SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 12, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15090 Miriam Levy Oates, as Administratrix of the Estate of Rachel Levy, deceased, et al., Plaintiffs-Respondents, Index 302214/07

-against-

New York City Transit Authority, Defendant-Appellant,

Manhattan and Bronx Surface Transit Operating Authority, et al., Defendants.

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Lawrence Heisler, Brooklyn, for appellant.

Law Offices of Rosemarie Arnold, New York (Paige R. Butler of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered September 9, 2013, upon a jury verdict, awarding plaintiffs $300,000 for decedent Rachel Levy's conscious pain and suffering; $150,000 for plaintiff Hadassah Levy's past loss of custodial services, and $400,000 for her future loss of custodial services (over a ten-year period); and $100,000 for plaintiff

Miriam Levy Oates's future loss of nurture, care and guidance (over a five-year period), affirmed, without costs.

Decedent, mother of Miriam and daughter of Hadassah, was found dead under one of defendant Transit Authority's buses. While the bus driver had no explanation for how her body came to be there, plaintiffs' evidence, including DNA evidence matching samples recovered from the bus, was sufficient to support the jury's finding that the bus driver was negligent in operating the bus. The evidence showed facts and conditions from which negligence and causation could "be reasonably inferred" (*Wragge v Lizza Asphalt Constr. Co.*, 17 NY2d 313, 320 [1966]). In particular, plaintiffs showed that decedent's body had been crushed by the bus at such an angle that the bus driver, pulling out of the bus stop, should have, with the proper use of his senses, seen decedent (*see Klein v Long Is. R.R. Co.*, 199 Misc 532, 535 [Sup Ct, Kings County 1950], *affd* 278 App Div 980 [2d Dept 1951], *affd* 303 NY 807 [1952]).

Plaintiffs' uncontroverted expert testimony that decedent was conscious and in pain for two to five seconds after being hit by the bus supports the jury's finding that decedent sustained conscious pain and suffering prior to her death (*see Triana v Smith's Transfer Corp.*, 198 AD2d 476, 477 [2d Dept 1993]; *see*

also Stein v Lebowitz-Pine View Hotel, 111 AD2d 572, 573 [3d Dept 1985], *lv denied* 65 NY2d 611 [1985]).

There was sufficient evidence of decedent's nuture, care and guidance to her daughter to justify the award to the latter (*see McHugh v New York City Tr. Auth.*, 95 AD3d 686 [1st Dept 2012]). Further, the Transit Authority waived its argument that decedent's mother could not recover damages for decedent's wrongful death, since it failed to raise the argument at any time before this appeal (*see* CPLR 3211[a][3]; [e]; *see also San Filippo v New York City Tr. Auth.*, 105 AD3d 665, 667 [1st Dept 2013]).

The amounts awarded are not excessive (*see* CPLR 5501[c]; *Santana v De Jesus*, 110 AD3d 561, 562 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]; *Filipinas v Action Auto Leasing*, 48 AD3d 333 [1st Dept 2008]; *McHugh*, 95 AD3d at 686; *Van Norden v Kliternick*, 178 AD2d 167 [1st Dept 1991]).

Plaintiffs' counsel's remarks during trial did not deprive the Transit Authority of a fair trial, especially since the court gave curative instructions after many of the challenged comments

(*see Boyd v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 AD3d 412, 413-414 [1st Dept 2010]).

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

TOM, J.P. (dissenting)

Plaintiffs' decedent's body was found lying face down on the southbound service road of the Henry Hudson Parkway in the Bronx, approximately five feet from the curb near the front of a bus stop. After an investigation, it was established, by DNA evidence, that the decedent was run over by bus 8865 operated by defendant New York City Transit Authority. The bus driver, Vincent Brady, and the passengers in the bus at the time of the occurrence did not see, feel or hear the bus come into contact with decedent. How decedent came to be run over is established by neither testimony nor physical evidence, and the conclusions advanced by plaintiffs' expert witness attributing negligence to defendant's driver have no foundation in the facts adduced at trial. The ensuing verdict awarding plaintiffs damages for wrongful death is thus predicated on no more than speculation, and cannot stand.

A call log from the New York City Fire Department shows that a report of "pedestrian struck" was received at 2:39 p.m. and that emergency medical technicians had arrived at the scene by 2:43 p.m. Police Officer Spiros Komis, an on-scene technician with the Highway Patrol Unit, testified that there was a fresh tire mark on the road surface leading directly to decedent's

body, which was consistent with a tire mark on her back. His accident report indicates that the victim was pronounced dead at 2:42 p.m., and lists the weather conditions as clear and dry. Measurements he made indicate that decedent's feet were positioned on the service road approximately 125 feet south of the intersection with 236th Street and that the bus stop was located 134 feet, 6 inches south of the intersection. Komis testified that all of the photographs of decedent showed her feet and head pointing at a southeast angle on the roadway. A police sketch shows her head positioned five feet from the curb and her right foot about half that distance into the roadway, which is approximately 20 feet in width. An investigator's scene report states that decedent was found "lying approx. 4 feet from sidewalk curb clutching tote bag and a bag full of groceries." The death certificate lists the immediate cause as "Blunt Impact Injuries of Head and Torso."

Police Officer Michael O'Connor of the Highway Patrol Collision Investigation Squad testified that he and a Detective Ryan, now retired, went to the Kingsbridge Bus Depot to look for evidence that a bus had struck a pedestrian. Upon inspecting the undercarriage of bus 8865, he found what appeared to be "blood and body tissue just behind the right rear wheel of the bus."

Swabs were taken from various locations. However, a forensic anthropologist with the Office of the Chief Medical Examiner testified that DNA analysis confirmed the presence of decedent's blood only on a swab taken from the right front tire of the vehicle. A "supplemental case information" report filed by Robert Yee, whose position is given as "medicolegal investigator II," states that the tire marks observed on the roadway measuring 11 inches in width correspond to the tire mark on the back of decedent's jacket. The report also notes the presence of "leaves against the sidewalk curb," and states that a sergeant from the 50th Precinct "at the scene offers that the decedent was a home health aide and had just finished her shift with a client that resided nearby the bus stop." Neither the sergeant nor the source of his information is identified.

Decedent's daughter, plaintiff Miriam Levy Oates, testified that her mother, who was 51 years old at the time of her death, worked every Sunday as a home attendant for an elderly woman who lived at the Briarcliff apartment building located behind, that is, to the west, of the bus stop. However, decedent had recently found a new job, and the date of the accident, October 29, 2006, was her last day of work at that residence.

Decedent's mother, plaintiff Hadassah Levy, testified that

decedent had lived in her home virtually her entire life and was in very good health. Decedent always took the BX10 bus after finishing her work at the Briarcliff, where she customarily arrived at 9:00 a.m. and left sometime around 2:00 p.m.

The bus driver, Vincent Brady, had been driving the BX10 route for about four years before the accident. He recalled picking up only one person at the 236th Street and Henry Hudson Parkway bus stop but admitted it may have been as many as three passengers. He did not see anyone in the vicinity of the bus when he pulled away from the curb. He heard nothing and did not feel any impact. He stated that there were two blind spots: one on the right side of the bus extending 10 feet back from the front passenger door that was not visible in the passenger-side mirror, and another extending toward the front where a passenger-side route sign blocked forward vision. None of his passengers mentioned seeing, hearing or feeling anything as he drove away from the bus stop.

Dr. Monica Smiddy, a forensic pathologist with the Office of the Chief Medical Examiner, testified regarding the results of an external examination of decedent's body. The accident victim was well nourished, approximately 62 inches in height, and 124 pounds. There were very severe injuries to the pelvic region,

chest and head, including pelvic fractures, multiple rib fractures, multiple fractures of the skull and facial bones, and multiple lacerations of the scalp. There were no leg fractures or fractures of the feet. Finally, there was "a small abrasion. of the skin surface overlying the left knee." Because the family objected on religious grounds, neither a toxicology study nor an autopsy was performed. Accordingly, the heart was not examined and "the brain was not examined for stroke or hemorrhage." However, blood and hair were submitted to the Medical Examiner's forensic biology laboratory for analysis.

Donald Phillips, an accident reconstructionist with a bachelor's degree in mechanical engineering, presented plaintiffs' theory of recovery to the jury. He noted the proximity of the bus stop to the Briarcliff apartment building, which was situated "directly behind it," and a light pole "where the accident took place." Decedent's body was found "just slightly north of that light pole," which held the bus stop signs at the time of the incident. From police photographs, he noted that the body was positioned face down with the feet oriented to the northwest and the head facing southeast.

Phillips, who did not visit the accident scene until more than six years after the occurrence, conceded that he did not

know which direction decedent was coming from to the bus stop, where the bus stopped or started, the dimension of the bus or tires, or the path or rate of speed the bus was traveling. Yet, based primarily on photos of the position in which decedent's body was found and his observation of three buses, not even the same type of RTS bus that was involved in this accident, coming and going at the subject bus stop more than six years after the accident, Phillips testified that he envisioned a "projection type impact," with the right front corner of the bus, as it was pulling away from the curb, pinning or "trapping" decedent to the light post and then propelling her five feet forward out into the roadway and the path of the right front wheel of the bus. From separate paths that he plotted for the front and rear tires as the bus pulled away from the curb, he posited that "the right outside rear tire could have been the one that went over her head." He offered no explanation for why decedent's blood was only found on the right front tire.

Phillips then, without any evidentiary basis, stated his opinion as to where decedent was positioned just before the accident, stating, "[B]ased on my review of the file materials and my understanding of the sequence of the accident, Ms. Levy would have been leaving her place of employment." To recite

facts to fit his position on how the accident occurred, he concluded "she would have been generally moving north" as she approached the bus stop. And that "she actually got caught between the pole in [sic] the front of the bus and that's why she couldn't escape in front of the bus because she would have been backed up to the pole." He measured the distance from the base of the pole to the curb at 15 inches. He assigned no role to the blind spot in the vicinity of the front passenger door stating that for the right front tire to strike her, "she had to be in front of the bus," and there was no sign that she was dragged out into the roadway.

On cross-examination, Phillips conceded that the investigation had uncovered no evidence of any contact between decedent and the front or sides of the bus. He stated that he learned that decedent worked at the Briarcliff "from discussions with plaintiff's attorneys" and confirmed that if, under his hypothesis, decedent was approaching from the apartment building just before she was hit, she would have been facing the bus, because the bus stop was situated just north of a driveway leading to the entrance of the Briarcliff apartment building. He dismissed the possibility that decedent could have been running alongside the bus to try and catch it "because then she would be

to the side of the bus not in front of it to get the two different tire paths."

Following his testimony, which concluded plaintiffs' case, defendant moved for dismissal on the ground that plaintiffs had failed to make out a prima facie case of negligence (CPLR 4401). Defendant contended that there was no testimony or other evidence showing that the bus was negligently operated or that the vehicle knocked down decedent, arguing that expert testimony had to have a scientific or medical basis and could not be based on speculation. The court denied the motion.

Dr. Ali Sadegh, an accident reconstructionist for the defense, testified that the absence of any leg injury was inconsistent with being struck by the front bumper of a bus. In addition, there was no physical evidence on the front bumper or to the side of the bus to indicate that "there was any contact with anything." Finally, he opined that the abrasion on the left knee indicated that decedent "must have been falling down" before the contact with the bus.

It was error to deny defendant's dismissal motion. The jury's assessment of the facts surrounding an incident must be made upon competent proof, and the conclusions drawn by plaintiffs' expert witness lack any evidentiary foundation in the

record. Rather, his theory of the accident is based on a series of unsubstantiated assumptions, the foremost of which is that decedent had just left her place of employment as a home care worker and was waiting for the bus (or possibly approaching the bus stop from the south) when she was struck. The only admissible evidence concerning when decedent's work day ended was given by her mother, Hadassah Levy, who put the time at "around twoish." When decedent actually left her workplace is simply unknown. Even accepting, for the sake of argument, that she left the Briarcliff at 2:00 p.m., there remains the question of what she was doing during the half hour before her death.

Under the scenario advanced by Phillips, decedent was waiting at the bus stop directly in front of the light pole to which the bus stop signs were affixed. The obvious problem with this supposition is that a person waiting for a bus gets on the bus when it arrives, and how decedent wound up under the bus rather than on it is unexplained. The majority points to no evidentiary proof to support the conclusion that defendant driver's negligence caused the bus to strike decedent and pin her to the light post and then propel her into the roadway. Clearly, there is not a scintilla of evidence to support Phillips's opinion as to the sequence of events of the incident; rather, the

record is totally inconsistent with his theory of occurrence. It is suggested that decedent was somehow trapped by the light pole and could not escape being hit by the front corner of the bus as the bus pulled out. If this were the scenario, the front bumper of the bus would have come into contact with decedent first, trapping and propelling her. The evidence showed that there were no injuries to her lower extremities, and there was no evidence of physical contact on the front bumper or side of the bus. Also, Phillips's theory does not explain why, when the passenger door opened to let on a passenger (or passengers), decedent did not simply get on board, or why, if decedent were somehow "trapped" between the bus and the lamp post, the other passenger (or passengers) who boarded did not see or hear the impact of the bus striking her and propelling her to the front of the bus and then rolling over her. Finally, the hypothesis that decedent was trapped and struck in front of the light pole and propelled onto the roadway is belied by the fact of where decedent's body was found. Under Phillips's theory, decedent would have been propelled south and east of the point of impact toward the direction the bus was traveling in, and, thus, her body should have been located *south*, not north, of the light pole. In other words, if the bus was traveling southbound and struck decedent in

front of the bus stop and propelled her onto the roadway, decedent's body should have landed south of the bus stop. However, decedent's body was found face down situated north of the bus stop. The position and location of decedent's body completely repudiates Phillips's theory as to how this incident occurred.

The alternative possibility, that decedent was moving toward the bus from the south, is equally irreconcilable with the evidence. Apart from the failure to explain why neither the driver nor any of his passengers observed decedent's approach from the front of the bus, if decedent left the Briarcliff at 2:00 p.m., as plaintiffs' expert assumed, why was she not already waiting at the bus stop, as his primary theory maintains, instead of approaching the bus from the south, as he speculated?

The competent evidence is consistent with an alternative – and more probable – sequence of events. Decedent left her place of employment at about 2:00 p.m. She took the overpass to the other side of the Henry Hudson Parkway and bought a bag of groceries. She retraced her path back across the Parkway overpass, which left her at a crosswalk some 100 feet north of the BX10 bus stop. At some point while crossing the service road and walking south toward the bus stop, she saw the bus pull up

and take on passengers, realized she might miss it, and began to run. Once alongside the bus, she would have been positioned on the right side of the vehicle, approaching the passenger door from the blind spot extending behind it. Burdened by a shopping bag in her left hand and a tote bag in her right, she was unable to wave or knock on the door to attract the driver's attention, so she made the unfortunate mistake of turning to her left to step in front of the bus where the driver could see her standing in front of it. Tragically, she tripped over the defect in the curbing – or slipped on the leaves in the gutter or otherwise lost her footing – and fell or sprawled headlong with forward momentum into the roadway as the bus was pulling out. Unable to see her lying on the road surface because of the blind spot extending toward the right front of the vehicle due to the bus route signs, and with his attention directed to possible traffic to his left, the driver pulled out, running over her. The scrape abrasion mark on her left knee would indicate that she fell forward, scraping her knee on the roadway.

Had decedent been struck by the bus and her body propelled approximately five feet into the roadway, as urged by plaintiffs' expert, the contents of the grocery bag and her tote bag would have scattered onto the roadway. However, decedent was found

face down with one hand clutching her tote bag and the other clutching a grocery bag, with the contents of the bags intact. Those facts support the inference that decedent suddenly tripped and fell while holding onto the two bags. That she was propelled approximately five feet into the roadway supports the conclusion that she fell while running, which explains how her body came to rest on the roadway at an angle facing southeast, five feet from the curb.

This sequence of events is more plausible than the one presented by plaintiffs' expert witness and has the distinct advantage of having a sound basis in the trial evidence. It explains what decedent was doing during the half hour immediately preceding her death. It also explains why no one saw her standing at the bus stop or approaching the bus as the driver prepared to depart. Most significantly, it conforms to the evidence – the bag full of groceries intact, the absence of any indication of contact between decedent and the front or side of the bus, the location of decedent's body north of the light pole, the angle of her body to the roadway, and the scrape found on her left knee. The position of decedent's arms as depicted in police photographs – elbows at her side, her hands positioned toward her head and still grasping her bags – is further suggestive of

someone trying to break a fall. By contrast, the theory propounded by plaintiffs' expert does not correlate with any of the facts and is merely specious. It required the jurors to speculate about facts not in evidence in order to accept its conclusions, which renders it "worthless as evidence" (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]).

To attribute negligence to Vincent Brady, plaintiffs postulate that decedent was present at the bus stop in a location where she could be readily observed by the driver, in the exercise of due care, when he pulled away from the curb. Their hypothesis rests on the expert's assumption that decedent went directly to the bus stop after finishing work. No evidence supports this supposition. No one saw decedent at the bus stop, and the time of her departure from her job at the Briarcliff can only be approximated ("around twoish," according to her mother). The physical evidence – a bag full of groceries – suggests that, contrary to plaintiffs' theory, she may have gone shopping before attempting to catch the bus.

Plaintiffs' second major deviation from the record evidence concerns the mechanism of the accident. According to their expert witness, decedent was struck while standing in front of the light pole and projected forward and into the roadway by the

front bumper of the bus. There is simply no evidence, either from the condition of the bus or the physical injuries sustained by decedent, that she came into contact with any other part of the bus other than the right front tire. Finally, her body was found north of the light pole, a location altogether incompatible with an impact between a bus traveling south and a person standing at that light pole.

It is settled that the driver of a vehicle is not chargeable with negligence for failure to see a pedestrian who suddenly darts into the street (*Rucker v Fifth Ave. Coach Lines*, 15 NY2d 516 [1964], *remittitur amended* 15 NY2d 852 [1965], *cert denied* 382 US 815 [1965]; *Williams v New York City Tr. Auth.*, 108 AD3d 403 [1st Dept 2013]). There is no evidence to controvert Vincent Brady's testimony that he never saw decedent and that neither he nor any of his passengers were even aware of any impact with the bus. Thus, there is no proof of negligence on the part of the bus operator.

Plaintiffs attempt to invoke the *Noseworthy* doctrine to subject this wrongful death action to a lower standard of proof (*Noseworthy v City of New York*, 298 NY 76 [1948]; *see Wragge v Lizza Asphalt Constr. Co.*, 17 NY2d 313 [1966]). However, *Noseworthy* does not relieve a plaintiff of the obligation to

establish that the defendant's negligence substantially contributed to the injuries sustained (*see Derdiarian v Felix Contr. Co.*, 51 NY2d 308, 315 [1980]). Moreover, under circumstances such as these, where there are no witnesses to an accident, the doctrine is inapposite, because the parties are equally situated, neither having knowledge of the surrounding events (*see Wright v New York City Hous. Auth.*, 208 AD2d 327, 332 [1st Dept 1995]). Even where applicable, at least an inference of negligence must be established before a plaintiff may invoke the doctrine, and mere contact with a vehicle is insufficient for that purpose (*Wank v Ambrosino*, 307 NY 321 [1954]; *Trillo v Gerry*, 135 AD2d 625 [2d Dept 1987]).

Accordingly, it is my opinion that the judgment should be vacated and the complaint dismissed.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

132 Cara Associates, L.L.C., et al., Index 651726/15
Plaintiffs-Respondents,

-against-

Howard P. Milstein, et al.,
Defendants-Appellants.

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Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler of counsel), for appellants.

Nixon Peabody LLP, New York (Adam B. Gilbert of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 13, 2015, which, inter alia, granted summary judgment to plaintiffs to the extent of declaring that plaintiffs Cara Associates, L.L.C. (Cara) and Hudson South Associates, LLC and Hudson South Site B Associates, LLC (together, Hudson) were empowered to remove defendant Howard P. Milstein's authority to manage, conduct, and operate the business of Mariner's Cove Site B Associates, Mariner's Cove Site J Associates, and Mariner's Cove Site K Associates (the partnerships) and to appoint a successor or successors by majority vote, unanimously modified, on the law, to delete the part of the declaration dealing with the appointment of a successor, and to declare that a new manager may be chosen by majority vote, and otherwise affirmed, without

costs.

Since nonparty Wells Fargo Bank, N.A. ceased to hold a mortgage on the partnerships' unsold condominium units on December 24, 2015, the only document at issue on appeal is the written confirmatory agreement of partnership, not the written consent. The first sentence of paragraph 2(b) of the partnership agreement states, "[U]*ntil changed by a majority in interest of the Partners*, . . . [defendant] Rector Park Associates LLC, Cara . . ., [and] Hudson . . . grant . . . Milstein authority to manage, conduct, and operate the Partnerships' businesses" (emphasis added). Therefore, Cara and Hudson – 60% of the partnership – had the authority to change the partners' grant of authority to Milstein (*see generally Cole v Macklowe,* 99 AD3d 595 [1st Dept 2012] ["when the agreement between partners is clear, complete and unambiguous, it should be enforced according to its terms"]).

While the second sentence of paragraph 2(b) states, "In the event that . . . Milstein is unable to act on behalf of the Partnerships by reason of death or other incapacity, the Partners shall (by majority vote) designate a successor to act in . . . Milstein's stead," it does not limit the partners' ability to select a new manager only under the circumstances of Milstein's

death or incapacity. A logical reading of the entire paragraph is that the partners are required to designate a successor to Milstein in the event of his death or incapacity, and may also do so by majority vote at any other time. This reading does not render the second sentence superfluous, in violation of the "cardinal rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect" (*Corhill Corp. v S.D. Plants, Inc.*, 9 NY2d 595, 599 [1961] [internal quotation marks and ellipsis omitted]).

Moreover, as Partnership Law § 40(8) provides, "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners." Accordingly, a new manager of the partnership's ordinary day-to-day business can be selected by a majority vote.

The purpose of each partnership was to construct and manage a condominium. If all of the partnerships' remaining condominium units are sold, the partnerships will not be able to carry on business. Therefore, Partnership Law § 20(3), rather than § 40(8), applies to the sale of the remaining units. Unanimity of the partners is thus required to sell the remaining units. *Matter of Roehner v Gracie Manor, Inc.* (6 AD2d 580 [1st Dept

1958], *affd* 6 NY2d 280 [1959]), on which plaintiffs rely, is not dispositive, as it dealt with a corporation, and corporations and partnerships are different (*see People v Zinke*, 76 NY2d 8, 14-15 [1990]).

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

295 Lofraco Belgium also known as Front Row Entertainment,
Plaintiff-Respondent,

-against-

Mateo Productions, Inc., et al.,
Defendants,

Kon Live Touring also known as Konvict Muzik,
Defendant-Appellant.

Index 651186/10

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Jonathan D. Davis, P.C., New York (Jonathan D. Davis of counsel), for appellant.

Law Offices of Kenneth L. Kutner, New York (Kenneth L. Kutner of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 9, 2014, which denied defendant Kon Live Touring's (KLT) motion for summary judgment dismissing the complaint as against it, and granted plaintiff's cross motion for summary judgment on its breach of contract claim as against KLT, modified, on the law, to deny plaintiff's cross motion, and otherwise affirmed, without costs.

Plaintiff Lofraco Belgium (a/k/a/ Front Row Entertainment) contracted with KLT for an artist known as Akon to perform at a concert in Brussels, Belgium on December 9, 2009. Pursuant to

the written contract between plaintiff and KLT, plaintiff paid $125,000 to KLT's agent, defendant American Talent Agency (ATA). However, on the morning of the concert plaintiff was informed that Akon would not be performing because he was ill.

The relevant contract contained a provision entitled "NON-PERFORMANCE," which stated that Akon's inability to perform due to "sickness or accident" would be considered force majeure, for which Akon would not be subject to liability; but that money would be returned for nonperformance which was not within the scope of force majeure.

KLT moved for summary judgment dismissing the breach of contract claim as against it based on the contract's force majeure clause. Plaintiff cross-moved for summary judgment on its breach of contract claim.

In support of its motion, KLT, submitted Akon's testimony that he did not perform at the scheduled concert due to illness, medical records from a November 16, 2009 surgery, and Akon's surgeon's testimony that the symptoms Akon described were consistent with tearing of scar tissue following the surgery he had undergone a few weeks before the concert date. KLT argued that, pursuant to its contract with plaintiff, it therefore had no obligation to return the monies paid for Akon's appearance.

However, KLT submitted no other evidence to substantiate Akon's claim that he was ill, such as the hospital records of his visit to an emergency room where he claimed he was given antibiotics and painkillers. Nor did it explain its failure to submit the hospital records. Since any such records are exclusively within the control of Akon and KLT, which is solely owned by Akon, this omission renders KLT's proof of Akon's illness insufficient to support summary judgment. In short, KLT failed to meet its burden on the motion (*see Winegrad v New York Univ. Med. Ctr*, 64 NY2d 851 [1985]).

The court properly considered plaintiff's untimely cross motion, since it addressed the same issue that KLT addressed in its motion, i.e., whether Akon was ill (*see Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337 [1st Dept 2008]). The record does not support KLT's contention that plaintiff's motion was also improper because the court had ordered plaintiff to wait until after KLT had deposed plaintiff's principals before seeking summary judgment.

However, contrary to the dissent's contention, plaintiff did not satisfy its burden on the cross motion. While the dissent notes that plaintiff established it paid $125,000 to secure Akon's performance, that Akon never performed, and that the

$125,000 was never repaid to plaintiff, plaintiff, in its cross motion for summary judgment, was required to establish that Akon was able to perform at the concert and was not unable to do so due to sickness. Instead, plaintiff merely pointed to gaps in KLT's evidence – the missing medical records that would have proven Akon was ill, and thus its cross motion was improperly granted (*see Torres v Merrill Lynch Purch.*, 95 AD3d 741 [1st Dept 2012]).

The dissent merely points to additional gaps in KLT's evidence, such as proof of travel arrangements to demonstrate Akon intended to travel to Brussels, and notes the limited value of the affidavit of Akon's surgeon. However, these gaps do not equate to plaintiff meeting its burden to establish an absence of a genuine issue of fact as to whether Akon was ill. Plaintiff acknowledges that it lacks any documentary evidence refuting that Akon was unable to perform, and has no evidence that he was physically capable of performing. The dissent, like the Supreme Court, appears to completely dismiss the value of Akon's deposition testimony, yet it is "not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

The dissent also stresses that Akon did not have the medical

records at the time of his deposition, that he failed to produce additional medical records in discovery, and that KLT was unable to obtain the records, which may be unavailable. This lack of additional medical evidence to support Akon's force majeure defense is why we find that KLT failed to meet its burden on its motion. At the same time, plaintiff also failed to meet its burden of proof for summary judgment. Thus, a trial is required.

All concur except Andrias, J. who concurs in part and dissents in part in a memorandum as follows:

ANDRIAS, J. (concurring in part, dissenting in part)

I agree with the majority that Supreme Court properly denied the motion of defendant Kon Live Touring (KLT) for summary judgment dismissing plaintiff's breach of contract claim against it. I also agree with the majority that the court properly considered plaintiff's untimely cross motion for summary judgment on that claim since it addressed the same issue that KLT addressed in its motion, namely, whether the artist known as Akon was unable to perform due to sickness, and therefore relieved of liability by the contract's force majeure clause. However, I disagree with the majority insofar as it holds that the grant of plaintiff's cross motion for summary judgment on its breach of contract claim was in error because plaintiff failed to sustain its prima facie burden of establishing that Akon was not too sick to perform. Accordingly, I dissent in part.

Pursuant to an August 7, 2009 agreement, KLT agreed to furnish plaintiff with Akon's services for a concert in Belgium scheduled for October 16, 2009. To secure Akon's performance, plaintiff paid $125,000 to Akon's booking agent. Due to a "scheduling conflict" on Akon's part, the concert was rescheduled for December 9, 2009. However, at 2:00 a.m. on the day of the concert, plaintiff was advised by Akon's booking agent that Akon

was ill and would not appear.

KLT moved for summary judgment dismissing plaintiff's breach of contract claim based on the contract's force majeure clause, which it raised as an affirmative defense. The clause states:

> "If ARTIST is unable to perform in the event of sickness or accident then this will be considered 'Force Majure' [sic] by ARTIST and ARTIST shall not be subject to any liability . . . Monies will be returned for any nonperformance that is not covered under the scope of force 'Force Majure' [sic]."

"The purpose of a force majeure clause is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties" (*United Equities Co. v First Natl. City Bank*, 52 AD2d 154, 157 [1st Dept 1976], *affd* 41 NY2d 1032 [1977]). "[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure" (*Route 6 Outparcels, LLC v Ruby Tuesday, Inc.*, 88 AD3d 1224, 1225 [3d Dept 2011] [internal quotation marks omitted]).

On its motion for summary judgment, KLT bore the burden of establishing its force majeure defense (*see Latha Rest. Corp. v Tower Ins. Co.*, 285 AD2d 437 [1st Dept 2001]; *see also Phillips Puerto Rico Core, Inc. v Tradax Petroleum, Ltd.*, 782 F2d 314, 319

[2d Cir 1985]). As the majority finds, KLT did not sustain its burden in that it failed to submit any objective evidence to substantiate Akon's self-serving claim that he was unable to perform due to sickness, such as the hospital records of his alleged visit to an emergency room where he claimed he was given antibiotics and painkillers, even though those records were exclusively within the control of Akon and KLT, which is solely owned by Akon.

Nevertheless, the majority finds that plaintiff did not satisfy its burden of proof on its cross motion because it failed to establish that Akon was able to perform or that he was not unable to perform due to sickness. On the record before us, I cannot agree. As shown below, plaintiff's submissions established its prima facie entitlement to summary judgment and Akon failed to produce any objective evidence supporting his force majeure defense, including the aforementioned medical records relating to the alleged treatment of the condition that purportedly rendered him too sick to perform.

To recover for breach of contract, it was incumbent on plaintiff to demonstrate that it performed its obligations under the contract, that KLT failed to perform, and that it was damaged by KLT's breach (*see Harris v Seward Park Hous. Corp.*, 79 AD3d

425, 426 [1st Dept 2010]). It is undisputed that plaintiff paid the $125,000 it was required to pay in order to secure Akon's performance, that Akon never performed, and that the $125,000 was never repaid to plaintiff, thereby establishing KLT's breach.

Plaintiff's submissions also established that there was no objective evidence that Akon was too sick to perform on December 9, 2009 and that the evidentiary materials of record were insufficient to raise a material issue of fact as to KLT's force majeure affirmative defense. Among other things, the record shows that: (i) on November 16, 2009, Akon underwent an elective medical procedure, even though he was scheduled to perform in Belgium a mere three weeks later; (ii) after the procedure, Akon recuperated at home for about two weeks and was "feeling good"; (iii) a few days prior to the Belgium performance scheduled for December 9, 2009, Akon was well enough to travel to Puerto Rico for a paid promotional event; (iv) although Akon claims that he immediately fell ill upon his arrival on the island, he did not seek any medical treatment, remained there for two days, and made his personal appearance; (v) there was no proof, such as airline reservations or tickets or other travel arrangements, that would demonstrate that Akon had ever intended to travel to Brussels; (vi) while Akon claimed that he received medical treatment upon

his return to Atlanta, KLT failed to produce any medical, prescription, emergency room or hospital records during discovery to substantiate that claim; and (vii) Akon did not see the physician who performed his surgery until December 22, 2009, more than two weeks after he allegedly fell ill in Puerto Rico, at which time he received lymphatic massage therapy rather than treatment for his alleged illness. Contrary to the view of the majority, these undisputed facts, which undermine Akon's claims, constitute more than "gaps" in KLT's proof. Rather, they demonstrate a complete absence of proof to support Akon's force majeure defense, which is based solely on Akon's self-serving claims that he was too sick to perform.

In holding otherwise and finding that plaintiff failed to satisfy its burden of proof, the majority faults plaintiff for its inability to produce documentary evidence to refute Akon's unsubstantiated claim that he was too sick to perform on December 9, 2009. However, the only post surgery medical records produced by defendant show that Akon saw his surgeon for massage therapy on December 22, 2009. While Akon testified that he received emergency room treatment at Piedmont Hospital in Atlanta upon his return from Puerto Rico, where he was allegedly given a prescription for painkillers and antibiotics, when asked at his

deposition if he had any documentation as to that visit, he responded, "No, I don't have the documents." While defendant's counsel stated that "we have been endeavoring to get all medical records[,] [a]nd should we obtain them we will produce them," defendant never produced the records.

Defense counsel's only explanation for this failure was that the request was not made until 2012, so it should be no surprise that records for a December 2009 visit were no longer available. However, when asked by the court at oral argument whether he had anything from the hospital to show that the records were destroyed, counsel evasively responded, "We don't have them." Thus, the majority would require plaintiff to produce medical records which defendant failed to produce during discovery, an unreasonable [and more likely impossible] burden, given that those records, as the majority concedes, were solely within defendant and Akon's control and, according to defendant, no longer exist.

The uncorroborated assertions of Akon and the affidavit of his surgeon, which is based solely on those assertions, are insufficient to create genuine issues of fact necessary to defeat a motion for summary judgment (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Charter One Bank, FSB v Leone*, 45 AD3d 958,

959 [3d Dept 2007] [self-serving and conclusory allegations by the defendant that she made timely payments subsequent to the date of the default or that the plaintiff had mismanaged her escrow account or that an accord and satisfaction had been reached did not raise a genuine issue of fact]). The surgeon did not state that he personally observed or treated Akon for any of the post surgery symptoms Akon purports to have experienced while he was in Puerto Rico during the first week of December 2009. Nor did he state that he examined any medical records evidencing same. While Akon testified that it was the surgeon who told him to go to the emergency room, the surgeon did not corroborate that or state that Akon contacted him upon his return to Atlanta with respect to the symptoms he allegedly experienced in Puerto Rico. Rather, the surgeon stated that the information as to Akon's alleged symptoms was obtained through his review of Akon's deposition transcript. In any event, although the surgeon did state that Akon's purported symptoms were theoretically consistent with the procedure he underwent, or "an ordinary sickness that passes with time," he did not opine that these symptoms would have rendered Akon too sick to perform on December 9, 2009. Nor did KLT submit proof that any other physician observed any of those symptoms or that they prevented Akon from

performing.

Accordingly, I would affirm the order on appeal which denied KLT's motion and granted plaintiff's cross motion for summary judgment on its breach of contract claim against KLT.

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

ENTERED: APRIL 12, 2016

CLERK

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

455 Peter Chan, et al., Index 112212/09
Plaintiffs-Appellants-Respondents,

-against-

Rowena Cheung,
Defendant-Respondent-Appellant.

_____

Granovsky & Sundaresh PLLC, New York (Alexander Granovsky of counsel), for appellants-respondents.

Mark C. Sternick, Flushing, for respondent-appellant.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 13, 2015, which denied plaintiffs' motion for spoliation sanctions and defendant's cross motion to strike the complaint for spoliation of evidence, unanimously modified, on the law and the facts, to grant plaintiffs' motion to the extent of directing that defendant's answer be stricken, and otherwise affirmed, without costs.

In this defamation action, plaintiffs allege that, on or about July 9, 2009, defendant published a defamatory affidavit via an email. Upon receipt of correspondence, dated July 13, 2009, threatening litigation, and certainly upon service of the complaint herein, defendant should have placed a litigation hold on relevant electronic data in order to preserve it (*see VOOM HD*

Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33 [1st Dept 2012]). However, defendant failed to preserve the email, and any other emails that may have been sent contemporaneously, and destroyed evidence of their existence, as plaintiffs proved conclusively at the hearing on these motions. Plaintiffs' computer forensic expert concluded that defendant had installed new operating systems on the subject computers after the July 13, 2009 notice and the August 26, 2009 complaint, resulting in the irrevocable destruction of evidence critical to the litigation. On three of the compromised systems, the expert was able to retrieve the exact dates of the destructive reinstall. The reinstall caused gigabytes of space on the allegedly preserved hard drives to be overwritten. At least one of the computers contained traces of PST files that no longer exist named "Rowena Archive Folder." In light of the warnings concerning potential loss of data and the prompts to reboot the machine that defendant would have received during the reinstallation process, the deletion of files containing defendant's archived email (like the reinstallation itself) could not be said to have been inadvertent. Plaintiffs did not rely on their computer forensic expert to establish the existence of the communications as defendant admitted sending the email to at least one vendor; and

plaintiffs recovered that email and another from third-party recipients of those emails. Although plaintiffs have recovered one or two of the allegedly defamatory emails, it is impossible to determine the universe of recipients of the subject affidavit, and thus to determine the extent of damage to plaintiffs. The spoliation of the evidence is therefore highly prejudicial to plaintiffs.

Defendant undertook an affirmative course of action resulting in destruction of relevant emails, though she represented otherwise during sworn testimony. As the documents received from third-party recipients confirm, the files defendant destroyed are highly relevant and tend to substantiate plaintiffs' claims. Evidence of defendant's willful and prejudicial destruction of evidence warrants the sanction of striking her pleadings (*see DiDomenico v C&S Aeromatik Supplies*, 252 AD2d 41 [2d Dept 1998]). Where a party disposes of evidence without moving for a protective order, a negative inference may be drawn that the destruction was willful (*id.*). Willfulness may also be inferred from a party's repeated failure to comply with discovery directives (*id.*). It should also be noted that this Court has upheld the striking of pleadings where the destruction of critical evidence occurs through ordinary negligence (*see e.g.*

Standard Fire Ins. Co. v Federal Pac. Elec. Co., 14 AD3d 213, 218 [1st Dept 2004]; *Amaris v Sharp Elecs. Corp.*, 304 AD2d 457 [1st Dept 2003], *lv denied* 1 NY3d 507 [2004).

Defendant's speculation that plaintiffs are responsible for the destruction of relevant data, maintained on an off-site server, and improperly accessed her email account is insufficient to support the imposition of sanctions on plaintiffs.

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

770 The People of the State of New York, Ind. 1156/12
Respondent,

-against-

Darryl Lawson-Varsier,
Defendant-Appellant.

_____

Cozen O'Connor, New York (Seth J. Zuckerman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J. at motions; Daniel P. Conviser, J. at jury trial and sentencing), rendered March 5, 2013, convicting defendant of criminal possession of stolen property in the third degree, criminal possession of a forged instrument in the second degree (two counts), and identity theft in the first degree, and sentencing him to an aggregate term of five years' probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's overall course of conduct supports the inference that he was a participant in a criminal scheme, acting, at least, as a lookout (*see e.g. People v*

Rodriguez, 52 AD3d 249 [1st Dept 2008], *lv denied* 11 NY3d 741 [2008]), and his accessorial liability rendered him a joint possessor of the fruits and instrumentalities of the scheme. In addition to defendant's lookout-like behavior, "a reasonable jury could conclude that only trusted members of the operation would be permitted to [be present]" as defendant's companions engaged in criminal activity (*People v Bundy*, 90 NY2d 918, 920 [1997]).

The motion court properly denied, without granting a hearing, defendant's motion to suppress physical evidence. Defendant received detailed information about the sequence of events leading up to his arrest, and the allegations in his moving papers were insufficient to create a factual dispute requiring a hearing (*see People v Long*, 36 AD3d 132 [1st Dept 2006], *affd* 8 NY3d 1014 [2007]), because defendant failed to "either controvert the specific information that was provided by

the People . . . or to provide any other basis for suppression" (*People v Arokium*, 33 AD3d 458, 459 [1st Dept 2006], *lv denied* 8 NY3d 878 [2007]).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

771 Modesto Gomez, Index 105047/05
Plaintiff-Appellant, 591185/05

-against-

The City of New York,
Defendant,

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

- - - - -

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

-against-

Nico Asphalt, Inc., et al.,
Third-Party Defendants-Respondents.

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The Law Offices of Regina L. Darby, New York (Alexander J. Wulwick of counsel), for appellant.

David M. Santoro, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York Inc., respondent.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for Nico Asphalt, Inc., respondent.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for Roadway Contracting Inc., respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered May 23, 2014, which, insofar as appealed from as limited by the briefs, granted defendant Consolidated Edison

Company of New York Inc.'s (Con Ed) and third-party defendants Nico Asphalt, Inc.'s (Nico) and Roadway Contracting, Inc.'s (Roadway) motions for summary judgment dismissing the complaint against Con Ed and denied plaintiff's cross motion for leave to amend his bill of particulars, unanimously affirmed, without costs.

Plaintiff allegedly sustained injuries when he stepped into a hole located "immediately adjacent to" the sidewalk curb in front of 240 E. 15th Street in Manhattan. Con Ed's contractors, Nico and Roadway, performed roadwork in front of 240 E. 15th Street about three months before the accident.

The motion court correctly dismissed the complaint against Con Ed. Regardless of how far into the block the accident occurred, plaintiff has consistently claimed that the accident occurred "immediately adjacent to" the curb, and the evidence undisputedly shows that the roadwork was performed at least two feet from the curb (*see Levine v City of New York*, 101 AD3d 419, 420 [1st Dept 2012]; *Robinson v City of New York*, 18 AD3d 255, 256 [1st Dept 2005]).

The motion court providently exercised its discretion in denying plaintiff leave to amend his bill of particulars to provide a more accurate narrative description of the location of

his fall. He failed to provide a reasonable explanation as to why he did not seek leave to amend until almost 9 years after the commencement of the action, over 4½ years after the filing of the bill of particulars, and about 4 months after the filing of the note of issue (*see Cintron v New York City Tr. Auth.*, 77 AD3d 410, 410 [1st Dept 2010]; *Haddad v New York City Tr. Auth.*, 5 AD3d 255 [1st Dept 2004]). In addition, granting leave at this stage of the litigation would be prejudicial to Con Ed, Nico, and Roadway. In any event, the proposed amendment, which still claims that the accident occurred "immediately adjacent to the curb of the sidewalk in front of 240 E. 15th Street" would not change the result, given the evidence that the roadwork was performed at least two feet from the curb.

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

772-
773 In re Lesli R., and Others.,

Children Under Eighteen Years of Age, etc.,

Luis R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

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

Anne Reiniger, New York, attorney for the children Ruby R., Damaris R., Isamel R., Elias R. and Bernice R.

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Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about January 21, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 2, 2014, which found that respondent sexually abused his stepdaughters and derivatively abused his five biological children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the

order of disposition.

The record supports the court's determination that respondent was a person legally responsible for the children who were referred to as his stepdaughters, and that a preponderance of the evidence demonstrated that he sexually abused them (*see* Family Ct Act §§ 1012[e][iii]; 1046[b][i]; *Matter of Shirley C.-M.*, 59 AD3d 360, 360 [1st Dept 2009]). Contrary to respondent's contention, his stepdaughters' out-of-court statements that he was inappropriately touching them was sufficiently corroborated by his own out-of-court statements that although he knew that his "rough housing" was making them uncomfortable, he continued touching them (*see Matter of N.& G. Children*, 176 AD2d 504, 504-505 [1st Dept 1991]). The fact that one of the stepdaughters vaguely recanted her statements did not render her initial statements incredible as a matter of law (*see Matter of Shawn P.*, 266 AD2d 907, 908 [4th Dept 1999], *lv denied* 94 NY2d 760 [2000]). Moreover, the fact that the stepdaughters did not have a physical injury or other corroboration does not require a different result (*see Matter of Jonathan F.*, 294 AD2d 121 [1st Dept 2002], citing *Matter of Danielle M.*, 151 AD2d 240, 242-243 [1st Dept 1989]).

Upon petitioner establishing its prima facie case, the

burden shifted to respondent to explain his conduct and rebut the evidence of his culpability, but he presented no credible evidence in his defense (*see Matter of Elizabeth S. [Dona M.]*, 70 AD3d 453, 453-454 [1st Dept 2010]). Respondent's intent to gain sexual gratification was properly inferred from his continuing to touch his stepdaughters even after he was told he was making them uncomfortable (*see Matter of Daniel R. [Lucille R.]*, 70 AD3d 839, 841 [2d Dept 2010]).

A preponderance of the evidence in the record supports the Family Court's determination that respondent derivatively abused his own five children. Petitioner's caseworker testified that one of respondent's stepdaughters told her that three of the other children were present on the bottom bunk when respondent sexually abused her, and thus, his actions demonstrated that he has a fundamental defect in his understanding of his parental obligations (*see Matter of Marino S.*, 100 NY2d 361, 373-375 [2003], *cert denied* 540 US 1059 [2003]; *Matter of Brandon M. [Luis M.]*, 94 AD3d 520, 520-521 [1st Dept 2012]).

The Family Court providently exercised its discretion in granting the motion of the stepdaughters' attorney to quash respondent's subpoena to compel one of his stepdaughters to testify at the hearing because the letter from the child's

psychotherapist and the affidavit from the child's social worker provided evidence of the potential psychological harm that testifying would cause to the child (*see Matter of Imman H.*, 49 AD3d 879, 881 [2d Dept 2008]; *Matter of Jennifer G.*, 261 AD2d 823 [4th Dept 1999]).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

774 Alon Barash, Index 151071/14
Plaintiff-Appellant,

-against-

Steven Baharestani, et al.,
Defendants-Respondents.

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Gordon & Gordon, P.C., Forrest Hills (Jason S. Matuskiewicz of counsel), for appellant.

Michael Goldman, Great Neck, for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered October 28, 2014, which granted defendants' pre-answer motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs.

Even when considering plaintiff's affidavit, which may be considered to remedy pleading defects (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]), plaintiff's own allegations establish that he was a licensed real estate salesperson, not a licensed broker.

Therefore, he is barred from demanding compensation for services he rendered in connection with the individual defendant's purchase of an apartment (*see* Real Property Law § 442-a).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

775-
776 Index 350649/08

Manuel H., An Infant by,
His Mother and Natural Guardian,
Reyna V.,
Plaintiff-Appellant,

-against-

Ellen Landsberger, M.D., et al.,
Defendants-Respondents.

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The Fitzgerald Law Firm, P.C., Yonkers (Mitchell L. Gittin of counsel), for appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi DiFolco of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 16, 2014, which, to the extent appealed from as limited by the briefs, dismissed plaintiff's medical malpractice cause of action as against defendants Ellen Landsberger, M.D., Mary Rosser, M.D., University Hospital of the Albert Einstein College of Medicine, and Montefiore Medical Center at the Jack Weller Hospital of Albert Einstein College of Medicine, and bringing up for review an order, same court and Justice, entered January 13, 2014, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint to the aforementioned extent, unanimously affirmed, without

costs. Appeals from order, same court and Justice, entered December 23, 2014, which, upon granting plaintiff's motion for reargument, adhered to the order entered January 13, 2014, unanimously dismissed, without costs, as academic.

Plaintiff alleges that defendants failed to assess the mother to determine the existence of fetopelvic disproportion in order to determine whether vaginal delivery was safe prior to inducing labor with Pitocin. Plaintiff further alleges that defendants departed from accepted medical practices in failing to timely perform a C-section, which resulted in forcing the fetus through the pelvis, and placing undue pressure on the head, causing hypoxic injury.

Plaintiff's claims are unavailing, and without record support. Defendant demonstrated prima facie the absence of malpractice by submitting, inter alia, hospital records and deposition testimony that show that the maternal pelvis was examined on multiple occasions to ascertain whether vaginal delivery was safe, including determining the pelvis's precise type, as described by plaintiff's expert. Moreover, there is no medical evidence of hypoxia, as the infant was born with normal Apgar scores, and an MRI, performed four years later, detected no abnormalities (*see Fernandez v Moskowitz*, 85 AD3d 566, 568 [1st

Dept 2011]; *compare Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 7 [1st Dept 2015] [objective medical tests indicated intracranial abnormality and early signs of delay]). The record refutes the opinion of plaintiff's expert, Dr. Edelberg, that defendants departed from the standard of care (*see Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]).

The opinion of plaintiff's other expert, Dr. Chen, that he need not rebut the normal MRI evidence, since defendants failed to show that the "relatively mild damage" would be seen, is no more than "bare conjecture" (*see Callistro v Bebbington*, 94 AD3d 408, 410 [1st Dept 2012], *affd* 20 NY3d 945 [2012]), insufficient to defeat defendants' entitlement to summary judgment.

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

777 The People of the State of New York, Ind. 12220/94
Respondent,

-against-

Marvin Brown,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Budd G. Goodman, J. at dismissal motion; Harold Rothwax, J. at jury trial and sentencing), rendered November 15, 1995, convicting defendant of absconding from temporary release in the first degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The circumstances surrounding defendant's failure to comply with the reporting requirement of his work release program support the inference that defendant acted intentionally.

The motion court, after considering the *Taranovich* factors (*People v Taranovich*, 37 NY2d 442 [1975]), properly determined

that although the 26-month prearrest delay was lengthy, and although defendant could have been charged sooner, the delay was not intended to obtain a tactical advantage relating to the absconding charge, but was the result of a determination, made in good faith, that a continuing homicide investigation required deferral of the absconding prosecution (*see People v Singer*, 44 NY2d 241, 254 [1978]). Defendant did not experience any period of pretrial incarceration due to the absconding charge, and he was not prejudiced by the delay (*see People v Decker*, 13 NY3d 12 [2009]).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

778 Excelsior Capitol LLC, Index 158220/14
Plaintiff-Appellant,

-against-

K&L Gates LLP,
Defendant-Respondent.

_____

Judd Burstein, P.C., New York (Judd Burstein of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Frederick B. Warder III of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 11, 2015, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs.

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages" (*Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012] [citation omitted]). "[T]he failure to show proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent" (*id.*), and for this reason, Excelsior's claims were properly dismissed.

In the underlying action, the Second Department found that the trial court erred in dismissing Excelsior's causes of action to recover upon the guarantor's three personal guarantees, finding that a jury could have found that the guarantor consented to the extensions of said guarantees, and remitted the matter for a new trial on those causes of action (*Excelsior Capital, LLC v Superior Broadcasting Co., Inc.*, 82 AD3d 696, 699 [2d Dept 2011] [internal citations omitted]). The trial court's error in that enforcement action was "independent of or far removed from the [attorney's] conduct," and therefore constituted an intervening cause, breaking any proximate cause by the defendants (*Kriz v Schum*, 75 NY2d 25, 36 [1989], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). In any event, plaintiff's causation theory is speculative.

"[T]he 'selection of one among several reasonable courses of action does not constitute malpractice'" (*Zarin v Reid & Priest*, 184 AD2d 385, 387 [1st Dept 1992]). The issue in this case is a May 26 letter which merely reserved Excelsior's rights while the parties worked out a possible forbearance agreement and redocumentation of the notes and guarantees, and did not ask the guarantor to reaffirm his guarantees. This was a reasonable course of action based on statements made by the guarantor's

attorney as to the continuing validity of the guarantees, and the fact that the parties were attempting resolution of this matter. More importantly, it was speculative to believe that the guarantor would have provided such a reaffirmance, since if prompt resolution was not reached, litigation was likely (*see Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294 [1st Dept 1993]).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

779-
780 Index 116744/09

Sofia Noboa-Jaquez,
Plaintiff-Appellant,

-against-

Town Sports International, LLC
doing business as New York Sports Club,
Defendant-Respondent.

_____

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Rory L. Lubin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered August 6, 2014, which, among other things, denied plaintiff's motion seeking recusal and a mistrial, and order, same court and Justice, entered April 14, 2015, which, during a bench trial, granted defendant's motion pursuant to CPLR 4401 for judgment as a matter of law dismissing plaintiff's complaint, unanimously affirmed, without costs.

The trial court providently exercised its discretion in denying plaintiff's motion (*People v Moreno*, 70 NY2d 403, 405-406 [1987]). There is no evidence that an email referring to plaintiff's counsel in unflattering terms was read, sent, or received by Justice Masley. Nor does plaintiff point to any

other evidence, such as adverse rulings or other actions evidencing the alleged judicial bias (*see R&R Capital LLC v Merritt*, 56 AD3d 370, 370 [1st Dept 2008]; *see also* NYCRR 100.2[A], 100.3[E][1][a][i]).

The trial court correctly granted defendant's motion pursuant to CPLR 4401 at the close of plaintiff's case, as plaintiff failed to set forth a prima facie case of negligence. There was no rational process by which a factfinder could base a finding in favor of plaintiff (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). The mere presence of water on a tiled floor adjacent to the gym's showers cannot impart liability, particularly since water was necessarily incidental to the use of the area (*see Dove v Manhattan Plaza Health Club*, 113 AD3d 455, 455-456 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014]). Nor, under the facts of the case, can liability be premised upon a lack of mats at the location of plaintiff's fall (*Jackson v State of New York*, 51 AD3d 1251, 1253 [3d Dept 2008]; *see Pomahac v*

TrizecHahn 1065 Ave. of Ams., LLC, 65 AD3d 46, 465-466 [1st Dept 2009]). Plaintiff also failed to show that defendant created or had actual or constructive notice of the wet floor (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

781-
782 Index 653382/14

Leon Pokoik, etc., et al.,
Plaintiffs-Appellants,

-against-

Norsel Realties, et al.,
Defendants-Respondents,

"John Doe" and "Jane Doe," etc.,
Defendants.

_____

The Law Firm of Gary N. Weintraub, LLP, Huntington (Leland S. Solon of counsel), for appellants.

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 13, 2015, and corresponding so-ordered transcript, same court and Justice, entered July 31, 2015, which granted defendants-respondents' motion to dismiss the complaint, unanimously modified, on the law, to deny the motion to dismiss except as to defendants 575 Realties, Inc., 575 Associates, LLC, and Steinberg & Pokoik Management Corp. (SPMC), and otherwise affirmed, without costs.

Plaintiffs are minority partners in defendant Norsel Realties, which is managed by the individual defendants Steinberg and Lieberman. Norsel Realties owns the commercial office

building located at 575 Madison Avenue in Manhattan, and leases the property to 575 Realties. 575 Realties net leases the property to 575 Associates, an affiliated operating company, owned by some of the Pokoik plaintiffs and the Steinberg family. SPMC is a wholly-owned subsidiary of 575 Realties and acts as a real estate managing agent for the property.

Pursuant to the rent renewal provision in the lease, Norsel Realties is entitled to rent from 575 Realties calculated as "a sum equal to five (5%) percent of the then appraised value of the land subject to this Lease covering the first renewal term, at the commencement thereof considered as unimproved and exclusive of any buildings or improvements thereon."

Plaintiffs alleged in their complaint that Steinberg and Lieberman had a fiduciary relationship with Norsel and the other Norsel partners, including plaintiffs, that Steinberg and Lieberman engaged in misconduct by purposely soliciting artificially depressed appraisals of the property so that the calculated rent under the lease would be artificially low so as to advance their "personal estate tax strategies," and that Norsel suffered damages as a result of this misconduct by agreeing to receive lower rents. These allegations sufficiently state a cause of action for breach of fiduciary duty as against

Steinberg, Lieberman, and Norsel (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]).

Plaintiffs sufficiently alleged that Steinberg and Lieberman were conflicted and stood to benefit personally, in a manner other than as shareholders of Norsel, so as to rebut the business judgment rule (*see Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49, 54 [1st Dept 2008]; *see also Stilwell Value Partners, IV, L.P. v Cavanaugh*, 41 Misc 3d 1216[A], 2013 NY Slip Op 51708[U], *3 [Sup Ct, NY County 2013], *affd* 118 AD3d 518 [1st Dept 2014]). In particular, in addition to alleging that the devalued rent paid by 575 Realties advanced the individual defendants' personal estate planning, plaintiffs also alleged that the devalued rent allowed 575 Realties, and its affiliated entity SPMC, to retain more money to pay higher salaries to the individual defendants.

Plaintiffs' complaint, however, does not state a cause of action against 575 Realties, 575 Associates, or SPMC, since there is no allegation that any of those entities owed plaintiffs a fiduciary duty, or that those entities engaged in any misconduct.

We reject defendants' arguments in support of the business judgment rule, including its interpretation of the "subject to" clause in the lease.

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

783-
784 In re Nadine Nicky McD., and Another,

Dependent Children Under Eighteen Years of Age, etc.,

Vernice H.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Andrew J. Baer, New York, attorney for the children.

_____

Order, Family Court, Bronx County (Linda B. Tally, J.), entered on or about September 10, 2014, which, to the extent appealed from, upon a finding that respondent mother had abandoned the subject children, terminated her parental rights to the children and committed the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of abandonment is supported by clear and convincing evidence that the mother failed to communicate with

the agency during the six months immediately preceding the filing of the petitions (Social Services Law § 384-b[4][b], [5][a]). The mother's minimal and insubstantial contacts with the agency during this period were insufficient to defeat this finding (*see Matter of Kairi Jazlyn F.*, 50 AD3d 602, 602 [1st Dept 2008]). Although the subject children relocated to Delaware with their foster parents, the mother continued to have an obligation to maintain contact with the agency, and her failure to do so manifested an intent to forgo her parental obligations (*see Matter of Alexa L. [Nilza L.]*, 79 AD3d 1290, 1291-1292 [3d Dept 2010]).

Petitioner was not required to show that it had made diligent efforts to encourage the mother's parental relationship with her children (*Matter of Ruth R. [Diana P.]*, 115 AD3d 531, 532 [1st Dept 2014]). Rather, it was the mother's burden, which she failed to meet, to show that she had been unable to contact the agency or that the agency had prevented or discouraged her

from doing so (*see Matter of Regina A.*, 43 AD3d 725, 725 [1st Dept 2007]; *see also Social* Services Law § 384-b[5][a]).

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

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

786 David E. Retter, Index 652106/10
Plaintiff-Respondent,

-against-

Neil Zyskind, et al.,
Defendants-Appellants.

_____

Asher Fensterheim, PLLC, White Plains (Asher Fensterheim of counsel), for appellants.

Blank Rome LLP, New York (Harris N. Cogan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 5, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint in its entirety, unanimously affirmed, with costs.

Given the substantial documentary evidence presented by plaintiff in opposition to defendants' motion, issues of fact preclude a finding that his investments with regard to two nursing homes were loans rather than equity investments (*see generally Mason v Dupont Direct Fin. Holdings*, 302 AD2d 260, 262 [1st Dept 2003]). While plaintiff's statements in his affidavit and at his deposition constitute judicial admissions (*see Performance Comercial Importadora E Exportadora Ltda v Sewa Intl.*

Fashions Pvt. Ltd., 79 AD3d 673, 674 [1st Dept 2010]), these statements, and the documentary evidence, do not contradict his theory that he held an interest in joint ventures that were to profit from the revenues of various LLCs set up by defendants.

Plaintiff's claims regarding the Heritage business are not barred by the statute of frauds. Where, as here, plaintiff alleged an oral joint venture agreement to form entities that would, among other things, acquire real property, the agreement is not subject to the statute of frauds (*see Malaty v Malaty*, 95 AD3d 961, 962-963 [2d Dept 2012]; *see also* General Obligations Law § 5-703).

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

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

789 The People of the State of New York, Ind. 5329/02
Respondent,

-against-

Elias McFarland,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered June 8, 2010, 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.

The court properly applied the presumptive override for a prior felony sex crime conviction, and properly exercised its discretion in denying a downward departure. The override, which results in a level three adjudication that is independent of the factors set forth in the risk assessment instrument, was supported by reliable documentation that defendant has twice been convicted of rape in Virginia. We have considered and rejected defendant's remaining arguments, most of which are generally

similar to arguments this Court rejected on a prior appeal in this case (120 AD3d 1121 [1st Dept 2014], *lv denied* 24 NY3d 1053 [2014]), or in *People v Ferrer* (69 AD3d 513 [1st Dept 2010], *lv denied* 14 NY3d 709 [2010]).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Richter, Kahn, JJ.

790- Index 311330/13
791-
792-
792A Douglas H.,
Plaintiff-Respondent,

-against-

C. Louise H.,
Defendant-Appellant.

_____

Cohen Clair Lans Greifer & Thorpe LLP, New York (Robert Stephan Cohen and Michael Calogero of counsel), for appellant.

Bender & Rosenthal, LLP, New York (Susan L. Bender of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen F. Gesmer, J.), entered September 24, 2015, to the extent it denied defendant's motion to exclude the forensic evaluator's report, and order, same court and Justice, entered October 19, 2015, to the extent it incorporated the decretal provisions of the September 2015 order and restated its award of sole legal custody of the parties' son to plaintiff, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered June 24, 2015, and on or about August 6, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the October 19, 2015 order.

The record fully supports the court's determination that the child's best interests are served by awarding sole custody and decision-making authority to plaintiff (*see Elkin v Labis*, 113 AD3d 419 [1st Dept 2014], *lv dismissed* 22 NY3d 1193 [2014]). After an 18-day evidentiary hearing, the court found that while both parties have "serious deficiencies as parents," plaintiff is the one more likely to make decisions that are appropriate for the child. In particular, he would send the child, who was diagnosed as being on the autism spectrum, to a therapeutic boarding school, which defendant opposed, and would use an appropriate educational consultant, in light of the child's need for intensive behavior modification.

The fact that defendant had been the child's primary caregiver is but one factor and not alone determinative (*Matter of Dedon G. v Zenhia G.*, 125 AD3d 419 [1st Dept 2015]). Nor is keeping siblings together, while an important factor, an "absolute" requirement (*id.* at 420 [internal quotation marks omitted]), and the record supports the court's determination that the child and his sister should be separated.

The court properly denied defendant's motion to exclude the forensic report. *Frye v United States* (293 F 1013 [DC Cir 1923]) does not require the exclusion of a forensic report solely

because it does not cite to the professional literature supporting the evaluator's opinion (*Straus v Strauss*, __ AD3d __, 2016 NY Slip Op 00634 [1st Dept Feb. 2, 2016]; *see also Lubit v Lubit*, 65 AD3d 954, 955-956 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* 560 US 940 [2010]). The forensic report does not rely to a significant extent on hearsay statements; the primary sources of the evaluator's conclusions are his interviews with the parties and his own observations.

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: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

793 In re Robert Titza, Index 111177/11
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Law Office of Jeffrey L. Goldberg, P.C., Port Washington (Eileen J. Goggin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about March 3, 2014, denying the petition seeking, inter alia, to annul the determination of respondent Board of Trustees of the Police Pension Fund, which denied petitioner's application for accidental disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The statutory presumption in petitioner's favor that his strokes were service related (General Municipal Law § 207-k) was rebutted by credible evidence that the etiology of his strokes was unknown, petitioner does not suffer from coronary artery

disease, and there was no evidence of hypertension *(see Matter of Hogg v Kelly*, 93 AD3d 507 [1st Dept 2012]; *Matter of Goldman v McGuire*, 101 AD2d 769 [1st Dept 1984], *affd* 64 NY2d 1041 [1985]; *see also Matter of Walsh v Board of Trustees of N.Y. City Police Dept. Pension Fund, Art. II*, 37 AD3d 370 [1st Dept 2007]).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

795 The People of the State of New York, Ind. 993/13
Respondent,

-against-

Erik Colvin,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J. at plea and Maxwell Wiley, J. at sentencing), rendered October 30, 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: APRIL 12, 2016

CLERK

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

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

796 In re VSA Architectural Consultants, P.C., Index 100146/15

Petitioner-Appellant,

-against-

State of New York Division of Human Rights,
Respondent-Respondent,

Isabel Payano,
Respondent.

_____

Bierman & Associates, New York (Mark H. Bierman of counsel), for appellant.

Toni Ann Hollifield, Bronx for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol E. Huff, J.), entered July 15, 2015, which denied the petition seeking to, among other things, annul a determination of respondent State of New York Division of Human Rights (DHR), dated October 24, 2014, denying petitioner's application to vacate DHR's determination that probable cause existed to believe that petitioner had engaged in disability discrimination against respondent Isabel Payano in violation of the New York State Human Rights Law (State HRL [Executive Law § 290 *et seq.*]), and dismissed the proceeding, unanimously affirmed, without costs.

This proceeding is barred, because petitioner failed to exhaust its administrative remedies (*id.*; *Matter of Ken Edrich Leather Accessories v New York State Div. of Human Rights*, 269 AD2d 334 [1st Dept 2000]).

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

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

797 Joanne Johnson-Glover, et al., Index 159040/12
Plaintiffs-Respondents,

-against-

Fu Jun Hao Inc.,
Defendant-Appellant.

_____

Gannon, Rosenfarb & Drossman, New York (David A. Drossman of counsel), for appellant.

The Law Offices of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph III of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered March 25, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Joanne Johnson-Glover alleges that she tripped over a "pulley bag" or wheeled shopping bag placed along an aisle of defendant's discount store. She testified at her deposition that the store's aisles were always cluttered with merchandise, leaving only a narrow pathway for shoppers to walk in, and that she fell when her back foot got caught on a metal stand protruding from the bag as she stepped forward.

Although plaintiff admitted that she saw the pulley bag before she tripped, so that it was an "open and obvious"

condition, defendant failed to demonstrate that it fulfilled its broad obligation to maintain the store in a reasonably safe condition (*Westbrook v WR Activities–Cabrera Mkts.*, 5 AD3d 69, 70–71, 73 [1st Dept 2004]). An issue of fact exists as to whether the placement of the pulley bag with its protruding metal stand, along with the other merchandise cluttering the store's aisles, was an inherently dangerous condition that presented a tripping hazard (*see Jackson v Paramount Decorators Inc.*, 132 AD3d 583, 583 [1st Dept 2015]; *see also Westbrook*, 5 AD3d at 75). That plaintiff saw the bag before tripping does not require dismissal of the complaint, but is relevant to the issue of her comparative negligence (*see Westbrook*, 5 AD3d at 72-73).

The testimony of defendant's cashier/manager that she usually cleared the aisles when the store was not busy was insufficient to establish lack of actual or constructive notice of the dangerous condition (*see Lehr v Mothers Work, Inc.*, 73 AD3d 564, 564-565 [1st Dept 2010]). Further, her testimony that

merchandise was sometimes left in the aisles for a few hours after it was delivered raised an issue of fact as to whether defendant created the hazardous condition (*see Westbrook*, 5 AD3d at 75).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

798 The People of the State of New York, Ind. 5759/12
Respondent,

-against-

Charlene Richardson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered September 25, 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: APRIL 12, 2016

CLERK

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

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

799N Board of Directors of Windsor Owners Corp., Plaintiff-Respondent, Index 155985/14

-against-

Elaine Platt, Defendant-Appellant.

_____

Elaine Platt, appellant pro se.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered December 18, 2015, which, to the extent appealed from, denied defendant's motion to renew that portion of a prior order, same court and Justice, entered on or about March 19, 2015, inter alia, granting plaintiff's motion for summary judgment seeking a permanent injunction prohibiting defendant from revealing privileged attorney-client communications with plaintiffs, deemed to be an appeal from an order denying reargument, and, so considered, the appeal from said order unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff has not demonstrated that her motion to "renew" was based on any new facts not known to her at the time of the

original motion, and as such, the appeal is deemed to be from a motion to reargue (CPLR 2221), the denial of which is not appealable (*see Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579 [1st Dept 2011]).

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

ENTERED: APRIL 12, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

800 In re Carl D. Wells, Ind. 6548/06
[M-685] Petitioner, 41/07

-against-

Hon. Jill Konviser, etc., et al.,
Respondents.

_____

Carl D. Wells, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Jill Konviser, respondent.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

803 The People of the State of New York ex rel. Johnny Mason, Petitioner-Appellant, Ind. 2075/14 1301/14 3232/14

-against-

Warden, Respondent-Respondent.

_____

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

_____

Appeal from judgment (denominated an order), Supreme Court, New York County (Larry R.C. Stephen, J.), entered June 17, 2015, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This appeal challenging the legality of petitioner's preconviction detention is moot because he is currently

incarcerated following his conviction and sentencing (*see e.g. People ex rel. Macgiollabhui v Schriro*, 123 AD3d 633 [1st Dept 2014]), and no exception to the mootness doctrine applies (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

804-
805 In re Eduardo V.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for presentment agency.

_____

Orders of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 10, 2014, which adjudicated appellant a juvenile delinquent upon fact-finding determinations that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, two counts of petit larceny and two counts of criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's findings regarding two separate incidents were based on legally sufficient evidence and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342,

348-349 [2007]). In the shoplifting incident, appellant's behavior clearly demonstrated that he intended to leave the store with merchandise, but without paying for it (*see People v Olivo*, 52 NY2d 309, 318 [1981]). The court properly declined to sanction the presentment agency for not obtaining a surveillance videotape made, and then erased, by the store where the incident occurred (*see People v Walloe*, 88 AD3d 544 [1st Dept 2011], *lv denied* 18 NY3d 963 [2012]).

In the robbery incident, there is no basis for disturbing the court's determinations concerning identification and credibility. Appellant's missing witness argument is unpreserved, and in any event it does not warrant a different conclusion regarding the sufficiency and weight of the evidence.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

806 In re Robert J. Troeller, etc., Petitioner-Appellant, Index 113097/11

-against-

New York City Department of Education, et al., Respondents-Respondents,

Temco Service Industries, Inc., Additional Party-Respondent.

_____

Spivak Lipton LLP, New York (Gillian Costello of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for The New York City Department of Education and Dennis M. Walcott, respondents.

Kramer Levin Naftalis & Frankel, LLP, New York (Adina Levine of counsel), for Temco Service Industries, Inc., respondent.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered September 16, 2014, which denied the petition seeking an order declaring the municipal respondents' (together DOE) practice of assigning public work to respondent Temco Service Industries, Inc. (Temco), without satisfying competitive bidding requirements, to be violative of General Municipal Law § 103 and Education Law § 2556(10), and dismissed the proceeding brought pursuant to CPLR article 78, unanimously

affirmed, without costs.

Article 3(B)(ii) expressly permitted DOE to assign to Temco schools under DOE's temporary custodial care, regardless of geography. Hence, DOE's construction of the subject contract as permitting such assignments was rationally supported by the contract's overall language and intent, and not arbitrary or capricious or affected by any error of law (*see* CPLR 7803[3]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180, 180 [1st Dept 2006]; *Valentin v New York City Police Pension Fund*, 16 AD3d 145, 145 [1st Dept 2005], *lv denied* 5 NY3d 703 [2005]). DOE likewise rationally interpreted Article 1(B)(32) of the contract, providing, in pertinent part, that DOE has "the right to amend staffing patterns as it deems appropriate," as permitting the agency to have its Deputy Directors of School Facilities oversee groups of two to five school buildings in which Temco employees

provided cleaning and custodial services, with no onsite "Building Managers," as otherwise provided for in the contract.

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

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

807-
808 Index 301056/12

State Farm and Casualty Company,
Plaintiff-Respondent,

-against-

Jennifer Guzman, et al.,
Defendants,

Dulce Cabrera,
Defendant-Appellant.

_____

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for appellant.

Nicolini, Paradise, Ferretti & Sabella, PLLC, Mineola (Joshua H. Stern of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about October 24, 2013, which denied defendant Cabrera's motion for summary judgment, and granted plaintiff's cross motion for summary judgment declaring that it has no obligation to defend or indemnify defendant Guzman in the underlying action, unanimously affirmed, without costs. Order, same court and Justice, entered April 15, 2014, which denied Cabrera's motion to reargue and renew, unanimously affirmed as to the motion to renew, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

It is undisputed that the named insured under the

homeowner's policy issued by plaintiff did not reside at the subject premises. Accordingly, under the terms of the policy, the subject premises was not covered (*see Marshall v Tower Ins. Co. of N.Y.*, 44 AD3d 1014 [2d Dept 2007]).

Since the policy never provided coverage for these circumstances in the first place, the timeliness of plaintiff's disclaimer is irrelevant (*see Zappone v Home Ins. Co.*, 55 NY2d 131 [1982]; *American Home Assur. Co. v Aprigliano*, 161 AD2d 357, 358 [1st Dept 1990]). Nor can Cabrera rely on the estoppel doctrine, since she failed to establish that she was prejudiced by the issuance of the disclaimer four months before the note of issue was filed (*see 206-208 Main St. Assoc. Inc. v Arch Ins. Co.*, 106 AD3d 403 [1st Dept 2013]).

We have considered Cabrera's remaining contentions, including that the policy's exclusions for business pursuits and property held for rental are ambiguous, and find them unavailing.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

809 The People of the State of New York, Ind. 4302/13
Respondent,

-against-

Richard Brown,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Richard Carruthers, J.), rendered June 25, 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 12, 2016

CLERK

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

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

810-
811 Seneca Insurance Company, Inc., Index 601817/05
590698/08
Plaintiff-Respondent,

-against-

Certified Moving & Storage Co., LLC, et al.,
Defendants-Appellants.

- - - - -

Certified Moving & Storage Co., LLC, et al.,
Third-Party-Plaintiffs-Respondents,

-against-

Frenkel & Co.,
Third-Party-Defendant-Appellant.

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Lazare Potter & Giacovas LLP, New York (David E. Potter of counsel), for Certified Moving & Storage Co., LLC and Certified Installation Services, LLC, appellants/respondents.

McCarter & English, LLP, New York (Steven H. Weisman of counsel), for Frenkel & Co., Inc., appellant.

D'Amato & Lynch, LLP, New York (Peter A. Stroili of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.) entered April 27, 2015, which, to the extent appealed from, denied defendants/third-party plaintiffs' motion for summary judgment dismissing plaintiff's complaint and partially denied third-party defendant Frenkel & Co.'s cross motion for summary

judgment dismissing the third party complaint, unanimously affirmed, with costs.

From 2002 through 2005, in three successive policies, plaintiff Seneca Insurance Company provided commercial general liability insurance for defendants/third-party plaintiffs Certified Moving and Storage Co. and Certified Installation Services, LLC (collectively, Certified). The premiums were based upon Certified's payrolls for the trucking and warehouse operations of the business. The initial premiums, however, were deposit premiums. Seneca maintained the right, under the policies, to conduct payroll audits after the conclusion of the policy periods to determine the final premium. During one of these audits, Seneca determined that the installation business and payroll was a far more substantial portion of Certified's business then the insurer had previously realized. Accordingly, Seneca sought to reclassify the policy and premium amounts to reflect the risks it actually believed it took under the policy.

Seneca filed this action, seeking payment of the premiums and alleging that Certified misrepresented the nature of its business when applying for insurance coverage. Certified filed a third-party claim for indemnification against third-party defendant Frenkel & Co., its broker, claiming that it relied on

Frenkel's representations in completing the application for insurance, specifically, that the installation payroll was not needed.

Certified moved for summary judgment dismissing the complaint, arguing that Insurance Law § 3426(d)(1) precludes Seneca from attempting to recover additional premiums under the policy. This argument is unavailing. As the motion court properly concluded, Insurance Law § 3426(d)(1) clearly permits the collection of additional premiums in instances, such as the one herein, where the policy terms call for it through the conduct of an audit (*see e.g. S.A.F. La Sala Corp. v CNA Ins. Cos.*, 291 AD2d 228, 228-229 [1st Dept 2002]). Moreover, as the motion court also correctly determined, even if § 3426(d)(1) did not apply, there would be, at the very least, a question of fact concerning whether the additional premium increase exceptions of § 3426(c)(1)(D) & (E) apply based on Certified's alleged omissions in filling out the policy applications.

On the issue of the alleged misrepresentations in the policy application, Frenkel's motion for summary judgment dismissing Certified's third-party indemnification claims was also properly denied. There are issues of fact concerning the representations made in filling out Certified's insurance application, an

application that was completed by Frenkel. It is well settled that an insurance broker may be held liable to its principal for common law indemnification where it breached its duty to that principal by negligently or intentionally misrepresenting facts in connection with obtaining insurance coverage (*Utica First Ins. Co. v Floyd Holding*, 5 AD3d 762 [2d Dept 2004]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

812 Naquan Clarke, et al., Index 156226/12
Plaintiffs-Appellants,

-against-

Verizon New York, Inc., etc.,
Defendant-Respondent,

Marymount Manhattan, Co.,
Defendant.

_____

Jaroslawicz & Jaros, LLC, New York (Norman E. Frowley of counsel), for appellants.

Ledy-Gurren, Bass, D'Avanzo & Siff LLP, New York (Joseph A. D'Avanzo of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 9, 2015, which granted the motion of defendant Verizon New York, Inc. (Verizon) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Verizon established entitlement to judgment as a matter of law in this action where plaintiff Naquan Clarke alleges that he was injured when, during the course of a rainstorm, he fell while using a worn and slippery ramp that was used for deliveries at Verizon's building. Verizon submitted testimonial and photographic evidence showing that the claimed defect was not actionable, as "[m]ere wetness on a walking surface due to rain

does not constitute a dangerous condition" (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]). There was also a lack of prior complaints or injuries relating to the ramp (*see Savio v Rose Flower Chinese Rest., Inc.*, 103 AD3d 575 [1st Dept 2013]). Contrary to plaintiffs' contention, Verizon was not required to submit an expert affidavit under the circumstances presented.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's expert merely described the surface of the ramp as worn and shiny, concluding that it was dangerously slippery when dry, and even more so when wet. This conclusion, unsupported by any empirical data obtained by scientific analysis, was insufficient to raise an issue of fact (*see Ceron* at 632; *Sims v 3349 Hull Ave. Realty Co. LLC*, 106 AD3d 466 [1st Dept 2013]). Furthermore, the statements allegedly made to plaintiff by the building security guard concerning the slippery

nature of the ramp do not qualify under the speaking agent exception to hearsay (*see Tyrell v Wal-Mart Stores*, 97 NY2d 650 [2001]; *Gordzica v New York City Tr. Auth.*, 103 AD3d 598 [1st Dept 2013]).

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Gesmer, JJ.

813 Deutsche Bank, AG, Index 161257/13
Plaintiff-Respondent,

-against-

Alexander Vik, et al.,
Defendants-Appellants.

_____

Zaroff & Zaroff LLP, Garden City (Ira S. Zaroff of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (David G. Januszewski of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered February 4, 2015, which denied defendants' motion to dismiss the complaint and to cancel a notice of pendency, unanimously affirmed, with costs.

The court correctly found that it had personal jurisdiction over defendant Sebastian Holdings, Inc. (SHI) pursuant to CPLR 303 and over defendants Alexander Vik, C.M. Beatrice, Inc. (Beatrice) and CSCSNE trust based on the well pleaded allegations that SHI and Vik are alter egos and that Vik, Beatrice and CSCSNE trust are alter egos. It also correctly found that New York law applies to the alter ego causes of action (*see Serio v Ardra Ins. Co.*, 304 AD2d 362 [1st Dept 2003], *lv denied* 100 NY2d 516 [2003]).

The fraudulent conveyance causes of action alleging that plaintiff's injury was suffered in New York are adequately stated under the applicable New York law and timely filed (*see Loreley Fin. [Jersey] No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d 463, 465 [1st Dept 2014]). At the very least, issues of fact exist as to the situs of plaintiff's injury. The unjust enrichment claim was also timely asserted.

There is no basis for dismissing the third cause of action, seeking to enforce a foreign judgment against Vik under CPLR article 53, since plaintiff has alleged facts sufficient to demonstrate that Vik is the alter ego of SHI (*see Harvardsky Prumyslovy Holding, AS.-V Likvidaci v Kozeny*, 117 AD3d 77, 83 [1st Dept 2014]).

The court also correctly declined to dismiss the ninth cause of action and to cancel the notice of pendency.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

814 The People of the State of New York, Ind. 947/14
Respondent,

-against-

Giovanny Negron,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 17, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

815 Ronald Matthews, Index 310549/10
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Becker & D'Agostino, PC, New York (Michael D'Agostino of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 16, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's cross motion to amend the complaint to add a claim for malicious prosecution, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying plaintiff's cross motion for leave to amend the complaint (*see e.g. Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]), since the proposed amendment lacked merit (*see e.g. Bag Bag v Alcobi*, 129 AD3d 649 [1st Dept 2015]). Plaintiff failed to submit "an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*id.* [internal quotation marks omitted]). Despite two years of discovery, he

merely submitted his attorney's affirmation and the proposed amended complaint, verified only by counsel. He submitted no evidence by which to overcome the presumption of probable cause created by his indictment by a grand jury (*see Colon v City of New York*, 60 NY2d 78, 82-83 [1983]).

In light of the above disposition, we need not consider plaintiff's remaining arguments.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

817 In re Paula Giddings, Index 100013/13
Petitioner,

-against-

New York City Department of Housing
Preservation and Development, et al.,
Respondents.

_____

Scott & Liburd, New York (Kofi D. Scott of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for New York City Department of Housing Preservation and Development, respondent.

Kellner Herlihy Getty & Friedman, LLP, New York (Jeanne-Marie Williams of counsel), for Stryker's Bay Apartments, Inc., respondent.

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Determination of respondent Department of Housing Preservation and Development, dated September 6, 2012, after a hearing, to issue a certificate of eviction against petitioner requested by respondent Stryker's Bay Apartments, Inc., upon a finding that the apartment at issue was not petitioner's primary residence, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Donna M. Mills, J.], entered April 23, 2013), dismissed, without costs.

Substantial evidence supports the determination that the

subject apartment was not petitioner's primary residence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The record demonstrates that petitioner failed to submit sufficient and reliable evidence establishing that she occupied the apartment as her primary residence after 2002 (*see Matter of O'Quinn v New York City Dept. of Hous. Preserv. & Dev.*, 284 AD2d 211 [1st Dept 2001]). Petitioner provided, inter alia, a Massachusetts address as her residence in connection with obtaining a driver's license and registering a vehicle in Massachusetts and, contrary to her assertions, appeared to spend less than an aggregate of 183 days in the subject apartment in the calendar year preceding commencement of the eviction proceedings in September 2012 (*see* 28 RCNY 3-02[n][4][ii], [iv]; *see also Matter of Santiago v East Midtown Plaza Hous. Co., Inc.*, 59 AD3d 174 [1st Dept 2009]).

Since 2002, petitioner has been a professor, as well as a department head and journal editor, at Smith College, in Massachusetts, and she has spent considerable time on campus, teaching, holding office hours and attending committee meetings, during the academic year, as well as often remaining on campus during school breaks, grading exams and conducting research. In that regard, at the time she started at Smith College, petitioner

obtained a house in Massachusetts, which was fully furnished, and where she kept her personal belongings and received time-sensitive mail (*see Matter of Shi Yi Tang v New York City Dept. of Hous. Preserv. & Dev.*, 29 AD3d 470, 471 [1st Dept 2006]).

Furthermore, by submitting tax returns for 2009 through 2011 that listed only her address in Massachusetts, petitioner failed to "provide[] proof that . . . she . . . filed a New York City Resident Income Tax return at the claimed primary residence for the most recent preceding taxable year for which such return should have been filed" (28 RCNY 3-02[n][4][iv]).

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: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

818 James Wallace, Index 310394/11
Plaintiff-Appellant,

-against-

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

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Beth S. Gereg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 18, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law, by submitting evidence showing that plaintiff, an experienced basketball player, voluntarily chose to play basketball on an outdoor court that had an open and obvious defect on its surface (*see McKey v City of New York*, 234 AD2d 114, 115 [1st Dept 1996]). The crack and/or hole in the basketball court's surface that allegedly caused plaintiff's injury was one of the risks he assumed when he decided to play basketball on the court, which was located in a public park owned

and maintained by defendants (*see Felton v City of New York*, 106 AD3d 488, 489 [1st Dept 2013]; *Ortiz v City of New York*, 101 AD3d 446 [1st Dept 2012]). The photographs of the defect and plaintiff's testimony that nothing was blocking the defect before he stepped on it demonstrate that the defect was open and obvious (*see LaSalvia v City of New York*, 305 AD2d 267, 267-268 [1st Dept 2003]).

Plaintiff's expert affidavits failed to raise a triable issue of fact, because the experts' assertions are speculative or unsupported by any evidentiary foundation or industry standard (*Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327, 327 [1st Dept 2006]).

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 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

820 The People of the State of New York, Ind. 1312/13
Respondent,

-against-

Walter Peterson,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Rena Uviller, J. at plea; Cassandra Mullen, J. at sentencing), rendered on or about August 21, 2013, as amended September 5, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on

reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 12, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

821N In re Probate Proceeding, Estate of Sy Syms, Deceased. File 4494/09

- - - - -

Anne C. Bederka,
Petitioner-Respondent,

-against-

Marcy Syms,
Respondent-Respondent,

Jillian Merns, et al.,
Objectants-Appellants.

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Michael S. Haber, New York and George R. Sommers, New York, for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Lauren E. Aguiar of counsel), for Marcy Syms, respondent.

Greenfield Stein & Senior, LLP, New York (Anne C. Bederka of counsel), for Anne C. Bederka, respondent.

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Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered January 26, 2015, which granted the Special Referee's motion to determine her fee for supervising pre-objection discovery and to allocate such fee among the parties, unanimously affirmed, without costs.

The amount of the fee award was justified by the qualifications of the referee and the time she reasonably spent in resolving acrimonious disputes among counsel, including issues

of some complexity. There is no merit to the contention that the fee award should be limited because the estate is small, as the purpose of the discovery was to establish that the estate had been diminished by transfers as a result of undue influence and is of greater value than stated by petitioner. The allocation of the fee was a proper exercise of discretion, commensurate with the Surrogate's correct perception of the causes of the discovery delays.

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

ENTERED: APRIL 12, 2016

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14900- Index 307977/08
14901 William Cardoza,
Plaintiff-Appellant,

Vielka De Leon,
Plaintiff,

-against-

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

P.O. Steven Tomala, et al.,
Defendants.

_____

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

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

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 18, 2014, reversed, on the law and the facts, without costs, the state law malicious prosecution claim, the 42 USC § 1983 malicious prosecution claim and the punitive damages claim under 42 USC § 1983 reinstated and a new trial ordered on damages unless plaintiff stipulates, within 30 days after service of a copy of this order with notice of entry, to a reduction of the jury awards for past and future pain and suffering to $400,000 and $1,250,000, respectively, and a reduction of the jury awards for punitive damages to $75,000 against Perez and $75,000 against Mendez and to entry of a judgment in accordance therewith. Order, same court and Justice, entered March 19,

2014, reversed, on the law, without costs, the motion granted, and the matter remanded to Supreme Court for a determination of reasonable attorneys' fees.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando Acosta, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische
Barbara R. Kapnick, JJ.

14900-
14901
Index 307977/08

_____x

William Cardoza,
Plaintiff-Appellant,

Vielka De Leon,
Plaintiff,

-against-

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

P.O. Steven Tomala, et al.,
Defendants.

_____x

Plaintiff William Cardoza appeals from the order of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 18, 2014, which, to the extent appealed from as limited by the briefs, granted defendants the City of New York, P.O. Benjamin Perez and P.O. Carlos Mendez's posttrial motion to set aside the jury verdict to the extent of vacating the punitive damages awards for violation of 42 USC § 1983 based on malicious prosecution and excessive force against Perez and Mendez respectively, dismissing the malicious prosecution and punitive damages claims, and ordering a new trial on compensatory damages

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando Acosta, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische
Barbara R. Kapnick, JJ.

14900-
14901
Index 307977/08

_____x

William Cardoza,
Plaintiff-Appellant,

Vielka De Leon,
Plaintiff,

-against-

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

P.O. Steven Tomala, et al.,
Defendants.

_____x

Plaintiff William Cardoza appeals from the order of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 18, 2014, which, to the extent appealed from as limited by the briefs, granted defendants the City of New York, P.O. Benjamin Perez and P.O. Carlos Mendez's posttrial motion to set aside the jury verdict to the extent of vacating the punitive damages awards for violation of 42 USC § 1983 based on malicious prosecution and excessive force against Perez and Mendez respectively, dismissing the malicious prosecution and punitive damages claims, and ordering a new trial on compensatory damages

on plaintiff's state law claim of excessive force, unless he stipulated to a reduction in damages for past pain and suffering from $500,000 to $200,000 and for future pain and suffering from $2,000,000 to $150,000, and from the order of the same court and Justice, entered March 19, 2014, which denied as moot plaintiff's motion for attorneys' fees.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel) and Burns & Harris, New York (Christopher J. Donadio of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris, Pamela Seider Dolgow and Lavanya Pisupati of counsel), for respondents.

KAPNICK, J.

In this action alleging, inter alia, excessive force and malicious prosecution, plaintiff William Cardoza (plaintiff or Cardoza) appeals from an order of Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 18, 2014, to the extent it granted defendants City of New York, Police Officer Benjamin Perez, and Police Officer Carlos Mendez's CPLR 4404 motion to set aside the part of the jury verdict finding Perez liable for malicious prosecution and Perez and Mendez liable for punitive damages, and ordered a new trial on damages on the excessive force claim against Mendez unless plaintiff agreed to a reduction from $500,000 to $200,000 for past pain and suffering and from $2 million to $150,000 for future pain and suffering.[1]

Plaintiff also appeals from an order of the same court and Justice, entered March 19, 2014, which denied as moot his motion for legal fees pursuant to 42 USC § 1988.

Background

On May 30, 2008, at approximately 8:30 p.m., New York City Police Officers Perez, Mendez, and Steven Tomala confronted

[1] The complaint also asserted causes of action on behalf of plaintiff Vielka De Leon, Cardoza's wife. The jury found in favor of defendants on all claims by De Leon and they are not at issue on this appeal. Also, defendants are not cross-appealing from the trial court's order declining to set aside the jury's finding of liability on plaintiff's excessive force claim.

plaintiff while he was in possession of and drinking alcohol from an open container in front of the Bronx building where he lived. At trial, the officers testified that, when plaintiff failed to comply with their requests to produce identification, and attempted to walk away, they proceeded to arrest him. According to the officers, he resisted, refusing to turn around so they could handcuff him, tensing and flailing his arms, and refusing to let go of a fence or gate along the side of the building. Mendez then struck plaintiff's hand three to five times with a baton to get him to let go. This resulted in a displaced, comminuted, open fracture to the second metacarpal bone of plaintiff's right hand. Mendez also pepper-sprayed plaintiff in the course of the altercation. Plaintiff contended that he did not understand English, was attempting to comply, and did not resist arrest. The entire incident was captured by a video surveillance camera, and the recording was entered into evidence during the trial. The video depicts plaintiff standing on the threshold of his building between the sidewalk and the entrance, looking into an area of the building area that his wife described as a courtyard.

Plaintiff testified at trial, through a Spanish interpreter, that on the day of the incident, he finished work at 4:30 p.m., returned home, and cooked food, which he brought to his wife and

daughters, who were downstairs in front of the building. Plaintiff, who was 49 years old at the time, also testified that he drank two or three beers while cooking, and brought a beer downstairs with him. His wife testified that she was in the building's courtyard with her daughters when plaintiff came downstairs. Plaintiff testified that he was standing near the entrance, facing the building, when the police approached him and spoke to him in English, which he does not understand. His wife, who speaks English and Spanish, told him that they were requesting identification. Plaintiff testified that he took out his wallet, but could not see well because it was dark and overcast, so he attempted to move toward a light. He recalled that when he turned to pull out his wallet, he was pepper-sprayed in the eyes, and could not see. He testified that he was struck with what he described as a metal tube six or seven times on his right arm, although he did not attempt to punch any of the officers, kick them, push them, prevent them from putting his hands behind his back, or resist them.

On cross-examination, while watching the surveillance video, plaintiff agreed with defendants' counsel that the officers approached him and spoke with him for 30 seconds, before he took two steps away from them toward the light. At that time, they pushed him against the wall of the building, and 10 seconds

later, they pepper-sprayed him. The video shows that Mendez turned plaintiff around, grabbed hold of his right hand, and placed it behind his back. Plaintiff acknowledged that the video showed him pulling his hand back in front of his body and grabbing the fence as Mendez pulled on him in an effort to get him to let go. He testified that he did not remember holding onto the fence. Instead, he testified that he had his hand against the wall to prevent himself from falling as the officers were pulling on him. When shown the portion of the surveillance video where he grabbed the fence, he responded, "What I'm seeing is I'm there, but that I'm trying not to be arrested."

Continuing to watch the video, he agreed that it showed Mendez turn against the wall and try to push him away from the wall, but he did not let go, and Mendez then grabbed his arm, but he still did not let go. Plaintiff testified that, at that point, Mendez hit him with a baton. The video shows that Mendez struck plaintiff's right arm or hand with a baton three to five times. Other officers were lifting plaintiff's left leg and pulling on it, while plaintiff continued to hold something in the wall with his right hand, before he collapsed onto the sidewalk.

After plaintiff let go, it took approximately 30 seconds for the officers to handcuff him. The entire encounter took just under two minutes, beginning from when Perez first approached

plaintiff.

Plaintiff's wife testified that when the officers approached her husband and requested identification, she told them that he did not understand English, and she told him that they wanted to see his identification. According to her, after he took his wallet out, he did not get a chance to open it because "they [were] all over him." She jumped between him and the officers, but was led away by another officer. She maintained that the entire time she was on the street, she heard the officers speaking only in English.

Mendez testified that on the evening of the encounter, he, Perez and Tomala had been assigned to address quality of life issues, such as public drinking, public urination, selling drugs from corners or buildings, jaywalking, and riding bicycles on sidewalks. Perez testified that from the car they were in, he observed plaintiff in front of the building with an open container. He stepped out, approached plaintiff, and asked him for identification twice, in English. The first time, plaintiff did not respond. The second time plaintiff answered, "No ID," and Perez asked him again in Spanish, in case he did not understand. After being asked multiple times, however, plaintiff did not produce identification, and attempted to walk away.

Mendez testified that, while dealing with other people

nearby, he heard plaintiff saying that he would not give Perez his identification. Mendez, who is fluent in English and Spanish, then joined Perez and requested identification. While Mendez could not recall whether he and Perez spoke with plaintiff in English or Spanish, he testified that he did not get the impression that plaintiff did not understand. He testified that plaintiff took his wallet out, but refused to provide any identification. At that point, he was placed under arrest, at which point he attempted to walk past the officers, who pushed him back against the wall. Mendez testified that lighting conditions were "ideal," and plaintiff never indicated that he needed additional light.

Mendez testified that after he and Perez pushed plaintiff back against the wall, plaintiff did not comply with their orders that he was under arrest, and refused to give them his hands. Mendez tried to grab plaintiff's hands, but plaintiff's arms were at his sides, and he remained stiff for about 10 to 15 seconds before Mendez pepper-sprayed him.

At that time, plaintiff's wife intervened and was led away by Tomala, at which time Mendez was able to turn plaintiff around, briefly getting at least one of plaintiff's hands behind his back before plaintiff moved it forward again and grabbed the fence. Perez and Mendez pulled on plaintiff, trying to pry his

grip loose from the fence. Tomala joined them, and grabbed plaintiff's left leg. He testified that when he grabbed plaintiff's leg, plaintiff attempted to "kick his way out of it," pulling his leg back and forth like a tug of war.

Perez testified that when plaintiff's left hand came loose from the fence, he swung his arm at Perez with a closed fist. Tomala described it as plaintiff swinging an arm so he would not be handcuffed. When confronted with the statement in the criminal complaint he signed that plaintiff swung a closed fist at him, Perez stated, "I never said he tried to punch me." Perez also testified that, although it is not visible on the video, plaintiff shuffled his feet, kicking Perez's feet in the process.

Having failed to remove plaintiff's right hand from the fence, Mendez removed his baton and struck plaintiff's hand until he let go of the fence. Mendez described the level of force of the first strike as "medium," and the subsequent strikes as "less."

Tomala, who was the last to join Perez and Mendez in dealing with plaintiff, testified that he spoke to plaintiff in English, as did Perez and Mendez.

Plaintiff was taken to the police precinct in a car, and was subsequently taken to a hospital, where he had surgery on his right hand. He remained in custody until June 5, 2008,

handcuffed to the hospital bed until he was released on his own recognizance when the hospital discharged him.

Perez, the arresting officer, created the arrest report and signed the criminal complaint prepared by the Bronx County District Attorney's Office. The brief narrative in the arrest report stated that, after plaintiff was observed consuming alcohol, he refused to produce identification, remained uncooperative, "and did swing at arresting officer, refusing to be taken into custody. While attempting to arrest defendant [plaintiff], OC spray was used to subdue him. Defendant [plaintiff] was also struck with baton to be subdue[d]." An online booking worksheet further noted that plaintiff did not use any physical force. The criminal complaint charged plaintiff with resisting arrest and disorderly conduct,[2] but not an open container violation, and stated that he "began to flail his arms and twisted his body, swung his closed fists at deponent, kicked him in his feet, and twisted his body preventing deponent from placing him in handcuffs."

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[2] "A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person" (Penal Law § 205.30). "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: . . . He engages in fighting or in violent, tumultuous or threatening behavior" (Penal Law § 240.20[1]).

Ultimately, the Bronx District Attorney's Office called Tomala as the only witness, and proceeded with the criminal trial only on the charge of disorderly conduct, which was dismissed for failure to prove a prima facie case at the end of the People's case.

In the civil trial, plaintiff called as a medical expert Dr. Jerry Lubliner, a board certified orthopedic surgeon. Dr. Lubliner testified that, as a result of being struck on the hand, plaintiff suffered a displaced, comminuted, open fracture to the second metacarpal bone of his right hand and a fracture of his right index finger. Plaintiff underwent open reduction internal fixation surgery with wires to hold the second metacarpal together. Dr. Lubliner examined plaintiff in September 2010, more than two years after the incident, at which time he observed muscle loss in plaintiff's right forearm and swelling in his right wrist. Plaintiff's grip in his dominant right hand was 60% weaker than in his left, and based on an active range of motion test, plaintiff had a 50% loss in his right index finger's range of motion. Dr. Lubliner opined that the injuries were permanent in nature and that plaintiff was unlikely to ever be able to make a fist or regain the strength in his right hand.

Plaintiff also called Dr. Hugo Morales, a licensed psychiatrist, whom plaintiff began seeing a month and a half

after the incident, after being referred by counsel. Plaintiff was still seeing Dr. Morales at the time of trial. Dr. Morales testified that he took a history from plaintiff and his wife, establishing, among other things, that plaintiff had been a good-natured person who had never been mentally sick before the incident. However, plaintiff told him that after the incident, he became isolated, fearful and depressed. He could not sleep, felt useless, had suicidal ideations, and was unable to enjoy or participate in social activities.

Dr. Morales diagnosed plaintiff with posttraumatic stress disorder and major depressive disorder as a result of the incident. He opined that plaintiff would need treatment for "10 to 15, 20 years." He explained that posttraumatic stress disorder "occurs after the individual has suffered what the individual perceived [sic] a threat to a [sic] physical and mental well being by trauma." The symptoms of posttraumatic stress disorder are flashbacks and nightmares, arousal or agitation, and avoidance of situations that will trigger memories of the trauma. Dr. Morales testified that plaintiff has experienced each of these symptoms.

Defendants called Dr. Ramesh Gidumal, a board certified orthopedic surgeon, who examined plaintiff and testified that both bones had healed completely and properly, that plaintiff had

"virtually a full range of motion" and could open and close his right hand. Dr. Gidumal stated that although the range of motion plaintiff demonstrated in his right index finger was less than in his left, plaintiff was resisting, and would not allow him to bend the index finger. He noted that the Xray report from the night of the incident stated that plaintiff might have an old fracture to his right thumb.

Dr. Gidumal further stated that a grip strength test for the right hand resulted in variable readings, indicating that plaintiff was not giving maximum effort. He opined that plaintiff had "no or minimal loss of function of his finger," and could lift, carry, grasp and manipulate objects, including screwdrivers, hammers, and perform plastering and painting type work. He further opined that plaintiff's failure to follow up with physical therapy was "a major cause for his minor limitations and motion." He opined that plaintiff had "no or minimal objective evidence of a problem, and therefore [was] not disabled from this injury."

Dr. William Kaplan, a board certified psychiatrist, also examined plaintiff on behalf of defendants, and opined that plaintiff did not meet the criteria for a diagnosis of post-traumatic stress disorder. Specifically, he testified that the first criterion is that the incident must:

> "rise to a certain level where the individual was threatened with severe bodily harm or realized he was threatened with death, so it's obviously something very serious, and you have to have experienced that, and it could be something, a natural disaster, you are in, you know, a tsunami or a hurricane or a tornado, or it could be an assault, that somebody did something very bad to you like a rape or a situation where you thought, you know, 'I could be seriously injured or even killed in this situation,' and that has to happen. Then you also have to have experienced a sense of helplessness or hopelessness, or feeling absolutely overwhelmed, like this is something way beyond the control of what you could normally deal with or handle."

He explained that he had watched the video of the confrontation and it showed a "step-wise graduated response" involving a "back and forth" with the officers, and was not life-threatening or beyond plaintiff's control to manage.

Responding to specific interrogatories on the verdict sheet, the jury found that Mendez used excessive force in arresting plaintiff, which violated plaintiff's civil rights pursuant to 42 USC § 1983, and that Perez knowingly provided false information to the District Attorney's Office, resulting in plaintiff's prosecution, which violated his civil rights. Regarding the malicious prosecution claim, the jury responded affirmatively to the second interrogatory, which read:

> "Did plaintiff prove by a preponderance of the evidence that Officer Perez knowingly

> provided false information to the Office of the District Attorney which resulted in William Cardoza's prosecution?"

The jury awarded plaintiff $500,000 for past pain and suffering and $2 million for future pain and suffering, intended to provide compensation for a period of 15 years. The jury also found, by clear and convincing evidence, that plaintiff was entitled to punitive damages against Perez and Mendez for violating his civil rights, and awarded him $750,000 in punitive damages against each, for a total verdict of $4 million.

After the trial, defendants moved, pursuant to CPLR 4404, to set aside the verdict and grant judgment for them, on the ground that plaintiff failed to establish a prima facie case as to his causes of action for malicious prosecution, assault and battery/excessive force and punitive damages, or, alternatively, to set aside the verdict as against the weight of the evidence, in the interest of justice and/or based on the damages being excessive, and grant a new trial. Plaintiff moved for attorneys' fees, pursuant to 42 USC § 1988, as the prevailing party on his federal civil rights claims under 42 USC § 1983.

Supreme Court granted defendants' motion insofar as it sought to set aside the jury verdict on the claims for malicious prosecution and punitive damages, finding that they were not supported by the record and that plaintiff had not proved a prima

facie case. The court also ordered a new trial on damages unless plaintiff stipulated to a reduction from $500,000 to $200,000 for past pain and suffering and from $2,000,000 to $150,000 for future pain and suffering.

Based on the video recording of the incident and plaintiff's testimony, including his statement that "he did not want to be arrested," the trial court held that there was insufficient evidence as a matter of law for the jury to have found for plaintiff on his malicious prosecution claim. The court further held that the record contained no showing of false statements, and thus plaintiff had failed to establish malice, which was necessary for a prima facie case of malicious prosecution and to sustain his claim for punitive damages. The court refused to disturb so much of the jury verdict as found Mendez liable for excessive force.

The court further held that the awards of $500,000 for past pain and suffering and $2 million for future pain and suffering over 15 years deviated from what would constitute reasonable compensation for plaintiff's injuries, based on a review of "prior verdicts for such injuries." With regard to plaintiff's hand injury, the court noted that plaintiff had not received any treatment since 2009 and that the extent of residual effects and permanency of that injury were in dispute. With regard to

plaintiff's claim of post-traumatic stress disorder, the court noted that "discrepancies" existed in the testimony of plaintiff's expert concerning the facts underlying the incident and the detailed testimony of defendants' expert that plaintiff did not meet the criteria of post-traumatic stress disorder. In a separate order, the court denied plaintiff's motion for attorneys' fees as moot.

Discussion

Where, as here, a jury verdict is set aside on the ground that, as a matter of law, it is not supported by sufficient evidence, the relevant inquiry for this Court is whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).[3] Further,

> "in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may

[3] Setting aside a verdict as against the weight of the evidence is quite different from setting it aside for insufficient evidence as a matter of law, in that, among other things, the former requires a new trial rather than a judgment in favor of the moving party (*Cohen*, 45 NY2d at 498; *see also* Siegel NY Prac § 405 [5th ed 2011]).

> not conclude that the verdict is as a matter of law not supported by the evidence" (*id.*).

Applying these principles in the instant context, we are asked to consider whether there is simply no valid line of reasoning or permissible inferences that could have led the jury to find in favor of plaintiff on his claims for malicious prosecution and punitive damages.

"The tort of malicious prosecution protects the personal interest of freedom from unjustifiable litigation[,] . . . [t]he essence [of which] is the perversion of proper legal procedures" (*Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied* 423 US 929 [1975]). To sustain a claim for malicious prosecution, a plaintiff must establish the following elements: (1) the initiation of a criminal proceeding against him or her, (2) termination of the proceeding in his or her favor, (3) lack of probable cause for the criminal proceeding, and (4) actual malice (*id.; see also Torres v Police Officer Jones*, _NY3d_, 2016 NY Slip Op 01254 [2016]). "Failure to establish any one of these elements defeats the entire claim" (*Brown v Sears Roebuck & Co.*, 297 AD2d 205, 208 [1st Dept 2002]). Since the first two elements are not disputed by defendants on appeal, we will discuss probable cause and actual malice only.

The element of lack of probable cause traditionally looks to

whether probable cause existed to commence the criminal proceeding (*Broughton*, 37 NY2d at 451), not whether there was probable cause to arrest the plaintiff. As plaintiff argues, a party may establish that there was a lack of probable cause to commence a criminal proceeding by proving that there was no probable cause to arrest in the first place (*see Brown*, 291 AD2d at 211). However, plaintiff did not actually pursue this theory at trial. A review of the record reveals that the issue of probable cause to arrest was never submitted to the jury, because plaintiff's false arrest claim was previously dismissed on a motion by defendants for summary judgment (Kibbie F. Payne, J.). The trial court did specifically charge the jury as follows: "I will remind you now again the arrest in this case of Mr. Cardoza is not the issue in terms of the legality of the arrest. [There] has already been a finding that it was proper and legal to arrest Mr. Cardoza." In fact, the issue submitted to the jury on the malicious prosecution claim was framed by the court in its charge as whether plaintiff had established "that *at the time the prosecution was initiated*, the defendants . . . did not have probable cause to believe that William Cardoza was guilty of the crime of resisting arrest, or the violation of disorderly conduct and that the defendants acted maliciously" (emphasis added).

Despite the arguments put forth by the parties and the

statements made by the court in its posttrial decision, the issue of whether there was probable cause to arrest plaintiff was never submitted to the jury. Nor did the jury make a finding, contrary to the trial court's analysis, that probable cause to arrest did not exist in this case.[4] Rather, the only question submitted to the jury on the verdict sheet regarding malicious prosecution was whether Perez knowingly provided false information to the Office of the District Attorney, resulting in plaintiff's prosecution. Thus, we must examine how the jury's response to this one question supports findings that defendants both lacked probable cause to prosecute and possessed actual malice, so as to satisfy the elements of the malicious prosecution claim.

"In the context of a malicious prosecution claim, probable cause under New York law is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of" (*Rounseville v Zahl*, 13 F3d 625, 629-630 [2d Cir 1994] [internal quotation marks omitted]). Stated another way, "Probable cause consists of such facts and

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[4] The court, in its posttrial decision, inexplicably stated that "Judge Payne's decision leaves the issue of whether or not the police had probable cause to arrest plaintiff for resisting arrest and disorderly conduct to the jury[,]" and that "[t]he jury found probable cause did not exist," which it did not.

circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" (*Colon v City of New York*, 60 NY2d 78, 82 [1983]). Here, it appears that plaintiff endeavored to prove that at the time the prosecution was initiated, a reasonably prudent officer would not have believed that plaintiff was guilty of resisting arrest and disorderly conduct based on the facts then known to defendants, as shown via the surveillance video and other testimony. By determining that Perez knowingly provided false information to the prosecutor, the jury essentially rejected defendants' claim that they had probable cause to believe that plaintiff was guilty of resisting arrest and acting in a disorderly manner by kicking and swinging his fists.[5] The jury was free to assess the surveillance video and the other testimony and determine whether plaintiff behaved in a manner that would support the charges of resisting arrest and disorderly conduct, as defendants claimed, or, did not act in such a manner, as plaintiff claimed.

The actual malice element "does not require a plaintiff to prove that the defendant was motivated by spite or hatred, although it will of course be satisfied by such proof" (*Nardelli*

[5] Indeed, in accordance with PJI 3:50, the jury was charged with the elements of the crimes of resisting arrest and disorderly conduct.

v Stamberg, 44 NY2d 500, 502-503 [1978]). Since "[a]ctual malice is seldom established by direct evidence of an ulterior motive" (*Martin v City of Albany*, 42 NY2d 13, 17 [1977]), it "may be proven by circumstantial evidence" (*Nardelli*, 44 NY2d at 502), and depends "upon inferences to be reasonably drawn from the surrounding facts and circumstances" (*Martin*, 42 NY2d at 17). Actual malice may also be inferred from a total lack of probable cause (*id.*; *see also* 2A NY PJI3d 3:50.4 at 520 [2016]) or from defendant's intentionally providing false information to law enforcement authorities (*Robles v City of New York*, 104 AD3d 829 [2d Dept 2013]). It is important to note that the lack of probable cause and actual malice elements are independent, and "a jury may, but is not required to, infer the existence of actual malice from the fact that there was no probable cause to initiate the proceeding" (*Martin*, 42 NY2d at 17). As a result, it is advisable to separate the questions of probable cause and malice on a verdict sheet (*see* 2A NY PJI3d 3:50.4 at 520 [2016]). Here, however, while there was only one question, the trial court did charge the jury on both the elements of probable cause and malice, and instructed the jury that only if they found that "plaintiff [] prove[d] *both* that the defendants did not have probable cause *and* that they acted maliciously" (emphasis added) should they move on to consider damages, which they did.

Based on the foregoing, and contrary to the trial court's finding, the jury's verdict on malicious prosecution was improperly set aside as insufficient as a matter of law. It cannot be said that there was no valid line of reasoning that could possibly have led rational people to the conclusion reached by the jury on the basis of the evidence at trial. Moreover, the court impermissibly usurped the jury's role and made factual determinations. The court's statement that the plaintiff "refus[ed] to submit to the authority of the police" is a clear example of the court substituting its judgment for that of the jury. When the facts give rise to conflicting inferences, as they do here, it is for the jury, not the court, to resolve those conflicts. Accordingly, the jury's verdict in favor of the plaintiff on his malicious prosecution claims under state law and 42 USC § 1983 must be reinstated.[6]

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[6] Although the trial court failed to specifically address this claim in its posttrial decision, the jury did find for plaintiff on his 42 USC § 1983 claim based on malicious prosecution. We assume from the trial court's discussion that it intended to set aside this jury finding for the same reasons that the state law malicious prosecution claim was set aside. Indeed, the two claims are virtually identical (*see Torres*, 2016 NY Slip Op. 01254, at 26-27). "[T]o assert a § 1983 action based on malicious prosecution, the plaintiff must show: a sufficient restraint on his or her liberty to implicate fourth amendment rights; that the defendant initiated . . . the prosecution against the plaintiff without probable cause; that the defendant acted maliciously; and that the proceeding terminated in plaintiff's favor" (2A NY PJI3d 3:60.4 at 676 [2016]; *see Fulton*

With respect to the issue of punitive damages, questions 8 and 10 of the verdict sheet asked the jury if plaintiff was entitled to punitive damages for a violation of plaintiff's civil rights. This signals that the punitive damages were tied to plaintiff's constitutional tort claims under 42 USC § 1983, which stemmed directly from plaintiff's excessive force[7] and malicious prosecution claims. In setting aside the punitive damages award, the trial court failed to distinguish the punitive damages awarded in questions 8 and 9 ($750,000 against Perez), which are connected to the § 1983 malicious prosecution claim, from the punitive damages awarded in questions 10 and 11 ($750,000 against Mendez), which correlates to the § 1983 excessive force claim. The court commented generally that plaintiff was not entitled to punitive damages. We will now consider the viability of each award.

"Punitive damages are available in § 1983 actions when a defendant's conduct is shown to be motivated by evil motive or

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v Robinson, 289 F3d 188, 195 [2d Cir 2002]).

[7] "A § 1983 claim may be brought for the use of excessive force in violation of the Fourth Amendment to the United States Constitution" (2A NY PJI3d 3:60.2 at 671 [2016], citing *Delgado v City of New York*, 86 AD3d 502 [1st Dept 2011]). Again, despite the fact that the trial court did not specifically address plaintiff's section 1983 claims, it does appear that the excessive force section 1983 claim was not set aside. Therefore, we do not address it on the merits.

intent, or when it involves reckless or callous indifference to federally protected rights of others" (2A NY PJI3d 3:60.4 at 689 [2016], citing *Smith v Wade*, 461 US 30 [1983]). Moreover, "[p]unitive . . . damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant[,] but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future" (*Walker v Sheldon*, 10 NY2d 401, 404 [1961]). Here, contrary to the trial court's assessment, there was evidence from which the jury could have reasonably concluded that Perez and Mendez acted with reckless indifference or malice when they, respectively, initiated the prosecution against plaintiff without probable cause and used excessive force in effecting his arrest. Although the jury's punitive damages awards may be excessive, it cannot be said that plaintiff is not entitled to these damages as a matter of law.

In reviewing the excessiveness of the punitive damages awards, the issue is whether they "deviate[] materially from what would be reasonable compensation" (CPLR 5501[c]). "The method of [this] review is to evaluate whether the appealed award deviates materially from comparable awards" (*Donlon v City of New York*, 284 AD2d 13, 15 [1st Dept 2001]). Here, a review of analogous

cases reveals that the punitive damages awarded by the jury fall far outside the boundaries of previous awards in similar § 1983 cases.

In *O'Neill v Krzeminski* (839 F2d 9, 13-14 [2d Cir 1988]), a case cited by defendants, the jury's punitive awards totaling $185,000 for the plaintiff's § 1983 excessive force claim was upheld where the plaintiff was struck repeatedly about the head by two police officers while he was handcuffed and unable to defend himself.

In *Lee v Edwards* (101 F3d 805, 812-813 [2d Cir 1996]), the plaintiff's $200,000 punitive damage award, solely for his § 1983 malicious prosecution claim, was found to be excessive and reduced to $75,000. The court reasoned that while the defendant's conduct in filing a false offense report recording that the plaintiff had assaulted a police officer and resisted arrest was a reprehensible abuse of power, a comparison of other police misconduct cases revealed that $200,000 was an amount awarded in far more egregious cases (*id.* at 812).[8]

[8] The court also held that plaintiff was entitled to punitive damages, notwithstanding the fact that the jury only awarded Lee $1 in compensatory damages on his malicious prosecution claim (101 F3d at 811). Here, while plaintiff would have been entitled to pursue recovery of compensatory damages for his malicious prosecution claim (PJI 3:50), this issue was not submitted to the jury and is not raised on appeal.

In *Ismail v Cohen* (899 F2d 183, 185 [2d Cir 1990]), the plaintiff suffered two displaced vertebrae, a cracked rib, and serious head trauma after his encounter with a police officer who was threatening to write him a parking ticket for violating alternate side parking regulations. The plaintiff was held in custody for approximately 60 hours and was made to stand trial on charges of resisting arrest, obstructing governmental administration, and harassment. He brought § 1983 claims for assault, battery, false arrest, malicious prosecution and abuse of process, and was awarded $150,000 in punitive damages. The trial court found the award excessive, but the Second Circuit upheld it, noting that the plaintiff had had to face a criminal prosecution and suffered permanent physical and emotional injury (*id.* at 187).

Finally, in *King v Macri* (993 F2d 294 [2d Cir 1993]), the jury found that the plaintiff, who was in the hallway of the New York City Criminal Court in Manhattan, entered a courtroom looking for his attorney when he encountered two court officers, who demanded to see his identification. When the plaintiff produced his driver's license, one of the officers tore his license into pieces and attempted to arrest the plaintiff, which precipitated a struggle. The officers then punched the plaintiff repeatedly and used a choke hold on him before placing him under

arrest and sending him to Rikers Island, where he was strip-searched and held for two months, awaiting trial on criminal charges that included resisting arrest and disorderly conduct. The plaintiff brought § 1983 claims for excessive force, false arrest, and malicious prosecution. On appeal, the jury's awards of $175,000 and $75,000 in punitive damages against the officers were reduced to $100,000 and $50,000 (*id.* at 299).

Based on the foregoing, we find that the amount of punitive damages awarded to plaintiff against Perez ($750,000) and Mendez ($750,000) deviates materially from what is reasonable, and should be reduced to $75,000 against each of them.[9]

The jury also awarded plaintiff $500,000 for past and $2,000,000 for future pain and suffering. The trial court held that these amounts were excessive, and conditionally reduced the awards for past and future pain and suffering to $200,000 and $150,000, respectively. While we agree that the jury awards for past and future pain and suffering were excessive, we find that the conditional amounts set by the trial court are not reasonable.

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[9] We note that "punitive damages may not be awarded against a municipality" (2A NY PJI3d 3:60.4 at 689 [2016]). While the reduction of the jury's award for punitive damages is substantial, a $75,000 award against each individual defendant will, in our opinion, surely act as a deterrent against similar conduct in the future.

In *Pinto v Gormally* (109 AD3d 425 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]), this Court upheld a jury award of $200,000 for past pain and suffering and $400,000 for future pain and suffering (*Pinto v Gormally*, 2013 WL 6215563, *2 [Sup Ct, Bronx County 2013]) where the plaintiff laborer sustained fractures to his left hand after a box of tiles fell on his hand upon his slip and fall on stairs.

In *Figueroa v City of New York* (78 AD3d 463 [1st Dept 2010]), a jury award for past pain and suffering, which covered a period of 14 years, was reduced from $2.5 million to $1.25 million where the plaintiff sustained a fractured right hand and developed post-traumatic stress disorder after police "pointed a gun at him, 'smacked' him, hit him with the gun, stomped on him, and arrested him during an investigatory stop" (*id.* at 463).

In *Diouf v New York City Tr. Auth.* (77 AD3d 600 [1st Dept 2010]), the 55-year-old plaintiff "sustained painful fractures to both wrists" and was required to undergo two surgeries and a course of occupational therapy, which, nevertheless, left him with "reduced ranges of motion, tenderness and reduced grip strength" (*id.* at 600). A jury award of $800,000 for future pain and suffering was unanimously affirmed.

Given the evidence of plaintiff's fractured right hand and post-traumatic stress disorder, we find that an award of $400,000

for past pain and suffering and $1,250,000 for future pain and suffering is warranted.

Finally, plaintiff asserts that he is entitled to attorneys' fees pursuant to 42 USC § 1988(b), as the prevailing party in an action pursuant to 42 USC § 1983. Specifically, he seeks $250,000 in attorneys' fees. Defendants concede that Supreme Court erred in "its blanket denial" of plaintiff's application for attorneys' fees.

In light of the fact that defendants have failed to set forth any argument challenging the amount of legal fees sought by plaintiff, and because the trial court failed to address this issue, erroneously deeming it moot, the matter should be remanded to Supreme Court for a determination of legal fees.

Accordingly, the order of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 18, 2014, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' posttrial motion to set aside the jury verdict to the extent of vacating the punitive damages awards for violation of 42 USC § 1983 based on malicious prosecution and excessive force against Perez and Mendez respectively, dismissing the malicious prosecution and punitive damages claims, and ordering a new trial on compensatory damages on plaintiff's state law claim of excessive force, unless he stipulated to a reduction

in damages for past pain and suffering from $500,000 to $200,000 and for future pain and suffering from $2,000,000 to $150,000, should be reversed, on the law and the facts, without costs, the state law malicious prosecution claim, the 42 USC § 1983 malicious prosecution claim and the punitive damages claim under 42 USC § 1983 reinstated, and a new trial ordered on damages unless plaintiff stipulates, within 30 days after service of a copy of this order with notice of entry, to a reduction of the jury awards for past and future pain and suffering to $400,000 and $1,250,000, respectively, and a reduction of the jury awards for punitive damages to $75,000 against Perez and $75,000 against Mendez, and to entry of a judgment in accordance therewith. The order of the same court and Justice, entered March 19, 2014, which denied as moot plaintiff's motion for attorneys' fees, should be reversed, on the law, without costs, the motion

granted, and the matter remanded to Supreme Court for a determination of reasonable attorneys' fees.

All concur.

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

ENTERED: APRIL 12, 2016

CLERK