitations (CPLR 214-a). However, the motion for summary judgment was properly denied.

Plaintiff raised a triable issue of fact as to whether Dr. Malpeso provided continuous treatment after September 14, 2008, and through at least March 14, 2009 (*see* CPLR 214-a; *Richardson v Orentreich*, 64 NY2d 896, 899 [1985]; *Santiago v Filstein*, 35 AD3d 184, 187-188 [1st Dept 2006]). Defendants' records show that Dr. Malpeso placed plaintiff on a two-month follow-up schedule after he noted that the restoration was complete, and renewed that direction in May 2009. At subsequent appointments, he replaced a lost or broken new crown, and the office addressed hygiene and gum issues. Plaintiff testified that she continued to complain of chronic pain and of dissatisfaction with the cosmetic results of the restoration dozens of times between September 2008 and February 2010, and that the parties discussed ways to address her complaints. While defendants contend that all subsequent visits related to distinct or routine conditions, there are issues of fact as to whether those visits were part of a continuous course of treatment involving correction of conditions resulting from the alleged improperly performed restoration (*see Krzesniak v New York Univ.*, 22 AD3d 378, 378-379 [1st Dept 2005]), and whether

they were "instigated by the patient to complain about and seek treatment for a matter relating to the initial treatment" (*Clayton v Memorial Hosp. for Cancer & Allied Diseases*, 58 AD3d 548, 549 [1st Dept 2009]).

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

ENTERED: APRIL 18, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, JJ.

9856N Henry T. Lau, Index 103807/10
Plaintiff-Appellant,

-against-

Margaret E. Pescatore Parking, Inc., et al.,
Defendants-Respondents.

Kenneth J. Gorman, New York, for appellant.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered August 10, 2012, which, in this personal injury action, granted defendants' motion to vacate the note of issue, and directed that plaintiff appear for a further deposition and provide additional outstanding discovery, unanimously affirmed, without costs.

The motion court providently exercised its discretion in striking the note of issue and reopening discovery upon defendants' showing that there were several items of discovery still outstanding (*see Nielsen v New York State Dormitory Auth.*, 84 AD3d 519, 520 [1st Dept 2011]). Given the general policy of this State to encourage "open and far-reaching pretrial discovery" (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d

952, 954 [4th Dept 1998] [internal quotation marks omitted]), the motion court providently exercised its discretion in determining that plaintiff's counsel had unduly objected to questions asking plaintiff to identify the location of his accident in photographs, and to questions concerning statements plaintiff may have made to others after the accident. "[I]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense" and thus should be disclosed pursuant to CPLR 3101(a) (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968] [internal quotation marks omitted]). Further, defendants made an adequate showing that they were entitled to authorizations for the medical providers who treated plaintiff's conditions related to his vision and feet, given the nature of his accident and claimed damages. The motion court also providently exercised its discretion in directing plaintiff

to provide other authorizations, despite his claim to have previously done so, as both defendants claimed to not have received them, and the record is inconclusive on the matter.

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

ENTERED: APRIL 18, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8888- Index 350047/09
8889 Mara Rubin,
Plaintiff-Respondent,

-against-

Anthony Della Salla,
Defendant-Appellant.

- - - - -

Mara Rubin,
Plaintiff-Appellant,

-against-

Anthony Della Salla,
Defendant-Respondent.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Eleanor B. Alter of counsel), for Anthony Della Salla, appellant/respondent.

Advocate & Lichtenstein, LLP, New York (Jason A. Advocate of counsel), for Mara Rubin, respondent/appellant.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered March 8, 2012, reversed, on the law, without costs, the motion granted, and the cause of action for child support dismissed. Order, same court and Justice, entered July 19, 2011, affirmed, without costs.

All concur except Acosta, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Dianne T. Renwick
Rosalyn H. Richter
Nelson S. Román, JJ.

8888-8889
Index 350047/09

_____x

Mara Rubin,
Plaintiff-Respondent,

-against-

Anthony Della Salla,
Defendant-Appellant.

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Mara Rubin,
Plaintiff-Appellant,

-against-

Anthony Della Salla,
Defendant-Respondent.

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Defendant appeals from the order of the Supreme Court, New York County (Ellen Gesmer, J.), entered March 8, 2012, which, to the extent appealed from, denied his motion for summary judgment dismissing plaintiff's cause of action for child support. Plaintiff appeals from the order of the same court and Justice, entered July 19, 2011, which, after a trial, awarded defendant primary physical custody of the parties' child during the school year and legal custody with respect to medical and educational decisions.

Kasowitz, Benson, Torres & Friedman LLP, New York (Eleanor B. Alter, Maxine R. Shapiro and Matthew Hrutkay of counsel), for Anthony Della Salla, appellant/respondent.

Advocate & Lichtenstein, LLP, New York (Jason A. Advocate of counsel), for Mara Rubin, respondent/appellant.

RICHTER, J.

In this appeal, we are asked to decide whether a parent who has primary physical custody of a child in a shared custody arrangement where the time is not equally divided can be ordered to pay child support to the other parent. We conclude that based on the plain language of the Child Support Standards Act, its legislative history, and its interpretation by the Court of Appeals, a custodial parent who has the child a majority of the time cannot be directed to pay child support to a noncustodial parent.

Plaintiff Mara Rubin (the mother) and defendant Anthony Della Salla (the father) are the unmarried parents of a 9-year-old son. The mother graduated from college with a degree in speech pathology and child development. After college, she worked as a paralegal, and then attended law school for two years. She dropped out of law school and worked in the real estate field for six years. She married in 1995, had a daughter in 1997 and was subsequently divorced. The father attended college on a football scholarship and studied finance and real estate. After college, he entered the insurance field and became a successful businessman, founding and owning a title insurance company. He was married for 22 years and has three grown children. His marriage ended in divorce in 1995.

The parties, who never married, met in the early 1990s and started their relationship as platonic friends. They became romantically involved in 1998, but did not move in together. In November 2003, the mother gave birth to the couple's son. After the child was born, the mother and father continued to live separately. The mother lived with the child and her daughter in an apartment on Manhattan's Upper East Side. The father had an apartment in midtown Manhattan and a house in New Jersey.

The parties' relationship ended in 2007. Although the child lived with his mother, he continued to spend time with his father. In the beginning of 2007, the father met his current girlfriend, and by that fall, they were in a committed relationship. The time the father spent with his son progressively increased after he began his relationship with his girlfriend. In May 2008, the parties agreed that the child would reside with the father every weekend he was not traveling. At that point, the child began to spend, on average, two out of every three weekends with his father. In the summer of 2008, the child went on a two-week vacation with the father and his girlfriend. In November 2008, the father and his girlfriend moved together into an apartment, where the child has his own bedroom.

At about the same time, school officials informed the father

that the mother was habitually late in getting the child to school. The father proposed that he take the child to school every day, and the mother agreed. Each morning thereafter, except when traveling on business, the father would pick his son up from the mother's apartment and timely transport him to school. During the 2008-2009 school year, the child spent most weekends with his father, as well as Thanksgiving, Christmas and nine days of his spring break. The father told the child that he and his girlfriend were expecting a baby, and their daughter was born in April 2009. After the daughter was born, the father significantly decreased his work travel and was available to spend more time with his son.

Despite her college degree and experience in real estate, the mother has not been employed since 2001. Although she claims that the father demanded that she not work, she provides no clear reason for her failure to find employment after the relationship ended in 2007. Nor has the court below made any finding that the mother is physically or mentally incapable of working.

In April 2009, the mother commenced this action seeking sole legal and residential custody of the child, and an order compelling the father to pay child support.[1] The father also

[1] The complaint also contains a cause of action, not relevant to this appeal, alleging that the father breached a

sought primary custody of the child. On May 27, 2011, after a ten-day trial, the court rendered its decision on custody, and an order was entered on July 19, 2011. The court awarded primary physical custody to the father during the school year, with the mother having parenting time on alternate weekends (from Friday after school to Monday morning) and every Thursday overnight. During the summer, the schedule was reversed and the child would live primarily with the mother, but would spend Thursday overnights and alternate weekends with the father. The mother would also have the child each midwinter school break, and the other school breaks were evenly divided. In addition, each parent was given two weeks with the child during the summer. With respect to legal custody, the court awarded the father decision-making authority, after consultation with the mother, over educational and medical issues. The mother was given authority, after consultation with the father, over decisions on summer and extracurricular activities, and religion.

The mother appeals from the custody order, arguing that the court erred in changing the parties' existing custodial

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promise to provide support to the mother. Throughout the parties' relationship, the father provided financial assistance to the mother and the child. In March 2008, the father reduced the level of support in light of the end of their relationship and the mother's refusal to obtain employment despite the child's being in school full-time.

arrangement. Custody disputes are resolved based upon a determination of the child's best interests, made after review of the totality of the circumstances (*Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]). Primary among such considerations are the ability to provide for the child's emotional and intellectual development, the quality of the home environment and the parental guidance provided (*Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]). In reviewing custody issues, deference is to be accorded to the determination rendered by the factfinder, unless it lacks a sound and substantial basis in the record (*David J.B. v Monique H.*, 52 AD3d 414, 415 [1st Dept 2008]).

Guided by these principles, we find that the trial court fashioned an appropriately tailored schedule that enables the child to benefit from both the stability and structure given by the father and the maternal nurturing and affection provided by the mother. Although the mother is warm and loving with the child, the evidence at trial showed that her life is in a constant state of turmoil. She lacks appropriate boundaries, has made questionable choices in her interpersonal relationships, is often overwhelmed by routine stress, and has had repeated problems in getting the child to school on time. These factors support the trial court's view that the father should be the primary custodial parent during the school year, when the child,

who has learning disabilities, most needs structure and stability.

The record also provides a sound basis for the trial court's determination that the father should have decision-making authority over educational and medical issues. With respect to education, the mother has failed to get the child to school on time, did not arrange for a tutor in a timely fashion and has increasingly failed to follow through on important educational issues. As for health matters, the mother neglected to get dental care for the child until he was five years old, and has been remiss in addressing some of her daughter's health issues. In contrast, the father has exhibited increased involvement in both areas, has followed the recommendations of education professionals and has taken significant steps in addressing the child's needs. Furthermore, in light of the child's learning problems and the resulting overlap between educational and medical issues, it makes better sense to have one parent in charge of both areas.

Following the custody decision, the father moved for summary judgment dismissing the mother's cause of action for child support. The father argued that, by the terms of the custody order, he was the custodial parent because the child would spend the majority of the year with him. Thus, the father argued that,

as a matter of law, the court could not order him to pay child support to the mother, the noncustodial parent. The father's motion included a calendar covering July 2011 to June 2012, which showed that, as per the custody decision, the father had 204 overnights with the child, and the mother had 161. A similar analysis was done for the July 2012 to June 2013 time period, showing 206 overnights with the father and 159 with the mother. These custodial periods equate to the child being with the father 56% of the time and with the mother 44% of the time.

In her response, the mother did not challenge the father's calculation of the number of overnights each parent had with the child. In fact, she conceded that the child would reside with the father "most of the time," that the father was the "de-facto custodial parent," and that she may not be the "custodial parent" for purposes of the Child Support Standards Act (CSSA). She also agreed that under a "strict application" of the CSSA, the father could not be ordered to pay child support. Nevertheless, the mother argued that she is entitled to an award of child support because any other result would be unjust and inappropriate.

In an order entered March 8, 2012, the court denied the father's summary judgment motion, finding that an award of child support to the mother was not precluded. The court reasoned that because the parties had "parallel legal custody" of their son and

both spent some time with the child, it was impossible to say, as a matter of law, that the father is the custodial parent for child support purposes. The court also focused on the disparity between the parents' financial circumstances and concluded that, regardless of whether the father was the custodial parent, it had the discretion to award the mother child support because she needed funds to pay her monthly rent and to maintain the type of home she could not otherwise afford without the father's assistance.

The father appeals from the denial of his motion for summary judgment. We reverse, and hold that under the current child support structure enacted by the Legislature, the father, as the custodial parent, cannot be directed to pay child support to the mother, the noncustodial parent. The CSSA (L 1989, ch 567) was enacted in 1989 to establish a uniform method for calculating child support awards in New York (*Holterman v Holterman*, 3 NY3d 1, 9 [2004]). The CSSA, which amended both the Domestic Relations Law and the Family Court Act, represented a "fundamental reform of the child support system in New York to ensure an appropriate and consistent level of support for children" (Exec Dept Mem, 1989 McKinney's Session Laws of NY, at 2208). The need for uniformity and consistency of child support awards was one of the paramount purposes in enacting the

legislation (*see Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149 [2001]; *Lanzi v Lanzi*, 298 AD2d 53, 56 [2d Dept 2002]).

Prior to the CSSA's enactment, child support awards were made in the court's discretion, guided by a non-binding list of statutory factors. As a result, "[a]wards var[ied] significantly from county to county and, within same county, even from judge to judge" (Exec Dept Mem, 1989 McKinney's Session Laws of NY, at 2210; *see also* Governor's Mem approving L 1989, ch 567, 1989 NY Legis Ann at 250 [calling child support a "national scandal," with awards set arbitrarily and varying widely]). The CSSA remedied this inequity by replacing the prior discretionary system with one that affords "'greater uniformity, predictability and equity in fixing child support awards'" (*Mars v Mars*, 286 AD2d 201, 203 [1st Dept 2001], quoting *Matter of Cassano v Cassano*, 85 NY2d 649, 652 [1995]).

The CSSA provides for "a precisely articulated, three-step method for determining child support" awards in both Family Court and Supreme Court (*Cassano*, 85 NY2d at 652). Unlike the discretionary system of the past, a court is required to make its child support award pursuant to the CSSA's provisions (*see* DRL §§ 240[1][a], 240[1-b][a]; FCA § 413[1][a] ["The court *shall* make its award for child support pursuant to [the CSSA] [emphasis added]"]; *see Dutchess County*, 96 NY2d at 155 ["CSSA guidelines

must be applied whenever child support obligations are calculated"]).

Under the CSSA's plain language, only the noncustodial parent can be directed to pay child support. Domestic Relations Law § 240(1-b)(f)(10) and FCA § 413(1)(f)(10) state that, after performing the requisite calculations, "the court *shall* order the *non-custodial parent* to pay his or her pro rata share of the basic child support obligation (emphasis added)" (*see also* DRL § 240[1-b][c][7]; FCA § [1][c][7] ["The non-custodial parent shall pay educational expenses, as awarded"]; DRL § 240[1-b][g]; FCA § [1][g] ["the court shall order the non-custodial parent to pay"]). The mandatory nature of the statutory language undeniably shows that the Legislature intended for the noncustodial parent to be the payer of child support and the custodial parent to be the recipient. The CSSA provides for no other option and vests the court with no discretion to order payment in the other direction.

Despite the clear language of the CSSA, the motion court nevertheless concluded that the parties' shared custody arrangement required a different result. This was error. In *Bast v Rossoff* (91 NY2d 723 [1998]), the Court of Appeals addressed how child support awards should be calculated in cases involving shared custody. The plaintiff in *Bast* urged the Court

to apply a proportional offset formula which would reduce the plaintiff's child support obligation based on the amount of time he spent with his daughter. Rejecting that approach, the Court found that neither the legislative history of the CSSA nor the statute itself suggested that the Legislature intended to dispense with the requisite formula in shared custody cases.

The Court unmistakably held that the CSSA applies to shared custody cases (*Bast*, 91 NY2d at 726) and that "child support in a shared custody case should be calculated as it is in any other case" (91 NY2d at 725; *see Matter of Commissioner of Social Servs. v Paul C.*, 73 AD3d 469, 471 [1st Dept 2010], *affd* 16 NY3d 846 [2011] [shared custody arrangements do not alter methodology of the CSSA]). Specifically, the Court instructed that after completing the three-step statutory formula, "the trial court must then order the noncustodial parent to pay" (91 NY2d at 727). Contrary to the conclusion reached by the court below, *Bast* leaves no other option than to direct payment by the noncustodial parent to the custodial parent.

To be sure, the Court in *Bast* recognized that there are "practical challenges" in applying the CSSA to shared custodial arrangements (91 NY2d at 725). Nevertheless, *Bast* made clear that even in shared custody cases, courts are required to identify the "primary custodial parent" (91 NY2d at 728). *Bast*

explained that "[i]n most instances, the court can determine the custodial parent for purposes of child support by identifying which parent has physical custody of the child for a majority of time" (*id.*). Only where the parents' custodial time is truly equal, such that neither parent has physical custody of the child a majority of time, have courts deemed the parent with the higher income to be the noncustodial parent for child support purposes (*see Baraby v Baraby*, 250 AD2d 201 [3d Dept 1998]).

Courts have uniformly followed *Bast*, finding that where parents have unequal residential time with a child, the party with the greater amount of time is the custodial parent for CSSA purposes (*see Smith v Smith*, 97 AD3d 923 [3d Dept 2012]; *Matter of VanBuren v Burnett*, 58 AD3d 900 [3d Dept 2009]; *Rossiter v Rossiter*, 56 AD3d 1011 [3d Dept 2008]; *Jennifer H.S. v Damien P.C.*, 50 AD3d 588 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]; *Matter of Ambrose v Felice*, 45 AD3d 581 [2d Dept 2007]; *Matter of Minter-Litchmore v Litchmore*, 24 AD3d 932 [3d Dept 2005]; *Gainey v Gainey*, 303 AD2d 628 [2d Dept 2003]; *Sluck v Sluck*, 266 AD2d 764 [3d Dept 1999]; *Borowicz v Mancini*, 256 AD2d 713 [3d Dept 1998]).

Here, given the schedule set by the court's custody decision, there is no question that the father has physical custody of the child for a majority of the time and should be

considered the custodial parent for child support purposes. Based on the custody order, for the July 2012 to June 2013 time period, the child will spend 206 overnights with the father compared to 159 with the mother. Thus, the child will be with the father for a majority of the time (56%), and with the mother a minority of the time (44%). The extra 47 days the child spends with the father translates into nearly 30% more than the mother's time. Put another way, the child is with the father approximately 130% of the time he is with the mother. The great disparity in overnights here — 56% to 44% — stands in marked contrast to the cases cited by the mother where the parents have equal, or essentially equal, custodial time (*see e.g. Barr v Cannata*, 57 AD3d 813 [2d Dept 2008]; *Carlino v Carlino*, 277 AD2d 897 [4th Dept 2000]; *Baraby v Baraby*, 250 AD2d at 201).

The court below ignored its own custody schedule when it stated that the parents here share "very nearly equal" physical custody of the child. In an attempt to equalize the custodial time, the court focused on how much "waking, non-school time" the child spends with each parent. In other words, the court suggested that a custodial parent could be identified by calculating the number of waking hours he or she spends with the child. The mother makes a similar argument on appeal, contending that she should be considered the custodial parent because she

"sees" the child on a majority of days during the year. For example, she counts a Thursday overnight as two days simply because she saw the child after school on Thursday and again on Friday morning.

This approach was soundly rejected in *Somerville v Somerville* (5 AD3d 878 [3d Dept 2004]). In that case, the child spent the majority of custodial time each week with his mother, and the father was ordered to pay child support. The father appealed, claiming that he should be considered the custodial parent because he had physical custody of the child during most of her "waking hours." The father argued that more weight should be given to daytime than to nighttime hours because a child needs less parental care during the time the child is sleeping. The court denied the father's objections to the child support order, finding his argument "patently absurd and . . . entitled to no serious consideration" (5 AD3d at 880; *see also Joleene D.R. v Robert J.W.*, 15 Misc 3d 1148A, 2007 NY Slip Op 51201[U] (Fam Ct Oswego Cty 2007] [rejecting claim that the court should give less weight to sleeping time]). We reach the same result here and reject the counting of waking hours as a method of determining who is the custodial parent. Although the Court in *Bast* did not elaborate on what constitutes a "majority of time," we believe that the number of overnights, not the number of waking hours, is

the most practical and workable approach. In *Smith v Smith* (97 AD3d 923), a case directly on point, the Third Department endorsed the use of overnights. In that case, during the school year, the children were with their father 18 out of every 28 nights, and with their mother the remaining 10 nights. For the summer, school recesses and holidays, the parents shared equal parenting time. Despite the fact that the father had the children for the majority of time, the trial court nevertheless designated him the noncustodial parent by virtue of his greater income, and directed him to pay child support. The Third Department reversed that determination, finding that the trial court's order violated *Bast v Rossoff*. The court held that "[i]nasmuch as 'shared' custody is not synonymous with 'equal' custody and [the father] clearly has physical custody for a majority of the time during the greater part of the year, Supreme Court incorrectly determined that [the father] was the noncustodial parent for child support purposes . . . and erred in directing [the father] to pay child support to [the mother]" (97 AD3d at 924).

There are sound policy reasons why calculating the waking hours spent with each parent should not be the method used to determine who is the custodial parent. Allowing a parent to receive child support based on the number of daytime hours spent

with the child bears no logical relation to the purpose behind child support awards, *i.e.*, to assist a custodial parent in providing the child with shelter, food and clothing (*see e.g. Higgins v Higgins*, 50 AD3d 852 [2d Dept 2008] [food, clothing and shelter costs are inherent to the basic child support obligation]). Furthermore, because a child's activities are subject to constant change, the number of hours spent with each parent becomes a moving target. Outside of school hours, a child may participate in after-school activities, spend time with a child care giver, be enrolled in tutoring, or attend summer camp. During those times, the child may not be with either parent. The child's activities may vary day to day and will change as the child ages, unnecessarily creating the need to recalculate the parties' parenting time and possibly modify the custodial parent designation. Moreover, the use of this type of counting approach could also lead parents to keep their children out of camp or other activities simply to manipulate their time spent with the child so as to ensure that they are designated the "custodial parent" (*see Bast v Rossoff*, 91 NY2d at 732 [rejecting proportional offset formula because it has undesirable potential of encouraging parents to keep a stopwatch on visitation]). An hour-by-hour analysis of custodial time is just not workable and would run afoul of the "greater uniformity [and] predictability"

the CSSA was designed to promote (*Cassano*, 85 NY2d at 652).

The dissent misconstrues the reality of the motion court's custody schedule, stating that the child does not spend significantly more time with the father. In fact, as noted above, the father has 56% of time with the child compared to 44% for the mother — an almost 30% difference. Thus, the child spends significantly more time with the father, making the father the custodial parent for child support purposes. The dissent's reliance upon *Redder v Redder* (17 AD3d 10 [3d Dept 2005]) is misplaced. In *Redder*, the parties had substantially the same amount of custodial time with the children, which is not the case here.[2]

In justifying its departure from the CSSA, the motion court placed undue emphasis on an isolated phrase in *Bast v Rossoff*. As noted above, *Bast* explained that "[i]n most instances," the custodial parent can be determined by identifying which parent has physical custody for a majority of time (91 NY2d at 728). The motion court interpreted the phrase "[i]n most instances" as

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[2] *Holterman v Holterman* (3 NY3d 1 [2004]), discussed by the dissent, involves an entirely different question than the one at issue here. *Holterman* addressed whether the father's child support obligation should be adjusted to account for certain distributive award payments he was obligated to pay the mother. The case did not involve the question presented here as to how to determine the custodial parent for child support purposes.

allowing it, in a proper case, to designate a parent who had the minority of time with the child as the custodial parent for child support purposes. There is no support in the case law for this reading of *Bast*. The more reasonable interpretation is that the Court recognized that there may be situations where it cannot be determined who has the child the majority of time, such as equal custody cases, or where the child is not residing with either parent for a majority of time because the child is away at college or at a boarding school.

In finding that the father could be considered the noncustodial parent, the motion court improperly focused on the parties' financial circumstances rather than their custodial status. In doing so, the court endorsed an approach where the determination of the custodial parent is based not on whom the child spends the majority of the time with, but instead on which parent has the lesser monetary means. No matter how well-intentioned the court may have been, neither the CSSA, nor *Bast v Rossoff*, allows for economic disparity to govern the determination of who is the custodial parent where the custodial time is not equal.[3]

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[3] The use of economic factors in determining custodial status might prove unwieldy for self-represented litigants because it could turn a relatively straightforward determination of custodial time into a full-blown financial trial. Such a

The dissent ratifies the motion court's approach, concluding that courts have the discretion to alter the methodology of the CSSA in "rare" or "unique" cases. These words appear nowhere in the CSSA, and no appellate court has ever held that financial need can be a basis for determining custodial status where one parent has the child for the majority of time. In any event, there is nothing particularly "rare" or "unique" about this case. It is not uncommon for one parent to have substantially more money than the other parent, or for the parent of a young child to have stopped working outside the home during the child's early life. Nor is it unusual for parents, such as those here, to have a shared custody arrangement. It also is not unique for parents, after a few years, to split up, and for a parent to face the prospect of finding employment as the child ages.

There is no support for the mother's argument that in shared custody cases, a court has the discretion to determine the custodial parent based on what is "just" and "appropriate." The exercise of judicial discretion in child support awards is narrowly circumscribed, and the CSSA allows for only two methods of deviating from the statutory formula. First, DRL §§ 240(1-

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result would be contrary to the policy goals of reducing the cost and length of matrimonial and support proceedings (*see* New York State Matrimonial Commission, Report to the Chief Judge of the State of New York [Feb. 2006]).

b)(f) and (g) provide that if the noncustodial parent's child support obligation is found to be "unjust or inappropriate," after review of ten enumerated factors, the court shall order the noncustodial parent to pay an amount it finds "just and appropriate" (*see also* FCA § 413[1][f], [g]). Second, under DRL § 240(1-b)(d), if the basic child support obligation would reduce the noncustodial parent's annual income below certain poverty or self-support reserve guidelines, the noncustodial parent's child support obligation can be reduced to as little as $25 a month, or, in an appropriate case, be entirely eliminated (*see also* FCA § 413[1][d]).

Contrary to the mother's view, these limited exceptions are inapplicable to the situation here. They merely permit a court to reduce or eliminate the child support obligation of a *noncustodial* parent who may be financially burdened by the presumptive amount of child support (*see e.g. Gainey v Gainey*, 303 AD2d at 630; *Carlino v Carlino*, 277 at 898). They do not vest the court with discretion to ignore the statutory scheme and direct that a custodial parent pay, rather than receive, child support.

In reaching its decision, the dissent speculates that without an award of child support to the mother, the child here would live "in or near poverty" during the time he spends with

his mother. We need not analyze the parties' financial circumstances because the question of who is the custodial parent here turns on an evaluation of the number of overnights, and not on economic need. We note, however, that the motion court's decision contains only a cursory discussion of the mother's future financial circumstances and future earning ability. The record provides no basis to conclude that the mother, who has a post-graduate education and who has worked before, cannot provide a reasonable quality of life for the child when he is with her. Even if we sympathize with the mother's difficulties in covering the cost of housing in New York City, under the current CSSA, we cannot provide a remedy by giving her child support when she is not, in reality, the custodial parent.

The mother's reliance on statutory and case law from other states cannot guide our decision here. That the mother might have fared better under a different state's law has no bearing on the issue before us. As noted in *Bast v Rossoff*, New York's legislature expressly considered, and rejected, the types of child support methodology the mother advocates (*see Bast*, 91 NY2d at 732 [observing that the proportional offset formula is currently used by other states only because the legislatures of those states expressly adopted it]).

Although the dissent claims otherwise, the approach it

advocates would allow a court to abandon the CSSA whenever it feels that an unfair result would occur. The dissent's view, if adopted, would create a "discretionary approach for a whole class of cases" (*Bast* at 728), and would herald a return to the same non-predictability and non-uniformity the CSSA was enacted to rectify. If a remedy is required for a situation such as the one here, it must come not from this Court, but from the Legislature.

Accordingly, the order of the Supreme Court, New York County (Ellen Gesmer, J.), entered March 8, 2012, which, to the extent appealed from, denied defendant father's motion for summary judgment dismissing plaintiff mother's cause of action for child support, should be reversed, on the law, without costs, the motion granted, and the cause of action dismissed. The order of the same court and Justice, entered July 19, 2011, which, after a trial, awarded defendant father primary physical custody of the parties' child during the school year and legal custody with respect to medical and educational decisions, should be affirmed, without costs.

All concur except Acosta, J. who dissents in part in an Opinion.

ACOSTA, J. (dissenting in part)

I respectfully dissent from the dismissal of the mother's cause of action for child support because the majority's rigid application of the statute sacrifices the child's well being at the altar of an arithmetic formula. It forces the child to bear the economic burden of his parents' decisions, even where, as here, the child, whose father is a millionaire, is in danger of living in poverty, solely to preserve uniformity and predictability in child support awards. I do not believe this result is what the legislature intended in drafting the Child Support Standards Act (CSSA), especially since the CSSA clearly did not envision every possible custodial situation.

Although the basic scheme outlined by the majority applies in the majority of cases and provides uniformity of child support awards (*see Holterman v Holterman*, 3 NY3d 1, 9 [2004]; *Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149 [2001] [uniformity of child support awards a paramount purpose in enacting the CSSA]), courts have consistently dealt with situations that simply were not contemplated when the statute was drafted. For instance, the CSSA is silent as to situations where there is a 50-50 split in custody (*see Baraby v Baraby*, 250 AD2d 201, 204 [3d Dept 1998); *see also Barr v Cannata*, 57 AD3d 813 [2d Dept 2008); *Carlino v Carlino*, 277 AD2d 897 [4th Dept 2000]).

Trial courts, which must nonetheless deal with the cases before them, have wisely deemed the "monied" spouse as the noncustodial parent for purposes of determining child support (*see Baraby*, 250 AD2d at 204). Thus, contrary to the majority, "financial need [appears to] be a basis for determining custodial status," albeit in rare cases. The holding in *Baraby* and related cases is supported by the CSSA's legislative history, which

> *had among its objectives* the assurance that both parents would contribute to the support of the children, and *that the children would not 'unfairly bear the economic burden of parental separation'* (Governor's Program Bill Mem, Bill Jacket, L 1989, ch 567, at 1). Emphasis was to shift' from a balancing of the expressed needs of the child and the income available to the parents after expenses to the total income available to the parents and the standard of living that should be shared with the child' (Reichler and Lefcourt, NY St BJ 36 [Feb 1990] at 44; *see also*, Governor's Approval Mem, 1989 NY Legis Ann, at 250 ['children will share in the economic status of both their parents']).

(*Cassano v Cassano*, 85 NY2d 649, 652 [1995] [emphasis added]).

This approach in cases that do not fit the "mold" also seems consistent with language in *Bast v Rossoff* (91 NY2d 723, 728 [1998]), where the Court of Appeals, while addressing the application of the CSSA to a shared custody arrangement, held that "*in most instances*, the court can determine the custodial parent for purposes of child support by identifying which parent

has physical custody of the child for a majority of time" (*id.* [emphasis added]). The Court could very well have categorically defined "noncustodial parent" purely on calendar days, but recognizing that the CSSA did not cover every conceivable situation, it instead vested the trial court with some discretion in those rare cases. Of course, once the "custodial" parent is identified, the "three-step method" outlined in *Cassano* (85 NY2d at 652), must be apply.

This is one of those rare cases. Defendant father, who has custody 56% of the time, has assets valued at approximately $20 million dollars. By comparison, the mother who is 49 years old and has not worked since 2001, supports herself by child support payments of $5,000 per month by the defendant pursuant to a 2009 pendente lite order, and an additional $1,000 by the father of her daughter.[1] Indeed, her net worth statements show that she had a zero monthly income in 2009 prior to the pendente lite order. Given today's economy, finding a job after being out of the work force for over a decade will be very difficult notwithstanding her college degree and two years of law school. Even more difficult perhaps is finding a suitable apartment on

[1]According to plaintiff, the child support amount from her daughter's father is $600 per month, but since November 2010, he has been paying her $1,000, which includes $400 in arrears.

income of a $1000 a month. Thus, a strict application of the CSSA would serve no purpose, especially since the child primarily lives with the mother during the summer and other school vacation periods. The child would live comfortably during 56% of the year, and in or near poverty for 44% of the year. Contrary to the legislative history, the child would "unfairly bear the economic burden of parental separation" (Governor's Program Bill Mem, Bill Jacket, L 1989, ch 567, at 1; *see Redder v Redder*, 17 AD3d 10 [3rd Dept 2005] [where parties have substantially the same amount of custodial time with the children, monied spouse found to be custodial parent]; *but see Smith v Smith*, 97 AD3d 923 [3rd 2012]).[2]

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[2]Notwithstanding the Third Department's holding *in Smith*, it cited with approval its earlier decision in *Reimersma v Riemersma* (84 AD3d 1474 [3rd 2011], where, in a similar scenario, it stated:

> [T]he court can still identify the primary custodial parent . . . based upon the reality of the situation . . . by determining who has physical custody of the children for a majority of the time . . . *While we do not necessarily countenance arriving at this determination in every case by comparing the number of hours the children are with each parent*, it is appropriate to consider the overall amount of time each parent spends with the children . . . *Here, inasmuch as it is undisputed that the children spend significantly more time with plaintiff than with defendant*, we find no error in the Support Magistrate's conclusion that

By dissenting in this case, I do not propose that the basic formula provided by the CSSA be abandoned whenever an unfair result would occur. For instance in *Holterman v Holterman* (3 NY3d 1), a strict application of the CSSA led to an arguably "unfair" result for the defendant father. There, defendant husband, a doctor, argued that his annual $21,288 installment payment of wife's distributive award based on his medical license should have been deducted from his income and included as income attributed to his wife for purposes of child support pursuant to the CSSA. Indeed, the wife's expert opined that a reassignment of income adjustment should be undertaken to avoid double dipping of the husband's income stream. The Court nonetheless held that the "CSSA does not provide for the deduction of distributive awards from income, whether based on enhanced earning capacity due to a professional license or otherwise. Nor does the CSSA

> plaintiff is the custodial parent for purposes of the CSSA (*id.* at 1476-1477 [emphasis added] [internal quotation marks omitted]).

In *Reimersma*, the plaintiff had custody 65% of the time versus defendant's 35%. In the present case, the child does not spend *significantly* more time with defendant, and, as noted by the majority, plaintiff was given important decision-making authority.

authorize the inclusion of a distributive award as income to the parent receiving the award" (3 NY3d at 11). Although a strict application of the statute in *Holterman* created financial difficulties for the non-custodial parent, it did not affect the children.

In the end, whether certain provisions of the statute were arguably unfair to the husband in *Holterman* is really beside the point because the children did not bear the consequences of that unfairness (3 NY3d at 10 [the aim of CSSA is to "maintain the children's marital standard of living after their parents separate: "Children should be protected as much as possible from the overall decline in living standards that results from parents maintaining two household"] [citing Sponsors Mem, Bill Jacket, at 1, L 1989, ch 567]). Here, however, as noted above, the child's overall standard of living will decline dramatically. In these rare circumstances, I believe the trial court is vested with

discretion to protect the child. Moreover, contrary to the majority, given the unique facts in this case, I do not believe that we run the risk of "return[ing] to a discretionary approach for a whole class of cases" (*Bast v Rossoff,* 91 NY2d at 728).

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

ENTERED: APRIL 18, 2013

CLERK