SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 14, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9509 The People of the State of New York, Respondent, Ind. 5944/06

-against-

Eric Bright,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

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Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about July 25, 2011, which adjudicated defendant a level three sexually violent predicate offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in denying defendant's request for a downward departure (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US, 130 S Ct 552 [2009]; *People v Mingo*, 12 NY3d 563, 568 n 2 [2009]). The mitigating factors cited by defendant are outweighed by his very

serious criminal record, which includes, among other things, the underlying sex crime as well as an egregious prior sex crime and a conviction for failing to register in connection with a prior sex offender adjudication. The record does not establish that psychiatric treatment has reduced defendant's risk of reoffense to an extent warranting a downward departure.

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9512 The People of the State of New York, Ind. 4511N/07
Respondent,

-against-

Robert Johnson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Robert M. Stolz, J.), rendered on or about April 14, 2010,

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: MARCH 14, 2013

CLERK

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

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9513 Robert Cenite, Index 112380/08
Plaintiff-Respondent,

-against-

Pyramid Floor Covering, Inc.,
Defendant-Appellant.

_____

Camacho Mauro Mulholland, LLP, New York (Peter J. Lo Palo of counsel), for appellant.

Kujawski & Kujawski, Deer Park (Bryan P. Kujawski of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about February 3, 2012, which, in this personal injury action, denied defendant's motion to set aside the jury award in the amount of $180,000 for plaintiff's past lost earnings, and granted plaintiff's motion for an order entering judgment in accordance with the jury verdict, unanimously affirmed, with costs.

Although the lost earnings award was based solely on plaintiff's testimony, without supporting documentation, defendant did not challenge the testimony by using plaintiff's

employment records or any other evidence (*see Kane v Coundorous*, 11 AD3d 304, 305 [1st Dept 2004]). The evidence of plaintiff's earnings immediately preceding his accident was sufficient to support the jury's award for past lost earnings (*id.*).

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9515 Dr. Georg Kremer, etc., et al., Index 603724/09
Plaintiffs-Appellants,

-against-

Sinopia LLC,
Defendant,

Alex Warren,
Defendant-Respondent.

_____

Robert I. Elan, New York, for appellants.

Roy A. McKenzie, New York, for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about January 9, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiffs' cross motion for partial summary judgment on their claims of fraudulent inducement and unjust enrichment as against defendant Alex Warren and to hold Warren liable for monies owed for the inventory of plaintiff Kremer Pigments, Inc. and for goods delivered by plaintiff Kremer Pigmente GMBH & Co. KG to defendant Sinopia LLC, and granted Warren's motion to dismiss those claims as against him, unanimously affirmed, without costs.

The fraudulent inducement claim fails because the allegation that plaintiff Dr. Georg Kremer justifiably relied on a pre-

contractual representation by Warren is refuted by the merger/integration clause of the Stock Purchase Agreement (*see generally National Union Fire Ins. Co. v Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006], *lv dismissed* 7 NY3d 886 [2006]).

Plaintiffs argue that Warren breached the Stock Purchase Agreement by failing to pay for the inventory of Kremer Pigments, Inc. However, the Stock Purchase Agreement, to which Dr. Kremer and Sinopia are the only parties, requires Sinopia to deliver a note for the inventory value for which Sinopia and Warren would be jointly and severally liable. Unfortunately for plaintiffs, Sinopia failed to deliver such a note. Warren – who signed the Stock Purchase Agreement only in his capacity as managing member of Sinopia – cannot be held personally liable for Sinopia's breach (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]). The complaint contains no allegations that would permit a court to pierce Sinopia's corporate veil.

Plaintiffs contend that Warren breached the Minutes Agreement (i.e., the agreement contained in the minutes of a Kremer Pigments, Inc. board meeting), which made him liable for all claims and outstanding invoices incurred "during his tenure,"

by failing to pay for goods delivered to Sinopia, as opposed to Kremer Pigments, Inc. However, it is clear that the tenure to which the Minutes Agreement refers is Warren's tenure as president of Kremer Pigments, Inc.

To the extent plaintiffs allege that Warren was unjustly enriched because Sinopia did not pay for all of Kremer Pigments, Inc.'s inventory and received goods from Kremer Pigmente GmbH for which it did not pay, the claim fails because, as indicated, the complaint does not contain allegations sufficient to pierce Sinopia's corporate veil. To the extent plaintiffs allege that Warren was unjustly enriched because Kremer Pigments, Inc. received goods from Kremer Pigmente GmbH for which it did not pay, the claim fails because there is a valid written agreement covering this dispute, i.e., the Minutes Agreement in which Warren agreed to be personally liable for (inter alia) the goods that Kremer Pigments, Inc. had received from Kremer Pigmente GmbH during his tenure as president of Kremer Pigments, Inc. (*see HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43, 54 [1st Dept 2006]).

The fact that no depositions have been taken does not render summary judgment premature, since plaintiffs failed to show that

discovery might lead to facts that would support their opposition to the motion (*see e.g. Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 [1st Dept 2009]).

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9516 The People of the State of New York, Ind. 2131/08
Respondent,

-against-

Handerson Polanco Brujan,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry Jamieson of counsel), and Linklaters, LLP, New York (Sterling P.A. Darling, Jr., of counsel), for appellant.

Robert T Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Colleen Duffy, J.), rendered May 14, 2010, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of five years, with four years' postrelease supervision, unanimously affirmed.

The court providently exercised its discretion in reopening the suppression hearing, after both sides had rested but before any decision on the merits had been made, to allow the People's witness to provide additional testimony bearing on the legality of the police conduct (*see People v Cestalano*, 40 AD3d 238 [1st Dept 2007], *lv denied* 9 NY3d 921 [2007]). A request to present additional evidence in this type of situation should be addressed

to the court's discretionary power to alter the order of proof within a proceeding (*see People v Whipple*, 97 NY2d 1, 6 [2001]), rather than being governed by the restrictions on rehearings set forth in *People v Havelka* (45 NY2d 636 [1978]). In the circumstances presented, we do not find that there was a significant risk of tailoring, and, as in *People v Alvarez* (51 AD3d 167, 179 [2008], *lv denied* 11 NY3d 785 [2008]), "we believe that the hearing court was more than up to the task of evaluating the risk of manufactured testimony."

The court correctly denied defendant's suppression motion. The police had, at least, reasonable suspicion warranting an investigatory detention. In the early morning hours in a desolate area, defendant and a codefendant were wearing clothing that, with the exception of a minor discrepancy as to the color of a garment, matched a description of two men who had just committed a robbery. Given the extremely close temporal and spatial proximity to the reported crime, and the absence of anyone else in the vicinity other than a person who did not fit the description, there was a strong likelihood that these men were the robbers (*see People v William*, 81 AD3d 453 [1st Dept 2011], *affd* 19 NY3d 891 [2012]; *People v Florencio*, 41 AD3d 113 [1st Dept 2007], *lv denied* 9 NY3d [2007]; *see also People v*

Johnson, 63 AD3d 518 [2009], *lv denied* 13 NY3d 797 [2009]). Moreover, when the men saw the police, they immediately fled, which heightened the level of suspicion (*see People v Woods*, 98 NY2d 627, 628 [2002]).

The police conducted a showup at the scene of the robbery in a manner that was permissible and not unduly suggestive, given the fast-paced chain of events (*see People v Duuvon*, 77 NY2d 541 [1991]). Even assuming that defendant was handcuffed and guarded by multiple officers during the showup, these were appropriate security measures, and the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup (*see People v Gatling*, 38 AD3d 239, 240 [2007] lv denied 9 NY3d 865 [2007]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The prosecution's case included

the victim's prompt identification and defendant's detailed written confession.

We perceive no reason for reducing the postrelease supervision portion of the sentence.

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9517 Tower Insurance Company of New York, Index 100677/08
Plaintiff-Respondent,

-against-

Ray & Frank Liquor Store, Inc., et al.,
Defendants-Appellants.

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Lipsius-Benhaim Law, LLP, Kew Gardens (David Benhaim of counsel), for Ray & Frank Liquor Store, Inc., appellant.

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

Law Offices of Andrew P. Saulitis, P.C., New York (Andrew P. Saulitis of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered December 15, 2010, following a nonjury trial, declaring that plaintiff is not obligated to indemnify or defend defendant Ray & Frank Liquor Store, Inc. in the underlying action, unanimously reversed, on the law, with costs, and it is declared that plaintiff is obligated to defend and indemnify Ray & Frank Liquor Store in the underlying action.

While the trial evidence shows that both the insured, Ray & Frank Liquor Store, Inc., and the claimant, defendant Luna, were delinquent in providing plaintiff with notice of the claim, there

is no evidence demonstrating that plaintiff timely disclaimed liability (*see* Insurance Law § 3420[d][2]). A disclaimer letter indicating that it was sent by certified mail, return receipt requested, was admitted into evidence. However, plaintiff failed to establish that the letter was mailed and therefore should be presumed received (*see Badio v Liberty Mut. Fire Ins. Co.*, 12 AD3d 229 [1st Dept 2004]). There is no return receipt in the record; plaintiff's only witness did not mail the letter himself – indeed, he was not yet employed by plaintiff on the date of the letter – and neither he nor anyone else testified as to plaintiff's regular office mailing practice and procedure. It appears that plaintiff's first disclaimer notice to defendants was the instant complaint.

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9518 Mushlam, Inc., Index 100207/08
Plaintiff-Appellant,

-against-

Marie Nazor, et al.,
Defendants-Respondents.

_____

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for appellant.

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for respondents .

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about July 10, 2012, which, after a hearing, set interim use and occupancy for defendants' loft unit at $3,600 per month, retroactive to May 1, 2008, unanimously modified, on the facts, to set monthly interim use and occupancy at $4,773.25, and otherwise affirmed, without costs.

The hearing court properly found that plaintiff landlord's evidence of fair market value of the premises was unreliable. The court did not exceed the scope of this Court's remand (*see* 80 AD3d 471 [1st Dept 2011]) or improperly conclude that defendant tenants' premises were occupied residentially. The hearing court implicitly made such a finding in an unappealed December 2010 order, and the landlord's counsel admitted that the premises were

being occupied residentially in an affirmation on a prior motion (*see Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 [1996]). However, upon our own review of the record (*see Baba-Ali v State of New York*, 19 NY3d 627, 640 [2012]), we find that, upon rejecting the evidence proffered by both sides, the hearing court should have awarded the amount that the tenants conceded they had been paying and which they requested in their answer, rather than the rent reserved in the 1993 lease, which in this instance is of limited probative value. As the hearing court recognized, the award of use and occupancy is only pendente lite, and the remedy for any over or underpayment is a speedy trial (*see Andejo Corp. v South St. Seaport Ltd. Partnership*, 35 AD3d 174 [1st Dept 2006]).

We have considered the landlord's other contentions and find them unavailing.

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9519 &
M-764 In re Joseph P.S.,
Petitioner-Respondent,

Anna Y. S., et al.,
Petitioners,

-against-

New York City Administration for
Children's Services, et al.,
Respondents,

Jeffrey K., et al.,
Intervenors-Appellants.

_____

Warren & Warren, Brooklyn (Richard J. Warren of counsel), for appellants.

Jerald D. Kreppel, New York, for Joseph P.S., respondent.

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about May 22, 2012, which granted petitioner paternal grandfather's application for discovery of documents concerning the intervenor foster parents to the extent of permitting the grandfather's counsel to inspect a redacted version of the records in the courtroom prior to the dispositional/custody hearing, and to discuss the records with the grandfather for the purposes of the hearing, unanimously

affirmed, without costs.

The court properly determined that information concerning the foster parents' fitness to adopt the subject child is relevant to the combined proceeding on the agency's petition to terminate the father's parental rights to free the child for adoption by the foster parents, and the grandfather's petition for custody of the child (*see* Social Services Law § 372[4][a]; *Matter of Louis F.*, 42 NY2d 260, 264-265 [1977]). The court properly reviewed the records and redacted the portions that are not relevant to the issues in the upcoming proceeding, such as the identification of family members and physical locations, and properly limited disclosure of the information to the proceeding.

M-764 - *In re S. Children*

Motion to reargue prior motion or for further relief denied.

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, J.P., Tom, Richter, Abdus-Salaam, JJ.

9520-
9521 Josie Bell, Index 102228/08
509393/10
Plaintiff-Respondent-Appellant,

-against-

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

TRC Environmental Corporation,
Defendant-Respondent,

New York University, et al.,
Defendants-Respondents,

Mobile Steam Boiler Rental Corp.,
Defendant-Appellant.

- - - - -

Mobile Steam Boiler Rental Corp.,
Third-Party Plaintiff-Appellant,

-against-

TRC Environmental Corporation,
Third-Party Defendant-Respondent,

Cooper Square Realty, Inc.,
Third-Party Defendant-Respondent-Appellant.

- - - - -

Mobile Steam Boiler Rental Corp.,
Second Third-Party
Plaintiff-Appellant,

-against-

Cooper Square Services, Inc.,
Second Third-Party
Defendant-Respondent.

_____

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

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

The Chartwell Law Offices, LLP, New York (Jack Gross of counsel), for New York University, New York University Real Estate Corporation and Cooper Square Realty, Inc., respondents.

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

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 12, 2012, which, to the extent appealed from as limited by the briefs, denied defendant Mobile Steam Boiler Rental Corp.'s motion for summary judgment dismissing the complaint and all cross claims against it, and granted New York University, New York University Real Estate Corporation (together, NYU), and Cooper Square Realty, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against them, unanimously modified, on the law, NYU and Cooper Square's motion denied as to NYU, and otherwise affirmed, without costs. Order, same court and Justice, entered February 23, 2012, which granted NYU and Cooper Square's motion for summary judgment on their cross claim for contractual indemnification as against

Mobile, unanimously reversed, on the law, without costs, and the motion denied.

The record shows that, in September 2007, having to shut down the basement boiler in one of its buildings for two weeks for asbestos removal, NYU contracted with Mobile to supply a temporary mobile boiler. Because of its size, the temporary boiler was to be housed in a trailer parked on Fifth Avenue. The permit issued by the City for the parking of the trailer, inter alia, required the permittee to coordinate with the City resident engineer before starting work and prohibited parking in or adjacent to a work zone. During the same month, the City undertook to mill and repave 100 blocks of Fifth Avenue. When Mobile parked its temporary boiler, the portion of Fifth Avenue where the trailer was parked had been milled and was awaiting repaving. Although signs had been placed on the roadway notifying the public of the repaving project and providing contact numbers for any inquiries related to the project, neither Mobile nor NYU made any inquiry before parking the trailer. One day before the boiler began supplying hot water to the building, the section of the street where it was parked was repaved. City officials had spoken with Mobile personnel in advance, but were told that the boiler could not be moved because it was providing

hot water to the NYU building. The officials elected to repave around the trailer. Two weeks later, Mobile removed the trailer, without notifying the City, leaving a large two- to three-inch depression in the roadbed. Plaintiff brought this action to recover for injuries she allegedly sustained when she tripped on the uneven surface of the road approximately one month later.

Issues of fact exist, inter alia, as to whether Mobile abided by the requirements of the permit, whether Mobile's acts or omissions caused the City to have to pave around the trailer, whether Mobile exacerbated a dangerous condition by removing the trailer and exposing the public to a greater risk of coming into contact with the roadbed depression (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]), and whether Mobile exercised control over the curb space it occupied during the City's repaving project (*see Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 60 [1st Dept 2006]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 297 [1st Dept 1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]).

The record also presents issues of fact as to NYU's liability arising from its special use of the street, i.e., the parking of the temporary boiler for its exclusive use (*see Kaufman v Silver*, 90 NY2d 204, 207 [1997]; *Petty v Dumont*, 77

AD3d 466, 468 [1st Dept 2010]), despite the roadbed's existing milled condition and the prohibition against parking in or near a work zone, and whether it had constructive notice of and failed to repair the dangerous condition of the roadbed after Mobile removed its trailer. However, there is no evidence that Cooper Square benefitted from the special use of the street.

Because the indemnification provision requires Mobile to indemnify NYU and Cooper Square for their own negligence, and there is an issue of fact whether NYU and Cooper Square were negligent, they are not entitled to summary judgment on their claim for contractual indemnification against Mobile (*see* General Obligations Law § 5-322.1; *Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]).

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9522 Marjorie T. Osborne, et al., Index 304325/09
Plaintiffs-Respondents,

-against-

Christian O. Diaz, et al.,
Defendants-Appellants.

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Brand, Glick & Brand, P.C., Garden City (Peter M. Khrinenko of counsel), for appellants.

Law Offices Of Alexander Bespechny, Bronx (louis A. Badolato of counsel), for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 8, 2012, which denied defendants' motion for summary judgment dismissing the complaint alleging serious injuries under Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion to the extent of dismissing plaintiff Osborne's claims of serious injury to her cervical spine and under the 90/180-day category and plaintiff Amissah's claims of serious injury to his cervical and lumbar spine and under the 90/180-day category, and otherwise affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by showing that plaintiff Osborne did not suffer a serious injury to her cervical spine or lumbar spine, and that

plaintiff Amissah did not suffer a serious injury to his right shoulder, cervical spine, and lumbar spine. Defendants submitted affirmed reports of a radiologist who opined that changes to the spine and shoulder were degenerative in origin and that there was no evidence of acute recent trauma (*see Pannell-Thomas v Bath*, 99 AD3d 485 [1st Dept 2012]; *Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011]). Defendants also submitted affirmed reports of an orthopedic surgeon who found full range of motion in every plane, and diagnosed both plaintiffs with resolved strains/sprains of the cervical and lumbar spines (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]).

Contrary to plaintiffs' contention, the affirmation of defendants' neurologist, finding a minor limitation in range of motion in a single plane of Amissah's cervical spine and lumbar spine, is not fatal to defendants' prima facie showing, where the neurologist found a full range of motion in every other plane, indicated that the deficits were subjective, and in light of the orthopedic surgeon's opinion that the strains/sprains were resolved (*see Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]; *Sone v Qamar*, 66 AD3d 566 [1st Dept 2009]).

Plaintiff Osborne raised an issue of fact as to her lumbar spine injury. She submitted an affirmed report of a neurologist

who measured recent limitations in range of motion and, upon reviewing Osborne's medical history and prior lack of symptoms, opined that the injuries were caused by the accident (*see Bonilla v Abdullah*, 90 AD3d 466 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]). Osborne's neurologist made a positive finding for straight leg raising test, which provided objective evidence of lumbar injury (*see Jackson v Leung*, 99 AD3d 489 [1st Dept 2012]; *Brown v Achy*, 9 AD3d 30, 32 [1st Dept 2004]).

Plaintiff Amissah raised an issue of fact as to his right shoulder injury by submitting the affirmation of his orthopedic surgeon who conducted a number of objective tests, performed arthroscopy, found recent range of motion limitations, and opined, based upon his examinations and observations made during surgery, that Amissah's injuries were caused by the accident (*see Delgado v Paper Tr., Inc.*, 93 AD3d 457 [1st Dept 2012]).

Serious injuries to plaintiffs Osborne's lumbar spine and plaintiff Amissah's right shoulder having been established, we need not address whether the other injuries claimed by plaintiffs were sufficient to meet the no fault threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Plaintiffs' 90/180-day claims are dismissed because the evidence shows Osborne was confined to bed and home for about two

months after the accident, and Amissah was confined to bed and home for about two weeks after surgery. Accordingly, neither plaintiff alleged the minimum duration to meet the statutory period of disability under the 90/180-day category (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]; *Borja v Delarosa*, 90 AD3d 407 [1st Dept 2011]).

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9523 In re Start Elevator, Inc., Index 104620/11
Petitioner-Appellant,

-against-

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

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Agulnick & Gogel, LLC, Great Neck (William Gogel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for The City of New York, The New York City Department of Correction, and The New York City Office of Administrative Trials and Hearings, respondents.

Peggy Kuo, New York, for The Contract Dispute Resolution Board, respondent.

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Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered January 10, 2012, denying the petition to annul the determination of respondent New York City Contract Dispute Resolution Board (CDRB), dated February 28, 2011, which dismissed petitioner's claim due to its untimely filing of a petition to CDRB, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Judicial review of a CDRB determination is limited to the question of whether it was "made in violation of lawful procedure, was affected by an error of law, or was arbitrary or

capricious or an abuse of discretion" (9 RCNY 4-09[g][6]). Here, CDRB's dismissal of the petition as untimely was proper. Petitioner submitted the materials in support of its notice of claim in March 2009. Once the New York City Comptroller failed to address this claim within 45 days thereafter, petitioner had 30 days in which to file a petition with CDRB, pursuant to the parties' contract and the New York City Procurement Policy Board (PPB) Rules (9 RCNY 4-09[e][4], [g]). Petitioner, however, petitioned CDRB in November 2010, well after the 30-day period had expired. The court properly interpreted the provision stating that petitioner "may" petition CDRB within that period to require petitioner to do so in order to exhaust its administrative remedies, given that the contract and the PPB

Rules provide that the time period is triggered once the Comptroller fails to respond within its 45-day period (*see JCH Delta Contr., Inc. v City of New York*, 44 AD3d 403 [1st Dept 2007).

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9524 In re Eliyahu File No. 178/10

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Nina Y.,
Appellant,

-against-

Jennifer B., et al.,
Respondents.

_____

Elayne Kesselman, New York, for appellant.

Brett Kimmel, New York, for respondents.

_____

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 6, 2011, which, in this private placement adoption proceeding, to the extent appealed from, denied the biological mother's application to dismiss the adoption petition of the prospective adoptive parents, and granted the adoptive parents' motion for summary judgment dismissing the mother's petition seeking to set aside her extrajudicial consent to the adoption of the subject child on technical grounds, unanimously affirmed, without costs.

Although the consent form was not in 18-point type, this technical noncompliance with Domestic Relations Law § 15-b(4)(a) does not invalidate the consent (*see Matter of Female Infant B.*, 51 AD3d 419, 422 [1st Dept 2008]; *Matter of De Filippis v*

Kirchner, 217 AD2d 145, 146-147 [3rd Dept 1995]), especially since the consent complied with all the substantive requirements of § 115-b and there was no showing of injury or prejudice to the biological mother (*see Matter of Gabriela*, 273 AD2d 940, 940-941 [4th Dept 2000]). Rather, the record shows that the biological mother consulted with an attorney prior to signing the consent, that the attorney read and reviewed the entirety of the consent, and that the mother understood that she could revoke the consent within 45 days of its execution. "Neither mistake as to the meaning of the form nor failure to read the form before signing it constitutes a valid ground for vitiating the consent" (*Matter of Baby Boy B.*, 163 AD2d 673, 674 [3d Dept 1990], *lv denied* 76 NY2d 710 [1990]; *see also Matter of Sarah K.*, 66 NY2d 223, 240-241 [1985], *cert denied sub nom. Kosher v Stamatis*, 475 US 1108 [1986]).

Nor does the prospective adoptive parents' failure to obtain judicial certification of their qualifications before taking custody of the child, in violation of Domestic Relations Law § 115(1)(b), or to file an adoption petition within ten days of taking custody, in violation of § 115-c, invalidate the birth mother's consent or disqualify the prospective adoptive parents from adopting the child (*see Matter of Joanna K.*, 33 Misc 3d 486,

495 [Fam Ct, Queens County 2011]). Indeed, the statute does not provide a penalty for failure to comply with these provisions (*see Matter of Baby Boy P.*, 182 Misc 2d 943, 948 [Fam Ct, Monroe County 1999]). In any event, the provisions are designed to ensure "prompt court supervision of such placements" (*id.*), and in this case the prospective adoptive parents acted with reasonable promptness to bring themselves in compliance with the statute by obtaining certification and filing an adoption petition.

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

ENTERED: MARCH 14, 2013

CLERK

Gonzalez, P.J., Tom, Richter, Abdus-Salaam, JJ.

9526 Luis Francisco Perez-Hernandez, Index 300583/10
Plaintiff-Respondent,

-against-

M. Marte Auto Corp., et al.,
Defendants-Appellants.

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Skenders & Cornacchia, P.C., Long Island City (Louis T. Cornacchia, III, of counsel), for appellants.

Kravet, Hoefer & Maher, P.C., Bronx (John A. Maher of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 11, 2012, which granted plaintiff's motion for summary judgment on the issues of liability and threshold injury under Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability by showing that he was crossing the street within the crosswalk, with the light in his favor, when defendants' vehicle struck him while making a left turn (*see Beamud v Gray*, 45 AD3d 257 [1st Dept 2007]). Defendants failed to raise a triable issue of fact as to comparative negligence. Plaintiff testified that he looked both ways before crossing the street, and he could not have avoided

the accident given his testimony that he noticed the car moments before being struck (*see Kirchgaessner v Hernandez*, 40 AD3d 437 [1st Dept 2007]).

Plaintiff also established his entitlement to judgment as a matter of law on the issue of threshold injury under Insurance Law § 5102(d) by submitting testimony that he fell on the left side of his body upon being hit on the right, and certified contemporaneous hospital records showing fractures in his left arm. A fracture constitutes a "serious injury" under Insurance Law § 5102(d) (*see Baez v Boyd*, 90 AD3d 524 [1st Dept 2011]; *Joyce v Lacerra*, 41 AD3d 236 [1st Dept 2007]). Defendants failed to raise a triable issue, and in fact, their own medical evidence acknowledged fractures in the arm. Because plaintiff has established a fracture, he is entitled to recover for all injuries causally related to the accident, including those not

meeting the serious injury threshold (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

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

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

ENTERED: MARCH 14, 2013

CLERK

Tom, J.P., Richter, Abdus-Salaam, Román, JJ.

7406 Candace Carmel Barasch, Index 600053/09
Petitioner-Respondent,

-against-

Williams Real Estate Co., Inc., et al.,
Respondents-Appellants.

_____

Foley & Lardner, LLP, New York (Peter N. Wang of counsel), for appellants.

Wachtel, Masyr & Missry, LLP, New York (John H. Reichman of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 13, 2011, which, to the extent appealed from, granted petitioner's motion to compel the production of documents that had been withheld by respondents on the basis of attorney-client privilege, reversed, on the law, with costs, and the motion denied.

This is a special proceeding commenced by petitioner, a shareholder and director of the respondent Williams entities (Williams) to compel Williams to pay the fair value of her shares pursuant to Business Corporation Law § 623. The proceeding was commenced after Williams sold a 65% interest in the business to a third-party investor, a transaction to which petitioner had objected. The transaction closed in October 2008. In connection

with the special proceeding, petitioner served a broad discovery demand, including a demand for all communications to or from Moses & Singer, transaction counsel, concerning petitioner and the transaction, from January 2008 to date. In opposing petitioner's motion to compel, respondents argued that petitioner was not entitled to the attorney-client communications between Williams and transaction counsel because she was in an adversarial relationship with Williams. The motion court disagreed, holding that although petitioner is now in an adversarial relationship with her codirectors and with Williams, she was not in an adversarial relationship during the time in question.

Based upon that order, from which no appeal was taken, Williams and Moses & Singer spent many hours conducting document review and produced more than 32,000 documents, including emails through October 8, 2008 (the date that petitioner dissented from the underlying transaction). A few months thereafter, at a deposition of Williams's in-house counsel, petitioner produced as an exhibit an email dated September 24, 2008 from Moses & Singer to Williams, that described petitioner as "hostile" to the transaction, and warned Williams that petitioner's attorneys could use provisions of the shareholder agreement to her benefit.

Williams's counsel objected to a question about the email, asserted the attorney-client privilege, and demanded the document's return, asserting that it was inadvertently produced. Respondents followed up a week later with a letter demanding that this email, as well as an email dated September 8, 2008, be returned. In the September 8 email, counsel informed Williams that there was a concern that petitioner would not cooperate and sign any documents, and explained petitioner's dissenter's rights, her leverage and a possible "blackmail" scenario.

In demanding return of these emails, respondents argued that the emails showed that petitioner had become adverse to her codirectors and Williams by September 8, 2008. Petitioner filed a motion to compel respondents to provide all outstanding discovery, and respondents cross-moved for a protective order and for return of what they asserted are privileged documents that were inadvertently produced.

In granting petitioner's motion and denying respondents' cross motion (respondents did not appeal from the denial of the cross motion), the motion court framed the issue before it as follows: "[W]hether a corporate director, by dissenting from a corporate transaction, retaining separate counsel, and threatening potential legal challenges to block the transaction,

becomes 'adverse' to the corporation, such that she waives her absolute right to inspect corporate books and records, including attorney-client communications." The court answered that question in the negative. We disagree.

The underpinning of the motion court's determination was that petitioner, as a director of Williams, was a corporate insider by definition, and therefore could not be adverse to Williams. However, this case involves a party who is both a corporate director and a shareholder, suing in her capacity as a shareholder, and seeking to invade the corporation's attorney-client privileged communications about her, which took place at a time when she was adverse to the corporation, in order to advance her own interests as a shareholder. It is evident from the September emails that Williams's transaction counsel believed petitioner to be hostile to the transaction and that it was advising Williams on how to handle petitioner. Furthermore, that petitioner retained separate counsel to represent her interests demonstrates that she did not believe that Williams's in-house counsel or transaction counsel were representing her interests as a shareholder. Thus, it is clear that as of September 8, 2008, petitioner was in an adversarial position with Williams, and the attorney-client communications between Williams and its counsel

regarding how to deal with petitioner are privileged.

A director of a corporation "should not be allowed to use [her] corporate position to waive the privilege that attaches to the corporation in a litigation relating to [her] own rights or in which [she] is asserting claims that are or may be adverse to the corporation" (*Matter of Weinberg*, 133 Misc 2d 950, 952 [Sur Ct, NY County 1986], *mod sub nom. Matter of Beiny* [*Weinberg*], 129 AD2d 126 [1st Dept 1987]). The Court of Appeals decision in *Tekni-Plex, Inc. v Meyner & Landis* (89 NY2d 123 [1996]), a case involving a dispute over a corporate acquisition, is instructive here. At issue for the Court was whether "long-time counsel for the seller company [old Tekni-Plex] and its sole shareholder [could] continue to represent the shareholder in [a] dispute with the buyer [new Tekni-Plex]" (*id.* at 127). Following the acquisition, new Tekni-Plex commenced an arbitration against old Tekni-Plex's sole shareholder and director, Tang, alleging that Tang had made false representations regarding the company's compliance with environmental laws (*id.* at 128). Tang retained counsel for old Tekni-Plex to represent him in the arbitration (*id.* at 129). The Court held that the confidential communications between corporate counsel and old Tekni-Plex during the law firm's representation of the corporation on

environmental compliance matters had passed to new Tekni-Plex, and that the law firm should be disqualified from representing Tang (*id*. at 133-136). It also held, with application here, that the law firm should be enjoined from disclosing the substance of those communications to Tang, who, like petitioner here, was both a director and a shareholder of Tekni-Plex at the time of those communications (*id*. at 136-137).

Petitioner's citation to *People v Greenberg* (50 AD3d 195 [1st Dept 2008], *lv dismissed* 10 NY3d 894 [2008]) is unpersuasive. In *Greenberg*, we held that former directors, who were clearly privy to, and participated in, legal consultations regarding the transactions, and who were not adverse to the corporation, were entitled to documents in support of an "advice of counsel" defense (*id*. at 202). Here, petitioner was not privy to the legal consultations and communications between transaction counsel and Williams, but instead was the subject of those consultations, and was adverse to the corporation at the time. Of note is the observation by the concurring Justice in *Greenberg* that there was no suggestion that any conflict of interest existed between the former directors and the corporation at the time of the privileged communications "that would have obligated the executives to retain separate counsel to advise them

individually on such matters. . . . Under these circumstances, affording [the former directors] access to the documents in question is consistent with *Tekni-Plex . . .* and fundamentally fair" (*id.* at 206-207 [Friedman, J., concurring]). In contrast, it is evident that as of September 8, 2008, there was a conflict between the interests of petitioner and Williams, which would have prevented Williams's in-house counsel from representing petitioner, and which in fact led to the retention of separate counsel by petitioner.

In *Hoiles v Superior Court of Orange County* (157 Cal App 3d 1192, 204 Cal Rptr 111 [1984]), a shareholder and director of a corporation whose stock was entirely held by family members, brought an action in his capacity as a shareholder to dissolve the corporation. The petitioner sought to depose the corporation's in-house counsel about communications with the other directors related to his threats to dissolve the corporation, or to sell his stock to a buyer outside the family (157 Cal App 3d at 1197, 204 Cal Rptr at 114). The trial court sustained counsel's objection that these were privileged communications. On appeal, the petitioner argued that he was entitled to question counsel about the privileged communications based on his status as a corporate director (*id.*). In rejecting

that argument and holding that the attorney-client privilege was properly asserted despite the petitioner's status as a director, the court wrote as follows:

> "There is a short answer to petitioners' claim that [petitioner] Harry Hoiles has a right to question corporate counsel in his role as a director. Assuming the point is correct, Hoiles has not brought suit as a director, only as a shareholder"(157 Cal App 3d at 1201, 204 Cal Rptr at 116).

Here, as in *Hoiles*, petitioner has brought suit only as a shareholder.

The motion court's holding would thwart the purpose of the attorney-client privilege, which is to "encourage full and frank communication between attorneys and their clients . . ." (*Upjohn Co. v United States*, 449 US 383, 389 [1981]). Taken to its logical conclusion, the motion court's reasoning would prevent a corporation from freely consulting with counsel when dealing with a dispute involving a sitting director, or seeking advice regarding a director's suspected misconduct. For these reasons, we find that the parties were adverse as of September 8, 2008.

Finally, respondents' appeal from the court's order is neither untimely nor moot, as argued by petitioner, nor does it seek review of an unappealable order, as posited by the dissent. As explained above, petitioner made two motions to compel

production of documents that were demanded by a discovery notice seeking, as is relevant here, all documents, correspondence, emails, etc., created by, directed to, or communicated between respondents and the law firm of Moses & Singer, from January 2008 to the date of the response. Respondents objected to production of all such communications on the ground of attorney-client privilege. The motion court granted the first motion, holding that petitioner was a director of the corporation, and that her codirectors "could not reasonably have expected to exclude her from their attorney-client communications concerning the valuation of her shares." The court also held that although petitioner is now in an adversarial relationship with her codirectors and the corporation, she was not in an adversarial relationship "during the time in question." Respondents did not appeal.

The order at issue on appeal is the order granting the second motion to compel which was made after respondent had provided a great deal of discovery. Although the court applied similar reasoning in determining both orders, the second order was not, as petitioner maintains, merely a confirmation of the first order. In fact, had the court believed that the second order was merely confirmation of the first order, there would

have been no reason to issue a decision addressing the motion and cross motion and setting forth the court's reasoning.

Nor is the appeal from the order directing production of privileged communications moot. The parties are still litigating the valuation of petitioner's shares and the documents may be used in connection with further proceedings.

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

TOM, J.P. (dissenting)

Respondents-appellants are not aggrieved by the ruling from which they appeal (CPLR 5511), and this Court is without jurisdiction to entertain the matter. As indicated by their briefs, which do not even address the order appealed from, respondents seek review of a prior, unappealable order for the apparent purpose of obtaining a ruling on an issue that their proffered defense to this proceeding strongly suggests is immaterial. The opinion offered by the majority concerning an issue not properly before us is advisory since it depends on a future event outside the parties' control which might never occur – namely, a determination by this Court that, contrary to respondents' contention, petitioner is entitled to maintain this proceeding to assess the fair value of her shares (*see Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354-355 [1988]).

This controversy arises out of the reorganization of the seven respondent constituent entities comprising the Williams real estate operation (collectively Williams) in connection with the sale of a 65% interest in the business to respondent First Service Corporation. Notices were mailed to the constituent share owners that their approval was required for the proposed disposition of substantially all of the assets of the respective

companies at a meeting to be held on October 8, 2008. The reorganization plan was approved on that date, following which petitioner notified Williams that she would exercise her appraisal rights as a dissenting share owner (Business Corporation Law § 623). While petitioner tendered her shares in the various Williams entities pursuant to § 623(f), the corporation did not make a timely offer to purchase the shares pursuant to § 623(g). This proceeding was commenced by petition dated January 7, 2009 pursuant to § 623(h), which affords the means "to determine the rights of dissenting shareholders and to fix the fair value of their shares" (§ 623[h][1]).

Petitioner served a discovery demand for all corporate communications dealing with the valuation of the business, her share of the Williams enterprise and the planned reorganization. Respondents resisted her demands, and petitioner brought a motion to compel production of the documents (CPLR 3124). In an order entered April 15, 2010, the court granted petitioner access to Williams's internal communications, including those with corporate counsel, Moses & Singer, LLP. The decision expressly held that, as a director, petitioner could not be excluded by her codirectors "from their attorney-client communications concerning the valuation of her shares," stating that while presently in an

adversarial relationship with respondents, "she was not in an adversarial relationship during the time in question." The court reasoned that "'[a] corporate director has an absolute, unqualified right, with roots in the common law, to inspect the corporate books and records'" (quoting *People v Greenberg*, 50 AD3d 195, 199 [1st Dept 2008], *lv dismissed* 10 NY 3d 894 [2008]). Rejecting respondents' contention that this Court's decision in *Matter of Beiny [Weinberg]* (129 AD2d 126 [1st Dept 1987]) requires a departure from the general rule, the court "decline[d] to carve out an exception to a corporate director's right to inspect the corporation's books and records without clear authority from the Appellate Division." No appeal was taken from this ruling.

When respondents did not comply with the order, petitioner brought the instant motion by way of order to show cause dated October 7, 2010 to compel the production of the documents as directed by Supreme Court's prior order (CPLR 3126). The ensuing court decision recites that petitioner was seeking "an [o]rder compelling respondents to comply with my April 15, 2010 Order and directing respondents . . . to produce certain discovery notwithstanding attorney-client privilege." Respondents cross-moved for a protective order with respect to certain

communications with Moses & Singer, which had represented respondents in connection with the transactions to reorganize and simplify the relationships between the constituent Williams entities. Respondents requested that all privileged documents filed in support of petitioner's motion be sealed and that petitioner be directed to "return all copies of inadvertently produced privileged communications" (CPLR 3103[c]).

While respondents nominally cross-moved for a protective order, both the court's decision and remarks made during oral argument reflect that the motion was interposed for the express purpose of enabling respondents to appeal from the court's prior ruling that petitioner is entitled to the privileged communications at issue. Without providing any procedural basis for revisiting the question, the court's decision states that the issue before it was "whether a corporate director, by dissenting from a corporate transaction, retaining separate counsel, and threatening potential legal challenges to block the transaction, becomes 'adverse' to the corporation, such that she waives her absolute right to inspect corporate books and records, including attorney-client communications."

Oral argument began with the court's comment that "this is a motion that comes about as a result of an in Court conference on

discovery," which culminated in a decision that was not subject to appeal. Petitioner's counsel responded, "Your Honor is absolutely right, we were here six months ago where they raised exactly the same argument." The court further indicated that it would direct that the "documents if I adhere to my original decision, are produced under the order," acknowledging that "[t]here is no appeal from the prior order." Also during argument, the court inquired, "Didn't this motion to compel in effect come about as a result of my pointing out in the course of the proceedings that whatever I do may not be appealable if the parties wanted to avail themselves of an appeal[able] order?" Tellingly, petitioner's attorney concluded his remarks by asking the court to adhere to its previous decision.

It is well settled that a ruling made on an issue "remains the law of the case, and it may not be contravened by a court of coordinate jurisdiction" (*Grossman v Meller*, 213 AD2d 221, 224 [1st Dept 1995]), and this result obtains whether or not a formal order is entered (*see George W. Collins, Inc. v Olsker-McLain Indus.*, 22 AD2d 485, 489 [4th Dept 1965]). Rather, review of an order is available only by way of appeal or on motion pursuant to CPLR 2221 brought before the issuing judge (*id.* at 488). Parties may not, by the simple expedient of styling their application in

some alternative form, obviate the 30-day time limit for bringing a motion to reargue (CPLR 2221[d][3]) or the necessity to establish the existence of new facts or a change in law in support of a motion to renew (CPLR 2221[e][2]). They certainly may not evade the strict 30-day time period in which to serve a notice of appeal (CPLR 5513; *see Ocean Acc. & Guar. Corp. v Otis El. Co.*, 291 NY 254 [1943]). In short, respondents may not exploit the absence of any statutory time restriction to move for relief under CPLR 3103 (protective orders) to avoid the limitations constraining a motion to renew or reargue under CPLR 2221. In any event, the statute plainly provides that to revisit a ruling on the basis of either reargument or renewal, the motion "shall be identified specifically as such" (CPLR 2221[d][1], [e][1]). Where, as here, the meaning of a statute is apparent from the language employed by the Legislature, there is no room for judicial interpretation (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; *Matter of Jakubowicz v A.C. Green Elec. Contrs., Inc.*, 25 AD3d 146, 147 [1st Dept 2005], *lv denied* 6 NY3d 706 [2006]). Because respondents identified their application as seeking relief only under CPLR 3103, it may not be judicially extended to include relief available under CPLR 2221. Finally, however their application may be categorized,

having declined to appeal from its denial, respondents may not employ the cross motion as a means to obtain review of an issue previously resolved.

This Court may not issue a ruling on the propriety of the prior discovery order, which was never the subject of a motion to renew or reargue and from which no appeal was ever taken. If parties were permitted to dispense with the law of the case by the simple ruse of raising anew an issue previously resolved on a prior motion, there would be no end to litigation. Moreover, an appellate court is without power to review any order beyond the time specified in CPLR 5513. Since the issue of petitioner's entitlement to material asserted to be privileged was resolved in an order entered in April 2010 and never challenged, the 30-day limitation of CPLR 5513 has elapsed, and that issue is not before us. The order appealed from merely directs that the parties comply with the motion court's previous discovery order, imposing no sanctions or further conditions. Since the prior order was binding upon the parties in any event (*Matter of Murray v Goord*, 298 AD2d 94, 97 [1st Dept 2002], *affd* 1 NY3d 29 [2003] ["an order or judgment of a court is binding on all persons subject to its mandate until vacated or set aside on appeal"]), respondents are not aggrieved by the order appealed from. Thus, they lack

standing to prosecute this appeal (*Bernstein v 1995 Assoc.*, 211 AD2d 560 [1st Dept 1995]), and this Court is without jurisdiction to entertain the matter (*Mixon v TBV, Inc.*, 76 AD3d 144, 155 [2d Dept 2010]; *Tortora v LaVoy*, 54 AD2d 1036, 1036 [3d Dept 1976]). The only ruling by which respondents are aggrieved that was potentially subject to review is whether the motion court erred in failing to direct the return of certain of the disclosed material, as sought in respondents' cross motion for a protective order. However, as their notice of appeal is confined to the motion court's disposition of petitioner's motion in chief, respondents have abandoned the issue.

While the arguments advanced before Supreme Court in support of respondents' cross motion were properly considered in opposition to petitioner's motion, entertaining an application under CPLR 3103 does not warrant revisiting the issue of the privilege attached to the material sought to be protected (*see Laura M. Inger v Hillside Children's Ctr.*, 17 AD3d 293, 295-296 [1st Dept 2005]). And while the motion court was correct that no appeal could be taken as of right from its April 15, 2010 order, which decided a motion that was not made on notice (CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]), respondents never sought to reduce that order to an appealable

paper. It would have been a simple matter to make a motion on notice to vacate the order, thereby providing an adequate record to permit review on appeal (CPLR 5701[a][3]; *Unanue v Rennert*, 39 AD3d 289 [1st Dept 2007]; *see Siegel*, NY Prac § 524 at 921-922 [5th ed 2011]). Respondents failed to take the necessary measures to establish their right to appeal from the April 15, 2010 order within the time constraints imposed by statute, and they identify no provision in the rules governing practice before our courts that would enable them to challenge the ruling some five months after the expiration of the allotted time period.

This Court's review is limited to the disposition of petitioner's motion to compel compliance with the court's previous discovery order. It appears that the parties stipulated to the sealing of the contested documents, and there is no remaining issue requiring this Court's resolution.[1]

The substance of respondents' position in opposition to the motion was that a director may be unilaterally excluded from corporate affairs whenever the corporation or its agent (here, counsel) expresses the opinion that the director might be

[1] The motion court issued a separate sealing order, apparently on the stipulation of the parties, which is not subject to this appeal.

unsupportive of some proposed corporate endeavor. Rather than allege any use that petitioner might make of the disputed information obtained during discovery that would be harmful to them, respondents reminded the motion court that their position in this litigation is that petitioner is not entitled to maintain this proceeding to fix the value of her shares because the transactions actually undertaken to reorganize Williams did not result in the disposition of substantially all of the assets of its constituent corporations. Thus, it is far from clear at this juncture that the disputed information remains material and necessary to the prosecution of the action (CPLR 3101[a]). Thus, the issue respondents seek to pursue is at best premature and presently moot.

In sum, it was previously decided that the documents in contention were properly obtained by petitioner in her capacity as director of the constituent Williams entities, Supreme Court lacked any procedural basis to revisit this determination, and it is not subject to review on appeal. And while Supreme Court's order directing production of the documents implicitly found them to be material and necessary to the valuation of petitioner's shares, the relevancy of this information has been rendered

immaterial in light of respondents' position that petitioner is not entitled to maintain this proceeding under Business Corporation Law § 623. Accordingly, the appeal should be dismissed for want of jurisdiction.

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

ENTERED: MARCH 14, 2013

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8552 On the Level Enterprises, Inc., Index 602781/08
Plaintiff,

-against-

49 East Houston LLC,
Defendant-Appellant,

Charles McGrath Construction Inc.,
Defendant-Respondent,

Midfirst Bank, et al.,
Defendants.

[And A Third-Party Action]

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Ferber Chan Essner & Coller, LLP, New York (Robert M. Kaplan of counsel), for appellant.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 22, 2012, which, insofar as appealed from, denied defendant 49 East Houston LLC's (LLC's) motion for summary judgment dismissing the cross claim of defendant Charles McGrath Construction Inc. (McGrath) alleging a cause of action for quantum meruit, and granted McGrath's motion for summary judgment dismissing LLC's cause of action alleging wilful exaggeration of a mechanic's lien, unanimously reversed, on the law, without costs, LLC's motion granted, and McGrath's motion denied.

LLC is the owner of property upon which it planned to erect

a new residential condominium. LLC contracted with McGrath for it to act as general contractor on the project. Due to market changes, the project was abandoned soon after foundation work commenced. Shortly thereafter, McGrath filed a mechanic's lien against the property.

A claim under Lien Law § 39-a is subject to summary disposition where the evidence concerning whether or not the lienor wilfully exaggerated the lien is conclusive (*see Northe Group, Inc. v Spread NYC, LLC*, 88 AD3d 557 [1st Dept 2011]). Such a burden necessarily involves proof as to the credibility of the lienor *(see Rosenbaum v Atlas & Design Contrs., Inc.*, 66 AD3d 576 [1st Dept 2009]). Accordingly, the issue of wilful or fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition (*see e.g. Aaron v Great Bay Contr.*, 290 AD2d 326 [1st Dept 2002]).

LLC's failure to prove conclusively that McGrath willfully exaggerated its lien did not require dismissal of its cross claim pursuant to Lien Law § 39-a, since McGrath likewise failed to establish that it did not wilfully exaggerate the lien. The record is devoid of affidavits from either of McGrath's two principals, absent which, the motion court could not summarily

conclude they bore no ill will when they calculated the lien and that any errors were the result of ignorance or honest mistake. Moreover, as the motion court observed, McGrath was unable to support many of the charges appearing on the mechanic lien's breakdown list. Given the foregoing, a determination as to whether McGrath's exaggeration of the lien was due to its principals' wilfulness, versus their ignorance, should be left to a trier of fact.

Because McGrath chose to move for summary judgment on both its contract and quasi contract claims, the motion court erred in failing to grant LLC's motion seeking dismissal of the quantum meruit claim. While a party is permitted to plead inconsistent theories of recovery (CPLR 3014), it must elect among inconsistent positions upon seeking expedited disposition (*see Unisys Corp. v Hercules, Inc.*, 224 AD2d 365, 367 [1st Dept 1996]). Although this rule does not require a litigant to elect remedies when defending a motion for summary judgment, the rule does require the litigant to make that election when it seeks summary judgment (*Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]).

Accordingly, McGrath did not need to elect between breach of contract and quantum meruit claims in the face of LLC's motion.

McGrath was, however, obligated to either elect between remedies when it filed its own summary judgment motion, or explain why election was not necessary at that juncture (*id.*). McGrath did neither.

The Decision and Order of this Court entered herein on November 13, 2012 is hereby recalled and vacated (*see* M-5640 decided simultaneously herewith).

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

ENTERED: MARCH 14, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8951 George Polgano, et al., Index 302102/07
Plaintiffs-Appellants,

-against-

Nicholas Christakos, et al.,
Defendants,

St. Barnabas Hospital,
Defendant-Respondent.

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Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellants.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 20, 2011, which, to the extent appealed from as limited by the briefs, granted the motion of defendant St. Barnabas Hospital for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

A hospital is ordinarily not liable for the acts of a private attending physician (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]) unless a patient, in accepting treatment by the private physician, relies upon the fact that the physician's services are provided by the physician as the hospital's apparent

agent (*see id.* at 79-82), such as where the patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing (*see Shafran v St. Vincent's Hosp. & Med. Ctr.*, 264 AD2d 553, 558 [1st Dept 1999]). Where apparent agency is established as a predicate for holding the hospital responsible for the alleged malpractice (*Hill*, 67 NY2d at 79), liability is contingent upon the plaintiff having a viable claim against the physician who treated him (*see Kukic v Grand*, 84 AD3d 609 [1st Dept 2011]; *Magriz v St. Barnabas Hosp.*, 43 AD3d 331 [1st Dept 2007], *lv denied and dismissed* 10 NY3d 790 [2008]).

Defendant established its entitlement to judgment as a matter of law by demonstrating that independent vascular surgeons, employees of nonparty Vascular Surgical Group, were responsible for the supervision and management of plaintiff's care. Since it is conceded that plaintiff arrived at defendant hospital in an unconscious state, liability on a theory of ostensible agency finds no record support (*Brink v Muller*, 86 AD3d 894, 896 [3d Dept 2011]). Nor is there evidence that hospital employees failed to carry out instructions given by the attending physicians. Thus, there is no basis upon which to subject the hospital to liability (*Walter v Betancourt*, 283 AD2d

223, 224 [1st Dept 2001]).

As to the affidavit submitted by plaintiffs' expert, the conclusory assertion that the hospital's doctors should have administered adequate anticoagulation therapy does not suffice to raise a question of fact with respect to whether hospital physicians assumed responsibility for plaintiff's treatment. Moreover, plaintiffs' expert failed to identify the manner in which the hospital staff deviated from good and accepted medical practice (*see Lopez v Master*, 58 AD3d 425 [1st Dept 2009]).

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

ENTERED: MARCH 14, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, JJ.

9067 Carolyn Halls, Index 23631/06
Plaintiff-Appellant,

-against-

Nejat Kiyici, M.D., et al.,
Defendants-Respondents.

_____

Law Office of Peter D. Assail, New York (Arnold E. DiJoseph of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains (Robert A. Spolzino of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Robert Torres, J.), entered April 5, 2011, upon a jury a verdict rendered in favor of defendant Nejat Kiyici, M.D. and against the plaintiff, unanimously reversed, on the law, without costs, the judgment vacated, the complaint reinstated, and the matter remanded for a new trial consistent with this decision.

In this medical malpractice action, plaintiff alleges that defendant, a gastroenterologist, failed to recommend and perform a timely colonoscopy. Plaintiff had first received a diagnosis of colon cancer in 1986, when she was 39 years old; her young age at this diagnosis placed her at high risk for developing another cancer.

In October 2002, while under treatment with a physician

other than defendant, plaintiff had a colonoscopy; during that procedure, the physician removed two polyps. According to the pathology report, each polyp proved to be a tubular adenoma, a precursor of colorectal cancer. When plaintiff had another colonoscopy in December 2003, that procedure revealed a large tubular adenoma with severe dysplasia, and the treating physician recommended that plaintiff receive a follow-up colonoscopy in six months.

In July 2004, plaintiff came under defendant's care. When defendant performed a colonoscopy in August 2004, he found two new polyps, one of which had developed into a tubular adenoma, and he recommended a three-year follow up. According to defendant, this recommendation fell within the framework set forth in the American Gastroenterological Association clinical guidelines (the Guidelines). The Guidelines, published in February 2003, addressed the recommended frequency of colonoscopies for patients depending on their risk for colon cancer. However, the expert testimony at trial established that the Guidelines simply gave recommendations for care based on statistical analysis and did not establish bright-line rules for treating individual patients.

In July 2006, during a colonoscopy performed after plaintiff

complained of blood in her stool, defendant discovered that plaintiff had developed colon cancer again.

At trial, defendant requested that the court allow him to introduce the Guidelines into evidence, arguing that they would support the methodology he used in treating plaintiff. Plaintiff's counsel objected to the Guidelines' admission, and requested a limiting instruction reminding the jury that the Guidelines did not set forth standards of care with regard to the diagnosis and treatment of plaintiff's colon cancer. The court agreed to give a limiting instruction, and informed the jury that the Guidelines "are being admitted as [they] relate to [defendant's] position. Ultimately, the determination as to whether [defendant] followed the accepted standards of care . . . is a fact that you will have to determine, all the evidence and the facts of the case as you determine them." The court then told the jurors that it would "instruct [them] further on that at the appropriate time." The trial court, however, later declined to give any further instruction regarding the jury's use of the Guidelines.

The court erred in failing to give the instruction that plaintiff requested. Although the trial court's instruction informed the jury that it was to make its determination based on

"all the evidence," this instruction was not sufficient to guide the jury on how to apply the Guidelines to the facts before it. The court's instruction as rendered failed to make clear to the jury that the Guidelines were simply recommendations regarding treatment, and thus, that compliance with the Guidelines did not, in and of itself, constitute good and accepted medical practice (*see Spensieri v Lasky*, 94 NY2d 231 [1999]; *see also Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 337 [1986]).

The trial court should have given the jury an instruction specifically stating that the Guidelines were not the same as standards of care and that the jury was to make its determination based on the particular circumstances of the case, not on the Guidelines alone. Introducing the Guidelines into evidence without the appropriate limiting instruction allowed the jury to infer that a physician need not exercise professional judgment with regard to individual patients, but could simply abide by the recommendations promulgated in the Guidelines. Indeed, when it gave its instruction on the Guidelines, the trial court stated that it intended to instruct the jury further later in the proceedings, but never did so.

The error was not harmless. On the contrary, during its deliberations, the jury twice asked for a copy of the Guidelines,

and soon after receiving them for the second time, returned a 5-to-1 verdict in defendant's favor. These circumstances strongly suggest that the Guidelines, given to the jury without an appropriate instruction, factored heavily into the jury's determination.

Our decision comports with the Court of Appeals' decision in *Hinlicky v Dreyfus* (6 NY3d 636 [2006]). In *Hinlicky*, the defendant-anesthesiologist in a medical malpractice case testified that he followed an algorithm set forth in certain clinical guidelines, and during his testimony, referred to the algorithm (*id.* at 642). The plaintiff objected to the testimony on the grounds that the algorithm was hearsay (*id.* at 642-643). The trial court found that the algorithm was admissible as non-hearsay demonstrative evidence of the steps that the defendant had followed in treating his patient (*id.* at 644-645).

In *Hinlicky*, therefore, the demonstrative evidence was not admitted to establish the proper standard of care. Nor was there any suggestion that it did serve that purpose. Rather, the evidence in that case "was offered not for its truth, and not to establish a per se standard of care[,] but for the non-hearsay purpose of illustrating a physician's decision-making methodology" (*id.* at 645; *see id.* at 646-647) (quotations

omitted). What is more, the plaintiff in *Hinlicky* never requested any limiting instruction.

In the case at bar, by contrast, not only did the court fail to give a proper limiting instruction as plaintiff requested, but defendant's counsel suggested to the jury, both in his opening statement and in his summation, that the Guidelines did, in fact, represent the standard of care. These circumstances created a high probability that the jury would misunderstand the G0uidelines' proper use.

We have considered and rejected the parties' remaining contentions.

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9277-
9278-
9279 In re Amir L.,

A Child Under the
Age of Eighteen Years, etc.

Chantal B., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

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Elisa Barnes, New York, for Chantel B., appellant.

Steven N. Feinman, White Plains, for Richard L., appellant.

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

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 5, 2012, which found that respondents had neglected their son, unanimously reversed, on the law and the facts, without costs, the findings of neglect vacated, and the petition dismissed.

The Family Court dismissed the abuse charges against respondents on the ground that petitioner did not prove by a preponderance of the credible evidence that they had

intentionally caused their five-month-old son's fractured femur. The court found that the opinion of petitioner's medical expert, Dr. Cooper, that the child's injury was intentionally inflicted was undercut by a 2000 article in the Journal of Pediatric Orthopaedics, "Femur Shaft Fractures in Toddlers," which "documents two cases of six-month-old infants who reportedly fractured their femurs by falling from a bed and a sofa, respectively. The article further specifically calculated a 62% probability that abuse was *not* a factor in the fractures suffered by the infants they studied." Thus, the court credited the opinion of respondents' expert, Dr. David, that the child's "injuries could have occurred by means other than intentional infliction," and found that "the evidence of the parents' care for the child prior to the injury and their actions after the injury weighs against a finding of abuse." The court acknowledged that inconsistent statements by respondents had been reported in the hospital records, and that respondents' "account of [the child's] symptoms was inconsistent with the expert testimony concerning the likely reactions the child would show after suffering a fracture," but found that those considerations did not "tip the scales in favor of a finding of abuse."

Although it dismissed the abuse charges, the Family Court

made findings of neglect based on respondents' "failure to provide a credible explanation for their infant son's fractured femur." The court noted that even if the fracture resulted from the child's accidental fall from a couch onto a tile floor on June 28, 2011, it would find medical neglect in light of the expert testimony that the child would have evinced symptoms whether he suffered "either a complete break or a progressing hairline fracture," yet respondents waited more than a week before seeking medical treatment. We now consider whether these findings of neglect are supported by a preponderance of the credible evidence.

The Family Court correctly determined that petitioner established a prima facie case of neglect because a fractured femur is an injury that a five-month-old child would not ordinarily sustain except by reason of the acts or omissions of the parent or other person responsible for the child (*see* Family Court Act § 1046[a][ii]; *Matter of Philip M.*, 82 NY2d 238, 244-245 [1993]; *Matter of Sara B.*, 41 AD3d 170 [1st Dept 2007]). This shifted the burden of going forward to respondents to rebut the presumption of culpability with a credible and reasonable explanation of how the child sustained the injuries (*see Matter of Philip M.*, 82 NY2d at 244).

Respondents satisfied their burden of explanation by showing that the injury could have occurred accidentally when, on June 28, 2011, the father went to dispose of a soiled diaper and the child, for the first time in his life, rolled over and fell off respondents' couch, which, according to Drs. David and McClellan, most likely caused him to incur a hairline fracture of his right femur that later progressed to an oblique fracture (*see Matter of Jose Luis T. [Carmen A.]*, 81 AD3d 406 [1st Dept 2011]; *Matter of Christopher Anthony M.*, 46 AD3d 896 [2d Dept 2007]; *Matter of Anthony R.C.* 173 AD2d 623 [2d Dept 1991]).

Nor does the record support a finding of medical neglect. In order to find a parent guilty of medical neglect, the court must find, by a preponderance of the evidence, that the parent's failure to seek or accept medical care placed the child in imminent danger of becoming impaired (Family Court Act § 1012(f)(i)(A); *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see Matter of Shawndel M.*, 33 AD3d 1006 [2d Dept 2006]). In determining whether a parent exercised a minimum degree of care, the court must evaluate the parent's behavior "objectively," i.e., in light of whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing" (*Nicholson v Scoppetta*, 3 NY3d at 370).

Here, the finding of medical neglect was based on Dr. Cooper's testimony that even a hairline fracture would cause the child evident pain, which led the Family Court to conclude that respondents testified untruthfully when they said that from the time of the child's fall on June 28th until the late evening of July 5th, the child never exhibited any signs of an injury to his right leg. However, respondents also introduced into evidence a videotape that showed the child rolling over and moving his right leg with no evident discomfort, which was received, without objection, as a "fair and accurate representation of what was filmed that morning of July 5."

Further, Dr. Cooper testified that because the leg of a five-month-old infant is often rather chubby, swelling might not be immediately apparent. Dr. David opined that a hairline fracture would have caused little or no pain or noticeable swelling or bruising until it progressed into a full fracture, and that it would have been reasonable for respondents not to have discovered the child's injury until it became a full fracture sometime in the evening on July 5. When the child repeatedly woke up in distress during that night, respondent mother called the pediatrician and was told, on July 6th, to bring him to the emergency room, which respondents did.

We also note that at the time the child entered the hospital his pain on a scale of one to ten was only a two or three. The child had a negative bone survey and negative retinal scan and no abnormalities or injuries other than the fractured femur. Moreover, the child's pediatrician reported that the child was up to date with all of his immunizations and had been provided with appropriate and timely medical care.

In light of respondents' rebuttal evidence and the lack of evidence of other neglect, the finding of neglect was not supported by a preponderance of the evidence (Family Court Act § 1046 [b][i]). Just as the court found with respect to the abuse charges, the inconsistent statements in the medical records attributed to respondents do not tip the scales in petitioner's favor with respect to the neglect charges.

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Freedman, Feinman, Gische, JJ.

9286 In re Jeffrey Wilson, Ind. 2615/08
[M-5939] Petitioner,

-against-

Hon. Barbara Newman, et al.,
Respondents.

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Jeffrey Wilson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Barbara Newman and Andrew M. Cuomo, respondents.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for Newton Mendys, respondent.

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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, and finding that the claims raised in the petition are not cognizable in this article 78 proceeding.

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

ENTERED: MARCH 14, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9296 Chakima Dover, Index 402642/11
Petitioner-Appellant,

-against-

John B. Rhea, etc., et al.,
Respondents-Respondents.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about March 26, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 26, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9442-
9442A In re Jani Faith B., and Another,

Children Under Eighteen
Years Of Age, etc.,

Craig S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

Julian A Hertz, Larchmont, attorney for the child, Jani Faith B.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child, Nassir S.

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Order of fact-finding and disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about December 22, 2011, which, to the extent appealed from, found that appellant father had sexually abused a child for whom he was legally responsible, and derivatively abused his biological son, unanimously affirmed, without costs. Appeal from order of protection, same court and Judge, entered on or about December 22, 2011, which directed appellant to stay away from and not

communicate with the children, except for agency-supervised visits, until February 2, 2013, unanimously dismissed, without costs, as moot.

A preponderance of the evidence supports the court's determination that appellant sexually abused his stepdaughter (*see Matter of Shirley C.-M.*, 59 AD3d 360, 360 [1st Dept 2009]). The child's testimony was competent evidence that appellant sexually abused her, and the fact that she did not have a physical injury or that there was no corroboration of her testimony does not require a different result (*see Matter of Jonathan F.*, 294 AD2d 121 [1st Dept 2002]; *Matter of Danielle M.*, 151 AD2d 240, 242-243 [1st Dept 1989]). Contrary to appellant's contention, kissing his stepdaughter, while using his tongue, was legally sufficient evidence to establish "sexual contact" within the meaning of Penal Law § 130.00 (*see Matter of David V.*, 226 AD2d 319 [1st Dept 1996]; *People v Sumpter*, 190 Misc 2d 115, 117 [App Term, 1st Dept 2001], *lv denied* 97 NY2d 762 [2002]). Once the agency established its prima facie case through the child's testimony, the burden shifted to appellant to explain his conduct and rebut the evidence of his culpability, which he failed to do

(*see Matter of Christina G. [Vladimir G.]*, 100 AD3d 454, 454-455 [1st Dept 2012]; *Matter of Elizabeth S. [Dona M.]*, 70 AD3d 453, 453 [1st Dept 2010]).

The court properly drew a negative inference against appellant as to the issue of whether his actions were for the purpose of gratifying his sexual desire since sexual gratification may be inferred from a totality of the circumstances and appellant failed to testify and offer an innocent explanation for his actions (*see Matter of Andre N.*, 282 AD2d 273, 274 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]). The court also properly determined that appellant had smoked marijuana and was drinking prior to the incident because his stepdaughter credibly testified that she saw him doing so and he failed to rebut these allegations (*see Matter of Ivette R.*, 282 AD2d 751, 751-752 [2d Dept 2001]).

In addition, a preponderance of the evidence supports the conclusion that appellant derivatively abused his son, because his stepdaughter testified that the child was present in the apartment and had walked into the room while appellant was sexually abusing her (*see Matter of Brandon M.[Luis M.]*, 94 AD3d 520, 520-521 [1st Dept 2012]; *Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]). The evidence of abuse

demonstrated that appellant's parental judgment and impulse control are so defective as to create a substantial risk of harm to any child in his care.

The appeal from the order of protection is dismissed as moot since the expiration date indicated on the order has elapsed (*see Matter of Deivi R. [Marcos R.]*, 68 AD3d 498, 499 [1st Dept 2009]). However, were that not the case, the order of protection would have to be vacated as having an expiration date, inter alia, inconsistent with the one the court stated in its ruling on the record.

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9527 The People of the State of New York, Ind. 4022/06
Respondent,

-against-

Larivia Hightower,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered August 10, 2010, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing her, as a second violent felony offender, to a term of 10 years, 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]). Although the victim did not identify defendant, and although both of his assailants appeared to him to be male, he noticed that one of the assailants had a tattoo of the capital letters LALA on the right side of the neck. The jury viewed the right side of defendant's neck, which had a tattoo of the same capital letters, along with some small decorations that

the victim had not noticed. In addition, when defendant was arrested she was wearing the victim's distinctive crucifix, which had been taken in the robbery three days earlier, a fact that would support an inference of guilt under the principle of recent, exclusive and unexplained possession of the fruits of a crime (*see People v Galbo*, 218 NY 283, 290 [1916]). The combination of the distinctive tattoo and the stolen property clearly established beyond a reasonable doubt defendant's identity as one of the robbers.

Defendant did not preserve her claim that she was entitled to CPL 710.30(1)(b) notice and a *Wade* hearing regarding a confrontation at which the victim viewed defendant in custody, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The victim did not make an identification of defendant, either at the pretrial confrontation or in court. The victim's testimony about the tattoo was not identification testimony, but evidence that defendant and one of the robbers shared a distinctive physical characteristic (*see People v Smalls*, 201 AD2d 333, 334 [1st Dept 1994], *lv denied* 84 NY2d 832 [1994]; *see also People v Myrick*, 66 NY2d 903 [1985]; *People v Sanders*, 108 AD2d 316, 318-319 [2d Dept 1985], *affd* 66 NY2d 906 [1985]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's strategic decisions (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although defendant cites to the record of her CPL 330.30(1) motion to set aside the verdict, such a motion is not a procedurally appropriate device for expanding the trial record (*see People v Ai Jiang*, 62 AD3d 515, 516 [2009], *lv denied* 14 NY3d 769 [2010]). In any event, nothing in the record of the postverdict motion establishes ineffective assistance. On the trial record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that her counsel's alleged deficiencies

fell below an objective standard of reasonableness, or that they deprived defendant of a fair trial, affected the outcome of the case, or caused defendant any prejudice.

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9530 In re The State of New York, Index 30051/09
Petitioner-Respondent,

-against-

John, S.,
Respondent-Appellant.

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Marvin Bernstein, Mental Hygiene Legal Service, New York (Deborah P. Mantell of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Andrew W. Amend of counsel), for the State.

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Order, Supreme Court, New York County (Daniel Conviser, J.), entered on or about August 4, 2011, which, upon a jury verdict that respondent suffers from a mental abnormality, determined that respondent is a dangerous sex offender requiring confinement, unanimously affirmed, without costs.

The court properly ordered the unsealing of records related to three rapes and two robberies for which respondent was indicted in 1968, although respondent's conviction of one count of rape and one count of robbery was ultimately overturned on the ground that he was incompetent at the time he pleaded guilty (*see Suggs v LaVallee*, 570 F2d 1092 [2d Cir 1978], *cert denied* 439 US 915 [1978]). Mental Hygiene Law § 10.08(c) provides, "*Notwithstanding any other provision of law*," the State is

entitled to access to "all records and reports relating to the respondent's commission or alleged commission of a sex offense" (emphasis added). Contrary to respondent's contention, this provision supersedes CPL 160.50, which requires that the record of a criminal proceeding that terminated in favor of the accused be sealed (*see Matter of State of New York v Zimmer*, 63 AD3d 1563 [4th Dept 2009]).

The court properly permitted the State's experts to rely on hearsay statements in the unsealed documents in forming their opinions and to testify as to the content of those documents, subject to certain restrictions, on the ground that the out-of-court documents were "of a kind accepted in the profession as reliable in forming a professional opinion" (*see People v Goldstein*, 6 NY3d 119, 124 [2005] [internal quotation marks omitted], *cert denied* 547 US 1159 [2006]). There is no basis for disturbing the court's determination that the disclosed hearsay facts' probative value to the jury in evaluating the experts' opinions substantially outweighed their prejudicial effect (*see id.* at 126-127).

The jury's verdict that respondent suffers from a mental

abnormality is supported by legally sufficient evidence (*see People v Tejeda*, 73 NY2d 958 [1989]) and is not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9531 In re Ilyas Zaire A.-R.,

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

Habiba A.-R.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Joseph T. Gatti, New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Doneth Gayle of counsel), attorney for the child.

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Order, Family Court, New York County (Jody Adams, J.), entered on or about December 14, 2011, which denied respondent mother's motion to vacate an order of disposition, same court and Judge, entered on or about October 13, 2011, upon her default, which, upon a finding of permanent neglect, terminated her parental rights to the subject child, and transferred custody and guardianship of the child to petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Respondent failed to establish a reasonable excuse for her default and a meritorious defense to the allegations asserted in the petition. Her claim that she was late for the hearing

because she and a companion were stopped by police for improperly traveling in the three person High Occupancy Vehicle lane, was unsubstantiated and she did not provide any explanation for her failure to contact the court or her counsel to advise them that she would be late (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538, 539 [1st Dept 2012]). The fact that respondent previously defaulted further supports the court's decision not to credit her alleged excuse (*see Matter of Damien Richard A., Jr.*, 49 AD3d 458, 459 [1st Dept 2008]).

Moreover, respondent failed to establish a meritorious defense to the allegation of permanent neglect. Despite respondent's claims to the contrary, the agency exercised "diligent efforts" to reunite her with her child, by, among other things, formulating a service plan, holding periodic planning meetings, scheduling regular visits with the child, and referring respondent for needed therapy. The evidence establishes that, despite these efforts, respondent failed to consistently visit with the child, poorly interacted with the child when she did visit, and failed to complete necessary mental health services or

plan for the child's future (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698, 699 [1st Dept 2012]; *Matter of Marah B. [Lee D.]*, 95 AD3d 604, 605 [1st Dept], *lv denied* 19 NY3d 810 [2012]).

Contrary to respondent's contention, a suspended judgment is not warranted under the circumstances. A preponderance of the evidence supports the finding that termination of respondent's parental rights is in the child's best interest (*see Matter of Olushola W.A.*, 41 AD3d 179, 180 [1st Dept 2007]). By the time of the dispositional hearing, he was six years old, and had lived with his kinship foster family, who was meeting all of his special needs, virtually his entire life (*see Matter of Roger Guerrero B.*, 56 AD3d 262, 262-63 [1st Dept 2008], *lv denied* 12 NY3d 704 [2009]).

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9532 New 24 West 40th Street LLC, Index 103495/11
Plaintiff-Respondent,

-against-

XE Capital Management, LLC,
Defendant-Appellant.

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Molina, Villaplana, Colon & Baker, LLP, Bronx (Angela Y. Baker of counsel), for appellant.

Seyfarth Shaw, LLP, New York (Ralph Berman of counsel), for respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered February 21, 2012, which, inter alia, granted plaintiff-landlord's motion for partial summary judgment to the extent of finding defendant-tenant liable for fixed annual rent and additional rent for the period between January 2011 and March 3, 2011, plus liquidated damages on the fixed annual rent from March 3, 2011 to the expiration of the lease (as modified), less amounts received pursuant to the landlord's new leases for the 2nd and 3rd floors with defendant's former subtenants and any new lease for the 15th floor of the building, plus liquidated damages on additional rent to the extent the landlord is entitled to recover the rent credited pursuant to the lease, and denied defendant's cross motion for summary judgment dismissing the

complaint and for leave to amend/supplement its affirmative defenses, unanimously affirmed, with costs.

There is no merit to defendant defaulting tenant's argument that New York law requires a liquidated damages clause in a commercial lease to obligate the landlord to re-rent the premises so as to offset any liabilities to which defendant may be subject due to its material breach of the lease (*see generally Holy Props. v Cole Prods.*, 87 NY2d 130 [1995]). Further, contrary to defendant's contention, the liquidated damages provision in the parties' lease did not constitute a penalty, but rather, allowed the landlord to recoup its actual damages and the benefit of its bargain. The provision did not allow recoupment of damages "disproportionate to any loss which could possibly accrue to the landlord" (*Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 578 [1979]). In fact, the landlord applied the terms of the parties' accelerated rent provision favorably so as to reduce defendant's liability exposure under the lease by seeking payment of the fixed annual rent and additional rent payable through the end of the lease at a 4% discounted rate, with credits to defendant for rent payments received by the landlord from defendant's former subtenants who remained in occupancy of portions of the former leasehold (pursuant to new direct leases

with the landlord), as well as credits for the security deposit defendant posted, and additional rents, if any, received by the landlord upon a successful re-letting of the fifteenth floor space, which was part of defendant's former leasehold (*see e.g. Fifty States Mgt. Corp.*, 46 NY2d at 577-578; *186-90 Joralemon Assoc. v Dianzon*, 161 AD2d 329 [1st Dept 1990]). To the extent that defendant argues that the landlord was not entitled to recoup an $84,776.94 rent credit initially extended to defendant, such argument is unavailing, as the express terms of the parties' "rent credit" provision allowed the landlord to collect the amount of the credit extended if the lease was ever terminated due to defendant's material default thereunder.

While a landlord is under no legal duty to mitigate damages in the event of a material breach of the lease by a commercial tenant (*see Holy Props.*, 87 NY2d at 133-134), here, the landlord has taken appreciable steps to mitigate any losses defendant may incur due to its own breach.

Defendant's contention that the lease terms were unconscionable in that they would allow the landlord a windfall of all rent due, including additional rent, notwithstanding that defendant was reluctantly "locked-out" of the premises, is an argument wholly without evidentiary support in the record.

Defendant failed to make such an assertion after being served with a notice to cure. Moreover, defendant's removal of its possessions from the 15th floor space, and its failure to pay any rent between January and March 2011, combined with its silence as to its reasons for its actions/inactions, left only one reasonable assumption - that it had abandoned the premises and deliberately defaulted on its lease obligations.

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, JJ

9533 Sandy DelRosario, Index 303940/08
Plaintiff-Appellant, 84042/09

-against-

United Nations Federal
Credit Union, et al.,
Defendants-Respondents.
- - - - -
United Nations Federal
Credit Union, et al.,
Third-Party Plaintiff-Respondents,

-against-

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

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

Jones Hirsch Connors Miller & Bull, P.C., New York (Peter S. Read of counsel), for United Nations Credit Union and Tishman Construction Corporation of New York, respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for Petrocelli Electric Co., Inc., respondent.

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross of counsel), for Eurotech Construction Corporation, respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered June 20, 2011, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment on the issue of

liability on his claims under Labor Law § 240(1) and § 241(6), unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff, a carpenter employed by third-party defendant Eurotech Construction Corporation (Eurotech), was injured during the construction of a new building owned by defendant United Nations Federal Credit Union (UNFCU). Plaintiff was standing on an A-frame ladder when he was struck on the left side of his face by a live, energized and exposed electrical wire. When he pulled away from the wire, the ladder wobbled and moved, causing him to lose his balance, and fall to the ground. Defendant Tishman Construction Corp. was the project's general contractor and defendant Petrocelli Electric Co. was the electrical subcontractor.

Partial summary judgment on the issue of liability on the Labor Law § 240(1) cause of action is warranted under the circumstances. The record establishes that the ladder provided to plaintiff was inadequate to the task of preventing his fall when he came into contact with the exposed wire and was a proximate cause of his injury *(see Vukovich v 1345 Fee, LLC*, 61 AD3d 533 [1st Dept 2009]; *Quackenbush v Gar-Ben Assoc.*, 2 AD3d 824, 825 [2d Dept 2003]).

Plaintiff is also entitled to judgment as a matter of law on the issue of defendants' liability under Labor Law § 241(6) predicated on violations of 12 NYCRR 23-1.13(b)(3) and (4). These code sections are clear and specific in their commands that before work is started, it is to be ascertained whether the work will bring a worker into contact with an electric power circuit, and, if so, that the worker not be permitted to come into contact with the circuit without it being de-energized (*see* 12 NYCRR 23-1.13(b)(4); *Hernandez v Ten Ten Co.*, 31 AD3d 333 [1st Dept 2006]; *Snowden v New York City Tr. Auth.*, 248 AD2d 235 [1st Dept 1998]). Here, the record shows that the exposed, live circuit in the ceiling hit plaintiff in the face and was a proximate cause of his injury.

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9538 Minoska Carrasquillo, etc., et al., Index 8440/06
Plaintiffs-Appellants,

-against-

The New York City
Department of Education, (DOE), et al.,
Defendants-Respondents.

_____

Peña & Khan, PLLC, Bronx (Diane Welch Bando of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about December 2, 2011, which granted defendants' motions in limine to preclude plaintiffs from proffering evidence that water caused the infant plaintiff's injury and to dismiss, for failure to state a cause of action, the complaint alleging premises liability and negligent supervision, unanimously modified, on the law, to deny the motion to dismiss as to the negligent supervision claim, and otherwise affirmed, without costs.

Plaintiffs' original notice of claim did not allege that the infant plaintiff slipped on water on the gym floor. It alleged merely that respondents were "negligent in the premises." This

allegation failed to provide respondents with enough information to enable them to investigate the premises liability claim (*see O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]). Plaintiffs may not rely on the complaint (served 13 months after the accident), the bill of particulars (served almost two years after the accident), or the General Municipal Law § 50-h hearing testimony (given almost one year after the accident) to alert respondents to their theory of a failure to discover and remedy a wet floor (*see Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]).

The motion court improperly treated the motion in limine to dismiss the negligent supervision claim as a motion for summary judgment (*see Downtown Art Co. v Zimmerman*, 232 AD2d 270 [1st Dept 1996]; *Brewi-Bijoux v City of New York*, 73 AD3d 1112 [2d Dept 2010]).

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9540 The People of the State of New York, Ind. 5704/09
Respondent,

-against-

Edward Cardelle,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at suppression hearing; Jill Konviser, J. at jury trial and sentencing), rendered October 21, 2010, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of the weight to be given the observing officer's admission that an aspect of his initial testimony had been mistaken.

The trial court providently exercised its discretion in

permitting the People to introduce rebuttal evidence that responded to evidence introduced by the defense (*see People v Harris*, 57 NY2d 335, 345 [1982], *cert denied* 460 US 1047 [1983]). Even if the testimony was "not technically of a rebuttal nature," the court had discretion to allow it (CPL 260.30[7]).

The hearing court properly denied defendant's suppression motion. The court properly determined that the police had reasonable suspicion to detain defendant when, in a drug prone area, an officer saw defendant accept money in return for a small package, and the officer, based on his experience, believed that the package contained drugs (*see e.g. People v Turell*, 248 AD2d 330 [1st Dept 1998], *lv denied* 92 NY2d 862 [1998]). The hearing evidence establishes that there was a brief investigatory detention of defendant (*see People v Hicks*, 68 NY2d 234, 238-239 [1986]), during which time police investigation of the apprehended buyer provided probable cause for defendant's arrest.

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9542 Philip Seldon, Index 116217/08
Plaintiff-Respondent,

-against-

Allstate Insurance Company, et al.,
Defendants-Appellants.

_____

Shapiro, Beilly & Aronowitz, LLC, New York (Roy J. Karlin of counsel), for appellants.

Weg and Meyers, P.C., New York (Dennis D'Antonio of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered April l9, 2012, which denied defendants Allstate Insurance Company and Allstate Insurance Co., Inc.'s (Allstate) motion for summary judgment dismissing the complaint, unanimously reversed on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action alleging that defendant insurer acted in bad faith by failing to settle libel and slander claims within policy limits, resulting in a judgment against plaintiff for punitive damages, defendant is entitled to summary judgment based on public policy precluding an insured from recovering the punitive damages portion of any judgment which may have resulted from the insurer's bad faith failure to settle (*see Soto v State Farm*

Ins., 83 NY2d 718 [1994]). Although this public policy argument was advanced for the first time in defendant's appellate brief, defendant alleged no new facts, but rather raised pure legal arguments which may be considered for the first time on appeal (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2010]).

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9543 Wilson Padilla, Index 304290/09
Plaintiff-Appellant,

-against-

Edison Transport, Inc., et al.,
Defendants,

Tremont Dispatching Corp., et al.,
Defendants-Respondents.

_____

Kelner & Kelner, New York (Joshua D. Kelner of counsel), for appellant.

Jonathan I. Edelstein, New York, for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 29, 2012, which, insofar as appealed from, granted the cross motion of defendants Tremont Dispatching Corp. (Tremont), Crosby Taxi Co. Ltd. (Crosby), Sasojo Realty Corp. (Sasojo), and John Caio for summary judgment dismissing the complaint as against them, and denied plaintiff's motion for partial summary judgment on the issue of liability as against these defendants, unanimously affirmed, without costs.

Plaintiff was injured when a taxicab owned by defendant Edison Transport, in which he was a passenger, struck a parked vehicle. Although plaintiff may have demonstrated that Tremont exercised complete domination and control over Edison, he failed,

as the party seeking to pierce the corporate veil, to sustain his burden of showing that the individual defendants "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against" him (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]).

There is also no basis to pierce the corporate veil to reach Caio in his individual capacity. There is a lack of evidence that Caio, the president and sole shareholder of all the corporate defendants, was doing business in his individual capacity, or that he used his corporate position for "personal rather than corporate ends" (*Brito v DILP Corp.*, 282 AD2d 320, 321 [1st Dept 2001] [internal quotation marks omitted]).

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

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9544 Leshai Ryals, Index 21244/04
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

R.G. Ortiz Funeral Home, Inc., et al.,
Defendants.

_____

Law Offices of Michael S. Lamonsoff, PLLC, New York (Stacey Haskel of counsel), for appellant.

Steve S. Efron, New York (Renee L. Cyr of counsel), for respondents.

_____

Appeal from decision, Supreme Court, Bronx County (John A. Barone, J.), entered March 12, 2012, which denied plaintiff's motion, pursuant to CPLR 4404(a), seeking to set aside the verdict and a new trial on the issue of liability, and directed the parties to settle judgment on notice, unanimously dismissed, without costs, as taken from a nonappealable paper.

The appeal is dismissed, as no appeal lies from a decision, or an appealed paper directing the settlement of a judgment (*see* CPLR 5512[a]; *Gunn v Palmieri*, 86 NY2d 830 [1995]; *Leser v Penido*, 96 AD3d 578 [1st Dept 2012]). Moreover, plaintiff's

right to a direct appeal from any order denying a motion to set aside the verdict terminated with the entry of a judgment (*see* CPLR 5501; *Matter of Aho*, 39 NY2d 241, 248 [1976]).

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9545 The People of the State of New York, Ind. 6534/10
Respondent,

-against-

Eduar Bueno,
Defendant-Appellant.

_____

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

_____

Appeal from judgment, Supreme Court, New York County (Carol Berkman, J.), rendered June 21, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of four months, held in abeyance, the application by assigned counsel to withdraw on the ground that the appeal is wholly frivolous (*People v Saunders*, 52 AD2d 833 [1976]) granted to the extent of relieving counsel, assigning Office of the Appellate Defender as new counsel, and enlarging the time to reperfect the appeal to the September, 2013 Term of this Court.

Counsel's letter to defendant explaining to him the expected consequences of counsel's *Saunders* brief was inadequate because it was written in English while the record reflects that defendant was aided by an interpreter at the plea proceeding, and

there is nothing to indicate that defendant understood counsel's letter or that anything was done to communicate its substance to him in Spanish (*see e.g. People v Rosario*, 19 AD3d 333 [1st Dept 2005]).

Furthermore, counsel's brief does not address all of the pertinent underlying facts or analyze issues presented in the record of the plea and sentencing proceedings, particularly regarding events immediately preceding the actual plea colloquy. While we express no opinion with respect to the merit, or lack thereof, of any possible issue, we find that there may be issues regarding the voluntariness of defendant's plea (*see e.g. People v Fisher*, 70 AD3d 114, 119 [1st Dept 2009]) that would not be "wholly frivolous" under the *Saunders* standard. Accordingly, the requirements of a *Saunders* brief have not been satisfied (*see People v Stokes*, 95 NY2d 633, 636-637 [2001]). Since our own

review cannot substitute for the single-minded advocacy of appellate counsel, a new assignment of counsel and reconsideration of the appeal is required (*see People v Casiano*, 67 NY2d 906 [1986]).

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

ENTERED: MARCH 14, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9547 Boanerges Roca, Index 17574/07
Plaintiff-Respondent,

-against-

66-36 Yellowstone Boulevard Cooperative,
Defendant,

Goodman Management,
Defendant-Appellant.

_____

Marshall, Conway & Bradley, P.C., New York (Marci D. Mitkoff of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 2, 2012, which, to the extent appealed from, denied the motion of defendant Goodman Management (Goodman) for summary judgment dismissing the complaint and all cross claims as against it on the ground that the action is barred by the exclusivity provisions of the Workers' Compensation Law, unanimously affirmed, without costs.

Plaintiff alleges that he was injured in the course of his job as a handyman employed by defendant 66-36 Yellowstone Boulevard Corp. (Yellowstone), a cooperative corporation, when he fell from a ladder while painting sprinkler pipes. Dismissal of the complaint as against Goodman, the managing agent for the

building, was properly denied since Goodman failed to demonstrate that it had assumed exclusive control over "the manner, details and ultimate result of [plaintiff's] work" so as to consider it plaintiff's special employer (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 [1991]). Notably, Goodman did not demonstrate, as a matter of law, that it supervised, directed and controlled the superintendent and plaintiff with respect to the project involved in the accident (*see Bautista v David Frankel Realty, Inc.*, 54 AD3d 549 [1st Dept 2008]). Although plaintiff regarded Goodman's property manager as his boss and believed she had directed the painting of the pipes, the superintendent testified that he managed maintenance in the building without reporting to Goodman's property manager, and the property manager did not recall directing the superintendent or plaintiff to undertake the painting job and testified it was the superintendent's job to handle such projects.

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

ENTERED: MARCH 14, 2013

CLERK