SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 12, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Acosta, Andrias, Saxe, Moskowitz, JJ.

15569 Julie Katz, Index 570321/13
Plaintiff-Respondent,

-against-

The United Synagogue of Conservative Judaism,
Defendant-Appellant.

Cozen O'Connor, New York (Amanda L. Nelson of counsel), for appellant.

Becker & D'Agostino, P.C., New York (Robert D. Becker of counsel), for respondent.

Order of the Appellate Term of the Supreme Court, First Department, entered on or about January 28, 2014, which reversed an order of the Civil Court, New York County (Frank P. Nervo, J.), entered April 17, 2012, granting defendant's motion for summary judgment dismissing the complaint, denied the motion, and reinstated the complaint, affirmed, without costs.

Plaintiff suffered a knee injury while participating in a study-abroad program in Israel that was operated by defendant. At the time of her injury, she was a 19-year old student who had

limited knowledge of Hebrew and was living in a small town in southern Israel, in an apartment provided to her by the program, which also provided the participants with counselors in order to help them with, inter alia, medical issues. According to plaintiff when physical therapy was prescribed for her knee injury, defendant refused to arrange for such treatment and, as a result, her recovery was delayed and compromised.

In order to establish a claim for negligence, a plaintiff must show that the defendant owed the plaintiff a duty and breached that duty, and that the breach proximately caused the plaintiff harm (*see Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). The existence of a duty depends on the circumstances, and the issue is one of law for the court; "the court is to apply a broad range of societal and policy factors" (*Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500 [1st Dept 2007], *lv denied* 9 NY3d 809 [2007]).

In determining the threshold question of whether a defendant owes a plaintiff a duty of care, courts must balance relevant factors, "including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the

expansion or limitation of new channels of liability" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 586 [1994]). The parties' relationship may create a duty where it "places the defendant in the best position to protect against the risk of harm [] and [] the specter of limitless liability is not present" (*Matter of New York City Asbestos Litig.*, 5 NY3d 486, 494 [2005] [internal quotation marks omitted]). Thus, where a defendant exercises a sufficient degree of control over an event, a duty of care to plaintiff may arise (*see Derezeas v Robert H. Glover & Assoc., Inc.*, 121 AD3d 523 [1st Dept 2014] [defendant owed pedestrian, who was injured by a runner, a duty of care because it supervised a running class, including selecting the route and providing coaches to ensure that runners stayed on the left and warn pedestrians]; *Hores v Sargent*, 230 AD2d 712, 712 [2d Dept 1996] [college, which organized and supervised a bicycle trip, selected the route, operated vans to help riders, and instructed participants on safety, had "a sufficient degree of control over the subject event, and thus was under a duty to take reasonable precautions for the safety of the participants"]).

Here, the parties' relationship created a duty to provide plaintiff with the necessary medical care because not only did defendant agree to do so, it was in the "best position to protect

against the risk of harm" and "the specter of limitless liability [was] not present" (*Matter of New York City Asbestos Litig.*, 5 NY3d at 494 [internal quotation marks omitted]). The program was not an ordinary college or study-abroad program. Indeed, the second "semester" did not take place in a university environment. Rather, it took place in Yerucham, a small town in the Negev desert, involved volunteering, and was supervised by counselors who did "[p]retty much everything," including responding to medical issues. Under the circumstances, defendant exercised a sufficient degree of control over the program to create a duty of care to plaintiff (*see Derezeas*, 121 AD3d at 523; *Hores v Sargent*, 230 AD2d at 712).

Our holding that a duty of care exists in this case is not premised on the doctrine of in loco parentis.[1] Accordingly, to the extent *Wells v Bard Coll.* (184 AD2d 304 [1st Dept 1992]) and

---

[1]The in loco parentis doctrine may apply to create a duty of care where a defendant takes the place of a plaintiff's parents. However, "New York has affirmatively rejected the doctrine of in loco parentis at the college level" (*Wells v Bard Coll.*, 184 AD2d 304, 304 [1st Dept 1992] [citing *Eiseman v State of New York*, 70 NY2d 175, 190 [1987], *lv dismissed in part, denied in part* 80 NY2d 971 [1992]; *see also Sirohi v Lee*, 222 AD2d 222 [1st Dept 1995], *lv dismissed in part, denied in part* 88 NY2d 897 [1996]). In so doing, the courts have found that colleges do not owe their adult students a duty to supervise their health care following an accident (*see Wells v Bard Coll., 184 AD2d at 304; McNeil v Wagner Coll.*, 246 AD2d 516, 517 [2d Dept 1998]).

McNeil v Wagner Coll. (246 AD2d 516 [2nd Dept 1998]) hold that in loco parentis does not apply at the college level, that holding is irrelevant to our analysis.

In any event, *Wells* and *McNeil* are easily distinguishable from the facts of the present case. In *Wells*, the student did not avail himself of available medical care and refused medical assistance, and there was no basis to find that defendant ever knew of the seriousness of his illness. In contrast, here, the program allegedly refused to comply with plaintiff's request that it arrange for insurance coverage for, and transportation to, physical therapy. Moreover, there is no indication in *Wells* that plaintiff relied on the theory that defendant assumed the duty.

In *McNeil*, which involved a student studying abroad, the Court found that "the defendant had no obligation to supervise the plaintiff's health care following her accident" (246 AD2d at 517). The court rejected plaintiff's contention that the program administrator, who accompanied her to the hospital and allegedly failed to inform her that the physician recommended immediate surgery, "voluntarily assumed a duty of care by acting as her interpreter . . . and that his breach of that duty placed her in a more vulnerable position," since there was evidence that the physician could speak English, and plaintiff's claim that the

administrator was told of the recommendation of surgery was unsupported (*id.*).

In contrast, plaintiff testified that defendant represented that it would assist her with medical care, which practice the program director confirmed, and plaintiff's testimony that the program refused to help her obtain prescribed physical therapy is unrefuted, which circumstances are compounded by a language barrier and the remoteness of Yerucham, requiring that plaintiff travel for treatment. Under these circumstances, defendant failed to establish, as a matter of law, that it did not owe plaintiff a duty to arrange for physical therapy (*see Matter of New York City Asbestos Litig.*, 5 NY3d at 494 ; *Hores*, 230 AD2d at 712). While plaintiff, an adult, with access to her parents in another country and family in Jerusalem, may not have been as helpless as she makes herself out to be, that fact is but one factor to consider.

Defendant accurately maintains that its general internal policy of accompanying injured participants to medical appointments and arranging for transportation to treatment in remote areas does not create a legal duty. However, the failure to provide access to physical therapy here was more than a policy violation. Plaintiff's testimony that she was told that the

program would set up medical appointments for her and attend them with her is uncontroverted and consistent with the program's accompaniment of plaintiff to the hospital and doctors' appointments.

Furthermore, it was foreseeable that the failure to arrange for prescribed care could compromise recovery. Defendant also maintains that, even if it owed plaintiff a duty, that duty was not breached because the program took plaintiff for medical treatment and "follow[ed] the general recommendations of the doctors who examined Plaintiff." This argument ignores the fact that plaintiff was prescribed physical therapy, which was not provided.

We disagree with the dissent's assertion that even if defendant owed plaintiff a duty, defendant met its prima facie burden on causation, and plaintiff failed to submit sufficient evidence to raise an issue of fact as to whether she suffered harm as a result of defendant's failure to arrange for physical therapy. Contrary to the dissent, defendant failed to make a prima facie showing that plaintiff's injuries were not caused or exacerbated by the alleged breach, and, thus, the burden never shifted to plaintiff on this issue (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Collado v Jiacono*, 126 AD3d

927, 928 [2nd Dept 2015] ["a moving defendant does not meet its burden of affirmatively establishing its entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its claim or defense"]).

On the motion, defendant improperly attempted to shift the initial burden to plaintiff, by challenging the existence of evidence as to causation, rather than affirmatively establishing a lack of causation, such as via an expert affidavit. Defendant argued that "[p]laintiff has failed to produce any evidence . . . suggesting that [defendant's] conduct caused her injury to worsen," and proceeded to poke holes in plaintiff's theory of causation, as does the dissent (*Davranov v 470 Realty Assoc., LLC*, 79 AD3d 697 [1st Dept 2010] [defendant cannot satisfy burden merely by pointing out gaps in plaintiff's case]). While plaintiff's ability to establish a causal connection may be difficult, that does not establish the absence of a causal connection.

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

ANDRIAS, J. (dissenting)

Plaintiff was a participant in defendant's Nativ Program, in which first-year-college level students live, study, and perform volunteer work in Israel for 9 or 10 months. She alleges that defendant was negligent in failing to arrange for the physical therapy, including transportation, prescribed in Israel after she injured her right knee, and that this failure caused a longer-than-otherwise recovery period following the surgical procedures she underwent upon her return to the United States to repair a patellar dislocation, and a less favorable result.

Defendant moved for summary judgment on the grounds that it did not owe the college-aged plaintiff a duty to supervise her medical care while she participated in the program and that, in any event, its alleged negligence did not cause her any compensable harm. Civil Court granted the motion, holding that defendant had demonstrated prima facie that its alleged failure to arrange for physical therapy was not a substantial factor in causing plaintiff's injuries, which could only be alleviated by surgery, and that the conclusory affirmation of plaintiff's medical expert was insufficient to raise an issue of fact. Appellate Term reversed (42 Misc 3d 109 [Appellant Term, 1st Dept 2014]), holding that: (i) "[m]ixed questions of law and fact are

raised as to whether defendant owed plaintiff a duty to supervise her medical care in the unusual circumstances of the fact pattern here presented," and (ii) if a duty exists, questions of fact exist as to whether defendant breached it and whether the breach caused or exacerbated plaintiff's injuries.

The majority affirms Appellate Term's determination, albeit on different grounds. Stating that this "was not an ordinary college or study-abroad program," the majority holds that defendant exercised a sufficient degree of control over the program to create a duty to provide plaintiff with the necessary medical care, independent of the doctrine of in loco parentis. Further, while acknowledging that "plaintiff's ability to establish a causal connection may be difficult," the majority denies summary judgment to defendant on the ground that it failed to establish prima facie that plaintiff's injuries were not exacerbated by its failure to arrange for the physical therapy, thereby avoiding the issue of whether Appellate Term erred when it held that the affirmation by plaintiff's medical expert was sufficient to raise an issue as to causation.

I do not agree. As a matter of law, defendant did not owe plaintiff, a 19-year-old college-level student in a gap year program, a duty to supervise her medical care. Even if such a

duty existed, defendant established prima facie that its alleged refusal to arrange for plaintiff's physical therapy was not a proximate cause of her injuries. In opposition, the conclusory affidavit by plaintiff's expert orthopedist did not suffice to raise an issue of fact. Accordingly, I respectfully dissent and would reinstate Civil Court's grant of summary judgment dismissing the complaint.

The program provided plaintiff with medical insurance and an insurance card. Plaintiff was also told that program staff would contact doctors, set up appointments, and attend them with her, should the need arise.

In September 2007, while studying at a university in Jerusalem, during the first semester of the program, plaintiff twisted her right knee. She was treated by a doctor who told her that she should return in two weeks if the knee was still bothering her. The pain lasted for one to two weeks, and plaintiff did not return. This was not the first time plaintiff had experienced a problem with her knees. In her medical forms for the program, she disclosed that she had arthritis and had worn a knee brace for sore joints "years ago."

For the second semester, plaintiff lived in Yerucham, a small town in southern Israel, an hour and a half away from

Jerusalem, where she performed volunteer work. Still, plaintiff was not completely on her own. She had a host family in the town, relatives in Jerusalem, and a cell phone that she could use to contact her parents.

On March 5, 2008, while on a trip to a kibbutz in northern Israel, plaintiff reinjured her right knee when she fell and struck it on the sidewalk while her boyfriend was giving her a piggyback ride. Staff members iced the knee, and on the next day brought her, accompanied by her boyfriend, to a hospital in Be'er Sheva, which was a half an hour away from Yerucham. There, a doctor told plaintiff that her knee was filled with fluid, and advised her to rest and return in two weeks to get it drained, if it remained swollen. Plaintiff informed her parents about the incident.

On March 12, 2008, plaintiff, accompanied by a staff member, was taken to see Dr. Yuri Zilberman, an orthopedist in Be’er Sheva. Dr. Zilberman drained plaintiff’s knee and prescribed an MRI. His records state that plaintiff reported sustaining a right knee trauma six months earlier and that a recent fall worsened the pain.

On March 24, 2008, plaintiff, accompanied by an assistant director of the program, underwent the MRI and saw Dr. Daniel

Plotkin, an orthopedist, who first believed that she had a torn meniscus. On March 31, plaintiff, accompanied by the assistant director of the program, returned to Dr. Plotkin, who diagnosed her with a bone contusion and/or bruise and for the first time prescribed physical therapy. Surgery was discussed, but Dr. Plotkin and the assistant director did not think it was a good idea for plaintiff to undergo surgery in Israel because the closest physical rehabilitation center to Yerucham was in Be'er Sheva.

Plaintiff testified that she asked the assistant director to contact the insurance company to arrange for the prescribed physical therapy and that the assistant director never called because "[plaintiff was] gonna be in Yerucham for a little bit and [the assistant director] [didn't] know how [defendant was] going to get [plaintiff] to and out of Beer Sheva and [the program was] going back to Jerusalem." Plaintiff also testified that she mentioned the need for physical therapy to the program's director, and that "[h]e didn't really say one way or the other." Plaintiff also talked to her parents about the situation. They were not happy and may have called her rabbi in New Jersey or defendant's New York office about it.

Plaintiff testified that she did not contact the insurance

company herself because she believed it was the program's responsibility, she did not have the money for transportation to and from Be'er Sheva, and the insurance company representatives did not speak English. In her application for the Nativ program, plaintiff had identified her reading and writing of Hebrew as "[g]ood" and speaking of Hebrew as "[p]oor."

On April 1, 2008, the day after she last saw Dr. Plotkin, plaintiff participated in a group activity in which she performed a dance with other women. During the week of April 6th, she participated in a hiking trip. On May 19, 2008, the program ended, and plaintiff returned home to New Jersey.

On June 4, 2008, Dr. Gerardo Goldberger, an orthopedic surgeon, found the MRI films from Israel to be consistent with a patellar lateral dislocation. He recommended physical therapy, ice, and anti-inflammatories. After reviewing a new MRI, on July 15, 2008, Dr. Goldberger diagnosed plaintiff with "[r]ecurrent dislocation of the right patella with contusion . . . and disruption of the medial patellar ligament," and recommended surgery. Plaintiff acknowledges that physical therapy would not have obviated her need for surgery to repair her patellar dislocation, which was not diagnosed until she returned to the United States.

On July 24, 2008, Dr. Goldberger discussed surgery with plaintiff, along with the need for extensive, post-operative physical therapy. On July 28, 2008, he performed an arthroscopy of the right knee, with debridement of the patellofemoral joint and large osteochondral defect. The operative report reflects that plaintiff sustained the original trauma eight months earlier and "did not receive adequate medical care in identifying the pathology" and that Dr. Goldberger recommended surgery because plaintiff's severe symptoms "were . . . not responding to medical and conservative approaches."

On August 4, 2008, Dr. Goldberger performed an open arthrotomy in order to repair an osteochondral lesion and defect in the patella, debride the patellofemoral joint, and release of lateral tendons, which involved the placement of hardware. On August 12, Dr. Goldberger noted that physical therapy would be re-started. At a September 12, 2008 visit, Dr. Goldberger recommended that physical therapy be continued. At an October 8, 2008 visit, he noted that plaintiff had "developed a significant pattern of arthrofibrosis with restriction of motion, for which she has regressed on each examination." On October 13, 2008, plaintiff underwent a third surgery.

On November 3, 2008, plaintiff saw Dr. James Cozzarelli, who

noted that plaintiff was "very happy with her progress" and "able to fully extend." Dr. Cozzarelli advised plaintiff to continue physical therapy. On December 18, 2008, Dr. Goldberger noted that plaintiff was doing "remarkably well," and recommended further physical therapy "for the final restoration and strength." However, plaintiff stopped physical therapy after one semester at SUNY-Binghamton because it was allegedly interfering with her grade point average.

On July 21, 2009, Dr. Goldberger noted the presence of extensive grinding of the patellofemoral joint, and that plaintiff reported that her right knee pain "is not severe unless she performs an extensive pattern of impact aerobics." At a September 18, 2009 visit, Dr. Alan Nasar noted that plaintiff reported having "been quite active recently with a lot of dancing," after which her knee swelled and stiffened.

To recover for negligence, a plaintiff must establish that the defendant owed a duty to use reasonable care, that the defendant breached the duty of care, and that the breach of such duty was a proximate cause of the plaintiff's injuries (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). "Absent a duty running directly to the injured [party] there can be no liability in damages, however careless the conduct or foreseeable the harm"

(*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 289 [2001]). Whether a duty exists and, if so, the scope of that duty, are questions of law for the court to decide (*see Church v Callanan Indus.*, 99 NY2d 104, 110-111 [2002]).

Plaintiff alleges in her complaint that "[u]pon information and belief following [her] injury the leaders and counselors in the Nativ Program were responsible for insuring that [she] received the necessary medical treatment for [her] injury. The leaders and counselors had custody and control of the participants in the Nativ Program including plaintiff." However, "New York has affirmatively rejected the doctrine of in loco parentis at the college level"; colleges and universities have "no obligation . . . to monitor the health of [students]" and no duty to "seek medical assistance on [students'] behalf" (*Wells v Bard Coll.*, 184 AD2d 304, 304 [1st Dept 1992], *lv dismissed in part, denied in part* 80 NY2d 971 [1992]; *see also Sirohi v Lee*, 222 AD2d 222 [1st Dept 1995], *lv dismissed in part, denied in part* 88 NY2d 897 [1996]).

This holding has been applied to the duty to supervise medical care of college-level students in study abroad programs. In *McNeil v Wagner Coll.* (246 AD2d 516 [2d Dept 1998]), the plaintiff broke her ankle in a town in Austria, which she was

visiting as part of an overseas program arranged by Wagner College. The plaintiff claimed that she sustained permanent injuries as a result of Wagner's negligent supervision of her medical care because the program's administrator failed to inform her of the treating physician's recommendation that she undergo immediate surgery. The Second Department held that "Supreme Court properly determined that the defendant had no obligation to supervise the plaintiff's health care following her accident" (246 AD2d at 517).

The majority believes that defendant nevertheless owed plaintiff a duty to supervise her medical care because defendant exercised a sufficient degree of control over the program and agreed to provide for all of her medical needs, including scheduling and transporting her to appointments, and was in the best position to protect against the risk of harm. However, plaintiff, an adult, had her own insurance card and cell phone and informed her parents of the accident and the alleged failure of defendant to grant her request for physical therapy. She also had family in Jerusalem, and, as the majority concedes, may not have been as helpless as she makes herself out to be.

Furthermore, "'[a] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract

itself has been violated'" (*Brown v Wyckoff Hgts. Med. Ctr.*, 28 AD3d 412, 413 [2d Dept 2006], quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). "While a defendant's internal rules may be admissible as evidence of whether reasonable care was exercised, such rules must be excluded, as a matter of law, if they require a standard of care which transcends the traditional common-law standard of reasonable care under the circumstances" (*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 323 [1st Dept 2006], *affd* 18 NY3d 931 [2007]; *see also Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]).

Accordingly, I see no basis to depart from the holdings in *Wells* and *McNeil*. Plaintiff does not assert a claim for breach of contract, and defendant had no duty to seek further medical care for plaintiff.

Even assuming that defendant owed a duty to plaintiff to supervise her medical care, including physical therapy, defendant established prima facie that its alleged negligence did not cause plaintiff's injuries. While the majority states that defendant improperly attempted to shift the initial burden to plaintiff, defendant satisfied its burden on causation by submitting, inter alia, (i) the medical records of Dr. Goldberger, which

demonstrated that plaintiff had suffered the full extent of her injury to her right knee by March 2008 and "did not receive adequate medical care in identifying the pathology," that plaintiff's symptoms "were . . . not responding to medical and conservative approaches," and that plaintiff did not follow through on the recommended post-surgery physical therapy; (ii) plaintiff's testimony that physical therapy would not have obviated her need for surgery to repair her patellar dislocation; (iii) a letter dated June 23, 2010 from an orthopedist hired by plaintiff to plaintiff's counsel opining that surgical intervention within a few weeks would have been the most appropriate treatment and that it was the delay of almost five months between the injury and the surgery that "deprived [plaintiff] of the best opportunity for a satisfactory result of treatment"; and (iv) an affidavit describing plaintiff's participation in a group activity, the day after her last visit to Dr. Plotkin, in which she performed a dance with other women, and in a hiking trip a week later. By these submissions, defendant established prima facie that the alleged breach could not have caused any deterioration to plaintiff's condition, as her patellar dislocation, which was visible on the March 2008 MRI but not diagnosed in Israel, required surgical repair whether she

had preoperative physical therapy or not, that the presurgical physical therapy she underwent in the United States did not obviate the need for surgery, and that it was the delay in diagnosing her condition and performing the surgery that was the cause of her alleged injuries.

In opposition, plaintiff was required to submit evidence in admissible form sufficient to raise an issue of fact as to whether she suffered harm as a result of defendant's failure to arrange for the physical therapy. The December 2011 affirmation of her expert, Dr. Cassels, who appears to be the same orthopedist that authored the June 23, 2010 letter attributing plaintiff's injuries to the five month delay in performing the required surgery, did not satisfy that burden (*see Romano v Stanley*, 90 NY2d 444, 451-452 [1997]; *Moore v New York Med. Group, P.C.*, 44 AD3d 393 [1st Dept 2007], *lv dismissed* 10 NY3d 740 [2008]).

Dr. Cassels failed to provide an evidentiary basis for his finding that earlier physical therapy would have resulted in a better recovery. He did not examine plaintiff or identify the records he examined. He did not indicate whether he had knowledge of plaintiff's original September 2007 injury, her pre-surgical course of physical therapy, her subsequent refusal

to complete physical therapy, or her engagement in strenuous physical activity. Nor did plaintiff produce any other evidence that would support her claim that her recovery time was extended by defendant's failure to arrange for physical therapy and that her injuries were not simply caused by September 2007 and March 2008 accidents.

Accordingly, defendant's motion for summary judgment dismissing the complaint should be granted.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Renwick, Andrias, Manzanet-Daniels, JJ.

15835-
15836 In re Christy C.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Christopher G. Arko of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Mary E. Bednar, J. at suppression hearing; Susan R. Larabee, J. at fact-finding and disposition), entered on or about May 31, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of false personation, and placed her on probation for a period of 13 months, affirmed, without costs.

At the time of her arrest, appellant, then 14 years of age, gave a false name, age and address to the police. A police officer had approached appellant at the Exchange Place Path station in Jersey City, New Jersey, as a possible abandoned

child. Appellant, who was a runaway child from Harlem, New York, continued her false assertions after being warned by a police officer that providing false information subjected her to criminal liability. On appeal, appellant challenges the denial of the motion to suppress her statements to the police, the finding that she committed false personation, and her adjudication as a juvenile delinquent in need of treatment and supervision.

The court properly denied appellant's motion to suppress her statement to the police, in which she gave a false name and date of birth, resulting in the false personation charge (Penal Law § 190.23). The police had probable cause to believe appellant was a runaway (*see Matter of Marrhonda G.*, 81 NY2d 942 [1993]). The then 14-year-old appellant, who appeared to be as young as 13, was alone in a PATH station in New Jersey, but she vaguely claimed to live in "upstate" New York. In addition, she had a bruised eye and was wearing provocative clothing, suggesting the possibility of some kind of sexual exploitation. The police were entitled to ask pedigree questions without *Miranda* warnings, even though an officer warned appellant, as required by the false personation statute, that providing false information would result in an additional charge (*see People v Ligon*, 66 AD3d 516

[1st Dept 2009], *lv denied* 14 NY3d 889 [2010]). We have considered and rejected appellant's remaining suppression claims. In light of the foregoing, we find it unnecessary to reach the presentment agency's argument that a misrepresentation of identity made in violation of Penal Law § 190.23 is not a statement subject to suppression.

The finding that appellant committed false personation was supported by legally sufficient evidence, and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348, 349 [2007]). There is no basis for disturbing the court's credibility determinations. The dissent argues that, "[b]ut for [the police officer's] warning, there would have been no . . . crime." There was, however, nothing nefarious about the police officer's conduct. The officer properly warned appellant in accordance with Penal Law § 190.23 of the consequences of providing false pedigree information. Further, the evidence supports the inference that appellant acted with the requisite knowledge and intent.

Upon disposition, the court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead appropriately adjudicated her a juvenile delinquent and placed her on a

13-month period of probation. This was the least restrictive alternative consistent with appellant's needs and the community's need for protection *(see Matter of Katherine W.*, 62 NY2d 947 [1984]). Appellant's history, which included violent behavior, toward her family, in placement, in school, and in the streets, aggressive behavior toward facility staff, a threat to kill a fellow student, truancy, promiscuity, and drug and alcohol abuse, warranted a 13-month period of supervision.

Appellant's record of violent behavior, truancy, promiscuity, and drug and alcohol abuse establishes that the court had ample reason to reject the Department of Probation's recommendations, and demonstrates that an adjudication of "supervised adjournment in contemplation of dismissal (ACD)," as the dissent posits, would have been unsuitable and inappropriate. We reject the dissent's suggestion that appellant's "past behavioral, disciplinary and psychiatric problems" raised herein, and taken into account by the court, should have been ignored because of improvements made by appellant after being returned home. While appellant did not run away from home again, took her medications and was enrolled in school, it is significant and cannot be ignored, that appellant missed well over half of the school days in March and April 2013; she was suspended for not

attending classes; and, again tested positive for marijuana. The dissent takes at face value that appellant's poor school attendance record in 2013 must be attributed to allegations of "peer bullying." Appellant's 2013 truancy, however, was not aberrant; it was consistent with her history, as she also had only a 50% school attendance rate for the Spring 2011 and Fall 2012 terms.

In addition, the dissent also fails to consider that the psychologist who prepared the Mental Health Studies, at the behest of the court, disagreed with the Department of Probation's recommendation of an ACD. In his final dispositional report, the psychologist opined that, while there were "some improvements at home," appellant was still at a significant increased risk of future aggression and substance abuse. Given this genuine concern,[1] the evaluating psychologist's final recommendation was a disposition of probation. These facts and circumstances

---

[1] The record indeed establishes that the psychologist's concern proved to be a prescient risk assessment because a few months after being adjudicated a juvenile delinquent, appellant violated the terms of her probation by failing to obey the lawful commands of her mother. As a result, appellant was placed with ACS in a Close to Home Facility for six months, with no credit for time served. Appellant took no appeal from the second order. Of course, such outcome was not known by the Family Court at the time of the adjudication nor should it be considered in the disposition of this appeal.

outweighed appellant’s lack of prior record and other mitigating factors that appellant cites.

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

ANDRIAS, J. (dissenting)

By order of disposition dated May 13, 2013, the Family Court adjudicated appellant a juvenile delinquent on the ground that she did an act, which if done by an adult, would constitute the crime of false personation, a class B misdemeanor (Penal Law § 190.23). The court placed respondent on "level III probation" under the supervision of the Probation Department of the County of New York for 13 months and imposed conditions including that she cooperate with the St. Luke's Cares School and New Beginnings Program, undergo random drug testing, attend school, obey her mother, have no further difficulties at home, in school or in the community, and have no involvement with drugs, alcohol or gangs.

The majority finds that the court providently exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal (ACD). However, based on the facts and circumstances as they existed at the time of the Family Court proceeding, a supervised ACD pursuant to Family Court Act § 315.3(2) would have been the least restrictive alternative available consistent with appellant's needs and the community's need for protection. Therefore, I dissent from the order of disposition adjudicating appellant a juvenile delinquent and placing her on probation for a period of 13 months.

"An [ACD] is an adjournment of the proceeding, for a period not to exceed six months, with a view to ultimate dismissal of the petition in furtherance of justice" (Family Ct Act § 315.3 [1]). An ACD may be subject to terms and conditions defined in the rules of court, including "supervision by the probation service" (Family Ct Act § 315.3[2]).

In rejecting appellant's request for an ACD, the court stated at the dispositional hearing:

> "I do not think an ACD is appropriate in any way[.] I agreed with [counsel for the presentment agency] that your transition is going pretty well but still very new. And your lawyer keeps pointing out this is a misdemeanor but is much more serious than the B misdemeanor would appear to be.
>
> "You have been sexually exploited, you were -- you had a black eye when the police found you, you lied about your age and so on . . ."

However, as is more thoroughly discussed below, the court's conclusion that appellant had been sexually exploited is rank speculation and there is evidence in the record to the contrary. Further, appellant had no prior juvenile delinquency adjudication and was 14 years old when she was charged with acts that, if committed by an adult, would constitute the crime of false personation, a relatively minor nonviolent offense. Moreover, the circumstances leading to the charge itself, in which a

detention for appellant's safety, rather than an investigation of a crime, ultimately led to appellant giving false pedigree information, were not egregious.

Appellant was approached at the PATH station in Jersey City by a police officer, who believed she was a runaway, for the sole purpose of reuniting her with her family, without any nonspeculative belief that she had done anything illegal. She told the officer that her name was Christy or Crissy Lopez and that she was born in 1997. When her identity could not be confirmed, the officer was instructed to take her to the PATH police command in Jersey City for further investigation, where she was treated for a bruise over her eye. After appellant gave another officer an address for a family residence in Harlem, she was eventually transported to the Port Authority Bus Terminal Police Command Youth Service Unit in New York, rather than to the hospital for further treatment.

The acts constituting false personation occurred after appellant had been detained for an extended period of time, questioned and shuffled from one police unit to another in New Jersey and New York. At the Port Authority precinct in New York City, a youth service officer told appellant that "she wasn't in any trouble" and that he "just needed to confirm her identity

because of the amount of missing children that we encounter." Nevertheless, appellant continued to maintain that her name was Chrissy Lopez and that she was born in 1997 (instead of 1998), even though the officer told her that she could be charged with false personation and placed under arrest if she was not honest with him. But for that "warning," there would have been no acts constituting the crime of false personation (Penal Law § 190.23), which is the sole basis for this proceeding.

Significantly, although appellant gave false pedigree information, she provided a specific address in Harlem where her mother lived, which led to the discovery of her true age and identity and the reunification with her family. While appellant's misstatements to police are not to be condoned, a report of the Family Court Mental Health Service states that appellant explained that she provided the false pedigree information because she did not want to be returned to placement.

The court's finding that appellant had been sexually exploited, based on the fact that she had a "black eye" when the police saw her in the bus station, is speculative at best. While there may have been a suspicion of sexual exploitation, it was never confirmed. Indeed, at the dispositional hearing, counsel stated that one of the concerns in getting appellant into the

CARES program was that it required a record of sexual exploitation that had not been established for appellant.

Although the Department of Probation reports and the mental health studies before the court indicated that appellant had behavioral and psychiatric issues, the reports also indicated that appellant's conduct had substantially improved after she was returned to her mother's custody, including that she did not run away from home, was following her mother's house rules, was taking her medications, was attending counseling with her family, and was attending school until she was bullied in class by a male student who hit her. Although the three Department of Probation reports issued before the adjudication stated that appellant needed to be in a highly structured and supervised environment that could provide her with educational support, mental health services, counseling, and peer leadership development, the reports nevertheless recommended an ACD. This recommendation should have been followed.

The majority disagrees, stating that "[a]ppellant's history, which included violent behavior toward her family, in placement, in school, and in the streets, aggressive behavior toward facility staff, a threat to kill a fellow student, truancy, promiscuity, and drug and alcohol abuse, warranted a 13-month

period of supervision." Emphasizing that the mental health reports recommended probation, the majority takes the position that the improvements in appellant's behavior were diminished by her renewed truancy and a positive test for marijuana.

I disagree. Both the probation and mental health reports establish that there had been a major improvement in appellant's behavior after the petition was filed.

The February 19, 2013 probation report recounted each of appellant's past behavioral, disciplinary and psychiatric problems raised by the majority, as well as her need for a highly structured and supervised environment. However, it concluded that appellant had "the potential to change her previous behavior patterns for the better," and recommended an ACD.

The March 22, 2013 probation report stated that after the Yonkers Residential Center was released from its obligations, appellant was returned home for a week. Appellant's mother advised probation that while she was home, appellant was respectful and obedient, and that the mother was willing to have appellant live with her.

The May 31, 2013 probation report indicated that the mother had stated that appellant had been doing very well after she was returned to the home. The mother advised probation that

appellant had not exhibited any behavioral problems, had attended scheduled appointments, had taken her medication, and had not tried to run away. The report also stated that according to her therapist at New Beginnings, appellant had been participating in individual and family counseling once or twice a week since March 20th. During these sessions, appellant was receptive and put in a lot of effort. Although issues remained, the family was making significant progress. Thus, the report concluded that "[d]ue to the present services in place, and [appellant]'s positive progress at home, the recommendation remains as an ACD."

The March 14, 2013 mental health report, while recommending placement in a residential setting with the goal of returning appellant to the community, stated that appellant, while in placement, had been taking her medication and had a relatively positive relationship with her mother, who had a history of seeking and participating in services for appellant. It also noted that appellant had begun evincing early behavioral improvement, including abstinence from substances and participation in therapy and mental health treatment, and that she had not absconded.

An update to the mental health report noted that the mother had reported "big progress" since appellant returned to the home.

The mother stated that appellant was happy and had not engaged in delinquent behavior, that she had new friends that were a positive influence, and that she was compliant with prescribed medication and attending mental health counseling. The mother acknowledged that while appellant had enrolled in school, she stopped attending after several weeks when she was bullied by a male peer and the school would not put her in a different class. However, the mother described efforts to get appellant into the CARES program.

The report also indicated that appellant had corroborated that things were good at home and that she was complying with her mother's rules. Appellant denied recent exposure to domestic violence or physical or sexual victimization, gang involvement and substance abuse (although she later tested positive for marijuana in one of several drug tests administered during the pendency of this proceeding).

In its updated conclusion, the report acknowledged that since her release from placement in March 2013 and return to her mother's home, appellant "has sustained an early pattern of mostly adequate adjustment. Many of [appellant]'s conduct disordered behaviors have not been present and she has reportedly evinced an improvement in mood and has abstained from

substances." While the report recommended that appellant be placed on probation to provide oversight, supervision, and monitoring, it did not specify a time frame.[1]

On this record, adjudicating appellant a juvenile delinquent and placing her on probation for a period of 13 months was an improvident exercise of discretion. While appellant's one positive test for marijuana and renewed truancy, even if attributable to peer bullying, demonstrate that she requires supervision, under the Uniform Rules for the Family Court [22 NYCRR] § 205.24 (a) the court could have imposed a supervised ACD directing the respondent to:

> "(1) attend school regularly and obey all rules and regulations of the school;
>
> "(2) obey all reasonable commands of the parent or other person legally responsible for respondent's care;
>
> "(3) avoid injurious or vicious activities;

---

[1]The majority notes that mental health's concerns "proved to be a prescient risk assessment" because appellant violated her probation two months after she was adjudicated a juvenile delinquent. However, as the majority acknowledges, the propriety of the Family Court's disposition must be assessed based on the record that existed as of the time of the dispositional hearing, not on appellant's behavior thereafter. In any event, if appellant had been given an ACD, rather than being branded a juvenile delinquent, it would have given her a greater incentive to continue and build upon the progress she had made, rather than relapsing into bad behavior.

"(4) abstain from associating with named individuals;

"(5) abstain from visiting designated places;

"(6) abstain from the use of alcoholic beverages, hallucinogenic drugs, habit-forming drugs not lawfully prescribed for the respondent's use, or any other harmful or dangerous substance;

"(7) cooperate with a mental health, social services or other appropriate community facility or agency to which the respondent is referred;

...

"(10) cooperate in accepting medical or psychiatric diagnosis and treatment, alcoholism or drug abuse treatment or counseling services and permit an agency delivering that service to furnish the court with information concerning the diagnosis, treatment or counseling;

"(11) attend and complete an alcohol awareness program established pursuant to section 19.25 of the Mental Hygiene Law;

"(12) abstain from disruptive behavior in the home and in the community;

"(13) abstain from any act which[,] if done by an adult[,] would be an offense; [and]

"(14) comply with such other reasonable terms and conditions as may be permitted by law and as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the filing of the petition or to prevent placement with the Commissioner of Social Services or the Office of Children and Family Services."

This would have provided appellant with each and every one of the conditions the court included in its dispositional order

as a condition of appellant's probation, without adding the stigma of a juvenile delinquency adjudication (*see Matter of Clarissa V.,* 117 AD3d 494, 494 [1st Dept 2014] ["While appellant had truancy issues at school, at the time of the disposition she was employed, was being treated for depression, and was generally making progress. Based on all these factors, there is no reason to believe that appellant needed any supervision beyond that which could have been provided under an ACD"]*; Matter of Justin Charles H.*, 9 AD3d 316, 317 [1st Dept 2004]). Thus, the imposition of a supervised ACD would have been the least restrictive alternative available consistent with appellant's needs and those of the community for this first, relatively minor offense by a troubled teenager who had no prior delinquency adjudication and was doing better at home and in therapy at the time of the dispositional hearing (*see* Family Ct Act §

352.2[2][a]; *Matter of Besjon B.*, 99 AD3d 526 [1st Dept 2012]; *Matter of Tyvan B.*, 84 AD3d 462 [1st Dept 2011]; *Matter of Joel J.*, 33 AD3d 344 [1st Dept 2006]).[2]

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

ENTERED: JANUARY 12, 2016

CLERK

[2]Even if supervision was required for more than six months, the court could have imposed the less restrictive disposition of a 12-month conditional discharge (Fam Ct Act §§ 352.2 [1][a]), rather than 13 months probation.

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16365 American Media, Inc., et al., Index 650230/13
Plaintiffs-Appellants,

-against-

Bainbridge & Knight Laboratories, LLC,
Defendant,

Carl Ruderman,
Defendant-Respondent.

_____

Martin S. Rapaport, P.C., New York (Martin S. Rapaport of counsel), for appellants.

Kane Kessler, P.C., New York (Gerard Schiano-Strain of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 26, 2014, which granted defendant Ruderman's motion to dismiss the complaint as against him, unanimously modified, on the law, to deny the motion as to the causes of action for fraud and violation of sections 273 and 275 of the Debtor and Creditor Law as against Ruderman, and otherwise affirmed, without costs.

Plaintiffs seek approximately $1.3 million in payment for advertising services furnished to defendant Bainbridge & Knight Laboratories, Inc. Defendant Ruderman is the owner and chairman of Bainbridge.

The amended complaint alleges that between March 2011 and July 2012, Bainbridge issued approximately 184 insertion orders to plaintiff American Media, Inc. for the publication of numerous ads in magazines owned by plaintiffs. Of the approximately $2.3 million total price, $1.3 million is alleged still to be owing for advertising services.

Plaintiffs' allegations in support of piercing the corporate veil to hold Ruderman liable for Bainbridge's alleged breaches of contract, i.e., that Bainbridge "ignored corporate formalities" and was totally dominated by Ruderman, are conclusory and therefore insufficient to warrant piercing the corporate veil (*see Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 AD2d 526, 528 [1st Dept 1986]).

The unjust enrichment claim fails because the subject matter of the claim is governed by express contracts (*Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]).

The complaint adequately states a cause of action for fraud as against Ruderman based on alleged misrepresentations of present fact concerning the capitalization of Bainbridge and the existence of an $850,000 account receivable from non-party Walgreen's. Ruderman's representation that he had loaned $6 million to Bainbridge that could be used to pay for expenses like

plaintiffs' advertising services is alleged to have induced plaintiffs into entering into the agreement. Similarly, Ruderman's assurance that Bainbridge had an $850,000 account receivable from Walgreen's that was "in the process of being paid" and "would be used to pay [p]laintiffs," is alleged to have induced plaintiffs to continue to furnish advertising services under the contract. Ruderman's alleged misrepresentations as to Bainbridge's wherewithal and the condition of Bainbridge's finances constitute actionable fraud (*see e.g. EED Holdings v Palmer Johnson Acquisition Corp.*, 387 F Supp 2d 265, 276 [SD NY 2004]). A misrepresentation of present fact is collateral to the contract and supports a separate claim for fraud (*see id.* at 278-279; *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 292 [1st Dept 1999]). The alleged misrepresentations regarding Bainbridge's finances and capitalization were collateral to the actual terms of the contract, irrespective of Ruderman's intentions with respect to paying for plaintiffs' advertising services in the future (*see e.g. EED Holdings*, 387 F Supp 2d at 279; *First Bank of Ams.*, 257 AD2d at 291-292 [error to dismiss fraud claim based on misrepresentations regarding the quality of the individual loans purchased by the plaintiffs]).

The issue of reasonable reliance is one of fact unsuitable for resolution on this motion to dismiss (*see Gonzalez v 40 W. Burnside Ave. LLC*, 107 AD3d 542 [1st Dept 2013]; *CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co.*, 106 AD3d 437 [1st Dept 2013]).

The complaint, on this CPLR 3211(a)(7) motion, adequately states a claim for violation of sections 273 and 275 of the Debtor and Creditor Law as against Ruderman. Ruderman is alleged to have repaid loans to himself at a time when Bainbridge was insolvent, or rendered insolvent thereby. An insider payment is not in good faith, regardless of whether or not it was paid on account of an antecedent debt. "The requirement of good faith is not fulfilled through preferential transfers of corporate funds to directors, officers or shareholders of a corporation that is, or later becomes insolvent, in derogation of the rights of general creditors" (*Matter of EAC of N.Y., Inc. v Capri 400, Inc.*, 49 AD3d 1006, 1007 [3d Dept 2008] [transfer of assets to corporate officer to satisfy antecedent debt lacked good faith]; *American Panel Tec v Hyrise, Inc.*, 31 AD3d 586 [2d Dept 2006]

[same]). The claim does not involve the failure to pay the amounts owed under the contract, but rather Ruderman's inappropriately taking money out of Bainbridge that could have been used to repay plaintiffs.

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16594 The People of the State of New York, Respondent, Ind. 3500/12

-against-

Shawn Jones, Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about September 4, 2013,

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

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

ENTERED: JANUARY 12, 2016

CLERK

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

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16595 Jerome Bialick, et al., Index 805154/13
Plaintiffs-Appellants,

-against-

Martin B. Camins,
Defendant,

The Mount Sinai Hospital,
Defendant-Respondent.

Alexander J. Wulwick, New York, for appellants.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered December 23, 2014, which granted defendant Mount Sinai Hospital's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

In this medical malpractice action, plaintiffs allege that plaintiff Jerome Bialick sustained personal injuries as a result of being malpositioned during a multi-level laminectomy performed by defendant Martin Camins, his private attending physician, at defendant Mt. Sinai Hospital. Plaintiffs maintain, inter alia, that Mt. Sinai's staff performed independent acts of negligence in applying excessive tension to the tape used in positioning and securing Mr. Bialick to the operating room table.

Mt. Sinai established prima facie, via deposition transcripts and an expert affirmation, that its staff members were working under Dr. Camins's supervision and carrying out his orders as to the positioning and securing of plaintiff. As these acts were performed to Dr. Camins's satisfaction and did not involve the exercise of independent medical judgment, any excessive tension that was applied does not constitute an "independent" act of negligence for which the hospital may be held liable (*see Cunningham v St. Barnabas Hosp.*, 36 AD3d 567 [1st Dept 2007]; *cf. Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265 [1968] [hospital may be found liable for nurses' negligence in failing to follow pediatrician's explicit orders as to amount of oxygen to be given infants]).

In opposition, plaintiffs failed to raise a triable issue of

fact. Indeed, plaintiffs' expert admitted that "it is [Dr. Camins's] job to make sure the taping procedure is performed properly without undue tension."

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16596-
16597 In re Alejandra B., and Another,

Children Under Eighteen
Years of Age, etc.,

Alejandro A.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

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

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

_____

Order of disposition, Family Court, Bronx County (Robert Hettleman, J.), entered on or about November 6, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about October 23, 2014, which found that respondent sexually abused the older child and derivatively abused the younger child, unanimously affirmed, without costs. Appeal from the fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding that respondent sexually abused the older child

by committing offenses against her defined in article 130 of the Penal Law is supported by a preponderance of the evidence (*see* Family Court Act §§ 1012[e][iii]; 1046[b][i]). The then 10-year-old child's testimony concerning two incidents in which respondent asked her to lock the bedroom door, give him a massage and straddle him, while he bounced her up and down near his private parts and then kissed her on the mouth, supports a finding of sexual contact (Penal Law § 130.00[3]). That the purpose of respondent's conduct was sexual gratification, and not innocent horseplay, was properly inferred from the conduct itself (*see Matter of Karina L. [Israel R.]*, 106 AD3d 439 [1st Dept 2013]), as well as the fact that he warned the child not to tell her mother about it. There was no need for corroboration of the child's testimony (*see Matter of Marelyn Dalys C.-G. [Marcial C.]*, 113 AD3d 569 [1st Dept 2014]). The court's assessment of the child's credibility as she related the traumatic events and responded to cross-examination is entitled to deference, and we find no basis for rejecting it (*see Matter of Mia B. [Brandy R.]*, 100 AD3d 569 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]).

The court properly balanced respondent's due process rights with the child's emotional well-being in permitting the child to testify via closed-circuit television (*see Matter of Giannis F.*

[Vilma C.-Manny M.], 95 AD3d 618 [1st Dept 2012]). Contrary to respondent's contention, the court was not required to find that the child would suffer "severe and substantial mental or emotional harm" if she testified in open court.

The finding that respondent engaged in sexual abuse of the older child supports the finding that he derivatively abused the younger child; his conduct, which occurred in the younger child's presence, evinced a "'fundamental defect'" in his understanding of his parental obligations (*see Matter of Estefania S. [Orlando S.]*, 114 AD3d 453 [1st Dept 2014]).

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

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16598 Jonathan Ausby, Index 302167/08
Plaintiff-Appellant,

-against-

365 West End LLC, et al.,
Defendants-Respondents-Appellants.
- - - - -
Abilene, Inc.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Themis Chimneys, Inc.,
Third-Party Defendant-Respondent.

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

McGaw, Alventosa & Zajac, Jericho (Ross P. Massler and James K. O'Sullivan of counsel), for respondents-appellants.

Camacho Mauro Mulholland, LLP, New York (Kathleen M. Mulholland of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 10, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), and granted third-party defendant's (Themis) motion for summary judgment dismissing the third-party claims for common-law indemnification and contribution, unanimously reversed, on the law, without

costs, plaintiff's motion granted, and Themis's motion denied.

The conflicting evidence as to whether the shaking of the ladder from which plaintiff fell was caused by his foreman standing on it with him or bumping into it on the ground does not raise a material issue of fact as to defendants' liability for plaintiff's injuries. "The failure to secure the ladder . . . against slippage by any means whatsoever constitutes a violation of Labor Law § 240(1) as a matter of law, for which defendants are absolutely liable" (*Urrea v Sedgwick Ave Assoc.*, 191 AD2d 319, 320 [1st Dept 1993]; *see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]; *Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476 [2d Dept 2012]). Because Labor Law § 240(1) was violated in either version of the accident, no credibility issue is presented (*see Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381 [1st Dept 1996]).

Themis failed to establish that it is not liable to defendant/third-party plaintiff Abilene, Inc. for common-law indemnification and contribution, since an issue of fact exists whether Themis directed and controlled plaintiff's work (*see Naughton v City of New York*, 94 AD3d 1, 10-11 [1st Dept 2012]). Plaintiff's foreman testified that Themis's president instructed

nonparty MadAlex's employees regarding the work, and Themis's president acknowledged that he met at the site with Abilene's vice president for construction while the work was being done.

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16599- Ind. 5879/02
16600 The People of the State of New York,
Respondent,

-against-

Steven Herrera,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about November 24, 2014, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Substantial justice dictates denial of resentencing, based on consideration of all relevant facts and circumstances. The mitigating factors cited by defendant are outweighed by the fact that he absconded from a drug treatment diversion program, and was convicted of two separate felonies, including robbery, while

on parole from the drug conviction at issue (*see e.g. People v Moore*, 112 AD3d 481 [1st Dept 2013], *lv denied* 22 NY3d 1140 [2014]).

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16601 Index 302414/09
83721/10
84096/11

Elba Camacho,
Plaintiff-Appellant,

-against-

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

Con Edison, Inc., et al.,
Defendants-Respondents.

- - - - -

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

-against-

Hallen Construction Co., Inc.,
Third-Party Defendant-Respondent.

- - - - -

Hallen Construction Company, Inc., etc.,
Fourth-Party Plaintiff-Respondent,

-against-

New York Paving, Inc.,
Fourth-Party Defendant-Respondent.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

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

Law Office of James J. Toomey, New York (Evy Kazansky of counsel), for Hallen Construction Co., Inc., respondent.

Pillinger, Miller, Tarallo, LLP, Elmsford (Michael Neri of counsel), for New York Paving, Inc., respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered August 13, 2014, which, to the extent appealed from as limited by the briefs, granted the motions of defendants Hallen Construction Company, Inc. and Consolidated Edison Company of New York, Inc., sued herein as Con Edison, Inc., for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

By demonstrating that the area where plaintiff fell was outside the area where they and their contractor, fourth-party defendant New York Paving, Inc., performed work, defendants Con Edison and Hallen (defendants) established prima facie that they did not cause or create the defective condition in the sidewalk (*see Levine v City of New York*, 101 AD3d 419 [1st Dept 2012]; *Jones v Consolidated Edison Co. of N.Y., Inc.*, 95 AD3d 659 [1st Dept 2012]). In opposition, plaintiff submitted a speculative and conclusory affidavit by a purported licensed engineer. The engineer attributed plaintiff's fall on the raised sidewalk flag to insufficiently filled expansion joints running from the sidewalk flags where defendants performed work to the raised flag 5½ feet away, but failed to explain how water in the joints

raised the flag 5½ feet away but not other flags that were closer to defendants' work and actually abutted the joints. The engineer also failed to explain why he believed that the flag was pushed up by water under it, as opposed to the roots of a nearby tree (*see Freimor v City of New York*, 44 AD3d 514, 515 [1st Dept 2007]; *Yass v Deepdale Gardens*, 187 AD2d 506 [2d Dept 1992]). In any event, plaintiffs had no duty to fill the expansion joints around the subject flag, on which they did not work and which they had not disturbed (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296-297 [1st Dept 1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]).

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16602 In re Keith H., III,

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

Logann Marchele K., etc.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

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

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

Order of fact finding, Family Court, New York County (Jane Pearl, J.), entered on or about July 9, 2014, which, after a hearing, determined that respondent mother derivatively neglected the subject child, unanimously affirmed, without costs.

The record demonstrates by a preponderance of the evidence that the mother posed an imminent danger of harm to the subject child, even though he was not abused by her, because there are prior orders finding that she had neglected and derivatively neglected her other children by inflicting excessive corporal punishment upon two of the child's siblings (*see Matter of Andre*

B. [Wilner G.B.], 91 AD3d 411, 412 [1st Dept 2012]; *Matter of Ameena C. [Wykisha C.]*, 83 AD3d 606, 607 [1st Dept 2011]). "The prior orders finding neglect, rendered before the [subject] child was born, were affirmed on appeal [], and supported a finding of derivative neglect as to all other siblings []" (*Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 555 [1st Dept 2014]; *see Matter of Jeremy H. [Logann K.]*, 100 AD3d 518 [1st Dept 2012]; *Matter of Jacob H. [Logann K.]*, 94 AD3d 628 [1st Dept 2012], *lv dismissed* 19 NY3d 952 [2012]).

Moreover, the instant petition was filed within four months after the Family Court's finding of neglect as to one of the subject child's older siblings, and the mother does not argue that the neglect finding was too remote in time to the instant proceeding to support a reasonable conclusion that the condition still exists (*see Matter of Keith H.*, 113 AD3d at 555-556; *Matter of Camarrie B. [Maria R.]*, 107 AD3d 409 [1st Dept 2013]).

Given that the mother has previously been found to have neglected her other children, the finding of derivative neglect as to the subject child was appropriate, since the mother's previous behavior "demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in [her] care" (*Matter of Jasmine B.*, 66 AD3d 420, 420 [1st

Dept 2009]).

The fact that the mother had completed a court-ordered mental health evaluation, parenting skills and anger management programs, and participated in regular visitation with her other children before the instant proceeding on behalf of the subject child commenced does not preclude a finding of derivative neglect. The mother's failure to see a psychiatrist and take medication, which was recommended in her service plan, demonstrates that she failed to take appropriate measures to deal with her mental health issues, and her inability to acknowledge her previous behavior "supports the conclusion that she has a faulty understanding of the duties of parenthood sufficient to infer an ongoing danger to the subject child" (*Matter of Keith H.*, 113 AD3d at 556; *see Matter of Jayden C. [Luisanny A.]*, 126 AD3d 433 [1st Dept 2015]; *Matter of T-Shauna K.*, 63 AD3d 420, 420 [1st Dept 2009]).

The Family Court also properly discredited the testimony of the mother's therapist that the mother's mental health condition had improved significantly, the mother received all the services she needed, and the mother did not need medication. The therapist testified that she never reviewed the mother's mental health evaluation or the notes from her colleagues who also

treated the mother, and that she did not have a full understanding of the mental health concerns ACS and other mental health providers had regarding the mother. There is no basis to disturb the Family Court's credibility determination (*see Matter of Nasir J.*, 35 AD3d 299, 299 [1st Dept 2006]).

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16603- SCI 63/02
16604 The People of the State of New York, 1162N/05
Respondent,

-against-

Giovanni Corporan, also known as
Angel Santiago,
Defendant-Appellant.

_____

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

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

_____

Appeal from judgments, Supreme Court, New York County (Laura A. Ward, J.), rendered November 14, 2012, convicting defendant, upon his pleas of guilty, of attempted criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of 5½ years and 6 years, respectively, held in abeyance, and the matter remanded for further proceedings in accordance herewith.

As the People concede, the court failed to warn defendant of the potential for deportation during the 2002 plea proceeding (*see People v Peque*, 22 NY3d 168, 176 [2013], *cert denied sub nom Thomas v New York,* 574 US __, 135 S Ct 90 [2014]). At the 2005

plea proceeding, which addressed the 2002 and 2005 cases after defendant had absconded before the scheduled sentencing on his 2002 conviction, the court did raise the issue of deportation. However, defendant was deprived of effective assistance when his counsel undermined the court's warning and understated the potential for deportation by remarking that the plea would "not necessarily" result in deportation, and that defendant only "might be deported" (*see People v Hemans*, 132 AD3d 428 [1st Dept 2015]). In fact, it was clear that defendant's plea of guilty to an aggravated felony triggered mandatory deportation under federal law (*see* 8 USC § 1227(a)(2)(A)(iii)).

Defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea (*see Peque*, 22 NY3d at 199-200; *see also People v Chacko*, 99 AD3d 527 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013]). Accordingly, we remit for the remedy set forth in *Peque* (22 NY3d at 200-201), and hold the appeal in abeyance for that purpose.

We have considered and rejected the People's arguments that defendant was required to preserve his claims concerning potential deportation, that the ineffective assistance claim is

unreviewable, and that defendant's claims are barred by his misconduct in absconding. We also reject defendant's claim that he is entitled to outright reversal of the judgment on a separate ground of involuntariness. Although defendant received erroneous information as to his potential sentence in the event he violated the conditions of the plea agreement, this reference to a sentence greater than the maximum legally permissible term could not have "induced" him to plead guilty (*People v Monroe*, 21 NY3d 875, 878 [2013]).

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16605 International Asbestos Removal, Index 652494/12
Plaintiff-Respondent,

-against-

Beys Specialty, Inc., et al.,
Defendants-Appellants.

_____

Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph J. Cooke of counsel), for appellants.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Michael E. Greene of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about August 12, 2013, which, to the extent appealed from, denied defendants' motion to dismiss the complaint in its entirety for failure to state a cause of action, or alternatively, for leave to convert their motion to one for summary judgment, unanimously affirmed, with costs.

Assuming defendants' right to move pursuant to CPLR 3211(a)(1) was not waived, their arguments are unavailing. Generally, "a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress" (*Global Precast, Inc. v Stonewall Contr. Corp.*, 78 AD3d

432, 432 [1st Dept 2010]). However, when the evidence in the record including, inter alia, the circumstances surrounding the release, as well as the parties' course of dealings, evinces that the parties' intentions were not reflected in the general terms of the release, the release does not conclusively establish a defense as a matter of law (*see Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 578 [2d Dept 2009]; *E-J Elec. Installation Co. v Brooklyn Historical Socy.*, 43 AD3d 642, 643-644 [1st Dept 2007]; *West End Interiors v Aim Constr. & Contr. Corp.*, 286 AD2d 250, 251-252 [1st Dept 2001]).

Among other things, the subject releases are only partial releases, and the fact that each release identified the actual amount paid could be construed to mean that the release pertained only to that amount, and not for additional work that was calculated after the fact. Further, the handwritten notations on certain releases, in addition to plaintiff's affidavit, which can be considered on a motion to dismiss (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]), support the contention that a dispute arose as to whether

the releases applied to payment for additional decontamination units that were built in connection with the parties' subcontract.

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16607 The People of the State of New York, Respondent, Ind. 5308/13

-against-

Jordan Vecchio, Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about January 22, 2014,

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

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

ENTERED: JANUARY 12, 2016

CLERK

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

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16608 Philip L. Friedman, Index 602193/00
Plaintiff-Appellant,

-against-

Mitchell Turner,
Defendant-Respondent.

_____

Philip L. Friedman, appellant pro se.

Mitchell N. Turner, respondent pro se.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 15, 2014, which denied plaintiff's motion for an order directing defendant to make installment payments to satisfy a money judgment, unanimously affirmed, without costs.

Defendant's Social Security payments and rollover retirement account are exempt from plaintiff's efforts to satisfy the money judgment (CPLR 5205[c][1], [2]; 42 USC § 407[a]; *see Bayerische Hypo-und Vereinsbank AG v DeGiorgio*, 74 AD3d 492, 493 [1st Dept 2010]; *Matter of Bank Leumi Trust Co. of N.Y. v Dime Sav. Bank of N.Y.*, 85 NY2d 925, 926 [1995]). Further, defendant showed that the insurance payments he received in 2012 and 2013 were used to make his residence habitable after Hurricane Sandy and that he could not reasonably afford to use them to pay plaintiff (*see Kaufman v Kaufman*, 29 AD2d 922, 922 [1st Dept 1968]; *see also*

Craig v Klein, 8 AD3d 55, 55 [1st Dept 2004]). Plaintiff failed to show that defendant has an annual income of over $100,000. Defendant averred that the Social Security payments are his only source of income, and the undated Fidelity Investments printout submitted by plaintiff does not show that defendant "is receiving or will receive money from [another] source" (CPLR 5226).

Under the circumstances, and given that there has been more than 10 years of discovery in this postjudgment enforcement proceeding, a hearing is not warranted.

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16612-
16612A In re S'Mya Jade R., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.

Paul Gregory R.,
Respondent-Appellant,

Graham Windham Services to
Families and Children,
Petitioner-Respondent.

_____

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

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

_____

Orders, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 29, 2014, which, after a parental status and dispositional hearing, found that appellant's consent was not required for the adoption of the children pursuant to section 111(1)(d) of the Domestic Relations Law (DRL) and that it was in the children's best interest to have their custody and guardianship committed to the Commissioner of Social Services and Petitioner Graham-Windham Services for Children and Families for the purpose of adoption, unanimously affirmed, without costs.

The agency proved by clear and convincing evidence that appellant only had minimal and sporadic contact with the agency and the children, and that his consent to their adoption was not required under the DRL (*Matter of Isabella Star G.*, 66 AD3d 536, 537 [1st Dept 2009]. The record reflects that appellant visited the children no more than ten times over a seven month period while he was living in New York and while the children were in foster care, and that he did not provide them with financial support.

A preponderance of the evidence also supported the conclusion that it was in the best interest of the children to be freed for adoption (*Matter of Star Leslie W.*, 63 NY2d 136, 148 [1984]; *Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573, 574 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]). The record reflects that the children are well-cared for by their foster parents, who wish to adopt them (*Matter of Ashley R.* at 574). Appellant has

not shown that he is familiar with the children's special needs or that he has taken any steps to provide for them.

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16613 The People of the State of New York, Respondent, Ind. 4921/12

-against-

David Jackson, Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about April 4, 2013,

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

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

ENTERED: JANUARY 12, 2016

CLERK

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

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16614 The People of the State of New York, Respondent, Ind. 3905/12

-against-

Brandon Freeman, Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about February 15, 2013,

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

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

ENTERED: JANUARY 12, 2016

CLERK

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

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16615 The People of the State of New York, Respondent, Ind. 3418/12

-against-

Brandon Freeman, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about February 15, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16616 Jerzy Dabrowski, et al., Index 106778/07
Plaintiffs-Respondents,

-against-

ABAX Incorporated, etc., et al.,
Defendants-Appellants,

John Doe Bonding Companies 1-20,
Defendants.

_____

Milman Labuda Law Group PLLC, Lake Success (Joseph M. Labuda of counsel), for ABAX Incorporated, appellant.

Goetz Fitzpatrick LLP, New York (Michael Fleishman of counsel), for John Bleckman and Edward Monaco, appellants.

Virginia & Ambinder, LLP, New York (LaDonna Lusher of counsel), for respondents.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered September 4, 2014, which denied defendants-appellants' motion for discovery sanctions against four class members, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying defendants' motion to dismiss the four class members from the class, as they did not show that the four class members' failure to appear for a court-ordered deposition was willfull, contumacious or in bad faith (*see* CPLR 3126; *Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). There is no

evidence of repeated failures to appear for scheduled depositions or to comply with court-ordered discovery (*see Tsai v Hernandez*, 284 AD2d 116, 117 [1st Dept 2001]). Plaintiffs' counsel stated that her mailings to the four class members were returned to her and that three of the four class members never contacted her (*see Blake v Mamadou*, 281 AD2d 301 [1st Dept 2001]). Counsel further stated that one class member notified her that he could not appear for his scheduled deposition because of personal reasons. Under the circumstances, the motion court providently exercised its discretion in declining to impose a monetary sanction.

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16617 The People of the State of New York, Respondent, Ind. 1595/12

-against-

Wallace McCollough, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 11, 2013, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years as a parole supervision sentence, unanimously affirmed.

Defendant did not preserve his claim that his plea was involuntary (*see People v Conceicao*, __ NY3d __, NY Slip Op 08615, *2 [2015]), and we decline to review it in the interest of justice. Although defendant moved to withdraw his plea, it is clear that the relief he was seeking was the court's adherence, notwithstanding defendant's rearrest, to the original promise of a parole supervision sentence (*see* CPL 410.91), and that the court granted that relief to defendant's satisfaction. As an

alternative holding, we find that defendant's plea was made knowingly, voluntarily, and intelligently, and that the court sufficiently explained the promised sentence.

Defendant's claim that the integrity of the grand jury proceedings was impaired because grand jurors allegedly saw him in handcuffs is likewise unpreserved, and we decline to review it in the interest of justice. Defendant's motion to dismiss the indictment did not assert this circumstance as a ground for dismissal, although the motion referred to the alleged handcuffing incident in a different context. As an alternative holding, we also reject it on the merits. Even at a trial, where the issue is guilt or innocence, a jury's brief and inadvertent viewing of a defendant in handcuffs does not warrant reversal (*People v Harper*, 47 NY2d 857, 858 [1979]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 12, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16618N Kathleen Carmody, Index 156818/14
Plaintiff-Appellant,

-against-

208-210 East 31st Realty, LLC,
Defendant-Respondent.

_____

Law Firm of Alexander D. Tripp, P.C., New York (Alexander D. Tripp of counsel), for appellant.

The Law Offices of Jason J. Rebhun, P.C., New York (Jason J. Rebhun of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 27, 2015, which denied plaintiff's motion for a default judgment against defendant, and granted defendant's cross motion to compel plaintiff to accept its answer, unanimously reversed, on the law, without costs, the motion granted, the cross motion denied, and the matter remanded for an inquest on damages.

The Supreme Court should have granted the default judgment against defendant and denied the cross motion to compel plaintiff to accept an answer, because defendant failed to set forth a reasonable excuse for its default in answering the summons. The record shows that plaintiff served defendant through the Secretary of State on July 14, 2014, and that defendant's

property manager received plaintiff's September 4, 2014 letter which had the summons and notice attached. Indeed, the property mananger averred in his affidavit that he received the letter and understood that defendant's time to answer was extended until September 12, 2014 (*see M.R. v 2526 Valentine LLC*, 58 AD3d 530, 531 [1st Dept 2009]). The property manager's conclusory claim that the first attorney he retained "must have dropped the ball" is insufficient to demonstrate a reasonable excuse of law office failure (*see Pryce v Montefiore Med. Ctr.*, 114 AD3d 594, 594-595 [1st Dept 2014], citing *Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]).

Moreover, the record shows that defendant's second counsel was aware of the summons and notice on October 29, 2014 and received the November 18, 2014 notice of rejection, but did not seek to compel plaintiff to accept the answer until after plaintiff had moved for a default judgment. Defendant's failure to do anything between November 18, 2014 and January 6, 2015 evinces willfulness even though the length of its delay is not

inordinate under the circumstances, and plaintiff failed to satisfy her burden of showing that the delay was prejudicial (*see Whittemore v Yeo*, 99 AD3d 496, 496-497 [1st Dept 2012]).

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16619 The People of the State of New York, Respondent, Ind. 657/13

-against-

Devin Newman, Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered on or about November 21, 2013,

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

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

ENTERED: JANUARY 12, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16620 Jorge Guaman, Index 306555/11
Plaintiff-Appellant,

-against-

Ansley & Company, LLC, et al.,
Defendants-Respondents,

LG Contracting,
Defendant.

- - - - -

Deeper Life Bible Church, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Keu Architectural Studio, P.C., et al.,
Third-Party Defendants.

Ginarte O'Dwyer Gonzalez Gallardo & Winograd, LLP, New York (Steven R. Payne of counsel), for appellant.

Kelly, Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for Ansley & Company, LLC, respondent.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for Deeper Life Bible Church, Inc., respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 23, 2014, which, to the extent appealed from, denied, without prejudice to renewal after completion of discovery, plaintiff's motion for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims against defendant Deeper Life Bible Church, unanimously reversed, on the law, without

costs, and the motion granted.

Plaintiff's motion was improperly dismissed as premature, since plaintiff and a coworker, who were the lone individuals present at the time of plaintiff's fall from a ladder, were each deposed. Further, defendant made no attempt to show that facts essential to justify its opposition to the motion exist, but cannot be stated absent depositions of the defendants and third-party defendants (*see generally Woods v 126 Riverside Dr. Corp.*, 64 AD3d 422 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]).

Plaintiff established, as a matter of law, that his fall from an inadequately secured ladder, due to an overhead beam striking the ladder after he cut the beam in two pieces, was foreseeable and amounted to a Labor Law § 240(1) violation that proximately caused his injurious fall (*see e.g. Dasilva v A.J. Contr. Co.*, 262 AD2d 214 [1st Dept 1999]; *Quinlan v Eastern Refractories Co.*, 217 AD2d 819 [3d Dept 1995]). Given the absence of adequate safety protections afforded to plaintiff in light of the elevation-related work hazards he faced, defendants' arguments that plaintiff's own actions were the sole proximate cause of his fall are unavailing (*see DeRose v Bloomindale's Inc.*, 120 AD3d 41, 45-46 [1st Dept 2014]), and the defense argument -- sounding in comparative negligence -- is no defense

to a Labor Law § 240(1) claim (*see Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015]).

As plaintiff has established defendant property owner's liability as a matter of law under Labor Law § 240(1), this Court need not reach defendant's arguments regarding the plaintiff's Labor Law § 241(6) claim (*see generally Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465 [1st Dept 2013]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 11-12 [1st Dept 2011]).

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16621 In re Jonathan M.H., etc.,

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

Reginald H.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

_____

Neil D. Futerfas, White Plains, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 29, 2014, which, to the extent appealed from, upon a fact-finding that respondent father's consent is not required for the subject child's adoption, committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The father's failure to provide any financial support for the child from the time he came into foster care defeats his contention that his consent to the child's adoption is required

(*see* Domestic Relations Law § 111[1][d]; *Matter of Isis S.C.* [*Lamont C.*], 88 AD3d 602, 603 [1st Dept 2011]). Moreover, the father, while incarcerated, did not make efforts to maintain regular communication with the child, the agency or the person who had custody of the child (*see id.*). Neither the father's incarceration nor any failure by the agency to inform him of his obligations absolved him of his obligations to support and maintain regular communication with the child (*see Matter of Isis*, 88 AD3d at 603).

Family Court providently exercised its discretion in denying the father's request for an adjournment of the fact-finding hearing (*see Matter of Amilya Jayla S.* [*Princess Debbie A.*], 83 AD3d 582, 583 [1st Dept 2011]), where he declined to be produced for the hearing until he could ensure that he would be returned to his preferred prison facility.

A preponderance of the evidence supports Family Court's determination that it is in the child's best interests to transfer his custody and guardianship to the agency so as to free him for adoption by his foster mother, who is also his godmother (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *see also Amilya Jayla S.*, 83 AD3d at 583). The record does not show that the father's family was interested

in obtaining custody of the child.

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

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16622 Danyelle P. Blocker, Index 300184/12
Plaintiff-Appellant,

-against-

Yun Baek Sung, et al.,
Defendants-Respondents.

Thomas Torto, New York (Jason Levine of counsel), for appellant.

Adams, Hanson, Rego & Kaplan, Yonkers (Sean M. Broderick of counsel), for respondents.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered June 11, 2014, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), and denied plaintiff's cross motion for summary judgment on the issue of liability as moot, unanimously modified, on the law, to deny defendants' motion with respect to the claim of serious injury to the lumbar spine, and to grant plaintiff's cross motion, and otherwise affirmed, without costs.

Defendants established prima facie that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) by submitting an affirmed report by their medical expert, who determined, after examining her, that plaintiff had full

range of motion and negative clinical test results in each body part and that any injuries had been resolved (*see Clementson v Price*, 107 AD3d 533 [1st Dept 2013]; *Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]; *Barry v Arias*, 94 AD3d 499 [1st Dept 2012]). As to plaintiff's claimed right knee injury, defendants also relied on plaintiff's testimony that she had previously sustained a workplace injury to that knee that required surgery, and on their expert's opinion, following review of plaintiff's MRI and operative reports, that any mild tenderness in the knee was due to that preexisting injury.

In opposition, plaintiff raised a triable issue of fact as to whether she sustained a serious injury to her lumbar spine by submitting a report by her chiropractor, who found restricted range of motion after the accident and limitations in range of motion, which he expressed as a percentage of normal, four years later. The chiropractor's opinion as to causation and the permanence of plaintiff's lower back injury, based upon his examinations and review of MRI reports done before and after the accident, is sufficient to raise a triable issue of fact (*see Bonilla v Abdullah*, 90 AD3d 466 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]; *Colon v Bernabe*, 65 Ad3d 969 [1st Dept 2009]; *Sanchez v Draper*, 123 AD3d 492 [1st Dept 2014]). The MRI reports

were relied upon and not disputed by defendants' expert in preparing his report, and are therefore properly considered (*see Macdelinne F. v Jimenez*, 126 AD3d 549 [1st Dept 2015]).

As for the claimed cervical spine injury, plaintiff did not submit sufficient medical evidence to raise an issue of fact since she neglected to include the relevant MRI report in the record, and the record contains admissions that her neck injury had resolved. However, if she establishes a serious injury to her lumbar spine at trial, plaintiff will be entitled to recover damages for any other injuries caused by the accident, even those that do not meet the serious injury threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

With respect to the 90/180-day claim, defendants showed that plaintiff was not prevented from performing all her usual and customary daily activities for more than 90 days during the 180 days immediately following the accident (see Insurance Law § 5102[d]), by submitting her own deposition testimony and affidavit, in which she admitted that she was only confined to her home for one week following surgery and did not miss any work until some 99 days after the accident (*see Komina v Gil*, 107 AD3d 596 [1st Dept 2013]).

In her cross motion, which is no longer moot, plaintiff

established prima facie that she is entitled to summary judgment on the issue of liability by submitting evidence demonstrating that defendant Yun Baek Sung changed lanes improperly, striking her vehicle in the side (*see* Vehicle and Traffic Law 1128[a]; *Velasquez v MTA Bus Co.*, 132 AD3d 485 [1st Dept 2015]; *Zummo v Holmes*, 57 AD3d 366 [1st Dept 2008]). In opposition, defendants failed to raise a triable issue of fact as to defendant Sung's responsibility or plaintiff's comparative negligence.

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

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16623 The People of the State of New York Ind. 5496/11
Respondent,

-against-

Allen Brown,
Defendant-Appellant.

_____

Davis Polk & Wardwell LLP, New York (Alexander F. Mindlin of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at first jury trial; Cassandra M. Mullen, J. at second jury trial and sentencing), rendered June 12, 2013, convicting defendant of grand larceny in the fourth degree and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

By failing to object or making only general objections, defendant failed to preserve his challenges to the prosecutor's conduct at the second trial, where defendant was convicted of grand larceny, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. The challenged portions of the prosecutor's summation were generally responsive to defense arguments, and there was

nothing so egregious as to warrant reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Furthermore, by arguing in his opening statement that a police officer had "rushed to judgment" and arrested defendant without conducting a proper investigation and "without even hearing his side of the story," defense counsel opened the door to otherwise inadmissible testimony regarding defendant's postarrest silence.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16624 Hector Rivera, Index 150282/12
Plaintiff-Respondent,

-against-

St. Nicholas 184 Holding, LLC, et al.,
Defendants-Appellants.

Kaufman Borgeest & Ryan LLP, Valhalla (David Bloom of counsel), for appellants.

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Jesse M. Minc of counsel), for respondent.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered March 24, 2014, which denied defendants' 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 dismissing the complaint.

Plaintiff alleges that he was injured when, while attempting to repair a clothesline, he fell out the window, which was not equipped with window stops. Plaintiff testified that he fell when he deliberately stood on a garbage can and leaned out of the open window, placing his entire torso through it. Thus, plaintiff's testimony establishes that his own voluntary conduct was the proximate cause of his accident.

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: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16625 The People of the State of New York, Respondent, Ind. 5505/08

-against-

Martine Green,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about March 6, 2014,

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

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

ENTERED: JANUARY 12, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16627 Dexia SA/NV, et al., Index 650231/12
Plaintiffs-Appellants,

-against-

Morgan Stanley, et al.,
Defendants-Respondents.

_____

Bernstein Litowitz Berger & Grossmann LLP, San Diego, CA (Timothy A. DeLange of the bar of the State of California, admitted pro hac vice, of counsel), for appellants.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 18, 2013, which granted defendants' motion to dismiss the complaint on the ground that the Dexia plaintiffs lacked standing to assert fraud claims, and FSA Asset Management LLC (FSAM) failed to sufficiently allege damages, unanimously affirmed, without costs.

This fraud action arises from plaintiffs' purchase in 2006 and 2007 of more than $626 million in residential mortgage-backed securities (RMBS) from defendants (Morgan Stanley). In the amended complaint, plaintiffs assert three causes of action against defendants, for common law fraud, fraudulent inducement, and aiding and abetting fraud, based on allegations that they

knowingly created, issued and sold poor quality RMBS while representing to plaintiffs that the RMBS were in fact prudent, AAA-rated securities.

The Court of Appeals recently explained that "the right to assert a fraud claim related to a contract or note does not *automatically* transfer with the respective contract or note" (*Commonwealth of Pennsylvania Pub. Sch. Employees' Retirement Sys. v Morgan Stanley & Co., Inc.*, 25 NY3d 543, 550 [2015]). "Thus, where an assignment of fraud or other tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language — although no specific words are required — that evinces that intent and effectuates the transfer of such rights" (*id.*). "Without a valid assignment, 'only the . . . assignor may rescind or sue for damages for fraud and deceit' because 'the representations were made to it and it alone had the right to rely on them" (*id.* [citations omitted]).

We find that plaintiff FSAM's agreement to deliver "all right, title and interest" in the RMBS to the Dexia plaintiffs did not include fraud claims, since FSAM only assigned rights in the subject securities without explicitly referencing any related tort claims or the overall transaction between FSAM and

defendants (*see id.*; *State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 432 [2000]; *cf. Banque Arabe et Internationale D'Investissement v Maryland Natl. Bank*, 57 F3d 146, 151 [2d Cir 1995]).

Because FSAM received from the Dexia plaintiffs the same amount it originally paid for the securities, FSAM cannot establish damages (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16628 The People of the State of New York, Respondent, Ind. 1166/10

-against-

Santo Carrero Silva, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered July 2, 2013, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years to life, respectively, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of any inconsistencies in testimony. Defendant's justification defense was based entirely on his own statements, and his account of the actual shooting was generally contradicted by physical evidence, including medical evidence as to the trajectory of the bullet that killed the deceased. The evidence

established an intentional killing, committed for revenge.

The court properly exercised its discretion in admitting two autopsy photographs, showing gunshot wounds in the front and back of the victim's heart, to corroborate an expert's testimony that the entry and exit wounds were at about the same height, indicating that the bullet's trajectory was approximately parallel to the floor. This evidence was highly probative in contradicting defendant's statement that he had shot the victim at a downward angle, and the probative value was not substantially outweighed by any prejudice resulting from the gruesome nature of the photos (*see People v Stevens*, 76 NY2d 833, 836 [1990]). The trajectory of the bullet was a contested issue, and the photos were not cumulative to the expert's testimony.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal, since any improprieties in the summation did not rise to the level of reversible error (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]; *People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). We have considered and rejected defendant's claim that his counsel rendered ineffective assistance by failing to

object to the challenged parts of the summation (*see People v Cass*, 18 NY3d 553, 564 [2012]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16629 In re Derick L.,

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

Catherine W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Law Offices of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

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

Order of fact-finding and disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about September 10, 2014, which, to the extent appealed from, as limited by the briefs, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding of neglect based on the child's excessive absences from school. The record shows that the child was absent 63 of 73 days during the early portion of the 2012 school year (*see Matter of Jaquan F. [Alexis F.]*, 120 AD3d 1113, 1114 [1st Dept 2014]).

A preponderance of the evidence also supports the court's finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of respondent's long-standing history of mental illness and resistance to treatment (*see Matter of Christopher R. [Lecrieg B.B.]*, 78 AD3d 586, 586-587 [1st Dept 2010]), which attack respondent's ability to recognize that the child required services and schooling to address his serious behavioral issues.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16630 In re J. Bruce Llewellyn, etc., File 1282/10
Deceased.

- - - - -

Donald McHenry, et al.,
Petitioners-Respondents,

-against-

Jaylaan Ahmad-Llewellyn,
Objectant-Appellant.

_____

Farrell Fritz, P.C., Uniondale (John R. Morken of counsel), for appellant.

Proskauer Rose LLP, New York (Leonard S. Baum of counsel), for respondents.

_____

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered February 23, 2015, admitting a document dated February 8, 2008 to probate as the last will and testament of decedent, based on a decision, same court and Surrogate, entered December 23, 2014, which had granted petitioners' motion for summary judgment dismissing the objectant's objections to probate, unanimously affirmed, with costs.

Petitioners sustained their burden of demonstrating due execution of the will, based on the signed affidavit and the deposition testimony of the three attesting witnesses (*see Matter of Falk*, 47 AD3d 21, 26 [1st Dept 2007], *lv denied* 10 NY3d 702

[2008]). Objectant failed to raise a triable issue of fact, as she presented no evidence that the witnesses' testimony was suspect, and she was not present when the will was signed by decedent (*see Matter of Halpern*, 76 AD3d 429, 432 [1st Dept 2010], *affd* 16 NY3d 777 [2011]).

Petitioners made a prima facie showing that decedent had testamentary capacity at the time of the will's execution, based on the testimony of decedent's treating physicians, who examined him the day before the execution and found him lucid, alert and able to understand the purpose of a will, his assets and the natural objects of his bounty (*see Matter of Morris*, 208 AD2d 733, 733 [2d Dept 1994]). Decedent's medical records and the affidavit of objectant's medical expert do not raise a triable issue of fact.

Petitioners made a prima facie showing that decedent's decision to change his testamentary plan to leave the bulk of his estate to charity was the product of his own wishes. Numerous witnesses testified to decedent's strong interest in providing for the education of minority youth, and the will explained that there was no bequest to three of decedent's children because of provisions he had established for them during his lifetime. Although petitioners were in a position of trust and confidence

with decedent, objectant failed to raise a triable issue of fact as to the exercise of undue influence over decedent by petitioners (*see Matter of Camac*, 300 AD2d 11, 12 [1st Dept 2002]). The record shows that decedent actively sought the intervention of petitioners, his longtime friends.

Objectant also failed to present evidence sufficient to raise an issue of fact as to fraud (*see Matter of Ryan*, 34 AD3d 212, 215 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). The provisions of the will were consistent with statements decedent made to witnesses over the years.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16631 The People of the State of New York, Respondent, Ind. 1179/13

-against-

Kareem Hamilton, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Ethan Krasnoo of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered November 19, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six 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]). There is no basis for disturbing the jury's credibility determinations. Defendant's overall course of conduct supports an inference that he was a participant in the drug transaction, and did not merely direct the undercover buyer

to the drug dealer he was seeking. The evidence demonstrated that defendant acted, at least, as a lookout (*see e.g. People v Rodriguez*, 52 AD3d 249 [1st Dept 2008], *lv denied* 11 NY3d 741 [2008]), as well as performing a receptionist-like function.

The court properly denied defendant's request for an agency instruction because there was no reasonable view of the evidence that defendant took part in the transaction, but acted only on behalf of the buyer. Absent evidence "indicative of a relationship with the buyer," an agency charge is not warranted by alleged "ambiguities about the defendant's connection to the seller," (*People v Herring*, 83 NY2d 780, 783 [1994]; *see also People v Williams*, 88 AD3d 463, 464 [1st 2011], *affd* 21 NY3d 932 [2013]; *People v Lewis*, 51 AD3d 475 [1st Dept 2008], *lv denied* 11 NY3d 738 [2008]).

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16632 The People of the State of New York, Respondent, Ind. 3714/12

-against-

Walter Lascano, Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about October 8, 2013,

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

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

ENTERED: JANUARY 12, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16633 Mamadou Sylla, Index 150705/12
Plaintiff-Appellant,

-against-

90-100 Trinity Owner LLC, et al.,
Defendants-Respondents,

The City of New York,
Defendant.

_____

Frekhtman & Associates, Brooklyn (Nikhil Agharkar of counsel), for appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Michael Lenoff of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Kathryn Freed, J.), entered March 26, 2014, which granted defendants 90-100 Trinity Owner LLC and The Chetrit Group LLC's motion for summary judgment dismissing the complaint as against them, unanimously dismissed, without costs.

Since the order appealed from was entered upon a written stipulation, signed by counsel and so ordered by the court (*see* CPLR 2104), plaintiff is not aggrieved by it (*see* CPLR 5511).

In any event, if were we to reach the merits, we would find that summary judgment as to these defendants was appropriate.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16634 The People of the State of New York, Respondent, Ind. 14/10

-against-

Yosttin Ortiz, Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered October 21, 2010, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree (Penal Law § 130.50(1)), and sentencing him to an aggregate term of seven years imprisonment with fifteen years of post-release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16635 Jan Arnett, Index 653445/13
Plaintiff-Appellant,

-against-

Charles Morgan Securities Inc., et al.,
Defendants-Respondents.

Scarinci & Hollenbeck, LLC, New York (Dan Brecher of counsel), for appellant.

Moritt, Hock & Hamroff LLP, New York (Bruce A. Schoenberg of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 10, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the claim for breach of fiduciary duty, unanimously affirmed, without costs.

Plaintiff asserts that defendants, as controlling shareholders of nonparty the Enlightened Gourmet, Inc. (EGI), breached fiduciary duties owed to plaintiff, a minority shareholder and creditor of EGI. We affirm the dismissal of the claim, as plaintiff failed to show that defendants owed him a fiduciary duty. Plaintiff does not dispute defendants' contention that Nevada, where EGI was incorporated, does not recognize a fiduciary duty owed to a corporation's creditors by

majority or controlling shareholders. To the extent he relies on *RSI Communications PLC v Bildirici* (649 F Supp 2d 184 [SD NY 2009], *affd* 412 Fed Appx 337 [2d Cir 2011], *cert denied* — US —, 132 S Ct 97 [2011]) in support of his argument that defendants owe him a fiduciary duty under New York law, *RSI* and the cases cited therein state only that "officers and directors" of insolvent corporations owe creditors a fiduciary duty (649 F Supp 2d at 202 [internal quotation marks omitted]), and plaintiff has not alleged facts showing that defendants were officers or directors of EGI. Further, his allegations that defendants controlled EGI are conclusory.

We decline to grant plaintiff leave to amend to assert a claim for fraud. Plaintiff never requested that relief before the motion court and, in any event, he fails to state a claim for fraud (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

We have considered and rejected plaintiff's remaining arguments.

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16636 In re Semenah R., and Another,

Children Under the Age of
Eighteen Years, etc.,

Keno R.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent,

Shanika R.,
Respondent.

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

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

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

Order of fact-finding and disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about May 19, 2014, to the extent it determined, after a fact-finding hearing, that respondent Keno R. abused Jordan R., for whom he was a person legally responsible, and derivatively abused and neglected the subject children, unanimously affirmed, without costs.

The findings of abuse and derivative abuse were supported by a preponderance of the evidence (*see* Family Court Act §

1046[b][i]; *Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411 [1st Dept 2012]). The evidence demonstrated, inter alia, that respondent was the primary caregiver for Jordan, then three years old, and the subject children, all day, while their mother was at work. When the mother returned home in the evening, respondent told her that Jordan was not feeling well. Later that night, Jordan was found by the mother to be unresponsive. He went into cardiac arrest and was brought to the hospital early the next morning, where he died, despite efforts to resuscitate him. An autopsy revealed that Jordan had bruises on his body and that he had sustained blunt force trauma to his abdomen, resulting in crushing and tearing of his bowel and mesentery, which led to cardiac arrest. The medical examiner testified that the injuries were not accidental and would have been inflicted hours earlier.

After the petitioner made out its prima facie case of abuse, respondent failed to provide a reasonable explanation for Jordan's injuries so as to rebut the presumption that he was responsible for them (*see Matter of Philip M.*, 82 NY2d 238 [1993]). There is no basis for disturbing Family Court's assessment of the credibility of the medical examiner's testimony as to the cause of Jordan's death (*see Matter of Anthony S.*, 280 AD2d 302 [1st Dept 2001]).

The finding of derivative abuse of the subject children was warranted by the nature and severity of the direct abuse - blunt force trauma resulting in the child's death – which demonstrated parental judgment so impaired as to place the subject children, for whom respondent was a person legally responsible, at substantial risk of harm (*see* Family Court Act § 1046[a][i]; *Matter of Dayanara V.*, 101 AD3d at 412; *Matter of Cruz*, 121 AD2d 901 [1st Dept 1986]).

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

ENTERED: JANUARY 12, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16637 The People of the State of New York, Respondent, Ind. 995/13

-against-

Eric Diaz,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about November 15, 2013,

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

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

ENTERED: JANUARY 12, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16638 The People of the State of New York, Respondent, Ind. 2828/13

-against-

Ramayana Jones, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about November 20, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JANUARY 12, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16644 Sanford Goldfarb, Index 650173/14
Plaintiff-Appellant,

-against-

Richard Schaeffer, et al.,
Defendants-Respondents.

Sullivan & Worcester, LLP, New York (Andrew T. Solomon of counsel), for appellant.

Teitler & Teitler, LLP, New York (Alan S. Rabinowitz of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 7, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the first and second causes of action in the complaint, unanimously affirmed, without costs.

The complaint alleges that plaintiff "was responsible for introducing [defendant Richard] Schaeffer to [nonparty] LIQD," that plaintiff "found the opportunity for Schaeffer," that "[t]hrough [plaintiff]'s connections, Schaeffer was introduced to [nonparty Brian] Ferdinand," the cofounder of LIQD, and that "[a]s payment for [plaintiff]'s role in introducing him to Ferdinand and LIQD, Schaeffer promised to pay to [plaintiff] an amount equal to 20% of any equity that he received from LIQD."

The complaint also alleges that plaintiff introduced LIQD and Schaeffer to customers and investors.

Reading the complaint liberally, as we must, we find that the motion court correctly determined that the breach of contract claim is barred by the statute of frauds, because the alleged oral contract between Schaeffer and plaintiff was not in writing (*see e.g. Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 267 [1977]). The complaint alleges an agreement to pay compensation for services plaintiff rendered to Schaeffer in "negotiating . . . a business opportunity," which squarely falls within the statute of frauds (General Obligations Law § 5-701[a][10]; *see Freedman*, 43 NY2d at 267; *see also Meyers Assoc., L.P. v Conolog Corp.*, 19 Misc 3d 1104[A], 2008 NY Slip Op 50552[U], *3 [Sup Ct, NY County 2008], *affd* 61 AD3d 547 [1st Dept 2009]).

The "narrow" cofinder exception to the statute of frauds does not apply here, because the complaint does not allege that plaintiff and Schaeffer were joint brokers or joint finders for LIQD (*Haskins v Loeb Rhoades & Co.*, 52 NY2d 523, 525 [1981]). There is no fair reading of the complaint that plaintiff and Schaeffer decided to "pool their efforts" in providing services to LIQD (*Dura v Walker, Hart & Co.*, 27 NY2d 346, 350 [1971]). To

the contrary, the complaint alleges that plaintiff's services were provided to Schaeffer, not LIQD. Nor is there any allegation in the complaint that Schaeffer agreed to perform any services for LIQD, or what fees Schaeffer would supposedly earn from LIQD for any such services.

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

ENTERED: JANUARY 12, 2016

CLERK

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

15259 In re Foster Williams, Index 400638/13
Petitioner-Appellant,

-against-

Department of Corrections
and Community Supervision,
Respondent-Respondent.

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

Eric T. Schneiderman, Attorney General, New York (Karen W. Lin of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2014, affirmed, without costs.

Opinion by Gische, J. All concur except Kapnick, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Karla A. Moskowitz
Judith J. Gische
Barbara R. Kapnick, JJ.

15259
Index 400638/13

_____x

In re Foster Williams,
Petitioner-Appellant,

-against-

Department of Corrections
and Community Supervision,
Respondent-Respondent.

_____x

Petitioner appeals from the judgment of the Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2014, denying the petition, dismissing the proceeding, and declaring that Executive Law § 259-c[14], as amended by Laws of 2005 (ch 544, §2), is not unconstitutional on its face or as applied to petitioner.

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

Eric T. Schneiderman, Attorney General, New York (Karen W. Lin and Steven C. Wu of counsel), for respondent.

GISCHE, J.

In this appeal we are asked to consider whether the mandatory 1000-foot buffer zone, contained in New York's Sexual Assault Reform Act (Executive Law § 259-c[14]) (SARA), which prohibits sex offender parolees from residing or traveling near schools or other institutions where minor children congregate, violates the Ex Post Facto Clause of the United States Constitution, and substantive due process rights under the United States and New York Stated Constitutions. These are issues of first impression in our Court.[1] For the reasons that follow, we hold that under the highly deferential constitutional standard applicable to legislative enactments, SARA does not violate either the Federal or the New York State Constitutions. Because SARA meets the tests of constitutionality, issues regarding whether there are better or wiser ways to achieve the law's stated objectives are policy decisions belonging to the

---

[1]In addition to this case, the issue has been considered by two other trial courts and one Federal District Court, all reaching different conclusions about the constitutionality of New York's statute (*see Wallace v New York*, 40 F Supp 3d 278 [ED NY 2014] [finding that SARA does not violate the Ex Post Facto Clause], *Devine v Annucci*, 45 Misc 3d 1001, 1009 [Sup Ct, Kings County 2014] [finding SARA violated Ex Post Facto "as applied" to petitioner], *and Matter of Berlin v Evans*, 31 Misc 3d 919, 928 [Sup Ct, NY County 2011][finding that the 2005 amendments violated Ex Post Facto Clause because the law was intended to increase punishment against convicted sex offenders and was "clearly punitive in effect"], *appeal dismissed* 103 AD3d 405 [1st Dept 2013]).

legislature and not the courts (*People v Parilla*, 109 AD3d 20, 29 [1st Dept 2013], *lv denied* 21 NY3d 865 [2013]).

On November 21, 1995, petitioner was convicted of rape in the first degree, three counts of sodomy in the first degree, and endangering the welfare of a child. His conviction was affirmed on appeal (*People v Williams*, 257 AD2d 425, 425 [1st Dept 1999], *lv denied* 93 NY2d 930 [1999]). The victim of the crimes was a nine-year old girl. Petitioner was sentenced to a prison term of 7 to 21 years (*see id.*). On December 20, 2012, when petitioner was 64 years old, he was released to parole supervision. He is due to complete his sentence on November 18, 2016.

In accordance with SARA, the granting of petitioner's parole was subject to mandatory conditions that restrict both the location of his residency and his knowing travel to no closer than 1000 feet of school grounds. Petitioner claims that the residency restriction has made it impossible to find housing within the borough of Manhattan and nearly impossible to find housing elsewhere within the city. At the time the petition was filed, petitioner was residing in the men's homeless shelter at Bellevue, which is located within a zone that is otherwise prohibited under SARA[2]. Petitioner also claims that he is unable

[2]Petitioner states in his brief that he has since moved to a shelter on Wards Island. Although respondent the Department of

to reasonably travel within Manhattan and that even required visits to his parole officer, and travel to drug and sex offender treatment programs, are made in violation of SARA's restriction on travel. He maintains that the restrictions impede his ability to visit doctors, lawyers, social workers, friends and family.[3] The record contains a demonstrative depiction, entitled "Manhattan No-go Zones and Public Bus Network," showing that most of Manhattan is off-limits to petitioner. Although the map truncates portions of the Bronx and Queens, it shows "no-go" or buffer zones in those boroughs as well. There is no depiction of Brooklyn, Staten Island or any other part of New York State.

Petitioner filed a hybrid declaratory judgment/Article 78 petition claiming that SARA violates the Ex Post Facto clause of the United States Constitution and his substantive due process rights under both the Federal and New York State Constitutions. Respondent filed an answer asserting that SARA is constitutional

---

Corrections and Community Supervision had formerly placed parolees subject to SARA at the Bellevue shelter, it later changed its policy, concluding that the shelter was within a prohibited buffer zone and could not serve as a SARA-compliant residence (*see People ex rel. Johnson v Superintendent, Fishkill Corr. Facility*, 47 Misc 3d 984 [Sup Ct Duchess Co 2015]).

[3]A further, albeit discretionary, condition of his parole prevents petitioner from leaving the City of New York without permission of his parole officer. Clearly this additional condition compounds petitioner's ability to remain SARA compliant.

on its face and denying most of petitioner's factual allegations about SARA's effect on him. The motion court held that SARA is constitutional.

SARA was first passed in 2000, only after petitioner was convicted. As originally enacted, it barred sex offenders whose victims were minors from knowingly entering school grounds or a facility or institution that primarily cares for minors. The restriction only applied to sex offenders convicted of certain enumerated offenses and only if the victim had been under the age of 18. It only applied while sex offenders were on parole and still under the custody and supervision of respondent the Department of Corrections and Community Supervision (DOCCS) (L 2000, ch 1, § 8). While the bar on entering school grounds applied at all times of day and night, the bar on entering a facility or institution only applied when minors were present. The law required that the bar be made a mandatory condition of parole. A violation of SARA was a violation of parole. No separate sanction, criminal or otherwise, was specified for a violation (Executive Law § 259-c[14]). There were limited exceptions to SARA's application if the parolee was a student or employee working at the school or institution or had a family

member enrolled there.[4]

Effective September 2005, SARA was amended in two respects. First, the definition of "school grounds" was broadened to include publically accessible areas within 1000 feet of school property (L 20005 ch 544, § 2). In expanding the geographical definition of "school grounds," SARA incorporated a definition already contained in Penal Law § 220.00. Second, SARA's coverage was extended to include sex offenders who are classified as high risk, level three sex offenders under the Sex Offender Registration Act (SORA). Level three sex offenders are subject to the ban regardless of whether any of their victims were minors. Although the statute itself does not restrict the location of a residence per se, the expanded definition of "school grounds" necessarily operates to restrict places where a parolee may live and travel (*People v Diack*, 24 NY3d 674, 681-682 [2015]). The law was otherwise unchanged[5].

---

[4]These exceptions still require written authorization for the parole officer and the head of the institution (*id.*)

[5]Executive Law § 259-c(14) provides as follows:

> "notwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty, one hundred thirty-five or two hundred sixty-three of the penal law or section 255.25, 255.26 or 255.27 of the penal law and the victim of such offense was

under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00 of the penal law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such sentenced offender may, with the written authorization of his or her parole officer and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the parole officer and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender.

Penal Law 220.00 defines school grounds as follows:

14. “School grounds” means (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial,

Petitioner was adjudicated a level two sex offender under SORA. SARA applies to him only by virtue of the fact that he was convicted of at least one of the statutorily enumerated sex offenses[6] and that his victim was under the age of 18.

The Ex Post Facto Clause

"The Ex Post Facto Clause of the United States Constitution [Art I § 10] prohibits states from enacting laws that criminalize prior, then-innocent conduct; increase the punishments for past offenses; or eliminate defenses to charges for incidents that preceded the enactment" (*id.*, *Kellogg v Travis*, 100 NY2d 407, 410 [2003]). "The prohibition on ex post facto laws applies only to penal statutes[,]" so that where the challenged conduct does not

---

> intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an 'area accessible to the public' shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants."

[6]The conviction for rape in the first degree, pursuant to Penal Law 130.35, is a qualifying conviction under SARA (*see* Executive Law § 259-c[14]). After his convictions, the crimes of Sodomy were renamed under Penal Law §§ 130.40 *et seq.* as a Criminal Sexual Acts. These are qualifying convictions under SARA.

seek to impose a punishment, there is no constitutional violation

The threshold question for the court is whether the challenged law is retrospective - that is, does it apply to events occurring before its enactment and does it disadvantage the offender affected by it (*Weaver v Graham*, 450 US 24, 29 [1981]). There is no dispute that SARA is retrospective. It was both passed and amended only after petitioner was originally convicted and it has been applied to impose mandatory restrictions on him during his period of parole.

Since the challenged enactment is retrospective, in order to determine whether it violates the Ex Post Facto Clause, we apply the intent-effects analysis established by the United States Supreme Court, as articulated in *Smith v Doe* (538 US 84, 92 [2003], *see also People v Parilla*, 109 AD3d 20, 23 [1st Dept 2013] *lv denied* 21 NY3d 865 [2013]). We first ascertain whether the legislature intended the statute to impose punishment or to enact a civil regulatory scheme that is nonpunitive (*id.)*. If the legislature intended to impose punishment, then retroactive application of the law violates the Ex Post Facto Clause, ending the court's inquiry (*id.*). If, however, the legislature intended to establish civil proceedings, then the court must go on to examine whether the statutory scheme is so punitive, either in its purpose or effect, that the State's intention to deem it

civil is negated (*Smith v Doe* at 92). Resolution of these questions is a matter of statutory interpretation (*Kansas v Hendricks*, 521 US 346, 361 [1997]; *United States v One Assortment of 89 Firearms*, 465 US 354, 362 [1984]).

Punitive Intent

We conclude that both SARA, as originally enacted, and the 2005 amendments, were intended to be civil measures designed to protect the public. More particularly, SARA was enacted to protect children from victimization by sexual predators by limiting access that certain previously adjudicated sex offenders could have to defined public areas where children regularly congregate and travel. This intent is evident from both the text of the law and the legislative history, and it is consistent with other civil regulatory schemes, designed to protect the public, which have been enacted in New York State and concern the management of sex offenders.

The complete focus of the geographical restrictions contained in the text of the statute itself correlates entirely with areas where children are regularly expected to be in larger numbers. The restrictions on institutions other than schools are limited to times only when children are actually there. The limitation does not apply to all sex offenders, but rather only to those who in the Legislature's evaluation have a greater

likelihood of reoffending against child victims. The child-focused language in the statute itself strongly supports the legislative intent to protect children as opposed to further punishing sex offenders.

To the extent legislative history exists for SARA, both at the time it was originally enacted and when amended in 2005, it supports a conclusion that it was enacted with the goal of protecting children and not to further punish sex offenders for their prior bad acts. The sponsor's memorandum in the Assembly describes the justification of the 2005 bill as "a need to prohibit those sex offenders who are determined to pose the most risk to children from entering upon school grounds or other areas where children are cared for" (Sponsor's Mem, Bill Jacket, L 2005, ch 544 at 4). Assemblyman Harvey Weisenberg, as sponsor of the bill, wrote to the Governor's counsel in support of the bill: "Given the threat to our children posed by sex offenders and the terrible damage caused by their heinous acts, we must strive to protect the youngest and most vulnerable members of our society from such horrible crimes in any way we can" (*id.* at 3). The State Education Department wrote a letter in support of the bill "because it will provide greater protection to children" (Letter from St Educ Dept, July 8, 2005, Bill Jacket, L 2005, ch 544 at 6). When SARA was originally passed in 2000, the Attorney

General's Office supported the legislation, explaining in a supporting memorandum that the purpose of the bill was "to protect children from sexual predators" (Mem of NY Attorney General, August 22, 2000, Bill Jacket, L 2000, ch 1 at 5).

SARA's civil legislative intent, which is to protect the public, is consistent with other existing New York legislation designed to manage other aspects of future behavior by adjudicated sex offenders. SORA requires all sex offenders to register with the State and provides for notification to the community (Correction Law § 168 *et seq*). The Sex Offender Management and Treatment Act (SOMTA), which only applies after the completion of a criminal sentence, provides for civil supervision and potential confinement of sex offenders who suffer from a mental abnormality (Mental Hygiene Law § 10.01 *et seq*). These statutes have each been found to be civil regulatory schemes, intended to protect the public from the risk of recidivism by sex offenders (*Doe v Cuomo*, 755 F3d 105, 110-112 [2d Cir 2014] [SORA amendments found nonpunitive]; *Doe v Pataki*, 120 F3d 1263, 1276 [2d Cir 1997] ["There is ample evidence that the New York legislature intended the SORA to further nonpunitive goals"]] *cert denied* 522 US 1122 [1998]; *Parilla* at 23 [rather than imposing punishment for a past crime, SORA is a remedial statute intended to prevent future crime]; *North v Matter of*

Board of Examiners of Sex Offenders of State of N.Y., 8 NY3d 745, 752 [2007] [same]; *People v Harnett*, 16 NY3d 200, 206 [2011] [SOMTA, like SORA, is not a penal statute designed to punish a past crime, but a remedial one designed to prevent a future crime]; *Matter of State of New York v Nelson*, 89 AD3d 441, 442 [1st Dept 2011] [proceedings under SOMTA are nonpunitive civil proceedings to which the Ex Post Facto Clause is inapplicable]). SARA, like SORA and SOMTA, is yet another remedial statute enacted by the legislature that is designed to protect the public, specifically children, from future crime. SARA shares a similar civil regulatory purpose to its legislative counterparts.[7]

---

[7]In a recent case finding that the SARA preempts local laws on issues relating to the management of sex offenders, the Court of Appeals considered the legislature's collective intent in enacting SORA, SARA and SOMTA (*Diack*, 24 NY3d 674).

Numerous states have enacted laws restricting the residency of convicted sex offenders. Although each state law is unique in its restrictions and application, and the courts have reached different conclusions on the constitutionality of the particular residency restriction before them, the courts have been almost uniform in finding that the particular residency restrictions were not enacted with any punitive intent (*see e.g. McGuire v Strange*, 83 F Supp 3d 1231, 1247 [MD Ala 2015] [Alabama statute]; *Commonwealth v Baker*, 295 SW3d 437, 443 [Ky Sup Ct 2009] *cert denied* 559 US 992 [2010]; *Weems v Little Rock Police Dept.*, 453 F3d 1010, 1017 [8th Cir 2006] [Arkansas statute], *cert denied* 550 US 917 [2007]; *Doe v Miller*, 405 F3d 700, 718 [8th Cir 2005] [Iowa statute] *cert denied* 546 US 1034 [2005]; *Starkey v Oklahoma Dept of Corrections*, 305 P3d 1004, 1020 [Okla Sup Ct 2013], *State v Trosclair*, 89 So3d 340, 350 [La Sup Ct 2012], and *People v Mosley*, 60 Cal4th 1044, 1065 [Cal Sup Ct 2015]; *but see State v*

We reject petitioner's argument that because SARA incorporates the definition of school grounds contained in Penal Law § 220.00(14), we must conclude that the Legislature intended SARA to be punitive. The reference to school grounds as defined in the Penal Law is not, in itself, sufficient to show criminal intent, in view of other more relevant evidence to the contrary, as previously discussed. "The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one" (*Smith v Doe* at 94 [Alaska SORA upheld as a civil, nonpunitive measure even though the Act's registration provisions were codified in Alaska's criminal procedure code]).

We also reject the argument that because SARA's mandatory conditions only apply to parolees, it necessarily is intended to punish them. SARA imposes no restrictions, punishment, or penalty over and above that to which parolees are already subject. For instance, there are no separate criminal or additional penalties imposed for violating SARA (*cf. Commonwealth v Baker* at 443, 447 [residency restriction that punished first offense as a Class A misdemeanor and any subsequent offense as a

---

Williams, 129 Ohio St3d 344 348 [Oh Sup Ct 2009]). Even when courts have found that individual state laws violate the Constitution, they have concluded that the laws were not enacted with a punitive intent (*see Commonwealth v Baker*, 295 SW3d at 443; *Starkey v Oklahoma Dept of Corrections*, 305 P3d at 1020).

Class D Felony violated Ex Post Facto Clause as applied]; *Weems v Little Rock Police Department* at 1014, 1017 [upholding constitutionality of Arkansas residency restriction that punished offense as a Class D]; *Doe v Miller* at 705, 723 [upholding constitutionality of Iowa residency restriction that made offense an aggravated misdemeanor]). The "penalties" imposed for violating SARA are the same penalties that apply for any other parole violations. While SARA's objective to deter future crime is consistent with DOCCS's statutory mandate that parole can only be granted if an inmate can live and remain at liberty without violating the law (Executive Law § 259-i[27][c][A]), the coalescence of these objectives does not transform a civil intent into a punitive one (*Smith v Doe* at 102).

Punitive Effect

Because we conclude that SARA was not enacted with a punitive intent, we now consider whether the statutory scheme is otherwise so punitive in purpose or effect as to negate the State's intention to deem it civil (*Smith v Doe* at 92). Statutes that are enacted as civil regulatory schemes can only be challenged as facial violations of ex post facto laws (*Seling v Young*, 531 US 250, 263 [2001]). In deciding whether such a statute imports a punitive purpose or effect, courts are guided by consideration of certain factors articulated by the United

States Supreme Court (*Smith v Doe* at 97*; Kennedy v Mendoza-Martinez*, 372 US 144 [1963]). The factors most relevant to our analysis are whether the sanction imposes an affirmative disability or restraint, has been historically regarded as a punishment, promotes traditional aims of punishment, has a rational connection to a nonpunitive purpose or is excessive with respect to its nonpunitive purpose (*id.*). In the end, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" (*Smith v Doe* at 92 [internal quotation marks omitted]). "[A] statutory scheme that serves a regulatory purpose is not punishment even though it may bear harshly on [those] affected" (*Doe v Pataki*, 120 F3d at 1279 [internal quotation marks omitted]).

As more fully set forth below, while some factors favor petitioner, overall we do not find the clear proof that is necessary to support a determination that SARA is punitive in its effect. The legislature was not "masking punitive provisions behind the veneer of a civil statute" (*Matter of State of New York v Nelson*, 89 AD3d 441, 442 [1st Dept 2011]). Consequently, we conclude that SARA does not violate the Ex Post Facto Clause of the United States Constitution.

Affirmative Restraint/Historically Criminal Punishment/Promotes Deterrence

We agree with petitioner that the residency and travel restrictions SARA imposes constitute affirmative restraints, bear some resemblance to historical criminal punishment, and serve the goal of deterrence. Because, however, SARA only applies to parolees, who otherwise have restricted liberty, these factors do not strongly support a conclusion that SARA is punitive in effect (*see Morrissey v Brewer*, 408 US 471, 482 [1972][recognizing the even though a parolee has a liberty interest that requires some measure of due process when parole is revoked, the State may "properly subject[] [a parolee] to many restrictions not applicable to other citizens"]; *Matter of Williams v New York State Div. of Parole*, 71 AD3d 524, 525 [1st Dept 2010][state has discretion to place restrictions on parole release because inmates have no constitutional right to be released to parole supervision before serving a full sentence], *appeal dismissed* 15 NY3d 770 [2010], *lv denied* 15 NY3d 710 [2010]).

There is no question that SARA on its face imposes affirmative restraints on petitioner, as well as anyone else to which it applies. While the parties may factually disagree about the extent of the restrictions and the burdens actually imposed, SARA by its terms restricts the parolee's freedom of movement and

choice of residency. The restraints are neither minor nor indirect, especially when applied to parolees released to live in densely populated areas, where there are many schools or other institutions caring for children (*see Smith v Doe* at 100).[8,9]

---

[8] In reaching this conclusion the Court does not look to the individualized circumstances of hardship presented by petitioner. Petitioner, himself, acknowledges that there can be no as-applied challenge based on the Ex Post Facto clause (*see Selig v Young* at 263). In this regard, constitutional analysis of this statute, of statewide application, should not be limited in terms of how it affects parolees, like petitioner, with a particularized need to reside in Manhattan. The restrictions and burdens need to be evaluated more generally. It is for this reason that the Court does not need to resolve the parties' dispute about whether this parolee has an actual need or only a preference for residing in Manhattan in order to evaluate whether SARA imposes any affirmative restraint.

In viewing the claimed consequences of SARA on this particular petitioner, however, the Court observes that some of the hardships identified by him are a consequence of other, nonmandatory conditions of parole imposed by DOCCS or the failure by the State to provide necessary resources for a parolee to comply with SARA. For instance, in petitioner's case, DOCCS has imposed a discretionary restriction against petitioner leaving New York City. He is necessarily required as a condition of parole to report to his parole officer, yet the officer assigned to him is not in a SARA accessible location. Neither are any of the treatment programs that he is expected to attend. It is difficult to understand why a parole officer or treatment programs cannot be located in geographic locations consistent with SARA compliance. A parolee should not be required to make a Hobson choice of complying with SARA or complying with other conditions of parole, while risking a violation of parole in either event. These questions, however, do not affect the core question of constitutionality raised in this proceeding.

Similarly, to the extent that any affirmative geographic restraint for any period of time is akin to "banishment," SARA's restrictions share that label. Banishment has been broadly construed to mean compelling an individual to quit a city, place, or country for a specified period of time (*United States v Ju Toy*, 198 US 253 [1905]). Banishment has, both in antiquity and modern jurisprudence, been viewed as a form of criminal punishment (*Kennedy v Mendoza-Martinez* at n 23; *see also Stewart v Commonwealth of Kentucky*, 2011 WL 3962606 [2011 Ky App unpub LEXIS 666 Sept. 9, 2011, No, 2010-CA-000838-MR]). While SARA's geographic limitations resemble "banishment," that label does little by way of proving a punitive effect without reference to the actual restraints.

Because the actual restraints SARA places on parolees are no greater than the restrictions or conditions to which they are otherwise subject, they do not transform SARA's civil regulatory scheme into criminal punishment. Inmates have no federal or state constitutional rights to be released to parole supervision before serving a full sentence (*Matter of Williams v New York State Div. of Parole* at 525; *Matter of MG v Travis*, 236 AD2d 163, 167 [1st Dept 1997] *lv denied* 91 NY2d 814 [1998]).[10] Pursuant to

[10]This is to be distinguished from the limited due process rights that attach to the revocation of parole (*Morrissey v*

Executive Law § 259-c[2] and 9 NYCRR 8003.3, special conditions may be imposed upon a parolee's right to release. The courts routinely uphold these conditions as long as they are rationally related to the inmate's past conduct and future chance of recidivism. Acceptable parole restrictions have included geographical restrictions and restrictions requiring that parolees refrain from contact with certain individuals or classes of individuals (*Boss v New York State Div. of Parole*, 89 AD3d 1265, 1266 [3d Dept 2011] [parole conditioned on finding an approved place of residence prior to release]; *Matter of Williams v New York State Div. of Parole* at 525 [parole condition prohibited contact with spouse absent permission]; *Matter of Poladian v Travis*, 8 AD3d 770, 770 [3d Dept 2004] [parole condition barred contact with an acquaintance]; *Matter of Dickman v Trietley*, 268 AD2d 914, 915 [3d Dept 2000] [parole condition restricted cohabitation with a woman with whom inmate began a relationship while incarcerated]; *Matter of Gerena v Rodriguez*, 192 AD2d 606, 607 [2d Dept 1993] [parole condition restricted employment as a chauffeur where vehicles were the means of past criminal acts]). Petitioner acknowledges that in the absence of SARA's mandatory condition to stay away from school grounds,

---

Brewer, 408 US 471 [1972]).

DOCCS has imposed it as a discretionary condition of a sex offender's parole, albeit on a case-by-case basis (Petitioner's Brief at 8). The categorical application of the condition will be upheld as long as it is rationally related to SARA's objective (*see Williams* at 525), and the mandatory nature of the condition does not change this analysis.

In terms of whether SARA promotes traditional aims of punishment, we agree with petitioner that SARA is intended to promote deterrence. In fact, the primary objective of SARA is to prevent parolees from reoffending. While deterrence is a traditional objective of criminal punishment, it does not necessarily follow that a sanction aimed at deterring future crime compels a conclusion that it is a criminal penalty. As the United States Supreme Court observed in *Smith v Doe*, any number of programs might deter crime without imposing a punishment. "To hold that the mere presence of a deterrent purpose renders . . . sanctions criminal . . . would severely undermine the Government's ability to engage in effective regulation" (538 US at 102 [internal quotation marks omitted] [first ellipsis added]). In this circumstance, the deterrent objective of SARA does not aid in our analysis about whether the statute is punitive in effect.

We reject petitioner's argument that SARA promotes

retribution. The restrictions imposed by SARA are consistent with the noncriminal objective of preventing future crime and do not subject a parolee to any additional sanctions or penalties other than those that could be validly linked to any other parole violation.

Rational Connection to a Nonpunitive Purpose/Excessiveness

These last factors concern the relationship and proportionality of the residency restrictions to their intended purpose. They are the most important tests in assessing whether SARA is punitive in effect (*Smith v Doe* at 102). The fit between the statute and its nonpunitive purpose need not be perfect, but must be a reasonable policy choice made to advance the stated objectives (*id*. at 103, 105). SARA is entitled to a presumption of constitutional validity and petitioner has the burden of demonstrating that SARA is not merely unwise or unfair, but that it serves no legitimate governmental purpose (*Ciafone v Kenyatta*, 27 AD3d 143, 146, 151-152 [2d Dept 2005]). Under this highly deferential standard, we conclude that there is a sufficient rational connection between SARA's nonpunitive intent and its effect. We also conclude that it is not unconstitutionally excessive.

SARA's legitimate governmental interest is the protection of children against people who have shown themselves capable of

committing sex crimes. It operates on the basic premise that by limiting access to children, society can reduce the risk of reoffense. Petitioner argues that because there is no empirical data supporting a conclusion that SARA actually achieves its stated objective, SARA's effect is punitive. He further argues that because current research actually supports a conclusion that SARA does not achieve its stated nonpunitive purpose, there is no rational connection and it is excessive. While research data may provide a basis for showing a rational connection between an enactment and its nonpunitive objective, the lack of research data does not, by itself, warrant the opposite conclusion (*see Heller v Doe*, 509 US 312, 320 [1993] ["[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data" [internal quotation marks omitted] [alteration in original]). One court considering the issue suggested that the connection between deterrence and lack of access to victims is a matter of logic and common sense (*Doe v Miller*, 405 F3d at 716 [n finding that a residency restriction rationally advanced a legitimate state interest in reducing reoffenses, the court held that policymakers of Iowa are allowed to rely on "common sense"]). Other courts have found that a residency restriction designed to reduce the proximity between offenders and children is "within the range of

rational policy options" (*e.g. Weems* 453 F3d at 1015; *Wallace*, 40 F Supp 3d at 278). The correlation between limiting access to potential victims and deterring crime is a proposition that is accepted in other aspects of our jurisprudence. It underlies SORA, in part, to the extent that notification permits the community to self-select association with sex offenders. It underlies parole conditions mandating that a parolee to stay away from his or her victims. It also is a major underpinning for New York State laws concerning orders of protection (*see* Family Court Act § 842; Domestic Relations Law § 252; CPL 530.12, 530.13; *People v Foster*, 87 AD3d 299, 307 [2d Dept 2011], *lv denied* 18 NY3d 858 [2011]). The correlation is no less rational or compelling when evaluating SARA.

In addition, contrary to the conclusion reached by the dissent, we believe that the rational connection between deterring recidivism and limiting access to potential victims supports SARA's ban both as to the real property boundaries of school buildings and the geographical buffer zones surrounding such buildings. Both the buildings and the buffer zones are areas where children are expected to travel and congregate in larger concentrations than other geographical locations (*see People v Robbins*, 5 NY3d 556 [2005]).

Petitioner calls to our attention important and considered

research that questions the effectiveness of SARA and statutes like it. The data and information, however, is not conclusive and highlights why, at this time, decisions regarding how to deter future sexual crimes against children are policy matters for the legislature to address.

Data regarding the rates at which sex offenders reoffend and whether they reoffend at greater or lesser rates than nonsex offenders, or whether sex offenders who have victimized minors re-offend at higher rates, is conflicting (*see* Center for Sex Offender Management, Recidivism of Sex Offenders at 6-9 [May 2001]; United States Department of Justice, Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994 at 1-2, 30-31 [Nov. 2003]). Based on existing literature, the legislature could have reasonably concluded that statistics understate the problem of sex crimes against children (Recidivism of Sex Offenders Released from Prison in 1994 at 30; *see also People v Knox*, 12 NY3d 60, 68 [2009], *cert denied* 558 US 1011 [2009]). Some statistics support a legislative conclusion that the rate of reoffense for sexual offenders is substantial (*Smith v Doe* at 103). There is no disagreement, however, that some percentage of sex offenders do reoffend. Given the serious nature of sex offenses and their life-long impact on victims, it is a policy decision to be made by the legislature about whether

even a low reoffending rate is too high.

Data demonstrating that most sexual assaults against children are perpetrated by persons known to them does not warrant a conclusion that SARA cannot meet the rational connection test. The logical corollary embedded within that conclusion is that some sexual assaults against children are perpetrated by strangers. A legislature is not precluded from addressing one aspect of a problem and leaving other parts for another day. While residential and travel restrictions cannot eliminate all contacts between potential recidivists and the potential child victims, particularly where the perpetrator and victim are related, the residency restrictions are still a rational means of decreasing those contacts (*see Commonwealth v Baker*, 295 SW3d at 451 [Abramson, J., dissenting]).

For similar reasons, we also disagree with the dissent's conclusion that because SARA only applies to certain paroled sex offenders, without any analysis of the relative recidivism rates between them and those "released without parole," it lacks a rational relationship to its intended purpose. Even if the recidivism rate were the same between the two groups, partially addressing a problem does not negate a rational relationship. Moreover, persons released without parole are those who have fully served their sentences and are no longer under the

supervision of DOCCS; thus, the liberty considerations are not the same.[11]

Petitioner points to research concluding that statutes like SARA have a destabilizing effect on housing for convicted sex offenders, impede treatment, and interfere with law enforcement efforts to supervise sex offenders (*see e.g.* Colorado Sex Offender Management Board, White Paper on the Use of Residence Restrictions as a Sex Offender Management Strategy [June 2009]; Levinson & Horn, Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry, 9 Just Res & Pol'y 59 [2007]). While these studies are compelling, they are not legally dispositive. The Court of Appeals has recently recognized that the management of sex offenders is an issue that has been comprehensively addressed by the State (*People v Diack*, 24 NY3d at 684). Decisions and evaluations about whether statutes are effective and whether there are better ways to protect the public from recidivism by sex offenders fall within the policy-making purview of the legislature (*People v Parilla*, 109 AD3d at 29).

---

[11] While in this decision we have broadly referred to SARA as applying to parolees, the express language of the statute also includes persons on postrelease supervision and those conditionally released. Consequently, the only group of people not subject to SARA who have been released without parole are those persons who have fully served their sentences.

Petitioner argues that the lack of individualized assessment of risk relative to the restrictions, renders the statute punitive. He claims that because the restrictions are mandatory, they can apply to parolees who present no risk of reoffending against children. This argument is best addressed in considering whether the effect of SARA is excessive. While an individualized assessment might conceivably result in a more nearly perfect fit consonant with the objectives of the statute, the categories of parolees to whom SARA applies is sufficiently narrowly drawn and reasonably related to an assessment of recidivism so as to pass constitutional muster. The Constitution "does not preclude a State from making reasonable categorical judgments that convictions of specified crimes should entail particular regulatory consequences" (*Smith v Doe* at 103; *see also People v Knox*, 12 NY3d 60 [upholding constitutionality of SORA requirement that all persons convicted of committing or attempting to commit kidnapping or unlawful imprisonment of children not their own register as sexual offenders despite lack of sexual act or motivation]). The determination of whether an individualized assessment is constitutionally required turns on the magnitude of the restraint imposed (*Smith v Doe* at 104). In *Smith v Doe* (538 US 84), the United States Supreme Court determined that the use of categories of convicted felons subject to Alaska's

registration requirements, without the need for individualized assessment, was constitutional (*id.* at 104). In *Kansas v Hendricks* (521 US 346), although the Supreme Court upheld a state statute providing for the civil commitment of dangerous sex offenders after their release from prison, it did so in part because there was an individualized assessment of the offender. In distinguishing its seemingly inconsistent treatment of the two regulatory schemes, the court in *Smith v Doe* relied on the magnitude of the restraint, finding that the involuntary and potentially indefinite confinement considered in *Hendricks* made individual assessment appropriate (*Smith v Doe* at 104). The restraints imposed by SARA are somewhere in between sex offender registration (considered in *Smith v Doe*) and civil commitment (considered in *Kansas v Hendricks*) in terms of their magnitude. We find for constitutional purposes that SARA's restraints are not of a sufficient magnitude to require individualized assessments. This is because SARA only applies to parolees, who have only limited liberty. It lapses once the period of parole terminates. The categories are otherwise sufficiently limited to people, who in the legislature's evaluation, have an unacceptable risk of recidivism against children. Thus, SARA does not apply to all sex offenders on parole, but only those who have previously victimized minors or are level 3 sex offenders under

SORA, which is the category most likely to reoffend among all sex offenders.

Right to Intrastate Travel/Substantive Due Process

Petitioner claims that SARA deprives him of his right to intrastate travel and otherwise deprives him of his liberty, in violation of the Due Process Clause of both the United States and New York Constitutions (US Const Amend V, XIV; NY Const, art § 6).

Even assuming there is a fundamental right to intrastate travel (*see Memorial Hospital v Maricopa County*, 415 US 250, 255-256 [1974] [reserving the question of whether there is a constitutionally protected right to intrastate travel]), SARA does not violate any such right. Parolees subject to SARA have only conditional liberty (*Morrissey*, 408 US at 480). They have no liberty interest, let alone a fundamental right, to be free from special conditions of parole (*see Robles v Williams*, 2007 WL 2403154, *4, 2007 US Dist LEXIS 62052, *10 [SD NY Aug. 23, 2007], No. 02 Civ. 6102(PAC)(DCF)]). Quite the opposite, they have no constitutional right to be granted parole (*Matter of Williams*, 71 AD3d at 525). Even if SARA were to implicate a deprivation of petitioner's liberty right, that right would not be a fundamental one. Therefore, the standard of review under both the Federal and State Constitutions is a lenient one and the burden of proof

is on the party attacking the legislative enactment (*Affronti v Crosson*, 95 NY2d 713, 719 [2001], *cert denied* 534 US 826 [2001]). The inquiry is only whether SARA bears a rational relationship to the legitimate government interest it seeks to advance (*People v Knox*, 12 NY3d at 67). This analysis, like the rational relationship analysis for the Ex Post Facto Clause, affords a legislative enactment a strong presumption of constitutionality (*Heller v Doe* at 319; *People v Knox* at 69). As the Court of Appeals stated in *Affronti v Crosson*:

> "[t]he rational basis standard of review is a paradigm of judicial restraint. On a rational basis review, a statute will be upheld unless the disparate treatment is so unrelated to the achievement of any combination of legitimate purposes that . . . [it is] irrational. Since the challenged statute is presumed to be valid, [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . *whether or not the basis has a foundation in the record*. Thus, those challenging the legislative judgment must convince the court that the legislative facts on which the [statute] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker (95 NY2d at 719)(internal quotation marks and citations omitted) (first second and fifth alterations, and first ellipsis, added).

We find that under this highly deferential standard, SARA does not violate any of petitioner's substantive due process rights.

Accordingly, the judgment of Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2014, denying the petition, dismissing the proceeding, and declaring that Executive Law § 259-c[14], as amended by Laws of 2005 (ch 544, §2), is not unconstitutional on its face or as applied to petitioner, should be affirmed, without costs.

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

KAPNICK, J. (dissenting in part)

I agree with the majority's holding that "both SARA, as originally enacted, and the 2005 amendments, were intended to be civil measures designed to protect the public." However, I depart from the majority's holding insofar as it concludes that the statute is not punitive in its effect and does not violate petitioner's substantive due process rights. In my view, the 1,000-foot buffer zone constitutes a retroactive punishment imposed on petitioner and other sex offenders who committed their crimes before the amendment of Executive Law § 259-c(14), in violation of the Ex Post Facto Clause of the United States Constitution, because the civil intent of SARA is negated by the statute's punitive effect (*see Smith v Doe*, 538 US 84, 92, 97 [2003]). I reach this conclusion after considering the relevant factors referred to in *Smith* (538 US at 97, citing *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 [1963]) and employed by the majority's analysis. These factors look to "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose" (*Smith*, 538 US at 97).

Petitioner's unrebutted evidence establishes that he is barred from living in or traveling to virtually all parts of Manhattan, where he allegedly lived for more than 20 years before his incarceration, and large areas of the other boroughs of New York City.[1] His parole officer's office is located in a dense area of central Manhattan, as are substance abuse and sex offender treatment programs that he is required to attend and the offices of his attorney and social worker. Those locations all appear to be in no-go zones, according to the map petitioner submitted, and apparently petitioner would be required to enter no-go zones to reach them regardless of where he resided in New York City.[2]

Even the majority concedes that "[t]here is no question that SARA on its face imposes affirmative restraints on petitioner, as well as anyone else to which it applies." These affirmative restraints are "not [merely] residency restriction[s], but [constitute] a comprehensive movement restriction" (*Devine v*

---

[1] Indeed, a discretionary condition of petitioner's parole prevents him from leaving the City of New York without receiving prior permission from his parole officer.

[2] As noted by the majority, even the Bellevue shelter where parolees subject to SARA were formerly placed by respondent the Department of Corrections and Community Supervision, has been determined to be within a prohibited buffer zone and can no longer serve as SARA-compliant housing.

Annucci, 45 Misc 3d 1001, 1007 [Sup Ct, Kings County 2014] [analyzing the punitive effect of Executive Law § 259(c)(14)]). Further, the majority agrees that this restriction amounts to "banishment," which is defined as "compelling [an individual] to quit a city, place, or country, for a specific period of time" (*United States v Ju Toy*, 198 US 253, 269 [1905, Brewer, J., dissenting]) and has historically been regarded as a form of punishment (*see Stogner v California*, 539 US 607, 614 [2003], citing *Calder v Bull*, 3 US 386 [1798]; *see also Ju Toy*, 198 US at 269 ["The forcible removal of a citizen from his country . . . by whatever name called . . . is always considered a punishment"]). Moreover, the majority does not disagree that the operation of the statute "serve[s] the goal of deterrence[,]" which is a traditional aim of punishment (*Mendoza-Martinez*, 372 US at 168).

It would appear, even in the majority's view, that these factors weigh in petitioner's favor. Nevertheless, the majority holds that "[b]ecause . . . SARA only applies to parolees, who otherwise have restricted liberty, these factors do not strongly support a conclusion that SARA is punitive in effect." To support this assertion, the majority cites *Morrissey v Brewer* (408 US 471, 482 [1972]) and *Matter of Williams v New York State Div. of Parole* (71 AD3d 524 [1st Dept 2010], *appeal dismissed* 15 NY3d 770 [2010], *lv denied* 15 NY3d 710 [2010]), neither of which

address alleged violations of the Ex Post Facto Clause or consider the *Smith* factors. Indeed, *Morrissey* only concerned the narrow question of whether the Due Process Clause of the Fourteenth Amendment generally applies to parole revocations (408 US at 472), and *Williams* examined an article 78 petition, in which a parolee challenged a specific special condition of his parole, which limited the contact he was allowed to have with his wife (71 AD3d at 524). These cases certainly make clear that parolees are uniquely situated, as they are properly subject to many restrictions not applicable to other citizens, but also enjoy more liberty than those who are incarcerated (*Morrissey*, 408 US at 482). However, the majority does not cite any cases to support the notion that these *Smith* factors, which tend to show the punitive effect of the subject law, may be discounted or disregarded simply because parolees hold a restricted liberty interest. In my view, these *Smith* factors clearly support a finding that the 2005 amendment is punitive in its effect and therefore violates the Ex Post Facto Clause.

As the majority points out, the next factors are the most important considerations in this analysis (*Smith*, 538 US at 102). It is instructive to note that petitioner does not challenge the part of the law barring him from entering the real property boundaries of schools; rather, he challenges the amendment adding

an additional buffer of 1,000 feet around schools, which seems to be equivalent to about four short blocks in Manhattan.[3] Contrary to the majority's holding, nothing in the record, in the legislative findings, or in common knowledge leads to the conclusion that a buffer zone as large as 1,000 feet has a rational connection to the legitimate state interest of protecting children from being victimized by sex offenders. Indeed, petitioner points to data that supports the notion that sex crimes are generally committed by someone known to the victim, especially when it comes to child victims.

Additionally, the majority's statement that petitioner must meet the burden of showing that the amendment "serves no legitimate governmental purpose" (citing *Ciafone v Kenyatta*, 27 AD3d 143, 151-152 [2d Dept 2005]) is somewhat misleading. Rather, "a law need have only a rational relationship to a

---

[3] 1,000 feet is about 0.19 miles. One mile down a north-south avenue in Manhattan is about 20 blocks (*see* Michael Pollak, *Knowing the Distance*, NY Times, Sep. 17, 2006, available at http://www.nytimes.com/2006/09/17/nyregion/thecity/17fyi.html [accessed Dec. 16, 2015]). Thus, 1,000 feet equals about four blocks down a north-south avenue on the Manhattan grid, although there is some slight variation. (20 * 0.19 = 3.8.) The distance between north-south avenues is a less useful benchmark because that distance varies more widely (*see id.*). Insofar as those facts are not in the record, this Court may take judicial notice of such "facts of common and general knowledge" that have been "authoritatively settled" (*Walker v City of New York*, 46 AD3d 278, 282 [1st Dept 2007]).

legitimate state interest; . . . even if the law appears unwise or works to the detriment of one group or the other" (*Ciafone*, 27 AD3d at 152 [holding that a law that provided victims of crime a civil mechanism to seek financial redress against their assailants is rationally related to the State's interest in ensuring that victims are compensated by those that harm them]). Here, I do not dispute that the State has a legitimate governmental interest in protecting children from convicted sex offenders. In my view, however, there is an insufficient factual context to support a rational connection between the 1,000-foot movement and residency restriction and its stated legitimate purpose of protecting children from sex offenders (*see Romer v Evans*, 517 US 620, 632-633 [1996]).

A lack of a rational relationship between the amendment and its stated purpose is also apparent from the fact that it only applies to paroled sex offenders, without any reference to statistics or data supporting the notion that recidivism rates among paroled sex offenders is any higher than those who are released without parole. Additionally, I point out that the alleged rational relationship here between the amendment and its intended purposes is very different from the situations cited by the majority where various types of criminal offenders are barred from contact with their *actual, not potential,* victims or where

orders of protection are issued.

As to the final factor, the petitioner points to two ways in which the amendment is excessive in relation to its purpose. First, it applies to certain sex offenders (those designated a level three sex offender under SORA), regardless of the age of their victim. The amendment is also excessive in making the ban effective 24 hours a day, 365 days a year, which includes times when schools predictably will be closed.

Based on the foregoing, I would find that petitioner has met his burden to rebut the presumption of constitutionality of the amendment (*see LaValle v Hayden*, 98 NY2d 155, 161 [2002]) and would find that it is punitive in its effect and therefore violates the Ex Post Facto Clause.

As to petitioner's argument that he was deprived of a fundamental constitutional right to travel, I agree with the majority that even assuming that a constitutional right to intrastate travel exists (*see King v New Rochelle Mun. Hous. Auth.*, 442 F2d 646, 648 [2d Cir 1971], *cert denied* 404 US 863 [1971]), "an individual's constitutional right to travel . . . [is] legally extinguished by a valid conviction followed by imprisonment, [and] is not revived by the change in status from prisoner to parolee" (*Bagley v Harvey*, 718 F2d 921, 924 [9th Cir 1983]).

In the absence of a fundamental constitutional right, petitioner's substantive due process claim under the United States Constitution depends upon whether the SARA amendment's deprivation of his liberty meets "the (unexacting) standard of rationally advancing some legitimate governmental purpose" (*Reno v Flores*, 507 US 292, 306 [1993]). Under the more protective Due Process Clause of the New York State Constitution (*see People v LaValle*, 3 NY3d 88, 127 [2004]), petitioner's due process claim "requires a balancing of the competing interests at stake: the importance of the right asserted and the extent of the infringement are weighed against the institutional needs and objectives being promoted" (*Matter of Lucas v Scully*, 71 NY2d 399, 406 [1988]). For the reasons discussed above as to the lack of a rational connection between the restriction and its stated goal and the excessiveness of the restriction in relation to the goal, I would find that the 2005 SARA amendment violates

petitioner's right to substantive due process under both the Federal and State constitutions.

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

ENTERED: JANUARY 12, 2016

CLERK