SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 24, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3356 Tara Keating Brooks, et al., Index 805144/13
Plaintiffs-Respondents,

-against-

Robert S. April, M.D., et al.,
Defendants-Appellants.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellants.

Kelner & Kelner, New York (Gerard K. Ryan, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about July 11, 2016, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint in its entirety, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

On October 23, 2010, plaintiff Tara Keating Brooks sustained a head injury after having fallen while playing catch with a family member. On November 2, 2010, she visited defendant Dr. Robert S. April, a neurologist at Mount Sinai Hospital, for the first time, complaining of headaches. Dr. April ordered a CT

scan of plaintiff, which took place that day. The results of the CT scan were unremarkable. Dr. April's diagnosis was that plaintiff was suffering from post-concussion headache syndrome. Dr. April conducted follow-up examinations of plaintiff on November 8 and November 15, 2010, and concluded that plaintiff was continuing to suffer from post-concussion headache syndrome. On November 30, 2010, the day that plaintiff experienced what later proved to be a cerebral hemorrhage, plaintiff called Dr. April, complaining that her head pain had increased. Dr. April advised plaintiff to rest, take pain medication and to come to his office the following morning. Plaintiff made no further attempt to seek medical assistance or contact any other medical professionals that evening.

The following day, plaintiff's headache pain had diminished somewhat, but she was still experiencing vision problems. Dr. April's examination of her that day indicated that she was alert and oriented, her reflexes were normal, with no Babinski sign, and her blood pressure and pulse rate were normal. He performed an electroencephalogram (EEG), with normal results. Dr. April administered a nonsteroidal anti-inflammatory anti-migraine medication in the office, after which plaintiff's headache was somewhat further relieved. He diagnosed her as having experienced a migraine, based upon her symptoms, his examination

that day, his earlier CT scan with normal results, the EEG, which showed no signs of abnormality or brain dysfunction, and her personal and family medical history of migraine headaches. After December 1, 2010, plaintiff sought no further treatment from Dr. April.

On December 2, 2010, plaintiff visited another neurologist, Dr. Paul-Henry Cesar of Columbia University Medical Center, for a second opinion. Upon examining plaintiff, Dr. Cesar formulated a working diagnosis, paralleling that of Dr. April, that plaintiff suffered from a migraine with aura and post-concussive headache syndrome, but he ordered an MRI of plaintiff's brain in order to evaluate secondary causes of plaintiff's headache. The MRI, done on December 7, 2010, showed a large amount of blood products in the left parietal lobe of plaintiff's brain, which was indicative of a brain bleed, but not of a micro-arteriovenous malformation (micro-AVM). The following morning, December 8, 2010, Dr. Cesar informed plaintiff of the results of the MRI and referred her to a neurosurgeon.

On December 9, 2010, plaintiff visited Dr. Guy McKhann of Columbia University Medical Center. Dr. McKhann ordered a CT scan that same day, which showed plaintiff's brain hemorrhage. Dr. McKhann stated that the hemorrhage had likely occurred nine days prior to her visit, when her acute new symptoms developed.

He recommended that plaintiff undergo another MRI, an MRA (magnetic resonance angiogram) and an MRV (magnetic resonance venogram). He added that if plaintiff had an AVM, a cerebral angiogram would be needed, but he did not refer her for that test (an invasive procedure subjecting the patient to possible stroke, loss of use of limbs due to the development of clots, renal failure, allergic reaction and even death), preferring to await the results of the MRI. On December 10, 2010, plaintiff underwent an MRI, MRA and MRV, but none of those tests revealed plaintiff's AVM.

On May 20, 2011, plaintiff consulted radiologist Maksim Shapiro, M.D., of NYU Langone Medical Center. Dr. Shapiro observed that plaintiff's November 2, 2010 CT scan did not reveal any evidence of a hemorrhage, and that the hemorrhage likely occurred at the time of plaintiff's very severe headache on November 30. Dr. Shapiro opined that the hemorrhage was unrelated to plaintiff's fall and appeared to be spontaneous.

On May 24, 2011, plaintiff underwent an MRI and MRA of the brain, which revealed a remote hemorrhage. Both Dr. Shapiro and Dr. Govindan Gopinathan, a neurologist at NYU Langone Medical Center, then recommended that plaintiff undergo an angiogram to check for a possible AVM.

On June 13, 2011, Dr. Rafael Ortiz of St. Luke's Roosevelt

Hospital performed a cerebral angiogram, which revealed an MRI-occult micro-AVM. Dr. Ortiz told plaintiff that the AVM had ruptured and could do so again, and that she needed surgery.

On July 27, 2011, Dr. Robert A. Solomon, a neurosurgeon at Columbia University Medical Center, performed a craniotomy. Following that surgery, plaintiff began to have seizures, from which she still suffers, as well as headaches, balance problems, confusion, fatigue and impaired vision.

This medical malpractice action followed. To the extent relevant for present purposes, plaintiff alleges that Dr. April was negligent in failing to order diagnostic testing that would have revealed the presence of a micro-AVM during the course of his treatment of her from November 2 through December 1, 2010. Defendants moved for summary judgment, alleging that there was no departure from the accepted standard of medical care and that, alternatively, any departures did not proximately cause plaintiff's injuries.

Defendants established their entitlement to judgment as a matter of law. Defendants submitted, inter alia, an affirmation of a neurologist and plaintiff's medical records, which demonstrated that the alleged deviations from the accepted standard of medical care did not proximately cause plaintiff's damages, as her AVM, a rare congenital condition found in one

percent of the population, and mostly in male patients, was not visible on noninvasive diagnostic testing. The claim that a cerebral angiography should have been performed prior to plaintiff's hemorrhage was inconsistent with the accepted standard of medical care, as shown by plaintiff's course of treatment involving several doctors affiliated with three different hospitals, and any subsequent testing would not have changed plaintiff's course (*see Foster-Sturrup v Long*, 95 AD3d 726, 727-728 [1st Dept 2012]).

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs submitted the affirmation of a neurological expert offering opinions in conclusory fashion, without evidentiary substantiation. Plaintiffs' neurological expert opined that the accepted standard of medical care on plaintiff's presentation of symptoms following her November 30 hemorrhage was to order a "cerebral MRI and MRA or CTA [computed tomography angiography] or conventional cerebral angiography." The disjunctive phrasing of this statement apparently indicates that, in plaintiffs' expert's view, performance of *either* noninvasive or invasive testing would have been sufficient to meet the accepted standard of medical care. Put otherwise, the apparent view of the expert is that the performance of noninvasive tests such as an MRI and MRA would have obviated the need for a

cerebral angiogram.

The record clearly establishes, however, that plaintiff's micro-AVM was MRI-occult, and thus was never detectable by means of noninvasive testing, including the December 7, 2010 MRI, the December 10, 2010 multiple tests (MRI, MRA and MRV) and the May 24, 2011 MRI and MRA ordered by doctors other than defendant.

Plaintiffs' expert's conclusory opinion that noninvasive testing would have led to an earlier diagnosis failed to address the opinion of defendants' expert (based on the noninvasive testing over the six-month period after plaintiff left defendant's care) that the MRI-occult AVM was not diagnosable by such testing. Moreover, plaintiffs' expert failed to identify a basis for the apparent conclusion that, as an alternative to noninvasive testing, cerebral angiography was indicated prior to plaintiff's November 30, 2010 hemorrhage (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] *G.L. v Harawitz*, 146 AD3d 476, 476 [1st Dept 2017]; *Holmes v Bronx-Lebanon Hosp. Ctr.*, 128 AD3d 596 [1st Dept 2015]).

Moreover, the course of events from the date of plaintiff's injury to the final date of plaintiff's treatment by Dr. April on December 1 makes clear that, throughout that period, there was never any indication of a need for a differential diagnosis. Aside from the fact that none of the tests performed by Dr. April

revealed anything remarkable, plaintiff's head injury and the symptoms that followed formed the basis for Dr. April's initial diagnosis of post-concussive headache syndrome. Dr. April's later diagnosis of migraines followed plaintiff's having reported to him that she underwent an MRI as an adolescent in 1990 in connection with her having experienced migraines. In addition, plaintiff's family medical history revealed that both plaintiff's mother and her aunt had suffered from migraines.

While an angiogram may have revealed plaintiff's AVM prior to the hemorrhage she suffered on November 30, plaintiffs' expert offered no probative evidence that performance of a risky, invasive angiogram was indicated at the time in question. As the AVM was an unindicated condition at that time, Dr. April's failure to seek a differential diagnosis was not malpractice (*see David v Hutchinson*, 114 AD3d 412, 413 [1st Dept 2014] ["the failure to investigate a condition [by performing testing] that would have led to an incidental discovery of an unindicated condition, does not constitute malpractice"]; *Curry v Dr. Elena Vezza Physician, P.C.*, 106 AD3d 413, 413 [1st Dept 2013] ["failing to investigate an otherwise unindicated disease is not malpractice"]; *see also Montilla v St. Luke's-Roosevelt Hosp.*, 147 AD3d 404, 404, 405, 407 [1st Dept 2017] [affirming judgment dismissing complaint where hemorrhage detected by CT scan had not

been detected by similar scan four days earlier and where the plaintiffs' neurological expert's opinion as to possible causes of hemorrhage was theoretical and not based on all relevant record evidence, rendering opinion insufficient] [citing *Callistro v Bebbington*, 94 AD3d 408, 410-411 (1st Dept 2012), *affd* 20 NY3d 945 (2012)]).

Even had Dr. April sought a differential diagnosis, there is no guarantee that plaintiff's AVM would have been detected, because Dr. April could have ordered only noninvasive testing, such as an MRI and MRA, and would still have met the accepted standard of medical care. There is no dispute that these tests - - while sufficient to constitute "correct diagnostic procedures" and meet what is, according to plaintiffs' expert, the accepted standard of medical care - - would not have detected the AVM.

The alternative for Dr. April, in plaintiffs' expert's view, would have been to perform a cerebral angiography. The dissent's view that plaintiff's symptoms at the point of time in question "might well have pointed to an AVM" and that an AVM would have been discovered with an angiogram amounts to nothing more than speculation, which we have consistently found inadequate to rebut a defendant's prima facie showing on a summary judgment motion (*see e.g. Diaz* 99 NY2d at 544; *G.L. v Harawitz,* 146 AD3d at 476; *Curry*, 106 AD3d at 414; *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d

357, 357 [1st Dept 2006] [the plaintiff's expert failed to raise a triable issue of fact based upon her conclusory and speculative assertions that more aggressive treatment would have led to earlier detection of the plaintiff's cancer]).

Furthermore, plaintiffs' expert's affirmation failed to demonstrate, by way of evidentiary substantiation, that Dr. April's conduct was a proximate cause of damages to plaintiff. Plaintiffs' expert's claim that Dr. April's alleged diagnostic failure exacerbated plaintiff's congenital AVM condition is utterly devoid of factual support.

In the absence of any probative evidence that Dr. April deviated from the accepted standard of medical care and that his conduct was a proximate cause of plaintiff's damages, Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint.

The dissent's attempt to distinguish *David* is unavailing. In *David*, we held that the failure to conduct testing that would have led to the discovery of an unindicated condition does not constitute malpractice (114 AD3d at 413). That same principle applies here, in that plaintiff's AVM was, at the time in question, an unindicated condition.

The dissent's effort to distinguish *Montilla* is similarly unavailing. Here, as in *Montilla*, plaintiffs' expert failed to

rebut the views advanced by defendants' expert on significant issues and to adduce sufficient evidentiary support for plaintiffs' expert's own views (*see* 147 AD3d at 407). Specifically, here, plaintiffs' expert failed to address defendants' expert's opinions that plaintiff's AVM would have been undetectable by concededly appropriate noninvasive testing, and that Dr. April's conduct prior to plaintiff's hemorrhage could not have been the proximate cause of any damages to plaintiff.

All concur except Mazzarelli and Moskowitz, JJ. who dissent in a memorandum by Moskowitz, J. as follows:

MOSKOWITZ, J. (dissenting)

I disagree with the majority that the affirmation of plaintiff's neurological expert was "conclusory" and "without evidentiary substantiation." On the contrary, plaintiff's neurological expert specifically identified numerous deviations from the standard of care and noted that plaintiff showed multiple AVM symptoms before her rupture, including headaches, two or three falls, severe head pain, weakness, and visual disturbance, all of which increased after the initial visit. Because I conclude that these assertions raise issues of fact sufficient to defeat summary judgment, I respectfully dissent.

In this medical malpractice action, plaintiffs alleged that defendant Dr. Robert S. April was negligent in, among other things, failing to order diagnostic testing that could have revealed the presence of a micro-arteriovenous malformation (AVM), a congenital condition in the injured plaintiff's brain. According to plaintiffs, had Dr. April ordered the proper tests, the injured plaintiff might not have suffered neurological damage, which, she alleges, has led to seizures, headaches, difficulty with her sense of balance, and impaired spatial vision.

Defendants failed to establish their entitlement to judgment as a matter of law. On their motion, defendants submitted, among

other things, the injured plaintiff's medical records and an affirmation of a neurologist, both of which purported to demonstrate that the alleged deviations from the accepted standard of medical care did not proximately cause plaintiff's damages. Those documents showed that plaintiff's AVM was not visible on noninvasive diagnostic testing, but would have been visible only by invasive cerebral angiography. Defendants noted that the latter test, however, would have been inconsistent with the standard of care, as it carried significant risks inappropriate for that stage of treatment. Further, defendants argued, the assertion that they should have performed a cerebral angiography before plaintiff's hemorrhage did not support the medical malpractice claim, because the bleed had already occurred and any subsequent testing would not have changed the course of plaintiff's health (*see Foster-Sturrup v Long*, 95 AD3d 726, 727-728 [1st Dept 2012]). This showing was sufficient for defendants to make out a prima facie case of their entitlement to summary judgment. The burden therefore shifted to plaintiffs to present evidence in admissible form demonstrating the existence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, plaintiffs did sufficiently make that showing in their opposition, presenting evidence that raised triable issues of

fact by way of their neurological expert's opinion. The neurological expert examined plaintiff's chart, particularly her various complaints over time of recurrent falls, vision failure, and headaches. After that review, the neurologist opined that Dr. April deviated from the standard of care by failing to engage in a differential diagnosis, failing to order a cerebral angiography and other tests such as MRIs and MRAs, engaging in "head shaking" or "head impact testing," prescribing contraindicated medications, and failing to obtain a neurological consultation. According to plaintiffs' expert, with a reasonable degree of medical certainty, these departures, particularly the failure to order and have performed the indicated tests between November 2, and November 30, 2010, prevented early detection and removal of the AVM before its rupture, causing plaintiff's injuries. This conclusion was sufficiently particularized to raise triable issues of fact, thus defeating defendants' motion for summary judgment (*see Polanco v Reed*, 105 AD3d 438, 440-441 [1st Dept 2013]).

As defendants concede on appeal, no party disputes that an angiogram would have revealed the congenital malformation in plaintiff's brain. But the question is whether the angiogram was actually indicated. Plaintiffs' expert directly addresses this question in the expert affirmation, stating that given

plaintiff's history and the clinical course of her neurological deterioration, defendants should have performed a differential diagnosis of her symptoms to rule out various possible conditions, including seizure disorder or intracranial infection. There is nothing conclusory about this opinion; it simply creates a question of fact as to whether defendants should have performed a differential diagnosis before the AVM advanced to the point where it caused permanent neurological damage (*see Adams v Pilarte*, 152 AD3d 97 [1st Dept 2017]).

That plaintiffs' expert offers an opinion in the disjunctive, as the majority notes, does not change the result ("Dr. April deviated from the accepted standard of medical care in not ordering indicated tests . . . including cerebral MRI [magnetic resonance imaging test] and MRA [magnetic resonance angiogram] or . . . conventional cerebral angiography"). On the contrary, the very point of plaintiffs' expert's opinion is that the failure to order any sort of test other than an EEG was part of defendants' failure to perform a differential diagnosis.

The cases that the majority cites do not compel any result to the contrary. In *David v Hutchinson* (114 AD3d 412, 412 [1st Dept 2014]), the decedent complained of abdominal pain during an emergency room visit following gallbladder removal surgery 11 days earlier. The defendants diagnosed an infection and treated

the decedent for that condition, after which her complaints resolved and she was discharged after being "stable and comfortable" for several hours (*id*. at 412, 413). The decedent was later found to have liver abscesses and pleural effusion, and died from infections related to her repeated stays in hospitals and nursing homes (*id*. at 412). Under those circumstances, we found, among other things, that the failure to investigate a condition that would have led to an incidental discovery of an unindicated condition does not constitute malpractice (*id.* at 413).

But the question here is not one of incidental discovery of an unindicated condition. In *David*, none of the decedent's symptoms pointed to a liver abscess or pleural effusion; thus, we found in that case that the failure to test for those conditions did not constitute a deviation from the standard of care (114 AD3d 413). Here, by contrast, as plaintiffs' expert notes in the expert affirmation, plaintiff's symptoms might well have pointed to an AVM – a condition that defendants would have discovered had they undertaken the correct diagnostic procedures.

What is more, the defense experts in *David* stated, without contradiction, that the decedent's liver abscesses had long since resolved by the time of her death, and the plaintiff's expert was unable to causally relate the liver abscesses to the decedent's

death (114 AD3d at 413). Thus, in *David*, the decedent's death was not even legally connected to the condition that the defendants allegedly failed to diagnose. Here, in contrast to *David*, no expert states that plaintiff's "blinding" headaches, visual disturbances, and difficulty walking proved unrelated to her condition. Quite to the contrary, plaintiffs' expert opines that plaintiff's symptoms were consistent with an AVM, among other things.

In *Montilla v St. Luke's-Roosevelt Hosp.* (147 AD3d 404, 407 [1st Dept 2017]), the plaintiff's expert never addressed the assertion of the defendant's expert that there was no radiological evidence of trauma in the decedent's brain, and omitted facts regarding the rise in the decedent's blood pressure, thus ignoring relevant record evidence about what had caused the decedent's injury. As noted above, plaintiffs' expert directly addresses the issues raised by defendants' expert. Nor

does the majority point to any relevant record evidence that plaintiffs' expert ignored in reaching his or her conclusion.

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

ENTERED: OCTOBER 24, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4688 In re Jonathan A.,
Petitioner-Respondent,

-against-

Tiffany V.,
Respondent-Appellant.

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Leslie S. Lowenstein, Woodmere, for appellant.

Larry S. Bachner, New York, for respondent.

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Order, Family Court, Bronx County (Jennifer Burtt, Referee), entered on or about September 23, 2016, which, to the extent appealed from, directed that the child be enrolled in school in Bronx County and that, if the mother moves to Queens in the future, the father be awarded primary physical custody, with visitation to the mother on three weekends each month, unanimously reversed, on the law and the facts, without costs, and the order vacated to that extent.

The mother does not challenge the Family Court's determination that the parties' relationship was too antagonistic for joint legal custody, and its consequent delegation of decision-making authority to each parent over different facets of the child's upbringing, with education to the father and medical care to the mother. She also does not challenge the Family Court's order directing an equal parenting time schedule, which

the parties had been following on consent since August 27, 2015.

Because the mother's petition did not seek permission to relocate with the child, the Family Court's order that custody be modified to set a particular parenting time schedule in the event that the mother moved in the future lacked a sound and substantial basis in the record (*see generally Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of Gregory D. v Athena Q.*, 149 AD3d 542 [1st Dept 2017]).

There was also no basis for the Family Court to direct that the child be enrolled in school in Bronx County since the father was granted final decision-making authority on education issues.

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4764 Jocelyn C., et al., Index 350615/09
Plaintiffs-Respondents,

-against-

Soundview Apartments Realty, LLC,
Defendant-Appellant,

Ward 101 LLC,
Defendant.

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Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Tara C. Fappiano of counsel), for appellant.

Law Office of Neil R. Finkston, Great Neck (Neil R. Finkston of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 22, 2016, which, insofar as appealed from, in this action for personal injuries suffered as a result of exposure to lead-based paint, denied the motion of defendant landlord Soundview Apartment Realty, LLC (Soundview) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The court correctly determined that Soundview failed to establish its entitlement to judgment as a matter of law. The record demonstrates that the subject building was constructed before 1960; that Soundview knew that a child younger than six resided in the apartment; and that Soundview had actual notice of

a positive lead test in 2006 that it failed to remediate and that resulted in a February 2009 letter alerting it to the fact that the lead condition had not been addressed (*see e.g. Rivera v Neighborhood Partnership Hous. Dev. Fund Co. Inc.*, 116 AD3d 633 [1st Dept 2014]; *Rivas v Danza*, 68 AD3d 743 [2d Dept 2009]). The conclusion of Soundview's expert that the positive lead paint test was too remote in time to establish proximate cause was insufficient to eliminate any issue of fact. The further conclusion of Soundview's expert that the positive lead paint test was unreliable is disputed by, at the very least, the existence of a 2006 HPD violation.

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

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4765 In re Zelda McM.,

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

Patrick L.-O. McM.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent.

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

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Order of fact-finding, Family Court, New York County (Jane Pearl, J.), entered on or about September 12, 2016, which found that respondent father had neglected the subject child, unanimously affirmed, without costs.

The findings of neglect are supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The mother's testimony, which the court credited, was sufficient to establish that the father had committed acts of domestic violence against the mother on at least two occasions, while the child was in close proximity, thereby subjecting the child to actual or imminent danger of physical impairment (*see e.g. Matter of Macin*

D. [Miguel D.], 148 AD3d 572, 573 [1st Dept 2017]; *see* also *Matter of Kelly A. [Ghyslaine G.]*, 95 AD3d 784, 784 [1st Dept 2012]).

Family Court properly drew the "strongest possible negative inference" against the father for his failure to testify (*Matter of Ninoshka M. [Liz R.]*, 125 AD3d 567, 568 [1st Dept 2015]). There are no grounds for disturbing the court's credibility determinations, including the weight to be given to any inconsistencies in testimony, as the court was in the best position to observe and assess the demeanor of the witnesses (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]; *Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). The mother's detailed testimony concerning repeated incidents of domestic violence was corroborated in part by the caseworker's testimony, photographs documenting injuries, and medical records relating to yet another incident of domestic violence.

Based on the mother's testimony that the father was never sober, used drugs every day, and smoked marijuana while caring for the child, the mother established a prima facie showing of neglect based on the father's misuse of drugs (*see* Family Ct Act § 1046[a][iii]; *Matter of Keoni Daquan A. [Brandon W.—April A.]*, 91 AD3d 414 [1st Dept 2012]). To defeat a finding of neglect on

that basis, the father was required to demonstrate that he was voluntarily and regularly participating in a recognized rehabilitative program, which he failed to do (*see id.*). Under these circumstances, petitioner agency was not required to establish the child's impairment or risk of impairment (*Keoni*, 91 AD3d at 415).

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

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4766 & M-4996 Lucila Savinon, Plaintiff-Respondent, Index 114141/08

-against-

New York City Transit Authority, Defendant-Appellant.

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Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for appellant.

Joelson & Rochkind, New York (Geofrey Liu of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 28, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was a passenger on defendant's bus, which was operated by its employee Alvin Hamblin, when a man attempted to board the bus without paying the fare and then assaulted Hamblin. During the altercation, passengers fled to the rear of the bus, yelling for the rear exit door to be opened. Plaintiff, who was in the rear of the bus at the time, suffered a panic attack, which allegedly caused a condition that necessitated implanting a defibrillation device in her chest.

Defendant established entitlement to judgment as a matter of law as to plaintiff's negligence claim by submitting evidence showing that the incident was the result of an emergency situation that was not of Hamblin's own making and that afforded him little or no time to consider an alternate course of action (*see Maisonet v Roman*, 139 AD3d 121, 123-124 [1st Dept 2016], *appeal dismissed* 27 NY3d 1062 [2016]; *Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60-61 [2d Dept 2004]). The record demonstrates that Hamblin reasonably and prudently responded to the emergency by making sure that the bus's emergency brake was activated and pressing the silent alarm to summon the police (*see Villar v MTA Bus Co.*, 80 AD3d 602 [2d Dept 2011]).

In opposition, plaintiff failed to raise a triable issue of fact. She only presented unsubstantiated assertions and speculation that Hamblin may have breached a duty of care by not making sure that the rear exit door was unlocked and that her injuries might have been avoided if he had acquiesced to the assailant's demand that he be permitted to board the bus without paying the fare (*see Mendez v City of New York*, 110 AD3d 421 [1st Dept 2013]; *Brooks v New York City Tr. Auth.*, 19 AD3d 162, 163 [1st Dept 2005]).

Dismissal of the false imprisonment claim is also warranted, since there is no evidence that Hamblin intended to confine

plaintiff (*see Broughton v State of New York*, 37 NY2d 451, 456 [1975], *cert denied* 423 US 929 [1975]).

M-4996 - *Lucila Savinon v New York City Transit Authority*

Motion to strike portions of brief denied.

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4768 The People of the State of New York, Ind. 4560/14
Respondent,

-against-

Michael Curtis,
Defendant-Appellant.

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Law Offices of Patrick J. Jennings, Saratoga Springs (Patrick J. Jennings of counsel), 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 (Arlene D. Goldberg, J.), rendered December 17, 2015, convicting defendant, upon his plea of guilty, of sexual abuse in the first degree and strangulation in the second degree, and sentencing him to an aggregate term of 60 days, concurrent with 10 years' probation, unanimously affirmed.

The court properly exercised its discretion in denying, without a hearing, defendant's motion to withdraw his guilty plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Defendant's written submissions, made while represented by new

counsel, and the record of the plea proceeding were sufficient to establish that defendant's plea was knowing, intelligent and voluntary (*see People v Alexander*, 97 NY2d 482, 485 [2002]).

Defendant's allegations that his prior counsel pressured or coerced him into pleading guilty are unsupported by the record, which reflects that "defendant responded in the negative when asked if anyone threatened him or coerced him into pleading guilty" (*People v Lowrance*, 41 NY2d 303, 304 [1977]). Defendant "did not give the court any reason to believe the allegedly coercive conduct amounted to anything more than frank advice, based on the strength of the People's case and defendant's predicted sentencing exposure, to accept the favorable plea offer" (*People v Chimilio*, 83 AD3d 537, 537 [1st Dept 2011], *lv denied* 17 NY3d 814 [2011]). Defendant also "had sufficient opportunity to weigh the relative merits of the plea offered against the hazards of a trial" (*People v Fiumefreddo*, 82 NY2d 536, 546 [1993]), in that the court gave defendant repeated opportunities to confer with his counsel before he accepted the plea offer, on the eve of trial. In addition, the court properly relied on its firsthand observations that defendant appeared to understand the proceedings (*see Alexander*, 97 NY2d at 486).

The court also properly found that defendant's allegation that his counsel pressured him to plead guilty because counsel

was entirely unprepared to try the case was conclusory and contradicted by defendant's statement in the plea proceeding that he was satisfied with his counsel's assistance. To the extent defendant is raising additional ineffective assistance of counsel claims, they are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record in the absence of a CPL 440.10 motion (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Alternatively, to the extent the 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]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]). Counsel's strong advice to defendant to accept the plea offer did not evince a "breakdown" in the attorney-client relationship.

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4769 The People of the State of New York, Ind. 1916/14
Respondent,

-against-

Craig Mighty,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered July 7, 2015, convicting defendant, upon his plea of guilty, 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: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4771 Heather James, LLC, et al., Index 651226/14
Plaintiffs-Respondents,

-against-

Day & Meyer, Murray & Young Corp.,
Defendant-Appellant.

_____

George W. Wright & Associates, LLC, New York (George W. Wright of counsel), for appellant.

William M. Pinzler, New York, for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered April 5, 2017, which denied defendant's motion to renew its motion for partial summary judgment limiting its liability to the amounts specified in the parties' contracts, unanimously affirmed, without costs.

Defendant's motion to renew is not based on any new law, since this Court's prior decision affirming the denial of summary judgment relied on established precedent (142 AD3d 842, 842-843 [1st Dept 2016], citing former UCC 7-204 [2], now 7-204 [b]; *I.C.C. Metals v Municipal Warehouse Co.*, 50 NY2d 657 [1980]). Nor did defendant offer facts that were unavailable at the time

of the original motion sufficient to grant the renewal motion (CPLR 2221[e][2]; *Reyes v Charles H. Greenthal & Co.*, 24 AD3d 131, 132 [1st Dept 2005]).

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4772 The People of the State of New York, Ind. 3267/99
Respondent,

-against-

Gary Knight,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Neil E. Ross, J.), entered on or about April 14, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's prior felony sex crime conviction

automatically resulted in an override to a risk level three, and there were no mitigating factors that were not adequately taken into account by the risk assessment instrument or outweighed by the seriousness of defendant's criminal history.

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4773 In re Jennifer D.,
Petitioner-Respondent,

-against-

Artise C. J.,
Respondent-Appellant.

_____

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

Law Office of Bruce A. Young, New York (Bruce A. Young of counsel), for respondent.

_____

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about June 8, 2015, which, upon finding that respondent father had willfully violated a court order mandating child support payments, sentenced him to incarceration for a term of six months, and set the purge amount at $5,000, unanimously affirmed, without costs.

The father failed to rebut prima facie evidence of his willful violation of the order of support entered on or about February 25, 2014 (*see* Family Ct Act § 454[3][a]). The father failed to present credible evidence that his alleged medical condition rendered him unable to provide support for the parties' children, or that he was financially unable to pay (*see e.g. Matter of April G. v Duane M.*, 105 AD3d 491 [1st Dept 2013]). The father also failed to provide proof that he diligently sought

gainful employment during the relevant time period (*see Matter of Maria T. v Kwame A.*, 35 AD3d 239, 240 [1st Dept 2006]). Nor did he provide documentation in support of his uncorroborated testimony that he had only recently obtained employment as a sales representative, earning $200/week plus commission. The Support Magistrate found the father's testimony to be not credible, and there is no basis to disturb that determination (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). Evidence of the father's online social media profile reflected travel and other activity that belied his claim that he was without funds to pay support (*see e.g. Matter of Powers v Horner*, 12 AD3d 609, 609 [2d Dept 2004]).

The extent of civil contempt incarceration is broadly within Family Court's discretion, and commitment for up to six months and a purge amount of $5,000 is not excessive under the circumstances (*see e.g. Matter of Columbia County Support*

Collection Unit v Risley, 27 NY3d 758 [2016]).

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

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4774 In re Javar Corp., Index 100275/17
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

_____

A proceeding having been commenced by the above-named petitioner and transferred to this Court by an order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered April 6, 2017,

And said proceeding having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 3, 2017,

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4775 Lotes Co., Ltd., Index 651560/14
Plaintiff-Appellant,

-against-

Hon Hai Precision Industry Co., Ltd.,
Defendant-Respondent.

_____

Vinson & Elkins LLP, New York (Christopher Kao of counsel), for appellant.

Morgan, Lewis & Bockius LLP, New York (Brian A. Herman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about September 13, 2016, which granted defendant's motion for summary judgment dismissing the complaint in its entirety, unanimously affirmed, with costs.

The parties are Taiwanese companies and direct competitors in the production and sale of USB 3.0 connectors for computers and other electronic devices. USB connectors conform to the industry-standard USB specifications developed and maintained by the USB-Implementors Forum (the USB-IF). As a member of the USB-IF, defendant, as relevant here, executed the USB 3.0 Contributors Agreements and the USB 3.0 Adopters Agreement, which contractually obligated defendant to license to plaintiff, also a member, the intellectual property "necessary" to practice the USB

3.0 standard, on a royalty-free basis, and on otherwise reasonable and nondiscriminatory (RAND) terms. Patent licenses for necessary technology are referred to as "Necessary Claims." Defendant has also "unequivocally affirmed" its willingness to license other detailed features of USB connectors to members on RAND terms. Such technology, which falls outside the Necessary Claims category, is referred to as "Optional Claims" or "Non-Necessary Claims." Plaintiff initiated this action, asserting various claims against defendant in connection with its efforts to obtain the licenses.

The court correctly dismissed all of plaintiff's causes of action. With respect to breach of contract, while there is no dispute that defendant was obligated to license to plaintiff the "Necessary Claims," and ultimately did provide that license, the factual record, even in the absence of further discovery, precludes a finding that defendant breached this obligation by wrongfully delaying the grant of such a license to plaintiff. Contrary to plaintiff's claim, the record does not contain numerous requests from plaintiff asking defendant to comply with the license requirement without any qualification or contingency. Rather, it shows that plaintiff consistently requested that defendant provide a draft license, along with other patent claim information, for plaintiff's review, as part of a license

negotiation, and the delay in completing the license negotiation process was not due to defendant's improper conduct.

The court also correctly dismissed the promissory estoppel claim, which is based on defendant's alleged wrongful failure to fulfill unequivocal promises to license to plaintiff its Optional Claims on RAND terms. Defendant never made an enforceable promise to license plaintiff the Optional Claims. While defendant unequivocally affirmed to the USB-IF its willingness to license Optional Claims, that commitment obliged defendant to, at most, negotiate such a license to any USB-IF member who sought it, and it cannot serve as the basis for plaintiff's promissory estoppel claim as alleged here. The record establishes defendant's willingness to negotiate and provide such a license to plaintiff and shows that the plaintiff's failure to obtain the license was not the result of defendant's unwillingness to do so.

The court properly dismissed plaintiff's claim that defendant tortiously interfered with prospective contractual relations by threatening plaintiff's potential customers with patent infringement litigation for using plaintiff's products based on a ruling in the Chinese courts finding that plaintiff had infringed on defendant's patents. Since plaintiff has not

alleged and cannot show that defendant's threats of civil suit were frivolous, it cannot establish the "wrongful means" element (*see Pagliaccio v Holborn Corp.*, 289 AD2d 85 [1st Dept 2001]). Given that, the unjust enrichment claim, based on the purportedly wrongful benefit defendant received from its alleged tortious interference, was also correctly dismissed.

Finally, the court correctly dismissed the claim for breach of the implied covenant of good faith and fair dealing based on defendant's failure to provide a claims list identifying what it considers to be Necessary Claims. The failure to provide such a list did not deprive plaintiff of receiving the benefits under the agreement (*see Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]). Indeed, plaintiff is presently enjoying the benefits of the license. Further, plaintiff cannot use this claim to impose on defendant the obligation of creating a claims list that is not provided for

in the express terms of the USB-IF agreements *(see Vanlex Stores, Inc. v BFP 300 Madison II LLC*, 66 AD3d 580, 581 [1st Dept 2009]; *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268 [1st Dept 2003]).

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4776 The People of the State of New York, Respondent, Ind. 2196/14 3053/15

-against-

Darius Trotman, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alvin Yearwood, J.), rendered June 30, 2016, convicting defendant, upon his plea of guilty, 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: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4777 Jhensy Rodriguez, Index 23534/16E
Plaintiff-Appellant,

-against-

J. Gonzalez Garcia, et al.,
Defendants-Respondents.

_____

The Sullivan Law Firm, New York (James A. Domini of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Christine A. Hilcken of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Donna Mills, J.), entered April 5, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to judgment as a matter of law by submitting an affidavit averring that while she was stopped in traffic, the vehicle operated by defendant Garcia struck her vehicle from behind. In opposition, defendants failed to raise a triable issue of fact, as they did not provide a nonnegligent explanation for the collision (*see Castaneda v DO&CO N.Y. Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]; *Cruz v Lise*, 123 AD3d 514 [1st Dept 2014]; *Dicturel v Dukureh*, 71 AD3d 558, 559 [1st Dept 2010]). Plaintiff's motion was not premature due to the lack of plaintiff's deposition, because the information as

to why defendants' car struck the rear end of plaintiff's car reasonably rests within defendant driver's own knowledge (*see* *Castaneda* at 407; *Johnson v Phillips*, 261 AD2d 269, 272 [1st Dept 1999]).

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4778 Kenneth Vaughan, etc., Index 653918/15
Plaintiff-Appellant,

-against-

Standard General L.P., et al.,
Defendants-Respondents.

Harwood Feffer LLP, New York (Daniella Quitt of counsel), for appellant.

Debevoise & Plimpton LLP, New York (Shannon Rose Selden of counsel), for respondents.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 30, 2016, which granted defendants' motion to dismiss the complaint without leave to amend, unanimously affirmed, with costs.

Plaintiff, formerly a shareholder of nonparty American Apparel, Inc., alleges that defendants, together the largest creditor of American Apparel at the time of its bankruptcy in October 2015, exercised de facto control over the corporation, which they used to prevent it from accepting an advantageous acquisition offer, to the detriment of equity holders. Defendants recovered in full on their claims in bankruptcy. The motion court correctly dismissed the complaint for lack of standing and failure to state a cause of action.

Plaintiff's claims are based on the board of directors'

alleged failure to pursue in good faith an acquisition offer. Because the alleged injury – a lost opportunity to realize a premium on the share price – affects all shareholders, not only plaintiff and the putative class, these claims are derivative, rather than direct (*see Feldman v Cutaia*, 951 A2d 727, 732 [Del 2008]; *see also In re Paxson Communication Corp. Shareholders Litig.*, 2001 WL 812028, *6, 2001 Del Ch LEXIS 95, *20-21 [Del Ch, July 12, 2001] ; *Thermopylae Capital Partners, L.P. v Simbol, Inc.*, 2016 WL 368170, *10, 2016 Del Ch LEXIS 15, *31 [Del Ch, Jan. 29, 2016]). Plaintiff's claims are also derivative insofar as they are based on allegations that defendants controlled the board and permitted the corporation to assume approximately $77 million in debt, which defendants later recovered in the bankruptcy proceeding (*see Agostino v Hicks*, 845 A2d 1110 [Del Ch 2004]; *see also Caspian Select Credit Master Fund Ltd. v Gohl*, 2015 WL 5718592, *3, 2015 Del Ch LEXIS 246, *9 [Del Ch, Sept. 28, 2015]).

Plaintiff cannot maintain these derivative claims for three reasons. First, the claims were released in the bankruptcy plan, which was confirmed by the bankruptcy court and has preclusive effect here (*see Agostino v Hicks*, 845 A2d at 1126-1127). Second, plaintiff does not allege either that he made a demand on the board to pursue the claims or that demand was futile (*see id.*

at 1116-1117; Court of Chancery Rule 23.1). Third, plaintiff does not dispute that he is no longer a shareholder (*see Feldman v Cutaia*, 951 A2d at 731).

The complaint fails to state a cause of action for breach of fiduciary duty, because the allegations do not demonstrate that defendants, which did not own or beneficially control a majority interest in the corporation, exercised actual control over the corporation's business affairs (*see Kahn v Lynch Communication Sys., Inc.*, 638 A2d 1110, 1113-1114 [Del 1994]; *see also In re PNB Holding Co. Shareholders Litig.*, 2006 WL 2403999, *9, 2006 Del Ch LEXIS 158, *30 [Del Ch, Aug. 18, 2006]). While plaintiff sufficiently alleged that two of the nine directors were interested, he failed to show a lack of independence on the part of a majority of the directors (*see Odyssey Partners, L.P. v Fleming Cos., Inc.*, 735 A2d 386, 407 [Del Ch 1999]).

The complaint fails to state a cause of action for unjust enrichment, because the allegations do not demonstrate that

defendants' recovery in the bankruptcy was without justification (*see Nemec v Shrader*, 991 A2d 1120, 1130 [Del 2010]).

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

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4779 The People of the State of New York, Respondent, Ind. 1405/03

-against-

Albert Greene, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Rachel L. Pecker of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Powers of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), entered on or about June 11, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's point assessment for defendant's history of substance abuse was supported by clear and convincing evidence, including defendant's multiple prior drug convictions (*see People v Wilkens*, 33 AD3d 399 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]) and his infraction for drug use while incarcerated. The drug related convictions were not remote in time, given defendant's intervening incarceration (*People v Gonzalez*, 48 AD3d 284 [1st Dept 2008], *lv denied* 10 NY3d 711 [2008]).

We find it unnecessary to reach defendant's remaining claim, upon which the court did not rule, and which would not affect the level three designation.

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

ENTERED: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4780 Kristin Breen, Index 155244/15
Plaintiff-Appellant,

-against-

330 East 50th Partners, L.P.,
et al.,
Defendants-Respondents.

_____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellant.

Kucker & Bruh, LLP, New York (Patrick K. Munson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 14, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion for partial summary judgment dismissing the causes of action for declaratory relief, injunctive relief, and rent overcharge, unanimously modified, on the law, to declare that the subject apartment is not rent-stabilized, and otherwise affirmed, without costs.

The motion court correctly dismissed the rent overcharge claim, as plaintiff did not meet her burden of coming forward with any indicia of fraud to warrant looking beyond the limitations period for an improper increase in rent (*see Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]; *Matter of Boyd v New York*

State Div. of Hous. & Community Renewal, 23 NY3d 999 [2014]). Neither the sizeable increase in the apartment rent between 1990 and 1991, based in part on apartment improvements, nor plaintiff's mere skepticism about the quality or extent of those improvements, were sufficient to establish a colorable claim of fraud (*Grimm*, 15 NY3d at 367; *Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 104 [1st Dept 2017]).

The motion correctly determined that plaintiff's apartment is not rent-stabilized and that she is not entitled to a rent-stabilized lease. Even if the 1990 to 1991 rent increases for improvements were disregarded, and only renewal and vacancy increases applied, defendants demonstrated that the rent would have reached the deregulation threshold by the time plaintiff leased the apartment (*see Matter of 18 St. Marks Place Trident LLC v State of New York Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 149 AD3d 574, 575 [1st Dept 2017]).

We modify only to issue a declaration in favor of defendants

(*see A1 Entertainment LLC v 27th St. Prop. LLC*, 60 AD3d 516, 516 [1st Dept 2009]).

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: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4781 The People of the State of New York, Ind. 633/15
Respondent,

-against-

Hamuja Hydara,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Anokhi A. Shah of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Powers 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 (Denis J. Boyle, J.), rendered January 14, 2016,

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: OCTOBER 24, 2017

CLERK

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

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4782 The People of the State of New York, Respondent, Ind. 3292/14

-against-

Solome Vega, 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 (Charles Solomon, J.), rendered May 5, 2015, 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: OCTOBER 24, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4783N Robert Moskowitz, etc., Index 155593/14
Plaintiff-Respondent,

-against-

Eileen Hickey,
Defendant-Appellant,

Jane Doe, et al.,
Defendants.

_____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellant.

Peluso & Touger, LLP, New York (Carl T. Peluso of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about September 1, 2016, which, inter alia, granted plaintiff's motion to strike the answer of defendant Eileen Hickey, unanimously affirmed, without costs.

The motion court providently exercised its discretion in striking Hickey's answer on account of her failure to comply with three successive court orders directing her to respond to plaintiff's discovery demands (*see Loeb v Assara N.Y. I L.P.*, 118 AD3d 457 [1st Dept 2014]; *Oasis Sportswear, Inc. v Rego*, 95 AD3d 592 [1st Dept 2012]). In response to plaintiff's showing that Hickey's conduct was willful and contumacious, Hickey failed to

tender any reasonable excuse for her repeated noncompliance (*see Menkes v Delikat*, 148 AD3d 442 [1st Dept 2017]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4784 The People of the State of New York, Respondent, Ind. 3453/12

-against-

Anonymous,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered July 22, 2015, convicting defendant, after a nonjury trial, of murder in the second degree, and sentencing him to a term of 17 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's rejection, after considering conflicting expert testimony, of defendant's insanity defense and his claim that he lacked the intent to kill. Defendant's homicidal intent could be reasonably inferred from his conduct and the surrounding circumstances, including defendant's infliction of numerous stab wounds to the victim's torso in the vicinity of vital organs, two of which pierced the victim's

heart and one his left lung (*see e.g. People v Pusepa*, 135 AD3d 559 [1st Dept 2016], *lv denied* 27 NY3d 1004 [2016]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4785 Jessica Lausell, Index 309846/10
Plaintiff-Appellant,

-against-

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

_____

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered July 20, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants sustained their initial burden through the testimony and affidavit of the building manager, plaintiff, the assistant principal, and plaintiff's daughter, as well as with the log book entries, which demonstrated that there was a path that was cleared of snow and ice at the crosswalk and on the sidewalk in front of the Marion Avenue entrance to the building; and that the building manager had inspected the area where plaintiff fell 80 minutes before her accident and it was free of snow and ice *(see Herrera v E 103rd St & Lexington Ave Realty*

Corp., 95 AD3d 463 [1st Dept 2012]).

The court properly found that plaintiff failed to raise a triable issue of fact concerning defendants' notice of the hazardous condition and as to defendants' negligence *(see McKenzie v City of New York*, 116 AD3d 526, 527 [1st Dept 2014]). Even if plaintiff's testimony that she did not climb over a mound of snow to access the sidewalk on Webster Avenue was accepted, despite the contrary testimony by the assistant principal and plaintiff's daughter, it was undisputed that plaintiff nevertheless elected to cross the street mid-block, wearing sneakers, and ignored the clear crosswalk and path on Marion Avenue *(see Zayas v New York City Hous Auth*, 115 AD3d 485 [1st Dept 2014]).

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4786 In re Jaden T.,

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 (Ingrid Gustafson of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 19, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that appellant committed an act that, if committed by an adult, would constitute the crimes of assault in the second degree (two counts) and criminal possession of a weapon in the fourth degree (two counts), and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding 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 court's credibility determinations and its conclusion that appellant took part in an attack on the victim.

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4787 Harvest 12708 Riata, LLC, Index 650931/16
Plaintiff-Appellant,

-against-

Wells Fargo Bank, N.A., etc., et al.,
Defendants-Respondents.

_____

Lazer, Aptheker, Rosella & Yedid, P.C., Melville (Giuseppe Franzella of counsel), for appellant.

Alston & Bird LLP, New York (John P. Doherty of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 1, 2016, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The loan provision requiring plaintiff borrower to deposit and maintain a certain balance in a reserve rollover account is unambiguous in setting a minimum balance (*see Greenfield v Philles Records*, 98 AD2d 562, 569-570 [2002]). Plaintiff was

thus barred from invading that minimum balance for disbursements for replacement tenant improvements and broker commissions when an anchor tenant's lease terminated and was not renewed.

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4788- Index 23243/12E
4789 Andrew Zlotnick,
Plaintiff-Appellant,

-against-

New York Yankees Partnership, et al.,
Defendants-Respondents.

_____

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

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about February 1, 2016, dismissing the complaint pursuant to an order, same court and Justice, entered on or about December 23, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff was injured when, while attending a Yankees baseball game, he was struck in the eye by a foul ball as he was sitting in his assigned seat halfway down the first-base line, a few rows from the field. Defendants did not breach a duty of care, since the evidence shows that appropriate netting was

erected behind home plate, and there was no evidence indicating that there was a lack of available seating in such protected area (*see Atkins v Glens Falls City School Dist.*, 53 NY2d 325, 331 [1981]; *see also Davidoff v Metropolitan Baseball Club*, 61 NY2d 996 [1984]).

Plaintiff's argument that triable issues of fact exist because defendants' conduct enhanced the risks normally attendant to the game of baseball by allowing the game to be played in intermittent rainy weather, and by not enforcing the stadium's umbrella policy by ensuring that spectators using umbrellas did not obstruct the ability of other patrons to view the game, is unavailing. Rainy weather and umbrellas are not uncommon to the game of baseball, and plaintiff admittedly used his own umbrella during the course of the game before being struck by the foul ball. The circumstances presented warranted plaintiff heeding the warnings on the back of his ticket, and on the back of the seats, as well as those regularly made over the public address system, to request a change of seating if necessary, and to advise a stadium employee of any particularized concerns a patron

may encounter during the course of watching the game.

We have considered and rejected plaintiff's remaining arguments.

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4790 The People of the State of New York, Ind. 4201/15
Respondent,

-against-

Melvin Fantauzzi,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 J. Obus, J. at plea; Laura Ward, J. at sentencing), rendered December 28, 2015,

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: OCTOBER 24, 2017

CLERK

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

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4792 The People of the State of New York, Respondent, Ind. 2056/15 2213/15

-against-

Kim James, Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered March 22, 2016,

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: OCTOBER 24, 2017

CLERK

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

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4793 Lazaro Joel Montas, Index 305620/10
Plaintiff-Appellant,

-against-

Sally H. Abouel-Ela,
Defendant-Respondent.

_____

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for appellant.

Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered April 26, 2016, upon a jury verdict in favor of defendant, unanimously affirmed, without costs.

Plaintiff has not demonstrated conduct by defendant's counsel that would warrant reversal. Defendant's counsel was properly permitted to cross-examine plaintiff's expert rebuttal witness about the circumstances surrounding his suspension from chiropractic school for falsely reporting that he had seen patients, a matter relevant to his credibility (*see generally Badr v Hogan*, 75 NY2d 629, 634 [1990]; *Spanier v New York City Tr. Auth.*, 222 AD2d 219, 220 [1st Dept 1995]). Although the conduct was 30 years ago, the witness opened the door to its relevancy by claiming that his expert knowledge of biomechanics came, in part, from his training as a chiropractor. Counsel's

comments about the plaintiff's expert in summations were within the broad bounds of rhetorical comment (*see Selzer v New York City Tr. Auth.*, 100 AD3d 157, 163 [1st Dept 2012]).

In any event, the purportedly offensive comments did not "create a climate of hostility that so obscured the issues as to have made the trial unfair" (*Wilson v City of New York*, 65 AD3d 906, 908 [1st Dept 2009]; *cf. O'Neil v Klass*, 36 AD3d 677 [2d Dept 2007]).

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: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4794-
4795-
4795A In re Unique M. and Others,

Dependent Children Under the Age
of Eighteen Years, etc.,

Veronica A.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

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Orders of fact-finding and disposition (one for each child), Family Court, New York County (Douglas E. Hoffman, J.), entered on or about May 6, 2016, which, to the extent appealed from as limited by the briefs, after a hearing, determined that respondent mother had permanently neglected the subject children, terminated her parental rights and committed custody and guardianship of the children to the Commissioner of the Administration for Children's Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

The determination that the children were permanently neglected by the mother is supported by clear and convincing

evidence (*see* Social Services Law § 384-b[3][g][i]; [7][a]). The agency engaged in diligent efforts to encourage and strengthen the mother's relationship with the children by developing an individualized plan tailored to fit her situation and needs, including multiple referrals for domestic violence counseling, individual counseling, visitation and housing (*see e.g. Matter of Adam Mike M. [Jeffrey M.]*, 104 AD3d 572, 573 [1st Dept 2013]; *Matter of Irene C. [Reina M.]*, 68 AD3d 416 [1st Dept 2009]). Despite these diligent efforts, the mother continued to deny responsibility for and failed to gain insight into the conditions that led to the children's removal (*see id.*).

A preponderance of the evidence supports the determination that terminating the mother's parental rights is in the best interests of the children (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the children are in stable and loving foster homes, where their special needs are being met and their respective foster mothers want to adopt them

(*see Matter of Jayvon Nathaniel L. [Natasha A.]*, 70 AD3d 580 [1st Dept 2010]). The circumstances presented do not warrant a suspended judgment.

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4798 The People of the State of New York, Ind. 2241N/13
Respondent,

-against-

Marvin Johnson,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Neil E. Ross, J.), rendered February 1, 2016,

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: OCTOBER 24, 2017

CLERK

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

Gische, J.P., Kapnick, Gesmer, Kern, JJ.

4799 Donnell Murray, Index 309848/11
Plaintiff-Appellant,

-against-

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

_____

John R. DePaola & Associates, PLLC, Bayside (Michael E. Soffer of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Meryl Holt of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 13, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the state law claim for malicious prosecution against the City of New York and the individual defendants and the federal claims pursuant to 42 USC § 1983 for false arrest, false imprisonment, malicious prosecution, excessive force, and illegal search and seizure against the individual defendants, unanimously reversed, on the law, without costs, and the motion denied.

The parties' differing versions of the events leading up to plaintiff's arrest, including whether plaintiff produced a driver's license and registration, present a triable issue of fact whether the individual defendants had probable cause to

arrest him (*see Mendez v City of New York*, 137 AD3d 468, 471 [1st Dept 2016]) and to impound and search his car (*see People v Francis*, 12 Misc 3d 781, 785 [Sup Ct, New York County 2006]). The motion court erred in relying on the DMV records submitted by defendants showing that plaintiff's license was suspended, because the officers did not know at the time of the arrest that plaintiff's license was suspended (*see Smith v County of Nassau*, 34 NY2d 18, 24 [1974]; *Cheeks v City of New York*, 123 AD3d 532, 545 [1st Dept 2014]).

As to the malicious prosecution claims, the triable issues of fact as to probable cause for the initial arrest and search, viewed in conjunction with plaintiff's claim that an officer planted the gun in the car and the record evidence of possible retaliation against him by members of the precinct, present issues of fact as to probable cause to bring the weapon possession charge and actual malice (*see Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied sub nom Schanbarger v Kellogg*, 423 US 929 [1975]). We reject defendants' contention that the gun, even if obtained pursuant to an illegal search, may be used to establish probable cause for the criminal prosecution

(*see Ostrover v City of New York*, 192 AD2d 115, 118 [1st Dept 1993]; *cf. Townes v City of New York*, 176 F3d 138, 148 [2d Cir 1999], *cert denied* 528 US 964 [1999]).

To the extent plaintiff asserts claims of assault and battery under 42 USC § 1983, these claims are best understood as a federal claim of excessive force. Plaintiff's testimony that, as a result of the way he was placed into the police car, he sustained a shoulder injury, necessitating a visit to the emergency room after his release, raises an issue of fact whether the officers used unreasonable force under the circumstances (*see Jones v Parmley*, 465 F3d 46, 61 [2d Cir 2006]; *Lynch v City of Mount Vernon*, 567 F Supp 2d 459, 467 [SD NY 2008]).

Defendants contend that the officers are entitled to qualified immunity with respect to the federal claims. However, in view of the factual disputes as to whether the officers had probable cause to arrest plaintiff and impound the car and plaintiff's allegations that the officers in the 47th Precinct

had been engaging in a pattern of harassment against him for years and had planted the gun in the car, questions exist as to whether the officers knowingly violated the law (*see Munafo v Metropolitan Transp. Auth.*, 285 F3d 201, 210 [2d Cir 2002]).

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4801 Lev Shekhtman, etc., Index 108004/09
Plaintiff-Appellant,

-against-

Alla Savransky, M.D.,
Defendant-Respondent,

Alexander Shvarts, M.D., et al.,
Defendants.

_____

Mark M. Basichas & Associates, P.C., New York (Aleksey Feygin of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Katherine Herr Solomon of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered October 26, 2015, dismissing the complaint, and bringing up for review an order, same court and Justice, entered September 18, 2015, which, after a jury verdict against defendant Alla Savransky, M.D. in plaintiff's favor, granted Dr. Savransky's motion for judgment notwithstanding the verdict, unanimously affirmed, without costs.

Plaintiff's decedent, Marina Marmur, while a patient of internist Dr. Savransky, was seen by gastroenterologist Dr. Alexander Shvarts, who conducted a colonoscopy and thereafter an endoscopy of Marmur. Upon observing polyps and other changes, Dr. Shvarts sent Marmur to Dr. Harry Snady, an interventionist

radiologist, for a further upper endoscopy with internal ultrasound. All tests and biopsies came back negative for cancer, and Marmur was diagnosed with a hiatal hernia, reflux esophagitis, Menetrier's disease, and H. pylori gastritis. From May of 2007 through October 2007, Dr. Savransky treated Marmur in accordance with the gastroenterologist's plan, prescribing acid reducers and antibiotics. Marmur's gastrointestinal symptomology initially lessened, but then increased, and Dr. Savransky referred her for further testing in October of 2007, which ultimately led to a diagnosis of stage IV gastric cancer.

"Liability is not supported by an expert offering only conclusory assertions and mere speculation that the condition could have been discovered and successfully treated had the doctors not deviated from the accepted standard of medical practice" (*Curry v Dr. Elena Vezza Physician, P.C.*, 106 AD3d 413 [1st Dept 2013], citing *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]; *Bullard v St. Barnabas Hosp.*, 27 AD3d 206 [1st Dept 2006]). As such, plaintiff did not submit legally sufficient evidence in support of his claim of malpractice. Plaintiff's experts testified that Marmur should have been referred for "further" testing, but failed to specify what test, at what time, would have revealed her cancer, which was of a type all experts agreed was aggressive and difficult to diagnose. The

expert's testimony was conclusory, particularly in the face of the fact that Marmur was already seen by a gastroenterologist, whose testing failed to detect cancer. Moreover, plaintiff's experts failed to specify when Marmur's cancer would have been diagnosable, yet still treatable, making their opinions pure speculation insufficient to support the jury's finding of causation (*see Rodriguez, supra; Curry, supra*).

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

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4802 The People of the State of New York, Respondent, Ind. 2506/10 5051/10

-against-

Richard Figueroa, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Bonnie Wittner, J.), entered on or about April 11, 2016, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The level three adjudication was appropriate, and there is no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument

or were outweighed by the aggravating factors. Defendant's course of sexual conduct against a very young child, and his involvement with child pornography, support the conclusion that he poses a threat to re-offend children.

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4803 The People of the State of New York, Respondent, Ind. 1114/10

-against-

Manuel Rodriguez, Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered April 26, 2012, convicting defendant, after a jury trial, of grand larceny in the third degree, and sentencing him to a term of 1⅓ to 4 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]). The charge arises out of a stolen check, the proceeds of which were deposited into defendant's newly-opened account by an unidentified man (undisputedly not defendant himself) using defendant's debit card and PIN number, and later withdrawn by defendant.

A person is guilty of grand larceny in the third degree when he "steals" "property" the value of which exceeds three thousand dollars (Penal Law § 155.35[1]). "Steal[ing]" is defined as

"wrongfully tak[ing], obtain[ing], or withhold[ing]" property from its "owner" "with intent to deprive another of [the] property or to appropriate the same to himself" (Penal Law § 155.05[1]).

The "taking" element was satisfied by proof that defendant "exercised dominion and control" over the proceeds of the check "in a manner wholly inconsistent with the owner's continued rights" (*People v Hardy*, 26 NY3d 245, 250 [2015]) by withdrawing the money from his account for his personal use. Defendant essentially concedes that he exercised dominion and control over the *money*, but claims that there is nothing linking him to the *check*. Even if this were this true, it would not undermine the conviction because the larceny charge was not based on the theft of the check (i.e., that piece of paper), but of the proceeds thereof (*see Matter of Aldridge v Kelly*, 157 AD2d 716, 717-18 [2d Dept 1990], *lv denied* 75 NY2d 706 [1990]).

In any event, there was ample circumstantial evidence from which the jury could have reasonably inferred that defendant participated in a scheme, with at least one other person, to steal the check, deposit it, and withdraw its proceeds (*see People v Spiegel*, 48 NY2d 647, 648-49 [1979]; *People v Forde*, 152 AD3d 442, 443 [1st Dept 2017]). This includes the quick succession of defendant opening the account, the unidentified man

depositing the check, and defendant withdrawing check proceeds, all within a three-day period; the fact that the man who deposited the check had defendant's debit card and PIN number; and the suspicious nature of defendant's three withdrawals, made over the course of four hours, at three different branch locations, in two boroughs, and in amounts apparently designed to avoid the bank's reporting and approval requirements (*see People v Shabazz*, 226 AD2d 290, 291 [1st Dept 1996], *lv denied* 88 NY2d 994 [1996]). The sequence of events makes no sense unless defendant and the unidentified man were acting in concert. This evidence also supported an inference of larcenous intent (*see People v Rodriguez*, 17 NY3d 486, 489 [2011]).

Defendant's contention that he did not steal from the "owner" of the property because he withdrew the money from his own account is similarly unavailing. An "[o]wner" is "any person who has a right to possession [of the property] superior to that

of the taker, obtainer or withholder" (Penal Law § 155.00[5]). Here, it is clear that the company that issued the check had a superior right to possession of the money (*see People v Bonneau*, 94 AD3d 1158, 1159 [3d Dept 2012], *lv denied* 20 NY3d 985 [2012]).

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4804-
4804A The People of the State of New York,
Respondent,

-against-

Jermaine Haywood,
Defendant-Appellant.

Ind. 2605/13
5223/14

_____

Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

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Judgments, Supreme Court, New York County (Abraham L. Clott, J.), rendered September 18, 2015, 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: OCTOBER 24, 2017

CLERK

Renwick, J.P., Richter, Kern, Moulton, JJ.

4805N Walter Melvin, Index 302247/15
Plaintiff-Respondent,

-against-

Sarah Melvin,
Defendant-Appellant.

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Warner Partners, P.C., New York (Kenneth E. Warner of counsel), for appellant.

Warshaw Burstein, LLP, New York (Eric I. Wrubel of counsel), for respondent.

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Order, Supreme Court, New York County (Michael L. Katz, J.), entered May 8, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff husband's cross motion for an order declaring defendant wife judicially estopped from claiming that charitable contributions reported on the parties' joint income tax returns from 2011 through 2015 constituted marital waste, unanimously affirmed, without costs.

The wife argues that charitable contributions totaling approximately $1.5 million, reflected on the parties' joint tax returns from 2011 through 2015, were made without her consent. However, she does not deny that she signed the tax returns under penalty of perjury, that the charity receiving the contributions was a bona fide nonprofit organization, and that the marital estate received a benefit from the contributions in the form of

tax deductions. Although the wife claims that the husband only sent her the signature page of the tax returns, so that she was unaware of their contents, she had unfettered access to the complete returns from the parties' accountant. In any event, by signing the tax returns, she is presumed to have read and understood their contents (*see Vulcan Power Co. v Munson*, 89 AD3d 494 [1st Dept 2011], *lv denied* 19 NY3d 807 [2012]; *see also Da Silva v Musso*, 53 NY2d 543, 550-551 [1981]). Significantly, the wife does not argue that the husband received a financial gain from the donations, only that they were inherently wasteful in their excess.

Under these circumstances, the motion court properly granted the husband's cross motion to preclude the wife from claiming the charitable contributions as marital waste. "A party to litigation may not take a position contrary to a position taken in an income tax return" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]). By signing the joint tax return, the wife represented that the charitable contributions were made in both parties' names as a married couple. Thus, she is judicially estopped from now claiming that the donations were, in fact, made without her consent (*see id.*).

Contrary to the wife's contentions, any procedural error was harmless. The husband clearly sought to limit the scope of

issues to be tried in the procedural equivalent of a motion for partial summary judgment, and, to that end, the parties submitted substantive motion papers, including sworn affidavits and documentary evidence, sufficient for the motion court to make that determination.

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

ENTERED: OCTOBER 24, 2017

CLERK

Renwick, J.P., Mazzarelli, Oing, Singh, JJ.

4875 Paul G. Mederos, etc., Index 800324/11
Plaintiff-Respondent,

-against-

New York City Health and
Hospitals Corporation,
Defendant-Appellant.

_____

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for appellant.

Law Offices of David B. Golomb, New York (David B. Golomb of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered January 18, 2017, which denied defendant's motion to dismiss the action on the ground that plaintiff did not serve a timely notice of claim, unanimously affirmed, without costs.

Supreme Court correctly found that the CPLR 208 toll did not terminate upon the appointment of the article 81 guardian (*see Henry v City of New York*, 94 NY2d 275 [1999]; *Giannicos v Bellevue Hosp. Med. Ctr.*, 42 AD3d 379 [1st Dept 2007]; *Costello v North Shore Univ. Hosp. Ctr. for Extended Care & Rehabilitation*, 273 AD2d 190 [2d Dept 2000]). The 90-day period to serve the

notice of claim was not extended by the CPLR 208 toll (*see Yessenia D. v New York City Health & Hosps. Corp.*, 139 AD3d 454 [1st Dept 2016]). However the 90-day period was tolled in this case by the continuous treatment doctrine.

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

ENTERED: OCTOBER 24, 2017

CLERK