SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 7, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Moskowitz, Richter, Feinman, JJ.

15363N Valerie Reuling, Index 117414/08
Plaintiff-Appellant,

-against-

Consolidated Edison Company
of New York, Inc., et al.,
Defendants.

- - - - -

Consolidated Edison Company of
New York, Inc.,
Third-Party Plaintiff,

-against-

Tully Construction Company,
Third-Party Defendant-Respondent.

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The Flomenhaft Law Firm, PLLC, New York (Stephen D. Chakwin, Jr. of counsel), for appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Louis A. Carotenuto of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 21, 2015, which, inter alia, denied plaintiff's motion for leave to supplement and amend her bill of particulars, unanimously affirmed, without costs.

The decision to permit an amendment to a pleading or bill of particulars, especially on the eve of trial, is committed to the sound discretion of the IAS court (*Lissak v Cerabona*, 10 AD3d 308, 310 [1st Dept 2004]). Here, we find the IAS court did not abuse its discretion in denying plaintiff leave to amend to add claims of injuries to her left foot. While plaintiff was aware of the injury to her left foot for more than three years, she inexplicably delayed in seeking her expert's opinion on the issue of causation and then further delayed in filing the instant motion. We note that the evidence ultimately relied upon by plaintiff's expert was developed in 2009 (the MRI) and 2011 (Dr. Fishman's report), well before plaintiff filed her note of issue in 2012. In short, the motion was untimely.

In the circumstances of this case, the motion court did not abuse its discretion in determining that third-party defendant Tully Construction Company carried its burden of showing that it would be prejudiced by a grant of plaintiff's motion (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Reyes v City of New York*, 63 AD3d 615, 616 [1st Dept 2009], *lv denied* 13 NY3d 710 [2009]; *Kassis v Teacher's Ins. & Annuity Assn.*, 258 AD2d 271, 272 [1st Dept 1999]).

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

The Decision and Order of this Court entered herein on June 9, 2015 is hereby recalled and vacated (*see* M-5811 decided simultaneously herewith).

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

ENTERED: APRIL 7, 2016

CLERK

Tom, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

15981 In re Jonas Aponte, Index 400546/14
Petitioner-Appellant,

-against-

Shola Olatoye, etc., et al.,
Respondents-Respondents.

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Urban Justice Center, New York (Leah Goodridge of counsel), for appellant.

New York City Housing Authority, New York (Jane E. Lippman of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 15, 2014, denying the petition seeking to annul a determination of respondent New York City Housing Authority (NYCHA), dated December 18, 2013, which dismissed petitioner's remaining family member (RFM) grievance on the ground that he did not qualify as an RFM, and dismissing the proceeding brought pursuant to CPLR article 78, reversed, on the law, without costs, the petition granted, the determination annulled, and the matter remitted to the Housing Authority for further proceedings in accordance with the following.

Petitioner's mother was the tenant of record of a one-bedroom apartment located in the Sedgwick Houses, a NYCHA-owned housing development. She resided in the apartment continuously

from 1992 until her death on July 17, 2012.

In 2009, petitioner's mother was diagnosed with advanced dementia. Her disability rendered her mentally unstable and incapable of living alone, as noted in medical records submitted to the housing manager and at the hearing below. These notes indicated, inter alia, that it was "unsafe" for petitioner's mother "to live on her own," and that she needed "to be under constant supervision."

On or about August 24, 2010, NYCHA received a permanent permission request seeking to add petitioner as an occupant of his mother's apartment. The request was denied on the ground that allowing petitioner to live with his mother "will create overcrowding conditions." The case manager noted that "tenant is applying to have son live with her as her health is failing and she cannot live alone."

In January 2011, petitioner's mother submitted an affidavit of income which included petitioner as a tenant. The housing manager crossed out petitioner's name.

In February 2011, NYCHA reviewed a second permanent permission request to add petitioner as an occupant of the household. The request stated that petitioner's mother was "[s]uffering from dementia [and] cannot be alone." The request

was disapproved, allegedly because the housing manager did not believe the form had been signed by petitioner's mother and the "son cannot request permissions and cannot sign for his mother."

In July 2012, petitioner informed the Sedgwick Houses management office that his mother had died and requested that he be permitted to lease the apartment. At a subsequent meeting with the housing manager, petitioner was informed that he was never part of the household and was never given written permission to join the household. In April 2013, NYCHA commenced a holdover proceeding against petitioner. The proceeding was adjourned while petitioner appealed the denial of his request for RFM status.

At the hearing, petitioner submitted evidence concerning his mother's health condition and her requests for petitioner to permanently join the household.

The hearing officer found that petitioner's mother was the sole authorized occupant of the subject apartment and denied petitioner's grievance, stating "the grievant was never an authorized member of the tenant's household and did not obtain the written permission of [m]anagement to join tenant's household."

On April 17, 2014, petitioner commenced an article 78

petition challenging NYCHA's denial of his RFM grievance. Petitioner asserted that the denial of his application on the ground that his occupancy would create an "overcrowding" condition was arbitrary and capricious. He noted, furthermore, that NYCHA had been aware of his occupancy from August 2010 onward.

The petition was denied and dismissed on the ground that NYCHA had a reasonable basis for its decision – namely, that petitioner had failed to obtain written consent to be added as a member of his mother's household. The court further found that petitioner lacked standing to assert a disability claim on behalf of the tenant of record responsible for obtaining NYCHA's permission to add petitioner to the household. We now reverse.

Petitioner has standing to bring an article 78 proceeding to challenge a denial of succession rights to a public housing apartment (*see Matter of Guttierrez v Rhea*, 105 AD3d 481 [1st Dept 2013], *lv denied* 21 NY2d 861 [2013]). Petitioner is not asserting a disability claim on his mother's behalf, as in the cases relied on by NYCHA (*see e.g. Matter of Filonuk v Rhea*, 84 AD3d 502 [1st Dept 2011]); rather, he is challenging NYCHA's denial of his application for RFM status.

We note, in any event, that under the New York City Human

Rights Law, the person claiming a failure to accommodate a disability need not be the person to whom the accommodation was not provided. The statute expressly grants standing to persons who have been discriminated against by their association with a disabled individual (Administrative Code of City of NY § 8-107[20]).

Respondent's determination denying petitioner succession rights to his mother's apartment was arbitrary and capricious. Petitioner's mother submitted multiple applications to add petitioner to the lease as required by 24 CFR 966.4(a)(1)(v). The first application was denied on the ground that adding petitioner to the household "will create overcrowding"; the second, not on that basis but allegedly because petitioner signed the application on his disabled mother's behalf. NYCHA never considered evidence of petitioner's mother's disability in denying the applications.

The ground proffered for the denial, i.e., that adding petitioner to the household would result in overcrowding, creates an unacceptable Catch-22 – a request to add an additional family member will almost always result in overcrowding unless NYCHA fails simultaneously to consider transferring the applicant to a larger apartment. NYCHA guidelines provide that an "overcrowded"

apartment should not result in a summary denial of the RFM's claims; rather, the housing manager should inform the new tenant that he may submit a request to transfer to a new apartment.

NYCHA asserts that had it considered petitioner's mother's request, any duties it owed toward the mother would have been satisfied by according petitioner the status of "temporary occupant," i.e., a person not entitled to succession rights.

We can never know what would have constituted a reasonable accommodation of petitioner's mother's disability under the circumstances. Neither petitioner nor his mother was afforded a meaningful opportunity to demonstrate what would constitute a reasonable accommodation under the circumstances. NYCHA's determination cannot be deemed rational in light of the absence of a proper inquiry and an opportunity to be heard on the issue (*compare Matter of Chun Po So v Rhea*, 106 AD3d 487 [1st Dept 2013] [petitioner's disability was reasonably accommodated by an offer to permit her adult daughter to reside in the apartment on a temporary basis]).

Petitioner, moreover, was residing in the subject apartment with NYCHA's knowledge for years before NYCHA instituted proceedings to evict him. While estoppel is not available against a government agency in the exercise of its governmental

functions, NYCHA's knowledge that a tenant is living in an apartment is an important consideration in the determination of a subsequent application for RFM status (*see Gutierrez*, 105 AD3d at 485; *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [1st Dept 2004]), as even the dissent recognizes.

The dissent notes that NYCHA de facto accommodated petitioner's mother's disability by knowingly permitting petitioner to remain in the apartment, yet sanctions NYCHA's policy whereby requests to add family members are inevitably denied because of overcrowding. The dissent faults petitioner's mother for failing to request a reasonable accommodation for her disability, overlooking the fact that her dementia likely precluded her from fully apprehending the nuances of NYCHA's regulations. We are compelled to disagree.

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

TOM, J.P. (dissenting)

In this article 78 proceeding, petitioner seeks to annul a determination of respondent New York City Housing Authority (NYCHA), dated December 18, 2013, which dismissed his remaining family member (RFM) grievance on the ground that he did not qualify as an RFM. Because NYCHA's denial of petitioner's grievance has a rational basis - the evidence adduced at the administrative hearing shows that NYCHA never granted written permission for petitioner to reside in the tenant of record's apartment - I would affirm Supreme Court's denial of the petition and dismissal of the proceeding (*see Rosello v Rhea*, 89 AD3d 466, 466 [1st Dept 2011]).

Petitioner's mother, the late Victoria Aponte, was the sole tenant of record in the one-bedroom apartment at 150 West 174th Street. Victoria lived in the apartment from February 1992 until her death on July 17, 2012. In or around 2009, Victoria had been diagnosed with advanced dementia which made it unsafe for her to live alone. For that reason, petitioner moved into the apartment to assist his mother.

Although NYCHA received in August 2010 a permanent permission request seeking permission to add petitioner as a permanent resident of the apartment, the request was denied

because adding petitioner to the one-bedroom apartment would "create overcrowding conditions" in violation of NYCHA's occupancy standards. In particular, NYCHA's occupancy standards do not permit an additional person to permanently join a household in a one-bedroom apartment unless that person is a spouse, domestic partner, or child under the age of six (*see Matter of Chun Po So v Rhea*, 106 AD3d 487, 488 [1st Dept 2013]; *Matter of Bashmet v Hernandez*, 87 AD3d 866, 866 [1st Dept 2011]).

On January 4, 2011, Victoria submitted her annual affidavit of income, listing petitioner as a person living in the apartment. On the second page, under the heading "Disability Status and Notice of Reasonable Accommodation," the form stated:

> The New York City Housing Authority will provide reasonable accommodation to meet the needs of persons with disabilities. A reasonable accommodation may include a modification to your apartment, common areas in and around your apartment building, development grounds, certain NYCHA programs and facilities, or transfer to another unit. The Housing Authority may require you to provide documentation to support your claim for a reasonable accommodation. If conditions change after you submit this form, you may fill out and submit a new form. If you need an explanation of disabilities or reasonable accommodations, information regarding the rights of persons with disabilities, or help in completing this form, you may contact your development's management office or the NYCHA Department of Equal Opportunity, Services for the Disabled at 212-396-4652 or TDD 212-306-4445.

Victoria stated that she suffered from a "mental or

psychological disability," namely, Alzheimer's disease and dementia. However, she nonetheless checked the box stating that, although she had a disability, she was "not requesting the Housing Authority to provide any accommodation at this time." Upon reviewing the affidavit, the housing manager crossed petitioner's name off of it because he was not an authorized resident of the apartment. The housing manager explained to Victoria that "she could not add her son to [the] family comp[osition] as it would create overcrowded living conditions." He also sent Victoria a Lease Addendum and Rent Notice, which, among other things, advised her that, other than herself, "no other person is permitted to reside permanently in the household unless the Housing Manager grants you WRITTEN PERMISSION to add that person to your household."

Then, in February 2011, NYCHA disapproved a second permanent permission request to add petitioner as an occupant of the household on the ground that petitioner had signed the form for his mother and could not request permission on her behalf.

After Victoria's death, petitioner went to the management office, informed them of her death, and stated that "he would like to keep his mother's apartment." Petitioner was given a RFM grievance form and told to request a meeting with the project

manager to discuss the issue. On August 17, 2012, petitioner met with the project manager, who denied his RFM grievance, explaining that "he was never part of the household and was never given written permission to join the household." On January 23, 2013, petitioner met with the Bronx borough manager and on February 1, 2013, the borough manager concurred with the project manager's determination, denying the grievance.

In November 2013, a hearing was held on petitioner's grievance. The hearing officer denied the grievance, finding that the "evidence presented at this hearing establish[es] the [petitioner] was never an authorized member of [Victoria's] household and did not obtain the written permission of Management to join." The hearing officer added that while petitioner "is a sympathetic individual and may have moved into the apartment to assist his elderly mother . . . he did not have NYCHA's permission to reside in the apartment."

Contrary to the majority's holding, I would find that NYCHA's denial of petitioner's grievance has a rational basis and was not arbitrary and capricious. The record reflects that petitioner never received written consent to reside in the apartment, and that he was not an authorized occupant of the apartment for a one-year period before his mother's death (*see*

Matter of Echeverria v New York City Hous. Auth., 85 AD3d 580, 581 [1st Dept 2011]). Further, as the majority recognizes, NYCHA may not be estopped from denying RFM status, even if it was aware of petitioner's occupancy (*Rosello*, 89 AD3d at 466).

Contrary to the majority's suggestion, the fact that NYCHA properly denied multiple applications to add petitioner to the lease does not make its determination denying petitioner's grievance arbitrary and capricious. Petitioner's mother was repeatedly made aware that she could not add petitioner to her household because it would create overcrowding. She was also given the opportunity to request a reasonable accommodation for her disability but she opted not to do so. Thus, NYCHA cannot be faulted for failing to consider transferring petitioner's mother to a larger apartment. Nor is there an "unacceptable Catch-22" situation as the majority posits; petitioner's mother could have avoided any such problem by simply requesting a transfer or other reasonable accommodation. There is nothing in the record supporting the majority's speculation that petitioner's mother's dementia precluded her from making a request for accommodation, and, in any event, the record shows that petitioner aided his mother in filling out the forms. In fact, petitioner testified that he moved into the apartment in mid-2009 and that he filled

out and signed the January 2011 permanent permission request form, and other documents, because his mother didn't "speak English" or "know how to write even."

To the extent petitioner is asserting a reasonable accommodation claim, petitioner lacks standing to assert such a claim on behalf of his mother, the tenant of record (*see Rosello*, 89 AD3d at 467; *Matter of Filonuk v Rhea*, 84 AD3d 502, 503 [1st Dept 2011]).

Moreover, petitioner's claim for associational discrimination, which, as the majority points out, is permitted under the New York City Human Rights Law (Administrative Code of City of NY § 8-107 [20]) is unavailing. Petitioner failed to show that he suffered any injury causally attributable to any alleged failure by NYCHA to reasonably accommodate his mother's disability (*see Filonuk v Rhea*, 84 AD3d at 503).

In any event, NYCHA could not have accommodated his mother's disability by making petitioner a permanent resident, since this would have created overcrowding in violation of the agency's occupancy standards (*Chun Po So*, 106 AD3d at 488). Moreover, to have made petitioner a "permanent tenant in the household" would have "unfairly provide[d] a windfall to [him] to the detriment of other potential tenants" (*id.*). Although NYCHA could have

reasonably accommodated his mother's need for live-in care by granting petitioner temporary residency (*see id.*), his mother never requested this accommodation and, in any event, petitioner in fact lived in the apartment and cared for his mother until her death.

I disagree with the majority's statement that "[w]e can never know what would have constituted a reasonable accommodation." In *Chun Po So*, the petitioner had a disability requiring "essentially 24-hour care." We found that her disability was reasonably accommodated by the offer to permit her adult daughter to reside in the apartment on a temporary basis. Similarly, here we can state that, had she requested it, petitioner's mother's disability could have been reasonably accommodated by granting petitioner temporary residency, and further that her disability was accommodated de facto by NYCHA knowingly permitting petitioner to remain in the apartment. The majority fails to demonstrate why petitioner's mother's disability was not accommodated by this temporary residency, or why a permanent occupancy, entitling petitioner to succession rights, was required.

Finally, the fact that NYCHA had knowledge of petitioner residing in the apartment for years does not warrant awarding

petitioner succession rights. NYCHA's knowledge that he was living in an apartment for a substantial period of time is only one component of the determination of a subsequent RFM application (*see Matter of Guttierrez v Rhea*, 105 AD3d 481, 485 [1st Dept 2013], *lv denied* 21 NY3d 861 [2013]), and is not determinative.

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

ENTERED: APRIL 7, 2016

CLERK

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

16343 The People of the State of New York, Ind. 2201/09
Respondent,

-against-

Elmer Castillo,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel) and Sullivan & Cromwell LLP, New York (George Robert Painter IV of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

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Judgment, Supreme Court, New York County (Peter J. Benitez, J.), rendered January 12, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 18 years, affirmed.

Initially, there was overwhelming evidence supporting the jury's finding that the attack on May 8, 2009 by defendant and his accomplices was the cause of the victim's death on May 12, 2009. Eyewitnesses and surveillance video established that they hit the victim repeatedly in the head, including defendant's assault on him with a tire iron. The victim was also kicked in the face and thrown down an open basement stairway. He suffered severe injuries, specifically a fractured skull with bone

fragments pushed into his brain, causing cerebral bleeding and swelling and a lack of oxygen to the brain, from which he died four days later.

The jury appropriately rejected the suggestion of the defense's expert that the victim had so recovered by his third day in the hospital that his death on the fourth day was caused not by his injuries but by a possible infection of unknown origin or a fall from his bed, since that testimony was unconvincing, if not speculative, particularly in view of the expert's acknowledgment that the injury was life-threatening and required emergency surgery. In any event, the jury's finding that the attack caused the victim's death was warranted by

> "the rule in New York that '[i]f a person inflicts a wound . . . in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes cooperated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible'"

(*People v Pratcher*, 134 AD3d 1522, 1524 [4th Dept 2015], quoting *People v Kane*, 213 NY 260, 274 [1915]).

Defendant failed to raise any challenge to the court's

charge regarding causation of death at a time when the court could have easily rephrased the instruction. The issue is therefore unpreserved for appellate review (*see* CPL 470.05[2]). The claimed error does not fall within the "very narrow exception" discussed in *People v Thomas* (50 NY2d 467, 471 [1980]), as the dissent suggests. That narrow exception is only applicable "when the procedure followed at trial was at basic variance with the mandate of law prescribed by Constitution or statute" (*id.*). Here, as was the case in *Thomas*, preservation was necessary because defendant essentially claims that "a portion of the charge could, in the particular case, be interpreted as having a contrary effect" to the burden of proof charge that was correctly stated by the court (*id.* at 472). Nor is the exercise of interest of justice jurisdiction warranted; defendant was not deprived of a fair trial (*see* CPL 470.15[6][a]). As an alternative holding, we consider the charge, viewed as a whole, to have properly conveyed the law regarding whether the assault was a sufficiently direct cause of the victim's death (*see People v Umali*, 10 NY3d 417, 426-427 [2008], *cert denied* 556 US 1110 [2009]; *People v Ladd*, 89 NY2d 893, 895 [1996]).

Defendant's argument that the prosecutor engaged in a pattern of improper remarks which deprived him of a fair trial is

similarly unpreserved, as no objection was made at trial to any of the remarks of which he now complains, and we decline to review it in the interest of justice. As an alternative holding, on balance the prosecutor's remarks did not prejudice defendant, and did not have the cumulative effect of depriving defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 119-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's argument that his defense was in conflict with that of his codefendant such that a severance was necessary is also unpreserved, since defendant never sought severance at trial (*see People v Bernier*, 245 AD2d 137, 138 [1st Dept 1997], *lv denied* 91 NY2d 940 [1998]), and we decline to review it in the interest of justice. As an alternative holding, this argument lacks merit. The two defendants' defenses — that one was not there and that the other did not mean to inflict serious injury or death — "were not so irreconcilable as to require severance" (*People v Funches*, 4 AD3d 206, 207 [1st Dept 2004], *lv denied* 3 NY3d 640 [2004]). Moreover, since the proof that defendants acted in concert to commit the crimes charged was supplied by the same evidence, a balancing of defendant's rights against the interest of judicial economy warranted the joint trial (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]).

Finally, we reject defendant's contention that his counsel's failure to preserve the foregoing claimed errors establishes an ineffective assistance claim. The record establishes that defendant's attorney mounted a competent defense in the face of a difficult case with powerful evidence of his client's guilt -- indeed, defendant's attorney succeeded in obtaining an acquittal of the charge of second-degree murder, the most serious of the numerous charges -- and defendant was not prejudiced by the lack of preservation.

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

TOM, J.P. (dissenting)

Defendant and the two codefendants attacked and beat Jonathan Jimenez and threw him down an open basement stairway. Jimenez was taken to St. Barnabas Hospital in the Bronx, where he died four days later. Following the attack, defendants were arrested and charged with second-degree murder, first-degree manslaughter, and first and second-degree gang assault. During trial, a number of lesser assault offenses were submitted (first through third degree assault), all of which required proof of physical injury or serious physical injury.

The trial presented two sharply different theories as to the cause of the victim's death. The medical examiner testified for the prosecution that the victim's injuries, which were consistent with "blunt impact to the skull," were the "but for" cause of the victim's death notwithstanding any complications the victim suffered during his hospitalization. In contrast, defendant's medical expert testified that the victim had recovered from the head injury sustained during the alleged assault, and that complications attributable to hospital negligence were the sole causes of his death. In particular, defendant's expert noted that while in the hospital the victim's condition was improving and he appeared to be recovering from the head injury, but then he

suffered a fall from his bed. Defendant's expert opined that the hospital was negligent in allowing him to fall but also in failing to repeat a CT scan of his head after the fall to make sure there was no injury, and in failing to swiftly treat the fever and infection which the victim developed within 24 hours after the fall. The expert also stated that the infection, which he believed was the cause of death, was likely caused either by the victim's fall from his bed or one of the intravenous catheters used on him.

Although there were various charges submitted to the jury, some of which only required proof of physical injury or serious physical injury, the court gave a single "charge of causation as being applicable to all the counts," lumping "death, physical injury or serious physical injury" together to the jury. The jury ultimately found defendant guilty of manslaughter in the first degree. On appeal, defendant argues that the trial court's charge misstated the law on causation and relieved the People of their burden of proving defendant caused the death of Jimenez, an essential element of the crime of manslaughter, by requiring the prosecution only to prove that defendant's conduct was a sufficiently direct cause of the victim's injury relating to the lesser assault offenses.

Although defendant failed to preserve his challenge to the court's charge regarding causation of death, because the instructions relieved the People of their burden of proving causation of death, normal preservation requirements do not apply and the issue may be reviewed nothwithstanding the lack of preservation (*see People v Thomas*, 50 NY2d 467, 471–472 [1980]). In the alternative, I would consider the claim in the interest of justice (*see People v McTiernan*, 119 AD3d 465, 467 [1st Dept 2014]). Further, I conclude that the charge, viewed as a whole, failed to properly convey the law regarding whether the assault was a sufficiently direct cause of the victim's death (*see People v Umali*, 10 NY3d 417, 426-427 [2008], *cert denied* 556 US 1110 [2009]; *People v Ladd*, 89 NY2d 893, 895 [1996]), and thus a new trial is warranted.

"In considering a challenge to a jury instruction, the 'crucial question is whether the charge, in its entirety, conveys an appropriate legal standard and does not engender any possible confusion'" (*People v Hill*, 52 AD3d 380, 382 [1st Dept 2008], quoting *People v Wise*, 204 AD2d 133, 135 [1st Dept 1994], *lv denied* 83 NY2d 973 [1994]). Where the court's charge creates undue confusion in the minds of the jurors, reversal is warranted (*Hill*, 52 AD3d at 382; *People v Rogers*, 166 AD2d 23 [1st Dept

1991], *lv denied* 78 NY2d 1129 [1991]). Guided by these principles, I find that the court's instructions on causation were prejudicially defective.

A person is guilty of first-degree manslaughter when "[w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person" (Penal Law § 125.20[1]). In contrast, first through third degree assault and gang assault in the first and second degrees require the causation of either physical injury (third degree assault) or serious physical injury (first and second degree assault, gang assault in the first and second degrees) (Penal Law §§ 120.00, 120.05, 120.06, 120.07, 120.10).

In order to prove defendant was guilty of manslaughter in the first degree, the People must "at least, prove that the defendant's conduct was an actual cause of death, in the sense that it forged a link in the chain of causes which actually brought about the death" (*People v Stewart*, 40 NY2d 692, 697 [1976]). The defendant's conduct must thus "be *a sufficiently direct cause* of the ensuing death before there can be any imposition of criminal liability" (*id.* [internal quotation marks omitted]). Causation of death is thus "an essential element which the People must prove beyond a reasonable doubt" (*id.*).

Significantly, while a defendant will generally be criminally responsible for a victim's death notwithstanding negligent medical treatment, he will be relieved of liability where the "death can be attributed *solely* to the negligent medical treatment" (*People v Bowie*, 200 AD2d 511, 512 [1st Dept 1994], *lv denied* 83 NY2d 869 [1994]).

Similarly, proof of injury or serious physical injury is an essential element of the assault offenses (*see* Penal Law §§ 120.00, 120.05-.07, 120.10).

Accordingly, the Criminal Jury Instructions (CJI) incorporate these principles, in a parallel fashion, with respect to causation of injury and causation of death, as follows:

> "CAUSE OF INJURY . . .
>
> "A person 'causes [physical or serious physical] injury' to another when that person's conduct is a sufficiently direct cause of such injury to another.
>
> "A person's conduct is a sufficiently direct cause of such injury when: One, the conduct is an actual contributory cause of such injury; and two, when the injury was a reasonably foreseeable result of the conduct. . .
>
> "A person's conduct is an actual contributory cause of [physical or serious physical] injury to another when that conduct forged a link in the chain of causes which actually brought about such injury — in other words, when the conduct set in motion or continued in motion the events which ultimately resulted in such injury.
>
> "An obscure or merely probable connection between the

conduct and the injury will not suffice.

"At the same time, if a person's conduct is an actual contributory cause of the injury to another, then it does not matter that such conduct was not the sole cause of the injury, or that a pre-existing medical condition also contributed to the injury, or that the injury was not immediately apparent. . .

"Injury is a reasonably foreseeable result of a person's conduct when the injury should have been foreseen as being reasonably related to the actor's conduct. It is not required that the injury was the inevitable result or even the most likely result.

"If a person inflicts injury on another, a reasonably foreseeable consequence of that conduct is that the victim will need medical or surgical treatment. It is no defense to causing the victim's injury that the medical or surgical treatment contributed to such injury. Only if the injury is solely attributable to the medical or surgical treatment and not at all induced by the inflicted injury does the medical intervention constitute a defense"

(CJI2d [NY] Penal Law art 120, Causation [footnotes omitted]).

"CAUSE OF DEATH . . .

"A person 'causes the death' of another when that person's conduct is a sufficiently direct cause of the death of another.

"A person's conduct is a sufficiently direct cause of death when: One, the conduct is an actual contributory cause of the death; and two, when the death was a reasonably foreseeable result of the conduct. . .

"A person's conduct is an actual contributory cause of the death of another when that conduct forged a link in the chain of causes which actually brought about the death -- in other words, when the conduct set in motion or continued in motion the events which ultimately resulted in the death.

> "An obscure or merely probable connection between the conduct and the death will not suffice.
>
> "At the same time, if a person's conduct is an actual contributory cause of the death of another, then it does not matter that such conduct was not the sole cause of the death, or that a pre-existing medical condition also contributed to the death, or that the death did not immediately follow the injury. . .
>
> "Death is a reasonably foreseeable result of a person's conduct when the death should have been foreseen as being reasonably related to the actor's conduct. It is not required that the death was the inevitable result or even "the most likely result. . .
>
> "And, it is not required that the actor have intended to cause the death. . .
>
> "If a person inflicts injury on another, a reasonably foreseeable consequence of that conduct is that the victim will need medical or surgical treatment. It is no defense to causing the victim's death that the medical or surgical treatment contributed to the death of the victim. Only if the death of the victim is solely attributable to the medical or surgical treatment and not at all induced by the inflicted injury does the medical intervention constitute a defense"

(CJI2d [NY] Penal Law art 125, Causation [footnotes omitted]).

However, rather than reading these pattern jury instructions separately, the trial court effectively took the CJI charge for "Injury" and selectively added the word "death" thereto, and instructing the jury in one lumped instruction as follows:

> "[E]ach of the counts that you will be asked to consider has as an element that the defendants caused a particular result. *A person causes physical injury or serious physical injury or death to another person when that person's conduct*

is a sufficiently direct cause of such injury to another (emphasis added).

"A person's conduct is a sufficiently direct cause of such injury when the conduct is an actual contributory cause of such injury and when the injury was a reasonably foreseeable result of that conduct. . .

"*A person's conduct is an actual contributory cause of physical injury or serious physical injury or death to another when that conduct forged a link in the chain of causes which actually brought about such injury* (emphasis added).

"In other words, when the conduct set in motion or continued in motion the events which ultimately resulted in such injury. [A]n obscure or merely probable connection between the conduct and the injury will not suffice. At the same time, if a person's conduct is an actual contributory cause of the injury to another, then it does not matter that such conduct was not the sole cause of the injury or that a preexisting medical condition also contributed to the injury or that the injury was not immediately apparent. . .

"Injury is a reasonably foreseeable result of a person's conduct when the injury should have been foreseen as being reasonably related to the actor's conduct. It is not required that the injury was the inevitable result or even the most likely result.

"If a person inflicts injury on another, a reasonably foreseeable consequen[ce] of that conduct is that the victim will need medical or surgical treatment. It is no defense to causing the victim's injury that the medical or surgical treatment contributed to such injury. Only if such injury is solely . . . attributable to the medical or surgical treatment and not at all induced by the inflicted injury does the medical intervention constitute a defense."

As is evident, adding to the confusion of the lumped-together charge, the court did not consistently add the word

"death" to its set of instructions, in most cases omitting "death" and discussing only causation of "injury." Notably, the trial court did not use the term "death" when addressing the impact of "medical or surgical treatment," which may have given the jurors an impression that improper medical treatment is irrelevant to the question of cause of death. Most concerning, however, is that in the two sentences emphasized above the court instructed the jury that, if it were to find causation of injury, then causation of death would also be proven. This is an incorrect statement of the law because the jury could of course simultaneously find causation of injury or serious physical injury but not causation of death. However, the charge on causation as given by the trial court could lead the jury to find defendant guilty of manslaughter in the first degree by merely finding defendant caused the victim's physical injury or serious physical injury.

Thus, the court's instructions as a whole did not convey the proper standard, created undue confusion in the minds of the jurors (*People v McTiernan*, 119 AD3d at 467), and had the effect of relieving the People of their burden of proving that defendant caused the victim's death as an essential element of the manslaughter count by requiring the People only to prove injury,

and not death. Moreover, these instructions misstated the law on a critical issue at trial - whether the victim died as a result of the assault or solely because of his inadequate medical treatment. Indeed, while the evidence that defendant participated in the assault was overwhelming, the evidence that those injuries caused the victim's death was not, and the jury was faced with a battle of experts and a question of fact as to the ultimate cause of the victim's death. Consequently, the court's error essentially "gutted" defendant's causation defense (*People v Minor*, 111 AD3d 198, 205 [1st Dept 2013]). Hence, I reject the People's contention that the error was harmless.

Proof of negligent medical treatment will not relieve defendant's criminal responsibility for the subsequent death of the victim unless the intervening negligence is the sole proximate cause of death (*People v Bowie*, 200 AD2d at 512). The court's charge improperly linked injury and death in a confusing manner that undermined these principles. There was ample evidence to support defendant's position that the victim's death was caused by the hospital's negligent medical treatment of the victim.

Defendant's medical expert, Dr. Ronald Paynter, testified that the victim "was actually getting better," such that, by his

third day in the hospital, "they were removing the sedation" and removed the "decompression tube" which had been relieving the pressure in his brain. At this point, the victim "appeared to be recovering from the head injury." After they "removed some of the sedation," however, he "fell out of bed, which is not supposed to happen in a hospital." Dr. Paynter stated that the hospital made "very little response" to the victim's fall. "[W]ithin 24 hours" of his fall, he "developed an infection" and "a very high fever" of 104°. "[A]s a result of the fever," he "developed a very rapid heart rate." Dr. Paynter opined that "the treatment for the fever was slow by the hospital," and stated that the hospital "did not give aggressive intravenous fluid and aggressive antibiotic treatment, and it appeared that [the victim] succumbed to the infection." Notably, the evidence at trial supports the conclusion that the victim died from an infection and fever, and not directly from injuries to his head.

The jury may have found defendant responsible for the victim's death due to the trial court's confusing charge.

Accordingly, it is my opinion that the judgment should be reversed, and the matter remanded for a new trial.

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

ENTERED: APRIL 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16574-
16574A The People of the State of New York,
Respondent,

-against-

Brian Degraffenreid,
Defendant-Appellant.

Ind. 2201/09

_____

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

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered January 12, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 18 years, affirmed. Order (same court and Justice), entered August 18, 2014, which denied defendant's CPL 440.10 motion to vacate the judgment, affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The evidence showed that defendant joined with two other men to savagely attack the victim, who ultimately died. Defendant, after throwing the first punch, then grabbed, held and continued to hit the victim, while his codefendant repeatedly hit the victim on the head with a tire

iron. The victim suffered numerous serious injuries, including a skull fracture, with fragments of bone lodging in his brain. Under these circumstances, defendant's intent to inflict serious physical injury is readily inferred (*see People v Ford*e, 120 AD3d 509 [2d Dept 2014], *lv denied* 24 NY3d 1043 [2014]; *People v Nicholson*, 97 AD3d 968 [3rd Dept 2012], *lv denied* 19 NY3d 1104 [2012]). The fact that defendant only used his fists, or that he was not the one actually wielding the tire iron, or even that he may not have known in advance that his codefendant would use the tire iron to seriously injure the victim is of no moment in this case. The evidence, establishing that even after his codefendant began assaulting the victim with a tire iron defendant continued to participate in the assault, is sufficient to support a conclusion that defendant shared the requisite intent with his codefendant to commit the crime (*Matter of Tatiana N.*, 73 AD3d 186, 191 [1st Dept 2010]).

Defendant's failure to raise any challenge to the court's charge regarding causation of death at a time when the court could have easily rephrased the instruction renders it unpreserved, and we decline to review it in the interests of justice. Were we to consider the charge, viewed as a whole, we would find that it was proper (*People v Castillo*, __ AD3d __,

Appeal No. 16343 [1st Dept 2016] [decided simultaneously herewith). Defendant's argument that the prosecutor engaged in a pattern of improper remarks which deprived him of a fair trial is similarly unpreserved and we decline to review it in the interests of justice. Alternatively we hold that the prosecutor's remarks neither prejudiced defendant nor deprived him of a fair trial (*id*). We also find that defendant's argument that he should have been tried separately from his co-defendant is unpreserved and we decline to review it in the interest of justice. Alternatively, we hold that it lacks merit because the defenses raised by each defendant were not so irreconcilable as to require severance. Judicial economy warranted a joint trial in this case where the People were relying on substantially the same evidence to convict each of the defendants (*id*).

We find that the trial court properly denied defendant's motion based on claimed ineffective assistance of trial counsel (*Strickland v Washington*, 466 US 668 [1984], *People v Caban*, 5 NY3d 143, 152 [2005]). Counsel pursued a defense that defendant did not have a shared intent with his co-defendant to inflict serious physical injury on the victim. Defense counsel admitted that although he reviewed a video recording made 11 minutes before the attack, he did not review it in slow motion.

Defendant argues that in slow motion the video clearly shows the codefendant possessing the tire iron that inflicted the fatal blow to the victim while in the company of defendant, thereby negating his defense. While the video evidence bears upon the defense, we do not need to decide whether, under the circumstances of this case, defense counsel should have viewed the video in slow motion. Defendant's intent was established by evidence that he participated in the assault after his codefendant actually struck the victim with the tire iron. Consequently, any issue about how long before the assault defendant knew about the tire iron is largely irrelevant. Under the circumstances, error by defense counsel, if any, was not so egregious and prejudicial as to compromise defendant's right to a fair trial (see *People v Cyrus*, 48 AD3d 150 [1st Dept 2007], *lv denied* 10 NY3d 763 [2008]).

Finally, we perceive no basis for reducing the sentence.

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

TOM, J.P. (dissenting)

For the reasons articulated in my dissent in *People v Castillo* (__ AD3d __, Appeal No. 16343 [1st Dept 2016] [decided simultaneously herewith]), which involves a jointly tried codefendant, I would reverse the judgment and remand the matter for a new trial.

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

746 The People of the State of New York, Ind. 1522/10
Respondent,

-against-

Richard Horsford,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Renee A. White, J.), entered on or about March 18, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841

[2014]). The mitigating factors cited by defendant are inadequately substantiated, and are in any event outweighed by the seriousness of the underlying sex crime and defendant's prior record.

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

748 In re Augustine A.,
Petitioner-Respondent,

-against-

Samantha R.S.,
Respondent-Appellant.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

_____

Order, Family Court, Bronx County (Jodi E. Hirschman, Support Magistrate), entered on or about April 10, 2014, which granted the petition pursuant to Article 5 of the Family Court Act for an order of filiation declaring and adjudging petitioner to be the father of the subject child, unanimously reversed, on the law, without costs, the order of filiation vacated and the matter remanded to the Family Court for further proceedings consistent herewith.

The support magistrate prematurely ordered the parties to take a genetic marker test to determine whether petitioner was the father of the subject child. Although the respondent mother, acting without counsel, did not initially object to DNA testing or expressly raise an "equitable estoppel" issue, she informed the court that another man had formally acknowledged paternity and that the child's birth certificate was being amended to

reflect that the child's surname had been changed to that man's name. Regardless of whether the acknowledgment of paternity was legally effective, these facts raised an issue concerning the child's best interests, which is the paramount concern in all cases involving the issue of paternity (*Andrew T. v Yana T.*, 74 AD3d 687, 687 [1st Dept 2010]). Thus, it was error for the support magistrate to order DNA testing without first transferring the matter to a Family Court judge (*see* Family Ct Act § 439[a]), to conduct a hearing to determine the issues of equitable estoppel and the child's best interests (*see* Family Ct Act § 532[a]; *Matter of Lovely M. [Michael McL.-Tracey M.]*, 70 AD3d 516 [1st Dept 2010]; *Matter of Isaiah A.C. v Faith T.*, 43 AD3d 1048 [2d Dept 2007]).

Since any determination by the Family Court has the potential to prejudice the child's interests, appointment of an

attorney to represent the best interests of the child will be necessary (*Andrew T. v Yana T.*, 74 AD3d at 687; *Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564 [2d Dept 2006]).

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

749 John Milone, et al., Index 100093/12
Plaintiffs-Appellants,

-against-

Scottsdale Insurance Company,
Defendant-Respondent.

_____

Law Offices of Craig A. Blumberg, New York (Craig A. Blumberg of counsel), for appellants.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered November 6, 2014, which, insofar as appealed from as limited by the briefs, dismissed the complaint in its entirety upon defendant's motion for summary judgment seeking certain declarations as to the limitations of coverage obligations, unanimously modified, on the law, to reinstate the first and second causes of action, and to declare in favor of defendant as indicated herein, and as so modified, affirmed, with costs against defendant.

The court erred in dismissing the complaint. The record does not conclusively establish that plaintiffs did not suffer any damage to the structure of the premises, its driveway, irrigation system or landscaping, that was not the subject of

defendant's reimbursement of plaintiffs' initial coverage claim, and which is covered by the operative insurance policy. Where, as here, "the insured, in opposition to the insurer's motion for summary judgment, presents circumstantial evidence of the manner in which the loss occurred, the motion court should view this evidence in the light most favorable to the non-movant" (*Gurfein Bros. v Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1998]). Plaintiffs are thus entitled to have their evidence of any such damages evaluated by a jury.

Defendant, however, is entitled to declarations that (1) plaintiffs are not entitled to coverage under the policy for any damages to the structure, brickwork, landscaping, irrigation system or driveway that was not caused by direct physical damage as a result of the fire or the efforts of the firefighters to combat the fire, and (2) that plaintiffs' damages are limited to the limits set forth in the policy.

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

750 In re Arbitration Between Index 155015/13
Seth R. Greenky, et al.,
Petitioners-Appellants,

-against-

Rochelle S. Aytes,
Respondent-Respondent.

_____

Paul Biedka, New York, for appellants.

Pryor Cashman LLP, New York (Eric D. Dowell of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered April 23, 2014, in respondent's favor, unanimously affirmed, with costs.

Petitioners failed to meet their "heavy burden" of establishing by clear and convincing evidence the existence of any ground for vacating the arbitration award under CPLR 7511 (*see Muriel Siebert & Co. v Ponmany*, 190 AD2d 544, 544 [1st Dept 1993]).

As to petitioners' contention that the arbitrator exceeded his authority, the arbitrator "may be said to have done so only if [he] gave a completely irrational construction to the provisions in dispute" (*see Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [1st Dept 2012] [internal quotation marks

omitted]). It was not irrational for the arbitrator to find that the broad arbitration clause of the subject personal management agreement, which contained a carve-out for the "collection of any past due monies," pertained only to disputes that were delinquent but not genuinely disputed and that the determination of amounts owing could be determined by the arbitrator.

Nor was the arbitrator's determination in disregard of the law (*see Sawtelle v Waddell & Reed*, 304 AD2d 103, 108 [1st Dept 2003]) or so abusive of his discretion as to constitute misconduct. Petitioners were not denied a fair hearing because the arbitrator accepted respondent's position on commissions as expressed in her affidavit dated December 31, 2009, which was supported by the documentary evidence submitted in response to petitioner's extensive interrogatories (*see Kaminsky v Segura*, 26 AD3d 188 [1st Dept 2006]). There was no need for a deposition to determine respondent's credibility; the arbitrator had the opportunity to make that assessment at the arbitration hearing.

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

751 The People of the State of New York, Ind. 2159/11
Respondent,

-against-

Kerri Roberts,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered June 7, 2013, convicting defendant of criminal possession of a forged instrument in the second degree (two counts) and identity theft in the second degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously modified, on the law, to the extent of vacating the identity theft conviction and dismissing that count of the indictment, and otherwise affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. Defendant's initial detention was not an arrest, but rather, a forcible stop justified by a reasonable suspicion

of criminality (*see People v Martinez*, 80 NY2d 444, 447 [1992]). A store security guard flagged down the police and told them of a "problem" in the store, and that defendant was "the guy." Defendant attempted to flee as soon as he saw the police, and in his flight he pushed a store employee. The inference was obvious that the "problem" involved criminality, and these fast-paced events provided reasonable suspicion for the detention (*see People v Lopez*, 258 AD2d 388 [1st Dept 1999], *lv denied* 93 NY2d 1022 [1999]). Given defendant's violent behavior toward the employee, the use of handcuffs was justified for the temporary detention, and did not elevate the encounter to an arrest (*see People v Foster*, 85 NY2d 1012, 1014 [1995]; *People v Allen*, 73 NY2d 378, 379-380 [1989]). Information from store employees about defendant's attempted use of a counterfeit driver's license and credit card, along with an officer's observation of the credit card when an employee placed it under a black light, provided probable cause for the arrest (*see People v Chandler*, 56 AD3d 284 [1st Dept 2008], *lv denied* 11 NY3d 923 [2009]).

The court properly found that the statement made by defendant, after *Miranda* warnings, during an interview at the precinct was attenuated from a brief statement he made at the scene, which the court had suppressed. There was a "pronounced

break" between the interrogations (*see People v Paulman*, 5 NY3d 122, 130-131 [2005]).

The identity theft conviction (Penal Law § 190.79[3]) was not supported by legally sufficient evidence. As we held in *People v Barden* (117 AD3d 216, 225 [1st Dept 2014], *lv granted* 24 NY3d 959 [2014]), to prove the commission of identity theft, evidence of the use of personal identifying information, alone, is insufficient. Rather, the People must show that the defendant both used the victim's personal identifying information and assumed the victim's identity. Here, while the proof was clear that defendant used the personal identifying information of the victim (*see* Penal Law § 190.77[1]), there was no proof that he assumed her identity. Instead, he assumed the identity of a fictitious person. We also note that the court's charge, to which defendant sufficiently objected, was defective in the same respect.

The verdict convicting defendant of criminal possession of a

forged instrument 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 credibility determinations.

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

752-
752A In re South Bronx Unite!, et al.,
Petitioners-Appellants,

-against-

New York City Industrial Development Agency, et al.,
Respondents,

New York State Department of Transportation, et al.,
Respondents-Respondents.

Index 260462/12

_____

New York Lawyers for The Public Interest, New York (Rachel Spector of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for New York State Department of Transportation, respondent.

Nixon Peabody LLP, New York (Laurie Styka Bloom of counsel), for Fresh Direct LLC and UTF Trucking, Inc., respondents.

Sive, Paget & Riesel, P.C., New York (Steven Barshov of counsel), for Harlem River Yard Ventures, Inc., respondent.

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Orders, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 25, 2014, and August 14, 2015, which denied petitioners' first and second motions, in this hybrid declaratory judgment/article 78 proceeding, to renew their motion for leave to amend the petition's third cause of action, seeking a declaration that the 2012 sublease between respondents Harlem

River Yards Ventures, Inc. and Fresh Direct is invalid, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying petitioners' renewal motions (*see Shine v Roosevelt Hosp.*, 26 AD3d 204 [1st Dept 2006]). Petitioners have not pointed to any "new facts not offered on the prior motion that would change the prior determination" to deny the underlying motion for leave to serve a second amended petition (CPLR 2221[e][2]).

Even assuming that petitioners' purported new facts warrant renewal, the underlying motion would still be subject to denial as futile. On petitioners' prior appeal to this Court, we held that petitioners' allegation that respondent New York State Department of Transportation "must pre-approve a modification of the Land Use Plan is insufficient to confer standing" under State Finance Law § 123-b, the statutory vehicle for their third cause of action (115 AD3d 607, 610 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]). Under the circumstances, there is no substantive difference between the "preapproval" which we have already rejected as insufficient and the "approval" of the sublease, and alleged concomitant abandonment of the site's intermodal rail infrastructure, which petitioners now advance as new facts

warranting renewal.

Furthermore, petitioners' challenge to the sublease is ultimately premised on their contention that the Fresh Direct Project will constitute "an abandonment of the intermodal terminal" upon which the larger Harlem River Yards project is based, thereby vitiating the purpose of the underlying lease. Petitioners presented this contention on the prior appeal, and we rejected it. Accordingly, even assuming that they did have standing to assert their third cause of action, the law of the case doctrine would require us to reject it, thereby obviating the proposed second amended petition and what petitioners term the proposed third amended complaint (*see Carmona v Mathisson*, 92 AD3d 492, 492-493 [1st Dept 2012]).

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

753 Jo Hsu, Index 156294/12
Plaintiff-Appellant,

-against-

Krav Maga NYC, LLC, doing
business as Krav Maga Academy,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 9, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The "Release of Liability, Waiver of Claims, Assumption of Risks and Indemnity Agreement" (Release) that plaintiff signed as a condition of participating in defendant's self-defense training class "expresses in unequivocal terms the intention of the parties to relieve ... defendant of liability for [its] negligence," and is thus enforceable (*see Lago v Krollage*, 78 NY2d 95, 99-100 [1991]). It states that defendant is not responsible for "any injury, loss or damage of any kind sustained

by any person while participating in the classes," and that plaintiff agreed "to assume and accept all risks arising out of, associated with or related to [her] participating in the class" (including risks that were "caused by the negligence of [defendant]") and "to hold harmless and indemnify [defendant] ... from any and all claims, demands, actions and costs which might arise out of [her] participating in the class."

Plaintiff argues that defendant may not rely on the copy of the Release included in its moving papers because the copy was not certified or otherwise authenticated by affidavit. However, plaintiff identified her handwriting and signature on that very copy of the Release at her deposition, raising no objection to its authenticity at that time. Moreover, the motion court properly allowed defendant to remedy the alleged defect by including in its reply papers an additional copy of the Release accompanied by an affidavit by its CEO attesting that the copy was made from the original Release kept in its records (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-382 [1st Dept 2006]; *Ramales v Pecker Iron Workers of Westchester, Inc.*, 114 AD3d 920 [2d Dept 2014], *lv dismissed* 24 NY3d 949 [2014]). Plaintiff's argument that the Release is void because the copy included in defendant's moving papers does not

comply with CPLR 4544 is unsubstantiated (*see Tsadilas v Providian Natl. Bank*, 13 AD3d 190 [1st Dept 2004], *lv denied* 5 NY3d 702 [2005]).

Plaintiff argues that an issue of fact exists whether defendant offers recreational as well as instructional uses and therefore whether defendant is barred by General Obligations Law § 5-326 from exacting a release from participants. However, defendant's name, promotional literature, and class schedules, as well as plaintiff's deposition testimony and the testimony of another member of the facility and defendant's CEO, establish as a matter of law that defendant's purpose is instructional and that its members' use of its fitness equipment is "ancillary" to the self-defense training (*see Debell v Wellbridge Club Mgt., Inc.*, 40 AD3d 248, 250 [1st Dept 2007]).

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 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

757 The People of the State of New York, Ind. 1996/11
Respondent,

-against-

Denni Valdez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 19, 2012, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 18 years to life, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved (*see People v Conceicao,* 26 NY3d 375, 381 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary. During the plea proceeding, whenever defendant made a statement that could be viewed as negating an element of the crime or raising a defense, the court asked clarifying questions that ensured that the allocution ultimately cast no doubt on defendant's guilt or the voluntariness of his

plea. Defendant had been found competent after extensive CPL article 730 proceedings, and there was nothing to warrant an inquiry into whether defendant's mental condition impaired his ability to understand the proceedings, or into whether he waived any potential psychiatric defenses (*see People v Diallo*, 88 AD3d 511 [1st Dept 2011], *lv denied* 18 NY3d 888 [2012]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

758-
759 In re Alan P.,
Petitioner-Appellant,

-against-

Charlotte E.,
Respondent-Respondent.

_____

Wrobel Markham Schatz Kaye & Fox LLP, New York (Luisa M. Kaye of counsel), for appellant.

Segal & Greenberg LLP, New York (Philip C. Segal of counsel), for respondent.

_____

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about January 30, 2015, which denied petitioner's objections to an order, same court (Lewis A. Barofsky, Support Magistrate), entered on or about October 17, 2014, dismissing his petition for termination of his child support obligation, unanimously affirmed, without costs.

The parties' stipulation of settlement, incorporated but not merged into the judgment of divorce, provides that petitioner's child support obligation for his disabled child will continue until the occurrence of the earliest of three specified events: the child's care is completely covered by a government entitlement program, the child's marriage, or the child's death.

Applying ordinary principles of contract interpretation, we find that the stipulation unambiguously expresses the parties' agreement that petitioner's child support obligation will continue until the child's death, unless one of the other two events occurs first, without regard to her reaching the age of majority (*see Gray v Pashkow*, 79 NY2d 930, 932 [1992]; *Streuli v Streuli*, 60 AD2d 829 [1st Dept 1978]).

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

760 Janessa Jordan, Claim 125939
Plaintiff-appellant,

-against-

Alice Schlesinger,
Defendant, respondent.

_____

Janessa Jordan, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondent,

_____

Order, Court of Claims of the State of New York (Faviola A. Sota, J.), entered August 10, 2015, which granted defendant's motion to dismiss the claim, unanimously affirmed, without costs.

The claim against defendant, which is based upon defendant's dismissal of a Supreme Court action brought by plaintiff for alleged medical malpractice, is barred by judicial immunity. Claimant did not assert that any of defendant's acts were

performed in the clear absence of jurisdiction (*see Murray v Brancato*, 290 NY 52 [1943]; *Rosenstein v State of New York*, 37 AD3d 208 [1st Dept 2007]).

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

763 The People of the State of New York, Ind. 2087/13
Respondent,

-against-

Miguel Chavez,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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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 February 26, 2014,

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 7, 2016

CLERK

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

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

767 Christopher Brown, Index 300279/12
Plaintiff-Respondent,

-against-

Wilbert George,
Defendant-Appellant,

Jacquline George,
Defendant.

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

Popkin & Popkin, LLP, New York (Eric F. Popkin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 20, 2014, which, insofar as appealed from, denied the motion of defendant Wilbert George for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant George established entitlement to judgment as a matter of law in this action where plaintiff cable service technician was injured when he fell from a ladder while working at defendant's home. Defendant submitted, inter alia,

plaintiff's deposition testimony wherein he described his fall from the ladder he had leaned against defendant's house. The testimony "establishe[d] that there was no dangerous condition on the premises which caused the accident, but rather that it was caused by the manner in which" plaintiff performed his work (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Defendant cannot be held liable for plaintiff's injuries resulting from the means or methods of his work, since it is undisputed that defendant did not exercise supervisory control over the work (*see id.*).

The court erred in finding that defendant failed to make a prima facie showing that the accident was not caused by a defective condition on the premises. The conclusory allegation in plaintiff's bill of particulars, that defendant created or had notice of a defective condition on the exterior of the house, was insufficient to raise a triable issue of fact (*compare Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890 [2013]). Indeed, plaintiff testified that he was unaware of any condition of the

building that caused his fall, and he tacitly conceded that the accident was not caused by a premises defect by making no such argument in opposition to defendant's motion for summary judgment (*see Cullen v Naples*, 31 NY2d 818, 820 [1972]).

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

ENTERED: APRIL 7, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

768 The People of the State of New York, Ind. 4228/13
Respondent,

-against-

Rafael Safadit,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Roger Hayes, J. at plea; Robert Stolz, J. at sentencing), rendered September 10, 2014,

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 7, 2016

CLERK

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

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

769N Lilian Hairston as Administratrix of the Estate of Guillermo DeJesus, Plaintiff-Appellant, Index 21039/11E

-against-

Liberty Behavioral Management Corporation, et al., Defendants-Respondents.

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Law Offices of Mark R. Bower, P.C., New York (Mark R. Bower of counsel), for appellant.

Barry, McTiernan & Moore LLC, New York (David H. Schultz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), which, to the extent appealed from, denied plaintiff's motion for leave to amend the complaint to include a demand for punitive damages, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Plaintiff's decedent voluntarily committed himself to defendant Arms Acres, an alcohol rehabilitation facility. While under defendant's care, the decedent, who, in addition to being an alcoholic, suffered from schizophrenia and bipolar disorder, became extremely disoriented, began having hallucinations, and attempted to leave the facility. On the morning of September 12, 2009, the decedent was found missing from the facility. His body

was discovered on October 18, 2009.

Although, following discovery, the motion court granted plaintiff leave to amend the complaint to include a claim under the Public Health Law, it denied her leave to add a demand for punitive damages pursuant to Public Health Law § 2801-d(2). Punitive damages are available under Public Health Law § 2801-d(2) where the patient has been deprived of a right or benefit and the deprivation "is found to have been willful or in reckless disregard of the lawful rights of the patient." The motion court held that the conduct alleged to have violated the Public Health Law did not rise to a level that warranted punitive damages. We conclude, to the contrary, that a jury could reasonably find, under these circumstances, that defendant's failure to provide for the decedent's safety at a time when he was disoriented and hallucinating warrants an award of punitive damages.

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

ENTERED: APRIL 7, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Richter, Manzanet-Daniels, JJ.

261 Carmelo Maisonet, Index 22180/13E
Plaintiff,

Miriam Cirera,
Plaintiff-Respondent,

-against-

Michael Roman, et al.,
Defendants-Appellants.

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Lester Schwab Katz & Dwyer, LLP, New York (Stewart G. Milch of counsel), for appellants.

Arze & Mollica, LLP, Brooklyn (Raymond J. Mollica of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered March 27, 2015, reversed, on the law, without costs, and the motions denied.

Opinion by Renwick, J. All concur except Andrias and Saxe, JJ. who dissent in an Opinion by Saxe, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter
Sallie Manzanet- Daniels, JJ.

261
Index 22180/13

_____x

Carmelo Maisonet,
Plaintiff,

Miriam Cirera,
Plaintiff-Respondent,

-against-

Michael Roman, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered March 27, 2015, which granted plaintiffs' motions for partial summary judgment on the issue of liability.

Lester Schwab Katz & Dwyer, LLP, New York (Stewart G. Milch of counsel), for appellants.

Arze & Mollica, LLP, Brooklyn (Raymond J. Mollica of counsel), for respondent.

RENWICK, J.P.

The sudden emergency doctrine defense is frequently interposed in motor vehicle cases involving rear-end collisions. It is, however, usually not a viable defense unless the driver of the offending vehicle is faced with a sudden and unexpected circumstance that is not of his or her own making. In the instant case, a plausible sudden emergency is alleged by defendant driver's explanation that his vehicle was suddenly cut off at an intersection by another vehicle, which did not have the right-of-way. Unlike the dissent, we are not willing to find as a matter of law that the emergency doctrine does not insulate defendants from liability just because it is also plausible that defendant driver's tortious conduct may have contributed to or caused the rear-end collision with plaintiff's vehicle, an issue within the purview of the jury.

This action arises from an accident that occurred on the morning of April 4, 2013, when a vehicle operated by defendant Michael Roman struck the vehicle owned and operated by plaintiff Carmelo Maisonet. The Roman vehicle was owned by defendants CSC Holdings, LLC, Cable Vision Systems Corporation and Cable Vision Systems New York City Corporation. Maisonet's vehicle was traveling northbound on Jerome Avenue in the Bronx when it was struck from behind by the Roman vehicle, which was also traveling

northbound on Jerome Avenue.

After defendants served their answer, Maisonet moved for partial summary judgment on liability, arguing that he was hit in the rear by the Roman vehicle, and was thus entitled to judgment against defendants as a matter of law. Plaintiff Miriam Cirera cross-moved for summary judgment arguing that she was an innocent passenger. Maisonet submitted an affidavit in which he averred that he had been stopped for about 45 seconds to a minute at a red light behind two or three cars, in the northbound lane of Jerome Avenue at its intersection with East 176th Street, when his vehicle was suddenly hit from behind. Prior to stopping, he had traveled on Jerome Avenue for about five minutes without any lane changes.

We find that plaintiffs have met their burden of establishing a prima facie showing of their entitlement to partial summary judgment on liability. A rear-end collision with a stopped vehicle creates a prima facie showing of negligence on the part of the rear driver (*see Santos v Booth*, 126 AD3d 506, 506 [1st Dept 2015]). Similarly, a violation of Vehicle and Traffic Law § 1129(a), which obligates drivers to maintain safe distances between their cars and cars in front of them, and be aware of traffic conditions, including vehicle stoppages, is prima facie evidence of negligence (*see Rodriguez v Budget Rent-*

A-Car Sys.,Inc., 44 AD3d 216, 223-224 [1st Dept 2007]; *Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]).

Defendants opposed, arguing that summary judgment was not warranted, because they had a valid emergency doctrine defense, which would preclude a summary finding of liability against them. The emergency doctrine recognizes that "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context," provided the actor had not created the emergency (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991]; *see also Caristo v Sanzone*, 96 NY2d 172, 174 [2001]).

In support of their emergency doctrine defense, defendants rely primarily upon defendant driver Roman's affidavit, in which he averred that a sequence of events, unfolding in no more than a few seconds, forced him into actions that resulted in his striking Maisonet's vehicle in order to avoid a head-on collision with another vehicle. According to Roman, he was driving 20 miles per hour north on Jerome Avenue at its intersection with 176 Street, when a woman traveling south on Jerome Avenue

suddenly turned left in front of him. The light at the intersection was green, he had the right-of-way, and he had been traveling a safe distance behind the vehicle directly in front of him. In order to avoid the car making the left turn, Roman swerved to the right, but since there was a subway column to the right, he was forced to swerve back to the left, which was why he struck the back of Maisonet's moving vehicle.

These factual allegations, viewed in a light most favorable to defendants, as the non-moving parties, are sufficient to raise triable issues of fact as to the existence of an emergency and the reasonableness of defendant driver's response to that emergency. The dissent cannot seriously argue that defendant driver's explanation -- that he swerved his car to the right to avoid the car that suddenly cut him off -- does not constitute a response to a sudden emergency. Indeed, courts have consistently held that the emergency doctrine may protect a driver from liability where the driver, through no fault of his or her own, is required to take immediate action in order to avoid being suddenly cut off (*see Hotkins v New York City Tr. Auth.*, 7 AD3d 474 [1st Dept 2004] [driver stepped hard on his brakes to avoid a vehicle that cut in front of him]; *Ward v Cox*, 38 AD3d 313 [1st Dept 2007] [defendant with right-of-way was hit by codefendant driver who was backing out of parking space without looking];

Barath v Marron, 255 AD2d 280 [2d Dept 1998] [driver claimed that his sudden stop, which caused an accident, was due to being suddenly cut off by another vehicle]).

Nor are we persuaded by the dissent's alternative argument that, even if defendant driver's explanation for the rear-end collision constituted an emergency situation, the doctrine still does not insulate him from liability because "it is certain ... that his own negligence had caused or contributed to the collision." Of course, we agree with the dissent to the extent it suggests that, even where an emergency is found to exist, that does not automatically absolve one from liability; a party may still be found negligent if the acts in response to the emergency are found to be unreasonable (*see Rivera,* 77 NY2d at 327; *Koenig v Lee*, 53 AD3d 567, 567 [2d Dept 2008]). However, in finding that defendant driver's reaction negates his emergency defense, the dissent misinterprets the proper application of the emergency doctrine. The dissent overlooks that in an emergency situation, a driver shall not be held to the same standard of care that would be applied to a driver in a nonemergency situation (*see Benedetto v City of New York,* 166 AD2d 209, 210 [1st Dept 1990]; *see also Pettica v Williams*, 223 AD2d 987 [3rd Dept 1996]; *Rivas v Metropolitan Suburban Bus Auth.*, 203 AD2d 349, 350 [2nd Dept 1994]). Rather, the reasonableness of the party's actions should

be judged in accordance with the emergency situation presented *(see Rivera,* 77 NY2d at 327).

Accordingly, except in the most egregious circumstances, an evaluation of the reasonableness of a defendant driver's reaction to an emergency is normally left to the trier of fact *(see e.g Green v Metropolitan Transportation Auth. Bus Co*, 26 NY3d 1061 [2015] ["On this record, whether the emergency doctrine precludes liability presents a question of fact and, therefore, summary judgment for defendants . . . was inappropriate."]; *see also Caristo v Sanzone*, 96 NY2d 172, 174 [2001]; *Dumas v Shafer*, 4 AD3d 720, 721-722 [3d Dept 2004]). Since the reasonableness of a driver's actions is generally a question of fact, granting summary judgment to a plaintiff is possible only in such cases where the plaintiff, as the movant for summary judgment, has established that the defendant driver's actions were unreasonable as a matter of law (*cf. Hendrickson v Philbor Motors, Inc.*, 101 AD3d 812, 814 [2d Dept 2012] [on defendant driver's summary judgment motion, defendant driver established that she was confronted with an emergency situation when the tire of the vehicle she was driving suddenly blew out, but failed to meet her prima facie burden of establishing that her subsequent actions were reasonable as a matter of law]; *Colangelo v Marriott*, 120 AD3d 985, 987 [4th Dept 2014) [issues of fact existed as to

whether swerving to the right in order to avoid rear-ending a garbage truck was a reasonable reaction to the emergency created by the loss of brakes]).

In finding that defendant driver's reaction negates his emergency defense, the dissent also misconstrues the record on appeal. The dissent argues that defendant driver's reaction contributed or caused the collision because he either failed to maintain a safe distance between his vehicle and the one in front of his, or he should have been going at an appropriate rate of speed. However, the dissent's allegations are completely speculative and are directly contradicted by defendant driver's affidavit, in which he maintains not only that he was driving 20 miles per hour when an unexpected car suddenly turned left in front of him, but that he had been traveling at a safe distance behind the vehicle directly in front of him.

In sum, on the record before us, we cannot say that defendant driver should have been able to stop before colliding with plaintiff Maisonet's vehicle after facing the emergency that caused him to swerve. Because we are unable to conclude that defendant driver's actions were unreasonable as a matter of law, we are constrained to reverse Supreme Court's grant of Maisonet's motion and Cirera's cross motion for partial summary judgment on the issue of liability.

Accordingly, the order of Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered March 27, 2015, which granted plaintiffs' motions for partial summary judgment on the issue of liability, should be reversed, on the law, without costs, and the motions denied.

All concur except Andrias and Saxe, JJ. who dissent in an Opinion by Saxe, J.

SAXE, J. (dissenting)

On April 9, 2013, a vehicle owned and operated by plaintiff Carmelo Maisonet, and occupied by passenger plaintiff Miriam Cirera, was in the northbound lane of Jerome Avenue in the Bronx, stopped at a traffic light at East 176th Street behind two or three other cars, when it was struck from behind by a truck operated by defendant Michael Roman, which was also traveling northbound on Jerome Avenue.

Defendant Roman told a different, and somewhat inconsistent, story. He said he was driving 20 miles per hour northbound on Jerome Avenue, and was at its intersection with 176th Street with a green light at the intersection, traveling a safe distance behind the vehicle directly in front of him, when a southbound car suddenly turned left in front of him. In order to avoid that oncoming car, Roman says, he swerved to the right, but since there was a column to his right supporting the elevated subway, he was forced to immediately swerve back to the left, at which time he struck the back of plaintiffs' vehicle, which he asserted was moving, not stopped.

It is undisputed that plaintiffs established a prima facie showing of negligence against defendant driver Roman with proof that he struck their vehicle in the rear (*see e.g. Santos v Booth*, 126 AD3d 506, 506 [1st Dept 2015]). The only question is

whether defendant's assertions created a triable issue of fact as to whether the emergency doctrine defense could be applied.

The defense may be invoked where a defendant was faced with a sudden and unexpected circumstance and forced to make an immediate decision, such that the resulting collision is attributable to that circumstance rather than to any negligence on defendant's part (*see Lifson v City of Syracuse*, 17 NY3d 492, 497 [2011]). To validly invoke the defense, a defendant must not only have been faced with a sudden and unexpected circumstance forcing him to make a speedy decision, but the resulting collision may not be attributable to that defendant's negligence (*id.*). Here, even accepting defendant's unsupported assertion, there is no logic by which it may be concluded that the rear-end collision was caused by a sudden need to swerve around an intervening car, rather than by defendant's own negligence.

Defendant relies on the bare assertion that another, unidentified vehicle suddenly turned left from the oncoming lane of traffic, appearing directly in front of him when he had the right-of-way, causing him to swerve first right, then left, after which he collided with the rear of plaintiffs' vehicle. However, that asserted intervening vehicle is insufficient to justify the application of the emergency doctrine. Defendant always had the duty to maintain a safe distance between his vehicle and the

vehicle in front of him, and to proceed at a rate of speed that would not alter that safe distance (*see Forbes v Plume*, 202 AD2d 821, 822 [3d Dept 1994]). If he had been going an appropriate rate of speed and had maintained a safe distance between his vehicle and plaintiffs' vehicle in front of him -- that is, leaving enough distance to allow for stopping if plaintiffs' vehicle stopped -- even the sudden need to swerve around a car that suddenly cut in front of him would not have caused him to crash into the back of plaintiffs' vehicle.

Defendant does not claim, nor could he reasonably claim, that having to swerve around a vehicle that suddenly appeared in front of his vehicle caused his rate of speed to increase, or shortened the distance between his vehicle and plaintiffs' vehicle. So, his inability to avoid rear-ending plaintiffs' car, which was directly in front of him in the lane, was not caused by his claimed sudden need to swerve. Instead, it could only have been caused by his excess speed or the insufficient distance between his own vehicle and plaintiffs' vehicle. Consequently,

the sudden emergency situation he says confronted him does not entitle him to invoke the defense, because it is certain, not merely "plausible," that his own negligence had caused or contributed to the collision.

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

ENTERED: APRIL 7, 2016

CLERK