SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 31, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11136 Danielle Gervais, Index 111537/10
Plaintiff-Respondent,

-against-

Maresa Laino,
Defendant-Appellant.

Wrobel Schatz & Fox LLP, New York (Katherine Sherman of counsel), for appellant.

Rosenbaum & Rosenbaum, P.C., New York (Matthew T. Gammons of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 23, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

In this action for injuries suffered by plaintiff when she was allegedly scratched or bitten in the face by defendant's dog, plaintiff stated that she was walking in Central Park when she saw defendant's dog, whose hind paw was caught in a fence, wailing in pain. Plaintiff claims that she was leaning over the dog and deciding what to do, when the dog lunged at her and

scratched or bit her face. However, both the hospital records and police report state that plaintiff was attempting to free the dog. Defendant dog owner, who was present and rushing over to her dog, states that plaintiff, wrapped her arms around the dog's head and neck. In support of the motion for summary judgment, defendant submitted evidence of her dog's gentle disposition and her lack of knowledge of any vicious propensities, including four affidavits from neighbors and other dog owners who know defendant's dog, as well as test results indicating that the dog was awarded the American Kennel Club's Good Citizen certification. The latter demonstrates that defendant's dog is cooperative, and does not have a history of attacking, or injuring people.

In opposition, plaintiff submitted deposition testimony from defendant's neighbor who stated that, prior to this incident, the neighbor's two dogs and defendant's dog, had a history of growling at each other and had been involved in two scuffles, one where one of the neighbor's dogs bit defendant's dog and one or possibly two where defendant's dog was the aggressor but she retreated when the neighbor reprimanded her. The neighbor further testified that she complained to defendant about her dog's behavior, but acknowledged that defendant's dog was not aggressive toward her and had never bitten or hurt her dogs.

In order to establish liability, there must be some evidence that the dog demonstrated vicious propensities prior to the incident (*Collier v Zambito,* 1 NY3d 444, 446-447 [2004]). The only case with facts at all comparable to those here is *Rosenbaum v Rauer,* 80 AD3d 686 [2nd Dept 2011], in which the plaintiff was also injured when trying to assist a dog who was caught in a fence. In *Rosenbaum*, however, there was evidence that the defendants' dog "had frequently . . . growled, shown its teeth, and snapped at the plaintiffs" (*Rosenbaum*, 80 AD3d at 686). Accordingly, the Second Department found that there was a triable issue of fact as to the animal's vicious propensities when it bit the injured plaintiff.

No court has found that a dog's growling at one or two other dogs is sufficient to establish vicious propensities, and the Third Department has specifically held that growling and baring of teeth, even at people, is insufficient to give notice of a dog's vicious propensities (*see Brooks v Parshall,* 25 AD3d 853 [3d Dept 2006]). Here, the evidence, which establishes only that defendant's dog growled at two other dogs, one of whom had bitten

her, and never growled or bared her teeth at any people, is insufficient to raise an issue of fact as to the dog's vicious propensities. Accordingly, defendant is entitled to summary judgment dismissing the complaint.

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

ENTERED: DECEMBER 31, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10165 Pavonix, Inc., (formerly known as Softscape, Inc.), et al.,
Plaintiffs-Appellants-Respondents,

-against-

Vista Equity Partners, LLC, et al.,
Defendants-Respondents-Appellants.

Index 651182/11

Cross appeals having been taken to this Court by the above-named parties from orders of the Supreme Court, New York County (Charles Edward Ramos, J.), entered on or about March 29, 2012,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 2, 2013,

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

ENTERED: DECEMBER 31, 2013

CLERK

Mazzarelli, J.P., Friedman, Renwick, Freedman, JJ.

6434 409-411 Sixth Street LLC, Index 570068/09
Petitioner-Respondent,

-against-

Masako Mogi,
Respondent-Appellant.

_____

De Castro Law Firm, New York (Steven De Castro of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Joseph Burden of counsel), for respondent.

_____

Upon remittitur from the Court of Appeals (__ NY3d __, 2013 NY Slip Op 06604 [October 10, 2013]), the order of the Appellate Term of the Supreme Court, First Department, entered March 29, 2010, which affirmed a final judgment of the Civil Court, New York County (Jean T. Schneider, J.), entered on or about August 8, 2008, awarding possession to the petitioner-landlord in a holdover summary proceeding, is unanimously affirmed, without costs.

Landlord 409–411 Sixth Street, LLC commenced a holdover proceeding to evict tenant Masako Mogi from her rent-stabilized apartment in New York City on the ground that she was not using the apartment as her primary residence as required by the Rent Stabilization Code (9 NYCRR 2524.4[c]). After a nonjury trial, Civil Court found in landlord's favor, determining that tenant

had not used the apartment as her primary residence. The Appellate Term affirmed the judgment, concluding that a fair interpretation of the evidence supported the Civil Court's determination. In a 3–2 decision, this Court reversed the Appellate Term order, denied the holdover petition, and dismissed the proceeding.

Subsequently, the Court of Appeals reversed, finding that we applied the incorrect standard of review. Specifically, the Court held that in primary residence cases, where the Appellate Division acts as the second appellate court, "'the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses,'" *(409-411 Sixth Street, LLC v Masako Mogi*, __ NY3d __, 2013 NY Slip Op 06604, **2, citing *Claridge Gardens v Menotti*, 160 AD2d 544, 544–545 [1st Dept 1990]).

Applying this standard, we find that competent evidence in the record supports the trial court's conclusion that the tenant actually resided in a house in Vermont from 2004 to 2006, and that she had not used her New York apartment as her primary residence during that same time. The tenant's attempt to explain

away this fact merely raises questions of fact and credibility for the trial court (*see Menotti*, 160 AD2d at 544; *542 E. 14th St. LLC v Lee*, 66 AD3d 18, 22 [1st Dept 2009]).

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

ENTERED: DECEMBER 31, 2013

CLERK

Friedman, J.P., Freedman, Richter, Feinman, Gische, JJ.

10550-
10551 The People of the State of New York,
Appellant,

-against-

Thomas Bond also known as Thomas Barnes also known as Ali Achmed,
Defendant-Respondent.

Ind. 4505/07

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Elon Harpaz of counsel), for respondent.

Judgment of resentence, Supreme Court, Bronx County (Richard Lee Price, J.), rendered October 12, 2012, resentencing defendant, as a second violent felony offender, to a term of seven years, and bringing up for review an order of the same court and Justice, entered on or about September 14, 2012, which granted defendant's CPL 440.20 motion to set aside his sentence as a persistent violent felony offender and directed that he be resentenced as a second violent felony offender, unanimously reversed, on the law, the judgment of resentence vacated, and the matter remanded for resentencing consistent with *People v Boyer* (__ NY3d __, 2013 NY Slip Op 07515 [2013]).

In view of the Court of Appeals' recent decision in *Boyer*, defendant was not entitled to relief under CPL 440.20 from his

original sentencing as a persistent violent felony offender. Accordingly, we vacate the judgment of resentence and remand for resentencing in accordance with the rule stated in *Boyer*.

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

ENTERED: DECEMBER 31, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10981 Ray Nelson, Index 303817/09
Plaintiff-Appellant,

-against-

Tamara Taxi Inc., et al.,
Defendants-Respondents.

Sacco & Fillas, LLP, Astoria (Andrew Wiese of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered April 20, 2012, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Ray Nelson alleges that he sustained serious injuries when the front of his vehicle was struck by a taxicab owned by defendant Tamara Taxi, Inc. and operated by defendant Ahmed M. Ahmed, while Ahmed was making a left turn at the intersection of West 82nd Street and Central Park West. The impact of the collision was substantial enough to cause the cab's front end to be pushed in, and damage to plaintiff's car, including a broken axle, sufficient for the insurance company to

assess it as a total loss. Plaintiff asserts that the collision caused him to sustain serious injury to his spine, left shoulder, and left knee.

Defendants failed to establish the absence of serious injury entitling them to summary judgment dismissing the complaint.

Although plaintiff's shoulder injury was his second injury of a similar type, he properly asserted it under an aggravation or exacerbation theory, and, moreover, made a showing that the prior injury was less severe and that it had fully resolved before the accident (*see Henry v Peguero*, 72 AD3d 600, 608 [1st Dept 2010], *appeal dismissed* 15 NY3d 820 [2010]). His physician concluded that the aggravation of the shoulder injuries was caused by the accident. While treatment for this shoulder injury was begun solely with physical therapy, his physician thereafter determined that arthroscopic surgery was necessary, and performed a subacromial decompression, extensive bursectomy and acromioplasty, continuing with physical therapy thereafter until the termination of plaintiff's no-fault benefits. Despite the assertion of defendants' expert that the surgery was a minor procedure that does not reflect a permanent orthopedic impairment, it has been found that this type of injury, warranting this type of surgery, may constitute serious injury (*see Morris v Cisse*, 58 AD3d 455, 456 [1st Dept 2009]).

Moreover, three years post-surgery, plaintiff continued to experience pain and restrictions in his range of motion and his ability to lift and carry.

As to the claimed injury to plaintiff's spine, plaintiff's expert reported that an MRI revealed bulging discs at C4-5 and L4-5, and a herniated disc at L5-S1, that were causally related to the accident, and substantial reductions in his range of motion. The permanence of the injury is supported by defendants' own expert's report after his examination of plaintiff, in which he observed a 60°/90° restriction in plaintiff's lumbar spine flexion. This reduction in range of motion may constitute objective evidence of serious injury (*Adetunji v U-Haul Co. of Wis.*, 250 AD2d 483 [1st Dept 1998]).

The swelling, tenderness and restriction in range of motion of plaintiff's left knee was substantiated by an MRI that plaintiff's expert interpreted as indicating a probable tear of the posterior horn of the medial meniscus; in a follow-up examination three years later, plaintiff's physician observed the continued presence of pain and restriction in the knee, and recommended arthroscopic surgery. The assertion by defendant's expert that in the MRI the menisci "appear" intact is insufficient to invalidate the reading of the MRI by plaintiff's expert.

As to defendant's claim that cessation of treatment established an absence of permanent injury, plaintiff testified that he continued to obtain the prescribed treatment and therapy for his injuries until the termination of his no-fault benefits, and that he could not afford to pay for continued care. This testimony explains the cessation of treatment and precludes reliance on the lack of continued treatment to establish an absence of permanent injury (*Ramkumar v Grand Style Transp. Enters., Inc.*, __ NY3d __, 2013 NY Slip Op 6638 [2013]).

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

ENTERED: DECEMBER 31, 2013

CLERK

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

10992-
10993 The People of the State of New York,
Appellant,

-against-

Terrance Wood, etc.,
Defendant-Respondent.

Ind. 6029/02

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Avi Springer of counsel), for respondent.

Judgment of resentence, Supreme Court, Bronx County (Michael A. Gross, J.), rendered September 28, 2012, resentencing defendant to a term of 13 years plus 5 years' postrelease supervision, and bringing up for review an order of the same court and Justice, entered on or about June 1, 2012, which granted defendant's CPL 440.20 motion to set aside his sentence as a second violent felony offender and directed that he be resentenced as a first violent felony offender, and an order, entered on or about July 23, 2012, which, upon reargument, adhered to the June 1, 2012 order, unanimously reversed, on the law, the motion denied, and the matter remanded for resentencing.

Pursuant to *People v Boyer* (__ NY3d __, 2013 Slip Op 07515 [2013]), the original date of a conviction is controlling for

purposes of determining the sequence of current and prior convictions, not the date of resentencing to correct the error identified in *People v Sparber* (10 NY3d 457 [2008]). Because the date defendant received a lawful sentence on a valid conviction for criminal possession of a weapon in the third degree precedes the date of conviction for the instant offense, it qualifies as a prior felony conviction.

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

ENTERED: DECEMBER 31, 2013

CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11206 Wilfrido Dominguez, et al., Index 113716/09
Plaintiffs-Respondents,

-against-

2520 BQE Associates, LLC,
Defendant,

Time Warner Cable,
Defendant-Appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Stephen N. Shapiro of counsel), for appellant.

Gorayeb & Associates, P.C., New York (Roy A. Kuriloff of counsel), for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 22, 2013, which, insofar as appealed from, denied the motion of defendant Time Warner Cable (TWC) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff was injured when he slipped and fell on a sheet of ice at the top landing of a four-to-five step staircase as he exited a building leased by TWC. Plaintiff testified that he did not see the ice prior to his accident. After being helped up from the ground, plaintiff then observed that he had slipped on a five-by-seven-inch sheet of ice. Plaintiff also stated that at the time of his fall, there was no salt on the steps and snow and

ice had been pushed to the sides of each step.

Summary judgment was properly denied because triable issues of fact exist as to whether TWC had constructive notice of the icy condition of the landing. Although plaintiff stated that the ice patch was "white" and "clear," he noticed that it was ice right after he fell, and described its dimensions. Thus, it cannot be said, as a matter of law, that the ice patch was not visible or could not be reasonably detected. Furthermore, TWC failed to present an affidavit or testimony from someone with personal knowledge as to the last time the exterior steps and landing were inspected and maintained prior to plaintiff's accident (*see Rodriguez v Bronx Zoo Rest.*, ___ AD3d ___, 2013 NY Slip Op 06294 [1st Dept 2013]). Moreover, climatological records show that it had snowed approximately eight inches two days before plaintiff's fall, and that temperatures remained below freezing up until the accident occurred. From this data, it can

be reasonably inferred that the ice patch had been present for at least two days, and fact issues exist as to whether TWC had constructive notice of the icy condition (*see id*.).

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

ENTERED: DECEMBER 31, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11412 In re Fawaz A.,

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

Franklyn B.C.,
Respondent-Appellant,

Nafysa J.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Michael S. Bromberg, Sag Harbor, for appellant.

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

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

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Order of disposition, Family Court, Bronx County (Kelly A. O'Neill Levy, J.), entered on or about March 30, 2012, which, upon a fact-finding determination of neglect by the infliction of excessive corporal punishment, transferred custody of the subject child to petitioner Administration for Children's Services until the next permanency hearing, and directed appellant to refrain from inflicting corporal punishment on the child and to continue to attend family therapy and individual counseling until no longer recommended, unanimously affirmed insofar as it brings up for review the fact-finding determination of neglect, and the

appeal therefrom otherwise dismissed as moot, without costs.

The court properly found that appellant maternal uncle neglected the subject child by inflicting excessive corporal punishment on him and permitting the babysitter to do the same, based upon the testimony of the child's teacher and a caseworker that they observed bruises on the child's body, which the child attributed to corporal punishment by appellant and the babysitter (*see Nicholson v Scoppetta,* 3 NY3d 357, 368 [2004]).

The appeal from the placement terms of the dispositional order is moot, since the placement terms of the order have expired by their own terms, and were superseded by subsequent orders *(see Matter of Fred Darryl B.,* 41 AD3d 276, 277 [1st Dept 2007]).

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

ENTERED: DECEMBER 31, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11416 The People of the State of New York, Respondent, Ind. 4928/09

-against-

Robert G. Rosa, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J. at hearing; Nicholas Iacovetta, J. at jury trial and sentencing), rendered November 22, 2011, convicting defendant of vehicular assault in the second degree and leaving the scene of an incident without reporting, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The element of serious physical injury (Penal Law § 10.00[10]) was established by evidence that two years after defendant hit her with his car, the victim was still experiencing pain in her wrist and back, which limited the physical activities in which she could engage. This constituted protracted impairment of health and protracted

impairment of the function of a bodily organ, thus constituting serious physical injury (*see People v Corbin*, 90 AD3d 478 [1st Dept 2011], *lv denied* 19 NY3d 972 [2012]; *People v Graham*, 297 AD2d 579 [1st Dept 2002], *lv denied* 99 NY2d 535 [2002]).

Because more than two hours had passed since defendant's arrest, the officer who administered the breathalyzer test should not have advised defendant that, if he refused to take the test, his driver's license would be suspended and the refusal could be used against him in court. Nevertheless, considering the record as a whole, the court properly concluded that defendant's consent to the test was voluntary. Most significantly, without any coercive conduct by the officer, defendant first agreed to take the test before the officer gave the inappropriate warnings.

The court properly denied defendant's request for a pretrial hearing to determine whether the test, administered more than two hours after the arrest, was sufficiently reliable to be admissible. Although there are trial court opinions to the contrary (*see e.g. People v Holbrook*, 20 Misc 3d 920 [Sup Ct Bronx County 2008]), we agree with the analysis set forth in *People v D.R.* (23 Misc 3d 605 [Sup Ct Bronx County 2009]), which

held that such a hearing is not required. While a defendant may challenge the reliability of the test at trial, we see no reason to conduct a pretrial hearing every time testing occurs more than two hours after arrest.

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

ENTERED: DECEMBER 31, 2013

CLERK

CORRECTED ORDER - JANUARY 2, 2014

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11417 Albert Ruggiere, Index 20704/10
Plaintiff-Appellant,

-against-

Cablevision of New York City-Phase I L.P., et al.,
Defendants-Respondents.

Law Office of Michael H. Joseph, PLLC, White Plains (Michael H. Joseph of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (**Steven** B. Prystowsky of counsel), for respondents.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered January 8, 2013, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Cablevision Systems New York City Corporation i/s/h/a Cablevision of New York City-Phase I L.P. (Cablevision), for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured when he slipped and fell on snow in the parking lot of premises owned by defendant Topeka Realty Company, Inc. and leased by his employer defendant Cablevision. The court properly dismissed the complaint as against Cablevision since it was demonstrated that a snowstorm was in progress at the time of plaintiff's fall (*see Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]). The exception to the "storm-in-

progress" doctrine, on which plaintiff seeks to rely, is not applicable here, since plaintiff was not involved in a construction-related accident, nor was any Industrial Code regulation violated to support a Labor Law § 241(6) claim (*compare Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 501-502 [1st Dept 2011]; *Rothschild v Faber Homes*, 247 AD2d 889, 891 [4th Dept 1998]).

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

ENTERED: DECEMBER 31, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11420 The People of the State of New York, Ind. 2372/11
Respondent,

-against-

Iris Diaz,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Arlene D. Goldberg, J.), rendered on or about March 12, 2012,

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: DECEMBER 31, 2013

CLERK

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

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11421 In re Joseph P., and Another,

Children Under the Age
of Eighteen Years, etc.,

Cindy H.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about December 8, 2009, which, to the extent appealed from, brings up for review a fact-finding determination that respondent-appellant mother derivatively abused and neglected the subject children, unanimously affirmed, without costs.

The derivative findings of abuse and neglect as to the subject children are supported by a preponderance of the evidence. The record demonstrates that there has been no change of circumstances since the previous finding that appellant had severely and repeatedly abused an older sibling, and, therefore,

"a substantial likelihood exists that the established pattern will continue" (*Matter of Kimberly H.*, 242 AD2d 35, 39 [1st Dept 1998]). The record does show that appellant took anger management and parenting classes while she was incarcerated for physically abusing the older brother. The caseworker's unrefuted testimony, however, demonstrates that appellant has never acknowledged what she did to that child and that her actions left that child brain damaged, which supports the conclusion that she has a faulty understanding of the duties of parenthood sufficient to infer an ongoing danger to the subject children (*see Matter of Umer K.*, 257 AD2d 195, 199 [1st Dept 1999]). In light of the nature and severity of the abuse appellant inflicted upon the children's older brother, the finding of derivative abuse with respect to the subject children was proper, even absent direct evidence that she had actually abused them (*see Matter of Quincy Y.*, 276 AD2d 419 [1st Dept 2000]).

Contrary to appellant's contention, the finding of derivative abuse is not undermined by the facts that neither of the subject children was born at the time of the prior abuse and that over five years have elapsed since that finding was entered against her. The record demonstrates that her "parental judgment and impulse control are so defective as to create a substantial risk of harm to any child in [her] care" (*Matter of Kylani R.*

[Kyreem B.], 93 AD3d 556, 557 [1st Dept 2012]; *and see Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566, 567 [1st Dept 2013]).

Appellant's contentions that the record contains no evidence that she refused to acknowledge the abuse and injuries she inflicted upon the children's older brother or that she abused Joseph while he was in her care for nine months are without merit because she was present at the fact-finding hearing and declined to testify, even though she was given the opportunity to do so (*see Matter of Michael N. [Jason M.]*, 79 AD3d 1165, 1168 [3d Dept 2010]). Thus, the Family Court could infer that appellant has never acknowledged the abuse or the injuries she inflicted upon the children's older brother (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79-80 [1995]). Although the court did not state that it was drawing a negative inference against appellant for failing to testify at the fact-finding hearing, it was entitled to do so (*see Matter of Brandon M. [Luis M.]*, 94 AD3d 520, 521 [1st Dept 2012]; *Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

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

ENTERED: DECEMBER 31, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11422- Index 100870/10
11423 Nick Addonisio, et al.,
Plaintiffs-Appellants,

-against-

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

Empire City Subway Company (Limited), et al.,
Defendants.

_____

Joshua Annenberg, New York, for appellants.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for the City of New York, respondent.

Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for Consolidated Edison, Inc., respondent.

Conway Farrell Curtin & Kelly P.C., New York (Darrell John of counsel), for Verizon New York, Inc., respondent.

Harris Beach PLLC, New York (A. Vincent Buzard of counsel), for NYC&LI One Call/Dig Safely, Inc. and One Call Concepts, Inc., respondents.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 28, 2013, insofar as appealed from as limited by the briefs, dismissing the Labor Law § 241(6) claims as against defendants Verizon New York, Inc., the City of New York, and Consolidated Edison, Inc., dismissing the Labor Law § 200 and common-law negligence claims as against Con Ed, and dismissing the common-law negligence claim as against defendants

NYC & LI One Call/Dig Safely, Inc. and One Call Concepts, Inc., unanimously modified, on the law, to vacate the dismissal of the Labor Law § 241(6) claim against the City, and the Labor Law § 200 and common-law negligence claims against Con Ed, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 19, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff Nick Addonisio was injured when, to excavate a roadway to install telecommunications equipment, he used a power saw to cut into a street intersection and struck a cable encased in a concrete conduit, owned by Con Ed, which electrocuted him. Defendants failed to establish that they should be relieved from liability on the ground that plaintiff cut further below ground than the maximum permissible depth and that this violation was the superseding cause of the injuries that occurred when his saw came into contact with the live cable (*see Verdi v Top Lift & Truck Inc.*, 50 AD3d 574 [1st Dept 2008]; *see also Soto v New York City Tr. Auth.*, 6 NY3d 487 [2006]). The risk that a worker would perform such an act was "the very reason" that defendants owed the worker a duty to comply with any safety standards applicable to the cable (*see McKinnon v Bell Sec.*, 268 AD2d 220, 221 [1st Dept 2000]; *see also Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316 [1980]). Although the testimony of plaintiff's

supervisor indicated that plaintiff had been warned of a live cable underground nearby, defendants failed to establish that plaintiff had actual knowledge of the hazard, rendering his conduct so reckless that it was the superseding or sole proximate cause of his accident (*compare Ziecker v Orchard Park*, 75 NY2d 761 [1989], *with Tkeshelashvili v State of New York*, 18 NY3d 199 [2011]).

The court erred in dismissing the Labor Law § 200 and common-law negligence claims against Con Ed. The evidence raises an issue of fact whether Con Ed created a dangerous condition that caused plaintiff's accident (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]). Con Ed admitted that it installed the cable originally and did not install a protective plate above it. Con Ed's accident report attributed the accident, in part, to the lack of such a plate and the shallow depth of the cable.

Con Ed and Verizon both established that they cannot be held liable under Labor Law § 241(6), since neither one was an owner, contractor, or statutory agent. Plaintiff's argument that Con Ed had a property interest in the site of the accident below ground is unavailing. Although a defendant can be deemed an owner for purposes of the statute without holding title to the property, Con Ed is not an owner under these circumstances, since there is

no evidence that it contracted to have the work performed or had the authority to control the work site (*see Scaparo v Village of Ilion*, 13 NY3d 864 [2009]; *Grilikhes v International Tile & Stone Show Expos*, 90 AD3d 480, 483 [1st Dept 2011]). Similarly, although Verizon engaged plaintiff's employer to perform the excavation work in which plaintiff was engaged when the accident happened, the evidence indicates that plaintiff's employer was the only entity with the requisite excavation permit, and Verizon did not have the right to control the site (*see Bart v Universal Pictures*, 277 AD2d 4 [1st Dept 2000]).

The City failed to demonstrate the inapplicability of, or its compliance with, Industrial Code (12 NYCRR) § 23-1.13(b)(4), the sole regulation on which plaintiff relies for his Labor Law § 241(6) claim. In any event, plaintiff raised issues of fact whether his accident was caused by a violation of the provision by submitting affidavits by two experts who explained that the cable was not de-energized, grounded, or effectively insulated, and that plaintiff was not provided with insulated protective gloves, body aprons and footwear while using a power saw that might make contact with underground electric power lines (*see DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515 [1st Dept 2013]).

However, there is no basis for finding liability against NYC

& LI One Call/Dig Safely, Inc. and One Call Concepts, Inc. (collectively, One Call) based on Con Ed's failure to fully mark the intersection where plaintiff was injured. A transcript of the conversation between plaintiff's employer, Empire City Subway, and the One Call operator indicates that One Call followed instructions. Although the One Call operator was first told the mark should be "starting from and including the intersection," when the operator said, "[S]tarting from the above intersection," the caller said, "Yes." The operator then read back the instructions, stating, "I have the installing of telephone conduit . . . that takes place on One Avenue intersecting with East Seventy-seven Street and that was to mark the street and the sidewalk. The marks starting from the above-intersection mark the east side of 1st Avenue going north for 100 feet. Is that correct?" The caller said, "Yes." One Call then properly transmitted the above information to Con Ed; thus, the absence of marks at the site of the injury cannot be attributed to One Call.

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

ENTERED: DECEMBER 31, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11424 The People of the State of New York, Respondent, Ind. 194/11

-against-

Dwayne Mahoney, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered June 7, 2011, convicting defendant, after a jury trial, of one count of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The verdict was not against the weigh of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of inconsistencies in testimony.

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

ENTERED: DECEMBER 31, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11426 The People of the State of New York, Ind. 5905N/11
Respondent,

-against-

Sharon S. Rickenbacker,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot 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 (Renee A. White, J.), rendered on or about July 10, 2012,

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: DECEMBER 31, 2013

CLERK

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

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11427N In re Interboro Insurance Company, Index 260096/11
Petitioner-Respondent,

-against-

Violetta Steed, et al.,
Respondents,

Maritza Velez, et al,
Proposed Additional Respondents,

State Farm Mutual Automobile Insurance Company,
Proposed Additional Respondent-Appellant.

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Bruno Gerbino & Soriano, LLP, Melville (Mitchell L. Kaufman of counsel), for appellant.

Picciano & Scahill, P.C., Westbury (Albert J. Galatan of counsel), for Interboro Insurance Company, respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 11, 2012, which, insofar as appealed from, granted the petition of Interboro Insurance Company to the extent of granting a temporary stay pending a framed issue hearing to determine whether the vehicle owned by the proposed additional respondents was insured on the date of the loss, unanimously affirmed, without costs.

Proposed additional respondent-appellant State Farm Mutual Insurance Company has been brought into this court proceeding to determine whether the proposed individual respondents were insured at the time of the alleged accident. The order is

appealable, since it affects a substantial right (CPLR 5701 [a][2][v]), in that "it would force one party or the other to submit to a lengthy expensive hearing" (*General Elec. Co. v Rabin*, 177 AD2d 354, 356-357 [1st Dept 1991]).

Considering State Farm's argument, dismissal of the underlying personal injury action pursuant to CPLR 3215(c) for the abandonment of a complaint was not a dismissal on the merits (*see Lincoln First Bank of Rochester v Palmyra Motors*, 84 AD2d 670, 670 [4th Dept 1981]; *see also New York Cent. Mut. Fire Ins. Co. v Barry*, 63 AD3d 892, 893 [2d Dept 2009]; *Shepard v St. Agnes Hosp.*, 86 AD2d 628, 630 [2d Dept 1982]). The motion court did not state that respondents' complaint was being dismissed on the merits, and so, respondents were not precluded from requesting arbitration of the insurance coverage issue.

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

ENTERED: DECEMBER 31, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10244 John R. Lucker, et al., Index 114818/09
Plaintiffs-Appellants,

-against-

Bayside Cemetery, et al.,
Defendants-Respondents,

Community Association for Jewish
At-Risk Cemeteries, Inc.,
Defendant.

- - - - -

10245 Steven R. Leventhal, etc., Index 100530/11
Plaintiff-Appellant-Respondent,

-against-

Bayside Cemetery, et al.,
Defendants-Respondents-Appellants,

Community Association for Jewish
At-Risk Cemeteries, Inc.,
Defendant.

_____

Pomerantz Grossman Hufford Dahlstrom & Gross LLP, New York (Michael M. Buchman of counsel), for appellants and appellant-respondent.

Axinn Veltrop & Harkrider LLP, New York (Russell M. Steinthal of counsel), for respondents/respondents-appellants.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about October 6, 2011, affirmed, without costs, and order, same court and Justice, entered on or about January 12, 2012, modified, on the law, to grant the motion as to the claim for breach of fiduciary duty, and otherwise affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
David B. Saxe
Karla Moskowitz
Judith J. Gische
Darcel D. Clark, JJ.

10244-
10245
Index 114818/09
100530/11

_____x

John R. Lucker, et al.,
Plaintiffs-Appellants,

-against-

Bayside Cemetery, et al.,
Defendants-Respondents,

Community Association for Jewish
At-Risk Cemeteries, Inc.,
Defendant.

- - - - -

Steven R. Leventhal, etc.,
Plaintiff-Appellant-Respondent,

-against-

Bayside Cemetery, et al.,
Defendants-Respondents-Appellants,

Community Association for Jewish
At-Risk Cemeteries, Inc.,
Defendant.

_____x

Cross appeals from the order of the Supreme Court, New York County (Debra A. James, J.), entered on or about October 6, 2011, which granted

defendants Bayside Cemetery and Congregation Shaare Zedek's motion to dismiss the *Lucker* complaint, and order, same court and Justice, entered on or about January 12, 2012, which, to the extent appealed from as limited by the briefs, granted so much of defendants Bayside Cemetery and Congregation Shaare Zedek's motion as sought to dismiss the conversion and General Business Law §§ 349 and 350 causes of action in the *Levanthal* complaint, and denied so much of the motion as sought to dismiss the breach of contract and breach of fiduciary duty causes of action.

Pomerantz Grossman Hufford Dahlstrom & Gross LLP, New York (Michael M. Buchman of counsel), for appellants and appellant-respondent.

Axinn Veltrop & Harkrider LLP, New York (Russell M. Steinthal and Stephen M. Axinn of counsel), for respondents/respondents-appellants.

SAXE, J.

These companion appeals raise issues regarding the enforcement of perpetual care obligations when cemeteries fall into disrepair. The cemetery in question, the Bayside Cemetery, located on Pitkin Avenue in Ozone Park, Queens, is owned and operated by defendant Congregation Shaare Zedek, a religious corporation.[1] Both actions are putative class actions in which their class status is not currently at issue.

The named plaintiffs in the *Lucker* action are five individuals whose relatives are buried in Bayside Cemetery. John Lucker, Elizabeth Lucker and Nancy L. Rousseau allege that their grandparents' graves at Bayside Cemetery are inaccessible due to overgrowth, despite their grandparents' purchase, in or about 1973, of a perpetual care agreement from defendants through a religious society of which they were members, the Chebra Shebath Achim Society. Lynn Cohen, who asserts that she served as the executor of her mother's estate, similarly alleges that her parents' graves at Bayside Cemetery have not been cared for although her "family member(s), including her parents, entered

[1] The third named defendant, Community Association for Jewish At-Risk Cemeteries, a not-for-profit corporation which allegedly holds itself out as the steward of the cemetery, is no longer a party to this action, since its separate dismissal motion was granted, and no appeal has been taken from that order.

into one or more perpetual care contract[s]" with defendants. Fran Goldstein alleges that her parents are buried in perpetual care plots at Bayside Cemetery, and that her "family member(s)/ relative(s) entered into one or more perpetual care contract(s) with a Defendant." These five individual plaintiffs purport to sue on behalf of the class consisting of family members and near relatives of individuals who purchased perpetual care from defendants.

The element of the *Leventhal* action that distinguishes it from the *Lucker* action is that named plaintiff Steven R. Leventhal was himself the purchaser of the perpetual care arrangement.

Specifically, Leventhal alleges that in 1985 he paid defendant Congregation Shaare Zedek $1,200 for the perpetual care of three graves at Bayside Cemetery. The document that Leventhal was given in return for this payment, called a Trust Fund Receipt, identified the $1,200 as the "Fund," and identified the following uses and purposes of the "Fund":

> "Pursuant to Section 92 of the Membership Corporation Law of New York, said sum shall be held as part of the Special Fund of the 'Congregation', maintained by it for the perpetual care of lots, plots or graves in Bayside Cemetery, and deposited by the 'Congregation' in its name in any State or Federal Savings Bank or Association paying interest thereon, or invested or re-invested

> by it for the purchase in its name of any Federal, State, Municipal or other Government certificates or bonds, or of other securities authorized by law for investment of Trust Funds.
>
> "The interest or income realized from the 'Fund' shall be used toward the perpetual care and upkeep of the following lots, plots or graves:
>
> 1. Ethel Leventhal, etc.,
> Benjamin Stoloff, etc.,
> Emma Stoloff, etc.,
>
> located in said Bayside Cemetery, limited, however [] to the extent for which such interest or income derived therefrom will permit and pay, as provided for in Section 91 of the aforesaid Membership Corporation [L]aw, and without applying any part of the principal 'Fund' for that purpose. Provided, however, that the 'Congregation' will not allow, pay or apply in any year or be in any way responsible for a higher rate of interest on the principal sum of the aforesaid 'Fund' than the average rate of interest it may receive in such year from its total perpetual care funds.
>
> "The 'Congregation' shall not be held responsible for any loss, depletion or depreciation of the principal of said 'Fund', or the value of any investment made therewith after it makes such deposit or investment."

Leventhal sues on behalf of "all persons or entities ... who purchased a perpetual care or annual care contract from a Defendant or their agents or assigns."

The deceased relatives of the *Lucker* plaintiffs were given the same form of Trust Fund Receipt when they purchased their perpetual care arrangements for their graves in the Bayside Cemetery, providing that the purchaser's payment would be held as

part of a special fund, to be invested by the Congregation, with the interest to pay for the care and upkeep of the specified graves.

The complaints in both actions allege that defendants failed to abide by the obligations created by those Trust Fund Receipts, and assert claims for breaches of contract and fiduciary duty, violation of General Business Law §§ 349 and 350, conversion, and unjust enrichment; they seek money damages, an accounting of the perpetual care trusts' funds, injunctive relief and imposition of a constructive trust.

Defendants moved to dismiss the *Lucker* complaint for lack of standing under the General Business Law and under common law, on the ground that plaintiffs were not parties to the perpetual care arrangements, but merely relatives of deceased family members who allegedly purchased such care. Defendants argued that if such claims were permitted, they could be brought by hundreds, if not thousands, of family members of deceased relatives buried in the cemetery who entered into perpetual care arrangements. Defendants asserted that the law limits the right to enforce such charitable trusts to the New York State Attorney General.

The motion court granted defendants' motion and dismissed the *Lucker* complaint in its entirety, and plaintiffs appeal.

In the *Leventhal* action, the motion court granted so much of

defendants' motion as sought to dismiss the conversion and General Business Law §§ 349 and 350 claims, and denied so much of the motion as sought dismissal of plaintiff's claims sounding in breach of contract and breach of fiduciary duty. Plaintiff appeals from the part of the order that granted the motion and defendants cross-appeal to the extent the motion was denied.

For purposes of these CPLR 3211 motions we must accept as true the factual allegations of the complaints and all inferences favorable to plaintiffs that reasonably flow from them (*see Cron v Hargo Fabrics*, 91 NY2d 362, 366 [1998]). We therefore assume that, as stated in the 2004 newspaper article quoted by the *Lucker* complaint ("Weeding Out an Eyesore," The Jewish Week, June 6, 2004), "much of the cemetery remains mired in overgrowth, and large swaths continue to look like rainforest, where fallen headstones are buried under vines, weeds, wildflowers and fallen trees." The question before us is whether, even accepting these facts, plaintiffs are legally entitled to bring these actions.

The general requirements for establishing standing are that the party must show injury in fact, that is, an actual stake in the matter to be adjudicated, so as to ensure that the party has some concrete interest in prosecuting the action, and the court must have before it a justiciable controversy (*see Schlesinger v Reservists Comm. to Stop the War*, 418 US 208, 220-221 [1974]).

But, the requirements for establishing standing to enforce a charitable trust are more exacting (*see Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 465 [1985]).

EPTL article 1, which governs charitable trusts, specifically includes trusts for the perpetual care of graves: "Dispositions of property in trust for the purpose of the perpetual care ... of cemeteries or private burial lots in cemeteries ... shall be deemed to be for charitable and benevolent purposes" (EPTL 8-1.5). The statute directs the State Attorney General to protect and enforce the interests and rights of the beneficiaries: "*The attorney general shall represent the beneficiaries of such dispositions for religious, charitable, educational or benevolent purposes and it shall be his duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts*" (EPTL § 8-1.1[f] [emphasis added]). "The obvious purpose of this provision was to provide a mechanism for enforcement of trusts whose beneficiaries were unascertainable" (*Lefkowitz v Lebensfeld*, 51 NY2d 442, 446 [1980]).

Plaintiffs in the *Lucker* action, as family members of deceased individuals buried in Bayside Cemetery who allegedly purchased perpetual care arrangements before their deaths, protest that the Attorney General failed to take appropriate

action to enforce their relatives' perpetual care contracts, leaving them no choice but to seek enforcement themselves.

Both sides rely on the ruling in *Alco Gravure* (64 NY2d 458) in support of their positions with regard to plaintiffs' standing. The Court in that case explained:

> "The general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust. Instead, the Attorney-General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes" (64 NY2d at 465 [citations omitted]).

Put another way, "Normally, standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney- General" (*id.* at 466). The public policy underlying this standing requirement is to preserve the assets of charitable trusts and "to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations" (*id.* at 466).

"There is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number"

(*id.* at 465). In *Alco Gravure*, the plaintiffs established that they constituted such a sharply defined and limited class of beneficiaries with a special interest in the funds; namely, they were the employees of the specified corporations (or the successors to those corporations) who were the intended beneficiaries of the funds placed with the defendant foundation. Plaintiffs contend that they, like the plaintiffs in *Alco Gravure*, fall within a sharply defined and limited class of beneficiaries; defendants argue that they do not.

We hold that the *Lucker* plaintiffs and their class as they define it -- indeed, whatever group categorization is used -- are neither sufficiently "sharply defined" nor sufficiently "limited in number" to be eligible for standing to sue the cemetery as beneficiaries. To the contrary, aside from the use of the vague term "near relatives," plaintiffs can offer no rational limiting principle that would distinguish children from grandchildren -- or, indeed, great-grandchildren -- or from nieces or nephews or cousins and their children. Over the years, each of the individuals buried in the cemetery who entered into a perpetual care arrangement potentially could have 5, 10, 20 or more relatives desirous of suing the cemetery for a failure of perpetual care. Even accepting the premise that each of those individuals could be said to have a "special interest" in the

upkeep of his or her relative's grave, the number of potential plaintiffs is far too great to permit their class to be characterized as sharply defined or limited in number. Notably, the Court in *Alco Gravure* relied on the fact that "the present action concerns not the ongoing administration of a charitable corporation, but the dissolution of that corporation and the complete elimination of the individual plaintiffs' status as preferred beneficiaries of the funds originally donated by Joseph Knapp" (64 NY2d at 466). That is, the class of claimants was limited to the presently-existing employees of the named corporations.

In contrast, here, allowing relatives to bring lawsuits as to each lot, plot or grave could create endless litigation, substantially depleting the trust assets. Enforcement of the subject charitable trusts is therefore best left to the Attorney General, so as not to expose the trust funds to money-draining multiple lawsuits, and to avoid setting a precedent of allowing a broad, vague beneficiary base to commence multiple actions against a charitable trust.

To further support their claim that New York law recognizes the right of family members to enforce an abused trust, plaintiffs cite *Smithers v St. Luke's-Roosevelt Hosp. Ctr.* (281 AD2d 127 [1st Dept 2001]). However, *Smithers* did not involve

either beneficiary standing or standing as a family member. Although the plaintiff was the wife of the donor, she was permitted standing as the administrator of the estate of the donor of a charitable donation that had been made subject to explicit restrictions. In reversing the motion court's dismissal for lack of standing, this Court explained that

> "Mrs. Smithers did not bring this action on her own behalf or on behalf of beneficiaries of the Smithers Center. She brought it as the court-appointed special administratrix of the estate of her late husband to enforce his rights under his agreement with the Hospital through specific performance of that agreement. Therefore, the general rule barring beneficiaries from suing charitable corporations has no application to Mrs. Smithers" (*id.* at 138).

The *Lucker* plaintiffs fall into the opposite category from Mrs. Smithers. They are relatives, acting as relatives. Moreover, there were no retained rights in the creation of the trusts, such as the donor retained in *Smithers.* The general rule barring beneficiaries from suing charitable corporations, inapplicable in *Smithers*, is entirely on point here.

The *Lucker* plaintiffs may not "stand in the shoes" of their deceased relatives to bring direct claims for injury to those relatives. Such claims would amount to an impermissible extension of the legislative scheme for the survival of actions. A decedent's personal representative has the authority to bring causes of action that were viable at the time of the decedent's

death, not claims that arose after his or her death (EPTL 11-3.1; *Estate of Gandolfo*, 237 AD2d 115 [1st Dept 1997]). The causes of action here arose after those decedents' deaths. John Lucker's belated application for, and receipt of, appointment in Connecticut to serve as the legal representative of the estate of his grandmother, Ruth Lucker, is therefore unavailing. Nor is there any other legal construct by which an individual may sue by standing in the shoes of a deceased individual.

We conclude that the *Lucker* plaintiffs' allegations do not, and cannot, sufficiently state that they are a sharply defined group of beneficiaries that holds a special interest in the perpetual care trusts. None of the individual plaintiffs allege that they are donors who established the charitable trusts or that the trusts specifically identify them as individuals intended to be benefitted by the trusts. None of them is an executor or administrator of an estate whose deceased possessed a viable claim against defendants at the time of his or her death.

As indicated, unlike the plaintiffs in *Lucker*, Leventhal himself entered into an agreement for perpetual care of his deceased relatives' graves. We must now address the question whether, and to what extent, this gives him enforceable rights against the cemetery.

In an ordinary contract law context, a party who entered

into an agreement would unquestionably have the legal authority to bring a legal action for its enforcement. However, the arrangement Leventhal made with defendant by virtue of his payment of $1,200 is not in the nature of a standard commercial contract for a product or services, under which he would be entitled to the item or service he purchased or the return of his purchase price, or other contract damages. Rather, by his payment, Leventhal became a donor of a charitable trust fund created and administered pursuant to Not-for-Profit Corporation Law § 1507 and EPTL 8-1.5.

As defendants point out, "Normally, standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney General" (*Alco Gravure, Inc. v Knapp Foundation*, 64 NY2d at 466). However, there are circumstances in which a donor of a charitable trust has been held to be entitled to sue for enforcement of the terms of a charitable donation. The parameters of a donor's entitlement to sue a charitable trust were discussed at length in *Smithers v St. Luke's Hosp.* (281 AD2d at 127).

As the *Smithers* decision points out, *Associate Alumni of Gen. Theological Seminary etc. v General Theological Seminary etc.* (163 NY 417 [1900]) established that the Attorney General's standing to challenge claimed abuses of trust funds is not

necessarily exclusive. In *Associate Alumni*, it was held that a donor of a charitable trust, namely, an alumni group that donated a fund to a seminary to be used for the endowment of a professorship, had standing to maintain an action to enforce the terms of the trust; the Court recognized that "[i]f the trustees of a charity abused the trust, misemploy the charity fund, or commit a breach of the trust, ... the redress is by bill or information by the attorney-general *or other person having the right to sue*" (*id.* at 422 [internal quotation marks omitted] [emphasis added]). The alumni group was such an "other person."

Moreover, as the *Smithers* decision observes, the right of the plaintiff group in *Associate Alumni* to bring its action was not dependent on the right it had retained in the trust instrument to nominate candidates for the professorship; rather, its entitlement to sue was derived from its status as the donor of the charitable trust (*see* 281 AD2d at 137). This conclusion was supported by the fact that, among the cases relied on by *Associate Alumni* to support the right of "other person[s]" to sue for a breach of a trust, was the case of *Mills v Davison* (54 NJ Eq 659 [1896]), in which the donor had not retained any rights, but was simply "the founder of the charity, [who had] standing to appear in court to restrain the diversion of the property donated from the charitable uses for which it was given" (54 NJ Eq at

667).

While the alleged breach of the terms of the trust in *Associate Alumni* did not entitle the plaintiff to seek the return of the funds, the plaintiff "had sufficient standing to maintain an action to enforce the trust" (163 NY at 422). Similarly, here, while Leventhal is not entitled to the return of his payment as damages for the alleged breach of the trust terms, as the donor of the trust fund, he has sufficient standing to sue to enforce the trust, that is, to obtain an order requiring the trustee to satisfy its obligations.

However, while Leventhal has standing to sue for enforcement of the terms of the trust, the remainder of his claims must be dismissed.[2]

The complaint fails to state a cause of action for conversion. "[A]n action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*Amity Loans v Sterling Nat'l. Bank & Trust Co. of N.Y.*, 177 AD2d 277 [1st Dept 1991]). The plaintiff must have a superior right of possession to the funds, and the defendant

[2] Leventhal does not challenge on appeal the dismissal of his claims for unjust enrichment and aiding and abetting a breach of fiduciary duty.

must have exercised unauthorized dominion over the funds to the exclusion of the plaintiff's rights (*see generally Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384 [1st Dept 1992]). The allegation in the *Leventhal* complaint, together with all reasonable inferences, fails to make out such a claim. There is no factual allegation that supports a finding that Leventhal retained any right of revocation or reversionary interest in the funds he paid to defendants for perpetual care of his deceased family members' graves. Rather, legal title to the trust funds vested entirely and irrevocably in Congregation Shaare Zedek at the time of payment (*see* EPTL 7-2.1). "[W]hen a valid charitable trust is created, without provision for a reversion, the interest of the donor is permanently excluded" (*Stewart v Franchetti*, 167 App Div 541, 547 [1st Dept 1915]).

The complaint also fails to state causes of action under General Business Law §§ 349 and 350. "To establish [a] prima facie violation of General Business Law § 349, a plaintiff must demonstrate that the defendant is engaged in consumer-oriented conduct which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it. Deceptive acts or practices may be defined as representations or omissions 'likely to mislead a reasonable consumer acting reasonably under the circumstances.' A similar showing is required under General

Business Law § 350, which prohibits false advertising" (*St. Patrick's Home for Aged & Infirm v Laticrete Intl.*, 264 AD2d 652, 655 [1st Dept 1999] [citations omitted]). Leventhal does not allege any misrepresentations or deception beyond the statement that perpetual care would be provided. Mere allegations that a party entered into a contract lacking the intent to perform are insufficient to establish a claim of misrepresentation or fraud (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). The conduct of which Leventhal complains is essentially that defendants failed to satisfy their contractual duties, not that they concealed or misrepresented contractual terms.

Even assuming that the factual allegations were sufficient to allege violations of General Business Law §§ 349 and 350, the claims would be time-barred under the three-year statute of limitations (*see* CPLR 214[2]; *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 789 [2012]). The accrual date for such a claim is the date of the injury (*see Corsello*, 18 NY3d at 790). Whether the date of injury is the date Leventhal entered into the perpetual care arrangement in 1985, or some time between that date and the date that reports of the cemetery's disrepair began to be publicized in 2004, Leventhal's commencement of this action in January 2011 is time-barred.

We reject Leventhal's contention that the statute of

limitations was tolled. The continuing violation theory is inapplicable, since it pertains to a situation where the injurious condition is intermittent, giving rise to recurring injuries (*see 1050 Tenants Corp. v Lapidus*, 289 AD2d 145, 146 [1st Dept 2001]). Equitable estoppel is also inapplicable, since Leventhal provides no basis for a claim that he relied on later acts of deception or concealment to justify estopping defendants from relying upon the statute of limitations (*see Corsello*, 18 NY3d at 789). Leventhal fails to explain how defendants' actions kept him from bringing a timely lawsuit (*see Zumpano v Quinn*, 6 NY3d 666, 674 [2006]).

We modify only to dismiss Leventhal's breach of fiduciary duty claim, which the motion court allowed to proceed. While defendants owe a fiduciary duty, the duty is owed only to trust beneficiaries, not to the trust's donor (*see Matter of Heller*, 6 NY3d 649, 655 [2006]); in the case of a charitable trust, the beneficiaries are the people of the State, as represented by the Attorney General. The beneficial interest Leventhal identifies is merely the same interest in being able to visit and have access to the graves of his deceased family members as that of every relative of a deceased individual. We have already concluded that relatives, who admittedly have an interest in the upkeep of their family members' graves, nevertheless are not

entitled to sue to enforce the cemetery's upkeep responsibilities; if relatives had a beneficial interest that allowed them to sue for enforcement of the terms of the perpetual care trusts, then they would all be entitled to sue for breach of fiduciary duty. Since Leventhal has no greater beneficial interest than that of any other relative, he can have no greater entitlement to make a claim for breach of fiduciary duty than any of those relatives. Notably, the duties owed to a donor of a trust, as identified in *Smithers v St. Luke's-Roosevelt Hosp. Ctr.* (281 AD2d 127) and the cases it discusses, do not encompass a fiduciary duty.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered on or about October 6, 2011, which granted defendants Bayside Cemetery and Congregation Shaare Zedek's motion to dismiss the *Lucker* complaint should be affirmed, without costs. The order of the Supreme Court, New York County (Debra A. James, J.), entered on or about January 12, 2012, which, to the extent appealed from as limited by the briefs, granted so much of defendants Bayside Cemetery and Congregation Shaare Zedek's motion as sought to dismiss the conversion and General Business Law §§ 349 and 350 causes of action in the *Leventhal* complaint, and denied so much of the motion as sought to dismiss the breach of contract and breach of

fiduciary duty causes of action, should be modified, on the law, to grant the motion as to the claim for breach of fiduciary duty, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 31, 2013

CLERK