SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 26, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14228 Joseph A. Tuana & Associates, Inc., Index 652438/13
Plaintiff-Appellant,

-against-

Robert Burns,
Defendant-Respondent.

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Wasserman Grubin & Rogers, LLP, New York (Richard Wasserman of counsel), for appellant.

Withers Bergman LLP, New York (Chaya F. Weinberg-Brodt of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 5, 2014, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court correctly determined that plaintiff was an unlicensed home improvement contractor and therefore precluded, pursuant to Administrative Code of City of NY § 20-387 (a), from either enforcing the terms of its home improvement contract or seeking recovery under equitable principles, such as quantum

meruit or an account stated (*JRF Bros. Realty, LLC v First Realty Bldrs., Inc.*, 51 AD3d 453, 454 [1st Dept 2008]; *O'Mara Org. v Plehn*, 179 AD2d 548 [1st Dept 1992]).

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: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14338 The People of the State of New York, Ind. 953/10
Respondent,

-against-

Kirk Miller,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered September 2, 2010, convicting defendant, upon his plea of guilty, of aggravated criminal contempt, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The plea was knowingly, intelligently and voluntarily made, and defendant's factual

allocution did not cast any significant doubt on his guilt. At sentencing, defendant was permitted to explain why he wanted to withdraw his plea, and the court properly rejected his claim of innocence.

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14339- Index 111065/08
14340-
14341 David Pullman,
Plaintiff-Appellant,

-against-

David A. Silverman, MD, et al.,
Defendants-Respondents.

_____

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

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered September 24, 2012, dismissing the complaint, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered August 28, 2012 and April 10, 2013, which, respectively, granted defendant's motion for summary judgment dismissing the complaint and, to the extent appealable, denied plaintiff's motion to renew the August 28, 2012 determination, unanimously dismissed, without costs, as subsumed in the appeal from the judgment, and as academic, respectively.

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment when he establishes that in treating plaintiff he did not depart from good and accepted medical practice or that such departure did not

proximately cause plaintiff's injuries. Once a defendant doctor meets that burden, plaintiff must rebut by showing with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]).

Ordinarily, the opinion of a qualified expert that plaintiff's injuries were caused by a deviation from relevant standards would preclude a grant of summary judgment. However, "where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, [] the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

Applying the test in *Frye v United States* (293 F 1013 [DC Cir 1923]), New York courts permit expert testimony based on scientific principles, procedures or theories only after they have gained general acceptance in the relevant scientific field (*see People v Wesley*, 83 NY2d 417, 422 [1994]). Under the *Frye* test, the burden of proving general acceptance rests upon the party offering the disputed expert testimony (*see Lara v New York City Health & Hosps. Corp.*, 305 AD2d 106 [1st Dept 2003]).

The court properly found that plaintiff failed to submit

evidence sufficient to raise a triable issue of fact that his experts' opinions were generally accepted in the medical community. Although plaintiff submitted numerous articles in medical literature concerning adverse reactions to Lipitor and Azithromycin, none of the articles linked atrioventricular (AV) heart block to the drugs prescribed by defendant. Biological plausibility and convergence in time between the administration of the drugs and the AV heart block diagnosis are insufficient, where no scientific evidence of causation was provided. "[O]bservational studies or case reports are not generally accepted in the scientific community on questions of causation" (*Heckstall v Pincus,* 19 AD3d 203, 205 [1st Dept 2005]; *Pauling v Orentreich Med. Group,* 14 AD3d 357, 358 [1st Dept 2005], *lv denied* 4 NY3d 710 [2005]).

The motion to renew was properly denied because plaintiff failed to submit "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e][2]; *American Audio Serv. Bur. Inc. v AT & T Corp.,* 33 AD3d 473, 476 [1st Dept 2006]). The additional case reports did not raise an issue

concerning the general acceptance of plaintiff's experts' causation theory in the medical community. Denial of the motion to reargue is not appealable (*see Lopez v Post Mgt. LLC*, 68 AD3d 671 [1st Dept 2009]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14342 David Asmar, Index 157228/13
Plaintiff,

-against-

20th and Seventh Associates, LLC, et al.,
Defendants.

- - - - -

20th and Seventh Associates, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

G.A.L. Manufacturing Corporation,
Third-Party Defendant-Appellant,

Hollister-Whitney Elevator Corp.,
Third-Party Defendant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Mark J. Volpi of counsel), for appellant.

Geringer & Dolan LLP, New York (Pauline A. Mason of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 30, 2014, which denied third-party defendant G.A.L. Manufacturing Corporation's (GAL) pre-answer motion to dismiss the amended third-party complaint and all cross claims against it, and for summary judgment, unanimously affirmed, without costs.

The motion court properly denied third-party defendant GAL's

motion to dismiss the complaint, made pursuant to CPLR 3211(a)(1) and (a)(7). The amended third-party complaint properly alleges causes of action for both contribution and indemnification and GAL'S only submission in support of its motion, an affidavit from its vice president, does not constitute "documentary evidence" within the meaning of the statute (*see Flowers v 73rd Townhouse LLC*, 99 AD3d 431 [1st Dept 2012]). Moreover, the affidavit should not be considered for the purpose of determining whether there is evidentiary support for the complaint since it does nothing more than assert the inaccuracy of the allegations in the amended third-party complaint and does not conclusively establish a defense to the asserted claims as a matter of law (*see Art And Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]).

GAL's affidavit was also insufficient to warrant dismissal of the third-party complaint pursuant to CPLR 3211(a)(7), since the facts therein do not demonstrate the absence of any significant dispute nor do they completely refute the allegations against GAL (*see Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]).

The motion court properly denied that portion of the motion seeking summary judgment pursuant to CPLR 3211(c) as premature since issue has not been joined in the third-party action, and no

discovery has been exchanged between defendants/third-party plaintiffs, GAL and Hollister, the co-third-party defendant (*see Republic Natl. Bank of N.Y. v Luis Winston, Inc.*, 107 AD2d 581, 582 [1st Dept 1985]).

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

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14343-
14344 Index 190187/10

Raymond Finerty, et al.,
Plaintiffs-Respondents,

-against-

Abex Corporation, formerly known
as American Brake Shoe Company, et al.,
Defendants,

Ford Motor Company, Ltd.,
Defendant-Appellant.

- - - - -

Raymond Finerty, et al.,
Plaintiffs-Respondents,

-against-

Abex Corporation, et al.,
Defendants,

Ford Motor Company,
Defendant-Appellant.

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Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for appellant.

Levy Konigsberg LLP, New York (Amber R. Long of counsel), for respondents.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered on or about October 27, 2014, which denied defendant Ford Motor Company's motion for summary judgment dismissing the complaint and to dismiss for failure to state a cause of action, unanimously affirmed, without costs. Order, same court, Justice, and entry date, which denied defendant Ford Motor Company Ltd.'s

motion to dismiss the complaint for lack of personal jurisdiction, unanimously reversed, on the facts, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Ford Motor Company Ltd.

Plaintiff Raymond Finerty suffers from peritoneal malignant mesothelioma, a disease whose primary cause is exposure to asbestos. He brought this action against, inter alia, the Ford Motor Company (Ford USA) and Ford Motor Company, Ltd. (Ford UK), alleging that he was exposed to asbestos while working as a mechanic in Ireland, replacing asbestos-containing brakes, clutches, and engine parts on Ford tractors, cars, and trucks.

Ford USA contends that it cannot be held liable for the asbestos-containing auto parts manufactured and distributed by Ford UK, its wholly owned subsidiary, and that there is no basis for piercing the corporate veil. We agree that there is no basis for piercing the corporate veil. However, the record demonstrates that Ford USA acted as the global guardian of the Ford brand, having a substantial role in the design, development, and use of the auto parts distributed by Ford UK, with the apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo. Thus, issues of fact exist whether Ford USA may be held directly liable as a result of its role in facilitating the distribution of the

asbestos-containing auto parts on the ground that it was "in the best position to exert pressure for the improved safety of products" or to warn the end users of these auto parts of the hazards they presented (*see e.g. Godoy v Abamaster of Miami*, 302 AD2d 57, 60-61 [2d Dept 2003] [internal quotation marks omitted], *lv dismissed* 100 NY2d 614 [2003]).

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

Ford UK moved to dismiss the complaint on the ground of lack of personal jurisdiction. We find that, while plaintiff's injury occurred in New York, where his mesothelioma manifested itself (CPLR 302[a][3]), plaintiff failed to establish that Ford UK expected or should reasonably have expected that his exposure to asbestos in Ireland would have consequences in New York (CPLR 302[a][3][ii]; *see e.g. Penny v United Fruit Co.*, 869 F Supp 122, 129 [ED NY 1994]; *Waggaman v Arauzo*, 117 AD3d 724 [2d Dept 2014], *lv denied* 24 NY3d 903 [2014]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14345 The People of the State of New York, Respondent, Ind. 4130/11

-against-

Paul Ramos, Defendant-Appellant.

_____

Lauriano Guzman, Jr., Bronx, for appellant.

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 18, 2013, as amended April 25, 2013, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 10 years, unanimously affirmed.

The court properly exercised its discretion (*see generally People v Foy*, 32 NY2d 473 [1973]) in denying defendant's request for additional midtrial delay of the trial in order to make further attempts to obtain the presence of a building superintendent who could have allegedly testified concerning police access to a surveillance videotape. Defendant failed to make the requisite showing of the likelihood of the witness's appearance. Furthermore, defendant's claim that the witness could have provided useful testimony rests on speculation. There

is no indication that the witness ever viewed the videotape, or reason to believe that it depicted anything relevant to the incident at issue. Defendant's argument that the court's ruling violated his constitutional right to present a defense is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record also fails to support defendant's contention that a police officer copied or physically acquired the tape, or that it was ever under the control of the prosecution. Accordingly, the court could not have compelled the prosecutor to produce a copy of the videotape, which the prosecutor and testifying officers stated did not exist.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record, such as counsel's strategic decisions (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]).

Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *Strickland v*

Washington, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

Defendant's remaining claims, including those relating to prosecutorial misconduct, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14346-
14346A-
14347 In re Ninoshka M., and Others,

Children Under the Age of
Eighteen Years, etc.,

Liz R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Bronx Defenders, New York (Lauren Teichner of counsel), and Boris Bershteyn, New York, for appellant.

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

Neal D. Futerfas, White Plains, attorney for the children Ninoshka M., Jose R., and Gloria R.

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Orders of disposition, Family Court, Bronx County (Linda B. Tally, J.), entered on or about August 19, 2013, to the extent they bring up for review a fact-finding order, same court (Gayle P. Roberts, J.), which, after a hearing, determined that respondent mother neglected her four children, unanimously modified, on the law, to vacate the neglect finding as to Moises M., and otherwise affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeals from the order of disposition.

Although the evidence does not support a finding that

respondent mother was engaged in illicit gun trading, the Family Court's finding of neglect is supported by a preponderance of the evidence, which established that respondent was storing illegal guns in the home where the children, including two teenagers, had access to them, thus showing impaired parental judgment (*see Matter of Kevin N. [Richard D.]*, 113 AD3d 524, 524 [1st Dept 2014]; *Matter of Fernando S.*, 63 AD3d 610 [1st Dept 2009]). This determination is supported by respondent's admission that she kept guns in the home, her brother's testimony that he saw her taking a gun he believed was loaded from four men to store in the home while three of the children were present, and by the teenage daughter's out-of-court statements that her mother stored guns in the home, making her feel unsafe, and that her mother did not object when she held one of the guns.

Contrary to respondent's contentions, the Family Court properly found respondent's daughter's out-of-court statements to be sufficiently corroborated by respondent's own admission as well as respondent's brother's testimony concerning his personal observations (*see Matter of Nicole V.*, 71 NY2d 112, 119 [1987]; *Matter of Peter G.*, 6 AD3d 201, 203 [1st Dept 2004], *appeal dismissed* 3 NY3d 655 [2004]; Family Court Act § 1046[a][vi]). While the mere repetition by the daughter of the same statement to her uncle and the ACS caseworker is not in itself

corroboration, the Family Court was entitled to rely on the consistency of her statements in deeming them credible (*Matter of David R. [Carmen R.]*, 123 AD3d 483, 484 [1st Dept 2014]). The court properly drew the "strongest possible negative inference" from respondent's failure to testify or offer any evidence (*see e.g. Matter of Mia B. (Brandy R.)*, 100 AD3d 569, 569 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]).

Finally, since the neglect petition regarding Moises M. was dismissed on May 16, 2012, when he turned 18 years old, there was no basis for entering a finding of neglect as to him (*see* Family Court Act § 1012[f]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14348 In re Danta P.C.,
Petitioner-Respondent,

-against-

Tyrell C.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Jo Ann Douglas, New York, attorney for the child Terrell C.

Bruce A. Young, New York, attorney for the child Tahj C.

_____

Order of protection, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about August 23, 2013, against respondent, upon a fact-finding that he committed the family offense of harassment in the second degree, unanimously affirmed, without costs.

A preponderance of the credible hearing evidence supports the referee's finding that respondent committed acts that would constitute harassment in the second degree, warranting the issuance of a two-year order of protection against him (*see* Family Court Act §§ 832; 842; Penal Law § 240.26[1], [3]). Petitioner testified that in July and August of 2011 respondent was verbally abusive to her, among other things, threatening to kill her (*see Matter of Sarah W. v David W.*, 100 AD3d 463 [1st

Dept 2012]). She also testified that on one occasion, at the children's basketball game, he announced that he was carrying a gun and threatened to harm her, and then, after the game, in the presence of the children, he threatened to "smack" her and said that he could have someone follow and kill her (*see Matter of Janice M. v Terrance J.*, 96 AD3d 482 [1st Dept 2012]). We see no basis for disturbing the referee's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

The Referee properly issued the order of protection in favor the children as well as petitioner, because some of respondent's threatening statements to petitioner were made in the children's presence (*see Matter of Angela C. v Harris K.*, 102 AD3d 588, 590 [1st Dept 2013]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14350 The People of the State of New York, Ind. 3731/11
Respondent,

-against-

Nadine Leach,
Defendant-Appellant.

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Robert s. Dean, Center for Appellate Litigation, New York (Jody Ratner of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered March 30, 2012, as amended April 11, 2012, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree and unlawful possession of marijuana, and sentencing her, as a second felony offender, to a term of 10 years and a fine of $100, unanimously affirmed.

The court properly granted the People's reverse-*Batson* application (*see Batson v Kentucky*, 476 US 79 [1986]; *People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]). The record supports the court's finding that defense counsel's race-neutral explanation for exercising a peremptory challenge was pretextual. Contrary to defendant's present argument, the *Batson* issue turned on the demeanor of the panelist at issue, as well as

that of similarly situated panelists who were not challenged. The trial court was in the unique position to observe demeanor, and its determination is entitled to great deference (*see e.g. People v Martinez*, 284 AD2d 157 [1st Dept 2001]).

Evidence of defendant's gang membership was clearly admissible, given trial issues relating to the police investigation leading to defendant's arrest, and especially after defendant plainly opened the door to such evidence during cross-examination of a detective. Defendant did not preserve her claim that the prosecutor should have obtained an advance ruling (*see People v Ventimiglia*, 52 NY2d 350 [1981]) on the admissibility of this evidence, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The lack of a *Ventimiglia* hearing did not cause defendant any prejudice (*see People v McLeod*, 279 AD2d 372 [1st Dept 2001], *lv denied* 96 NY2d 921 [2001]).

The prosecutor properly questioned defendant about her prior weapon possession conviction, notwithstanding the court's *Sandoval* ruling. On direct examination, defendant went beyond her attorney's question and twice volunteered that she "never had a gun." She then repeated that assertion when the prosecutor asked her a clarifying question on cross-examination (*see People v Fardan*, 82 NY2d 638, 646 [1993]). Even before any questions by

the prosecutor, defendant gave a misleading impression that she had never possessed a firearm in her entire life, and not just on the day of her arrest in this case (*see People v Dunkley*, 61 AD3d 428 [1st Dept 2009], *lv denied* 12 NY3d 914 [2009]). In any event, any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The evidence against defendant was overwhelming, and it was not undermined by the defense case.

Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that although some of the challenged remarks were inappropriate, they were not so egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). In any event, we likewise find that any error was harmless.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14351 African Sarac-Marshall, Index 302826/12
Plaintiff-Respondent,

-against-

John B. Mikalopas, et al.,
Defendants-Appellants.

_____

Montfort, Healy, McGuire & Salley, Garden City (Michael A. Baranowicz of counsel), for appellants.

Leav & Steinberg, LLP, New York (Kathleen E. Beatty of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 16, 2013, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff was riding a bicycle southbound on Ralph Avenue when the vehicle driven by defendant John Mikalopas made a left-hand turn from the northbound lane, over the double yellow line, to enter into a parking lot, causing a collision between the vehicle and plaintiff's bicycle. Plaintiff demonstrated that defendant was negligent by submitting defendant's testimony that he made a left-hand turn without ensuring that it was safe to do so (*see* Vehicle and Traffic Law § 1141; *see also Foreman v Skeif*, 115 AD3d 568, 569 [1st Dept 2014]). Defendant admitted that his view was not blocked, that he did not look for bicyclists, and

that he did not see plaintiff. Accordingly, plaintiff showed that defendant failed "to see that which, through the proper use of senses, should have been seen" (*Griffin v Pennoyer*, 49 AD3d 341, 342 [1st Dept 2008]). Plaintiff also demonstrated his freedom from comparative negligence by submitting evidence that, among other things, he was traveling below the speed limit in his lane of travel at the time of the accident, and that he saw the vehicle driven by defendant to his left for a "brief second or two" before the collision, giving him no time to react (*see Foreman*, 115 AD3d at 569; *Espinoza v Loor*, 299 AD2d 167, 168 [1st Dept 2002]).

In opposition, defendants failed to raise a triable issue of fact as to plaintiff's alleged negligence. Defendants failed to offer admissible evidence to support their contention that plaintiff could have avoided the collision (*see Yelder v Walters*, 64 AD3d 762, 765 [2d Dept 2009]; *Gajjar v Shah*, 31 AD3d 377, 378 [2d Dept 2006]).

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: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14352 The People of the State of New York, Ind. 531/13
Respondent,

-against-

Rodney Brown,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Denise Fabiano 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 (Maxwell Wiley, J.), rendered on or about August 1, 2013,

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

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

ENTERED: FEBRUARY 26, 2015

CLERK

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

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14353 Andy Nguyen, etc., Index 309108/08
Plaintiff-Appellant,

-against-

Jean Dorce, D.O.,
Defendant-Respondent,

St. Barnabas Hospital, et al.,
Defendants.

_____

Andrew Rosner & Associates, Garden City (Andrew Rosner of counsel), for appellant.

Callan, Koster, Brady & Brennan, LLP, New York (Stuart Bernstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered July 17, 2013, which, to the extent appealed from as limited by the briefs, granted defendant Jean Dorce, D.O.'s motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Plaintiff contends that defendant Dorce, an emergency room (ER) attending physician, failed to properly treat and diagnose the decedent during a June 19, 2007 visit to the ER at defendant St. Barnabas Hospital that ended in her death. The decedent, who had undergone gastric bypass surgery approximately five months earlier, presented to the ER with sudden onset abdominal pain, and was ultimately diagnosed with a perforated viscus after a

finding was made of "free air" in the peritoneum.

Dorce established prima facie that he did not depart from accepted medical practice (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Dorce's expert opined that Dorce appropriately treated the decedent conservatively, ordered laboratory and diagnostic tests, relied upon the radiologist's initial reading of a CT scan, and requested and obtained a surgical consultation, and that any delay alleged to be attributable to Dorce did not, in any event, proximately cause the decedent's injuries or death. Significantly, the radiologist who read the CT scan first admitted that his initial interpretation did not include a finding of "free air," and there is no evidence that Dorce learned of the presence of free air before the second radiological review of the films was conducted, hours later, when the surgeon consulted.

In opposition, plaintiff failed to raise an issue of fact by submitting a non-conclusory opinion by a qualified expert (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]). Plaintiff's expert, a pathologist, failed to profess personal knowledge of the standard of care in the field of emergency medicine, whether acquired through his practice or studies or in some other way (see *Romano v Stanley*, 90 NY2d 444, 452 [1997]). As plaintiff points out, a physician may qualify as an expert by study of the

subject alone (*Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398 [1941]). However, the nature of that study must be identified (*see id.* at 397-398).

In any event, plaintiff's expert's opinion was insufficient to raise an issue of fact because it was conclusory, relied on assumptions based upon hindsight, and failed to address the presence of factors not common to a perforated viscus. The expert also failed to causally connect the alleged delay in diagnosing and treating the decedent's condition, which had a high mortality rate, to her death (*see Mortensen v Memorial Hosp.*, 105 AD2d 151 [1st Dept 1984]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14354-
14355 Index 102154/11

American International Specialty Lines Insurance Company,
Plaintiff-Respondent,

-against-

Kagor Realty Co. LLC, et al.,
Defendants,

Star Insurance Corporation,
Defendant-Appellant,

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Dawn M. Warren of counsel), for appellant.

Saiber, LLC, New York (Lisa C. Wood of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered January 3, 2013, which granted the motion of plaintiff American International Speciality Lines (AISLIC) for summary judgment declaring that AISLIC had no duty to defend or indemnify in the underlying personal action, and denied the cross motion of defendant Star Insurance Company (Star) for summary judgment, unanimously affirmed, without costs. Order, same court and Justice, entered November 13, 2013, which, inter alia, denied Star's motion to renew, unanimously affirmed, without costs.

The purpose of the subject policy's "retroactive date" was to provide coverage to claims made during the policy period that were based on events that took place after a particular date.

Thus, the insured in this case was required to prove that a pollution incident commenced after the retroactive date (*see Pritchard v Federated Mut. Ins. Co.*, 1995 WL 854775, at *7, *10 [WD Tenn 1995]). Here, the record amply demonstrates that the lead paint pollution conditions that were alleged to have caused the infant plaintiff's bodily injuries commenced prior to the June 9, 1996 retroactive date. Moreover, because there is no coverage under the policy for such a claim, as opposed to an operative exclusionary clause, the motion court correctly found that AISLIC was not estopped pursuant to Insurance Law § 3420(d) from enforcing the retroactive date (*see Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 563-564 [2008]).

Although Star maintains that there is an ambiguity because the original AISLIC policy's declarations omitted reference to the coverage parts that were subject to the retroactive date, "[c]ourts are obliged to interpret a contract so as to give meaning to all of its terms" (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 87 AD3d 65, 70 [1st Dept 2011] [internal quotation marks omitted]). As the motion court determined, the only reasonable interpretation is that the retroactive date applies to third-party claims insured under Coverage C and Coverage F, such as here.

Star's motion to renew was properly denied, as the "new"

evidence submitted by Star did not warrant a different finding than that previously reached by the motion court (*see e.g. Matter of Weinberg*, 132 AD2d 190, 209-211 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]; CPLR 2221[e][2]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14356 Milagro Torres, et al., Index 21807/12
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant-Appellant,

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

_____

Morris Duffy Alonso & Faley, New York (Arjay G. Yao and Andrea Alonso of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danzinger, J.), entered on or about June 19, 2014, which, inter alia, denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The notice of claim at issue specified that plaintiff was injured when she tripped and fell "on the median" at the southwest corner of Lincoln Avenue and East 138th Street, due to a defect, hole, crack, or breaks "in the street." At her General Municipal Law § 50-h hearing, plaintiff testified that she tripped at the place where the sidewalk meets the street, and when shown photographs of the street corner, circled the intersection of the sidewalk curb and the roadway as the place

where she fell. The location description in the notice of claim, when considered in conjunction with plaintiff's 50-h testimony, was sufficient to enable defendant to conduct a prompt investigation, and assess the merits of plaintiff's claim. Defendant failed to exclude the possibility that any notice defects, if they exist, "were remedied at the General Municipal Law § 50-h hearing" (*Cruz v New York City Hous. Auth.*, 269 AD2d 108, 109 [1st Dept 2000]), as plaintiff's hearing testimony enabled defendant "to identify precisely the site of the accident" (*Ortiz v New York City Hous. Auth.*, 214 AD2d 491, 492 [1st Dept 1995]).

Defendant also failed to show any prejudice resulting from the notice of claim's description, inasmuch as it made no effort to investigate the circumstances of plaintiff's accident (see *Miles v City of New York*, 173 AD2d 298, 299-300 [1st Dept 1991]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14357 The People of the State of New York, Ind. 725/12
Respondent,

-against-

Jennifer Detres,
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 (Thomas A. Farber, J.), rendered on or about December 4, 2012, unanimously affirmed.

Application by appellant'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 appellant'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: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14360 Ronny Becker, et al., Index 651575/13
Plaintiffs-Appellants,

-against-

Daniel Perla, et al.,
Defendants-Respondents.

_____

Alexander J. Wulwick, New York, for appellants.

Cooperman Lester Miller Caros LLP, Manhasset (Eric H. Gruber of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 12, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to disqualify plaintiffs' counsel and sua sponte ordered that plaintiff Ronny Becker could not be represented by the same counsel as the other plaintiffs, unanimously reversed, on the law, without costs, the motion to disqualify denied, and the sua sponte order vacated.

Although plaintiffs concede that their lawyer represented some of the defendants in a prior matter, and that the parties' interests are now directly adverse, disqualification is not required. The present and prior matters are not substantially related, and plaintiff's attorney did not obtain confidential information from the defendants during the prior matter (*see*

Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 131 [1996]). In order to show that the matters are "substantially related," defendants must show that the issues in the matters are identical or essentially the same (*Lightning Park v Wise Lerman & Katz*, 197 AD2d 52, 55 [1st Dept 1994]). Defendants failed to make that showing. The prior matter involved the enforcement of a loan against a third party, and the present matter involves defendants' alleged diversion of monies intended for and earned by a project in the Dominican Republic. Further, the financial information involving plaintiff Becker shared by some of the defendants with the attorney during the prior matter was not confidential, since it was disclosed to Becker or otherwise known to him.

The court erred in sua sponte directing that Becker must have separate counsel from the other plaintiffs, as defendants never requested such relief and the relief is not supported by

the parties' motion papers (*see Carter v Johnson*, 84 AD3d 1141, 1142 [2d Dept 2011]). The court may, however, allow the parties to submit papers on the issue.

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14361 In re Elite Demolition Contracting Corporation, et al., Petitioners-Appellants, Index 154789/13

-against-

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

_____

Sullivan P.C., New York (Peter R. Sullivan of counsel), for appellants.

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

_____

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered December 16, 2013, inter alia, denying the petition to annul the determination of respondent City of New York Business Integrity Commission (BIC), dated May 13, 2013, which denied the application of petitioner Elite Demolition Contracting Corp. (Elite) for an exemption from licensing to operate a construction and demolition debris removal business, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioners' constitutional challenge to the statutory definition of a principal of a corporation (*see* Administrative Code of City of NY § 16-501[d][1][iii]) is academic, since that provision was not a basis of BIC's determination.

BIC's finding that Elite failed to demonstrate its eligibility for an exemption from licensing had a rational basis, on the grounds that Elite undisputedly owed significant debt to the Internal Revenue Service and had failed to pay an administrative fine to the New York City Environmental Control Board (*see* Administrative Code § 16-509[a][x]). BIC also reasonably found that petitioner Fabio Bordone's father, Vincenzo Bordone, was an undisclosed principal of Elite, based on admissions by Vincenzo and an Elite truck driver to a BIC investigator. This finding warranted the denial of the application since BIC had previously denied exemption applications by Vincenzo on the ground that he lacked good character (*see* Administrative Code § 16-509[c]; *Matter of DeCostole Carting v Business Integrity Commn. of City of N.Y.*, 2 AD3d 225 [1s Dept 2003], *appeal dismissed* 2 NY3d 759 [2004], *lv denied* 3 NY3d 605 [2004]). BIC also properly relied on abundant evidence that Elite was an alter ego or successor of four other companies whose exemption applications had previously been denied (*see* Administrative Code §§ 16-501[a], 16-509[a][vii]). Furthermore, BIC's finding that Elite had provided false, misleading, and conflicting information in its BIC filings and testimony provided an independent rational basis to deny the

application (*see* Administrative Code § 16-509[a][I], [b]; *Matter of Breeze Carting Corp. v City of New York*, 52 AD3d 424 [1st Dept 2008]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14362 The People of the State of New York, Respondent, Ind. 3480/09

-against-

Charles McDowell, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered March 12, 2012, convicting defendant, after a jury trial, of murder in the second degree and robbery in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 40 years to life, unanimously affirmed.

The court properly exercised its discretion in permitting the prosecutor to elicit limited, innocuous background information about the murder victim. This evidence was not unduly prejudicial, and any error in this regard was harmless (*see People v Stevens*, 76 NY2d 833, 835-836 [1990]). There was overwhelming evidence of defendant's guilt of both felony murder and a separate, subsequent robbery.

Defendant did not preserve his claim that the prosecutor exceeded the scope of the court's ruling on background evidence,

his arguments on other evidentiary issues, or his challenges to the prosecutor's opening statement and summation (*see People v Romero*, 7 NY3d 911 [2006]), and he expressly waived any objection to the court's supplemental jury instructions. We decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Any error was harmless in light of the overwhelming evidence (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including matters of strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged

deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14363N Carmen Tejeda, Index 25459/02
Plaintiff-Respondent,

-against-

Cherise M. Dyal, MD, et al.,
Defendants-Appellants.

_____

Kaufman Borgeest & Ryan, LLP, Valhalla (Adonaid C. Medina of counsel), for appellants.

H. Fitzmore Harris, P.C., New York (Fitzmore Harris of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 11, 2012, which granted plaintiff's motion to restore this action to the active trial calendar solely to the extent of granting defendants leave to serve new discovery demands, and directing plaintiff to serve and file a note of issue after complying with the demands, unanimously affirmed, without costs.

As we previously held in reversing the grant of defendants' motion to dismiss this action as abandoned pursuant to CPLR 3404, once the note of issue and certificate of readiness were vacated and the matter struck from the trial calendar, this case reverted to pre-note of issue status, and CPLR 3404 is therefore inapplicable (*see Tejeda v Dyal*, 83 AD3d 539, 540 [1st Dept], *lv dismissed* 17 NY3d 923 [2011]). Plaintiff's motion to restore the

case to the calendar was properly granted only to the extent of directing her to file a new note of issue and certificate of readiness upon completion of additional discovery, pursuant to the criteria set forth in 22 NYCRR 202.21(f) for reinstating a note of issue that has been vacated.

We note that the motion court denied plaintiff's motion in sum and substance and we reject defendant's request that the motion be denied in its entirety and the complaint dismissed with prejudice. As we previously explained, "[d]efendants' avenues to dismiss this pre-note of issue case are limited to CPLR 3216 and 22 NYCRR 202.27. The latter is inapplicable to the facts herein, and defendants failed to comply with the preconditions of the former" (*Tejeda*, 83 AD3d at 540).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14364 Index 401056/13

[M-6030] In re Ruth Berk,
Petitioner,

-against-

Tanya Kennedy, etc.,
Respondent.

- - - - -

BLDG Christopher LLC,
Nonparty Respondent.

_____

Advocates for Justice, New York (Arthur Z. Schwartz of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for state respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Alexa Englander of counsel), for BLDG Christopher LLC, respondent.

_____

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

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

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

ENTERED: FEBRUARY 26, 2015

CLERK

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14487 The People of the State of New York, Respondent, Ind. 663/11

-against-

James Livrieri, Defendant-Appellant.

_____

Kliegerman & Joseph, LLP, New York (Michael P. Joseph of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered September 4, 2013, convicting defendant, after a jury trial, of three counts of strangulation in the second degree and two counts of assault in the second degree, and sentencing him to an aggregate term of 5½ years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The court properly admitted evidence of uncharged crimes to complete the victim's narrative, to provide background information explaining the abusive relationship between defendant and the victim, and to place the events in a believable context (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Steinberg*, 170 AD2d 50, 72-74 [1991], *affd* 79 NY2d 673 [1992]). This evidence was not

excessive or unduly inflammatory, and its probative value outweighed its prejudicial effect, which was minimized by the court's limiting instructions.

The court properly admitted the victim's medical records, including references to domestic violence, under the business records exception to the hearsay rule (*see* CPLR 4518[a]). Such statements were part of the attending physician's diagnosis, and were relevant to diagnosis and treatment, since "[i]n addition to physical injuries, a victim of domestic violence may have a whole host of other issues to confront, including psychological and trauma issues that are appropriately part of medical treatment" (*People v Ortega*, 15 NY3d 610, 619 [2010]).

The court properly admitted defendant's recorded telephone calls, made while incarcerated, which included abusive remarks by defendant about the victim and efforts by defendant to conspire with others to prevent the victim from testifying. All of this evidence was relevant to motive and consciousness of guilt, and it was not unduly prejudicial.

The court properly admitted a portion of a 911 call under the excited utterance exception to the hearsay rule (*see People v*

Johnson, 1 NY3d 302 [2003]; *People v Edwards*, 47 NY2d 493 [1979]). The tape of the call reveals that the victim was in an agitated state and was still operating under the influence of defendant's attack, notwithstanding intervening events.

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

ENTERED: FEBRUARY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13638 The People of the State of New York, Respondent, Ind. 3425/09

-against-

Damian Silva, Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Eve Kessler of counsel) for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered January 24, 2011, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him to a term of one to three years to be served concurrently with a term to which he was sentenced under a separate indictment, unanimously affirmed.

Application by appellant'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 appellant'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: FEBRUARY 26, 2015

CLERK

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

14024 Five Towns Nissan, LLC, Index 651164/13
Plaintiff-Respondent,

-against-

Universal Underwriters Insurance Company, et al.,
Defendants,

Tower National Insurance Company,
Defendant-Appellant.

_____

Mound Cotton Wollan & Greengrass, New York (Kevin F. Buckley of counsel), for appellant.

McCarter & English, LLP, Newark, NJ (Anthony Bartell of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 22, 2014, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment, unanimously reversed, on the law, without costs, the motion denied, and, upon a search of the record, partial summary judgment granted in favor of defendant Tower National Insurance Company. It is declared that the subject policy's flood exclusion bars coverage for plaintiff's loss of business income and extra expense.

"[T]he goal of a court reviewing an insurance policy is to ascertain whether, afford[ing] a fair meaning to all of the

language employed by the parties in the contract and leav[ing] no provision without force and effect[,] . . . there is a reasonable basis for a difference of opinion as to the meaning of the policy" (*Jacobson Family Invs., Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 102 AD3d 223, 231 [1st Dept 2012] [internal quotation marks and citation omitted], *lv dismissed in part, denied in part* 22 NY3d 948 [2013]). Applying this principle, plaintiff's motion for partial summary judgment declaring that the policy exclusion for flood was inapplicable to its business income and extra expense (BI) coverage should have been denied.

Pursuant to the plain language of the subject policy, the BI and Building Forms share a "Covered Cause of Loss" requirement, and defined that term by looking to the "Cause of Loss - Special Form," which covers all risks, except those otherwise excluded, such as loss due to flooding or waves. On this basis, plaintiff's argument, and the motion court's finding - that the Special Form operates to define a "Covered Cause of Loss" for purposes of only physical damage coverage - overly emphasized the chart attached to the Commercial Property Coverage Part Declarations and ignored the terms of the BI Form and its coverage grant.

As there is no issue as to the application of the policy

terms excluding losses due to the flooding that plaintiff claims, we grant partial summary judgment to defendant insurance company and make a declaration of no coverage (see CPLR 3212[b]; *Fineman Family LLC v Third Ave. N. LLC*, 90 AD3d 549, 551 [1st Dept 2011]).

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

ENTERED: FEBRUARY 26, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13958- Index 650197/12
13959- 652861/12
13960-
13961 Macy's Inc., et al.,
& M-5837 Plaintiffs-Respondents-Appellants,

-against-

Martha Stewart Living Omnimedia, Inc.,
Defendant,

J.C. Penney Corporation, Inc.,
Defendant-Appellant-Respondent.

_____

Munger, Tolles & Olson LLP, Los Angeles, CA (Mark H. Epstein of the bar of the State of California admitted pro hac vice of counsel), for appellant-respondent.

Jones Day, New York (Theodore M. Grossman of counsel), for respondents-appellants.

_____

Order and judgment (one paper), Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 30, 2014, bringing up for review orders, same court and Justice, entered April 15, 2013, and May 16, 2013, modified, on the law, to deny defendant JCP Penny Corporation, Inc.'s CPLR 4401 motion, and reinstate the second and third causes of action against it, and otherwise affirmed, without costs. Appeal from the aforesaid orders, dismissed, without costs, as subsumed in the appeal from the aforesaid order and judgment.

M-5837 - *Macy's Inc., et al., v J.C. Penney Corporation., Inc.*

Motion to enlarge the record on appeal denied.

Opinion by Sweeny, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Richard T. Andrias
Karla Moskowitz
Rosalyn H. Richter, JJ.

13958-13959-13960-
13961 & M-5837
Index 650197/12
652861/12

_____x

Macy's Inc., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Martha Stewart Living Omnimedia, Inc.,
Defendant,

J.C. Penney Corporation Inc.,
Defendant-Appellant-Respondent.

_____x

Plaintiffs and defendant J.C. Penney Corporation, Inc. (JCP) appeal from the order and judgment (one paper) of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 30, 2014, to the extent appealed from, adjudging JCP liable on plaintiffs' first cause of action against JCP for tortious interference with contract, and denying plaintiffs' request for punitive damages, and bringing up for review the orders of the same court and Justice, entered April 15, 2013, and May 16, 2013, which, respectively, granted JCP's CPLR 4401 motion for judgment as a matter of law dismissing plaintiffs' second and third causes of action asserted against JCP, and denied plaintiffs' motion

to reopen its case-in-chief. Plaintiffs appeal from the aforesaid orders.

Munger, Tolles & Olson LLP, Los Angeles, CA (Mark H. Epstein of the bar of the State of California, admitted pro hac vice, of counsel), and Miller & Wrubel P.C., New York (Martin D. Edel and Adam J. Safer of counsel), for appellant-respondent.

Jones Day, New York (Theodore M. Grossman and Michael A. Platt of counsel), for respondents-appellants.

SWEENY, J.

The case before us involves two contracts and three well-known corporate entities. The first contract is between plaintiffs, Macy's, Inc. and Macy's Merchandising Group (collectively, Macy's), and former defendant Martha Stewart Living Omnimedia, Inc. (MSLO). The second contract is between MSLO and defendant J.C. Penney Corporation, Inc. (JCP).

Macy's complaint against JCP alleges tortious interference with contract and unfair competition, and asserts a demand for an award of punitive damages, all stemming from allegations of unethical and improper conduct by JCP in causing MSLO to breach its contract with Macy's[1]. More specifically, Macy's alleges, in two separate causes of action, that JCP's action caused MSLO to breach the exclusivity (first cause of action) and confidentiality (second cause of action) provisions of its contract with Macy's. Macy's also alleges in its third cause of action that JCP's actions constituted unfair competition. Finally, Macy's seeks punitive damages against JCP.

After a bench trial, the court found that JCP tortiously interfered with Macy's and MSLO's contract regarding the

[1]After a bench trial but before the court rendered its final decision, Macy's settled its case against MSLO, leaving only the claims against JCP before us.

exclusivity provision of the agreement. JCP has appealed that determination. The court granted JCP's motion for judgment as a matter of law dismissing Macy's remaining causes of action, and denied Macy's application for punitive damages. Macy's has appealed that ruling.

The record reveals the following pertinent facts:

In 2006, Macy's and MSLO entered into a licensing agreement granting Macy's certain exclusive rights with respect to products designed by MSLO. These products were defined in the agreement as "Exclusive Product Categories" and included bedding, bathware, housewares and cookware. In conjunction with Macy's, MSLO would design goods in those categories, which were branded with the MSLO mark. Macy's would manufacture the goods and sell them in Macy's stores. The agreement further provided that Macy's would be the exclusive outlet for sales of these items and that MSLO would not, without Macy's consent, enter into any new agreement or extend any existing agreement "with any department store or manufacturer or other retailer of department store merchandise that promotes the sale of any items" in Macy's Exclusive Product Categories that are branded with a Martha Stewart Mark. The agreement further provided that if MSLO ultimately contracted, with Macy's approval, tacit or otherwise, to sell goods in the Exclusive Product Categories through other outlets, such goods

were to be manufactured solely by Macy's and could not be sold through a downscale retailer. The agreement was subject to several limitations, the key one being MSLO's reservation of the right to open its own retail stores. These stores were defined as "retail store[s] branded with Martha Stewart Marks or Stewart Property that [are] owned or operated by MSLO or an Affiliate of MSLO or that otherwise prominently feature Martha Stewart Marks or Stewart Property." Even with respect to those MSLO stores, however, only Macy's could manufacture and sell products in its Exclusive Product Categories at Macy's cost plus 20%. This arrangement was designed to prevent MSLO stores from undercutting Macy's prices on those goods. The contract had a five-year term, with Macy's having a unilateral right to renew for a maximum of three subsequent five-year terms. The initial contract was set to expire in 2013 and Macy's timely notified MSLO of its intent to renew in 2012.

In 2011, MSLO needed to raise additional capital. It turned to investment banker Blackstone to find a strategic partner. Blackstone, through its connections with members of the board of directors of JCP, arranged for Ms. Stewart and JCP executives to meet. Although JCP executives admittedly knew of Macy's agreement with MSLO and that MSLO was looking for a strategic (financial) partner, they proceeded to commence negotiations for

a retail partnership instead of the strategic partnership initially sought by MSLO. The evidence in the record clearly shows that JCP executives knew that, in order to obtain this retail partnership, they would have to "break" the exclusivity provisions in the Macy's contract. In order to evade those provisions, JCP viewed the exemption for MSLO stores as a means to attain its goals of creating a retail partnership with MSLO. It proposed creating a "store-within-a-store." Under this concept, MSLO retail stores would be set up as a separate "store" within already established JCP stores. Entry to the store would be located wholly within the confines of JCP stores, i.e., it would not be a freestanding store with a separate outside entrance; the MSLO store would only be accessible by entering through the JCP store. MSLO would help design the branded goods and receive a royalty, just as with Macy's. However, JCP would manufacture the goods, own the inventory, own the retail space, employ the salespeople, book the sales, set the prices, set the promotions and bear all risk of loss.

JCP also insisted, as a condition of entering into the retail agreement, that MSLO provide it, not only with complete copies of the contract with Macy's (which JCP alleged it needed for the SEC filings required if it provided a strategic partnership) but also the confidential information regarding

Macy's royalty arrangement, product manufacturing and distribution information, and other material which JCP admitted at trial was highly confidential and essentially constituted trade secrets.

JCP had previously asked Blackstone to provide this information but it declined, citing the confidentiality provisions of the Macy's contract. MSLO initially declined several times to provide this information on the same grounds. However, JCP was insistent on obtaining this information, making it a sine qua non of entering into a retail agreement with MSLO. After repeated requests, MSLO ultimately yielded to JCP's requests and did provide this confidential information. Thereafter the parties entered into the arrangement as proposed by JCP, despite misgivings from some executives from both companies as to whether the "store-within-a store" concept would survive a legal challenge by Macy's should it decide to litigate the agreement as a breach of its contract with MSLO.

Macy's first asserts a tortious interference with contract claim against JCP, alleging that JCP induced MSLO to breach the exclusivity provisions of its contract by entering into a licensing agreement with MSLO in 2011 pursuant to which MSLO designed approximately 900 products, branded with MSLO marks, intended to be sold in "MSLO stores" located within JCP stores as

described above. The court found that since JCP would manufacture the goods, own the inventory and, in short, control all aspects of the "store," this would run afoul of the clear language of the contract with MSLO and Macy's that requires Macy's to manufacture all MSLO goods in Exclusive Product Categories, even for MSLO stores. It also violated the prohibition on MSLO from entering into any agreement with any department store that promotes the design and sale of items within the Exclusive Product Categories, thus breaching, among other things, the exclusivity provisions of its contract with Macy's. The court also found that JCP's "relentless efforts" to pursue MSLO and Ms. Stewart were "over the top" and had "exceeded the minimum level of ethical behavior in the marketplace," and that by its conduct, it had wrongfully induced MSLO to breach its contract with Macy's. We agree.

It is well settled "that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties" (*Cole v Macklowe*, 99 AD3d 595, 596 [1st Dept 2012]). "[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977] [internal quotation marks

omitted] [second alteration in original]). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield v Philles Records*, 98 NY2d 562, 570 [2002]; *see Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010]). In examining a contract to find the parties' intent as to a particular section, a court should read "the entirety of the agreement in the context of the parties' relationship" rather than isolating distinct provisions out of an entire agreement (*Matter of Riconda*, 90 NY2d 733, 738 [1997]). Thus, "[t]he rules of construction of contracts require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]). A court should "not write into a contract conditions the parties did not include by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning" (*see Tikotzky v City of New York*, 286 AD2d 493, 494 [2d Dept 2001]).

To sustain its claim of tortious interference with contract, Macy's must prove (1) that it had a valid contract with MSLO; (2) that JCP had knowledge of Macy's contract with MSLO; (3) that JCP intentionally induced MSLO to breach its contract with Macy's;

(4) that MSLO breached its contract with Macy's; (5) that MSLO would not have breached its contract with Macy's absent JCP's conduct; and (6) that Macy's sustained damages (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

There is no question that Macy's contract with MSLO was valid and that the parties were performing pursuant to its terms. There is also no question that JCP knew the contract was valid and binding on MSLO. In fact, in order to achieve its goal of obtaining MSLO products and designs for its own stores, the record is replete with references from JCP personnel that they had to find a way to "break" that "tight" contract. The agreement between Macy's and MSLO is not ambiguous, and thus, the extrinsic evidence regarding the parties' intent and expectations in entering into the agreement need not be considered. Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous (*Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [1st Dept 2007], *affd* 10 NY3d 25 [2008]). On the record before us, the evidence establishes that JCP had, as the court found, a "certainty" or "substantial certainty" that it actions would result in a breach, particularly in light of the unambiguous language of the contract requirement that all MSLO goods in the Exclusive Product Categories, including all such goods sold in any MSLO Store, had

to be manufactured by Macy's. There are no exceptions to this exclusivity of manufacture, yet JCP's agreement with MSLO called for JCP to manufacture these products. Further, there is evidence that, but for JCP's activities, MSLO would not have breached its contract with Macy's. Indeed, even after breaching the terms of its contract with Macy's by entering into the contract with JCP and providing JCP with highly confidential information, MSLO continued to design products for and otherwise perform under its contract with Macy's. Thus, the court properly found for Macy's on this cause of action.

The second cause of action, alleging tortious interference with contract by JCP, should not have been dismissed. Macy's alleges that JCP induced MSLO to disclose the terms of its agreement and confidential financial information. This was a violation of the confidentiality provision of the agreement. Macy's sufficiently demonstrated that the material disclosed does not fall under any exception to the confidentiality provisions as required by law or legal processes. Further, Macy's demonstrated that the scope of disclosure was not properly limited with respect to the information provided and the personnel receiving it. As noted, JCP sought this information almost from the inception of its discussion with MSLO. The information was tantamount to trade secrets, as JCP's executives acknowledged.

The evidence on this record clearly showed that JCP intended to, and did in fact, use its financial leverage over MSLO to obtain this information. It used this leverage by making its licensing proposal with MSLO contingent on MSLO's providing the entire Macy's agreement, including the material covered by the confidentiality provisions. By providing the material at JCP's insistence, MSLO breached its contract with Macy's. Moreover, despite its agreement with MSLO regarding limiting the disclosure of this confidential material to certain personnel, JCP shared this information with members of its negotiating team working on the licensing agreement, who in turn shared it with other JCP executives and personnel. It was JCP's inducement of MSLO's breach of the confidentiality provisions in Macy's contract that ultimately brought about the finalization of its agreement with MSLO.

The court also erroneously dismissed Macy's unfair competition claim. It is well settled that "the primary concern in unfair competition is the protection of a business from another's misappropriation of the business' 'organization [or its] expenditure of labor, skill, and money'" (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 671 [1981], quoting *International. News Service v Associated Press*, 248 US 215, 239 [1918]). Indeed, "the principle of misappropriation of another's

commercial advantage [is] a cornerstone of the tort" (52 NY2d at 671). Allegations of a "bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information" can give rise to a cause of action for unfair competition (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2d Dept 2008] [internal quotation marks omitted]; *see also Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 20 AD3d 439, 440 [2d Dept 2005]).

Here, the agreement between Macy's and MSLO provided Macy's with valuable exclusive rights to the Martha Stewart trademark and MSLO's designs in the Exclusive Product Categories, which, as the court found, gave Macy's a competitive advantage. It is conceded that the MSLO brand had significant value in the retail world, and the record shows JCP was fully aware of Macy's commercial advantage as the exclusive distributor of these branded products. JCP's actions in attempting to misappropriate this commercial advantage by inducing MSLO to breach its agreement falls squarely within *Ruder and Finn's* definition of unfair competition (*Ruder & Finn*, 52 NY2d at 671). Further, JCP misappropriated Macy's expenditures and labors in obtaining, developing and selling approximately 900 of MSLO's designs in the Exclusive Product Categories to which Macy's was exclusively entitled. Its conduct in this regard, as the trial court found

in connection with its discussion on the issue of tortious interference of contract, "exceeded the minimum level of ethical behavior in the marketplace." In using MSLO's designers to develop its designs and products at the same time those designers were developing designs and products for Macy's, and by using Macy's confidential competitive information obtained from MSLO as discussed above, JCP misappropriated Macy's "labor, skill, expenditures, [and] good will," all the while demonstrating bad faith in pursuing its objective. Macy's therefore made out a viable claim for unfair competition (*Parekh v Cain*, 96 AD3d 812, 816 [2d Dept 2012]; *Out of Box Promotions*, 55 AD3d at 578).

Finally, we agree that Macy's should not be awarded punitive damages. In order to be entitled to punitive damages, a private litigant "must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]). Punitive damages are "a social exemplary remedy, not a private compensatory remedy" (*Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976] [internal quotation marks omitted]).

Macy's, in support of its application for punitive damages, points to, among other things, various emails from JCP's

executives and board members which evince a certain degree of malicious gloating over the supposed coup of obtaining MSLO products for their company and the angst it would cause for Macy's executives. Macy's argues that, in conjunction with the actions taken by those executives toward achieving that goal, these emails establish the wanton and reckless conduct required to meet the high threshold for the imposition of punitive damages. To be sure, the conduct of JCP's personnel in this case was intentional and clearly below any minimum standard of business practices and ethical behavior. However, those emails, while distasteful and far beneath what one would expect from executives of a major corporation, are simply part and parcel of the unsavory atmosphere surrounding JCP's conduct.

Nevertheless, at least with respect to the "store-within-a store" concept, JCP was given an arguable basis on which to proceed with its negotiations for a retail agreement with MSLO. It bears noting that this concept came from MSLO's counsel, who opined that these stores would be in compliance with the Macy's agreement. JCP had experience with this concept with its Sephora product lines, albeit under very different circumstances. Its personnel were asked to validate whether the concept could work for MSLO. Despite some misgivings by some people involved on both sides of the negotiations as to whether the concept would

hold up under a court challenge, the decision to go ahead, while ill-advised, did not constitute the type of wanton and reckless conduct that warrants the imposition of punitive damages.

Taken as a whole, JCP's conduct, while clearly intentional, did not "evince [the] high degree of moral turpitude and demonstrate such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Walker v Sheldon*, 10 NY2d 401, 405 [1961]; *Ross v Louise Wise Servs.*, 8 NY3d 478, 489 [2007]). As a result, the court correctly determined that punitive damages are not warranted in this case.

Macy's raises no arguments in support of its appeal from the order denying its motion to reopen its case-in-chief.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 30, 2014, to the extent appealed from, adjudging defendant JCP liable on plaintiffs' first cause of action against it for tortious interference with contract, and denying plaintiffs' request for punitive damages, and bringing up for review orders of the same court and Justice, entered April 15, 2013, and May 16, 2013, which, respectively, granted JCP's CPLR 4401 motion for judgment as a matter of law dismissing plaintiffs' second and third causes of action asserted against JCP, and denied Macy's motion to reopen its case-in-chief, should be modified, on the

law, to deny JCP's CPLR 4401 motion, and reinstate the second and third causes of action against it, and otherwise affirmed, without costs. The appeals from the aforesaid orders should be dismissed, without costs, as subsumed in the appeal from the aforesaid order and judgment.

M-5837 - *Macy's Inc., et al. v J.C. Penney Corporation Inc.*

Motion to enlarge the record on appeal denied.

All concur.

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

ENTERED: FEBRUARY 26, 2015

CLERK