SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 16, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16545 Mercedes Guevara, Index 310364/11
Plaintiff-Respondent,

-against-

Miguel Ortega,
Defendant.

- - - - -

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

Fordham Carwash, et al.,
Defendants.

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Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for appellants.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 9, 2014, which, to the extent appealed from as limited by the briefs, denied the amended motion of defendant City of New York for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and

the amended motion granted. The Clerk is directed to enter judgment accordingly.

The motion court improperly denied the City's motion for summary judgment. Plaintiff was injured when, while stopped in her car at a red light, defendant Miguel Ortega, a car wash attendant employed by defendant J&B of New York, LLC, the owner of defendant Fordham Car Wash, drove a New York City Police Department traffic van into her vehicle. Contrary to plaintiff's contention, plaintiff did not raise any triable issues of fact as to whether the City was negligent when its traffic enforcement agent allowed an unlicensed driver to drive the NYPD traffic van or whether that negligence was a proximate cause of the accident. Plaintiff has not shown that the agent failed to exercise that degree of care which a reasonably prudent person would have exercised under these circumstances by failing to ask the attendant if he had a driver's license. The keys were given to the attendant for the sole purpose of having the van washed. To impose an affirmative duty on a customer of a commercial car wash to investigate the driving qualifications of each employee who might operate his or her vehicle during the cleaning process would unduly extend liability. In any event, the attendant's isolated negligent act of slipping his foot off the brake pedal

and onto the gas was the sole proximate cause of the accident.

The City is also not vicariously liable as the owner of the van pursuant to Vehicle and Traffic Law § 388(1), which is designed to hold vehicle owners vicariously liable for the negligence of those whom they allow to drive their vehicles (*see Tikhonova v Ford Motor Co.*, 4 NY3d 621, 623 [2005]; *Carter v Travelers Ins. Co.*, 113 AD2d 178 [1st Dept 1985]). Vehicle and Traffic Law § 388(2) specifically exempts "police vehicles," which are defined by Vehicle and Traffic Law § 132-a, in relevant part, as "[e]very vehicle owned by the state, a public authority, a county, town, city or village, *and operated* by the police department or law enforcement agency of such governmental unit . . ." (emphasis added). Here, the result turns on the meaning of the word "operated" within the statute.

Plaintiff's argument that the NYPD traffic van does not qualify as a "police vehicle," because it was not being "operated by the police department" at the time of the accident, but, rather, was being "operated" by the car wash attendant, assumes that the term "operated" means "to cause to function" (Merriam- Webster Online Dictionary, http://beta.merriam-webster.com/dictionary/operate [accessed Jan. 27, 2016]) or is a substitute for the word "driven." This

ignores the common use of the term "operated" as an intransitive verb meaning "to exert power or influence" (*id.*). Under plaintiff's interpretation, a police vehicle would not qualify as such under Vehicle and Traffic Law § 132-a, unless it was being driven by "the police department," which strains common sense, since a police department cannot be the driver of a vehicle. More importantly, plaintiff's interpretation would strip the exemption provided to police vehicles in Vehicle and Traffic Law § 388(2) of its force and effect. Vehicle and Traffic Law § 388 specifically contemplates that someone, other than the vehicle's owner, is driving the vehicle when an injury occurs. If "police vehicles" are only exempted when an owner or owner equivalent is driving, there would be no need for the exemption in Vehicle and Traffic Law § 388(2). This interpretation is untenable as it would render the police vehicle exemption in Vehicle and Traffic Law § 388(2) meaningless (*Heard v Cuomo*, 80 NY2d 684, 689 [1993] ["Every part of a statute must be given meaning and effect and the various parts of a statute must be construed so as to harmonize with one another" (internal citations omitted)]).

Moreover, recently, in *Matter of State Farm Mut. Auto Ins. Co. v Fitzgerald* (25 NY3d 799 [2015]), the Court of Appeals extensively reviewed the legislative history of Insurance Law §

3420 and Vehicle and Traffic Law § 388 to determine whether police vehicles are "motor vehicles" subject to the requirement of carrying supplementary uninsured/underinsured motorist coverage. In doing so, the Court of Appeals reaffirmed the holding in *Matter of State Farm Mut. Auto Ins. Co. v Amato* (72 NY2d 288, 295 [1988]) that police vehicles are not required to have uninsured motorist coverage. The Court specifically remarked that "New York ha[s] traditionally exempted police vehicles from statutes dealing with civil liability under the Vehicle and Traffic Law" (*Fitzgerald*, 25 NY3d at 818). Thus, under the specific facts of this case, the police vehicle here is exempt from civil liability.

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

ENTERED: FEBRUARY 16, 2016

CLERK

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

144 The People of the State of New York, Ind. 454/10
Respondent,

-against-

Cecilia Casabuena,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Ryan Mansell of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered August 16, 2012, as amended September 6 and September 24, 2012, convicting defendant, upon her plea of guilty, of grand larceny in the third degree (seven counts), grand larceny in the fourth degree (four counts) and petit larceny, and sentencing her to an aggregate term of three to nine years, and ordering her to execute 52 confessions of judgment, unanimously affirmed.

The court properly required defendant to sign confessions of judgment as a component of her plea (*see People v Gress*, 4 AD3d 830 [4th Dept 2004], *lv denied* 2 NY3d 740 [2004]). The People provided the court with information, which defendant did not dispute, as to the specific sum defendant stole from each victim of her fraudulent scheme, and the court had a sufficient factual

predicate under *People v Consalvo* (89 NY2d 140 [1996]) for ordering the defendant to sign the confessions of judgments in those sums (*see* Penal Law § 60.27[2]; *People v Kim*, 91 NY2d 407, 410-411 [1998]). Although neither the Penal Law nor the CPL makes any reference to confessions of judgment, we find that defendant was not prejudiced by the use of this procedure (*see also* CPL 420.10[6]). Further, defendant voluntarily agreed to sign these documents. Although defendant now objects to these confessions of judgment, she explicitly declines to have her plea vacated.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

211 The People of the State of New York, Ind. 5144/11
Respondent,

-against-

Adrian Dumit,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Charles H. Solomon, J. at plea and sentencing), rendered April 9, 2014, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. The suppression issue turns on the legality of the initial police contact with a car in which defendant was riding, after which the police made observations that ultimately led to the recovery of a weapon. The record supports the court's finding that, based on the totality of the factors discussed in *People v Ocasio* (85 NY2d 982 [1995]), the encounter was a nonforcible approach to an already-stopped car, rather than a seizure (*see also People v*

Bora, 83 NY2d 531 [1994]), and thus it required only an objective, credible reason, for which there was ample basis. The police observed two cars, one of which contained defendant. The cars were described in a 911 call, and were clearly traveling together as predicted by the caller. The caller reported that men in the two cars had been "taking out guns." The caller supplied his first name, and the 911 system recorded the caller's phone number, which facilitated a callback. In any event, to the extent the reasonable suspicion standard applies, based on the foregoing facts, the officers had reasonable suspicion as well (*see Navarette v California*, 572 US__, 134 S Ct 1683 [2014]; *People v Argyris*, 24 NY3d 1138 [2014]).

We find no basis for a reduction of the five-year term of postrelease supervision.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

212 Ojinika Okpe, Index 307847/13
Plaintiff-Respondent,

-against-

Augustine Okpe,
Defendant-Appellant.

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'Toks Sofola LLC, Brooklyn (Olatokunbo (Toks) Sofola of counsel), for appellant.

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Order, Supreme Court, New York County (Ellen F. Gesmer, J.), entered April 21, 2014, which, after a hearing, granted plaintiff a three-year order of protection, unanimously affirmed, with costs.

Plaintiff established by a fair preponderance of the evidence that defendant committed acts warranting an order of protection in her favor (*see* Family Ct Act § 832). Plaintiff established that defendant committed the acts alleged in the

petition, and the court's determination is supported by the record (*see Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

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

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

213 In re Melanie C.,

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

Melissa L.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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

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Order of fact-finding, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 27, 2015, which, after a hearing, determined that respondent mother had neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence shows that the child's physical and mental condition has been impaired or is in imminent danger of becoming impaired as a result of the mother's mental condition (*see Matter of Zariyasta S.*, 158 AD2d 45, 48 [1st Dept 1990]; *see also* Family Ct Act § 1012[f][i]). There is evidence that, among other things, the mother, while in the child's

presence, threatened to kill herself and the child, that the mother did not take her medication on a consistent basis, and that the child had two facial injuries that were not adequately explained, as well as diaper rash that became more severe after the mother failed to fill the child's prescription (*see Matter of Madeline R.*, 214 AD2d 445, 446 [1st Dept 1995]). Family Court's credibility determinations are entitled to deference (*see Matter of Matthew O.* [*Kenneth O.*], 103 AD3d 67, 76 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Moskowitz, Gische, Kapnick, JJ.

215 2406-12 Amsterdam Associates LLC, Plaintiff-Respondent, Index 151120/13

-against-

Alianza LLC, et al., Defendants-Appellants.

_____

Weil, Gotshal & Manges LLP, New York (David Yolkut of counsel), for appellants.

Sperber Denenberg & Kahan, P.C., New York (Seth Denenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 21, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the claims for alter ego liability and fraudulent conveyance under the Debtor and Creditor Law §§ 273-276, unanimously affirmed, without costs.

Plaintiff was not required to plead the elements of alter ego liability with the particularity required by CPLR 3016(b), but only to plead in a non-conclusory manner (*see International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]). The complaint, together with plaintiff's affidavits in opposition to defendants' motion, sufficiently alleges that defendant

Alianza Dominicana transferred all of its assets to a newly formed entity, defendant Alianza LLC, which was 90% owned by Alianza Dominicana and had no employees and no function but to hold those assets away from creditors and, in particular, plaintiff. These and other allegations establish the alter ego theory (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]) sufficiently to sustain contract claims against Alianza LLC, although, as the motion court noted, alter ego is a theory of recovery, not an independent cause of action.

Plaintiff pleaded fraudulent conveyance under Debtor and Creditor Law § 276 with the requisite particularity. The allegations that Alianza Dominicana put plaintiff off with promises to pay, while in the process of transferring its assets to Alianza LLC, that Alianza LLC was owned by Alianza Dominicana, and that Alianza LLC had no employees and no business other than as a holding company for Alianza Dominicana's assets establish sufficient "badges of fraud" to sustain the claim (*see Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [2d Dept 1997]). Construed liberally, plaintiff's allegations allege a lack of adequate consideration sufficient to sustain its claims

under Debtor and Creditor Law §§ 273-275. Nor are these claims precluded by the Attorney General's or court approval of the transfer of assets from Alianza Dominicana to Alianza LLC pursuant to N-PCL 510-511.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

218 The People of the State of New York, Ind. 1051/97
Respondent,

-against-

Dorcey Lovejoy,
Defendant-Appellant.

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Wilens & Baker, New York (Daniel S. Kratka of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barbara F. Newman, J.), entered on or about June 11, 2014, which denied defendant's CPL 440.10 motion to vacate a 1999 judgment of conviction, unanimously affirmed.

Defendant's claim that the court failed to advise him of the immigration consequences of his plea (*see People v Peque*, 22 NY3d 168 [2013], *cert denied* 574 US –, 135 S Ct 90 [2014]), is not properly raised in a CPL article 440.10 motion, because that claim would be "clear from the face of the record" (*People v Llibre*, 125 AD3d 422, 423 [1st Dept 2015], *lv denied* 26 NY3d 969 [2015]). While the remedy for a *Peque* error may involve a remand, upon the direct appeal, for fact-finding proceedings (22 NY3d at 200-201), that circumstance does not permit a record-

based *Peque* claim to be raised on a CPL 440.10 motion (*Llibre*, 125 AD3d at 423).

Even if the statute permitted a record-based *Peque* claim to be raised in a CPL 440.10 motion, defendant's claim nonetheless would be unavailing. Although *Peque* is retroactive to cases pending on direct appeal (*People v Brazil*, 123 AD3d 466 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]), there is no basis to extend retroactivity to collateral review of convictions that have become final (*Llibre*, 125 AD3d at 424).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

220 The People of the State of New York, Ind. 7837/95
Respondent,

-against-

Andrew Postelli,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Andrew Postelli, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

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Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about September 17, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supported the court's assessment of 20 points for the relationship (strangers) between defendant and the victim. A finding that the parties were strangers was supported by evidence that their connection was limited to minimal communication on occasions when defendant encountered the homeless victim on the street (*see People v Ramsey*, 124 AD3d 472 [1st Dept 2015], *lv denied* 25 NY3d 903

[2015]; *People v Tejada*, 51 AD3d 472 [1st Dept 2008]). Alternatively, the evidence supported a reasonable inference, constituting clear and convincing evidence on the facts presented, that any relationship was established by defendant for the primary purpose of victimization (*see id.*).

The case summary was sufficient, by itself, to support the court's assessment of points for defendant's conduct while confined, and defendant presents no basis to reject the statements in the case summary (*see People v Irizarry*, 124 AD3d 429 [1st Dept 2015], *lv denied* 25 NY3d 907 [2015]). Defendant's contention that he was deprived of due process by the timing of the People's disclosure of prison records that supported the case summary is unpreserved, and we decline to review it in the interest of justice. As any alternative holding, we find that any error was harmless.

We have considered and rejected defendant's pro se claims.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

221-
221A
222-
222B In re Skylean A.P., and Another,

Children Under the Age of Eighteen Years, etc.,

Jeremiah S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Theresa Q.,
Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

Larry S. Bachner, Jamaica, attorney for the children.

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Order of disposition, Family Court, Bronx County (Linda Tally, J.), entered on or about August 6, 2014, to the extent it brings up for review a fact-finding order, same court (Jane Pearl, J.), entered on or about October 22, 2013, which found that respondent father sexually abused the older child, and order of disposition, same court (Linda Tally, J.), entered on or about August 12, 2014, to the extent it brings up for review an order,

same court and Judge, entered on or about August 6, 2014, which granted petitioner agency's motion for summary judgment against respondent on the issue of derivative neglect of the younger child, unanimously affirmed, without costs. Appeals from the fact-finding order and the order granting summary judgment unanimously dismissed, without costs, as subsumed in the appeals from the orders of disposition.

A preponderance of the evidence in the record supports the finding that respondent abused the older child, for whom he was responsible (Family Court Act § 1046[b]). The child's unsworn out-of-court statements were sufficiently corroborated by the expert testimony of a psychotherapist specializing in child sexual abuse (*see Matter of Nicole V.*, 71 NY2d 112, 120-121 [1987]; *Matter of Dorlis B. [Dorge B.]*, 132 AD3d 578 [1st Dept 2015]; Family Court Act § 1046[a][vi]). Respondent's expert's testimony was insufficient to rebut the psychotherapist's opinion. The inconsistencies among the child's statements were minor and peripheral (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659 [1st Dept 2013]). The absence of physical injury to the child is not fatal to a finding of sexual abuse (*id.*). Family Court was entitled to draw a negative inference against respondent from the fact that he did not testify (*see Dorlis B.*,

132 AD3d at 579; *Matter of Estefania S. [Orlando S.]*, 114 AD3d 453, 453-454 [1st Dept 2014]).

Family Court correctly found that no issue of fact existed as to whether respondent derivatively neglected the younger child, who was born during the abuse and neglect proceedings concerning the older child, since the abuse of the older child was proximate in time to the derivative proceeding, and respondent acknowledged that he had not remedied the condition underlying the abuse finding since he refused to complete a sex offender program, as ordered (*see Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 555-556 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]; *Matter of Kimberly H.*, 242 AD2d 35, 38 [1st Dept 1998]). Respondent's abuse of the older child evinced so fundamental a defect in parenting as to place the younger child at substantial risk of harm (*see Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411 [1st Dept 2012]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

223 Kathleen MacDonald, Index 800048/11
Plaintiff-Respondent,

-against-

Beth Israel Medical Center, et al.,
Defendants-Appellants,

Jason M. Bratcher, M.D.,
Defendant.

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Carroll, McNulty & Kull LLC, New York (Frank J. Wenick of counsel), for appellants.

Law Offices of Jeffrey S. Lisabeth, Mineola (Jeffrey S. Lisabeth of counsel), for respondent.

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Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered on or about September 15, 2014, which, to the extent appealed from, denied the motion of defendants Beth Israel Medical Center and Shamit Patel, M.D. for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Beth Israel and Dr. Patel established their entitlement to judgment as a matter of law by submitting evidence showing that defendant Dr. Jason Bratcher, plaintiff's attending physician, followed plaintiff's care throughout her stay at Beth Israel.

This included the period prior to plaintiff's discharge when she allegedly showed symptoms of infection, and the hospital's staff, including Dr. Patel, followed Dr. Bratcher's orders (*see Udoye v Westchester-Bronx OB/GYN, P.C.*, 126 AD3d 653, 654 [1st Dept 2015]).

In opposition, plaintiff failed to raise an issue of fact. Although plaintiff's expert asserted that Beth Israel was liable because its records indicated that its employee, Dr. Patel, was the "attending of record," Dr. Patel's actual function was to serve as an in-hospital attending physician to those patients, unlike plaintiff herein, admitted without private attending physicians of their own. Furthermore, the record shows that the functions that Dr. Patel performed were routine tasks, such as entering orders for blood work, pain control, hydration, and antibiotic administration for plaintiff's post-surgical complications (*see Filippone v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 253 AD2d 616, 618 [1st Dept 1998]). Dr. Patel deferred decisions as to plaintiff's surgical and gastrointestinal care to

her private attending, Dr. Bratcher, and exercised no "independent medical judgment" in plaintiff's medical treatment (*Walter v Betancourt*, 283 AD2d 223, 224 [1st Dept 2001]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

224 Edwin Ramos, Index 310505/10
Plaintiff-Appellant, 84056/11

-against-

Washington 2302 Plaza Associates, L.P., et al.,
Defendants-Respondents,

FA Alpine Window Manufacturing Corporation,
Defendant.

- - - - -

Washington 2302 Plaza Associates, L.P., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Carnegie Construction Corp.,
Third-Party Defendant-Respondent,

FA Alpine Window Manufacturing Corporation,
Third-Party Defendant.

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Law Offices of Michael A. Cervini P.C., Elmhurst (Michael A. Cervini of counsel), for appellant.

Eustace, Cotter & Bender, White Plains (Christopher M. Yapchanyk of counsel), for Washington 2302 Plaza Associates, L.P., Washington Plaza Associates and J.M.I. Management Company, Inc., respondents.

Galvao & Xanthakis, PC, New York (Matthew D. Kelly of counsel), for Carnegie Construction Corp., respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.),

entered September 5, 2014, which, insofar as appealed from as

limited by the briefs, granted defendants Washington 2302 Plaza Associates, L.P., Washington Plaza Associates, and J.M.I. Management Company, Inc.'s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to summary judgment by tendering evidence that there was no prior criminal activity at their premises likely to endanger the safety of plaintiff, and that plaintiff's alleged attacker's conduct was not foreseeable (*see Jacqueline S. v City of New York*, 81 NY2d 288, 294-295 [1993]; *Jean v Wright*, 82 AD3d 1163, 1164 [2d Dept 2011], *lv denied* 17 NY3d 704 [2011]).

In opposition, plaintiff failed to provide any evidence indicating that the persons who attacked him were intruders or gained access to the building because of any lapse in security. Under these circumstances, there is no triable issue of fact as to whether any alleged negligence on defendants' part was the

proximate cause of plaintiff's injuries (*see Rodriguez v Camaway Realty, Inc.*, 96 AD3d 479, 479 [1st Dept 2012]; *Schwartz v Niki Trading Corp.*, 222 AD2d 214, 214 [1st Dept 1995], *lv denied* 87 NY2d 810 [1996]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

225 Derek V. Simmons, Index 105356/11
Plaintiff-Appellant,

-against-

MDA Contracting Inc., et al.,
Defendants-Respondents.

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Borrell & Riso, L.L.P., Staten Island (John Riso of counsel), for appellant.

Nicoletti Hornig & Sweeney, New York (Barbara A. Sheehan of counsel), for MDA Contracting Inc., respondent.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for Kaufman Management Company, L.L.C., and Kaufman 8th Avenue Associates of New York, respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 29, 2014, which, to the extent appealed from as limited by the briefs, granted the Kaufman defendants' (Kaufman) motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

Kaufman established prima facie, through sworn statements by their elevator consultant/expert and employees with personal knowledge, that the elevator was functioning properly, that there had been no previous complaints about its operation, and that it had not been "hot-wired," as plaintiff claimed, to override the

interlocking safety devices that preclude its gates and doors from opening while it is in motion (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712 [1st Dept 2005]). However, in opposition, plaintiff raised issues of fact, including credibility issues, as to the overriding of the safety devices through his eyewitness testimony that the freight elevator had mis-leveled and that the freight car operator had told him to wait while he moved the elevator car – although its gates and doors remained open – and Kaufman's elevator expert's testimony, on cross-examination, acknowledging that an elevator could easily be "hot-wired" by the use of a toothpick or small wire (*see Villalba v New York El. & Elec. Corp., Inc.*, 127 AD3d 650 [1st Dept 2015]). While testimony that is unbelievable because it is "physically impossible [or] contrary to experience" should be disregarded as lacking evidentiary value (*Loughlin v City of New York*, 186 AD2d 176, 177 [2d Dept 1992], *lv denied* 81 NY2d 704 [1993]), plaintiff's testimony, indirectly buttressed by Kaufman's expert's testimony, raises genuine triable issues whether Kaufman, through its employees, either knew of or created the alleged hazardous mis-leveled condition of the elevator (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). The alleged improper functioning of the elevator would not have

been impossible if the elevator had been hot-wired, and the inference that the elevator was hot-wired is reasonable in the circumstances of this case.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

226-
227 Ind. 1059/12

The People of the State of New York,
Respondent,

-against-

David Bullock,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at speedy trial motions; Renee A. White, J. at jury trial and sentencing), rendered April 30, 2013, convicting defendant of burglary in the third degree, grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree, and tampering with a witness in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. The period from July 11 to August 1, 2012 was excludable as an exceptional circumstance under CPL 30.30(4)(g). The People sufficiently established that the testimony of an Assistant

District Attorney was material to address the circumstances relating to a missing surveillance videotape, and that she was medically unavailable during the period at issue (*see People v Womack*, 229 AD2d 304 [1st Dept 1996], *affd* 90 NY2d 974 [1997]). Despite extensive motion practice, defendant failed to preserve the specific arguments he raises on appeal concerning two other time periods, and we decline to review them in the interest of justice. As an alternative holding, we find that each of the two periods at issue was excludable as a delay resulting from pretrial motions under CPL 30.30(4)(a).

The court properly exercised its discretion in permitting testimony concerning the circumstances underlying the missing video, given by a store manager, who had watched the video and turned it over to police, and the Assistant District Attorney previously assigned to the case, who lost the video. This testimony was relevant to explain the absence of a videotape in a situation where one might be expected, especially since defendant had requested an adverse inference instruction related to the video (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]). To the extent that defendant claims that the trial prosecutor attempted to elicit evidence from the testifying Assistant District Attorney that implicitly revealed the contents of the

video, the court sustained defendant's objections before they were answered, and instructed the jury that the witness did not testify as to what she observed on the video. In any event, any prejudice was minimal because although the court had precluded testimony about the contents of the video, defense counsel elicited that information during cross-examination of the manager. Accordingly, a mistrial was not warranted. We need not decide any issues relating to the admissibility of testimony about the contents of an unavailable videotape (*see e.g. Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570 [1st Dept 2013]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

228 In re Regina Harper, Index 101332/13
Petitioner,

-against-

New York State Central Register
of Child Abuse and Maltreatment,
et al.,
Respondents.

_____

Law Office of Kevin P. Sheerin, Mineola (Kevin P. Sheerin of counsel), for petitioner.

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

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Determination of respondent New York State Office of Children and Family Services (OCFS), sued herein as the New York State Central Register of Child Abuse and Maltreatment (Central Register), dated May 21, 2013, which denied petitioner's request to have an "indicated report" of maltreatment (Social Services Law § 412[7]) sealed or expunged, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Peter H. Moulton, J.], entered on or about May 28, 2014), dismissed, without costs.

Substantial evidence supports OCFS's determination that, as alleged in the maltreatment report, petitioner rendered

inadequate guardianship or lack of medical care by waiting approximately three days to seek medical care for her 13-month-old foster child after he fell from his crib and hit his head (18 NYCRR 432.1[b][1]; *Matter of Bookhard v Carrion*, 98 AD3d 914 [1st Dept 2012]). Petitioner does not appear to dispute that the fall occurred several days before she took the child to a doctor. While, as petitioner notes, the child initially appeared to have a minor injury to his head, and might have fallen first onto his brother and more softly to the floor, he nevertheless could have incurred an internal injury not apparent to petitioner. In addition, the 13-month-old child was too young to describe any resulting pain or injury. Petitioner also acknowledged that she received foster parent training requiring her to seek immediate medical attention in such cases.

Petitioner argues that she faces obstacles to serving as a foster parent as a result of the indicated maltreatment report. However, maintaining the indicated report in the Central Register

is not a penalty that shocks the conscience (*see Matter of Waldren v Town of Islip*, 6 NY3d 735 [2005]; Social Services Law §§ 413; 414; 415; 422; 424-a).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

229 The People of the State of New York, Respondent,

-against-

David Graves,
Defendant-Appellant.

SCI 1987N/13

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard M. Weinberg, J.), rendered October 31, 2013, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of one year, unanimously affirmed.

Defendant's waiver of indictment and prosecution by superior court information was valid under CPL 195.10(2)(b) because the proceedings at issue took place in Supreme Court, not Criminal Court. Defendant waived indictment in Part N, a hybrid court. The record, including all relevant court documents as well as the

statements of the court and defense counsel, unequivocally establish that at the time of the waiver of indictment, Part N was operating in its capacity as a Supreme Court part.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

230 Harbins Singh, Index 106057/09
Plaintiff-Respondent, 590033/12
590625/12
-against- 590288/14

Citibank, N.A., et al.,
Defendants-Appellants.
- - - - -
[And Third Party Actions]

_____

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for appellants.

Pardalis & Nohavicka, LLP, Astoria (Ashley Serrano of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 17, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to establish their entitlement to judgment as a matter of law in this action where plaintiff alleges that he slipped and fell on a patch of black ice on a driveway located on defendants' premises. Defendants did not demonstrate that they lacked constructive notice of the icy condition since they did not proffer an affidavit or testimony based on personal knowledge as to when its employees last inspected the driveway or as to the driveway's condition prior to the accident (*see Simpson v*

City of New York, 126 AD3d 640 [1st Dept 2015]). The testimony of defendants' branch manager as to his usual and customary practice of inspecting the premises each morning does not satisfy defendants' burden of showing that they lacked notice of the alleged condition of the driveway prior to the accident, as there was no evidence to show that the manager's customary practice was followed on the day of the accident (*see e.g. Bonilla v 191 Realty Assoc., L.P.*, 125 AD3d 470 [1st Dept 2015]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

231-
231A-
231B-
231C The People of the State of New York,
Respondent,

-against-

Kiron Ritchens,
Defendant-Appellant.

Ind. 4821/09
5673/09
749/10
4649/12

_____

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

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

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Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Laura A. Ward, J. at plea; Edward McLaughlin, J. at sentencing), rendered February 4, 2013,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: FEBRUARY 16, 2016

CLERK

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

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

232- Index 651688/12
233- 590475/12
234N 590603/12

WA Route 9, LLC,
Plaintiff,

-against-

PAF Capital LLC,
Defendant.

- - - - -

PAF Capital LLC,
Third-Party Plaintiff,

-against-

Jacob Frydman, et al.,
Third-Party Defendants.

- - - - -

Jacob Frydman,
Fourth-Party Plaintiff-Appellant,

-against-

David Lichtenstein, et al.,
Fourth-Party Defendants-Respondents,

Lightstone Value Plus Real Estate
Investment Trust Inc. I, et al.,
Fourth-Party Defendants.

- - - - -

WA Route 9, LLC,
Plaintiff,

-against-

PAF Capital LLC,
Defendant.

- - - - -

PAF Capital LLC,
Third-Party Plaintiff,

-against-

Jacob Frydman, et al.,
Third-Party Defendants.

- - - - -

Jacob Frydman,
Fourth-Party Plaintiff-Respondent,

-against-

David Lichtenstein, et al.,
Fourth-Party Defendants-Appellants.

_____

Morrison Cohen LLP, New York (Gayle Pollack of counsel), for appellant.

Reiss Sheppe LLP, New York (Robert J. Grand of counsel), for David Lichtenstein, PAF Capital, LLC, the Lightstone Group, appellants/respondents.

Lewis S. Fischbein, P.C., New York (Lewis S. Fischbein of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 10, 2013, which, insofar as appealed from as limited by the briefs, granted fourth-party defendants David Lichtenstein, PAF Capital, LLC, and the Lightstone Group's motion to dismiss the fourth-party claims for defamation and injunctive relief as against the Lightstone Group (TLG), unanimously affirmed, with costs. Order, same court and Justice, entered September 2, 2014, which denied fourth-party plaintiff's (Frydman) motion pursuant to CPLR 5015(a)(2) and (3) to vacate

the June 10, 2013 order to the extent it dismissed the fourth-party complaint as against TLG, unanimously affirmed, with costs. Order, same court and Justice, entered on or about February 5, 2015, which denied Lichtenstein and PAF's motion for a protective order to preclude from disclosure two email communications on ground of attorney-client privilege, unanimously affirmed, with costs.

Frydman failed to allege facts sufficient to establish that TLG conspired with PAF and Lichtenstein to carry out the alleged common scheme of initiating a sham complaint asserting fraud against him for the sole purpose of later disseminating the false allegations to defame him. The complaint does not show that TLG participated in the drafting of the sham complaint (*see Conte v Newsday, Inc.*, 703 F Supp 2d 126, 147 [ED NY 2010]).

Although the newly discovered evidence submitted by Frydman on his motion to vacate demonstrates TLG's involvement in disseminating the press releases and other Internet posts reporting on the fraud allegations, it does not show that TLG participated in drafting the sham complaint. To the extent TLG was involved in disseminating reports of the judicial proceeding, its conduct falls under the fair reporting privilege of Civil Rights Law § 74.

The email communications, dated June 25, 2012 and July 2, 2012, between Lichtenstein and his general counsel do not reflect a discussion of legal strategy relevant to the pending litigation but, rather, a discussion of a public relations strategy (*see Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2005]).

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

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

235 The People of the State of New York, Ind. 1798/13
Respondent,

-against-

James Keys,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 22, 2014, convicting defendant, upon his guilty plea, of attempted assault in the second degree, and sentencing him to a term of one year, unanimously affirmed.

The court properly denied defendant's constitutional speedy trial motion. Even considering the period following the court's decision on the motion, about which defendant has not preserved any claim, we find, upon consideration of the factors set forth in *People v Taranovich* (37 NY2d 442 [1975]), that there was no

violation of defendant's constitutional right to a speedy trial. In particular, most of the delay is attributable to defendant and his counsel.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

236 The City of New York, Index 451366/12
Plaintiff-Appellant,

-against-

Granite State Insurance Company,
Defendant-Respondent.

_____

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for appellant.

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Kathryn E. Freed, J.), entered March 4, 2014, which denied plaintiff's motion for summary judgment seeking a declaration that defendant insurer is required to defend and indemnify it in an underlying action, granted defendant insurer's cross motion seeking a declaration that it is not required to defend and indemnify plaintiff City in the underlying action, so declared, and awarded defendant $245 in costs and disbursements, unanimously reversed, on the law, without costs, plaintiff's motion granted, defendant's cross motion denied, and it is declared that defendant is obligated to defend plaintiff in the underlying action. The Clerk is directed to enter judgment accordingly.

Plaintiff City of New York, its Administration for Children's Services, and a foster care agency with which it contracted were named as defendants in a lawsuit alleging that the decedent suffered abuse, and ultimately death, as a result of their negligence. The City seeks insurance coverage as an additional insured under a commercial general liability (CGL) policy issued by defendant. The CGL part of the policy was occurrence-based but contained an exclusion for liability arising from occurrences of abuse or molestation. However, it also contained an abuse or molestation endorsement that added such coverage back in but only if reported during the policy period or 60 days after its expiration.

Although the incidents alleged in the underlying action occurred during the policy period, the City did not receive notice of the claim against it until June 2011, more than 60 days after expiration of the policy. The City promptly notified defendant of the claim but defendant did not disclaim coverage as to the City for more than six months.

When a claim falls outside the scope of an insurance policy's coverage portion, a disclaimer of coverage is unnecessary because the policy did not contemplate coverage in the first instance and requiring coverage for a failure to

disclaim in such instances "would create coverage where it never existed" (*Matter of Worchester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]). By contrast, when a refusal to provide coverage is based on a policy exclusion, a timely disclaimer of coverage is necessary to invoke the policy exclusion (*id.* at 188-189). Here, abuse and molestation claims occurring during the policy period but not reported until afterwards were eliminated from coverage by the exclusion but not added back in by the endorsement, and thus required a disclaimer (*id.*), which defendant failed to timely provide.

Moreover, the Limitation of Coverage to Designated Premises or Project endorsement (Premises Limitation endorsement) does not provide a basis for defendant to decline coverage here. The Premises Limitation endorsement restricts coverage only to injuries or damages arising from the "ownership, maintenance or use of the [designated] premises . . . and operations necessary or incidental to those premises." The acts of negligence alleged in the underlying complaint here are "incidental to" the "use" of

the premises designated in the Premises Limitation (*Matter of Vissa v Williamson*, 276 AD 662 [3d Dept 1950], *affd* 302 NY 750 [1951]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

237-
238 In re Jewel M., and Others,

Children Under Eighteen Years of Age, etc.,

Crystal V.,
Respondent-Appellant,

Administration for Children's Services
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the children.

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about July 15, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about January 30, 2014, which found that respondent mother neglected her five children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

According the greatest respect to the court's credibility findings, we find that a preponderance of the evidence

establishes that the children were neglected since respondent's mental condition placed them at imminent risk of harm (Family Court Act § 1012; *Matter of Irene O.*, 38 NY2d 776 [1975]; *Matter of Devin M. [Margaret W.]*, 119 AD3d 435, 436 [1st Dept 2014]). Respondent's failure to provide adequate education for her school-aged children is another basis for a finding of neglect (*Matter of William AA.*, 24 AD3d 1125 [3d Dept 2005], *lv denied* 6 NY3d 711 [2006]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

239 In re Patricia Gill, Index 400855/14
Petitioner-Appellant,

-against-

Nyack College, et al.,
Respondents-Respondents.

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Patricia Gill, appellant pro se.

Kaufman Dolowich Voluck, Woodbury (Aaron N. Solomon of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered October 22, 2014, denying the petition seeking, inter alia, to reverse the determination of respondent New York State Division of Human Rights, dated April 11, 2014, which dismissed petitioner's Human Rights complaint, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner's administrative complaint alleging disability discrimination was properly dismissed as untimely. It is undisputed that the complaint was filed more than one year after

the last alleged act of discrimination (*see Matter of Baird v New York State Div. of Human Rights*, 100 AD3d 880, 881 [2d Dept 2012], *lv denied* 22 NY3d 851 [2013]; *Matter of Morehead v Lind*, 112 AD2d 996 [2d Dept 1985]; Executive Law § 297[5]).

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

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

240 Michael Ring, et al., Index 113849/11
Plaintiffs-Appellants-Respondents,

-against-

The Elizabeth Foundation for the Arts,
Defendant-Respondent-Appellant,

The Robert Blackburn Printmaking Workshop,
Defendant.

_____

Morrison Cohen LLP, New York (Joaquin Eczurra of counsel), for appellants-respondents.

Epstein Becker & Green, P.C., New York (Kenneth J. Kelly of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 11, 2014, which granted defendant Elizabeth Foundation for the Arts's (EFA) motion for summary judgment to the extent it sought to dismiss the mere continuation cause of action and denied the motion to the extent it sought to dismiss the de facto merger cause of action, and denied plaintiffs' motion for summary judgment on both causes of action, unanimously affirmed, with costs.

In July 2002, EFA – a not-for-profit corporation – purchased the assets of Printmaking Workshop, Inc. (PMW), another not-for-profit corporation (not a party to this action). The

asset purchase agreement said, inter alia, "EFA has no legal obligation to pay past debts of PMW, but may elect to pay any vendors whose non-payment would provide obstacles to the operations of" defendant Robert Blackburn Printmaking Workshop (RBPW), a program of EFA (as opposed to a distinct legal entity).

It is undisputed that, as of April 2, 2014, PMW was still registered as an active corporation with the New York State Department of State. Since PMW was not "extinguished" by the asset-purchase transaction, the mere continuation cause of action was correctly dismissed (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]).

In de facto merger, unlike mere continuation, "the dissolution criterion . . . may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity is shorn of its assets and has become, in essence, a shell" (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 257 [1st Dept 2005] [internal quotation marks omitted]). The court correctly found that issues of fact exist whether a de facto merger occurred here.

Of the four factors to be considered in determining whether a purchase-of-assets transaction can be deemed a de facto merger, the first is "continuity of ownership" (*New York City Asbestos*,

15 AD3d at 256). *New York City Asbestos*, which involved for-profit corporations, defined continuity of ownership as existing "where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation," and said that it was "a necessary element of any de facto merger finding" (*id.*). Not-for-profits such as EFA and PMW do not have owners (*see 64th Assoc., L.L.C. v Manhattan Eye, Ear & Throat Hosp.*, 2 NY3d 585, 590 [2004]). However, de facto merger is "based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). Since otherwise a not-for-profit could never be held liable under the theory of de facto merger, we decline to apply the *New York City Asbestos* definition of continuity of ownership to not-for-profits. However, given our emphasis on the element of continuity of ownership in *New York City Asbestos*, we decline to find that this factor "is not applicable to nonprofit corporations" (*see Feld Entertainment, Inc. v American Socy. for the Prevention of Cruelty to Animals*, 873 F Supp 2d 288, 324 [D DC 2012]). One approach to determining continuity of ownership in the nonprofit situation is to look at

the boards of the nonprofits (*see Rogers-Duell v Ying-Jen Chen*, 42 Misc 2d 1226[A], 2014 NY Slip Op 50203[U], *4 [Sup Ct, Albany County 2014]). When EFA bought PMW's assets, its board consisted of five members, and PMW's consisted of three. Only one of EFA's directors was also a director of PMW, and he was inactive due to his advanced age. Under the circumstances, plaintiffs failed to establish continuity of "ownership."

Since, unlike for-profit corporations, nonprofits do not have owners, we hold that continuity of ownership is not a sine qua non of de facto merger of nonprofits, as it is for a finding of a de facto merger of for-profits (*see New York City Asbestos*, 15 AD3D at 256, 258, *citing Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41, 46-47 [2d Cir 2003]). Thus, it is necessary to examine the other elements of de facto merger.

Plaintiffs satisfied the second and third elements, "cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction," and "the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business" (*see Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]). EFA's contention that plaintiffs failed to satisfy the third element due to the

provision of the asset purchase agreement that said, "EFA has no legal obligation to pay past debts of PMW," is unavailing (*see Burgos v Pulse Combustion*, 227 AD2d 295, 296 [1st Dept 1996]).

Triable issues of fact exist as to the fourth element of de facto merger, "continuity of management, personnel, physical location, assets and general business operation" (*see New York City Asbestos*, 15 AD3d at 256). Continuity of management was contemplated but did not occur due to the death of PMW's principal before RBPW opened; none of RBPW's employees previously worked for PMW; and there was no continuity of physical location between PMW and RBPW. On the other hand, there was continuity of general business operations; the relevant comparison here is between PMW and RBPW, not between PMW and EFA (*see Grant-Howard Assoc. v General Housewares Corp.*, 115 Misc 2d 704, 709 [Sup Ct, NY County 1982], *affd* 97 AD2d 390 [1st Dept 1983], *revd on other*

grounds 63 NY2d 291 [1984]), and the differences identified by EFA were relatively minor. There is a triable issue of fact as to continuity of assets.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

241-
241A The People of the State of New York, Respondent,

-against-

Donte Brown,
Defendant-Appellant.

Ind. 3562/12
627/13

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

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered January 7, 2014,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: FEBRUARY 16, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

242 Seamus Lannon, et al., Index 302050/12
Plaintiffs-Appellants,

-against-

356 West 44th Street Restaurant, Inc., et al.,
Defendants-Respondents.

_____

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

Lewis, Brisbois, Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered December 8, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Dismissal of the Labor Law § 240(1) claim was proper in this action where plaintiff Seamus Lannon was injured when he fell from a two-story building while installing flag holders on the exterior of defendants' building facade. The record establishes that plaintiff was not engaged in a protected activity under Labor Law § 240(1) at the time of his accident. Plaintiff testified that the installation of the three flag holder brackets

entailed marking the location of the screws, drilling three holes for each bracket, placing plastic fasteners in the holes, and attaching each flag holder with three screws to hold it in place. Such work did not constitute "altering" since it did not result in a "*significant* physical change" to the building's structure (*Joblon v Solow*, 91 NY2d 457, 465 [1998]; *see Amendola v Rheedlen 125th St., LLC,* 105 AD3d 426 [1st Dept 2013]; *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434 [1st Dept 2013]). The cosmetic and nonstructural nature of the work is reflected by the temporary placement of the flags to enhance the exterior appearance of the building during the St. Patrick's Day celebration, after which they were removed (*see Anderson v Schwartz,* 24 AD3d 234 [1st Dept 2005], *lv denied* 7 NY3d 707 [2006]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

243 Pursuit Capital Management, LLC, Index 654301/12
Petitioner,

-against-

Claridge Associates, LLC, et al.,
Respondents-Appellants.

Northeast Capital Management, LLC,
Nonparty Respondent.

_____

Harris, O'Brien, St. Laurent & Chaudhry LLP, New York (Andrew St. Laurent of counsel), for appellants.

Cane & Associates LLP, New York (Peter S. Cane of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about November 19, 2014, which, to the extent appealed from as limited by the briefs, denied respondents-appellants' (respondents') motion to hold nonparty respondent Northeast Capital Management, LLC and related nonparties in contempt, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying respondents' motion to hold Northeast in contempt of an order entered September 13, 2013, which the motion court had already determined did not apply to Northeast (*see e.g. El-Dehdan v El-Dehdan*, 26 NY3d 19, 28-29 [2015]; *Miller v Icon Group LLC*,

107 AD3d 585, 585 [1st Dept 2013]). The motion court, in denying the motion for contempt, did not effectively vacate the September 13, 2013 order.

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

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

246 The People of the State of New York, Ind. 5530/10
Respondent,

-against-

Ekeythia Dunston,
Defendant-Appellant.

_____

Myers, Singer & Galiardo LLP, New York (Matthew D. Myers of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered July 11, 2012, convicting defendant, after a jury trial, of assault in the first degree, and sentencing her to a term of 7 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence disproved defendant's justification defense beyond a reasonable doubt. By the time defendant shot the victim, any threat that the victim

might use deadly force had clearly abated (*see e.g. People v Boyd*, 222 AD2d 314 [1st Dept 1995], *lv denied* 87 NY2d 970 [1996]). Notwithstanding the testimony of defendant's expert psychiatrist to the effect that defendant's history as a victim of domestic abuse caused her to believe she faced such a threat, any such belief "was not objectively reasonable" (*People v Bonilla*, 57 AD3d 400, 400 [1st Dept 2008], *lv denied* 12 NY3d 814 [2009]).

The court properly exercised its discretion in allowing the prosecutor to address leading questions to the victim for permissible purposes such as to direct her attention to specific topics (*see Heines v Minkowitz*, 100 AD3d 597, 598 [2d Dept 2012]; *see also People v Arhin*, 203 AD2d 62, 62 [1st Dept 1994], *lv denied* 83 NY2d 908 [1994]). By failing to object, or by expressly agreeing to particular rulings by the court, defendant failed to preserve his claims regarding the People's questioning of their other eyewitness, the admission of photographic evidence, and the *Sandoval* ruling and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. In any event, we find that any error regarding any of the evidentiary rulings was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36

NY2d 230 [1975]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Alternatively, insofar as the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see Strickland v Washington*, 466 US 668 [1984]). We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

247-
248 In re Margaret R.-K.,
Petitioner-Appellant,

-against-

Kenneth K.,
Respondent-Respondent.

_____

Law Offices Of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellant.

Cheryl S. Solomon, Brooklyn, for respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

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Order, Family Court, New York County (Marva Burnett, Ref.), entered on or about October 15, 2014, which, after a hearing, awarded sole custody and decision-making authority of the subject child to respondent father, with limited visitation to the mother and no provision for vacations and school breaks, unanimously modified, on the law, to vacate the parental access schedule and remand the matter to the Family Court for reassignment to a different referee, or to a judge, to conduct further proceedings consistent herewith, and otherwise affirmed, without costs. Appeal from order, same court and Referee, entered on or about August 19, 2011, which temporarily placed the child in the

father's care with limited visitation, unanimously dismissed, without costs, as moot.

The Referee's finding that it was in the child's best interests to award full custody and decision-making to the father is supported by a sound and substantial basis in the record, including the parties' testimony (*see Matter of Xiomara M. v Robert M.*, 102 AD3d 581, 582 [1st Dept 2013]).

A new hearing concerning parental access and visitation is required to determine, based on up-to-date information, including an interview of the child, the child's best interests with respect to parental access, and to craft a more detailed and comprehensive schedule in an attempt to avoid further conflict. On remand, the proceedings are to be presided over by a different referee, or a judge, on an expedited basis.

We have considered the mother's remaining contentions, and find them unavailing.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

250 2015 Freeman LLC also known as 2015 Freeman Avenue LLC, et al., Plaintiffs-Respondents,

-against-

Seneca Specialty Insurance Company, Defendant-Appellant.

Index 653519/14

Ken Maguire & Associates, PLLC, Garden City (Kenneth R. Maguire of counsel), for appellant.

Marc Scollar Law Office, Staten Island (Marc Scollar of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 16, 2015, which denied defendant's motion to dismiss, or for summary judgment dismissing, plaintiffs' claim of bad faith denial of insurance coverage, and granted plaintiffs' cross motion for a declaration that Ohio law applies to this action, unanimously affirmed, with costs.

The motion court correctly resolved the conflict of laws by applying Ohio, not New York, law. Where, as here, each commercial property insurance policy at issue insured a building located solely in Ohio, the governing law is Ohio (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 318 [1994]). The location of the insured risk will be given greater weight than

other factors where, as here, the insured risks are located in one state (*see Appalachian Ins. Co. v General Elec. Co.*, 20 Misc 3d 1122[A], 2008 NY Slip Op 51585[U], *3-4 [Sup Ct, NY County 2008], *affd sub nom. Appalachian Ins. Co. v Di Sicurata*, 60 AD3d 495 [1st Dept 2009]).

In order to prevail on its pre-answer motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence submitted by defendant must conclusively establish as a matter of law that its denial of insurance coverage was reasonably justified (*see McCurdy v Hanover Fire & Cas. Ins. Co.*, 964 F Supp 2d 863, 874 [ND Ohio 2013] [applying Ohio law]; *see generally Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). The documentary evidence submitted by defendant failed to establish its defense as a matter of law, and plaintiffs are entitled to proceed with discovery. Further discovery is also warranted with respect to plaintiffs' request for punitive damages and attorneys' fees. Plaintiffs may recover such damages and fees, even though their claim of bad faith denial of insurance coverage arises from their breach of contract claims (*see Zoppo v Homestead Ins. Co.*, 71 Ohio St 3d 552, 558, 644 NE2d 397, 402 [1994] [applying Ohio law]).

We have considered defendant's remaining contentions, including its request for partial summary judgment, and find them unavailing.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

251 The People of the State of New York, Ind. 4685/07
Respondent,

-against-

Darryl Smith,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ruth E. Smith, J.), rendered December 13, 2010, convicting defendant, after a jury trial, of rape in the first degree, and sentencing him to a prison term of 15 years, unanimously affirmed.

The verdict 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. Defendant's acquittal of other charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

Defendant's argument regarding the sufficiency of his written consent to replacement of a juror with an alternate during deliberations is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we

conclude that since defense counsel noted that he conferred with defendant, since the court confirmed that defendant consented to the replacement and had an opportunity to discuss the issue with counsel, and since he court obtained defendant's written signature on the consent form in open court, the inadvertent failure to circle "consent," or cross out "do not consent" on a line reading "consent/do not consent" does not amount to a mode of proceedings error (CPL 270.35[1]; *compare People v Page*, 88 NY2d 1 [1996][lack of any writing]). This trivial oversight did not violate the requirement of written consent to replacement of a deliberating juror (*see* NY Const, art I, §2; CPL 270.35[1]; *People v Ryan*, 19 NY2d 100, 104-105 [1966]). The form plainly constituted written consent; the surplus "do not consent" language was meaningless, given that the form would serve no purpose where a defendant did *not* consent.

Defendant's challenge to the court's instruction to the jury following the substitution is likewise unpreserved. As an alternative holding, we find no basis for reversal (*see People v Copeland*, 10 AD3d 588 [1st Dept 2004], *lv denied* 4 NY3d 743 [2004]).

The court properly granted two challenges for cause by the People. Both panelists' answers revealed "opinions reflecting a

state of mind likely to preclude impartial service" (*People v Johnson*, 94 NY2d 600, 614 [2000]), and their statements as a whole never established unequivocal assurances of impartiality (*see e.g. People v Acosta*, 88 AD3d 483 [1st Dept 2011], *lv denied* 19 NY3d 861 [2012]). "It is almost always wise. . .to err on the side of disqualification because "the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror" (*People v Culhane*, 33 NY2d 90, 108 n 3 [1973]).

Based on our review of the victim's psychiatric records, we find that the trial court properly inspected them in camera and correctly concluded that they were irrelevant. There was no reasonable possibility the withheld materials could have led to an acquittal (*see People v McCray*, 23 NY3d 193, 198 [2014]; *People v Gissendanner*, 48 NY2d 543, 550 [1979]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

252 Awilda Acosta, Index 303080/11
Plaintiff-Appellant,

-against-

Moussa Traore, et al.,
Defendants-Respondents.

_____

Bailly and McMillan, LLP, White Plains (Keith J. McMillan of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 25, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint due to plaintiff's inability to demonstrate that she suffered a serious injury to her left knee within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by submitting the affirmed report of an orthopedic surgeon who opined that the condition of plaintiff's left knee was degenerative in nature, and by relying on plaintiff's medical records, which contained similar findings of arthritis and degeneration (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st

Dept 2014], *affd* 24 NY3d 1191 [2015]; *Galarza v J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488 [1st Dept 2014]).

In opposition, plaintiff failed to raise a triable issue of fact as to causation. Her treating orthopedic surgeon did not adequately refute or address the findings of preexisting degeneration found in plaintiff's own medical records, or explain how the accident, rather than her preexisting arthritis or obesity, was the cause of the alleged injury to plaintiff's left knee (*see Alvarez*, 120 AD3d at 1044; *Nicholas v Cablevision Sys. Corp.*, 116 AD3d 567 [1st Dept 2014]; *Batista v Porro*, 110 AD3d 609 [1st Dept 2013]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

253- Index 101302/07
253A Augusto Figueroa,
Plaintiff-Appellant,

-against-

Andrew Mandel,
Defendant-Respondent.

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

Morris Duffy Alonso & Faley, New York (Arjay G. Yao, Kevin G. Faley and Jeoungson Kim, of counsel), for respondent.

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Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered April 1, 2014, upon a jury verdict finding in favor of defendant, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 5, 2014, which denied plaintiff's posttrial motion to, inter alia, set aside the jury's verdict as against the weight of the evidence, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

On September 29, 2006, plaintiff, Augusto Figueroa, was allegedly injured when he and defendant Andrew Mandel were involved in an accident at the intersection of Weeks Avenue and the Cross Bronx Expressway.

Defendant's approach on the Cross Bronx Expressway was controlled by a stop sign, while plaintiff's was not. At trial, defendant testified that he stopped his vehicle for 5 or 10 seconds, looked both ways with his view unobstructed, saw no approaching vehicles, entered the intersection, but struck plaintiff's vehicle, which he did not see until the "very last second." The jury found that the defendant was not negligent in entering the intersection and striking plaintiff's vehicle.

Under the circumstances of this case, it cannot be said that the jury could not have reached the verdict by any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). The jury, which had the opportunity to see and hear the witnesses and assess their credibility (*see Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 [2006]), was entitled to evaluate plaintiff's testimony, reject it, and credit defendant's testimony in full, in reaching its verdict in favor

of defendant (*see Scalogna v Osipov*, 117 AD3d 934 [2nd Dept 2014]; *Rose v Conte*, 107 AD3d 481, 482 [1st Dept 2013]).

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

254 The People of the State of New York, Ind. 2629/13
Respondent,

-against-

Raul Perez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot 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 (Jill Konviser, J.), rendered September 17, 2013,

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: FEBRUARY 16, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

255 The People of the State of New York, SCID 99032/14
Respondent,

-against-

Liem Ha,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ryan Mansell of counsel), for respondent.

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Order, Supreme Court, Bronx County (Seth L. Martin, J.), entered on or about June 18, 2014, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Since it is undisputed that defendant was convicted of an offense under the Uniform Code of Military Justice that is the equivalent of an enumerated sexually violent offense, the court

was required to designate him a sexually violent offender (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We decline to revisit our holding in *Bullock*.

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

ENTERED: FEBRUARY 16, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

259N Elizabeth Elting, etc., Index 651423/14
Plaintiff-Respondent,

-against-

Philip Shawe,
Defendant-Appellant,

Transperfect Global, Inc., et al.,
Nominal Defendants.
- - - - -
[And a Petition for Dissolution
of a Corporation]

_____

Kaplan Rice LLP, New York (Howard J. Kaplan of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Philip S. Kaufman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about February 10, 2015, which, to the extent appealed from, denied defendant's cross motion to renew his motion for sanctions with respect to a purportedly false statement made by plaintiff's counsel regarding access to nonparty Automatic Data Processing Inc. (ADP), unanimously affirmed, with costs.

Although the deposition testimony submitted on renewal is not cumulative of the evidence presented on defendant's original motion, it would not have changed the motion court's original

Corrected Order - July 19, 2016

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

256-
257-
258 Index 154552/13

501 Fifth Avenue Company, LLC,
Plaintiff-Appellant,

-against-

Mohammad Aslam,
Defendant-Respondent.

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Belkin Burden Wenig & Goldman, LLP, New York (David R. Brand of counsel), for appellant.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 12, 2015, awarding plaintiff the principal sum of $9,542.46 against defendant, unanimously reversed, on the law, without costs, **the judgment vacated**, and plaintiff awarded $71,542.46, plus statutory interest to be recalculated upon remand. **The Clerk is directed to enter an amended judgment accordingly**. Appeals from orders of the same court (Ira Gammerman, J.H.O., and Manual J. Mendez, J.), entered February 5, 2015, and March 16, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

By the clear and unambiguous terms of the commercial lease and the unconditional guaranty of the tenant's obligations under the lease, plaintiff landlord was entitled to recover from defendant guarantor, as demanded, the full amount of the accrued

pre-vacatur arrears, i.e., without a setoff in the amount of the tenant's security deposit. Plaintiff had a right under the lease to determine when and how the security deposit would be applied towards the tenant's outstanding lease obligations, and it advised the court that it intended to use the security deposit to cover post-vacatur damages, because defendant's guaranty only covered the tenant's lease obligations until the tenant vacated the premises.

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

ENTERED: FEBRUARY 16, 2016

CLERK

determination (*see Cammeby's Equity Holdings LLC v Mariner Health Care, Inc.*, 106 AD3d 563, 564 [1st Dept 2013]; CPLR 2221[e][2]). While the statement by plaintiff's counsel that both sides had equal access to ADP, the company's payroll administrator, is not strictly true, it is not materially false. It is true, as the subsequent deposition testimony makes clear, that plaintiff and her assistant had telephone access and higher administrative and security powers than defendant and his team. However, the gravamen of the underlying dispute is whether the parties each had access to the ADP payroll system, which is accessed through the Internet; the deposition testimony establishes that they did. In the absence of a material misstatement of fact, the motion court providently exercised its discretion in denying the motion to renew defendant's motion for sanctions (*see Elting v Shawe*, 129 AD3d 648, 649 [1st Dept 2015] [holding that sanctions were not warranted where a different misstatement by plaintiff and her counsel was not material]). Because the misstatement is not

material, there is no need to consider whether the motion to renew should be granted to avoid substantive unfairness (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001]).

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

ENTERED: FEBRUARY 16, 2016

CLERK